October 1, 2024

Nell Diamond
Management and Program Analyst, Public Works
City of Lake Oswego
17601 Pilkington Road
Lake Oswego OR 97035

**RE: Comments on Resolution 24-29 and Proposed Ordinance 2931, LOC Chapter 51 (Utility Facilities in Public Right-Of-Way) Amendments and Fees**

Dear Analyst Diamond:

CTIA®, the trade association for the wireless communications industry, respectfully submits these comments on the City of Lake Oswego's proposed Resolution and Ordinance governing access to and use of the City's rights-of-way (ROW).

CTIA's members are eager to work with Lake Oswego to bring the benefits of fifth-generation ("5G") and broadband wireless services to the City's residents, schools, and businesses at a time when demand for wireless services could not be greater. Americans used more than 100 trillion megabytes in 2023 – the largest single-year increase in wireless data ever and nearly double the amount of data used just two years ago. To meet this demand, our members are investing tens of billions of dollars annually to update the nation's wireless networks, including Oregon, where the wireless industry supports more than 46,000 jobs and generates $5.6 billion in annual GDP growth.

Unfortunately, we have serious concerns that the most recent draft Resolution and Ordinance impedes the deployment of wireless infrastructure, and strongly urge caution before proceeding. By way of background, CTIA had engaged with City consultants and provided written comments on Lake Oswego's proposed ROW proposal in 2022 (see enclosure), and the most recent draft Resolution and Ordinance still includes a number of troublesome provisions addressed in our 2022 letter. As such, we strongly encourage a better approach, adopting reasonable, predictable regulations that promote and encourage investment and expand high-quality service as well as preserve the critically important role of local government. Addressing the following concerns will achieve that balance.

- The revenues-based fees are excessive and violate federal law. In addition, imposing fees on service providers who do not deploy any of their own equipment in the right-of-way is unjustified and itself unlawful. It would generate fee payments to the City that bear no relationship to the City's costs of managing the right-of-way.

- Certain non-fee provisions in the proposed updates are unjustified and would impose excessive obligations on providers that will deter investment in service to Lake Oswego residents.

<u>Proposed Fees</u>
Federal law limits the fees that localities can charge communications providers for deploying facilities in a right-of-way, because Congress has recognized that excessive right-of-way fees can impair the

public's access to communications services. The Resolution requires wireless service operators deploying non-small cell facilities in the right-of-way to pay an Annual Usage Fee of 5% of gross revenue. While we appreciate the City's efforts to better align with the Federal Communications Commission (FCC) governing fees on small cell wireless facilities, we remain concerned about the application of gross revenue fees to non-small cell facilities. Courts have ruled that these fees are not based on a locality's costs and may inhibit service. This concern is heightened because these fees apply to providers whose traffic is carried over third-party right-of-way facilities, but who do not themselves own facilities in the right-of-way. We recommend removing the gross revenue fee requirement and clarifying the fees that would be due on a per-facility basis for non-small cell facilities in the ROW.

Licensing Requirements

The Ordinance requires wireless providers to apply for and obtain a license to provide service. However, Section 332(c)(3) of the Communications Act prohibits states and localities from regulating the entry of wireless providers and may preempt the City from requiring a license to the extent it imposes obligations or conditions on a provider. Additionally, the Ordinance requires a five-year license renewal as well as annual registration requirement. Given the substantial investment that providers must make in infrastructure to provide service, providers need more certainty that their investment will not be undercut. These provisions should be modified, whether to specify a ten-year initial term, which will be automatically renewed for successive 10-year terms if the licensee is in compliance with the terms of its license as well as clarifying that a license will automatically be granted upon application without conditions.

Other Provisions

The Ordinance includes a number of other issues CTIA previously raised in its 2022 letter that remain unaddressed.

