

ORDINANCE NO: _____

AN ORDINANCE GRANTING A NON-EXCLUSIVE ELECTRIC UTILITY FRANCHISE TO PACIFIC POWER, AND FIXING TERMS, CONDITIONS AND COMPENSATION OF SUCH FRANCHISE.

WHEREAS, the City of Bend ("City") is authorized by state statutes, its charter, and ordinances to grant non-exclusive franchises to Persons desiring to occupy Rights of Way and Public Places within the City.

WHEREAS, Pacific Power is an Oregon corporation that owns, maintains, and operates, in accordance with regulations promulgated by the Public Utility Commission ("PUC"), an electric energy utility system and desires to install, operate, and maintain its Electric Facilities in Rights of Way in the City.

WHEREAS, the purposes of this franchise are to: establish reasonable regulations applicable to the construction, operation and maintenance of Electric Facilities in, along, across, under and over City Right of Way and Public Places and the provision of Services within the City; protect the health, safety and welfare of the public in the City; and to limit the City's liability for claims arising from the granting of this franchise and the operations of Grantee thereunder.

WHEREAS, the City agrees to grant a franchise to Grantee under the terms and conditions provided in this ordinance.

WHEREAS, the existing franchise expires on May 20, 2007

NOW, THEREFORE, THE CITY OF BEND ORDAINS AS FOLLOWS:

1. Definitions and Explanations.
 - 1.1 As used in this ordinance the following words and terms have the meaning stated in this section. Any words not defined in this franchise that are defined by the Bend Code shall have the meaning provided by the Bend Code.
 - 1.2 "Bridge" includes a structure erected within the City to facilitate the crossing of a river, stream, ditch, ravine or other place, but does not include a culvert.
 - 1.3 "City" means the City of Bend and the areas within its boundaries, including its boundaries as extended in the future.
 - 1.4 "Council" means the Bend City Council.
 - 1.5 "Grantee" means Pacific Power, its successors and assigns.

- 1.6 “Electric Facilities” includes Grantee’s electric energy transmission and distribution facilities, poles, wires, meters, fixtures, circuits, connections and all attachments, appurtenances, and all accessories necessary and incidental thereto located within any Public Place or Rights of Way, whether the facilities are located above or below ground.
- 1.7 “Gross Revenue” shall be defined as any revenue earned by Grantee within the corporate limits of the City of Bend, after adjustment for the net write-off of uncollectible accounts, from the performance of the utility business; and from the use, rental or lease of operating facilities of the utility. Unless otherwise provided in this franchise, there shall be no deduction on account of the cost of the commodity furnished or sold, the cost of materials used, labor costs, interest, discount, delivery cost, taxes or other expense. Gross revenue does not include revenue paid directly by the United States of America or its agencies.
- 1.8 “Person” includes an individual, corporation, association, firm, partnership and joint stock company.
- 1.9 “Public Place” includes any City-owned property that is open to the public and that is not a Right of Way, and includes public squares and parks.
- 1.10 “Right of Way” means the space in, upon, above, or under the public streets, roads, highways, lanes, courts, ways, alleys, boulevards, sidewalks, bicycle lanes, Bridges, and places used or intended to be used by the general public for travel as the same now or may hereafter exist, that the City has the right to allow Grantee to use.
- 1.11 “Services” means the electric energy transmission, distribution, sales and marketing services provided by Grantee to its customers located within the City.
2. Rights Granted. Subject to the terms, conditions and reservations contained in this ordinance, the City hereby grants to Pacific Power the right, privilege and franchise to:
 - 2.1 Construct, maintain and operate an electric energy utility system within the City.
 - 2.2 Install, maintain and operate Electric Facilities on and under the Right of Way and, with respect to existing Electric Facilities in Public Places, in Public Places, for distribution of electricity to its customers located within the City and its inhabitants and to other customers and territory beyond the limits of the City; and

