

403. Utilities Generally

RIGHT-OF-WAY MANAGEMENT

§403.01. FINDINGS AND PURPOSE.

Subd. 1. General. To provide for the health, safety, and well-being of its citizens, and to ensure the structural integrity of its streets and the appropriate use of the rights-of-way, the City strives to keep its rights-of-way in a state of good repair and free from unnecessary encumbrances. Although the general population bears the financial burden for the upkeep of the rights-of-way, a primary cause for the early and excessive deterioration of its rights-of-way is frequent excavation.

The City holds the rights-of-way within its geographical boundaries as an asset in trust for its citizens. The City and other public entities have invested millions of dollars in public funds to build and maintain the rights-of-way. It also recognizes that some persons, by placing their equipment in the right-of-way and charging the citizens of the City for goods and services delivered thereby, are using this property held for the public good. Although such services are often necessary or convenient for the citizens, such persons receive revenue and/or profit through their use of public property.

In response to the foregoing facts, the City hereby enacts this new Chapter of this Code relating to right-of-way permits and administration. This Chapter imposes reasonable regulations on the placement and maintenance of equipment currently within its rights-of-way or to be placed therein at some future time. It is intended to complement the regulatory roles of state and federal agencies. Under this Chapter, persons disturbing and obstructing the rights-of-way will bear a fair share of the financial responsibility for their integrity. Finally, this Chapter provides for recovery of out-of-pocket and projected costs from persons using the public rights-of-way.

Subd. 2. Legislative Power. By enactment of this Chapter, the City Council hereby exercises its lawful police power and common law authority, and all statutory authority which is available to it, including, but not limited to, the powers conferred on it under Minn. Stat. §§ 237.162 and 237.163, while preserving all power and authority to further require franchises from right-of-way users under Minn. Stat. §§ 216B.36, 222.37, 300.03, and 412.11, and other provisions of law.

§403.02. DEFINITIONS.

The following definitions apply in this Chapter of this Code. References hereafter to “sections” are, unless otherwise specified, references to sections in this Chapter. Defined terms remain defined terms whether or not capitalized.

(a) "Applicant" means any person requesting permission to excavate or obstruct a right-of-way.

(b) "Business District" means that portion of the City lying within and bounded by the following streets: to be subsequently designated.

(c) "City" means the City of White Bear Lake, Minnesota. For purposes of section 403.28, city means its elected officials, officers, employees, and agents.

(d) "Management Costs" means the actual costs the City incurs in managing its rights-of-way, including, but not limited to, costs associated with registering applicants; issuing, processing, and verifying right-of-way permit applications; creating, maintaining and updating mapping systems; budget analysis; systems analysis; legal assistance; inspecting job sites and restoration projects; maintaining, supporting, protecting, or moving user facilities, during public right-of-way work; determining the adequacy of right-of-way restoration; restoring work inadequately performed; and revoking right-of-way permits and performing all other tasks required by this Chapter, including other costs the City may incur in managing the provisions of this Chapter.

(e) "Degradation" means a decrease in the useful life of the right-of-way caused by excavation in or disturbance of the right-of-way, resulting in the need to reconstruct such right-of-way earlier than would be required if the excavation did not occur.

(f) "Degradation Cost" means the cost to achieve a level of restoration as determined by the City at the time the permit is issued, not to exceed the maximum restoration shown in plates 1 to 13, set forth in proposed PUC rules parts 7819.9900 to 7819.9950.

(g) "Degradation Fee" means the estimated fee established at the time of permitting by the City to recover costs associated with the decrease in the useful life of the right-of-way caused by the excavation, and which equals the degradation costs.

(h) "Department" means the Department of Public Works of the City.

(i) "Department Inspector" means any person authorized by the Director to carry out inspections related to the provisions of this Chapter.

(j) "Director" means the Director of the Department of Public Works of the City, or her or his designee.

(k) "Delay Penalty" is the penalty imposed as a result of unreasonable delays in right-of-way construction.

(l) "Emergency" means a condition that (1) poses a clear and immediate danger to life or health, or of a significant loss of property; or (2) requires immediate repair or

replacement in order to restore service to a customer.

(m) "Equipment" means any tangible asset used to install, repair, or maintain facilities in any right-of-way.

(n) "Excavate" means to dig into or in any way remove or physically disturb or penetrate any part of a right-of-way.

(o) "Excavation Permit" means the permit which, pursuant to this Chapter, must be obtained before a person may excavate in a right-of-way. An excavation permit allows the holder to excavate that part of the right-of-way described in such permit.

(p) "Excavation Permit Fee" means money paid to the City by an applicant to cover the costs as provided in Section 707.11.

(q) "Facility or Facilities" means any tangible asset in the right-of-way required to provide utility service.

(r) "Local Representative" means a local person or persons, or designee of such person or persons, authorized by a registrant to accept service and to make decisions for that registrant regarding all matters within the scope of this Chapter.

(s) "Obstruct" means to place any object in a right-of-way so as to hinder free and open passage over that or any part of the right-of-way.

(t) "Obstruction Permit" means the permit which, pursuant to this Chapter, must be obtained before a person may obstruct a right-of-way, allowing the holder to hinder free and open passage over the specified portion of that right-of-way by placing equipment described therein on the right-of-way for the duration specified therein.

