

American Public Works Association
Utility and Public Right-of-Way Committee

Model Franchise And License Agreement

APWA MODEL FRANCHISE AND LICENSE AGREEMENT

Franchise and License Agreements are powerful tools in managing the occupants of public right of ways (ROW). These agreements outline the rules, rights and fees associated with using public property for private purpose. By definition, franchise agreements are applicable for those right of way occupants that provide services to the local community. License agreements are written for firms that are simply travelling through the area with facilities that serve other communities. The power that local municipalities have, and thus the use of these franchise or license tools, is regulated through state law. Federal law may dictate who must have access to ROW, but on what condition this occupancy occurs is clearly under local control. The Franchise and License Agreement serves as the device to set these conditions.

Any community considering or expanding current agreements should first review their state law. Generally, most local municipalities have the power to require a franchise or license agreement from occupants of publicly owned or regulated lands and right of ways. Once you have determined how your state law allows local municipalities to use the license and franchise tools, the next step is to determine how your rights of ways are legally constituted.

Public ROW is established as a legislative doctrine, in fee, by easement; or in some combination. Consider the case where deeds and survey maps of individual property show that private property extend to the middle of the ROW. While there may be local/state legislation that outlines a municipal ROW over these lands, exactly what right do municipalities have controlling this space? Can municipalities allow others access to this space without property owner "permission"? Are there superceding laws that transfer ownership rights to the municipality? Answers to the questions will guide the Franchising and Licensing process.

Some argue that for a municipal ROW's not owned in fee (license agreement easement), the community can control only activities as it relates to the expressed easement purpose: in many cases it is simply to provide transportation services. In this situation, you can build highways, drainage, and control access to those highways without gaining any additional approvals or information from the property owners.

However, to grant franchises allowing use of these rights of way for other than highway purposes may not be within the authority of the municipality (See *Heyert vs. Orange and Rockland Utilities*, 17N.Y. 2d 352). Property rights, as authorized within the U.S. Constitution, is a very powerful and protected rule of law. Other users of the right of way such as telephone, electric or gas should be getting their own easements to occupy the ROW. However, non-highway-related occupants of the right of way will need both an easement from the property owners, and a permit from the municipality for its location. This can be accomplished through a franchise agreement (limited in scope) or the more

standard ROW permit process. Under this argument, the issue of franchise fees and other types of control may rest more with the property owners than with the local municipality.

If your municipality is in a non-fee based ROW ownership position, it is imperative to identify the legal basis for whatever ROW management process is implemented. In California, the Attorney General (opinion at CV 75-354, July 27, 1976) advises municipalities to "... assess a charge for the use of City streets...even though the City does not own the streets in fee..." This may not be the case in other states. Finding this answer is important in the ROW management process.

With fee ownership, the municipality has all constitutionally granted power of any property owner. While the Telecommunications Act of 1996 and certain states "transportation" laws mandate fair and reasonable access to ROWs by utilities and telecommunications firms, there are clear legal rights for local municipalities to control and manage that resource as any property owner can. This includes (though it may be controversial and contentious) obtaining fair compensation for its use. Since you have ownership of the property, the franchise and license agreements procedure is a proper tool in the management of this resource. Again, it's important to check your state law to determine exactly what rights you have as a municipality.

Assuming that you have the right to use the franchise agreement process, these agreements cover such issues as: 1) location 2) service covered by the agreement 3) conditions and procedures for that use 4) what bonds or insurance are required 5) repair and maintenance standards 6) permit and inspection and 7) fees and compensation. The franchise agreement can either stand alone as a document or refer to a ROW or telecommunication ordinance.

It is recommended that the franchise and license agreements be used in conjunction with a full right of way management ordinance. Yet by writing comprehensive agreements, they can be used even in absence of a ROW ordinance. In the attached model Franchise agreement, there is a clause requesting that the Franchise adhere to any existing ROW ordinances and/or to comply with any future new or revised ordinances. Communities are still in the process of adopting these ordinances and will need to continually update them as technology and conditions warrant.

To assure fairness on the use of the right of ways, it is best to have the base ROW ordinance written to cover all uses of the ROW: from electric utilities to Telecom firms. The use of Franchise/License agreements for the "historic" occupants of the ROW (water, sewer, electric, gas, and telephone) is common but the language is often incomplete and some of these agreements can be traced to the early 1900's. Few have provision for fees or repair guidelines. Later agreements, like electrical and gas franchises in Union City (1959) and San Francisco, California (1939) have fees based on its gross annual receipts and provisions to cover repair costs. The same tools used to manage the "historic" ROW occupants are useful for everyone.

Municipalities that take the right of way management ordinance approach may have less exposure to challenge under the Federal Telecommunications Act. By including all ROW uses, no telecommunication firm can claim the municipality is acting discriminatory towards a particular industry in their right of way management practices.

The enclosed model franchise agreement was compiled based on review of a number of existing agreements from various parts of the country. The purpose of providing this model is to grant users an opportunity to see the broad range of issues and conditions addressed in these types of agreements. It is not the intent of this document to be used in its totality, but to serve as a reference in creating your own franchise agreement.