- 2.3 Transmit, distribute and sell electricity to customers within the City.
 - 2.4 This franchise does not authorize Grantee to install or use Electric Facilities or other facilities in the Right of Way for any other purposes. This franchise does not authorize Grantee to install Electric Facilities in Public Places not currently occupied by Grantee's Electric Facilities, unless Grantee first obtains an easement or other necessary right to occupy the land.
3. Use of Right of Way/Construction and Location.
- 3.1 Grantee shall comply with Bend Municipal Code prior to commencing any construction, installation, extension, removal, relocation, or maintenance of any Electric Facilities in the Right of Way or any Public Place. Compliance with all City Code requirements includes, but is not limited to, compliance with Bend Code Sections 2.400 through 2.432. Prior to commencing all such work in any Public Place, Grantee shall first obtain permission and permits from the City to do so and shall comply with all permitting requirements the City may impose on such work, use or occupation. Grantee will comply with all City engineering standards and specifications in effect at the time the work is performed for all future work under this franchise. In the process of obtaining permits from City, the location of the proposed construction, installation, extension, removal, relocation, or maintenance of Grantee's Electric Facilities is subject to approval by the City Engineer and shall not be undertaken in such a way so as to interfere unreasonably with the use by the City and the public of the Right of Way, any Public Place, or any other public improvement.
 - 3.2 Where protection of the public health and safety requires emergency work to be performed before a City permit can be reasonably obtained, Grantee may proceed with such work, provided such work is performed in accordance with all City standards and specifications, and provided that Grantee obtain a permit from the City for such work as soon as practical after the work is commenced. Failure to comply with all requirements of the Bend Code, or performance of work under this section where no real emergency exists shall subject Grantee to the penalties provided by Bend Code Section 2.432. City shall have, in addition to the penalties provided in its code, all other remedies provided by law.
 - 3.3 Grantee or its contractor may prune all trees and vegetation which overhang a public Right-of-Way, property or place, whether such trees or vegetation originate within or outside said Right-of-Way, property or place, in such manner and to such extent as will prevent the branches or limbs or other parts of such trees or vegetation from growing within limits specified in the "Oregon Public Utility Commission Staff Policy on Tree and Power Line Clearances" and consistent with ORS 758.280-758.286.

Such pruning shall comply with the *American National Standard for Tree Care Operation (ANSI A300)* and be conducted under the direction of an arborist certified with the International Society of Arboriculture. Prior to removal of any trees planted in the Right-of-Way, Grantee shall obtain written approval from the City, which approval may be withheld by the City in its reasonable discretion. A growth inhibitor treatment may be used for trees and vegetation species that are fast-growing and problematic.

4. Duration.

4.1 This franchise is granted for a period of 10 years from and after the effective date of this ordinance, provided that Grantee has provided unconditional written acceptance in accordance with Section 21. This franchise shall expire on the last day of the 10 year period unless extended or modified by the parties in writing.

4.2 Either party, by written notice delivered not less than 90 days, nor more than one year, in advance of the termination date of this Agreement, may request renewal, extension or modification of the Agreement, and both parties agree to negotiate in good faith toward a renewal, extension or modification of the Agreement in a timely manner.

5. Franchise Not Exclusive. This franchise is not exclusive, and shall not be construed as a limitation on the City in:

5.1 Granting rights, privileges and authority to other Persons similar to or different from those granted by this ordinance;

5.2 Constructing, installing, maintaining or operating any City-owned public utility.

5.3 This franchise is subject to all deeds, easements, dedications, conditions, covenants, restrictions, encumbrances, and claims of title of record that may affect the Right of Way or Public Places. Nothing in this franchise shall be deemed to grant, convey, create, or vest in Grantee a real property interest in land, including any fee, leasehold interest, or easement.

6. Public Works and Improvements Not Affected by Franchise. The City reserves the right to:

6.1 Construct, install, maintain and operate any public improvement, work or facility in, over or under any Right of Way or Public Place;

6.2 Perform or authorize or direct the performance of any work that the City may find desirable or convenient in, over or under any Right of Way or Public Place;

