

East Bay Charter Township

3

**CHARTER TOWNSHIP OF EAST BAY
PUBLIC RIGHT-OF-WAY ORDINANCE
Ordinance No. 12 of 2009**

AN ORDINANCE REGULATING THE USE OF PUBLIC RIGHTS-OF-WAY IN THE TOWNSHIP BY PUBLIC UTILITIES AND PROVIDING PENALTIES FOR THE VIOLATION THEREOF

THE CHARTER TOWNSHIP OF EAST BAY ORDAINS:

Section 1. Definitions. As used in this Ordinance,

“Franchise” means the authorization granted by the Township of a privilege, permit, license or other authority to construct, operate, and maintain Public Utility Facilities within the Public Ways located in the Township.

“Public Utility” means a person, firm, corporation, municipal department or board which is authorized to furnish to the public electricity, natural gas, telephone, cable television, Internet, water, sewage disposal or storm water disposal services and which has been granted a Franchise by the Township.

“Public Utility Facilities” means any underground, surface, or overhead electrical, natural gas, telephone, cable television, Internet, water, sewage or storm water transmission, distribution, or collection systems, including mains, drains, sewers, pipes, conduits, wires, cables, hydrants, towers, poles, electrical substations, gas regulator stations, and other similar equipment, and applicable accessories reasonably necessary for the furnishing of adequate service by Public Utilities.

“Public Ways” means public streets, roadways, highways, boulevards, concourses, bridges, tunnels, parkways, alleys, and other rights-of-way and through easements, including but not limited to public utility easements or dedicated utility strips, now or hereafter under the jurisdiction of the Township.

“Township” means the Charter Township of East Bay.

Section 2. Location in Public Ways.

To the maximum extent possible, the Public Utility shall use existing Public Utility Facilities in the Public Ways when providing its services to the public.

Section 3. Use of Public Rights-of-Way by Public Utilities.

- (a) No Burden on Public Ways. A Public Utility and its contractors and subcontractors shall not unduly burden or interfere with the present or future use of any of the Public Ways within the Township by the installation of any Public Utility Facilities. A Public Utility shall erect and maintain its Public Utility Facilities so as to cause minimum interference with the use of the Public Ways and with

the rights or reasonable convenience of property owners. No Public Way shall be obstructed longer than necessary during the construction of or repair to the Public Utility Facilities. If the Township in its reasonable judgment determines that any portion of the Public Utility Facilities constitutes an undue burden or interference, the Public Utility at its expense shall modify its Public Utility Facilities or take such other actions as the Township may reasonably determine is in the public interest to remove or alleviate the burden, and the Public Utility shall do so within the reasonable time period established by the Township.

- (b) Restoration of Public Ways. A Public Utility and its contractors and subcontractors shall immediately restore, at the Public Utility's sole cost and expense and in a manner approved by the Township, any portion of the Public Ways that is in any way disturbed, damaged, or injured by the construction, operation, maintenance or removal of the Public Utility Facilities to as good or better condition than that which existed prior to the disturbance. In the event that a Public Utility, its contractor or subcontractors fail to make such repair within the reasonable time specified by the Township, the Township shall be entitled to complete the repair and the Public Utility shall pay the costs of such repair to the Township.
- (c) Easements. Any easements over or under private property necessary for the construction or operation of the Public Utility Facilities shall be arranged and paid for by the Public Utility. Any easements other than Public Ways which the Public Utility desires to obtain from the Township shall be negotiated separately with the Township.
- (d) Tree Trimming. A Public Utility may trim trees upon and overhanging the Public Ways so as to prevent the branches of such trees from coming into contact with the Public Utility Facilities. The Public Utility shall adhere to tree trimming standards set by the Rural Utilities Service. The Public Utility shall use its best efforts to notify the Township prior to trimming trees in the Public Ways.
- (e) Marking. A Public Utility shall mark its Public Utility Facilities pursuant to the guidelines established by the Rural Utilities Service.
- (f) Compliance with Laws. A Public Utility shall comply with all laws, statutes, ordinances, rules and regulations regarding the installation, construction, ownership or use of its Public Utility Facilities whether federal or state, now in force or which hereafter may be promulgated. Before any installation is commenced, the Public Utility shall secure all necessary permits, licenses and approvals from all appropriate departments, agencies, boards or commissions of the Township or other governmental entities as may be required by law, including, without limitation, all utility lines and highway permits. The Public Utility shall comply in all respects with applicable codes.
- (g) Street Vacation. If the Township vacates or consents to the vacation of a Public Way within its jurisdiction, and such vacation necessitates the removal or relocation of the Public Utility's Public Utility Facilities in the vacated Public Way,

the Public Utility shall move its Public Utility Facilities at its sole cost and expense when asked to do so by the Township or a court of competent jurisdiction. The Public Utility shall relocate its facilities to such alternative route as the Township, acting reasonably and in good faith, shall designate.

