

FILED<sup>3</sup>

SEP 9 2005

Missouri Public  
Service Commission

BEFORE THE PUBLIC SERVICE COMMISSION OF THE  
STATE OF MISSOURI

REED KLINE )  
Complainant, )  
 )  
 )  
vs, )  
 )  
MISSOURI-AMERICAN WATER COMPANY )  
Respondent, )

Case No. \_\_\_\_\_

COMPLAINT

1. Complainant, Reed Kline, resides at 12408 Donovan Drive, St. Joseph, Missouri 64505.
2. Respondent, Missouri-American Water Company, located at 3901 Beck Road, Suite B, St. Joseph, Missouri 64506, is a public utility providing service to complainant's residence and development projects.
3. As the basis of this complaint, complainant states the following facts:  
The Missouri-American Water Company (MAWC) has, basically, refused to install new infrastructure in local developments here in St. Joseph, including mine. The reason given by MAWC is that revisions recently made (on June 20, 2005) to the City of St. Joseph's right-of-way management ordinance have hampered its now-common practice of circumventing certain City Code provisions by obtaining private easements outside the City's right-of-way. However, my development was platted *prior* to June 20, 2005, which is significant because the specific language contained in the amendment states that the June 20<sup>th</sup> revisions are only applicable to actions *subsequent* to its passage. Although MAWC has since agreed to proceed with providing service in these previously-platted developments, I am concerned about what might happen in the future, (in developments platted after June 20, 2005), due to certain information I have recently been made aware of. More specifically, that MAWC has implemented a new policy, which pre-dates the City's June 20, 2005 ordinance, wherein it will no longer place its facilities in any public

rights-of-way or public utility easements (not just in St. Joseph, but anywhere in the State of Missouri) unless it either: 1) has a specifically named property interest, or 2) the municipality or developer provides it with unlimited cost indemnifications forever into the future.

By placing its water lines exclusively in easements in which it has a property interest, MAWC is able to bypass its obligations to pay for the cost of relocation or adjustment of its mains at its own expense when the relocation occurs as a result of a public improvement – basically, it wants somebody, other than MAWC, to foot the bill for these costs. MAWC is, essentially, refusing to provide service/withholding service, in violation of the provisions of its tariff. MAWC may argue that it is not refusing to provide service/withholding service because it is simply in the process of “negotiating an agreement” with the developer and/or the municipality regarding the property interest and/or the indemnification language. However, the result is that MAWC is refusing to provide service/withholding service unless developers sign-off on its form language. Developers are often-times under extreme pressure to move their developments along. Time is money. MAWC knows this, which makes its tactics all the more repugnant.

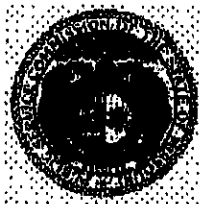
4. The complainant has taken the following steps to present this complaint to the respondent: I, and other developers, have had discussions with MAWC about this issue. MAWC initially took the position that the City Council needed to repeal the recent amendments made to the City’s right-of-way management ordinance before it would once again begin providing service. This is the reason why a group of developers approached the City Council at its meetings on August 1, 2005 and August 15, 2005 seeking relief. After we subsequently became aware that MAWC’s new policy *pre-dated* the revisions that had been made to the right-of-way ordinance, it became apparent that the ordinance was not the real problem – MAWC’s new policy was. (It is important to note here that I am aware of the fact that City Staff requested a copy of MAWC’s new policy, which was relayed to them verbally by MAWC officials on August 10, 2005, but that City Staff was informed at that time that this policy was not in writing. Therefore, if MAWC claims that there are exceptions that may apply, neither the developers, nor the City has been given an opportunity to review these exceptions in order to conduct any

type of detailed analysis or review.) Following our request for assistance on August 15, 2005, City Staff met once again with MAWC officials, on August 17, 2005, at which time they were able to come to an understanding with regard to the previously-platted (pre-June 20, 2005) developments. However, as I stated previously, *my concern is with what might happen in the future, given MAWC's new policy. MAWC officials provided no assurance to City staff on August 17<sup>th</sup> that MAWC will provide service to developments that were platted after June 20<sup>th</sup>, (unless, we presume, the developers and municipalities agree to abide by MAWC's new, unwritten policy).*

WHEREFORE, Complainant now requests the following relief: I would respectfully request that the Public Service Commission provide an official ruling with regard to whether or not MAWC has the right to refuse to provide service based upon MAWC's new policy that it will no longer place its facilities in any public rights-of-way or public utility easements unless it has: 1) been granted a private property interest, or 2) either the developer or the City agrees to indemnify MAWC from all possible costs of a future relocation of the line. In essence, can MAWC refuse to provide service based on its desire for "asset protection" by seeking to avoid any and all risk associated with its own business use of facilities? It does not seem at all fair to me that a public utility company should have the ability to basically require developers (or the general taxpayers) to foot the bill for relocation costs within the public right-of-way; especially, if relocation costs are already included in MAWC's tariff. I would also request that MAWC be required to provide a written copy of it's new policy for my review and, more importantly, for review by PSC Staff for purposes of determining, among other things, if it is in conformance with the provisions of MAWC's tariff.

9/6/05  
Date

  
Reed Kline



Commissioners

**STEVE GAW**  
Chair

**CONNIE MURRAY**

**ROBERT M. CLAYTON III**

**JEFF DAVIS**

**LINWARD "LIN" APPLING**

## ***Missouri Public Service Commission***

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Executive Director

**ROBERT SCHALLENBERG**  
Director, Utility Services

**WARREN WOOD**  
Director, Utility Operations

**COLLEEN M. DALE**  
Secretary/Chief Regulatory Law Judge

**DANA K. JOYCE**  
General Counsel

### **Formal complaint for individual customers**

Included is some information regarding filing a formal complaint. Also included is internet link information if you wish to use those. The information includes the Commission's rules of practice, 4 CSR 240 Chapter 2, which states how filings including formal complaints are to be made. It is on the Secretary of State home page, please see <http://www.sos.mo.gov/adrules/csr/csr.asp>, and go to Title 4, Division 240, and Chapter 2, or <http://www.sos.mo.gov/adrules/csr/current/4csr/4c240-2.pdf>, then look at the paragraph about "formal complaints," 4CSR 240-2.070 (3) on page 7. Also included is a form that may be filled out if you wish to use it, or used as a guide for filing a formal complaint. Feel free to make more copies if you need them or if others wish to file a formal complaint.

Individual persons may file and represent themselves, however a corporation such as an association or development company, or a group of persons, will need to have representation by an attorney. As such, if other individuals file complaints they should write out their own complaint filings rather than several people signing one. If others file their own complaints about the same matter, the cases could be consolidated and handled as if a single case.

Prior to moving ahead, the Commission normally allows an opportunity for mediation between the complainant and respondent, which takes place at the University of Missouri Law School.

High St., Jefferson City, Missouri. All general inquiries to the commission, cover letters, briefs, and pleadings shall be addressed to the Secretary of the Commission, Missouri Public Service Commission, P.O. Box 360, Jefferson City, MO 65102, unless otherwise ordered by the commission.

(2) Regular meetings for the purpose of conducting public business shall be held by the commission. The time of each meeting and the matters to be discussed shall be posted at the commission offices and shall be available to the public by contacting the commission.

(3) The commission may change the principal office of the commission and may also change the time and place of meetings or hearings of the commission with reasonable prior notice to the public.

**AUTHORITY:** section 386.410, RSMo Supp. 1998. \* Original rule filed Dec. 19, 1975, effective Dec. 29, 1975. Amended: Filed Nov. 7, 1984, effective June 15, 1985. Rescinded and readopted: Filed March 10, 1995, effective Nov. 30, 1995. Amended: Filed July 26, 1999, effective Jan. 30, 2000.

\*Original authority: 386.410, RSMo 1939, amended 1947, 1977, 1996.

#### 4 CSR 240-2.030 Records of the Commission

**PURPOSE:** This rule sets forth the record-keeping requirements of the commission and the availability of these records to the public. Charges for copies are subject to statutory limitations.

(1) The secretary of the commission shall keep a full and true record of all the proceedings of the commission, of all books, maps, documents and papers ordered filed by the commission, of all orders made by each of the commissioners, and of all orders made by the commission or approved and confirmed by it and ordered filed. In addition, the secretary of the commission shall maintain a docket of all cases filed and cases set for hearing and shall assign each matter an appropriate case number. These records shall be available for public inspection in the office of the secretary of the commission, during reasonable business hours, Monday through Friday, except for legal holidays. The specific hours the records are available shall be posted at the principal office of the commission.

(2) Copies of records, official documents, pleadings, transcripts, briefs, and orders filed with the commission may be requested from the secretary of the commission. Any such request shall be made in writing. Copies of records, official documents, pleadings, transcripts, briefs, and orders furnished to public officers for use in their official capacity may be provided without charge. Copies shall be provided to all others as follows:

(A) Records, official documents, pleadings, briefs, and orders, thirty-five cents (35¢) per page;

(B) Certificate under seal, one dollar (\$1);

(C) Transmittal by facsimile device, fifty cents (50¢) per page;

(D) Copies of official transcripts, fifty cents (50¢) per page. A diskette shall be provided upon request with a request for a printed copy of the transcript.

**AUTHORITY:** sections 386.300 and 386.410, RSMo Supp. 1998. \* Original rule filed Dec. 19, 1975, effective Dec. 29, 1975. Amended: Filed Nov. 7, 1984, effective June 15, 1985. Rescinded and readopted: Filed March 10, 1995, effective Nov. 30, 1995. Amended: Filed July 26, 1999, effective Jan. 30, 2000.

\*Original authority: 386.300, RSMo 1939, amended 1947, 1984, 1995 and 386.410, RSMo 1939, amended 1947, 1977, 1996.

#### 4 CSR 240-2.040 Practice Before the Commission

**PURPOSE:** This rule sets forth who may practice as an attorney before the commission.

(1) The general counsel represents the staff in investigations, contested cases and other proceedings and appears for the commission in all courts and before federal regulatory bodies; and in general performs all duties and services as attorney and counsel to the commission which the commission may reasonably require.

(2) The public counsel represents the interests of the public before the commission.