There are certain elements that should be included in all franchise agreements:

a) *PARTIES TO THE AGREEMENT*

This section outlines the corporations that are involved in the agreement. It should also explain what the franchisee plans to do and any other information pertinent to the parties address and other information.

There should be a clause that requires occupants to "register" on a given timeline or when business/ownership conditions change. In an age when mergers and divestitures seem common place, ROW managers are frustrated by not knowing who is in charge. Who in the company has authority over the capital planning, engineering, and construction activities?

b) *PURPOSE AND RIGHTS OF THE AGREEMENT*

This section points out the goals and objectives of this franchise agreement. It outlines the need to protect and manage the rights of way authority to assure adequate utility and communication services; all in relation to protecting the public health, safety, and welfare. State in this section that you plan to cover costs and receive fair compensation for ROW use.

c) *DEFINITIONS*

The franchise agreements should contain a clear set of terms, phrases, words and other meanings that are clear to the municipality and franchisee.

d) *SCOPE OF AGREEMENT*

This section outlines the branch of authority for the use of the rights of way by the franchisee. The following items are important to this section.

- ◆ The franchise given is a non-exclusive right to the franchisee.
- ◆ Outline clear authority as to what the franchisee can do in the right of way. It is common practice with some occupants of the right of way to rent their

facilities to others. In most cases, there should be clear direction that sharing facilities, such as, attachments to poles, is not allowed without a franchise agreement from the municipal corporation.

- ◆ Outline what the franchisee can construct and how they should coordinate activities with other utilities. If a municipality requires that additional facilities be installed for use by the municipal corporation or by others, that should be outlined in this section.
- ◆ Include general information about obtaining permits and review of all construction documents by the municipality. More detail on this subject is found in subsequent parts of the franchise agreements.

e) TERM

The franchise agreement should outline the affective term limits of the agreement. This is normally done for a period of years with agreeable extensions from both parties. The municipality must retain the right to modify or re-write ROW ordinances. New ordinance conditions will apply even if the effective term of the agreement has not expired.

f) COMPENSATION

There are numerous ways to compensate the municipality for the right to occupy the right of way. Compensation is comprised of 3 parts: 1) Administrative fees 2) reimbursement (inspection, designation of facilities, etc) and 3) property rent. The enclosed franchise agreement contains various clauses and terminology depending on what type of compensation is received.

There are two different schools of thought on what and how much the municipalities can charge. Some claim municipalities are compensated only for reimbursement of costs. Others support the right to assess a fee based on the value of the property occupied. There is precedence for occupancy fees for cable service and the newer telecommunications firms (wireless and fiber optic firms). The challenge is coming from the established landline companies and other utilities (gas, water, etc.). Many of these companies were regulated by state legislation to warrant a "public-benefit" statute much like government agencies. These regulations require firms to expand service as broad as possible. The new start-ups often choose only the profitable corridors (business centers, etc.) to extend service.

If a municipality wishes to structure a franchise agreement to include both types of compensation, then there is precedent to proceed in that manner. There is ample argument to support treating incumbent users offering traditional services (established under government regulations) differently from new entities with no obligations to the public at large. When establishing rate schemes, consider the service more than the company. Telephone, water, sewer, electric and gas may be

thought to be essential public services much like transportation services. However, cable TV, data services, video and internet services are or not essential for public welfare. Compensation structures can be totally different for these different classes of services.

This section should also include any requests or requirements that the franchisee provide facilities for municipality use. This can be done in addition to or in lieu of actual franchise fees.

It is not uncommon for a franchisee to provide numerous services such as cable TV, telephone and broad band internet type services. There should be clauses within the franchise agreement that requires that the services be "unbundled" (separated) and presented to the municipalities for complete verification that fees were calculated appropriately. As noted previously, a company may be assessed fees for only certain services.

g) PERMITS AND CONSTRUCTION STANDARDS

Franchise agreements should include permitting requirements and the approval process for construction. Applicants should submit all plans for approval and provide as-builts as necessary. It may be best to have construction standards included within the right of way ordinance and have the franchise agreement refer to that right of way ordinance.

Many communities are concerned about the plight of numerous wires attached to power poles. If your community requires undergrounding of facilities, then that should be clearly stated within this section.

h) SECURITY AND PERFORMANCE BONDS

If a municipality requires performance bonds or other financial guarantees during the performance of the work, this should be clearly outlined in the franchise agreement.

Avoid the use of Bonds whenever possible. Court action is required to release any money. It's better to establish Bank letters of credit or hold cash in an agency account.

i) RELOCATION OF FACILITIES

The municipal corporation should protect itself by requiring the franchise to relocate facilities whenever the municipality requires such relocation. It may also be necessary that some facilities be moved because a third party wishes to gain entrance to the right of way. Under those circumstances, it should be clear that the third party should pay for the relocation of the occupants. The best way to prevent the need to relocate is to have proper planning of the initial location of all

occupants. Try to keep all private companies at the extreme edges of the right of way so that it allows the municipality the clear use of the right of way for road, sewer, water, and drainage facilities.