(u) "Obstruction Permit Fee" means money paid to the City by a registrant to cover the costs as provided in Section 707.11.

(v) "Patch or Patching" means a method of pavement replacement that is temporary in nature. A Patch consists of (1) the compaction of the subbase and aggregate base, and (2) the replacement, in kind, of the existing pavement for a minimum of two feet beyond the edges of the excavation in all directions. A Patch is considered full Restoration only when the pavement is included in the City's five year project plan.

(w) "Performance and Restoration Bond" means a performance bond or letter of credit posted to ensure the availability of sufficient funds to assure that all obligations pursuant to this Chapter, including, but not limited to, right-of-way excavation and obstruction work is timely and properly completed.

(x) "Permittee" means any person to whom a permit to excavate or obstruct a right-of-way has been granted by the City under this Chapter.

(y) 'Person' means any natural or corporate person, business association or other business entity including, but not limited to, a partnership, a sole proprietorship, a political subdivision, a public or private agency of any kind, a utility, a successor or assign of any of the foregoing, or any other legal entity.

(z) "Probation" means the status of a person that has not complied with the conditions of this Chapter.

(aa) "Probationary Period" means one year from the date that a person has been notified in writing that they have been put on probation.

(bb) "Registrant" means any person who (1) has or seeks to have its equipment or facilities located in any right-of-way, or (2) in any way occupies or uses, or seeks to occupy or use, the right-of-way or any equipment in the right-of-way.

(cc) "Restore or Restoration" means the process by which a right-of-way and surrounding area, including pavement and foundation, is returned to the same condition and life expectancy that existed before excavation.

(dd) "Restoration Cost" means an amount of money paid to the City by a permittee to achieve the level of restoration according to plates 1 to 13 of PT.JC rules.

(ee) "Right-of-Way" means the surface and space above and below a public roadway, highway, street, cartway, bicycle and public sidewalk in which the City has an interest, including other dedicated rights-of-way for travel purposes, utility easements and any other real property owned by or under the control of the City.

(ff) "Right-of-Way Permit" means either the excavation permit or the obstruction permit, or both, depending on the context, required by this Chapter.

(gg) "Service" or "Utility Service" includes but is not limited to (1) those services provided by a public utility as defined in Mimi. Stat. §216B.02, subs. 4 and 6; (2) telecommunications, pipeline, community antenna television, fire and alarm communications, water, electricity, light, heat, cooling energy, or power services; (3) the services provided by a corporation organized for the purposes set forth in Minn. Stat. 300.03; (4) the services provided by a district heating or cooling system; and (5) cable communications systems as defined in Minn. Stat. Chap. 238; and (6) Telecommunications right-of-way user as defined below.

(hh) ‘Supplementary Application’ means an application made to excavate or obstruct more of the right-of-way than allowed in, or to extend, a permit that had already been issued.

(ii) “Telecommunication Rights-of-Way User” means a person owning or controlling a facility in the right-of-way, or seeking to own or control a facility in the public right-of-way, that is used or is intended to be used for transporting telecommunication or other voice or data information. For purposes of this Chapter, a cable communication system defined and regulated under Minn. Stat. Chap. 238, and telecommunication activities related to providing natural gas or electric energy services are not telecommunications right-of-way users for purposes of this chapter.

(jj) “Unusable Facilities” means facilities in the right-of-way which have remained unused for one year and for which the registrant is unable to provide proof that it has either a plan to begin using it within the next twelve (12) months or a potential purchaser or user of the equipment.

§403.03. ADMINISTRATION.

The Director is the principal City official responsible for the administration of the rights-of-way, right-of-way permits, and the ordinances related thereto. The Director may delegate any or all of the duties hereunder.

§403.04. UTILITY COORDINATION COMMITTEE.

The City may create a utility coordination committee. If created, this committee shall be voluntary and advisory to the Director. It will be composed of any registrants that wish to assist the City in obtaining information and by making recommendations regarding use of the tight-of-way, and to improve the

process of performing construction work therein. The Director may determine the size of such committee

and shall appoint members from a list of registrants that have expressed a desire to assist the City.

§403.05. REGISTRATION AND RIGHT-OF-WAY OCCUPANCY.

Subd. 1. Registration. Each person who occupies, uses, or seeks to occupy or use, the right-of-way or place any equipment in the right-of-way, including persons with installation and maintenance responsibilities by lease, sublease or assignment, must register with the Director. Registration will consist of providing application information, paying a registration fee, and posting a performance and restoration bond, or other security acceptable to the Director.

The performance and restoration bond required in this section and in Sections 403.09, subd. 2; 403.12, subd. 2(b), and Section 403.30, subd. 1(b)(3) shall be in an amount determined in the director's sole discretion, sufficient to serve as security for the full and complete performance of the obligations under this Chapter, including any costs, expenses, damages, or loss the City pays or incurs because of any failure to comply with this Chapter or any other applicable laws, regulations or standards. During periods of construction, repair or restoration of rights-of-way or equipment in rights-of-way, the performance and restoration bond shall be in an amount sufficient to cover 100% of the estimated cost of such work, as documented by the person proposing to perform such work, or in such lesser amount as maybe determined by the Director, taking into account the amount of equipment in the right-of-way, the location and method of installation of the equipment, the conflict or interference of such equipment with the equipment of other persons, and the purposes and policies of this Chapter. Sixty (60) days after completion of the work, the performance and restoration bond may be reduced in the sole discretion of the Director.