- 6.3 Vacate, alter or close any Right of Way or Public Place, provided that the City shall make available to Grantee with alternative Right of Way for the location of its facilities or provide for the preservation of Grantee's rights of use, replacement and maintenance. If Grantee's Electric Facilities must be relocated from a vacated Right of Way, the petitioners of the vacation shall bear the cost of relocation of the Electric Facilities.
 - 6.4 Control or prevent the use of any Public Place by Grantee and require payment of additional compensation for the use of the Public Place in any amount the parties agree is reasonable.
 - 6.5 Exercise any non-regulatory power that the City currently holds, or may hereafter be authorized or granted by the laws of the State of Oregon or the City Charter, except where that power may be preempted or superseded by the constitutions of the United States or the State of Oregon.
 - 6.6 Exercise any regulatory power that is abandoned by the Oregon Public Utility Commission, not vested exclusively by law in any other state regulatory body, and that can be lawfully exercised by the City.
 - 6.7 Whenever the City shall perform or cause or permit to be performed any work in any Right of Way where such work may disturb or interfere with Grantee's Electric Facilities, the City shall, or require its permittee, to notify, in writing, Grantee sufficiently in advance of the contemplated work to enable Grantee to take those measures, including relocation or removal, as may be deemed necessary to protect its Electric Facilities, at its own expense.
 - 6.8 Before installing new underground conduits or replacing existing underground conduits, Grantee shall first notify the City of such work and shall allow the City, at its own expense, to share the trench of Grantee to lay its own conduit therein, provided that such action by the City will not unreasonably interfere with Grantee's Electric Facilities or delay project completion.
7. Service Standards; compliance with Laws.
 - 7.1 The Grantee shall maintain and operate an adequate and safe system for the distribution of electric energy in the City. The Grantee shall use due diligence to maintain continuous and uninterrupted 24-hour a day service which shall at all times conform at least to the standards common in the business and to the standards adopted by state authorities. Under no circumstances shall the Grantee be liable for an interruption or failure of

service cause by act of God, unavoidable accident or other circumstances beyond the control of the Grantee or through no fault of its own.

- 7.2 Grantee shall comply with those rules lawfully prescribed by the Oregon Public Utility Commission with respect to rates to be charged and the conditions, quality, character and standards of service furnished.
- 7.3 Grantee shall comply with all laws, including those of the United States, the State of Oregon, and the Ordinances of the City of Bend.
8. Safety Standards and Work Specifications.
 - 8.1 Grantee's Electric Facilities shall be constructed and maintained in good order and condition, in a safe manner, and in accordance with standard engineering practice and all lawful governmental regulations.
 - 8.2 For the purpose of carrying out the provisions of this section, the City may provide such specifications relating thereto as may be necessary or convenient for public safety or the orderly development of the City. The City may amend and add to such specifications from time to time.
9. Street Excavations and Restorations; Moving Buildings.
 - 9.1 Grantee shall comply with the Bend Code, and without limitation, Chapter 2 of the Bend Code, with respect to work in the Right of Way. All work is subject to inspection by the City.
 - 9.2 Whenever it becomes necessary to temporarily rearrange, remove, lower or raise Grantee's aerial Electric Facilities to permit the passage of a building, machinery, or other object, Grantee shall perform the rearrangement upon receipt of written notice from the Persons desiring to move the building, machinery or object. The rearrangement shall not be required unless the City Building Official has approved the structural relocation. The costs incurred by Grantee in making the rearrangements to its aerial Electric Facilities shall be borne by the Persons requesting rearrangement, unless the aerial Electric Facilities are placed or maintained in violation of the applicable PUC rules and regulations and thereby interfere with the movement.
10. Relocation of Facilities; Overhead to Underground Conversion.
 - 10.1 Whenever the City determines that it is necessary to change the location of any Electric Facilities located in a Right of Way or Public Place, the Grantee shall, at its own expense, remove, relocate, and/or alter the Electric Facilities within a reasonable time after receiving written notice to do so from the City. The cost of such removal, relocation and/or alteration

of the Electric Facilities shall be paid by the Grantee, but when the removal, relocation, and/or alteration is required for the convenience or benefit of any Person, governmental agency or instrumentality other than the City, Grantee shall be entitled to reimbursement for the reasonable cost thereof from that Person, agency or instrumentality. The City shall provide the Grantee with timely notice of any anticipated requirement to remove, relocate or alter its Electric Facilities and shall cooperate with the Grantee in the matter of assigning or allocating the associated costs.