(3) Attorneys who wish to practice before the commission shall fully comply with its rules and also comply with one (1) of the following criteria:

(A) An attorney who is licensed to practice law in the state of Missouri, and in good standing, may practice before the commission;

(B) A nonresident attorney who is a member of the Missouri Bar in good standing, but

who does not maintain an office for the practice of law within the state of Missouri, may appear as in the case of a resident attorney;

(C) Any attorney who is not a member of the Missouri Bar, but who is a member in good standing of the bar of any court of record may petition the commission for leave to be permitted to appear and participate in a particular case under all of the following conditions:

1. The visiting attorney shall file in a separate pleading a statement identifying each court of which that attorney is a member and certifying that neither the visiting attorney nor any member of the attorney's firm is disqualified to appear in any of these courts;

2. The statement shall designate some member in good standing of the Missouri Bar having an office within Missouri as associate counsel; and

3. The designated Missouri attorney shall simultaneously enter an appearance as an attorney of record.

(4) An eligible law student may petition the commission to be allowed to appear. Such application must comply with any applicable rules or statutes.

(5) Practice by Nonattorneys. A natural person may represent himself or herself. Such practice is strictly limited to the appearance of a natural person on his or her own behalf and shall not be made for any other person or entity.

(6) After an attorney has entered an appearance for any party, the attorney may withdraw only by leave of the commission.

**AUTHORITY:** section 386.410, RSMo Supp. 1998. \* Original rule filed Dec. 19, 1975, effective Dec. 29, 1975. Amended: Filed Nov. 7, 1984, effective June 15, 1985. Rescinded and readopted: Filed March 10, 1995, effective Nov. 30, 1995. Rescinded and readopted: Filed Aug. 24, 1999, effective April 30, 2000.

\*Original authority: 386.410, RSMo 1939, amended 1947, 1977, 1996.

*Smith v. Public Service Commission*, 336 SW2d 491 (Mo., 1960). *Commission Rule 12.07* allowing individual party before commission held not to authorize non-lawyer individual to act as attorney for twenty-five other individuals. See also *Reed v. Labor and Industrial Relations*, 789 SW2d 19 (Mo. banc 1990) and *Clark v. Austin*, 340 Mo. 647, 101 SW2d 977 (Mo. 1937).

(3) **Formal Complaints** If a complainant is not satisfied with the outcome of the informal complaint, a formal complaint may be filed. Formal complaint may be made by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any person, corporation or public utility, including any rule or charge established or fixed by or for any person, corporation or public utility, in violation or claimed to be in violation of any provision of law or of any rule or order or decision of the commission. However, no complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any public utility unless the complaint is signed by the public counsel, the mayor or the president or chairman of the board of aldermen or a majority of the council or other legislative body of any town, village, county or other political subdivision, within which the alleged violation occurred, or not fewer than twenty-five (25) consumers or purchasers or prospective consumers or purchasers of public utility gas, electricity, water, sewer or telephone service as provided by law. Any public utility has the right to file a formal complaint on any of the grounds upon which complaints are allowed to be filed by other persons and the same procedure shall be followed as in other cases.

(4) The commission shall not be required to dismiss any complaint because of the absence of direct damage to the complainant.

(5) The formal complaint shall contain the following information:

(A) The name, street address, signature, telephone number, facsimile number and electronic mail address, where applicable, of each complainant and, if different, the address where the subject utility service was rendered;

(B) The name and address of the person, corporation or public utility against whom the complaint is being filed;

(C) The nature of the complaint and the complainant's interest in the complaint, in a clear and concise manner;

(D) The relief requested;

(E) A statement as to whether the complainant has directly contacted the person, corporation or public utility about which complaint is being made;

(F) The jurisdiction of the commission over the subject matter of the complaint; and

(G) If the complainant is an association, a list of all its members.

(6) The commission, on its own motion or on the motion of a party, may after notice dis-

miss a complaint for failure to state a claim on which relief may be granted or failure to comply with any provision of these rules or an order of the commission, or may strike irrelevant allegations.

(7) Upon the filing of a complaint in compliance with these rules, the secretary of the commission shall serve by certified mail, postage prepaid, a copy of the complaint upon the person, corporation or public utility against whom the complaint has been filed, which shall be accompanied by a notice that the matter complained of be satisfied or that the complaint be answered by the respondent, unless otherwise ordered, within thirty (30) days of the date of the notice.

(8) The respondent shall file an answer to the complaint within the time provided. All grounds of defense, both of law and of fact, shall be raised in the answer. If the respondent has no information or belief upon the subject sufficient to enable the respondent to answer an allegation of the complaint, the respondent may so state in the answer and assert a denial upon that ground.

(9) If the respondent in a complaint case fails to file a timely answer, the complainant's averments may be deemed admitted and an order granting default entered. The respondent has seven (7) days from the issue date of the order granting default to file a motion to set aside the order of default and extend the filing date of the answer. The commission may grant the motion to set aside the order of default and grant the respondent additional time to answer if it finds good cause.

(10) The commission may order, at any time after the filing of a complaint, an investigation by its staff as to the cause of the complaint. The staff shall file a report of its findings with the commission and all parties to the complaint case. The investigative report shall not be made public unless released in accordance with sections 386.480, 392.210(2) or 393.140(3), RSMo, or during the course of the hearing involving the complaint.

(11) When the commission determines that a hearing should be held, the commission shall fix the time and place of the hearing. The commission shall serve notice upon the affected person, corporation or public utility not fewer than ten (10) days before the time set for the hearing, unless the commission finds the public necessity requires that the hearing be held at an earlier date.

(12) All matters upon which a complaint may be founded may be joined in one (1) hearing and no motion for dismissal shall be entertained against a complainant for misjoinder of causes of action or grievances or misjoinder or nonjoinder of parties.

**AUTHORITY:** section 386.410, RSMo Supp. 1998.\* Original rule filed Dec. 19, 1975, effective Dec. 29, 1975. Amended: Filed Nov. 7, 1984, effective June 15, 1985. Amended: Filed June 9, 1987, effective Nov. 12, 1987. Rescinded and readopted: Filed March 10, 1995, effective Nov. 30, 1995. Rescinded and readopted: Filed Aug. 24, 1999, effective April 30, 2000.

\*Original authority: 386.410, RSMo 1939, amended 1947, 1977, 1996.

#### 4 CSR 240-2.075 Intervention

**PURPOSE:** This rule prescribes the procedures by which an individual or entity may intervene in a case and allows for the filing of briefs by amicus curiae.

(1) An application to intervene shall comply with these rules and shall be filed within thirty (30) days after the commission issues its order giving notice of the case, unless otherwise ordered by the commission.

(2) An application to intervene shall state the proposed intervenor's interest in the case and reasons for seeking intervention, and shall state whether the proposed intervenor supports or opposes the relief sought or that the proposed intervenor is unsure of the position it will take.

(3) An association filing an application to intervene shall list all of its members.

(4) The commission may on application permit any person to intervene on a showing that—

(A) The proposed intervenor has an interest which is different from that of the general public and which may be adversely affected by a final order arising from the case; or

(B) Granting the proposed intervention would serve the public interest.

(5) Applications to intervene filed after the intervention date may be granted upon a showing of good cause.

(6) Any person not a party to a case may petition the commission for leave to file a brief as an amicus curiae. The petition for leave must state the petitioner's interest in the matter and explain why an amicus brief is desirable and

how the matters asserted are relevant to the determination of the case. The brief may be submitted simultaneously with the petition. Unless otherwise ordered by the commission, the brief must be filed no later than the initial briefs of the parties. If leave to file a brief as an *amicus curiae* is granted, the brief shall be deemed filed on the date submitted. An *amicus curiae* may not file a reply brief.

**AUTHORITY:** section 386.410, RSMo 2000.\*  
Original rule filed March 10, 1995, effective Nov. 30, 1995. Rescinded and readopted: Filed Aug. 24, 1999, effective April 30, 2000. Amended: Filed March 26, 2002, effective Nov. 30, 2002.

\*Original authority: 386.410, RSMo 1939, amended 1947, 1977, 1996.

#### 4 CSR 240-2.080 Pleadings, Filing, and Service

**PURPOSE:** This rule prescribes the content and procedure for filing pleadings before the commission and for service thereof.

(1) Every pleading or brief shall be signed by at least one (1) attorney of record with the attorney's individual name or, if a natural person is not represented by an attorney, shall be signed by the natural person.

(2) Each pleading or brief shall state the signer's address, Missouri bar number, electronic mail address, fax number and telephone number, if any. If the attorney is not licensed in Missouri the signature shall be followed by the name of the state in which the attorney is licensed and any identifying number or nomenclature similarly used by the licensing state.

(3) Each pleading shall include a clear and concise statement of the relief requested and specific reference to the statutory provision or other authority under which relief is requested.

(4) Except when provided by rule or statute, pleadings or briefs need not be verified or accompanied by affidavit.

(5) An unsigned pleading or brief shall be rejected.

(6) By signing a pleading, the signer represents that he or she is authorized to so act, and that the signer is a licensed attorney-at-law in good standing in Missouri or has complied with the rules below concerning any attorney who is not a Missouri attorney or is appearing on his or her own behalf.

(7) By presenting or maintaining a claim, defense, request, demand, objection, contention, or argument in a pleading, motion, brief, or other document filed with or submitted to the commission, an attorney or party is certifying to the best of the signer's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, that—

(A) The claim, defense, request, demand, objection, contention, or argument is not presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(B) The claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(C) The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(D) The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(8) Any person filing a pleading or a brief shall file with the secretary of the commission either:

(A) One (1) paper original and eight (8) paper copies of the pleading or brief; or

(B) An electronic copy of the pleading or brief as permitted elsewhere in these rules.

(9) Each pleading may be accompanied by a cover letter which states the subject matter. This cover letter shall contain no matter for commission decision.

(10) The party filing a pleading or brief shall serve each other party a copy of the pleading or brief and cover letter. Any party may contact the secretary of the commission for the names and addresses of the parties in a case.

(11) The date of filing shall be the date the pleading or brief is stamped filed by the secretary of the commission. Pleadings or briefs received after 4:00 p.m. will be stamped filed the next day the commission is regularly open for business.