Subd. 2. Registration Prior to Work. No person may construct, install, repair, remove, relocate, or perform any other work on, or use any facilities or any part thereof in any right-of-way without first being registered with the Director.

Subd. 3. Exceptions. Nothing herein shall be construed to repeal or amend the provisions of a city ordinance permitting persons to plant or maintain boulevard plantings or gardens in the area of the right-of-way between their property and the street curb. Persons planting or maintaining boulevard plantings or gardens shall not be deemed to use or occupy the right-of-way, and shall not be required to obtain any permits or satisfy any other requirements for planting or maintaining such boulevard plantings or gardens under this Chapter. However, nothing herein relieves a person from complying with the provisions of the Minn. Stat. Chap. 216D, "One Call" law.

§403.06. REGISTRATION INFORMATION.

Subd. 1. Information Required. The information provided to the Director at the time of registration shall include, but not be limited to:

(a) Each registrant's name, Gopher One-Call registration certificate number, address and e-mail address if applicable, and telephone and facsimile numbers.

(b) The name, address and e-mail address, if applicable, and telephone and facsimile numbers of a local representative. The local representative or designee shall be available at all times. Current information regarding how to contact the local representative in an emergency shall be provided at the time of registration.

(c) A certificate of insurance or self-insurance:

(1) Verifying that an insurance policy has been issued to the registrant by an insurance company licensed to do business in the State of Minnesota, or a form of self insurance acceptable to the Director;

(2) Verifying that the registrant is insured against claims for personal injury, including death, as well as claims for property damage arising out of the (i) use and occupancy of the right-of-way by the registrant, its officers, agents, employees and permittees, and (ii) placement and use of facilities in the right-of-way by the registrant, its officers, agents, employees and permittees, including, but not limited to, protection against liability arising from completed operations, damage of underground equipment and collapse of property;

(3) Naming the City as an additional insured as to whom the coverages required herein are in force and applicable and for whom defense will be provided as to all such coverages;

(4) Requiring that the Director be notified thirty (30) days in advance of cancellation of the policy or material modification of a coverage term; and

(5) Indicating comprehensive liability coverage, automobile liability coverage, workers compensation, and umbrella coverage established by the Director in amounts sufficient to protect the City and the public and to carry out the purposes and policies of this Chapter.

(d) The City may require a copy of the actual insurance policies.

(e) If the person is a corporation, a copy of the certificate required to be filed under Minn. Stat. §300.06 as recorded and certified to by the Secretary of State.

(f) A copy of the person's order granting a certificate of authority from the Minnesota Public Utilities Commission or other applicable state or federal agency, where the person is lawfully required to have such certificate from said Commission or other state or federal agency.

(g) Such other information as the City may require.

Subd. 2. Notice of Changes. The registrant shall keep all of the information listed above current at all times by providing to the Director information as to changes within fifteen (15) days following the date on which the registrant has knowledge of any change.

§403.07. REPORTING OBLIGATIONS.

Subd. 1. Operations. Each registrant shall, at the time of registration and by December 1, of each year, file a construction and major maintenance plan for underground facilities with the Director. Such plan shall be submitted using a format designated by the Director and shall contain the information determined by the Director to be necessary to facilitate the coordination and reduction in the frequency of excavations and obstructions of rights-of-way.

The plan shall include, but not be limited to, the following information:

(a) The locations and the estimated beginning and ending dates of all Projects to be commenced during the next calendar year (in this section, a "Next-year Project"); and

(b) The tentative locations and estimated beginning and ending dates for all Projects contemplated for the five years following the next calendar year (in this section, a "Five-year Project").

The term "project" in this section shall include both Next-year Projects and Five-year Projects.

By January 1 of each year the Director will have available for inspection in this Director's office a composite list of all Projects of which the Director has been informed in the annual plans. All registrants are responsible for keeping themselves informed of the current status of this list.

Thereafter, by February 1, each registrant may change any Project in its list of Next-year Projects, and must notify the Director and all other registrants of all such changes in said list. Notwithstanding the foregoing, a registrant may at any time join in a Next-year Project of another registrant listed by the other registrant.

Subd. 2. Additional Next-year Projects. Notwithstanding the foregoing, the Director will not deny an application for a right-of-way permit for failure to include a project in a plan submitted to the City if the registrant has used commercially reasonable efforts to anticipate and plan for the project.

§403.08. PERMIT REQUIREMENT.

Subd. 1. Permit Required. Except as otherwise provided in this Code, no person may obstruct or excavate any right-of-way without first having obtained the appropriate right-of-way permit from the Director to do so.

(a) Excavation permit. An excavation permit is required by a registrant to excavate that part of the right-of-way described in such permit and to hinder free and open passage over the specified portion of the right-of-way by placing facilities described therein, to the extent and for the duration specified therein.