- (h) Relocation. If the Township requests the Public Utility to relocate, protect, support, disconnect, or remove its Public Utility Facilities because of work being conducted in the Public Way, the Public Utility shall relocate, protect, support, disconnect, or remove its Public Utility Facilities in the Public Ways, at its sole expense, to such alternate route as the Township, acting reasonably and in good faith, shall designate. A Public Utility shall raise or lower wires or equipment upon the reasonable request of any third person, including any person holding a building permit. Expenses associated with raising and lowering the wires or equipment shall be paid by the person requesting the same (except in cases where the Public Utility is required to bear the costs under other provisions of this Ordinance). The Public Utility may require advance payment. In addition, the Public Utility shall be entitled to receive up to ten (10) business days advance notice by the person requesting the movement.
- (l) Miss Dig. If eligible to join, a Public Utility shall subscribe to and be a member of "MISS DIG", the association of utilities formed pursuant to Act 53 of the Public Acts of 1974, as amended, MCL 460.701. *et seq.*, and shall conduct its business in conformance with the statutory provisions and regulations promulgated thereunder.
- (j) No Priority. Neither this ordinance nor any Franchise gives a priority of use of Public Ways to a Public Utility. In the event of any dispute as to the priority of use of a Public Way, the first priority shall be to the public's general use of the Public Way and to the State of Michigan, Grand Traverse Road Commission and other governmental entities in the performance of their various functions, and thereafter as between other authorized users or Franchise holders, as determined (except as otherwise provided by law) by the Township in the exercise of its powers, including the police power and other powers reserved to and conferred on it by the State of Michigan.
- (k) Underground Relocation. If the Public Utility has its facilities on another company's above ground utility poles and the owner of said poles relocates its facilities to an underground conduit, the Public Utility shall relocate its facilities underground in the same location.

Section 4. No Township Liability; Indemnification.

- (a) Township Not Liable. With the exception of willful misconduct or gross negligence, the Township, its officers, employees, departments, boards and commissions shall not be liable to a Public Utility or the Public Utility's customers for any interference with or disruption in the operation of the Public Utility Facilities or the provision of service over or through the Public Utility Facilities, or for any damages arising out of the Public Utility's use of the Public Ways.

- (b) Indemnification. As part of the consideration for a Franchise granted by the Township, a Public Utility shall defend, indemnify, protect and hold harmless the Township, its board members, officers, employees, departments, boards and commissions from any and all claims, losses, liabilities, causes of action, demands, judgments, decrees, proceedings, and reasonable expenses of any nature (including, without limitation, actual fees and expenses of attorneys, expert witnesses and consultants), arising out of or resulting from the acts or omissions of the Public Utility, its officers, agents, employees, contractors, successors, or assigns, but only to the extent of the fault of the Public Utilities, its officers, agents, employees, contractors, successors, or assigns.
- (c) Notice, Cooperation and Expenses. The Township shall promptly notify the Public Utility of the making of any claim or the commencement of any action, suit or other proceeding covered by the provisions of this Section, and shall permit the Public Utility to assume the defense of any claim or action. Nothing herein shall be deemed to prevent the Township from cooperating with the Public Utility and participating at its expense in the defense of any litigation by the Township's own counsel. The Public Utility shall pay all expenses incurred by the Public Utility in defending itself with regard to any such actions, suits or proceedings.

Section 5. Emergencies; "As-built" Plans.

- (a) Emergencies. Whenever, in case of fire or other disaster, it becomes necessary in the judgment of the Township to remove any of the Public Utility Facilities, no charge shall be made by the Public Utility against the Township for restoration and repair, unless such acts amount to gross negligence by the Township.
- (b) "As-built" Plans. Upon request, a Public Utility shall provide to the Township route maps showing the location of the Public Utility Facilities, access to "as-built" maps, and updated route maps to reflect any changes. The Township shall give the Public Utility a minimum of 48 hours notice of a request to view "as-built" maps, unless there exists an emergency situation requiring earlier viewing.

