

ORDINANCE NO. 249

AN ORDINANCE OF RICHLANDTOWN BOROUGH, BUCKS COUNTY, PENNSYLVANIA, TO MANAGE ITS RIGHTS OF WAY; ESTABLISHING A RENTAL FEE; REQUIRING INSURANCE AND INDEMNIFICATION; AND CREATING MECHANISMS FOR ENFORCEMENT.

WHEREAS, the Council of Richlandtown Borough, pursuant to its powers and under the Borough Code, has the power to physically and fiscally manage the Borough's rights of way; and

WHEREAS, the Council of Richlandtown Borough deems it necessary and advantageous to adopt the within Ordinance.

NOW THEREFORE IT IS HEREBY ORDAINED, by the Council of Richlandtown Borough as follows:

SECTION 1. DEFINITION OF TERMS

For the purpose of this Ordinance, the following terms, phrases, words and abbreviations shall have the meanings ascribed to them below. When not inconsistent with the context, words used in the present tense include the future tense, words in the plural number include the singular number and words in the singular number include the plural number:

1. **"Affiliate"** means a Person (i) with a direct or indirect ownership interest in the subject entity of five (5%) percent or more or which controls such interest, including forms of ownership such as general, limited, or other partnership interests, direct ownership interests, limited liability companies and other forms of business organizations and entities but, not including corporations, (ii) with a stock interest in the subject entity where the subject entity is a corporation and such stockholder or its nominee is an officer or director of the Grantee or who directly or indirectly owns or controls five (5%) percent or more of the outstanding stock, whether voting or non-voting; or (iii) which controls Grantee and/or, is controlled by, or is under common control with such Person or entity.
2. **"Borough"** means the Borough of Richlandtown, County of Bucks, Commonwealth of Pennsylvania, or the lawful successor, transferee, or assignee thereof
3. **"Cable Service"** shall have the same meaning as used in the Communications Act.
4. **"Communications Act"** means the Communications Act of 1934, as amended as of the time of enactment of this Ordinance.
5. **"Equipment"** means any tangible asset used to install, repair, or maintain a Facility in the Public Way.
6. **"Exempt"** means a service which is provided to residences or businesses within the

Service Area, but which is exempt from the provisions of this Ordinance under Section 4.2 of this Ordinance.

7. **"Facility"** means any tangible asset in the Public Way used or required to provide a Non Exempt service to residences or businesses within the Service Area. The following are not a Facility: a railroad, street railway, gas pipe, water pipe, electric conduit, electric piping, telephone pole, telegraph pole, electric light pole, electric power pole, coal tipple or obstruction to the Public Way.

8. **"Grantee"** means a person who enjoys a non-exclusive privilege to occupy or use a Public Way to provide Non Exempt service under this Ordinance and who is in continuous compliance with this Ordinance.

9. **"Gross Revenue"** means all gross revenue of Grantee or any Affiliate of Grantee derived from the use or occupancy of Public Ways for the provision of Non Exempt services to Persons having a residence or place of business in the Service Area. "Gross Revenue" shall include amounts earned, regardless of: (i) whether the amounts are paid in cash, in trade, or by means of some other benefit to Grantee or its Affiliates; (ii) whether the services with which the revenue is associated are provided at cost or the revenue amount can be matched against an equivalent expenditure; and/or (iii) how the amounts are initially recorded by Grantee or its Affiliates. "Gross Revenue" shall not be a net of: (a) expense, including but not limited to any operating expense; capital expense; sales expense; or commission; (b) any accrual, including, without limitation, any accrual for commissions; or (c) any other expenditure, regardless of whether such expense, deduction, accrual, or expenditure reflects a cash payment. "Gross Revenue" shall not be double counted, viz., "Gross Revenue" which has been included as Gross Revenue of both Grantee and an Affiliate but which sum is included in Gross Revenue due solely to a transfer of funds between Grantee and the Affiliate shall not be counted for purposes of determining Gross Revenue.

10. **"Non Exempt"** means a service which is provided to residences or businesses within the Service Area, but which is not exempt from the provisions of this Ordinance under Section 4.2 of this Ordinance.

11. **"Person"** means (i) any natural person, sole proprietorship, partnership, association, limited liability company, corporation or other form of organization authorized to do business in the Commonwealth of Pennsylvania and (ii) provides or seeks to provide one or more Non Exempt services to residences or businesses in the Service Area. A governmental entity or a municipal authority is not a "Person."

12. **"Public Way"** means the surface of, and the space above and below, any public street, unopened right of way, highway, bridge, land path, alley, court, boulevard, sidewalk, parkway, way, lane, public way, drive, circle, or other public right-of-way held by the Borough in the Service Area. Public Way shall also mean any easement now or hereafter held by the Borough within the Service Area for the purpose of public travel and/or for utility and/or public service use dedicated for compatible uses.

13. **"Service Area"** means the present municipal boundaries of the Borough, and shall

include any additions thereto by annexation or other legal means.

SECTION 2. REGISTRATION

Each Person, other than on a transitory basis, who occupies or uses or seeks to occupy or use a Public Way to provide a Non Exempt service to residences or businesses within the Service Area, or places any Equipment or Facility in a Public Way other than on a transitory basis, including Persons with installation and maintenance responsibilities by lease, sublease or assignment, must register with the Borough. Registration is accomplished by filing with the Borough a completed Provider Certification in the form shown at Appendix "A" to this Ordinance.

SECTION 3. GRANT OF ORDINANCE; EXEMPTIONS

3.1 GRANT. It shall be unlawful for any Person to construct, repair, remove, relocate or perform any work on or use any Facilities or any part thereof in a Public Way unless in compliance with this Rights of Way Ordinance. Continuous compliance with this Rights of Way Ordinance grants to Grantee a non-exclusive privilege to construct, repair, remove, relocate or perform any work on or use any Facilities or any part thereof in the Public Ways within the Service Area and to occupy or use the Public Ways for the purpose of providing Non Exempt service to residences or businesses within the Service Area.

3.2 EXEMPTIONS. This Rights of Way Ordinance shall not apply to occupation or use of the Public Ways to provide:

- (1) The transportation of passengers or property or both as a common carrier by means of elevated street railway, inclined plane railway, railroad, street railway or underground street railway, trackless-trolley omnibus or by any combination of such means.
- (2) The transportation of artificial or natural gas, electricity, petroleum or petroleum products or water or any combination of such substances for the public
- (3) The production, generation, manufacture, transmission, storage, distribution or furnishing of natural or artificial gas, electricity, steam, air conditioning or refrigerating service or any combination thereof to or for the public.
- (4) The diverting, developing, pumping, impounding, distributing or furnishing of water from either surface or subsurface sources to or for the public.
- (5) The collection, treatment or disposal of sewage for the public.
- (6) The conveyance or transmission of messages or communications by telephone or telegraph for the public.
- (7) The diverting, pumping or impounding of water for the development or furnishing of hydroelectric power to or for the public.

- (8) The transportation of oxygen or nitrogen, or both, by pipeline or conduit for the public.
- (9) Any ancillary service reasonably necessary or appropriate for the accomplishment of services specified in (1) - (8).
- (10) Cable Service.

3.3 NOT A CABLE SYSTEM. This Ordinance does not authorize a Person to provide Cable Service. A Person seeking to provide Cable Service must obtain permission from the Borough under separate legislation of the Borough.

3.4 NOT A POLE ATTACHMENT AGREEMENT. This Ordinance does not authorize the Grantee to attach to any pole or other structure in a Public Way devices for the intentional transmission or radiation of radio frequency emissions or energy through the ether by any means now known or hereafter developed.

SECTION 4. STANDARDS OF SERVICE

4.1 CONDITIONS OF STREET OCCUPANCY. All Facilities and Equipment installed or erected by the Grantee pursuant to the terms hereof shall be located so as to cause a minimum of interference with the proper use of Public Ways and with the rights and reasonable convenience of property owners who own property that adjoins any of said Public Ways.

4.2 RESTORATION OF PUBLIC WAYS. If during the course of Grantee's construction, operation, and/or maintenance of its Facilities and Equipment there occurs a disturbance of any Public Way by Grantee, Grantee shall, at its expense, replace and restore such Public Way to a condition which existed immediately prior to such disturbance. If Grantee excavates the surface of any Public Way, Grantee shall be responsible for restoration of the Public Way and its surface within the area affected by the excavation. The Borough reserves the right, after providing notice to Grantee, to remove and/or repair any work done by Grantee which is inadequate. The reasonable cost thereof, including the cost of inspection and supervision, shall be paid by the Grantee. All excavations made by Grantee in the Public Way shall be properly safeguarded for the prevention of accidents.

4.3 TREES AND SHRUBBERY. The Grantee shall notify Borough and all affected property owners regarding Grantee's need to trim trees or other natural growth upon and overhanging Public Ways so as to prevent the branches of such trees from coming in contact with its Facilities or Equipment. Trimming shall be limited to the area required to clear its Facilities or Equipment.

4.4 SAFETY REQUIREMENTS. All such work in the Public Ways shall be performed in accordance with applicable safety codes and technical requirements.

4.5 MAPS. Prior to beginning any construction of Facilities, Grantee shall provide the Borough with a construction schedule for work in the Public Ways which schedule shall be updated as changed. Upon completion of initial construction and upon completion

of construction of any modification to its Facilities, Grantee shall provide the Borough with a map showing the location of its installed Facilities in the Public Ways. Such maps shall be provided in both paper form, as well as in an electronic format for placement on the Borough's GIS system. Annually thereafter, Grantee shall provide a map to the Borough showing the location of Grantee's Facilities in the Public Ways on a scale of one hundred fifty feet (150') per inch or whatever standard scale the Borough adopts for general use.

4.6 EXCAVATIONS. Grantee may make excavations in Public Ways for any Facility subject to obtaining excavation permits from the Borough. Prior to doing such work, Grantee must apply for, and obtain, appropriate permits from the Borough, and give appropriate notices to any other licensees and/or permittees of the Borough, and/or other units of government owning or maintaining facilities which may be affected by the proposed excavation.

4.7 RESERVATION OF BOROUGH PUBLIC WAYS. Nothing in this Ordinance shall be construed to prevent the Borough or other agency of government or municipal authority from constructing sewers, grading, paving, repairing and/or altering any street and/or laying down, repairing and/or removing water mains and/or constructing and/or establishing any other public work or improvement. If any of the Grantee's Facilities or Equipment interferes with the construction or repair of any street or public improvement, including construction, repair or removal of a sewer or water main, the Grantee's Facilities or Equipment shall be removed or replaced in the manner the respective Borough or other agency of government or municipal authority shall direct. Any and all such removal or replacement shall be at the expense of the Grantee. Should Grantee fail to remove, adjust or relocate its Facilities by the date established by the Borough or other agency of government or municipal authority, the Borough or other agency of government or municipal authority may cause and/or effect such removal, adjustment or relocation, and the expense thereof shall be paid by Grantee, including all reasonable costs and expenses incurred by the Borough or other agency of government or municipal authority due to Grantee's delay.

SECTION 5. RENTAL

5.1 RENTAL.

a. In consideration of occupying or using the Public Ways under this Ordinance, Grantee shall pay to Borough a rental equal to five (5%) percent of Gross Revenue.

b. The rental shall be assessed on a calendar quarterly basis and shall be payable to the Borough no later than forty-five (45) days after the expiration of the calendar quarter for which payment is due. Grantee shall file with the Borough a complete and accurate statement, under notarial seal, at the end of each calendar year quarter certified as true and correct by a representative of Grantee, authorized to make such certification, explaining how the payment was calculated. In connection with the rental payment due on February 14th, the Grantee shall also submit to the Borough, on that date or no later than six (6) months thereafter, a detailed statement by an officer of the Grantee certified by the Grantee's independent certified public accountant verifying the accuracy of the Gross Revenue and rental payments for the previous calendar year, with a detailed breakdown and explanation of the calculation by each month.

c. Grantee shall keep accurate books of account which shall clearly support the calculation of rentals and describe in sufficient detail the amounts attributable to each specific component of Gross Revenue. Such books of account and all supplemental information and source documents in support thereof including, but not limited to, third party remittances and contract documents, shall be made available to the Borough and its authorized representatives for examination at a location in Bucks County, Pennsylvania, at any time during regular business hours on thirty (30) days' prior written notice and from time to time for the purpose of verifying or identifying rentals owed to the Borough. Grantee shall exercise its best efforts to obtain financial records of Affiliates for the Borough for the purpose of verifying the accuracy of the rental payments. Borough shall have the right to examine and to recompute any amounts determined to be payable under this Ordinance provided, however, that such examination shall take place within forty-eight (48) months following the close of each year. Any additional amount due to Borough as a result of the examination and recomputation shall be paid within thirty (30) days following written notice to Grantee by the Borough, which notice shall include a copy of the examination report. In the event that said examination determines that funds are owed to the Borough in an amount in excess of two (2%) percent, the cost of said examination shall be borne by the Grantee and reimbursed to Borough within thirty (30) days following written notice to Grantee.

d. In the event that any rental or other payment is not made or the requisite documentation and certification is not provided on or before the applicable dates heretofore specified, interest shall be compounded daily and set at the one-year United States Treasury Bill rate existent on the date payment was due, plus three (3) percentage points. Any amount recomputed to reflect correct payment due shall bear interest as described from the date such payment was originally due.

SECTION 6. INSURANCE, INDEMNIFICATION AND BONDS OR OTHER SURETY

6.1 INSURANCE, INDEMNIFICATION AND BONDS OR OTHER SURETY.

A. Grantee shall save the Borough, its agents, employees and elected and appointed officials, harmless from and against all claims, damages, losses and expenses, including reasonable attorney's fees, sustained on account of any suit, judgment, execution, claim or demand whatsoever arising out of the construction, leasing, operation or maintenance of the Grantee's Equipment, Facilities, and services specified by this Ordinance, whether or not any act or omission complained of is authorized, allowed and/or prohibited by the Ordinance and the rights granted thereunder.

B. (1) Grantee shall obtain and maintain in full force and effect throughout the term of this Ordinance insurance with an insurance company licensed to do business and doing business in the Commonwealth of Pennsylvania and acceptable to the Borough. All companies will be required to be rated A-VH or better by A.M. Best or A better by Standard and Poors. Grantee shall provide Borough with proof of such insurance so required.

(2) Grantee shall obtain and maintain in full force and effect, at Grantee's sole expense, insurance coverage in the following types and minimum amounts:

<u>Type</u>	<u>Amount</u>
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i.. Workers' Compensation and
Statutory Employers Liability

Pursuant to PA Statutory Limits

ii. Commercial General (public) Liability
to include coverage for the following where
exposure exists:

- Premises operations
- Independent contractors
- Products/completed operations
- Personal Injury
- Contractual liability
- Explosion, collapse and underground
property damage

Combined single limit for bodily
injury and property damages
\$2,000,000 per occurrence or its
equivalent

iii. Comprehensive Vehicle insurance coverage for loading and unloading hazards, for:

- Owned/leased vehicles
- Non-owned vehicles
- Hired a vehicles

Combined single limit of bodily
injury and property damage \$ 1,000,000
per occurrence or its equivalent

(3) The Borough shall receive without expense copies of certificates of insurance evidencing coverage stated above.

(4) Grantee agrees that with respect to the above-required insurance, all insurance certificates will contain the following required provisions.

a. Name the Borough and its officers, employees, board members and elected and appointed officials as additional insured parties (as the interests of each insured may appear) as to all applicable coverage (except worker's compensation);

b. Provide for sixty (60) days written notice to the Borough for cancellation, non-renewal, or material change;

c. Provide that all provisions of this Ordinance concerning liability, duty, and standard of care, including the Indemnity provisions, shall be underwritten by contractual coverage sufficient to include such obligations within applicable policies, subject to policy terms and conditions.

(5) Companies issuing the insurance policies shall have no recourse against the Borough for payment of any premiums or assessments which all are set at the sole risk of the Grantee. Insurance policies obtained by Grantee shall provide that the issuing company waives all right of recovery by way of subrogation against the Borough in connection with any damage covered by these policies.

C. Grantee shall obtain and maintain, at its sole cost and expense, and file with the

Borough, a corporate surety bond with a surety company authorized to do business in the Commonwealth of Pennsylvania in the amount of fifteen percent (15%) of Grantee's estimated costs to secure Grantee's performance of its obligations and faithful adherence to all requirements of this Ordinance.

(1) No action, proceeding or exercise of a right with respect to such bond shall affect the Borough's rights to demand full and faithful performance under this Ordinance or limit Grantee's liability for damages.

(2) The bond shall contain the following endorsement: "It is hereby understood and agreed that this bond may not be cancelled by the surety nor any intention not to renew be exercised by the surety until sixty (60) days after receipt by the Borough of Richlandtown, by registered mail, of written notice of such intent."

D. All expenses of the above-noted insurance and bond shall be paid by the Grantee.

E. The insurance policies mentioned herein shall contain an endorsement stating the following:

Should any policies of insurance be cancelled or coverages be reduced, before the expiration date of said policies of insurance, the issuer shall deliver sixty (60) days advance written notice to the Borough.

F. Neither the provisions of this Ordinance nor any insurance accepted by the Borough pursuant hereto, nor any damages recovered by the Borough thereunder, shall be construed to excuse faithful performance by the Grantee and/or limit the liability of the Grantee under the Ordinance issued hereunder and/or for damages, either to the full amount of the bond or otherwise.

SECTION 7. ENFORCEMENT AND TERMINATION OF ORDINANCE

7.1 GENERAL. In addition to all other rights, remedies and powers reserved and/or retained by the Borough under this Rights of Way Ordinance or otherwise, the Borough reserves the right to bring a civil action to collect any sums due to Borough by Grantee and/or forfeit or revoke all privileges of Grantee under this Ordinance in the event of willful or repeated violation of this Ordinance.

7.2 PENALTIES. Any Person which commits or suffers the violation of this Ordinance, shall, upon being found liable in a civil enforcement proceeding commenced by the Borough, pay a fine of Six Hundred Dollars (\$600.00) plus all court costs, including reasonable attorneys' fees incurred by the Borough. A separate offense shall arise for each day or portion thereof in which a violation is found to exist or for each section of this Ordinance which is found to have been violated. In addition, the Borough also may enforce this Ordinance by an action brought in equity.

SECTION 8. MISCELLANEOUS PROVISIONS

8.1 COMPLIANCE WITH APPLICABLE LAWS AND ORDINANCES. The Grantee shall at all times be subject to the exercise of the police power of the Borough. The Grantee shall comply with all lawful ordinances, codes, laws, rules and regulations of the Borough, County of Bucks, Commonwealth of Pennsylvania, and the United States of America which are now in effect or hereafter enacted.

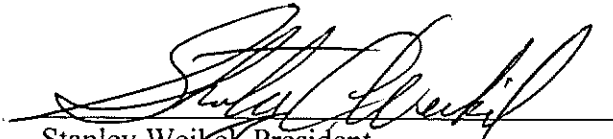
8.2 CONFLICT. Whenever the requirements of this Ordinance are in conflict with other requirements of the ordinances of the Borough of Richlandtown, the most restrictive, or those imposing the highest standards shall govern. Privileges granted by this Ordinance do not constitute a waiver or impairment of the rights of the Borough at law or equity now or henceforth existing to proceed versus Grantee for enforcement of the Ordinance or violation of this Ordinance or ordinances of the Borough.


8.3 EFFECTIVE DATE. This Ordinance shall become effective five (5) days after the date of its within enactment.

8.4 SEVERABILITY. The provisions of this Ordinance are severable. If any section, clause, sentence, part or provision thereof shall be held illegal, invalid or unconstitutional by any court of competent jurisdiction, such decision of the court shall not affect or impair any of the remaining sections, clauses, sentences, parts of provisions of this Ordinance. It is hereby declared to be the intent of the Board of Supervisors that this Ordinance would have not been adopted if such illegal, invalid or unconstitutional section, clause, sentence or part of a provision had been included herein.

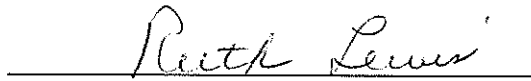
ENACTED and ORDAINED this 8TH day of SEPT, 2008.

RICHLANDTOWN BOROUGH COUNCIL:


Stanley Weikel, President


Lloyd Ewer, Mayor

Attest:


Secretary

SEAL

ENACTED this 8TH day of SEPT, 2008.