(12) Pleadings and briefs in every instance shall display on the cover or first page the case number and the title of the case. In the event the title of a case contains more than one (1) name as applicants, complainants or respondents, it shall be sufficient to show

only the first of these names as it appears in the first document commencing the case, followed by an appropriate abbreviation (et al.) indicating the existence of other parties. Unless a case is consolidated, pleadings or briefs shall be filed with only one (1) case number and title thereon.

(13) Pleadings and briefs that are not electronically filed shall be bound at the top or at an edge, shall be typewritten or printed upon white, eight and one-half by eleven-inch (8 1/2" x 11") paper. Attachments to pleadings or briefs shall be annexed and folded to eight and one-half by eleven-inch (8 1/2" x 11") size whenever practicable. Printing on both sides of the page is encouraged. Lines shall be double-spaced, except that footnotes and quotations in excess of three (3) lines may be single-spaced. Reproduction of any of these documents may be by any process provided all copies are clear and permanently legible. Electronically filed pleadings or briefs shall be formatted in the same manner as paper filings.

(14) Pleadings and briefs which are not in substantial compliance with this rule, applicable statutes or commission orders shall not be accepted for filing. In addition, filings will be scanned for computer viruses before being uploaded into the commission's electronic system and may not be accepted if the filing is infected. The secretary of the commission may return these pleadings or briefs with a concise explanation of the deficiencies and the reasons for not accepting them for filing. Tendered filings which have been rejected shall not be entered on the commission's docket. The mere fact of filing shall not constitute a waiver of any noncompliance with these rules and the commission may require amendment of a pleading or entertain appropriate motions in connection with the pleading.

(15) Parties shall be allowed not more than ten (10) days from the date of filing in which to respond to any pleading unless otherwise ordered by the commission.

(16) Any party seeking expedited treatment in any case shall include in the title of the pleading the words "Motion for Expedited Treatment." The pleading shall also set out with particularity the following:

(A) The date by which the party desires the commission to act;

(B) The harm that will be avoided, or the benefit that will accrue, including a statement of the negative effect, or that there will be no negative effect, on the party's customers or

the general public, if the commission acts by the date desired by the party; and

(C) That the pleading was filed as soon as it could have been or an explanation why it was not.

#### (17) Methods of Service.

(A) Any person entitled by law may serve a document on a represented party by—

1. Delivering it to the party's attorney;
2. Leaving it at the office of the party's attorney with a secretary, clerk or attorney associated with or employed by the attorney served;
3. Mailing it to the last known address of the party's attorney;
4. Transmitting it by facsimile machine to the party's attorney; or
5. Transmitting it to the e-mail address of the party's attorney.

(B) Any person entitled by law may serve a document on an unrepresented party by—

1. Delivering it to the party; or
2. Mailing it to the party's last known address.

#### (C) Completion of Service.

1. Service by mail is complete upon mailing.
2. Service by facsimile transmission is complete upon actual receipt.
3. Service by electronic mail is complete upon actual receipt.

(18) Unless otherwise provided by these rules or by other law, the party filing a pleading or brief shall serve every other party, including the general counsel and the public counsel, a copy of the pleading or brief and cover letter.

(19) Every pleading or brief shall include a certificate of service. Such certificate of service shall be adequate proof of service.

(20) Any pleading may be amended within ten (10) days of filing, unless a responsive pleading has already been filed, or at any time by leave of the commission.

(21) Any list of issues ordered by the commission must contain one (1) or more questions presented for decision, stated in the following form per issue: in three (3) separate sentences, with factual and legal premises, followed by a short question; in no more than seventy-five (75) words; and with enough facts woven in that the commission will understand how the question arises in the case.

(A) The questions must be clear and brief, using the style of the following examples of issue statements, which illustrate the clarity and brevity that the parties should aim for:

1. Example A: The Administrative Pro-

cedures Act does not require the same administrative law judge to hear the case and write the final order. ABC Utility Company filed an appeal based on the fact that the administrative law judge who wrote the final order was not the administrative law judge who heard the case. Is it reversible error for one administrative law judge to hear the case and a different administrative law judge to write the final opinion?

2. Example B: For purposes of establishing rates, ABC Utility Company is entitled to include in its costs expenses relating to items that are used or useful in providing services to its customers. ABC Utility Company has spent money to clean up environmental damages resulting from the operation of manufactured-gas plants some 70 to 80 years ago. Should ABC Utility Company be allowed to include these expenses among its costs in establishing its future natural gas rates?

**AUTHORITY:** section 386.410, RSMo 2000.\* Original rule filed Dec. 19, 1975, effective Dec. 29, 1975. Amended: Filed May 15, 1980, effective Sept. 12, 1980. Amended: Filed Nov. 7, 1984, effective June 15, 1985. Amended: Filed Sept. 6, 1985, effective Dec. 15, 1985. Amended: Filed Feb. 23, 1990, effective May 24, 1990. Rescinded and readopted: Filed March 10, 1995, effective Nov. 30, 1995. Rescinded and readopted: Filed Aug. 24, 1999, effective April 30, 2000. Amended: Filed Sept. 11, 2001, effective April 30, 2002. Amended: Filed May 21, 2002, effective Dec. 30, 2002.

\*Original authority: 386.410, RSMo 1939, amended 1947, 1977, 1996.

#### 4 CSR 240-2.085 Protective Orders

**PURPOSE:** This rule prescribes the procedures for obtaining a protective order.

(1) Any party seeking a protective order in any case, shall request such by separate pleading denominated "Motion for Protective Order." The pleading shall state with particularity why the moving party seeks protection, and what harm may occur if the information is made public. The pleading shall also include a statement that none of the information for which a claim of confidentiality is made can be found in any format in any other public document.

(2) Pleadings, testimony, or briefs shall not contain highly confidential or proprietary information unless a protective order has been issued by the commission; except that if the pleading, which initiates a case, or testi-

mony accompanying a pleading initiating a case contains highly confidential or proprietary information, then the party shall file one (1) original, and eight (8) copies of the public version; and one (1) original, and eight (8) copies of the complete version containing the information to be protected, together with a Motion for Protective Order. A highly confidential or proprietary copy of the pleadings shall be served on the attorneys of record, including general counsel and the public counsel.

(3) Unless otherwise ordered, after the issuance of a protective order all pleadings or exhibits shall be filed in the form of one (1) original and eight (8) copies of the protected matter and one (1) original of the public version.

**AUTHORITY:** section 386.410, RSMo Supp. 1998.\* Original rule filed Aug. 24, 1999, effective April 30, 2000.

\*Original authority: 386.410, RSMo 1939, amended 1947, 1977, 1996.

#### 4 CSR 240-2.090 Discovery and Prehearings

**PURPOSE:** This rule prescribes the procedures for depositions, written interrogatories, data requests and prehearing conferences.

(1) Discovery may be obtained by the same means and under the same conditions as in civil actions in the circuit court. Sanctions for abuse of the discovery process or failure to comply with commission orders regarding discovery shall be the same as those provided for in the rules of civil procedure.

(2) Parties may use data requests as a means for discovery. The party to whom data requests are presented shall answer the requests within twenty (20) days after receipt unless otherwise agreed by the parties to the data requests. If the recipient objects to data requests or is unable to answer within twenty (20) days, the recipient shall serve all of the objections or reasons for its inability to answer in writing upon the requesting party, within ten (10) days after receipt of the data requests, unless otherwise ordered by the commission. If the recipient asserts an inability to answer the data requests within the twenty (20)-day time limit, the recipient shall include the date it will be able to answer the data requests simultaneously with its reason for its inability to answer. Upon agreement by the parties or for good cause shown, the time limits may be modified. As used in this rule



AN ORDINANCE AMENDING ARTICLE V "PUBLIC UTILITY RIGHT-OF-WAY MANAGEMENT ORDINANCE" OF CHAPTER 29 "UTILITIES" OF THE CODE OF ORDINANCES.

WHEREAS, The City of St. Joseph, Missouri is authorized by state law and its Charter to regulate the use of its rights-of-way, and

WHEREAS, The City of St. Joseph, Missouri desires to modify City Code Chapter 29, Article V Public Utility Right-of-Way Management Ordinance to reflect ongoing changes in law and practices and to conform such requirements to the requirements of the City Charter and other applicable law relative to various types of right-of-way users.

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF ST. JOSEPH, MISSOURI, AS FOLLOWS:

SECTION 1. That Chapter 29 of the Code of Ordinances of the City of St. Joseph, Missouri, be, and hereby is, amended by repealing Article V entitled "Public utility right-of-way management ordinance" and enacting in lieu thereof a new Article V to be numbered and read as follows:

#### ARTICLE V. RIGHT-OF-WAY MANAGEMENT

##### Sec. 29-350. Intent.

The city council finds that the enactment of a Right-of-Way Management Ordinance will have a beneficial impact on all of the citizens of the city. The use of the public right-of-way is increasing due to the advancements in technology, changes in federal and state law and increased demand for services from residents, businesses, educational institutions, governmental offices located in the city and other public and private institutions. The city council further finds that the public convenience, health, safety and welfare can be best served by establishing regulatory power and procedures to protect the public right-of-way, ensure the orderly development of infrastructure which effectively serves the city, while at the same time not creating barriers which prohibit or effectively prohibit competition. The city council further finds that such regulatory powers should be vested in the city or such persons as the city shall designate. **This article further addresses the various regulatory schemes as may be imposed by state and federal law as to distinct types of right-of-way users.**

##### Sec. 29-351. Definitions.

For the purpose of this article the following terms, phrases, words, abbreviations and their derivations shall have the meaning given in this Section. Words used in the present tense include the future tense, words in the single number include the plural number, words in the plural number include the single number. The words "shall" and "will" are mandatory and the word "may" is permissive. Words not defined shall be given their common and ordinary meaning.