First, federal law has in place policies that limit the scope of state and local review of certain modifications to wireless facilities, and deadlines within which localities are to act to accelerate the deployment of wireless facilities. Specific to modifications, the FCC has clarified that localities do not have discretion to condition or deny certain modifications to facilities that qualify as "eligible facilities requests." Related to deadlines, the time periods are (i) 60 days for eligible facilities requests under Section 6409 or for collocating a small wireless facility on an existing structure; (ii) 90 days for installing a new structure to hold small wireless facilities, or to collocate a larger wireless facility on an existing structure; and (iii) 150 days for installing a new larger structure. The Ordinance should be modified to align with these federal provisions.

Second, providers may choose to locate their facilities on private property such as commercial centers and apartment buildings rather than in the right-of-way. Others may choose to transmit their customers' traffic using equipment that is owned and operated by third parties and that is in the right-of-way. In both cases, providers do not install or operate equipment in the right-of-way and impose no burdens or costs on Lake Oswego. If a provider has no facilities in the right-of-way, it should not need, or pay for, a license.

Third, the Ordinance continues to regulate the lease of "capacity" on a facility, even though localities have no jurisdiction over leases of radio spectrum, which the FCC exclusively regulates.

Thank you for your attention to these comments. We strongly encourage the City to work with all communications providers to address these ongoing concerns in order to promote the deployment of expanded service that will benefit Lake Oswego.

Sincerely,

Annissa Reed

Annissa Reed
Director
State and Local Affairs

Enclosure: CTIA Comment Letter 2022

July 30, 2022

Ms. Emma Hiatt
Program & Management Analyst
City of Lake Oswego
17601 Pilkington Road
Lake Oswego, OR 97034
www.ci.oswego.or.us

**RE: Lake Oswego Rights-of-Way (ROW) Ordinance**

Dear Ms. Hiatt,

CTIA®[1], the trade association for the wireless communications industry, appreciates the opportunity to submit these comments on the City of Lake Oswego's proposed new and updated ordinances governing access to and use of the City's rights-of-way ("ROW"). The updates would amend Chapter 51 of the Municipal Code, entitled the "Utility Service Utilizing the Public Rights-of-Way Ordinance" ("ROW Ordinance"), and adopt a new Chapter 61 of the Municipal Code, entitled the "Communications License Law" ("License Ordinance"). In addition, the City Council would adopt a "Resolution" establishing schedules of fees as authorized by the two ordinances and revising Resolution 19-03.

CTIA's members seek to work with Lake Oswego to bring the benefits of fifth-generation ("5G") and broadband wireless services to the City's residents, schools, and businesses. The COVID-19 pandemic has highlighted the importance of reliable wireless communications that meet the public's increasing demand for high-speed connectivity. Our members are investing tens of billions of dollars in wireless networks nationwide to expand the availability of 5G and broadband.

However, certain provisions in the proposed ordinances, and the exceedingly high fees that the City proposes to charge, would impede the deployment of network infrastructure that is needed to deliver 5G and broadband services to Lake Oswego's residents. They also raise serious legal issues. CTIA has three overall concerns:

- The proposed revenues-based fees are excessive and violate federal law. In addition, imposing fees on service providers who do not deploy any of their own equipment in the ROW is unjustified and itself unlawful. It would generate windfall payments to the City that bear no relationship to the City's costs of managing the ROW.

[1] CTIA – The Wireless Association® ("CTIA") (www.ctia.org) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st century connected life. The association's members include wireless carriers, device manufacturers, and suppliers as well as apps and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry's voluntary best practices, hosts educational events that promote the wireless industry and co-produces the industry's leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.

- Application of a number of the non-fee requirements to entities who do not own facilities in the ROW exceeds the City's authority and is unnecessary.
- Certain non-fee provisions in the proposed updates to the ordinances are unjustified, would impose excessive obligations on providers that will deter investment in service to Lake Oswego residents, and would in some cases violate federal law.

CTIA details its concerns below. Given the many legal and other issues with the proposed ordinances and the Resolution, we respectfully urge the City to revise these documents as CTIA proposes and release them for further comment. This will enable the City to ensure that it complies with legal requirements and promotes (rather than deters) the availability of advanced, high-speed wireless services in Lake Oswego.

