



CITY OF BEND

February 4, 2021

House Committee on Economic Prosperity and Recovery
900 Court Street NE
Salem, Oregon 97301

Re: Comments re HB 2613

Chair Lively, Vice-Chairs Kropf and Cate and Members of the Committee:

The City of Bend writes to express significant concerns about HB 2613 as currently drafted and to provide detailed feedback about how the proposed language would impact our efforts to manage city rights of way in a safe and cost-effective manner.

The proposed language for HB 2613 amending ORS 758.010 will conflict with our current permitting business practices, require colocation in City utility trenches, create shot clocks around permitting, require an expedited permitting process, limit the City's ability to require prepared plans on projects under 1,000 feet in length, and will impact the City's ability to deliver capital projects using alternate delivery methods without additional delays. This bill is inconsistent and conflicts with many industry best practices, the Bend Standards and Specifications, Bend Code, existing land use codes, the Oregon dig law and potentially other state laws around operation of the City's utilities.

It should be acknowledged that collaboration and coordination between all utilities operating in the public right of way is important to any successful right of way management program. The City is continuously working on improving permitting processes and workflows, coordinates with franchise utilities on City funded capital projects, private development projects, and other utility projects. The City leverages industry best practices, modern engineering design principles and practices to establish a proactive and safe right of way management program. Current permitting processes provide an equitable opportunity for all franchise utilities to comment on potential conflicts with their facilities through our infrastructure permitting process. This is an example of an informal notice process which allows all franchise utilities the opportunity to collocate in a common trench for large development projects or partner with others utilities on smaller projects. The House Bill, as written, would place a large administrative burden on municipalities to create a program that would directly benefit only the telecom/broadband industry and shift the burden of permitting, and excavation costs to other utilities or government funded capital projects.

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The following are issues to consider:

1. In Section 1. (2) House Bill 2613 (Bill) requires that a permitting agency which *“permits or plans to conduct an excavation project within the public right of way (ROW) shall provide notice...”* on all projects that:
 - a) *“Will involve the construction of underground utility infrastructure, road construction, road resurfacing, or other work...”* which *“...could reasonably include...”* the installation of broadband facilities.
 - i. This could potentially put the sole cost of construction on the City or other permitted party. This cost can be substantial because of the underlying geology which often requires rock excavation. It is unclear if this is limited to just open trench or if this bill would also require co-location if trenchless construction means were used to install a facility like power or gas. Under ORS 757.542 the definition of Excavation includes trenchless construction methods.
 - b) Projects that are greater than *“...900 feet...”* or *“...involve terrain that is difficult or expensive to traverse or...”* are part of a *“...larger project that will require the installation or upgrade of underground utility infrastructure”* would require notice.
 - i. All excavation projects could be considered *“difficult and expensive to traverse”* regardless of the length because rock trenching, hammering, drilling or blasting are often required when installing, upgrading or replacing utility infrastructure within in the ROW.
2. In Section 1. (3) the Bill requires that all projects as described above provide notice to:
 - a) *“...to every telecommunications provider with a history of installing (existing franchise) underground [facilities]...or has a potential to install [facilities]...in the [ROW] in the future.”*
 - i. This is unreasonable and puts a burden on the City of Bend to coordinate with any and all telecom providers across the state of Oregon and possibly the United States. This would have severe impact on current permitting operations with no ability to cover the cost of this effort. The City’s current permitting program is a cost recovery model which is not supported by franchise fees. Additionally, the FCC has currently constrained what a municipality is able to collect from a telecom provider in the terms of a franchise fee. Essentially, this is again shifting cost to the City who will subsidize the coordination process for any possible location(s) that a Provider wishes to colocate their potential facilities, all at the cost of another entity or the City.
 - b) The Provider shall have *“...no less than 30 days from the date of the notice...”* to provide *“...a statement of interest to colocate underground [facilities] within the excavation site.”*
 - i. This leaves the notice open ended and only provides a time limit on a minimum response time. It does not give a timeframe to the Provider to give comments. This could severely impact a City capital project that require specific procurement guidelines and project timelines. Without a stipulated time frame for the provider to respond this would restrict the City’s ongoing permitting process and established timeframes for permit reviews. Reviewing permits is difficult enough without having to coordinate a notice with any and all potential telecom providers across the state and country.
 - ii. The City has seen, in the past few years, project delays and impacts to City funded capital projects, street preservation projects, and ongoing

transportation and utility maintenance programs because of unresponsiveness of the telecom and other franchise utilities within central Oregon. This is partially due to the high volume of construction and development occurring in Bend and Central Oregon. Creating a requirement that provides a 30 day minimum time frame for a telecom to provide a letter of interest to collocate in an excavation on a capital project will cause substantial project delays to City and private development projects.