- 10.2 If Grantee fails to relocate, remove or alter any Electric Facilities as requested by the City by the date established by the City, the City may cause the Electric Facilities to be removed by qualified contractors at Grantee's sole expense. Upon receipt of demand for payment from the City, Grantee shall promptly reimburse the City for the costs the City incurred.
- 10.3 Grantee shall remove and replace overhead Electric Facilities underground at the request of the City. Cost responsibility shall be allocated in accordance with all applicable Oregon Administrative Rules and a schedule agreed upon by the City and Grantee. The City shall require that each customer served from the existing overhead Electric Facilities shall make all facility changes to the customer's premises in accordance with Grantee's policies and standards necessary to receive service from the underground facilities as soon as they become available.

11. Co-Location.

In consideration for granting this franchise, Grantee grants the right and privilege without payment or charge to the City, but at the City's expense, with prior notice and approval of Grantee, to place and maintain wires, control boxes, and any other necessary equipment as the City may require for fire, police, emergency or other municipal purposes, on Grantee's Facilities placed by Grantee in the Right of Way or Public Places, whether above or underground. All such installations shall be made in a manner so as not to interfere with Grantee's electric energy service and in conformance with good electrical practice, Grantee's standards, and local, state and federal regulations. When safety is an issue, Pacific Power shall not be required to share locations with water or sewer utilities. The City shall not sell or lease its rights under this subsection to any third parties. If City uses Grantee's Facilities in the Right of Way for proprietary purposes, then, in addition to the procedures for co-location described in this paragraph, City and Grantee agree to negotiate in good faith regarding compensation to Grantee for use of such Facilities for proprietary purposes. The parties agree to negotiate such fees in good faith and within a reasonable time. The City shall hold Grantee harmless from all claims or liability for damage that arises out of the City's use of Grantee's Electric Facilities under this subsection.

12. Compensation.

- 12.1 As compensation for the benefits and privileges of this franchise granted by this ordinance, the Grantee shall pay to the City a franchise fee in the amount equal to five percent (5%) of Gross Operating Revenue. Grantee may offset against such compensation the amount of any license, permit or other fees paid to the City in connection with the Grantee's use of the Right of Way when the fee or charge is imposed upon Grantee alone or not under an ordinance or resolution applicable to others in addition to Grantee. Notwithstanding any provision to the contrary, at any time during the term of this Franchise, the City may elect to increase the franchise fee amount as may then be allowed by state law. The City shall provide Grantee with prior written notice of such increase following adoption of the change in percentage by the City. The increase shall be effective sixty (60) days after City has provided such written notice to Grantee.
- 12.2 Acceptance by the City of any payment due under this section shall not be deemed as an accord that the amount paid is the correct amount, nor shall any acceptance of payment be construed as a release of any claim the City may have for additional funds or as a waiver by the City of any breach of this franchise.
- 12.3 Grantee shall also pay any other fees required by City ordinance or the City's Fee Resolution.
- 12.4 Except as provided herein, Grantee is exempt from payment of business license fees required by City ordinance and any other occupation or excise taxes levied by the City against businesses with respect to business operations within the corporate limits of the City, however, Grantee is not exempt from payment of any City imposed fee for service, such as permit fees, land use fees, system development charges, fees imposed by the City fee resolution, and the like.
- 12.5 The franchise fee shall be paid monthly on or before the 20th of each month during the term hereof, and shall be computed upon the gross operating revenue accruing during the previous calendar month or portion thereof. The City license fee shall be paid as required by City ordinance.

13. Books of Account and Reports.

Grantee shall keep accurate books of account at an office in Oregon for the purpose of determining the amounts due to the City under Section 12 of this ordinance. Grantee shall provide City with its customer account data without request each year. The City may inspect the books of account at any time during business hours and may audit the books from time to time, provided that only

payments which occurred during a period of 36 months prior to the date the City notifies Grantee of its intent to conduct an inspection shall be subject to such review. The City may also require Grantee to provide an audit report prepared at Grantee's expense or an audit report prepared by an independent accounting firm prepared at the City's expense, but not more than once per calendar year. The City may require periodic reports from Grantee relating to its operations and revenues within the City.