1. Proposed Fees

Federal law limits the fees that localities can charge communications providers for deploying facilities in a ROW, because Congress has recognized that excessive ROW fees can impair the public's access to communications services. Section 253(a) of the Communications Act of 1934, as amended (the "Act") preempts state and local laws that "prohibit or have the effect of prohibiting any entity" from providing service.[2] Courts have concluded that high fees can have that prohibitive effect, and thus held that fees must be based on actual use of the ROW and be proportionate to the costs to maintain the ROW.[3] Additionally, Section 253(c) only permits fees that recover "fair and reasonable compensation" for ROW use.[4] Section 332(c)(7) of the Act contains similar language preempting regulation of personal wireless facilities that has the effect of prohibiting those services.[5]

In 2018, the Federal Communications Commission ("FCC") recognized the benefits to the public of speeding the deployment of wireless infrastructure, and addressed fee-based and other regulatory barriers to deployment.[6] It interpreted Sections 253(a) 253(c) and 332(c)(7) to set guardrails on local regulation. The FCC held that any fee that "materially inhibits" the provision of wireless services is prohibited by 253(a) and 332(c)(7).[7] It further held that to qualify for the 253(c) exception allowing reasonable ROW fees, fees for small wireless facilities must be based on the locality's reasonable costs to manage the ROW, and adopted presumptively lawful fees of $100 for each initial application and $270 in annual charges. Localities may charge higher ROW fees, but only if they demonstrate that such higher fees are based on an approximation of the locality's reasonable ROW management costs. The City's proposed fee schedule, however, provides no such justification.

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[2] 47 U.S.C. § 253(a).
[3] See, e.g., *New Jersey Payphone Association, Inc. v. Town of West New York*, 130 F.Supp.2d 631, 638 (D.N.J. 2001); *Puerto Rico Telephone Co. Inc. v. Municipality of Guayanilla*, 450 F.3d 9, 22 (1st Cir. 2006); *AT & T Commc'ns of Sw., Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 593 (N.D. Tex. 1998).
[4] 47 U.S.C. § 253(c).
[5] 47 U.S.C. § 332(c)(7).
[6] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Deployment,* Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705 (2018) "(Wireless Broadband Order").
[7] *Id.* at ¶¶ 35-37.

The U.S. Court of Appeals for the Ninth Circuit (which has jurisdiction to hear appeals involving Oregon) affirmed the FCC's interpretation of Sections 253 to limit localities' fees.[8] The court rejected localities' argument that Section 253(c) authorized them to set fees that were not cost based: "The statute requires that compensation be 'fair and reasonable"; this does not mean that state and local governments should be permitted to make a profit by charging fees above costs."[9]

Lake Oswego's proposed fees violate these federal guardrails in multiple ways.

First, Section 1 of the draft Resolution, which sets out the fee schedule for various "utility services," would require a wireless service operator that deploys facilities in the ROW to pay a yearly "usage fee" of "5% of gross revenue, or a minimum of $5,000, whichever is greater."[10] But courts have struck down gross revenues fees, finding that they are by definition not based on a locality's costs and can prohibit service, contrary to the language and purpose of Section 253. For example, one court found that because a 5% gross revenues fee "'materially inhibits or limits the ability'" of providers to compete, it violates Section 253.[11] Summarizing the case law in its 2018 Order, the FCC held: "[W]e agree with courts that have recognized that gross revenue fees generally are not based on the costs associated with an entity's use of the ROW and where that is the case, are preempted under Section 253(a)."[12]