(b) Obstruction permit. An obstruction permit is required by a registrant to hinder free and open passage over the specified portion of right-of-way by placing equipment described therein on the right-of-way, to the extent and for the duration specified therein. An obstruction permit is not required if a person already possesses a valid excavation permit for the same project.

Subd. 2. Permit Extensions. No person may excavate or obstruct the right-of-way beyond the date or dates specified in the permit unless such person (i) makes a supplementary application for another right-of-way permit before the expiration of the initial permit, and (ii) a new permit or permit extension is granted.

Subd. 3. Delay Penalty. Notwithstanding Subd. 2 of this section, the City shall establish and impose a delay penalty for unreasonable delays in right-of-way excavation, obstruction, patching, or restoration. The delay penalty shall be established from time-to-time by *City* Council resolution.

Subd. 4. Permit Display. Permits issued under this Chapter shall be conspicuously displayed or otherwise available at all times at the indicated work site and shall be available for inspection by the Director.

§403.09. PERMIT APPLICATIONS.

Subd. 1. General Requirements. Application for a permit is made to the Director. Right-of-way permit applications shall contain, and will be considered complete only upon compliance with the requirements of the following provisions:

(a) Registration with the Director pursuant to this Chapter;

(b) Submission of a completed permit application form, including all required attachments, and scaled drawings showing the location and area of the proposed project and the location of all known existing and proposed facilities;

(c) Payment of all money due to the City for

(1) permit fees, estimated restoration costs and other management costs;

(2) prior obstructions or excavations;

(3) any undisputed loss, damage, or expense suffered by the City because of applicant's prior excavations or obstructions of the rights-of-way or any emergency actions taken by the City;

(4) franchise or user fees, if applicable.

(d) Payment of disputed amounts due the City by posting security or depositing in an escrow account an amount equal to at least 110% of the amount owing.

Subd. 2. Additional Equipment. When an excavation permit is requested for purposes of installing additional performance and restoration bond for the additional equipment may be required in

accordance with Section 403.05, subd. 1.

§403.10. ISSUANCE OF PERMIT; CONDITIONS.

Subd. 1. Permit Issuance. If the applicant has satisfied the requirements of this Chapter, the Director shall issue a permit.

Subd. 2. Conditions. The Director may impose reasonable conditions upon the issuance of the permit and the performance of the applicant thereunder to protect the public health, safety and welfare or when necessary to protect the right-of-way and its current use.

§403.11. PERMIT FEES.

Subd. 1. Excavation Permit Fee. The Excavation Permit Fee shall be established by the City Council in an amount sufficient to recover the following costs:

- (a) the City cost;
- (b) degradation cost, if applicable.

Subd. 2. Obstruction Permit Fee. The Obstruction Permit Fee shall be established by the City Council and shall be in an amount sufficient to recover the City cost.

Subd. 3. Payment of Permit Fees. No excavation permit or obstruction permit shall be issued without payment of excavation or obstruction fees. The City may allow the applicant to pay such fees within thirty (30) days of billing.

Subd. 4. Non refundable. Permit fees that were paid for a permit that the Director has revoked for a breach as stated in Section 707.21 are not refundable.

§403.12. RIGHT-OF-WAY REPAIR AND RESTORATION.

Subd. 1. Timing. The work to be done under the excavation permit, and the patching and restoration of the right-of-way as required herein, must be completed within the dates specified in the permit, increased by as many days as work could not be done because of extraordinary circumstances beyond the control of the permittee, as determined by the Director, or when work was prohibited as unseasonal or unreasonable under Section 403.15.

Subd. 2. Patch and Restoration. Permittee shall patch its own work. The City may chose either to have the permittee restore the right-of-way or to restore the right-of-way itself.

- (a) City Restoration. If the City restores the right-of-way, permittee shall pay the costs thereof within thirty (30) days of billing. If, during the thirty-six (36) months following such restoration, the pavement settles due to permittee's improper backfilling, the

permittee shall pay to the City, within thirty (30) days of billing, all costs associated with having to correct the defective work.

(b) Permittee Restoration. If the permittee restores the right-of-way itself, it shall at the time of application for an excavation permit, if the Director determines additional security is necessary, post an additional performance and restoration bond in an amount determined by the Director to be sufficient to cover the cost of restoration. If, thirty-six (36) months after completion of the restoration of the right-of-way, the Director determines that the right-of-way has been properly restored, the surety on the Performance and Restoration Bond posted pursuant to this subd. 2(b) shall be released.

Subd. 3. Standards. The permittee shall perform patching and restoration according to the standards and with the materials specified by the Director. The Director shall have the authority to prescribe the manner and extent of the restoration, and may do so in written procedures of general application or on a case-by-case basis. The Director in exercising this authority shall be guided by the following considerations:

- (a) The number, size, depth and duration of the excavations, disruptions or damage to the right-of-way;
- (b) The traffic volume carried by the right-of-way; the character of the neighborhood surrounding the right-of-way;
- (c) The pre-excavation condition of the right-of-way; the remaining life-expectancy of the right-of-way affected by the excavation;
- (d) Whether the relative cost of the method of restoration to the permittee is in reasonable balance with the prevention of an accelerated depreciation of the right-of-way that would otherwise result from the excavation, disturbance or damage to the right-of-way; and
- (e) The likelihood that the particular method of restoration would be effective in slowing the depreciation of the right-of-way that would otherwise take place.