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- (1) "Abandoned Equipment or Facilities" shall mean any equipment, materials, apparatuses, devices or facilities that are:
  - a. Declared abandoned by the owner of such equipment, materials, apparatuses, devices or facilities; or
  - b. No longer in active use, physically disconnected from a portion of the operating facility or any other facility that is in use or in service, and no longer capable of being used for the same or similar purpose for which the equipment, materials, apparatuses or facilities were installed; or
  - c. No longer in active use and the owner of such equipment, materials, apparatuses, devices or facilities fails to respond within 30 days to a written notice sent by the city that the city deems such equipment, materials, apparatuses, devices or facilities abandoned.
- (2) "Applicant" shall mean any right-of-way user that applies for a right-of-way permit.
- (3) "Application" shall mean the process by which an applicant submits a request to be issued a right-of-way permit. An application includes all written documentation and representations, in whatever form, made by the applicant to the city regarding the matters pertaining to a requested right-of-way permit.
- (4) "Article" shall mean this Public Utility Right-of-Way Management Ordinance.
- (5) "Cable Communications System", "Cable System" and "Cable Communications Service" shall have the meanings set forth in Section 9-3 of the code.
- (6) "Cable Franchise" shall mean a franchise to construct and operate a cable system or provide cable service granted pursuant to Chapter 9 of the code.
- (7) "City" shall mean the City of St. Joseph, Missouri as now incorporated and including all future annexations.
- (8) "City Council" shall mean the governing body of the city.
- (9) "Code" shall mean the Code of Ordinances of the City of St. Joseph, Missouri.
- (10) "Completed Application" shall mean when an applicant has submitted all documents, plans, specifications and information required by this article, the applicant has fully paid all applicable fees required by this article and satisfied all other requirements for consideration of the application by the city under this article.
- (11) "Department of Public Works and Transportation" shall mean the department of public works and transportation of the city.

(12) "Emergency" includes, but is not limited to, the following:

- a. An unexpected or unplanned outage, cut, rupture, leak or any other failure of a public utility facility that prevents or significantly jeopardizes the ability of a public utility to provide service to customers; or
- b. An unexpected or unplanned outage, cut, rupture, leak or any other failure of a public utility facility that results or could result in danger to the public or a material delay or hindrance to the provision of service to the public if the outage, cut, rupture, leak or any other such failure of public utility facilities is not immediately repaired, controlled, stabilized or rectified; or
- c. Any occurrence involving a public utility facility that a reasonable person could conclude under the circumstances that immediate and undelayed action by the public utility is necessary and warranted.

(13) "Excavation" shall mean any act by which earth, asphalt, concrete, sand, gravel, rock or any other material in or on the ground is cut into, dug, uncovered, removed or otherwise displaced, by means of any tools, equipment or explosives, except that the following shall not be deemed excavation:

- a. Any de minimis displacement or movement of ground caused by pedestrian or vehicular traffic; or
- b. The replacement of utility poles and related equipment at the existing general location that does not involve either a street or sidewalk cut; or
- c. Any other activity which does not disturb or displace surface conditions of the earth, asphalt, concrete, sand, gravel, rock or any other material in or on the ground.

(14) "Facilities" shall mean any tangible thing located wholly or partially in, above or underneath the public right-of-way, including, but not limited to, lines, pipes, wires, cables, conduit facilities, poles, towers, vaults, pedestals, boxes, appliances, antennas, transmitters, gates, motors, appurtenances or other equipment and systems.

(15) "Law" shall mean all duly enacted and applicable federal, state, county or generally applicable city laws, ordinances, resolutions, regulations, orders or other enactments now in force or hereafter adopted.

(16) "Missouri One Call" means the procedural requirements for excavation and utility safety established by Sections 319.010, et seq. of the Revised Statutes of Missouri as amended and the terms and conditions of Missouri One Call System, Inc.

(17) "Person" shall mean any natural person and all domestic and foreign corporations, closely-held corporations, limited liability companies, associations, syndicates, joint stock corporations, partnerships of every kind, clubs, businesses, common law trusts, societies and any other legal entity.

(18) "Public Improvement" means any project undertaken by the city, or its agents,

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contractors, or subcontractors, for the construction, reconstruction, maintenance, or repair of any public infrastructure, and including without limitation, streets, alleys, bridges, bikeways, parkways, sidewalks, sewers, drainage facilities, traffic control devices, street lights, public facilities, public buildings or land owned by the city.

(19) "Public Right-of-Way" shall mean the surface, the air space above the surface (to the extent such air space may be regulated by the city under federal law) and the area below the surface of any public roadway, highway, street or alleyway, in which the city has an interest, in fee or easement, but not including:

- a. The airwaves above a public right-of-way with regard to cellular or other nonwire telecommunications or broadcast service; or
- b. Easements obtained by utilities or private easements in platted subdivisions or tracts; or
- c. Railroad rights-of-way and ground utilized or acquired for railroad facilities; or
- d. Poles, pipes, cables, conduits, wires, optical cables, or other means of transmission, collection or exchange of communications, information, substances, data, or electronic or electrical current or impulses utilized by a municipally owned or operated utility pursuant to Chapter 91, RSMo, or pursuant to a charter form of government.

(20) "Public Utility" shall mean every cable television service provider, every pipeline corporation, gas corporation, electrical corporation, rural electric cooperative, telecommunications company, water corporation, heating or refrigerating corporation or sewer corporation under the jurisdiction of the public service commission; every municipally owned or operated utility pursuant to Chapter 91, RSMo, or pursuant to a charter form of government or cooperatively owned or operated utility pursuant to Chapter 394, RSMo; every street light maintenance district; every privately owned utility; and every other entity, regardless of its form of organization or governance, whether for profit or not, which in providing a public utility-type of service for members of the general public, utilizes pipes, cables, conduits, wires, optical cables, facilities, or other means of transmission, collection or exchange of communications, information, substances, data, or electronic or electrical current or impulses, in the collection, exchange or dissemination of its product or services through the public right-of-way. "Public utility" shall include a public utility provider that does not own facilities in the public right-of-way but uses the public right-of-way by interconnecting with or using the network elements of another public utility utilizing the public right-of-way, and/or by purchasing or leasing excess capacity from another public utility.

(21) "Public Utility Right-of-Way User" shall mean a public utility owning, controlling, or utilizing a facility in the public right-of-way except that neither the city nor its departments shall be considered a public utility right-of-way user under this article but such users shall comply with the

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requirements herein as may be required to be applied pursuant to application of state or federal law.

- (22) "Public Works and Transportation Director" shall mean the director of the department of public works and transportation of the city, or his or her designee.
- (23) "Right-of-Way Permit" shall mean a permit issued under this Chapter 29 by the city authorizing the performance of excavation or installation or alteration of facilities in, on or above the public right-of-way by a right-of-way user.
- (24) "Reseller Service Provider" shall mean a person doing business in the city by providing a service to locations within the city that who does not have ownership, possessory interest, or control of identifiable facilities in the rights-of-way, but instead uses the rights-of-way by interconnecting with or using the network elements of another right-of-way user in the rights-of-way without any physical access or entry on or to facilities in the right-of-way.
- (25) "Right-of-Way User" shall mean any person, including but not limited to a public utility right-of-way user, owning, controlling, or utilizing a facility in the public right-of-way or otherwise using the right-of-way for excavation, provision of services, or to install, construct, maintain, repair facilities, equipment or structures thereon, except that a right-of-way user shall not include:
- (a) The city or its departments, provided that such users shall be subject to all such requirements as may be required to be applied pursuant to application of state or federal law; or
  - (b) Uses of the right-of-way for incidental and ordinary uses by adjacent property owners specifically exempted or specially permitted by the director of public works and transportation including but not limited to mail boxes, authorized obstructions, and individual private lateral sewer or water lines; or
  - (c) Lawful incidental uses having obtained a special permit issued by the director of public works and transportation for special incidental uses of the right-of-way pursuant to Chapter 25 of the code, provided that the excavation and construction standards otherwise required herein and in Chapter 25 of the code, or as specified by the director of public works and transportation are satisfied.
- (26) "Trenchless Technology" shall mean the use of directional boring, horizontal drilling and microtunneling and other techniques in the construction of facilities underground which results in the least amount of disruption and damage to the public right-of-way as possible.

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Sec. 29-352. Franchise or right-of-way agreement required.

(a) Agreement or franchise required. Except when otherwise authorized by applicable law, no right-of-way user may construct, maintain, own, control, or lease facilities located in the public rights-of-way without a franchise or rights-of-way use agreement with the city as provided herein. All such franchises and agreements shall be approved by ordinance of the council on a non-discriminatory basis provided that the applicant is in compliance with all applicable requirements. Such franchises and agreements shall be deemed to incorporate the terms of this article and other applicable laws of the city, except as may be expressly stated in such agreements and franchises. Reseller service providers shall not be required to obtain a franchise or agreement but shall be required to obtain an otherwise applicable business license and shall provide notification to the city of its status as reseller service provider prior to providing any such service within the city.

(1) Franchise. A franchise shall be obtained by a right-of-way user seeking to use of the rights-of-way for purposes of providing cable communications service, or distribution or supply of light, water, electricity, heat, gas, steam, or sewer public utility service in the city or as may be otherwise required by city charter, subject to any applicable superseding law. Such franchise shall be obtained prior to any use of the rights-of-way and shall be granted only in conformance with the franchise procedures and requirements set forth in Article XIII of the city charter, after public hearing and on satisfaction of all other applicable ordinances and requirements.

(2) Right-of-way use agreement. A rights-of-way use agreement shall be required for all other right-of-way users, except as provided herein or applicable law. Such agreements shall conform to all applicable law but shall not be subject to procedures applicable to franchises and the council may authorize form agreements that may be executed by the city administrator in substantially the form approved by council ordinance. Use of the rights-of-way for antennas shall be permitted only by separate agreement approved by the council, or as expressly authorized by a right-of-way agreement specifically approved by the council and subject to such zoning or other limitations applicable to antennas or communications towers.

(b) Franchises and agreements nonexclusive. The authority granted by the city in any agreement or franchise shall be for nonexclusive use of the rights-of-way, unless otherwise provided therein consistent with applicable law. The city specifically reserves the right to grant, at any time, such additional agreements or other rights to use the rights-of-way for any purpose and to any other person, including itself, as it deems appropriate, subject to all applicable law.

(c) Application; fees; approval. An application for franchise or right-of-way agreement shall be presented to the director in writing and shall include all such

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information as is provided for on an initial registration application pursuant to Section 29-353 for public utility right-of-way users. After the effective date of this article, no current or future registration or permit for any shall be valid or effective until a franchise or right-of-way agreement has been duly executed by the applicant and by the city granting consent to such use; provided that the city will refrain from enforcement of this provision for a period of six months from and after the effective date of this article to provide time for submission of applications and approval by the city of franchise or right-of-way agreements. An application fee for review, documentation and approval of such agreement or franchise shall be established by the department to recover any actual costs incurred by the city in reviewing, documenting, or negotiating such agreement or franchise, including reasonable legal fees, provided that no costs, if any, of litigation or interpretation of RSMo. Section 67.1830 or 67.1832, shall be included if such inclusion is prohibited by law as to that applicant. If the actual costs are less than the application fee, such amount shall be returned to the applicant after written request therefrom; if the actual costs exceed the application fee, applicant shall pay such additional amount prior to issuance of any final city approval after written notice from the city. Nothing herein shall be construed to prohibit the city from also charging reasonable compensation for use of the rights-of-way where such a fee is not contrary to applicable law. Upon submission by the right-of-way user of a duly signed franchise or right-of-way agreement to the city in conformity with the requirements of this article and all applicable law, the city shall execute such approved form franchise or right-of-way agreement (or modified agreement otherwise acceptable to the city consistent with the purposes of this article), and such executed franchise or agreement shall constitute consent to use the rights-of-way; provided that nothing herein shall preclude the rejection or modification of any executed franchise or agreement submitted to the city to the extent such applicable law does not prohibit such rejection or modification such as where necessary to reasonably and in a uniform or nondiscriminatory manner reflect the distinct engineering, construction, operation, maintenance or public work or safety requirements applicable to the applicant.

(d) Lease required for public lands. Unless otherwise provided herein or by law, use or installation of any facilities in, on or over public lands of the city not constituting right-of-way shall be permitted only if a lease agreement or other separate written approval has been negotiated and approved by the city with such reasonable terms and conditions as the city may require.

Sec. 29-353. Public utility right-of-way user registration.

(a) All public utility right-of-way users shall maintain a registration with the director of financial services of the city. No registration shall be valid except during the term of a franchise or right-of-way agreement as required herein and no existing permit or registration shall be deemed to exempt any entity from the requirement to obtain a franchise or agreement per Section 29-352.

(b) No public utility right-of-way user shall be authorized to use the public right-of-

way without registering with the director of financial services of the city and obtaining any necessary right-of-way permit required by this article. A public utility right-of-way user shall be responsible for all costs incurred by the city due to the failure to provide any information to the city required for registration.

(c) A public utility right-of-way user shall report any changes in its registration within 60 days of the change or upon application for a right-of-way permit, whichever occurs first. Failure to report any change shall be a violation of this article. **No change shall occur that violates any provision of a franchise or right-of-way agreement.**

(d) The valid registration shall be on the form provided by the city and at a minimum shall include the following:

- (1) Identity and legal status of the public utility right-of-way user; and
- (2) Name, address, telephone number and e-mail address of the employee, agent or officer of the public utility right-of-way user responsible for the accuracy of the registration statement. Such employee, agent or officer shall be the person to whom notices shall be sent, and shall be responsible for facilitating all necessary communications; and
- (3) Telephone number for the city to call in the case of an emergency and the name, address, telephone number of employee(s) of the public utility right-of-way user for the city to contact, if necessary, in the case of an emergency; and
- (4) Proof of any necessary permit, license, certification, grant, registration, franchise agreement or any other authorization required by any appropriate governmental entity, including, but not limited to, the Federal Communications Commission or the Missouri Public Service Commission; and
- (5) Information which identifies any public utility right-of-way user that does not own facilities in the public right-of-way but uses the public right-of-way by interconnecting with or using the registering public utility right-of-way user's facilities in the public right-of-way and/or by purchasing or leasing any excess capacity from the registering public utility right-of-way user to the extent allowed by state and/or federal law; and
- (6) A list of authorized agents, contractors or subcontractors eligible to obtain permits on behalf of the public utility right-of-way user. A registration may be updated to add such person at the time of an application if the updated registration is submitted by an authorized representative of the public utility right-of-way user; and
- (7) Information sufficient to determine the amount of net assets of the public utility right-of-way user.

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(e) Except as provided in this article, or as otherwise required by law, no registration may be transferred without the written consent of the city. Any person not named on a valid registration, including any affiliates or successors in interest to a registered public utility right-of-way user, must register in accordance with this article or receive written authorization to transfer the registration. Written authorization to transfer a registration shall be granted according to the same standards for a registration. The city shall not unreasonably withhold its consent to transfer as provided herein, provided that a registration may only be transferred in conjunction with approval of or transfer of a franchise or right-of-way agreement granting consent to use the right-of-way to transferee.

Sec. 29-354. Permit required.

Except in the case of an emergency as set forth in Section 29-364, a right-of-way user shall not perform any excavation within a public right-of-way without obtaining a right-of-way permit. Such permit shall be issued pursuant to and subject to the provisions of this chapter and shall be deemed to incorporate all additional provisions and requirements set forth in Chapter 25 of the city code relating to use or excavation in the rights-of-way.

Sec. 29-355. Permit application and submittal requirements.

(a) Right-of-way users may seek bulk permits as may be established by administrative rules. An application for a right-of-way permit by a right-of-way user shall be in the form provided by the city and must be filed with the director of public works and transportation to obtain a right-of-way permit either by an authorized right-of-way user or an authorized agent of the right-of-way user who will perform or furnish the excavation.

(b) A right-of-way user desiring to perform excavation in the public right-of-way to construct or install new facilities, extend facilities, or replace existing facilities in the public right-of-way shall submit with the application the following information:

- (1) The location of all visible topographic features affected by the project within the public right-of-way; and
- (2) Engineering drawings, construction plans, profiles, specifications, record drawings and similar documents, in the form maintained by the public utility right-of-way user, showing the horizontal and vertical location of the proposed project and all existing and proposed facilities at such location, and the design details of the proposed project, which documents shall be confidential and not disclosed to third parties to the extent permitted by law; and
- (3) Complete plan and profile drawings and specifications detailing the restoration of the public right-of-way and the design details of such restoration, including the proposed pavement and public right-of-way restoration, all in compliance with Section 29-362 of this article. The drawings and specifications required herein shall be sealed by a professional engineer duly licensed in the State of

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Missouri to the extent required by the public works and transportation director after considering the complexity, scope or difficulty of the restoration work; and

- (4) An erosion control plan in compliance with applicable provisions of the code; and
- (5) A safety plan indicating the methods used to protect the general public from injury including, but not limited to, the proposed use of barricades, signs, lights, fencing and other barriers. Such safety plan shall be in compliance with all applicable law, including, but not limited to, as applicable, the rules, regulations and standards adopted pursuant to the Williams-Steiger Occupational Safety and Health Act of 1970 and applicable amendments ("OSHA"); and
- (6) A traffic control plan in compliance with the applicable provisions of the code; and
- (7) A landscape plan; and
- (8) A work plan including a schedule indicating the extent and duration of excavation work and restoration work, including a proposed start and end date; and
- (9) The information required by Section 29-356.
- (10) Evidence of the applicant's financial ability to construct and operate the proposed facilities in the public right-of-way and to pay all applicable fees, taxes and other charges allowed by the code and law; and
- (11) Proof that the applicant has obtained and secured all certificates and other authorizations required by law in order to construct and operate the proposed facilities in the manner proposed by the applicant.

(c) A right-of-way user desiring to excavate in the public right-of-way for the purpose of repairing or maintaining existing facilities that results in no material change to the facilities, shall submit with the application for a right-of-way permit the following information:

- (1) Engineering drawings, construction plans, profiles, specification and record drawings, and similar documents in the form maintained by the right-of-way user showing the standard details of the project including the type and nature of the work which documents shall be confidential and not disclosed to third parties to the extent permitted by law; and
- (2) A safety plan indicating the methods used to protect the general public from injury including, but not limited to, the proposed use of barricades, signs, lights, fencing and other barriers. Such safety plan shall be in compliance with

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applicable law, including but not limited to, as applicable, OSHA; and

- (3) An erosion control plan as required by applicable provisions of the code; and
- (4) Traffic control plan in compliance with the applicable provisions of the code; and
- (5) Drawings and specifications detailing the restoration of the public right-of-way, including, proposed pavement and public right-of-way restoration all in compliance with Section 29-362 of this article. The public works and transportation director may require that such drawings and specifications be sealed by a professional engineer duly licensed in the State of Missouri after considering the complexity, scope or difficulty of the restoration work; and
- (6) A landscape plan; and
- (7) A schedule for excavation work and restoration work, including a proposed start and end date.

Sec. 29-356. Other facilities study.

(a) Prior to commencement of any construction or extension or replacement of facilities, in the public right-of-way pursuant to Subsection 29-355(b), an applicant shall complete the following tasks and provide the city the following information:

- (1) Contact Missouri-One-Call to mark the location of facilities located underground in accordance with Missouri-One-Call; and
- (2) Provide the city drawings, maps and other similar documents, in the form maintained by the public utility right-of-way user, of facilities located underground in the public right-of-way along the proposed system route; and
- (3) Where the design of the proposed system and the location of facilities located underground appear to conflict, utilize reasonable methods to locate all critical points of conflict as precisely as possible in accordance with the rules and regulations adopted by the public works and transportation director pursuant to Chapter 25, Article II, Division 3 of the code and provide any information and documents required by the rules and regulations adopted by the public works director pursuant to Chapter 25, Article II, Division 3 of the code.

(b) The applicant shall bear the cost of compliance with this section of this article.

→ Sec. 29-357. Design and location of facilities.

(a) The construction plans and specifications required by Subsection 29-355(b) and Subsection 29-355(c) shall comply with all law and the code including, but not limited to, the rules and regulations adopted by the public works and transportation director pursuant to Chapter 25, Article II, Division 3 of the code. The design shall not

provide for the disruption or interference with any other facilities or public improvement.

(b) Except when a special exception has been obtained pursuant to Subsection 29-379(b), new facilities shall be installed underground or contained within buildings or other structures in conformity with applicable standards, law and the code where practical. A right-of-way user shall not erect new poles or other wire holding structures without the city's consent, which consent shall not be unreasonably withheld.