Section 51.01.140(2) charges wireless providers that operate only above-ground antenna facilities an attachment fee rather than a gross revenues-based fee, and we have been advised other Oregon cities have interpreted a similar section to limit ROW usage fees for wireless facilities to only a site-specific fee. However, according to the draft ROW Ordinance, those wireless providers that also deploy backhaul facilities to support their networks would remain subject to the gross-revenues fee. Further, all wireless providers that operate anywhere in Lake Oswego still must pay the separate – and higher – 7% gross-revenues-based license fee, net of the other fees they pay. The ordinance thus remains inconsistent with FCC and court rulings invalidating gross revenues fees.[13]

Second, Section 5 of the draft Resolution requires wireless providers to pay an even larger recurring fee of 7% of its gross revenues to obtain the license needed to lawfully operate anywhere in the City.[14] While

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[8] *City of Portland v. United States,* 969 F.3d 1020 (9th Cir. 2020).
[9] *Id,* 969 F.3d at 7715. The court also affirmed the FCC's holding that "Section 332 should be construed as having the same meaning and governed by the same preemption standard as the identical language in Section 253(a). *Id.*
[10] The fee applies to a "communication utility service operator." Under the definitions of terms used in the Resolution and the ROW Ordinance in Section 51.01.050, wireless providers are subject to the fee.
[11] *Puerto Rico Telephone Co. Inc. v. Municipality of Guayanilla*, 450 F.3d 9, 22 (1st Cir. 2006). Similarly, in *XO Missouri, Inc. v. City of Maryland Heights*, 256 F. Supp. 2d 987, 994 (E.D. Mo. 2003), the court held that fees based on providers' revenues are not permitted by Section 253(c): "The Court adopts the reasoning supporting other courts' decisions that revenue-based fees are impermissible under the [1996 Telecom Act]. Thus, to meet the definition of "fair and reasonable compensation" a fee charged by a municipality must be directly related to the actual costs incurred by the municipality when a telecommunications provider makes use of the rights-of-way. . . [P]lainly a fee that does more than make a municipality whole is not compensatory in the literal sense, and instead risks becoming an economic barrier to entry."
[12] Wireless Broadband Order at ¶ 70.
[13] In addition, the City fails to demonstrate that the attachment fee reasonably approximates the City's ROW management costs. This fee is thus also inconsistent with federal law.
[14] Section 61.01.150. The recurring license fee is in addition to a $100 initial license application fee and a $100 annual license renewal fee.

Section 61.01.160 of the License Ordinance enables licensees to deduct the 5% gross revenues-based "usage fee" or the attachment fee from the 7% gross-revenues based license fee,[15] all wireless operators would still be compelled to pay the City a substantial fee based on their revenues – precisely the type of governmental charge that the FCC and courts have invalidated. The license fee imposed by 61.01.150 would materially inhibit providers' ability to provide service in Lake Oswego, and is therefore prohibited by Sections 253(c) and 332(c)(7). Because it is a license fee, not a ROW fee, the exception in 253(c) for reasonable ROW fees is simply inapplicable. But even if 253(c) did apply, the 7% gross revenues fee bears no relationship to the City's costs to manage the ROW and thus violates the federal guardrails.

Third, these gross revenues fees are particularly exorbitant and unreasonable because they would apply to providers whose traffic is carried over third parties' ROW facilities but *do not themselves own facilities in the ROW*. For example, if a non-facilities-based provider leases access to use a fiber operator's fiber optic lines to backhaul wireless traffic, *both* it and the fiber operator would pay gross revenues fees because under the ROW Ordinance, both would be engaged in ROW "use." Lake Oswego incurs zero costs because the provider's traffic merely traverses third-party ROW facilities and there is no new fiber installation that affects the City; the use is effectively invisible. Yet the City would collect multiple fees for a single ROW facility. The fiber owner would pay – but so would every provider whose traffic traverses that fiber. Such multiple charges for the same ROW facilities violate Section 253 of the Act because they are clearly not related to ROW management costs.

Fourth, even a wireless service provider who has no facilities in the ROW, but deploys only on private property, must pay the ROW fee and the license fee. Compelling non-ROW users to pay such fees underscores that the City is not seeking compensation for its costs to manage its ROW – rather, it wants to maximize the revenues it receives. But as CTIA explained above, such fees do not comply with federal law.