Subd. 4. Guarantees. By choosing to restore the right-of-way itself, the permittee guarantees its work and shall maintain it for thirty-six (36) months following its completion. During this 36-month period it shall, upon notification from the Director, correct all restoration work to the extent necessary, using the method required by the Director. Said work shall be completed within five (5) calendar days of the receipt of the notice from the Director, not including days during which work cannot be done because of circumstances constituting force majeure or days when work is prohibited as unseasonal or unreasonable under Section 403.15.

Subd. 5. Failure to Restore. If the Permittee fails to restore the right-of-way in the manner and to the condition required by the Director, or fails to satisfactorily and timely complete all restoration required by the Director, the Director at its option may do such work. In that event the permittee shall pay to the City, within thirty (30) days of billing, the cost of restoring the right-of-way. If permittee fails to pay as required, the City may exercise its rights under the restoration bond.

Subd. 6. Degradation Fee in Lieu of Restoration. In lieu of right-of-way restoration, a right-of-way user may elect to pay a degradation fee. However, the right-of-way user shall remain responsible for patching, and the degradation fee shall not include the cost to accomplish these responsibilities.

§403.13. JOINT APPLICATIONS.

Subd. 1. Joint Application. Registrants may jointly apply for permits to excavate or obstruct the right-of-way at the same place and time.

Subd. 2. With City Projects. Registrants who join in a scheduled obstruction or excavation performed by the Director, whether or not it is a joint application by two or more registrants or a single application, may not be required to pay some or all of the obstruction and degradation portions of the permit fee, in the sole discretion of the Director.

Subd. 3. Shared Fees. Registrants who apply for permits for the same obstruction or excavation, which the Director does not perform, may share in the payment of the obstruction or excavation permit fee. Registrants must agree among themselves as to the portion each will pay and indicate the same on their applications.

§403.14. SUPPLEMENTARY APPLICATIONS.

Subd. 1. Limitation on Area. A right-of-way permit is valid only for the area of the tight-of-way specified in the permit. No permittee may do any work outside the area specified in the permit, except as provided herein. Any permittee which determines that an area greater than that specified in the permit must be obstructed or excavated must before working in that greater area (i) make application for a permit extension and pay any additional fees required thereby, and (ii) be granted a new permit or permit extension.

Subd. 2. Limitation on dates. A right-of-way permit is valid only for the dates specified in the permit. No permittee may begin its work before the permit start date or, except as provided herein, continue working after the end date. If a permittee does not finish the work by the permit end date, it must apply for a new permit for the additional time it needs, and receive the new permit or an extension of the old permit before working after the end date of the previous permit. This supplementary application must be done before the permit end

date.

§403.15. OTHER OBLIGATIONS.

Subd. 1. Compliance With Other Laws. Obtaining a right-of-way permit does not relieve permittee of its duty to obtain all other necessary permits, licenses, and authority and to pay all fees required by the City or other applicable rule, law or regulation. A permittee shall comply with all requirements of local, state and federal laws, including Minn. Stat. §§ 216D.01-.09 (“One Call Excavation Notice System”). A permittee shall perform all work in conformance with all applicable codes and established rules and regulations, and is responsible for all work done in the right-of-way pursuant to its permit, regardless of who performs the work.

Subd. 2. Prohibited Work. Except in an emergency, and with the approval of the Director, no right-of-way obstruction or excavation may be done when seasonally prohibited or when conditions are unreasonable for such work.

Subd. 3. Interference with Right-of-Way. A permittee shall not so obstruct a right-of-way that the natural free and clear passage of water through the gutters or other waterways shall be interfered with. Private vehicles of those doing work in the right-of-way may not be parked within or next to a permit area, unless parked in conformance with City parking regulations. The loading or unloading of trucks must be done solely within the defined permit area unless specifically authorized by the permit.

Subd. 4. Screening. A permittee placing a utility cabinet or other structure on any boulevard or other right-of-way area may be required to provide visual screening of the structure with appropriate landscaping, as determined by the Director.

§403.16. DENIAL OF PERMIT.

The Director may deny a permit for failure to meet the requirements and conditions of this Chapter or if the Director determines that the denial is necessary to protect the public health, safety and welfare or when necessary to protect the right-of-way and its current use.

§403.17. INSTALLATION REQUIREMENTS.

The excavation, backfilling, patching and restoration, and all other work performed in the right-of-way shall be done in conformance with Engineering Standards adopted by the PUC or other applicable local requirements, in so far as they are not inconsistent with the PUC rules.

§403.18. INSPECTION.

Subd. 1. Notice of Completion. When the work under any permit hereunder is completed, the permittee shall furnish a Completion Certificate in accordance with PUC

rules.

Subd. 2. Site Inspection. Permittee shall make the work-site available to the Director and to all others as authorized by law for inspection at all reasonable times during the execution of and upon completion of the work.

Subd. 3. Authority of Director.

(a) At the time of inspection the Director may order the immediate cessation of any work which poses a serious threat to the life, health, safety or well-being of the public.