(c) The public works and transportation director shall assign specific corridors within the public right-of-way, or any particular segment thereof as may be necessary, for facilities, that are, or pursuant to current technology the public works director expects will someday be, located in public right-of-way. All facilities shall be designed and constructed in the proper corridor as designated by the public works and transportation director pursuant to the authority contained in this section. All persons whose facilities are located in public right-of-way in a position at variance with the corridors established by the public works director shall, no later than at the time of the next reconstruction or excavation of the area where its facilities are located, move the facilities to the proper corridor designated by the public works and transportation director.

(d) All construction or maintenance of facilities shall be accomplished in the manner resulting in the least amount of damage and disruption of the public right-of-way. Specifically, every applicant shall utilize trenchless technology and specify the use of trenchless technology in the design of projects located below or under pavements or other locations that will require cutting or patching of public right-of-way. If and when the city requires a right-of-way user to cease using existing poles, all other right-of-way users utilizing the same poles shall also relocate their facilities underground at the same time. The cost of such relocations shall be borne in accordance with this article and approved applicable tariffs governing that right-of-way user. The design of each project shall be the design that will result in the least amount of disruptions to the public right-of-way.

→ (e) All new or replaced facilities located within the right-of-way shall be placed in accordance with city standards and shall be located entirely within the right-of-way unless an exception is granted in writing by the director and included in the permit. Unless good cause is shown to and found to exist by the director,

(1) No facilities shall be permitted to meander or cross onto private property or in easements thereon except for approved crossings of right-of-way, and

(2) No easement shall be granted nor shall facilities be placed in any private property within 15 feet directly adjacent and parallel to any right-of-way, or within the applicable zoning setback, whichever distance is less.

Good cause shall be deemed to exist where application of this requirement would constitute a taking of property without required compensation or where

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**no alternative location is feasible.**

Sec. 29-358. Processing of applications and approval.

(a) The public works **and transportation** director shall promptly, but not longer than 31 days, process each completed application for a right-of-way permit. The public works **and transportation** director may require an applicant to separate proposed work into individual or distinct applications due to the complexity of a proposed project or for other reasonable reasons.

(b) If the public works **and transportation** director determines that an applicant has complied with the requirements of this article, the public works **and transportation** director shall issue a right-of-way permit.

(c) Issued right-of-way permits are not transferable without prior written consent of the public works **and transportation** director. The public works **and transportation** director shall not unreasonably withhold consent for transfer of a right-of-way permit.

(d) A right-of-way permit shall only be valid for the area of the public right-of-way specified within the right-of-way permit. No right-of-way user may cause any excavation to be done outside the area specified in the right-of-way permit. Any right-of-way user who determines that an area greater than that which is specified in the right-of-way permit must be excavated must do the following prior to the commencement of excavation in that greater area:

- (1) Make an application for a right-of-way permit amendment describing the area in which the excavation will occur; and
- (2) Pay any additional fees required thereby.

(e) Right-of-way permits issued shall be available by the right-of-way user at all times at the indicated work site and shall be available for inspection by the public works **and transportation** director, other city employees and the public.

Sec. 29-359. Denial of application for right-of-way permit.

The public works **and transportation** director may deny an application for a right-of-way permit for any of the following reasons:

- (1) The right-of-way user fails to provide all the necessary information and documents required by this article and reasonably requested by the city for managing the public right-of-way; or
- (2) The right-of-way user has failed to return the public right-of-way to its previous condition under a previous right-of-way permit; or
- (3) A reasonable, competitively neutral, and nondiscriminatory justification for requiring an alternative method for performing the work identified in the

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application or a reasonable alternative route that will result in neither additional installation expense up to 10% to the right-of-way user nor a declination of service quality; or

- (4) The public works **and transportation** director determines that the denial is necessary to protect the public health, safety or welfare. In determining whether denial of a right-of-way permit application is necessary to protect the public health, safety or welfare, the public works **and transportation** director may consider one or more of the following factors:

- a. The extent to which the public right-of-way space where the right-of-way permit is sought is available, including the consideration of competing demands for the particular space in the public right-of-way, or other general conditions of the public right-of-way;
- b. The applicability of any ordinance, code provision, or other regulations that affect the location of facilities in the public right-of-way;
- c. The degree of disruption to surrounding communities and businesses that will result from the use of that part of the public right-of-way, including whether the issuance of a right-of-way permit for the particular dates and/or times requested would cause a conflict or interfere with an exhibition, celebration, festival or any other event.

- (5) The area is environmentally sensitive as defined by law or is a historic district as defined by law; **or**

- (6) Any other reason in the public interest permissible under applicable law as may be necessary or appropriate to protect the public welfare and reasonably manage the rights-of-way consistent with the purposes of this article.**

Sec. 29-360. Other conditions.

(a) The public works **and transportation** director in issuing a right-of-way permit is authorized to impose such conditions as is necessary to protect the public health, safety or welfare, to properly manage the public right-of-way and to properly restore the public right-of-way.

(b) The public works **and transportation** director may establish in the right-of-way permit limitations on the amount of excavation which may occur at one time and the amount of public right-of-way which may be obstructed during construction.

(c) The right-of-way user shall not permit excavation to remain open longer than is necessary to complete the repair or installation, and in no event may excavation remain open beyond the expiration of the right-of-way permit or any approved extension.

(d) Non-emergency excavation on arterial and collector streets shall be performed during the hours allowed by law.

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(e) The public works and transportation director may limit the number of conduits that may be installed by each right-of-way user based on the reasonable needs so that no one right-of-way user may unreasonably consume a disproportionate amount of the available public right-of-way to deter competition.

Sec. 29-361. Construction.

(a) Before the start date of any excavation, each right-of-way user who has facilities located in the area to be excavated shall be responsible to mark the horizontal and approximate vertical placement of all its facilities in accordance with Missouri One Call System. A right-of-way user shall be solely liable for any damages caused by its mismarks. Any right-of-way user whose facilities are less than 20 inches below a concrete or asphalt surface shall notify and work closely with the person performing excavation in an effort to establish the exact location of its facilities and the best procedure for excavation.

(b) Before the commencement of any excavation, the right-of-way user shall provide the director of public works and transportation 48 hours written notice before commencing any such work.

(c) Before the commencement of any excavation, the right-of-way user shall provide each affected occupant of premises adjacent to the project 48 hours written notice before commencing any such work. The notification required herein may be satisfied through the use of door hangers or similar means.

(d) The right-of-way user shall provide the public works and transportation director 72 hours prior written notice before the closure of any roadway, highway or street or interruption in traffic flow.

(e) All work permitted by the right-of-way permit shall be in accordance with the terms of the right-of-way permit, and all applicable law and the code. All restoration work required shall be completed in accordance with the approved plans and specifications, the terms of the right-of-way permit and all applicable law and the code, including, but not limited to, rules and regulations adopted by the public works and transportation director pursuant to Chapter 25, Article II, Division III of the code.

(f) All work allowed under the right-of-way permit shall be completed by the time required in the right-of-way permit. At the completion of said work, record drawings in the form maintained by the right-of-way user shall be provided for all extensions or new installations of facilities. Any abandoned equipment or facilities shall also be identified on record drawings in the form maintained by the right-of-way user and provided to the city.

Sec. 29-362. Restoration.

(a) In the event that the city does not exercise its rights to perform restoration work

under Subsection (b) below, each permittee shall provide for the restoration of the public right-of-way and surrounding areas in accordance with the following requirements:

- (1) Any public right-of-way within the city which are disturbed or damaged during the work under a right-of-way permit shall be repaired and restored by the right-of-way user pursuant to the terms of the approved plans and specifications, the terms of the right-of-way permit and the rules and regulations adopted by the public works and transportation director pursuant to Chapter 25, Article II, Division III of the code and in all events the public right-of-way shall be repaired and restored to a condition as good as that previously existed before such work was commenced; and
- (2) The restoration of the public right-of-way as required herein must be completed within the time set forth in the right-of-way permit. In addition to its own work, the right-of-way user must restore the general area of the work, and the surrounding areas, including the paving and its foundations. The right-of-way user shall also inspect the area of the work and maintain the restored public right-of-way in the condition required hereunder for four years thereafter; and
- (3) If the right-of-way user fails to restore the public right-of-way as required by this section, the city may restore the public right-of-way itself and the right-of-way user shall reimburse the city for the cost of restoration as provided in Subsection (5) below; and
- (4) For four years following completion of any restoration, each right-of-way user guarantees that the restoration work shall comply with the applicable requirements of this article ("guarantee period"). The guarantee period shall commence when the restoration work and all required corrections have been inspected and completed to the satisfaction of the public works and transportation director. During the guarantee period, each right-of-way user shall, upon notification from the city, perform all follow-up restoration work required to correct, repair or replace restoration work performed by a right-of-way user which fails to conform to the applicable requirements under this article using any method or materials specified by the city. Such follow-up work shall be completed within five working days after the receipt of notice from the city that such follow-up restoration work is necessary. Follow-up restoration work required because of an emergency shall be performed by a right-of-way user immediately upon verbal or written notification from the city; and
- (5) Upon the failure, refusal or neglect of a right-of-way user to comply with the provisions of this section, the public works and transportation director, after reasonable notice is given to such right-of-way user, may cause the work or other activity required by this section to be completed or performed, in whole or in part, to the satisfaction of the city. Upon so doing, the city shall submit to such right-of-way user an itemized statement of the cost for repairing and

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restoring the public right-of-way. The right-of-way user shall, within 30 days after receipt of the statement, pay to the city the entire amount thereof, or such amounts may be charged against any performance bond required by Section 29-373.

- (6) All excavation shall have a metal or plastic marker of a color, size and shape approved by the public works and transportation director inserted into restored pavement which shall identify the right-of-way user.

(b) The city shall have the option to perform or caused to be performed street restoration work, in which case the right-of-way user shall reimburse the city any reasonable and actual restoration work costs within 30 days from a right-of-way user's receipt of a statement from the city for such costs.

Sec. 29-363. Revocation of right-of-way permit.