Fifth, if a provider offers more than one type of service that requires a license, the provider must obtain a license for each one – and pay a separate gross revenues fee.[16] This would result in the same provider paying multiple fees, even though there is no ROW-related impact to the City, because the types of services offered do not affect the degree or amount of ROW use. Double- or triple-charging fees merely because a provider offers different services to customers is excessive and unlawful.

Section 51.01.030(4) of the ROW Ordinance acknowledges, "The provisions of this chapter are subject to and shall be applied consistent with applicable state and federal laws, rules and regulations, and shall be interpreted to be consistent with such laws, rules, and regulations." Given that the gross revenues fees are unlawful for multiple reasons, they cannot be applied "consistent" with federal law. The City should:

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[15] Section 61.01.160(1).

[16] Section 51.01.080(7)(B). *See also* Sections 51.01.080(11)(B) and 51.01.140(1), which also indicate that a fee must be paid for each separate service the same operator offers.

- Delete the provisions establishing the ROW usage and license gross revenues fees. Such gross revenues fees should not be assessed on any wireless providers, regardless of whether they own and/or operate ROW facilities or rely on other providers' facilities.
- Adopt instead per-site fees that are presumptively reasonable as determined by the FCC, or are supported and documented by a showing that these fees are necessary to compensate the City for its reasonable, direct costs to manage the ROW. This could include, for example, adopting a recurring annual fee of $270 for each small wireless facility, which the FCC has determined is a presumptively reasonable charge.[17]

2. Proposed Non-Fee Provisions that Apply to Entities that Do Not Own ROW Facilities

The updated ordinances would regulate entities that do not own or operate facilities in the ROW. Those additional provisions conflict with federal law, impose unreasonable burdens on wireless providers, and will create uncertainty and delay in providing new or expanded wireless services in Lake Oswego.

Some CTIA members may choose to locate their facilities on private property such as commercial centers and apartment buildings rather than in the ROW. Others may choose to transmit their customers' traffic using equipment that is owned and operated by third parties and that is in the ROW. They may, for example, lease or purchase fiber capacity from a fiber optic operator for backhauling their traffic, or obtain capacity on a facilities-based provider's antennas and resell that capacity to retail customers. In both cases, providers do not install or operate equipment in the ROW. They thus impose no burdens or costs on Lake Oswego, which will already regulate providers that do own and operate physical facilities in the ROW.

The proposed ordinances, however, clearly intend to regulate entities that do not operate facilities in the ROW. Section 61.01.140 of the License Ordinance, for example, requires "any person … providing telecommunications" to secure a license.[18] This is an arbitrary and unjustified extension of City regulation. If a provider has no facilities in the ROW, it should not need, or pay for, a license. In addition, requiring a wireless provider to obtain a license before it may offer service could violate federal law because Section 332(c)(3) of the Act prohibits states and localities from regulating the entry of wireless providers into the market.

Other provisions similarly impose unjustified obligations on entities that do not operate equipment or other facilities in the ROW. Section 51.01.160(1), for example, subjects these entities to audits and information requests "at any time." And Section 51.01.170(2) imposes broad obligations to indemnify the City. The ordinances, however, supply no basis for extending such requirements to encompass entities that do not deploy ROW infrastructure.

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[17] The "definitions" section of the ROW Ordinance contains a definition of "small wireless facility," which is consistent with the federal definition. However, the remainder of the ordinance does not address small wireless facilities. Clarifying the Ordinance to state that wireless providers may deploy such facilities, and specifying the fees that will be charged for use consistent with the FCC's rules (e.g., $270 in annual recurring fees) would provide important clarity to wireless providers necessary to promote investment in the networks that will benefit the City.

[18] The definitions in Section 61.01.130 of the ordinance stat that "telecommunications" includes most commercial wireless communications services.

CTIA thus opposes subjecting non-facilities-based wireless providers or providers that do not deploy facilities in the ROW to regulation as arbitrary and contrary to law. The City should remove all provisions of the proposed ordinances that apply to providers that do not own or operate facilities in the City's ROW.

3. Additional Non-Fee Provisions that Should be Deleted or Modified.

Finally, CTIA asks that the City reconsider a number of provisions in the proposed ordinances because they would impose unjustifiable costs and obligations on providers that likely will impede the expansion of service, and several violate federal law. They should be revised or deleted.

Section 51.01.080(8) sets a five-year term for ROW licenses. Given the substantial investment that providers must make in infrastructure in order to provide service, providers should have more certainty that their investment will not be undercut. This provision should be modified to specify a ten-year initial term, which will be automatically renewed for successive 10-year terms as long as the licensee is in compliance with the terms of its license.

Section 51.01.090(2) requires City approval "prior to the commencement of any construction, extension, or relocation of any facilities," and other provisions of Section 51.01.090 set requirements for obtaining approval. In 2010, however, Congress sought to speed wireless deployment by enacting a statute that limits the scope of state and local review of certain modifications to wireless facilities.[19] The FCC implemented that statute by adopting rules that specify that localities do not have discretion to condition or deny certain modifications to facilities (such as the addition of an antenna on an existing utility or streetlight pole) that qualify as "eligible facilities requests." FCC rules provide that the locality "shall approve" such requests; it has no discretion to deny them.[20] Section 51.01.090 should accordingly be modified to reflect the limited scope of review applicable to such eligible facilities requests as defined in FCC rules.

Section 51.01.090 also does not set deadlines for the City to approve the construction or modification of wireless facilities. Federal law, however, sets specific deadlines within which localities are to act in order to accelerate the deployment of wireless facilities. Those time periods are (i) 60 days for eligible facilities requests under Section 6409 or for collocating a small wireless facility on an existing structure; (ii) 90 days for installing a new structure to hold small wireless facilities, or to collocate a larger wireless facility on an existing structure; and (iii) 150 days for installing a new larger structure. Section 51.090 should be modified to include each of these time periods.

Section 51.01.110 states that a ROW licensee "may lease or otherwise provide capacity on or in its facilities to others" only if "all lessees have obtained proper authority, in the form of a permit, license, or franchise from the city before leasing capacity on or in its facilities." By regulating the lease of "capacity" on a facility,

[19] Section 6409 of the 2010 Spectrum Act, *codified at* 47 U.S.C. § 1455.
[20] 47 C.F.R. § 1.6100.

Section 51.01.110 appears to require that that before a licensee leases any of its radio spectrum to another provider, it must obtain the City's consent. But localities have no jurisdiction over leases of radio spectrum, which the FCC exclusively regulates. Section 51.01.110 should thus be deleted.

Section 61.01.140 requires wireless providers to apply for and obtain a license to provide service. However, Section 332(c)(3) of the Communications Act prohibits states and localities from regulating the entry of wireless providers, and may preempt the City from requiring a license to the extent it imposes obligations or conditions on the provider in order to secure grant. In addition, the provision supplies no rationale for allowing license terms of only one year and requiring annual renewal – other than to obtain the annual fees. Given these issues, the City should delete the licensing requirements. If it nonetheless determines to retain them, it should clarify that a license will automatically be granted upon application without conditions, or change it to a simple registration requirement. Section 61.01.140 should also set an initial license term of at least ten years, which can be automatically renewed for successive ten-year terms.

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In sum, the draft proposed ordinances and Resolution raise serious legal and policy issues as to both the high fees and the non-fee requirements. We thus ask that the City work with all communications providers to revise these documents to bring them into compliance with law, and remove unnecessary and unjustified requirements, in order to promote the deployment of expanded service that will benefit Lake Oswego.

Sincerely,

Bethanne Cooley
Assistant Vice President
State Legislative Affairs

cc: Ms. Reba Crocker, Reba@ROWmanagers.com