(b) The Director may issue an order to the permittee for any work which does not conform to the terms of the permit or other applicable standards, conditions or codes. The order shall state that failure to correct the violation will be cause for revocation of the permit. Within ten (10) days after issuance of the order, the permittee shall present proof to the Director that the violation has been corrected. If such proof has not been presented within the required time, the Director may revoke the permit pursuant to Sec. 403.21.

§403.19. WORK DONE WITHOUT A PERMIT.

Subd. 1. Emergency Situations. Each registrant shall immediately notify the Director of any event regarding its facilities which it considers to be an emergency. The registrant may proceed to take whatever actions are necessary to respond to the emergency. Within two business days after the occurrence of the emergency the registrant shall apply for the necessary permits, pay the fees associated therewith and fulfill the rest of the requirements necessary to bring itself into compliance with this Chapter for the actions it took in response to the emergency.

If the Director becomes aware of an emergency regarding a registrant's facilities, the Director may attempt to contact the local representative of each registrant affected, or potentially affected, by the emergency. In any event, the Director may take whatever action it deems necessary to respond to the emergency, the cost of which shall be borne by the registrant whose facilities occasioned the emergency.

Subd. 2. Non-Emergency Situations. Except in an emergency, any person who, without first having obtained the necessary permit, obstructs or excavates a right-of-way must subsequently obtain a permit, and as a penalty pay double the normal fee for said permit, pay double all the other fees required by the Legislative Code, deposit with the Director the fees necessary to correct any damage to the right-of-way and comply with all of the requirements of this Chapter.

§403.20. SUPPLEMENTARY NOTIFICATION.

If the obstruction or excavation of the right-of-way begins later or ends sooner than the date given on the permit, permittee shall notify the Director of the accurate information as soon as this information is known.

§403.21. REVOCAION OF PERMITS.

Subd. 1. Substantial Breach. The City reserves its right, as provided herein, to revoke any right-of-way permit, without a fee refund, if there is a substantial breach of the terms and conditions of any statute, ordinance, rule or regulation, or any material condition of the permit. A substantial breach by permittee shall include, but shall not be limited to, the following:

- (a) The violation of any material provision of the right-of-way permit;
- (b) 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;
- (c) Any material misrepresentation of fact in the application for a right-of-way permit;
- (d) The failure to maintain the required bonds and/or insurance;
- (e) The failure to complete the work in a timely manner; unless a permit extension is obtained or unless the failure to complete the work is due to reasons beyond the permittee's control; or
- (f) The failure to correct, in a timely manner, work that does not conform to a condition indicated on an order issued pursuant to Sec. 403.18.

Subd. 2. Written Notice of Breach. If the Director determines that the permittee has committed a substantial breach of a term or condition of any statute, ordinance, rule, regulation or any condition of the permit the Director shall make a written demand upon the permittee to remedy such violation. The demand shall state that continued violations may be cause for revocation of the permit. A substantial breach, as stated above, will allow the Director, at his or her discretion, to place additional or revised conditions on the permit.

Subd. 3. Response to Notice of Breach. Within twenty-four (24) hours of receiving notification of the breach, permittee shall contact the Director with a plan, acceptable to the Director, that will cure the breach. Permittee's failure to so contact the Director, or the permittee's failure to submit an acceptable plan, or permittee's failure to reasonably implement the approved plan, shall be cause for immediate revocation of the permit. Further, permittee's failure to so contact the Director, or the permittee's failure to submit an acceptable plan, or permittee's failure to reasonably implement the approved plan, shall

automatically place the permittee on probation for one (1) full year.

Subd. 4. Cause for Probation. From time to time, the Director may establish a list of conditions of the permit, which if breached will automatically place the permittee on probation for one full year, such as, but not limited to, working out of the allotted time period or working on right-of-way grossly outside of The permit authorization.

Subd. 5. Automatic Revocation. If a permittee, while on probation, commits a breach as outlined above, permittee's permit will automatically be revoked and permittee will not be allowed further permits for one full year, except for emergency repairs, or as allowed in writing by the Director.

Subd. 6. Reimbursement of City Costs. If a permit is revoked, the permittee shall also reimburse the city for the city's reasonable costs, including restoration costs and the costs of collection and reasonable attorneys' fees incurred in connection with such revocation.

§403.22. MAPPING DATA.

Subd. 1. Information Required. Each registrant shall provide Mapping information required by the Director in accordance with PUG rules.

Subd. 2. Trade Secret Information. At the request of any registrant, any information requested by the Director, which qualifies as a "trade-secret" under Minn. Stat. §13.37(b) shall be treated as trade secret information as detailed therein.

§403.23. LOCATION OF FACILITIES.

Subd. 1. Undergrounding. To the extent not inconsistent with applicable law or regulation, or unless otherwise permitted by an existing franchise or Minn. Stat. §216B.34, or unless existing above-ground facilities are repaired or replaced, new construction and the installation of new facilities and replacement of old underground facilities shall be done underground or contained within buildings or other structures in conformity with applicable codes, if required by the Director.

Subd. 2. Corridors. The Director may assign specific corridors within the right-of-way, or any particular segment thereof as may be necessary, for each type of equipment that is or, pursuant to current technology, the Director expects will someday be located within the right-of-way. All excavation, obstruction, or other permits issued by the Director involving the installation or replacement of facilities shall designate the proper corridor for the facilities at issue.

Any registrant who has facilities in the right-of-way in a position at variance with the corridors established by the Director shall, no later than at the time of the next reconstruction or excavation of the area where the facilities are located, move the facilities

to the assigned position within the right-of-way, unless this requirement is waived by the Director for good cause shown, upon consideration of such factors as the remaining economic life of the facilities, public safety, customer service needs and hardship to the registrant.

Subd. 3. Nuisance. One year after the passage of this Chapter, any facilities found in a right-of-way that has not been registered shall be deemed to be a nuisance. The City may exercise any remedies or rights it has at law or in equity, including, but not limited to, abating the nuisance or taking possession of the facilities and restoring the right-of-way to a useable condition.

Subd. 4. Limitation of Space. To protect health, safety, and welfare or when necessary to protect the right-of-way and its current use, the Director shall have the power to prohibit or limit the placement of new or additional facilities within the right-of-way. In making such decisions, the Director shall strive to the extent possible to accommodate all existing and potential users of the right-of-way, but shall be guided primarily by considerations of the public interest, the public's needs for the particular utility service, the condition of the right-of-way, the time of year with respect to essential utilities, the protection of existing facilities in the right-of-way, and future City plans for public improvements and development projects which have been determined to be in the public interest.

§403.24. RELOCATION OF FACILITIES.

A registrant must promptly and at its own expense, with due regard for seasonal working conditions, permanently remove and relocate its facilities in the right-of-way whenever the Director for good cause requests such removal and relocation, and shall restore the right-of-way to the same condition it was in prior to said removal or relocation. The Director may make such request to prevent interference by the Company's equipment or facilities with (i) a present or future City use of the right-of-way, (ii) a public improvement undertaken by the City, (iii) an economic development project in which the City has an interest or investment, (iv) when the public health, safety and welfare require it, or (v) when necessary to prevent interference with the safety and convenience of ordinary travel over the right-of-way.

Notwithstanding the foregoing, a person shall not be required to remove or relocate its facilities from any right-of-way which has been vacated in favor of a non-governmental entity unless and until the reasonable costs thereof are first paid to the person therefor.

§403.25. PRE-EXCAVATION FACILITIES LOCATION.

In addition to complying with the requirements of Minn. Stat. §§ 216D.01-.09 ("One Call Excavation Notice System") before the start date of any right-of-way excavation, each registrant who has facilities or equipment in the area to be excavated shall mark the horizontal and approximate vertical placement of all said facilities. Any registrant whose facilities are less than twenty (20) inches below a concrete or asphalt surface shall notify and work closely with the excavation contractor to establish the exact location of its equipment and the best procedure for excavation.

§403.26. DAMAGE TO OTHER FACILITIES.

When the Director does work in the right-of-way and finds it necessary to maintain, support, or move a registrant's facilities to protect it, the Director shall notify the local representative as early as is reasonably possible. The costs associated therewith will be billed to that registrant and must be paid within thirty (30) days from the date of billing.

Each registrant shall be responsible for the cost of repairing any equipment in the right-of-way which it or its facilities damages. Each registrant shall be responsible for the cost of repairing any damage to the facilities of another registrant caused during the City's response to an emergency occasioned by that registrant's facilities.

§403.27. RIGHT-OF-WAY VACATION.

Subd. 1. Reservation of Right. If the City vacates a right-of-way which contains the facilities of a registrant, and if the vacation does not require the relocation of registrant's or permittee's facilities, the City shall reserve, to and for itself and all registrants having facilities in the vacated right-of-way, the right to install, maintain and operate any facilities in the vacated right-of-way and to enter upon such right-of-way at any time for the purpose of reconstructing, inspecting, maintaining or repairing the same.

Subd. 2. Relocation of Facilities. If the vacation requires the relocation of registrant's or permittee's facilities; and (i) if the vacation proceedings are initiated by the registrant or permittee, the registrant or permittee must pay the relocation costs; or (ii) if the vacation proceedings are initiated by the City, the registrant or permittee must pay the relocation costs unless otherwise agreed to by the City and the registrant or permittee; or (iii) if the vacation proceedings are initiated by a person or persons other than the registrant or permittee, such other person or persons must pay the relocation costs.

§403.28. INDEMNIFICATION AND LIABILITY.

By registering with the Director, or by accepting a permit under this Chapter, a registrant or permittee agrees as follows:

Subd. 1. Limitation of Liability. By reason of the acceptance of a registration or the grant of a right-of-way permit, the City does not assume any liability (i) for injuries to persons, damage to property, or loss of service claims by parties other than the registrant or the City, or (ii) for claims or penalties of any sort resulting from the installation, presence, maintenance, or operation of facilities by registrants or activities of registrants.

Subd. 2. Indemnification. A registrant or permittee shall indemnify, keep, and hold the City free and harmless from any and all liability on account of injury to persons or damage to property occasioned by the issuance of permits or by the construction, maintenance, repair,

inspection, or operation of registrant's or permittee's facilities located in the right-of-way.