14. Supplying Maps Upon Request.

The Grantee shall maintain on file, at an office in Oregon, maps and operational data pertaining to its operations in the City. Upon reasonable notice, authorized representatives of the City may inspect the maps and data any time during business hours at an office of the Grantee. Grantee and the City may determine that the location of certain Electric Facilities should be confidential as the public interest may require. In such a case, Grantee is under no obligation to provide records of the location of these facilities to the public and the City shall treat any public record disclosing the location of these facilities as confidential, subject to the provisions of state law and the Oregon Public Records Law. The City shall limit access to any such confidential record to trustworthy employees of the City with a need to know the information set out in the record. The City shall store any such confidential record in a secure and private place and avoid making and distributing copies of the record.

15. Annexation

15.1 Extension of City Limits. Upon the annexation of any territory to the City, the rights granted herein shall extend to the annexed territory to the extent the City has such authority. All Electrical Facilities owned, maintained, or operated by Pacific Power located within any public ways of the annexed territory shall thereafter be subject to all of the terms hereof.

15.2 Notice of Annexation. When any territory is approved for annexation to the City, the City shall, not later than ten (10) working days after passage of an ordinance approving the proposed annexation, provide by certified mail to the Grantee: (a) each site address to be annexed as recorded on county assessment and tax rolls; (b) a legal description of the proposed boundary change; and (c) a copy of the City's ordinance approving the proposed annexation. If notice is not provided within 10 days of the annexation, Pacific Power's obligation to pay franchise fees on revenue generated by service to the annexed property shall begin 10 days after notice is actually provided.

The notice shall be mailed to:

Pacific Power Customer Contact Center

P.O. Box 400
Portland, Oregon 97202-0400

With a copy to:

Pacific Power
Attn: Office of the General Counsel
Suite 1800
825 N E Multnomah
Portland, OR97232

16. No Value in Franchise.

If, during the term hereof, the franchise is terminated, no value or damage of any kind shall be claimed by or allowed to Grantee in respect to the unexpired term of the franchise hereby granted.

17. Indemnification and Insurance.

17.1 Grantee shall indemnify and save harmless the City and its officers, agents and employees from any and all loss, cost and expense arising from damage to property and/or injury to, or death of, Persons due to any wrongful or negligent act or omission of the Grantee, its agents or employees in exercising the rights, privileges and franchise granted under this ordinance, but not arising solely out of or by reason of any negligence or willful misconduct by the City, its officers, agents or employees.

17.2 Grantee shall maintain automobile, comprehensive general liability and property damage insurance that protects Grantee and the City, as well as the City's officers, agents, and employees, from the claims referred to in Section 17.1. The insurance shall provide coverage in the amount not less than two times the City's statutory limit on tort claims, and this amount may be raised by resolution of City. The insurance policies may provide for self-retention or deductibles in reasonable amounts to be approved by the City in advance. The limits of the insurance shall be subject to statutory changes as to maximum limits of liability imposed on municipalities of the State of Oregon during the term of this franchise.

17.3 The insurance shall be without prejudice to coverage otherwise existing and shall name as additional insureds the City and its officers, agents, and employees. Notwithstanding the naming of additional insureds, the insurance shall protect each insured in the same manner as though a separate policy had been issued to each, but nothing in this section shall operate to increase the insurer's liability as set forth elsewhere in the policy beyond the amount or amounts for which the insurer would have

been liable if only one Person or interest had been named as insured. The coverage must apply as to claims between insureds on the policy.

17.4 The insurance policy shall provide that the insurance shall not be canceled or materially altered without thirty (30) days' prior written notice first being given to the City Manager. If the insurance is canceled or materially altered within the term of this franchise, Grantee shall provide a replacement policy with the same terms. Grantee shall maintain continuous uninterrupted coverage, in the terms and amounts required, upon and after the effective date of this franchise.

18. Assignment of Franchise.

This franchise shall not be assigned or transferred without the prior written consent of the City, which consent shall not be unreasonably withheld, conditioned, or delayed, provided the franchise is transferred or assigned to an entity that controls, is controlled by, or is under the common control of the Grantee. If the City consents to an assignment or transfer of the franchise, the transfer or assignment shall not be effective until the assignee or transferee has complied with the requirements in Section 21 and filed a signed acceptance of the terms of this franchise. Notwithstanding anything in this franchise to the contrary, Grantee may mortgage this franchise, together with its Electric Facilities and properties within the City, in order to secure any legal bond issue or other indebtedness of Grantee, with no requirement that the trustees accept this franchise.