(a) The city may, after reasonable notice and an opportunity to cure, revoke a right-of-way permit granted to a right-of-way user, without fee refund, but only in the event of a substantial breach of the terms and material conditions of the right-of-way permit. A substantial breach by a right-of-way user includes, but is not limited to:

- (1) A material violation of a provision of the right-of-way permit; or
- (2) An evasion or attempt to evade any material provision of the right-of-way permit, or the perpetration or attempt to perpetrate any fraud or deceit upon the city or its citizens; or
- (3) A material misrepresentation of fact in the application for a right-of-way permit; or
- (4) A failure to complete work by the date specified in the right-of-way permit, unless a permit extension is obtained; or
- (5) A failure to correct, within the time specified by the city, work that does not conform to applicable law, this article and other provisions of the code.

Sec. 29-364. Emergencies.

In case of an emergency, a right-of-way user may proceed with required work without a right-of-way permit, however, in such event, the right-of-way user shall, within five working days following the emergency, submit the documents and information required by Section 29-355 of this article and pay the right-of-way permit fee(s) required by Section 29-374 of this article. In case of an emergency, a right-of-way user shall immediately notify the public works and transportation director of such emergency and the excavation necessary to address such emergency. All required work necessitated by the emergency and restoration work shall satisfy all requirements of this article. If such required work necessitated by the emergency or the restoration work fails to satisfy the requirements of this article, then the right-of-

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way user shall promptly correct such unsatisfactory work. In the event the right-of-way user fails to correct such unsatisfactory work, then the city shall be entitled to correct such unsatisfactory work. The city shall submit to the right-of-way user an itemized statement of the costs for such work. The right-of-way user shall pay the amount of the statement within 30 days from receipt.

Sec. 29-365. Abandonment of equipment or facilities.

(a) Unless otherwise permitted by the city in writing, a right-of-way user shall remove all abandoned equipment or facilities which prevents or significantly impairs the public right-of-way use, repair, excavation or construction, upon receipt of written notice from the city and shall restore any affected public right-of-way in accordance with the standards set forth in this article. In the event a right-of-way user fails to remove such abandoned equipment or facilities, the city may do so at such right-of-way user's cost and expense.

(b) The city, upon such terms as it may impose, may give a right-of-way user permission to abandon, without removing, any equipment or facilities, so long as such equipment or facilities abandoned in place does not materially interfere with the use of the public right-of-way, or with the use of the public right-of-way by any right-of-way user.

(c) If required by the city, a right-of-way user shall submit to the city an accurate map of all abandoned equipment and facilities in the form maintained by the right-of-way user.

Sec. 29-366. Facilities relocation.

(a) The public works and transportation director may order a right-of-way user, at the right-of-way user's own cost, to permanently or temporarily remove, relocate, protect, support or disconnect its facilities, in the public right-of-way for the following reasons:

- (1) To prevent interference with a public improvement undertaken by the city;
- (2) When necessary, because of traffic conditions, street vacations, freeway grading, sewer or drainage or to otherwise prevent interference with the safety and convenience of ordinary travel over the public right-of-way; or
- (3) When required to protect the public health, safety or welfare.

(b) With respect to any permanent or temporary removal, relocation, protection, support or disconnection of facilities, in the public right-of-way pursuant to Subsection (a) above, the city shall be liable to a right-of-way user only for damages caused by the sole negligence of the city; provided, however, that nothing herein shall relieve any other person from liability for damage to a right-of-way user's facilities.

(c) Except in the case of an emergency, the city shall provide a right-of-way user

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written notice if, in the reasonable judgment of the city, facilities must be permanently or temporarily removed, relocated, protected, supported or disconnected pursuant to this section. If the right-of-way user fails to promptly commence such work and substantially complete such removal, relocation, protection, support or disconnection, including all associated repair of the public right-of-way, within a reasonable time thereafter, then, to the extent not inconsistent with law, the city shall have the right to authorize removal of the facilities installed by the right-of-way user on, over or under the public right-of-way at the right-of-way user's cost and expense. Unless otherwise provided in the written order from the director of public works and transportation, such relocation shall be completed within 30 days of the first written request by the city to relocate the facilities. Failure to relocate facilities at the cost of the right-of-way user within such 30 days or other time period reasonably specified in writing shall constitute a violation of this article subject to the violations provisions herein and shall further constitute basis for denial or revocation of any other use of the rights-of-way until remedied.

Sec. 29-367. Damage to property.

Each right-of-way user shall be responsible for the cost of repairing any property owned by other persons in the public right-of-way caused by the right-of-way user or its facilities. Each right-of-way user shall be responsible for the cost of repairing any damage to the property of another person caused during the city's response to an emergency caused by a right-of-way user or its facilities, except for damage caused by the city's gross negligence or willful misconduct.

Sec. 29-368. Public right-of-way vacation.

If the city vacates a public right-of-way, the city shall reserve for itself and all public utility right-of-way users having facilities in the vacated public right-of-way, the right to install, maintain and operate the facilities in the vacated public right-of-way and to enter upon such public right-of-way at anytime for the purpose of reconstructing, inspecting, maintaining, repairing or restoring the same. The city shall retain all necessary easements in vacated public right-of-way in existence at the time of vacation.

Sec. 29-369. Extensions of time and inspection.

(a) Any construction, excavation, or restoration work required under this article shall be completed in the time set forth in the right-of-way permit, unless extended. If a right-of-way user is unable to complete the construction, excavation or restoration work within the time set forth in the right-of-way permit due to reasons beyond the public utility right-of-way user's control, upon application to the public works and transportation director, the time required for such work shall be extended to the extent of the delay caused by the reason beyond public utility right-of-way user's control. Upon completion of such work, the right-of-way user shall immediately notify the public works and transportation director. The right-of-way user shall make the work site available to the public works and transportation director and to all others as authorized by law for inspection at any reasonable times during the

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execution and upon completion of the work.

(b) At the time of inspection, the public works and transportation director may order the immediate cessation of any work which poses a serious threat to the public health, safety or welfare.

(c) The public works and transportation director may order a right-of-way user to perform or redo any work which does not conform to this article, or other applicable standards, conditions or the code. An order issued pursuant to this section shall state that failure to correct the violation will be cause for revocation of the right-of-way permit. Within ten days after issuance of the order, the right-of-way user shall present proof to the public works and transportation director that the violations have been corrected. If such proof has not been presented within the required time, the public works and transportation director may revoke the right-of-way permit.

Sec. 29-370. Other obligations.

(a) Obtaining a right-of-way permit does not relieve the right-of-way user of its duty to obtain all other necessary permits, licenses and authority and to pay all fees required by any other law.

(b) A right-of-way user shall comply with all requirements of law, including Missouri One Call System.

(c) A right-of-way user shall perform all work in conformance with all law, and is responsible for all work done in the public right-of-way pursuant to the right-of-way permit, regardless of who performs the work.

(d) Except in the case of an emergency, and with the approval of the public works and transportation director, no excavation may be performed when conditions are unreasonable for such work.

(e) A right-of-way user shall not obstruct a public right-of-way to the extent that the obstruction interferes with the natural free and clear passage of water through gutters or other waterways.

Sec. 29-371. Trimming of trees.

A right-of-way user shall have the authority to trim trees, in accordance with the city tree ordinance, upon and above public right-of-way so as to prevent the branches of such trees from coming in contact with facilities.

Sec. 29-372. Indemnification.

(a) Each right-of-way user shall indemnify, hold harmless, release and defend the city, its municipal officials, elected officials, boards, commissions, agents, attorneys and employees, from and against any and all lawsuits, claims, causes of action, liability, contractual damages and losses, economic damages and losses, all other

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damages and losses, and expenses, including reasonable attorneys' fees, resulting or in any manner arising from the action or inaction of a right-of-way user, its agents, representatives, employees, contractors, subcontractors or any other person for whose acts such right-of-way user may be liable, in constructing, operating, maintaining, repairing, restoring or removing facilities, or in carrying on a public utility right-of-way user's business or operations in the city. This indemnity shall apply, without limitation, to any claim or cause of action for invasion of privacy, defamation, antitrust, negligence, theft, fire, violation or infringement of any copyright, trademark, trade name, service mark or patent or intellectual property right of any person, whether or not any act or omission complained of is authorized, allowed or prohibited by this article; and

(b) The city shall notify a right-of-way user of any claims subject to indemnification by a right-of-way user and shall cooperate with all reasonable requests by a right-of-way user for information, documents, testimony or other assistance appropriate to a resolution of such claims. A right-of-way user shall have full responsibility for and control of any action or undertaking directed at the resolution of such claims.

#### Sec. 29-373. Insurance and bonds.

(a) Each right-of-way user shall secure and maintain commercial general liability insurance ("CGL Insurance") with a combined single limit per occurrence of not less than the amount required by the requirements for CGL Insurance established by the public works and transportation director. The CGL Insurance required herein shall be written on a comprehensive form and shall cover claims and liability in connection with or resulting from the right-of-way user's operations and activities for personal injuries, occupational sickness, disease, death or damage to property of others, including loss of use resulting therefrom, arising out of any operations or activities of the public utility right-of-way user, its agents, or any person directly or indirectly employed by them. The CGL Insurance required herein shall include premises, operations, independent contractors, products-completed operations, personal injury and advertising injury and liability assumed under an insured contract (including the tort liability of another assumed in a business contract) coverages. In particular, and not by way of any limitation, the CGL Insurance shall cover the right-of-way user's indemnity obligations contained herein.

(b) Each right-of-way user shall secure and maintain commercial automobile liability insurance ("auto insurance") with a combined single limit for bodily injury and property damage per accident of not less than the amount required by the requirements for auto insurance established by the public works and transportation director. This insurance, to be in comprehensive form, which shall cover claims and liability for all injuries and all damage to property arising from the use of automobiles, trucks and motorized vehicles, and shall cover the operation on or off the site of the work of all motor vehicles licensed for highway use whether they are owned, non-owned or leased.

(c) The right-of-way user shall purchase and maintain workers' compensation

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insurance which shall protect the right-of-way user against claims for injury, sickness, disease or death of the right-of-way user's employees or statutory employees in accordance with law.

(d) The city shall be endorsed as an additional insured under the policies described in Subsections (a) and (b) above. However, nothing contained in this Section 29-373, including that the right-of-way user maintain insurance, is intended or shall be construed to be a waiver of the sovereign immunity protections afforded the city under law.

(e) Before commencing any work allowed by the right-of-way permit, the right-of-way user shall procure and furnish to the department of public works and transportation a performance bond in the amount of the estimated cost of the required public right-of-way restoration work to be performed by the right-of-way user and approved by the department of public works and transportation. Such bonds shall be in effect through the duration of the work allowed by the right-of-way permit and for the four year guarantee period. The bonds required hereunder shall be in a form approved by the public works and transportation director and executed by a responsible surety licensed in the State of Missouri. The right-of-way user shall require the attorney in fact who executes the required bond on behalf of the surety to affix thereto a certified and current copy of this power of attorney indicating the monetary limit of such power. If the surety of any bond furnished by the right-of-way user is declared bankrupt or becomes insolvent or its right to conduct business in the State of Missouri is terminated, or it ceases to meet the requirements of this paragraph, the right-of-way user shall within ten days substitute another bond and surety, both of which must be acceptable to the public works and transportation director. If the right-of-way user fails to make such substitution, the city may procure such required bonds on behalf of the right-of-way user at the right-of-way user's expense.

(f) If the public utility right-of-way user can demonstrate through certified documents reasonably acceptable to the public works and transportation director that the public utility right-of-way user has \$25,000,000.00 in net assets and does not have a history of permitting noncompliance within the city, the requirements of Subsections (a) through (e) of this Section 29-373 shall not apply to such public utility right-of-way user.

(g) In the event the right-of-way user contracts with any other person to perform the work allowed by the right-of-way permit, such person shall comply with all the terms and provisions of the right-of-way permit, this article, including all insurance and bonding requirements, all law and the code and shall have the same obligations as the right-of-way user under this article. The right-of-way user shall provide a written guaranty that the work allowed by the right-of-way permit and performed by another person shall be in accordance with the right-of-way permit, this article, applicable law and the code. The right-of-way user shall be responsible for correcting acts or omissions by any other person performing the work allowed by the right-of-way Permit. The form of the written guaranty shall be approved by the public works and transportation director.

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Sec. 29-374. Right-of-way permit fees.

(a) Each applicant shall pay to the city a right-of-way permit fee for each application for a right-of-way permit as follows:

- (1) For each 150 square feet or part thereof of the area to be restored or excavated, whichever is larger, a permit fee of \$28.25.
- (2) For an area 150 square feet or less to be restored or excavated which does not involve pavement removal or trenchless technologies under pavement, a permit fee of \$21.00.
- (3) Bulk permits, pursuant to administrative rules promulgated under the authority of Chapter 25 for issuance, a permit fee of \$12.00.
- (4) Any fee required pursuant to this section shall be doubled for each activity requiring a permit under this section but not obtained, in violation of this section.

Such right-of-way permit fee shall be based upon all of the city's costs in issuing, processing and verifying applications and inspections of the project site and restoration work up to two hours. Such right-of-way permit fee shall be paid by each applicant to the city at the time the applicant submits its application for a right-of-way permit.

(b) Each right-of-way user shall pay to the city a supplemental right-of-way permit fee in the amount of all of the city's costs associated with the following:

- (1) Inspecting the project site and the restoration work in excess of two hours; and
- (2) Protecting or moving the right-of-way user's equipment or facilities after reasonable notification to the right-of-way user doing the public right-of-way work; and
- (3) Determining the adequacy of public right-of-way restoration; and
- (4) Inspecting and/or testing restoration work after rejection of improper or defective restoration work;
- (5) Restoring work inadequately performed after the city has provided notice and five working days for the right-of-way user to correct such inadequate work; and
- (6) Revoking the right-of-way permit.

(c) Fees paid for a right-of-way permit, which is subsequently revoked by the public works and transportation director, are not refundable.

(d) In the event the scope of the project is revised during the course of the project, the public works and transportation director may reevaluate the fee based on the actual size of the excavation and may require an additional fee.

(e) The amount of the right-of-way permit fee set forth in Section 29-374(a) shall be reviewed annually by the public works and transportation director and adjusted based upon the costs to the city as set forth in Subsection 29-374(a) as approved by the city council.

#### Sec. 29-375. Violations.

(a) No right-of-way user shall excavate in the public right-of-way in violation of Section 29-354 of this article. Any violation of Section 29-354 of this article shall result in the immediate issuance of a citation to the right-of-way user and enforcement action pursuant to Section 29-375(d) hereof.

(b) Except as provided in Subsection (a) of this section, if the public works and transportation director determines that a right-of-way user has committed a violation of this Article, any law, or a condition of the right-of-way permit, the public works and transportation director shall make written demand upon the right-of-way user to remedy such violation, which may include the issuance of a stop work order.

(c) The right-of-way user shall, within seven calendar days of receiving a notification of a violation, propose a plan to promptly correct such violation. The right-of-way user shall promptly correct such violation in accordance with an approved plan. If the violation creates a threat to public safety, the right-of-way user upon verbal or written notice from the public works and transportation director shall immediately correct such violation. A right-of-way user's failure to submit an acceptable plan, or to promptly cure a violation shall in addition to all other remedies provided by law be cause for immediate revocation of the right-of-way permit.

(d) Any right-of-way user violating any provision of this article is guilty of a public offense, and upon conviction thereof shall be fined in a sum of not less than \$200.00 nor more than \$500.00. Every day that this article is violated shall constitute a separate offense. The city shall have the authority to maintain civil suits or actions in any court of competent jurisdiction for the purpose of enforcing the provisions of this article. In addition to any other remedies, the city attorney may institute injunction, mandamus or other appropriate actions or proceedings to prevent violations of this article.

#### Sec. 29-376. Appeals.

A public utility right-of-way user that has been denied a right-of-way permit, has had its right-of-way permit revoked, believes that the fees imposed upon it by the city do not conform to the requirements of RSMo. Section 67.1840 or asserts any other issues related to the use of the public right-of-way shall be entitled to have its disputes reviewed in accordance with the Chapter 2, Article XIII, of the code, provided however, that a decision affirming the denial, revocation, fee imposition or dispute

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resolution shall be in writing and supported by written findings establishing the reasonableness of the decision.

Sec. 29-377. Separability.

If any provision of this article is held by any federal, state or local court, or by any federal or state agency of competent jurisdiction, to be invalid as conflicting with any Law, or is held by such court or agency to be modified in any way in order to conform to the requirements of any such law or regulation, such provision shall be considered a separate, distinct and independent part of this article and such holding shall not affect the validity and enforceability of all other provisions hereof. In the event that such law or regulation is subsequently repealed, rescinded, amended or otherwise changed so that the provision which had been held invalid or modified is no longer in conflict with such law, said provision shall return to full force and effect and shall again be binding on the city and each right-of-way user, provided that the city shall give the right-of-way user 30 days, or a longer period of time as may be reasonably required for the right-of-way user to comply with such a rejuvenated provision, written notice of the change before requiring compliance with such provision.

Sec. 29-378. Exceptions.

(a) Regardless of any contrary provisions of this article, nothing contained in this article shall relieve the city of any obligations under an existing franchise agreement in effect on May 1, 2001.

(b) Regardless of any contrary provisions of this article, nothing contained in this article shall relieve a right-of-way user of the provisions of an existing franchise, franchise fees, license or other agreement or permit in effect on May 1, 2001.

(c) Regardless of any contrary provisions of this article, nothing contained in this article shall prohibit the city or a right-of-way user from renewing or entering into a new franchise in compliance with applicable law.

(d) Regardless of any contrary provisions of this article, nothing contained in this article shall prohibit the city from enacting, renewing or enforcing ordinance articles allowed by the provisions of RSMo. Section 67.1846, where applicable.

(e) Regardless of any contrary provisions of this article, nothing contained in this article shall prevent the city from imposing a franchise fee and other terms and conditions permitted by law in connection with the city granting or renewing a cable franchise and the city may fully enforce all such cable franchise and cable ordinance provisions notwithstanding any contrary term or provisions herein to the full extent permitted by law.

(f) The permitting and other requirements for towers and other structures or equipment for wireless communications facilities in the public right-of-way shall not be governed by this article and shall be governed by other provisions of the code.

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Authenticated Copy

of Reso. G.O. S.O. 3111

PAULA HEYDE, City Clerk

By

Deputy

Date

6-22-05

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#### Sec. 29-379. Reservation of rights and special exceptions.

(a) In addition to any rights specifically reserved to the city of by this article, the city reserves unto itself every right and power which its required to be reserved by a provision of any ordinance under any registration, permit or other authorization granted under this article.

(b) The city may grant a special exception to the requirements of this article if an applicant, upon application, demonstrates with written evidence that the exception will not create any threat to the public health, safety or welfare, and:

- (1) The applicant demonstrates that the increased economic burden and the potential adverse impact on the applicant's construction schedule resulting from the strict enforcement of the requirement actually or effectively prohibits the ability of the applicant to provide public utility services in the city; or
- (2) The applicant demonstrates that the requirement unreasonably discriminates against the applicant in favor of another public utility right-of-way user.

**(3) The applicant demonstrates that under the facts clearly shown, an exception is required by superseding applicable law.**

(c) A grant of special exception to the requirements of this section pursuant to **Subsection 29-379(b)** shall not be deemed to be a waiver of any other requirement of this section or this article or constitute a waiver of any requirement with respect to a new or separate right-of-way permit.

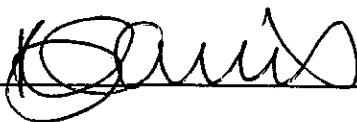
#### Sec. 29-380. City's failure to enforce.

The city's failure to enforce or remedy any noncompliance of the terms and conditions of this article or of any right-of-way permit granted hereunder shall not constitute a waiver of the city's rights nor a waiver of any right-of-way user's obligations as herein provided.

SECTION 2. That any ordinances or parts of ordinances in conflict with this ordinance be, and hereby are, repealed.

SECTION 3. That this ordinance shall be in full force and effect from and after date of passage.

Approved as to form:



Passed June 20

20 05

 City Attorney

Attest: /s/Paula Heyde, CMC  
(Seal)

City Clerk<sup>26</sup>

/s/David J. Jones

Mayor