The City shall not be indemnified for losses or claims occasioned through its own negligence except for losses or claims arising out of or alleging the local government unit's negligence as to the issuance of permits or inspections to ensure permit compliance. The City shall not be indemnified if the injury or damage results from the performance in a proper manner of acts that the registrant or permittee reasonably believes will cause injury or damage, and the performance is nevertheless ordered or directed by the City after receiving notice of the registrant's or permittee's determination.

Subd. 3. Defense. If a suit brought against the City under circumstances where the registrant or permittee is required to indemnify, the registrant or permittee, at its sole cost and expense, shall defend the City in the suit if written notice of the suit is promptly given to the registrant or permittee within a period in which the registrant or permittee is not prejudiced by the lack or delay of notice.

If the registrant or permittee is required to indemnify and defend, it shall thereafter have control of the litigation, but the registrant or permittee may not settle the litigation without the consent of the City. Consent will not be unreasonably withheld.

This part is not, as to third parties, a waiver of any defense, immunity, or damage limitation otherwise available to the City.

In defending an action on behalf of the City, the registrant or permittee is entitled to assert in an action every defense, immunity, or damage limitation that the City could assert in its own behalf.

§403.29. APPEAL.

(a) A right-of-way user that: (1) has been denied registration; (2) has been denied a permit; (3) has had permit revoked; or (4) believes that the fees imposed are invalid, may have the denial, revocation, or fee imposition reviewed, upon written request, by the City Council. The City Council shall act on a timely written request at its next regularly scheduled meeting. A decision by the City Council affirming the denial, revocation, or fee imposition will be in writing and supported by written findings establishing the reasonableness of the decision.

(b) Upon affirmation by the City Council of the denial, revocation, or fee imposition, the right-of-way user shall have the right to have the matter resolved by binding arbitration. Binding arbitration must be before an arbitrator agreed to by both the City Council and right-of-way user. If the parties cannot agree on an arbitrator, the matter must be resolved by a three-person arbitration panel made up of one arbitrator selected by the City, one arbitrator selected by the right-of-way user and one selected by the other two arbitrators. The costs and fees of the single arbitrator shall be borne equally by the City and right-of-way user. In

the event there is a third arbitrator, each party shall bear the expense of its own arbitrator and shall jointly and equally bear with the other party the expense of the third arbitrator and of the arbitration.

§403.30. ABANDONED AND UNUSABLE FACILITIES.

Subd. 1. Discontinued Operations. A registrant who has determined to discontinue its operations in the City must either:

(a) Provide information satisfactory to the Director that the registrant's obligations for its facilities in the right-of-way under this Chapter have been lawfully assumed by another registrant; or

(b) Submit to the Director a proposal and instruments for transferring ownership of its facilities to the City. If a registrant proceeds under this clause, the City may, at its option:

(1) purchase the facilities; or

(2) require the registrant, at its own expense, to remove it; or

(3) require the registrant to post an additional bond or an increased bond amount sufficient to reimburse the City for reasonably anticipated costs to be incurred in removing the facilities.

Subd. 2. Abandoned Facilities. Facilities of a registrant who fails to comply with subd. 1, of this Section, and which, for two (2) years, remains unused shall be deemed to be abandoned. Abandoned facilities are deemed to be a nuisance. The City may exercise any remedies or rights it has at law or in equity, including, but not limited to, (i) abating the nuisance (ii) taking possession of the facilities and restoring them to a usable condition, or (iii) requiring removal of the facilities by the registrant, or the registrant's successor in interest.

Subd. 3. Removal. Any registrant who has unusable and abandoned facilities in any right-of-way shall remove it from that right-of-way during the next scheduled excavation, unless this requirement is waived by the Director.

§403.31. RESERVATION OF REGULATORY AND POLICE POWERS.

A permittee's or registrant's rights are subject to the regulatory and police powers of the City to adopt and enforce general ordinances necessary to protect the health, safety and welfare of the public.

§403.32. FRANCHISE; FRANCHISE SUPREMACY.

The City may, in addition to the requirements of this Chapter, require any person which has

or seeks to have equipment located in any right-of-way to obtain a franchise to the full extent permitted by law, now or hereinafter enacted. The terms of any franchise which are inconsistent with any provision of this Chapter, whether granted prior or subsequent to enactment of this Chapter, shall control and supersede the conflicting terms of this Chapter. All other terms of this Chapter shall be fully applicable to all persons whether franchised or not.

§403.33. SEVERABILITY.

If any section, subsection, sentence, clause, phrase, or portion of this Chapter is for any reason held invalid or unconstitutional by any court or administrative agency of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision and such holding shall not affect the validity of the remaining portions thereof. If a regulatory body or a court of competent jurisdiction should determine by a final, non-appealable order that any permit, right or registration issued under this Chapter or any portions of this Chapter is illegal or unenforceable, then any such permit, right or registration granted or deemed to exist hereunder shall be considered as a revocable permit with a mutual right in either party to terminate without cause upon giving sixty (60) days written notice to the other. The requirements and conditions of such a revocable permit shall be the same requirements and conditions as set forth in the permit, right or registration, respectively, except for conditions relating to the term of the permit and the right of termination. Nothing in this Chapter precludes the City from requiring a franchise agreement with the applicant, as allowed by law, in addition to requirements set forth herein.