We are fast approaching situations where ROW's are full. No law exists mandating access when such approval will effect system reliability or increase the potential for catastrophic failures or repair costs. Simply put, if the only space available is over top of the sewer main, just say no.

Most utilities will push to have old facilities abandoned in place. This is happening in the natural gas industry because of the environmental restrictions on disposing of old mains. Often times these facilities are not mapped nor are they marked during stake out requests. A municipality needs to determine whether an abandoned facility should be removed as part of this franchise agreement

*j) **REPLACEMENT FRANCHISE***

At this time many communities are writing ROW of way ordinances or other types of codes. These codes are also being upgraded on a continuing basis as the utility industry changes. There should be a clause within the franchise agreement that requires the franchisee to remain consistent with applicable requirements of any amended or new regulatory ordinances.

*k) **ASSIGNMENT AND TRANSFER***

The industry is going through extensive de-regulation and mergers. It is often difficult to determine exactly who is the owner of the facilities. There should be a section that clearly requires the franchisee to inform the municipal owner and to seek approval for the assignment or transfer of the franchise agreement terms. The goal is not to prohibit this transfer but to clearly understand who is taking over the company and the applicable persons to contact should problems arise with the maintenance and/or coordination of the rights of way.

*l) **IMDEMNIFICATION AND WAIVER***

Include a section that indemnifies the municipality against all claims and/or losses and liabilities because of the franchisee's having occupancy within the right of way. This is standard legal jargon.

*m) **INSURANCE AND BONDS***

In this section, the franchisee should be made aware of exactly all limits and conditions required by the municipality. Certificates and endorsements should be filed with the municipality. There should also be a clause that should state if there is a change in the insurance that a notice should be given directly to the municipality.

n) TERMINATION

There should be a clause that outlines all the conditions of which this agreement could be terminated by either of the parties. Should termination occur, there should be clauses that indicate that all facilities shall be removed at the expense of the franchisee.

o) MISCELLANEOUS PROVISIONS

Most municipalities have various clauses that are to be included in agreements or contracts. These may include some or all of the following:

- ◆ The agreement should be binding on both parties.
- ◆ Choice of law should be clearly stated where any disputes should be presented to the courts. Generally that should be within the state of the municipality.
- ◆ Severability of provisions. Some provisions of the agreement may be considered invalid or illegal. This type clause generally states that should this occur, other provisions shall stay in force.
- ◆ Consent requirements. This generally says that approvals pursuant to this agreement shall not be unreasonably withheld or delayed.
- ◆ Representation and warranties. This statement warrants that each of the parties in this agreement have authority to enter into and perform the obligations under this agreement.
- ◆ Financial review: This provision allows the municipal auditor to look at the books of the company to make sure that the revenues and other calculations are consistent with the agreement.
- ◆ Gratuities, kickbacks and conflicts of interest. Generally, there are clauses that cover that no gratuities shall be offered to municipal employees. Kickbacks are of course illegal, and those conflict of interests are avoided.

This provides a general outline of the provisions and standards in a franchise or license type agreement.

REFERENCES

Below is a listing of references that can provide Franchise models. The first step is to research the APWA Resource Center on Right of Way Management through the APWA web page.

<u>COMMUNITY</u>	<u>MODEL</u>	<u>CONTACT</u>
Bothell, Washington	Franchise Ordinance for Fiber Network	www.mrsc.org/ords.g-f/B67-1975.htm
Spokane, Washington	Model Telecom Franchise	www.mrsc.org/ords/m-s/S73-model.htm
Kansas City, Missouri	Cable and Gas Franchise Agreement	Managers Franchise Affairs, Public Works Dept, City Hall, 20 th floor, 414 E. 12 th St., Kansas City, Mo 64106
Model developed by Telecom Company	Model License Agreement	www.apwa.net/documents/organization/vl3licagrmnt.pdf
Southern California Gas Company	Model Franchise Agreement	www.apwa.net/documents/org
Charlotte, North Carolina	Various Right of Way Approval documents	City of Charlotte, Engineering and Property Management Dept, 600 E. Fourth St., Charlotte, NC 28202-2844
Contra Costa County, California	Sample Ordinance and License Agreement Model	Public Works Department, Contra Costa County, 255 Glacia Drive, Martinez, Ca 94553-4825
Nashville and Davidson County	Franchise Agreement	Metropolitan Government of Nashville, Department of Public Works, Division of Engineering, 720 So. Fifth St., Nashville, Tennessee 37206
Tucson, Arizona	Public Right of Way Permit Process	City of Tucson Dept. of Transportation, Engineering Division, PO Box 27210, Tucson, Arizona 85726
St. Louis, Missouri	Electric Utility Franchise Agreement	Department of Highways & Traffic, St. Louis County, 7900 Forsyth Blvd., Clayton, Missouri 63103