3. In Section 1. (4) the Bill requires the City to create a program to administer this notification program to all potential providers and create a procedure for negotiating colocation of facilities within all qualifying excavation projects.
 - a) This would be a difficult task and take a considerable amount of time for the City to develop policies and procedures which would require a lengthy public process and adoption by the City Council. Additionally, the City would be put in the middle of facilitating a negotiating process between potential competitors or unwilling franchise utilities that may not be interested in colocation with another provider.
 - b) The City of Bend does not allow for other utilities to be within a specific distance of City water and sewer facilities due to operational and future replacement requirements. In the past the City has promoted joint utility trenches and current standards and specifications require joint trenching when possible. However, differences in cost sharing opinions has led to unsuccessful outcomes and failed colocation partnerships. This would be very time consuming for the city to administer and could end up with one party subsidizing another parties cost of installing infrastructure. This leads to lopsided construction costs which may not be allowable under some franchise utility's tariffs.
 - c) The City encourages collaboration but should not get involved in discussions about cost sharing or the feasibility of colocation except where it is required by our current standards and specifications.

4. In Section 2. (2) requires that *"...a city or country must respond to a request by a telecommunications provider for a permit to install broadband utility infrastructure:*
 - a) *Within 72 hours of receipt of the request if the request is for a permit to obtain access to an established [ROW] under the jurisdiction or control of the city or county; and within 60 days of receipt of the request if the request is for a permit..."*
 - i. A shot clock of 72 hours for a response is not practical considering the current business processes established through our new permitting software and permit review programs. It is not clear of the meaning of a response if they are implying that a permit is issued at the end of the 72 hours or it is just the initial response.
 - ii. Creating an expedited permitting process will require a significant investment in staffing and program management without a lot of revenue to support the program. This effectively would also require other utilities to subsidize this program due to the constraints on franchise fees, and cost recovery fee model that is currently implemented for ROW permits. Often, the completeness of some telecom initial permit application submittals, has been spotty at best, results in multiple review cycles and revisions. This timeline does not provide a clear understanding of the intent of a response to a request for a permit.
 - iii. City capital projects should not fund or subsidize the installation of private/public franchise utility infrastructure. The cost of excavation outweighs the material cost of a conduit. This Bill does not provide for a

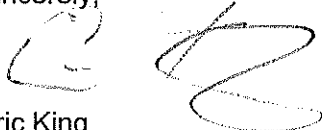
cost sharing model and assumes that the all excavation costs would fall to the original permittee or City funded capital project.

- iv. It should also be noted that a 72 hour shot clock may be in conflict with established FCC regulations as they pertain to small wireless facilities and City development codes. This might inadvertently create a loophole in our established Small Wireless Facilities code because wireless carriers could be considered Broadband and telecom providers.
5. In Section 4, House Bill 2613 is repetitive in the definitions which are previously defined in Section 1. Except for Boadband Utility.
- a) It is unclear the need to restate these definitions. In subsection (2) the Bill preempts the city from requiring any "...prepared plans detailing the depth and location of other underground facilities in the area of the proposed project if the project is for the construction of a segment of linear broadband utility infrastructure that is 1,000 feet or less in length."
 - b) Of all of the sections this is the most concerning provision of the house bill. This is in direct conflict with the intent of the Oregon Dig Laws, all of our standards and specifications with respect to the installation of a franchise utilities, best practices identified by the Common Ground Alliance, Subsurface Utility Engineering practices developed by ASCE, public safety considerations and proper utility engineering design practices for installing underground facilities developed by APWA.
 - c) In the past six years the City has worked diligently to revamp permitting programs and construction standards within the City of Bend. This effort has helped to reduce damages to City and franchise utility infrastructure as a result of poor construction, limited engineering design, and project management. Proper planning, engineering review, and project management are critical to controlling costs and reducing the need for utility relocations. Allowing a telecom/broadband utility to determine, in the field, where they would like to place their facility has proven unsuccessful, leads to damaged facilities, and is adverse to responsible management of the City's biggest asset, the public right of way.

To conclude, the City of Bend is not supportive of the bill as written. Many of the industry best practices regarding planning, design, and construction of underground utilities are currently leveraged in the City's permitting and ROW management program. These practices, policy and permitting processes have been vetted and approved through a collaborative stakeholder group and public engagement processes over the past five to six years. The partnerships and relationships that the City of Bend has forged with the franchise utility community have resulted in a more modern, safer, and more equitable approach to right of way management, focused on creating value for public and private stakeholders alike.

Thank you for your consideration and this opportunity to comment.

Sincerely,



Eric King
City Manager