Section 6. Violations.

- (a) Notice of Violation. If the Township believes that a Public Utility has not complied with the terms of this Ordinance, the Township shall first informally discuss the matter with the Public Utility. If these discussions do not lead to resolution of the problem, the Township shall notify the Public Utility in writing of the exact nature of the alleged noncompliance.
- (b) Public Utility's Right to Respond or Cure. A Public Utility shall have thirty (30) days from receipt of the notice described in subsection (a) above to take one or more of the following actions: (i) respond to the Township contesting the assertion of noncompliance, (ii) cure such noncompliance, or (iii) if, by the nature of the noncompliance, compliance cannot be achieved within the thirty (30) day

period, initiate reasonable steps toward compliance and notify the Township of the steps being taken and the projected date that compliance will be achieved.

- (c) Public Hearing. If the Public Utility fails to respond to the notice provided pursuant to subsection (a) above or if the Public Utility fails to cure the noncompliance within thirty (30) days or fails to initiate reasonable steps toward compliance as provided in subsection (b) above, the Township shall schedule a public hearing if it intends to continue its investigation into the noncompliance. The Township shall provide the Public Utility no less than twenty (20) days prior written notice of such public hearing, which notice shall specify the time, date, place, and purpose of the public hearing. A notice of the public hearing shall be published by the Township in a newspaper of general circulation within the Township no less than ten (10) days prior to the public hearing.
- (d) Enforcement. Subject to applicable federal and state law, in the event the Township, after the public hearing held pursuant to subsection (c) above, determines that the Public Utility is not in compliance with any provision of this Ordinance, the Township may do one or more of the following:
1. Seek specific performance of any provision of this Ordinance, which reasonably lends itself to such a remedy, or seek other equitable relief.
 2. Commence an action at law for monetary damages.
 3. Commence an action with the Michigan Public Service Commission declaring its rights in the matter.
 4. Revoke the Franchise previously granted by the Township.

Section 7. Force Majeure.

A Public Utility shall not be held in noncompliance with the provisions of this Ordinance, nor suffer any enforcement or penalty relating to noncompliance, where such noncompliance occurred or were caused by circumstances reasonably beyond the ability of the Public Utility to anticipate and control. This provision includes work delays caused by waiting for utility providers to service or monitor their utility poles to which the Public Utility Facilities are attached, as well as unavailability of materials and/or qualified labor to perform the work necessary. Furthermore, the Township hereby declares that it is not its intention to subject a Public Utility to penalties, fine, forfeitures or revocation of any Franchise for violations of this Ordinance where the violation was a good faith error that resulted in no or minimal negative impact on the Public Utility's customers within the Township, or where strict performance would result in practical difficulties and hardship to the Public Utility which outweighs the benefit to be derived by the Township.

Section 8. Public Service Commission Jurisdiction.

To the extent any regulation in this Ordinance is in conflict with a rule or regulation of the Michigan Public Service Commission, then the rule or regulation of the Michigan Public Service Commission shall control.

Section 9. Severability.

If any section, provision or clause of this Ordinance or the application thereof to any person or circumstances is held invalid, such invalidity shall not effect any remaining portions or application of this Ordinance, which can be given effect without the invalid portion or application.

Section 10. Effective Date.

This Ordinance shall become effective thirty (30) days after being published in a newspaper of general circulation within the Township.

CHARTER TOWNSHIP OF EAST BAY

By: _____
Glen Lile

Its: Supervisor

By: _____
Susanne M. Courtade

Its: Clerk

CERTIFICATE

I, the undersigned, the Clerk of the Charter Township of East Bay, Grand Traverse County, Michigan, do hereby certify that the foregoing is a true and complete copy of certain proceedings taken by said municipality of East Bay Charter Township at its regular meeting held on September 14, 2009, relative to adoption of the resolution therein set forth; that said meeting was conducted and public notice of said meeting was given pursuant to and in full compliance with the Open Meetings Act, being Act 267, Public Acts of Michigan, 1976, and that the minutes of said meeting were kept and will be or have been made available as required by said Act.

Dated: _____

Susanne M. Courtade, Clerk