19. Termination of Franchise for Cause.

The City may terminate this franchise as provided in this section, subject to Grantee's right to a court review of the reasonableness of such action, upon the willful failure of the Grantee to perform promptly and completely each and every material term, condition or obligation imposed upon it under or pursuant to this ordinance. The City shall provide Grantee written notice of any such failure and the Grantee shall have sixty (60) days from receipt of notice to cure the failure, or if the failure cannot reasonably be cured within sixty (60) days, to commence and diligently pursue curing the failure. If Grantee does not cure the failure within the sixty day period, or does not commence and diligently pursue curing the failure to the City's satisfaction within the 60 day period, then the City Council may declare the franchise terminated.

20. Remedies Not Exclusive, When Requirement Waived.

All remedies and penalties under this ordinance, including termination of the franchise, are cumulative, and the recovery or enforcement of one is not a bar to the recovery or enforcement of any other remedy or penalty. The remedies and penalties contained in this ordinance, including termination of the franchise, are

not exclusive and the City reserves the right to enforce the penal provisions of any ordinance or resolution and to avail itself of any and all remedies available at law or in equity. Failure to enforce shall not be construed as a waiver of a breach of any term, condition or obligation imposed upon the grantee by or pursuant to this ordinance. A specific waiver of a particular breach of any term, condition or obligation imposed upon Grantee by or pursuant to this ordinance shall not be a waiver of any other or subsequent or future breach of the same or of any other term, condition or obligation, or a waiver of the term, condition or obligation itself.

21. Acceptance; Effective Date.

The Grantee shall, within sixty (60) days from the date this ordinance takes effect, file with the City its written unconditional acceptance of this franchise, and if the Grantee fails so to do, this ordinance shall be void. This franchise shall be effective the later of 30 days after passage by the City Council and Grantee's acceptance. Grantee shall continue paying the franchise fee required by Bend Code 3.112 during any time a franchise agreement is not in effect.

22. Miscellaneous Provisions.

22.1 Severability of Provisions. If any one or more of the provisions of this ordinance is held by a court of competent jurisdiction to be invalid or unenforceable or pre-empted by federal or state laws or regulations, such provision(s) shall be deemed severable from the remaining provisions of this ordinance and shall not affect the legality, validity, or constitutionality of the remaining portions of this ordinance to the extent consistent with the original intent of the parties.

22.2 Governing Law and Choice of Forum. This ordinance and the franchise granted under it shall be governed and construed by and in accordance with the laws of the State of Oregon without reference to its conflicts of law principles. If suit is brought by a party to this franchise, the parties agree that trial of such action shall be vested exclusively in the state courts of Oregon, County of Deschutes, or in the United States District Court for the District of Oregon.

22.3 Representations and Warranties. Each of the parties to this franchise represents and warrants that it has the full right, power, legal capacity, and authority to enter into and perform the parties' respective obligations hereunder and that such obligations shall be binding upon such party without the requirement of the approval or consent of any other Person or entity in connection herewith.

22.4 No Third Party Beneficiaries. Nothing in this ordinance shall be construed or applied to create rights in or grant remedies to any third party as a

beneficiary of this franchise or any duty or obligation established in this franchise.

- 22.5 Independent Contractor Status. When performing under this franchise, Grantee shall be an independent contractor and not an agent, employee or representative of the City in the performance of work pursuant to this franchise. No term or provision of this franchise, or act of the Grantee or its agents shall be construed as changing that status.
- 22.6 Amendment of Franchise. This franchise may not be amended, except pursuant to a written instrument signed by Grantee and approved by the City Council.
- 22.7 Entire Agreement. This franchise contains the entire understanding between the parties with respect to the subject matter herein. There are no representations, agreements, or understandings (whether oral or written) between or among the parties relating to the subject matter of this franchise that are not fully expressed herein.

Read for the first time the ____ day of _____, 2007.

Read for the second time the ____ day of _____, 2007.

Placed upon its passage the ____ day of _____, 2007.

YES:

NO:

ABSTAIN:

Authenticated by the Mayor the ____ day of _____, 2007.

Mayor

Attest:
