

ORDINANCE NO.936

AN ORDINANCE OF THE CITY OF BENTON CITY, WASHINGTON, GRANTING TO BENTON COUNTY PUBLIC UTILITY DISTRICT NO. 1, A CONTINUING NONEXCLUSIVE FRANCHISE FOR THE TRANSMISSION OF ELECTRICAL ENERGY WITHIN THE CITY OF BENTON CITY, WASHINGTON; AND EXTENDING ORDINANCE NO. 710, AND RATIFYING ITS TERMS FROM THE DATE OF ITS EXPIRATION, TO THE EFFECTIVE DATE OF THIS ORDINANCE

WHEREAS, the City of Benton City is authorized pursuant to RCW 35A.11.020 to regulate the use of its streets, public right-of-ways, and specifically pursuant to RCW 35A.47.040, grant, permit, and regulate nonexclusive franchises for the use of public right-of-ways; and

WHEREAS, Public Utility District No. 1 of Benton County (hereinafter referred to as "PUD"), is a provider of electrical energy and broadband serving the citizens of the City of Benton City, Washington (hereinafter referred to as "City"), and has faithfully performed under the terms of a nonexclusive franchise granted by Ordinance No. 710; and

WHEREAS, such franchise having expired in 2005, however, the parties have continued to operate under the terms and conditions of the grant of franchise; and

WHEREAS, the parties wish to ratify the rights and responsibilities created under such franchise up to the effective date of a newly granted franchise provided herein; and

WHEREAS, the City and the PUD have negotiated a new franchise agreement as provided herein; and

WHEREAS, the City has conducted a public hearing and reviewed the application, and having determined that the franchise's terms and conditions contained herein are in the best interest of the citizens of the City of Benton City. NOW, THEREFORE,

THE CITY COUNCIL OF THE CITY OF BENTON CITY, WASHINGTON, DO ORDAIN AS FOLLOWS:

1. **Ratification of Expired Franchise.** The City does hereby ratify the terms and conditions of the grant to PUD of a nonexclusive franchise for the distribution of electrical energy and broadband services within the City of Benton City, Washington, in accordance with the terms and conditions contained in Ordinance No. 710, and ratify that such terms and conditions shall be binding upon the parties from the date of its expiration on August 15, 2005, until the effective date of this Ordinance as provided below.
2. **Grant of Current Franchise.** The City does hereby grant to PUD, a right and franchise to construct, maintain, and operate, in, over, upon, and under the present and future streets, alleys, bridges, highways, and right-of-way within the present or future limits of the City, electrical power distribution and fiber-optic lines, and all necessary appurtenances thereto, for the purpose of transmitting electrical power and broadband services.
3. **Nonexclusive Right.** The right and franchise hereby granted shall be nonexclusive and the City expressly reserves the right, at any time during the term of the franchise hereby granted, to grant rights or franchises to other persons, corporations, agencies, or entities, as well as the right in its own name as a municipality to use the City's streets for the transmission and location of other utility services and other uses not incompatible therewith.

4. **Franchise Term.** This franchise term shall commence upon the effective date of this Ordinance and subsequent acceptance of such Ordinance and franchise by the PUD. This franchise is granted upon the expressed condition that the PUD, within thirty (30) days after the adoption of this Ordinance, shall file with the City Clerk, a written acceptance of the same. If PUD fails to do so within the timeframe above, this Ordinance and franchise shall be null and void. This franchise shall be for a period of ten (10) years and will automatically renew for successive periods of five (5) years each unless cancelled at the end of a term by either party by written notice to the other party no less than 180 calendar days prior to the expiration of the initial ten (10) year term, or the then current successive term.
5. **Construction, Maintenance and Operation of Utility.** The locations and methods of installation, operation and maintenance of all poles, lines, wires, fixtures, underground conduits, utility structures and required appurtenances (hereinafter referred to as "facilities") shall be subject to the following conditions:
- A. All facilities shall be constructed and maintained so as to avoid the creation of a safety hazard or unreasonably interfere with the use of streets and adjacent properties.
 - B. All facilities, construction, operation, and maintenance shall comply with all applicable codes and ordinances regulating construction and use of public ways.
 - C. The PUD shall, before commencing any construction in any public ways, comply with all regulations of Title 19.122 RCW (the One Call Locator Service), and shall as the facility operator (as defined by RCW 19.122.020) fulfill all the facility operator duties of excavation as required by RCW 19.122.030; and, except for negligence solely caused by the City, or its agent, defend and indemnify the City for any damages incurred arising from the PUD or its agent's violation of RCW 19.122.
 - D. Within ten (10) days of written request from the City, PUD shall furnish the City with information sufficient to demonstrate:
 - 1. That PUD has complied with all requirements of applicable Codes, Ordinances and Regulations and this franchise;
 - 2. That all utility taxes to the City in connection with this franchise have been properly collected and paid; and
 - 3. All books, records, maps and other documents, maintained by the PUD with respect to its facilities within the public ways and upon City property, shall be made available for inspection by the City at reasonable times and intervals.
 - E. PUD shall provide, upon request by the City, an accurate map showing the approximate location of all PUD facilities within the City limits.
 - F. To the extent provided by law, all facilities shall be constructed, installed and located in accordance with the following terms and conditions, unless otherwise specified in writing, by the City:
 - 1. Facilities shall be installed within an existing underground duct or conduit whenever excess capacity exists within such utility facility;
 - 2. Overhead facilities shall be installed on pole attachments to existing utility poles if surplus space is available.
 - 3. Whenever existing facilities are located underground within the public ways of the City, the PUD, with permission to occupy the same way, must also locate its electrical facilities underground; and

4. PUD acknowledges that the City desires to promote a policy of undergrounding of facilities within the City of Benton City. The City acknowledges that PUD provides electrical services on a non-preferential basis subject to and in accordance with regulations. Subject to those conditions, PUD agrees that it will cooperate and participate with the City in constructing all new facilities required for individual electric customer service from and after the effective date of this Ordinance, eligible for undergrounding, using underground cable; provided that installation of cabinet enclosed surface mounted switches, transformers, and other similar equipment will be permitted and installed pursuant to the provisions of any applicable City code and not in conflict or inconsistent with the terms of this franchise or other applicable regulations. "Eligible for undergrounding" means lines operating at a voltage of 35 kilovolts or less and that are required for residential developments and subdivisions or individual and multi-tenant commercial developments. The PUD reserves the right to construct main feeders or laterals installed for the common good using overhead construction.
 5. Whenever any existing facility is relocated underground within a public way of the City, PUD shall occupy the same public way, and shall, at its own expense, relocate its electrical facilities underground other than in situations involving the PUD's main feeders or laterals in which case the conversion to underground facilities will be at the PUD's discretion. Such relocation shall be made concurrently to minimize the disruption of the public ways.
 6. In the event the City requires relocation of an existing facility within the right-of-way, the City shall provide notice as soon as practical of the need of relocation and the allocation of costs shall be in accordance with RCW 35.99.060.
- G. Neither PUD or any person acting on PUD's behalf, shall commence any nonemergency work in or about the public ways of the City, other ways, or upon City property within ten (10) working days advance notice to the City.
 - H. The PUD, to the extent possible, shall cooperate with the City, and other franchise PUDs to schedule and coordinate construction in the public ways to minimize public inconvenience, disruption or damages.
 - I. PUD shall construct, operate and maintain its facilities in good and safe condition and in a manner that applies with all applicable federal, state and local requirements and in accordance with good electrical practices.
 - J. Upon written notice from the City, PUD shall within fifteen (15) working days provide a plan and schedule to the City to temporarily or permanently remove, relocate, change, or alter the position of any of the PUD's facilities within the public ways or upon public property at the PUD's expense whenever such action is reasonably necessary for:
 1. The construction, repair, maintenance, or installation of any City or other public improvement in or upon the public ways or City property; or
 2. The operations of the City or other governmental entity in or upon the public ways or City property.
6. **Temporary Removal.** Whenever any person shall have obtained permission from the City to use any street or public way for the purpose of moving any oversized building, structure or vehicle, PUD, upon fourteen (14) days advance notice from the City, shall raise or temporarily remove, at the expense of person moving such oversized building, structure or vehicle, any of the PUD's facilities which may obstruct its movement; provided that the

person moving the oversized building, structure or vehicle shall comply with all reasonable requirements of the City for such movement.

7. **Removal of Unauthorized Facilities.** Within thirty (30) days following written notice from the City, PUD shall, at its own expense, remove unauthorized facilities from the public way of the City or on City property. An unauthorized facility subject to removal shall occur:
 - A. Upon abandonment of a facility.
 - B. If the facility was constructed or installed without the prior grant of franchise or required permits from the City or at the authorized location.

The City retains the right and privilege to move or remove a facility located within the public ways of the City or upon City property, as the City may determine to be necessary, appropriate or useful response to any public help or safety emergency.

If the PUD is required to relocate, change or alter any facility constructed, operated or maintained hereunder and fails to do so, the City may cause such work to occur and charge the PUD for the reasonable costs incurred.

8. **Restoration of Public Ways and City Property.**
 - A. When PUD, or any person acting on its behalf, does any work in or affecting a public way, other ways or City property, it shall, at its own expense, promptly remove any obstructions therefrom and restore such ways or property to as good a condition as existed before the work was undertaken, unless otherwise directed by the City.
 - B. If weather or other conditions cannot permit the complete restoration required by this Section, the PUD shall temporarily restore the affected ways or property. Such temporary restoration shall be at the PUD's sole expense and the PUD shall promptly undertake and complete the required permanent restoration when the weather or other conditions the longer prevent such permit restoration.
 - C. The PUD shall take all reasonable safety precautions, and comply with all safety regulations necessary to provide for the safety of all members of the general public and to prevent injury or damage to any person, vehicle or property by reason of such work in or affecting such ways or property.

9. **City Use of Facilities.** The City shall be permitted, without charge therefore, and at the City's sole expense, to attach communication, traffic control, monitors, and emergency services devices to poles of PUD as space may be available subject to the terms and conditions (other than annual rental fees) of the PUD's standard pole-attachment license agreement and the City's obligation to assume all risk incident to the installation and operation of such device.

10. **Coordination and Shared Excavations.**
 - A. PUD and the City shall exercise all best reasonable efforts to coordinate any construction work that either may undertake within the City so as to promote the orderly and expeditious performance and completion of such work as a whole. Such efforts shall include, at a minimum, reasonable and diligent efforts to keep the other party and other utilities which may be affected by the work, informed of its intent to undertake such construction work. PUD and the City shall further exercise best reasonable efforts to minimize any delay or hindrance to any construction work undertaken by themselves, other utilities, or third parties.

- B. If either PUD or the City shall cause excavations to be made within the City, the party causing such excavation shall afford the other, upon receipt of a written request to do so, an opportunity to use such excavation, provided that:
1. Such joint use shall not unreasonably delay the work of the party causing the excavation to be made; and
 2. Such joint use shall be arranged and accomplished on the terms and conditions satisfactory to both parties.
11. **Vacation of Public Ways.** The City reserves the right to vacate any public way which may be subject to this franchise. If PUD has facilities in such public way, the City shall reserve an easement for PUD.
12. **Records.**
- A. PUD will manage all of its operations in accordance with a policy of keeping its documents and records open and accessible to the City. The City will have access to, and the right of inspection, any documents and records of PUD and its affiliates that are reasonably necessary for the enforcement of this franchise, or to verify PUD's compliance with the terms and conditions of this franchise. PUD will not deny the City access to any of the PUD's records on the basis that the PUD's documents or records are under the control of any affiliate or third party. PUD will take all necessary steps to assist the City in complying with the Public Records Act (RCW Chapter 42.56), including providing the City with a written statement identifying how long it will take to produce records not immediately available, and for any records that are not disclosed in whole or in part, a written statement from PUD's legal counsel stating the authority upon which the documents are withheld.
 - B. All documents and records maintained by PUD shall be made available for inspection by the City at reasonable times and intervals; provided, however, that nothing in this section shall be construed to require PUD to violate State or Federal law regarding subscriber privacy, nor shall this section be construed to require PUD to disclose proprietary or confidential information without adequate safeguards for its confidential or proprietary nature.
 - C. One copy of documents and records requested by the City will be furnished to the City at the cost of the PUD. If the requested documents and records are too voluminous or for security reasons cannot be copied or removed, then PUD may request, in writing, within ten (10) days of the City's request, that the City inspect them at the PUD's local office. If any documents or records of PUD are not kept in the local office, and/or are not made available in copies to the City, and if the City determines that an examination of such documents or records is necessary or appropriate for the enforcement of this franchise, or to verify PUD's compliance with the terms and conditions of this franchise, then all reasonable travel and related costs incurred in making such examination shall be paid by PUD.
13. **Indemnification.**
- A. PUD shall indemnify, defend and hold the City, its agents, officers or employees harmless from and against any and all claims, demands, liability, loss, cost, damage or expense of any nature whatsoever including all costs and attorneys' fees, made against the City, its agents, officers or employees on account of injury, harm, death or damage to persons or property which is caused by, in whole or in part, and then only to the extent of, the willfully tortuous or negligent acts or omissions of PUD or its agents, servants, employees, contractors, or subcontractors in the exercise of the rights

granted to PUD by this franchise. Provided, however, such indemnification shall not extend to that portion of any claims, demands, liability, loss, cost, damage or expense of any nature whatsoever including all costs and attorneys' fees caused by the negligence of the City, its agents, employees, contractors or subcontractors.

- B. PUD's indemnification obligations pursuant to this Section shall include assuming potential liability for actions brought by PUD's own employees and the employees of PUD's agents, representatives, contractors, and subcontractors even though PUD might be immune under Title 51 RCW from direct suit brought by such employees. It is expressly agreed and understood that this assumption of potential liability for actions brought by the aforementioned employees is limited solely to claims against the City arising by virtue of PUD's exercise of the rights set forth in this franchise. The obligations of PUD under this section has been mutually negotiated by the parties hereto, and PUD acknowledges that the City would not enter into this franchise without PUD's waiver thereof. To the extent required to provide this indemnification and this indemnification only, PUD waives its immunity under Title 51 RCW as provided in RCW 4.24.115.
- C. In the event any matter (for which the City intends to assert its rights under this Section) is presented to or filed with the City, the City shall promptly notify PUD thereof and PUD shall have the right, at its election and as its sole costs and expense, to settle and compromise such matter as it pertains to PUD's responsibility to indemnify, defend and hold harmless the City, its agents, officers or employees. In the event any suit or action is started against the City based upon any such matter, the City shall likewise promptly notify PUD thereof, and PUD shall have the right, at its election and at its sole cost and expense, to settle and compromise such suit or action, or defend the same at its sole cost and expense, by attorneys of its own election, as it pertains to PUD's responsibility to indemnify, defend, and hold harmless the City, its agents, officers or employees.

14. Insurance.

- A. PUD shall procure and maintain for the duration of the franchise, insurance, or provide self-insurance, against all claims for injuries to persons or damages to property which may arise from or in connection with the exercise of the rights, privileges and authority granted hereunder to PUD, its agents, representatives, or employees. PUD shall provide evidence of self-insurance and/or an insurance certificate, together with an endorsement naming the City, its officers, elected officials, agents, employees, representative, engineers, consultants and volunteers as additional insureds, to the City for its inspection prior to the commencement of any work or installation of and facilities pursuant to this franchise, and such self-insurance and/or insurance certificate shall evidence the following minimum coverages:
 - 1. Comprehensive general liability insurance including coverage for premises - operations, explosions and collapse hazard, underground hazard and products completed hazard, written on an occurrence basis, with limits not less than:
 - (a) \$2,000,000 for bodily injury or death to each person;
 - (b) \$2,000,000 for property damage resulting from any one accident; and
 - (c) \$2,000,000 for general liability.
 - 2. Automobile liability for owned, non-owned and hired vehicles with a limit of \$2,000,000 for each person and \$2,000,000 for each accident.

3. Worker's compensation within statutory limits and employer's liability insurance with limits of not less than \$2,000,000.

B. Any deductibles or self-insured retentions must be declared to the City. Payment of deductible and self-insured retentions shall be the sole responsibility of PUD. The insurance certificate required by this Section shall contain a clause stating that coverage shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

C. PUD's insurance shall be primary insurance with respect to the City, its officers, officials, employees, agents, consultants, and volunteers. Any insurance maintained by the City, its officers, officials, employees, consultants, agents, and volunteers shall be in excess of PUD's insurance and shall not contribute with it.

D. In addition to the coverage requirements set forth in this Section, the certificate of insurance shall provide that:

"The above described policies will not be cancelled before the expiration date thereof, without the issuing company giving sixty (60) days written notice to the certificate holder."

In the event of said cancellation or intent not to renew, PUD shall obtain and furnish to the City evidence of replacement insurance policies meeting the requirements of this Section by the cancellation date.

15. **Assignment or Transfer of Franchise.** To the extent permitted by Federal or State law, the PUD's right, title or interest in an approval franchise granted hereunder may not be sold, transferred, assigned, or encumbered, other than to an entity controlling, controlled by, or under common control with the PUD, without the prior consent of the City. Provided, that consent by the City will be unreasonably denied, conditional, or withheld. No consent is required for a transfer in trust, by mortgage, by other security interest, or by assignment of any rights, title, or interest in the PUD, its equipment or facilities in order to secure indebtedness.

16. **Default.** If PUD shall fail to perform or comply with any of the obligations and requirements imposed by this franchise, after receipt of written notice from the City specifying the nature of the default and demanding that such default be remedied within a reasonable time to be fixed in such notice, the right and franchise granted herein may be terminated and annulled by the City Council, after reasonable opportunity for PUD to be heard and appropriate termination is made with respect to such alleged default.

17. **Dispute Resolution.** In the event of a dispute regarding the enforcement, breach, default, or interpretation of this franchise, the Chief Executive Officer of the City, represented by the City Mayor, and the Chief Executive Officer of the PUD, shall first meet in a good faith effort to resolve such dispute. In the event the dispute cannot be resolved by agreement of the parties, said dispute shall be resolved by arbitration pursuant to RCW 7.04A, as amended, with both parties waiving the right of a jury trial de novo, with venue being placed in Benton County, Washington. The substantially prevailing party shall be entitled to its reasonable attorney fees and costs as additional award and judgment against the other.

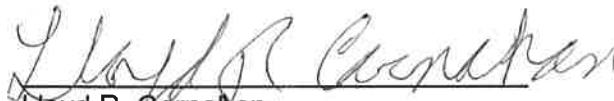
18. **Amendments to Franchise.** This franchise may be amended only by mutual agreement thereto, set forth in writing in the form of a City Ordinance, signed by both parties, which specifically states that it is an amendment to this franchise and is approved and executed in accordance with the laws of the State of Washington. Without limiting the generality of the foregoing, this franchise (including, without limitation to the sections addressing

indemnification and insurance) shall govern and supersede and shall not be changed, modified, deleted, added to, supplemented or otherwise amended by any permit, approval, license, agreement or other document required by or obtained from the City in conjunction with the exercise (or failure to exercise) by PUD of any and all of its rights, benefits, privileges, obligations or duties in and under this franchise, unless such permit, approval, license, agreement or other document specifically:

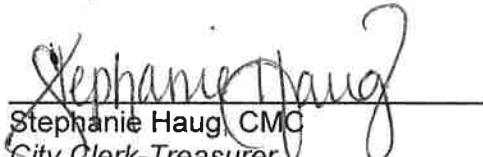
- A. References this franchise; and
- B. States that it contains terms and conditions which change, modify, delete, add to, supplement or otherwise amend the terms and conditions of this franchise.

18. Effective Date. This Ordinance shall be effective on the 1st day of September, 2014.

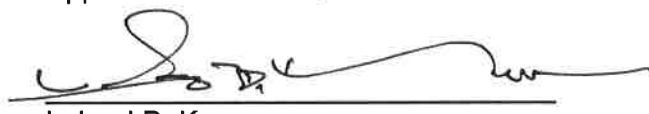
PASSED by the City Council of the City of Benton City, Washington, and approved as provided by law this 19 day of August, 2014.


Lloyd R. Carnahan
Mayor

Attest:

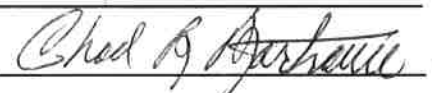

Stephanie Haug, CMC
City Clerk-Treasurer

Approved as to Form:


Leland B. Kerr
City Attorney.

Accepted this 9th day of September, 2014, subject to applicable Federal, State and local law.

Benton County Public Utility District No. 1

Signature: 

Print Name: Chad B. Bartram

Title: General Manager