

ORDINANCE NO. 4659

AN ORDINANCE OF THE CITY OF ELLENSBURG, WASHINGTON, GRANTING AN ELECTRICAL UTILITY FRANCHISE AND UTILITY EASEMENT TO KITTITAS COUNTY PUBLIC UTILITY DISTRICT NO. 1

WHEREAS, Kittitas County Public Utility District No. 1, a Washington corporation (“PUD”) provides electric power and energy to parts of unincorporated Kittitas County adjacent to the City of Ellensburg, Washington (the “City”); and

WHEREAS, PUD’s established electrical system providing power and energy to certain unincorporated areas surrounding the City requires the installation, operation and maintenance of power poles and other related facilities to be located within the public ways of the City; and

WHEREAS, the City, pursuant to the provisions of RCW 35A.11.020, RCW 35A.47.040 and RCW 80.32.010 has the authority to regulate power line facilities within public ways and to grant to PUD a utility easement for the use thereof; and

WHEREAS, the City desires to set forth the terms and conditions by which PUD shall use the public ways of the City,

NOW, THEREFORE,

THE CITY COUNCIL OF THE CITY OF ELLENSBURG, WASHINGTON DOES ORDAIN AS FOLLOWS:

Section 1. Grant of Franchise. The City hereby grants to PUD the right, privilege and authority to construct, maintain, operate, upgrade, and relocate its electrical distribution lines and related appurtenances, including underground conduits and structures, poles, wires, guy anchors, vaults, transformers, and communication lines (collectively referred to herein as “Electric Facilities”) in, under, along, over and across certain present and future streets, alleys, public ways and public places (collectively referred to herein as “Public Ways”) within the City as specified in the map attached hereto as Exhibit A (Limits of Franchise Area), for the purpose of supplying and transmitting electric power and energy to inhabitants beyond the corporate limits of the City.

Section 2. Term. The term of this Franchise is for eight (8) years commencing on the date of acceptance by PUD as set forth in Section 3 below.

Section 3. Acceptance by PUD. Within sixty (60) days after the passage and approval of this ordinance, this Franchise may be accepted by PUD by its filing with the City Clerk an unconditional written Acceptance of Franchise thereof on the form appended hereto. Failure of PUD to so accept this Franchise within said period of time shall be deemed a rejection thereof, and the rights and privileges herein granted shall, after the expiration of the sixty (60) day period, absolutely cease, unless the time is extended by ordinance duly passed for that purpose.

Section 4. Non-Exclusive Franchise. The right to use and occupy the Public Ways of the City shall be non-exclusive and the City reserves the right to use the Public Ways for itself or any other entity that provides utility service to City residences; provided, however, that such use shall not unreasonably interfere with PUD's Electric Facilities or PUD's rights as granted herein.

Section 5. City Regulatory Authority. In addition to the provisions herein contained, the City reserves the right to adopt such additional ordinances and regulations as may be deemed necessary in the exercise of its police power for the protection of the health, safety and welfare of its citizens and their properties, and to exercise any other rights, powers, or duties required or authorized, under the Constitution of the State of Washington, the laws of Washington or City ordinance.

Section 6. Indemnification. The City shall in no way be liable or responsible for any loss or damage to property or any injury to any person that may occur in the construction, operation, upgrading, relocation or maintenance by PUD of its Electric Facilities. PUD shall indemnify, defend and hold the City harmless from and against claims, demands, liens and all liability or damage of whatsoever kind on account of PUD's use of the Public Ways within the City, and shall pay the costs of defense plus reasonable attorneys' fees for any claim, demand or lien brought thereunder. The City shall: (a) give prompt written notice to PUD of any claim, demand or lien with respect to which the City seeks indemnification hereunder; and (b) unless in the City's judgment a conflict of interest exists between the City and PUD with respect to such claim, demand or lien; permit PUD to assume the defense of such claim, demand, or lien with counsel satisfactory to the City. If the City unreasonably refuses to allow PUD to assume the defense, PUD shall not be subject to liability for any settlement made without its consent. Notwithstanding any provision hereof to the contrary, PUD shall not be obligated to indemnify, defend or hold the City harmless to the extent any claim, demand or lien arises out of or in connection with any negligent or willful act or failure to act of the City or any of its officers or employees.

Section 7. Expansion of Franchise Area by Annexation.

7.1 If, during the term of this Franchise, the City annexes any territory to the City pursuant to RCW 35A.14.900, the franchise area specified in Exhibit A will be deemed amended to include the annexed territory and the rights granted PUD under this Franchise will extend to the annexed area as follows: (a) all Electric Facilities owned or operated by PUD within any Public Ways of the annexed territory that are integral to PUD's overall system required to serve customers in the unincorporated areas surrounding the City, as identified by PUD from time to time, will be covered by this Franchise for the remainder of the term of this Franchise, and (b) all other Electric Facilities owned or operated by PUD within any Public Ways of the annexed territory will be covered by this Franchise for a temporary period of seven (7) years from the date of the annexation by the City, which period may extend into any renewal period of this Agreement as provided in Section 11.

7.2 Nothing in this Franchise shall apply to, or require PUD to bear any cost or expense in connection with the location or relocation of, any Electric Facilities of PUD existing pursuant to easement or other rights not derived from this Franchise.

Section 8. Plan, Design, Construction and Installation of Company Facilities.

8.1 All Electric Facilities installed or used under authority of this Franchise shall be used, constructed and maintained in accordance with applicable federal, state and city laws, codes and regulations.

8.2 Except in the case of an emergency, PUD shall, prior to commencing new construction or major reconstruction work in the Public Way or street or other public places, apply for a permit from the City. PUD will abide by all applicable ordinances and all reasonable rules, regulations and requirements of the City, and the City may inspect the manner of such work and require remedies as may be necessary to assure compliance. Notwithstanding the foregoing, PUD shall not be obligated to obtain a permit to perform emergency repairs.

8.3 All Electric Facilities shall be located so as to cause minimum interference with the Public Ways of the City and shall be constructed, installed, maintained, cleared of vegetation, renovated or replaced in accordance with applicable rules, ordinances and regulations of the City.

8.4 If, during the course of work on its Electrical Facilities, PUD causes damage to or alters the Public Way or public property, PUD shall (at its own cost and expense and in a manner and within a period of time approved by the City) replace and restore it in as good a condition as existed before the work commenced.

8.5 The City shall have the right without cost to use all poles and suitable overhead structures owned by PUD within Public Ways for City wires used in connection with its fire alarms, police signal systems, or other communications lines used for governmental purposes; provided, however, any such uses shall be for activities owned, operated or used by the City for public purpose; provided further, that PUD shall assume no liability nor shall it incur, directly or indirectly, any additional expense in connection therewith, and the use of said poles and structures by the City shall be in such a manner as to prevent safety hazards or interferences with PUD's use of same. Nothing herein shall be construed to require PUD to increase pole size, or alter the manner in which PUD attaches its equipment to poles, or alter the manner in which it operates and maintains its Electric Facilities. City attachments shall be installed and maintained in accordance with the reasonable requirements of PUD and the current edition of the National Electrical Safety Code pertaining to such construction. Further, City attachments shall be attached or installed only after written approval by PUD which approval shall not be unreasonably withheld, conditioned, or delayed.

8.6 PUD shall have the right to excavate the Public Ways subject to reasonable conditions and requirements of the City. Before installing new underground conduits or replacing existing underground conduits, PUD shall first notify the City of such work and shall allow the City, at its own expense, to share the trench of PUD to lay its own conduit therein, provided that such action by the City will not unreasonably interfere with PUD's Electric Facilities or delay project completion.

8.7 Before commencing any street improvements or other work within a Public Way that may affect PUD's Electric Facilities, the City shall notify PUD.

Section 9. Relocation of Electric Facilities.

9.1 The City reserves the right to require PUD to relocate its Electric Facilities within the Public Ways in the interest of public convenience, necessity, health, safety or welfare at no cost to the City. PUD shall promptly commence the relocation of its Electrical Facilities within a reasonable period of time after written notice to do so from the City. Before requiring a relocation of Electric Facilities, the City shall, with the assistance and consent of PUD, which consent shall not be unreasonably withheld, conditioned or delayed, identify a reasonable alignment for the relocated Electric Facilities within the Public Ways of the City. In the event additional easement or right of way is required for the relocation, the City will obtain the necessary rights at no cost to PUD.

9.2 PUD shall not be obligated to pay the cost of any relocation that is required or made a condition of a private development, unless that development results in construction, widening, or improvement of a roadway on the City's arterial/collector system. If the removal or relocation of facilities is caused directly by an identifiable private development of property in the area, or is made for the convenience of a customer, PUD may charge and collect the reasonable expense of removal or relocation from the developer or customer. For example, PUD can recover relocation costs in connection with that portion of a road widening or realignment where the non-arterial/collector road project is adjacent to the development and is made a condition of or caused by said private development.

Section 10. Trees and Vegetation Management. PUD or its contractor may prune all trees and vegetation which overhang the Public Ways to prevent the branches or limbs or other parts of such trees or vegetation from interfering with PUD's Electrical Facilities. 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. The pruning of any trees located within public rights-of-way shall be subject to the City's Street Tree ordinance, Chapter 4.36 of the Ellensburg City Code.

Section 11. Renewal. Following the initial term of this Franchise as set forth in Section 2, this Franchise shall automatically be renewed for another ten (10) year period unless either party, at least 120 days prior to the expiration of this Franchise, gives the other party: (a) written notice of its desire to renegotiate the terms of this Franchise; or (b) written notice of termination of this Franchise. During any such renegotiation period, the parties shall use good faith efforts to renegotiate a replacement Franchise and PUD shall have the continued right to use the Public Ways of the City as set forth herein.

Section 12. No Waiver. Neither the City nor PUD shall be excused from complying with any of the terms and conditions of this Franchise by any failure of the other, or any of its officers, employees, or agents, upon any one or more occasions to insist upon or to seek compliance with any such terms and conditions.

Section 13. Assignment. PUD shall, upon prior written authorization from the City which shall not be unreasonably withheld, have the right to assign its rights, benefits and privileges in and under this Franchise. Any assignee shall, within (30) days of the date of any assignment, file written notice of the assignment with the City together with its written acceptance of all the terms and conditions of this Franchise. Notwithstanding the foregoing, PUD shall have the right, without such notice or such written acceptance, to mortgage its rights, benefits and privileges in and under this Franchise for the benefit of bondholders.

Section 14. Amendment. At any time during the term of this Franchise, the City, through its City Council, or PUD, may propose amendments to this Franchise by giving thirty (30) days written notice to the other of the proposed amendment(s) desired. Within a reasonable time thereafter, both parties, through their designated representatives, will negotiate in good faith in an effort to agree upon mutually satisfactory amendment(s). No amendment or amendments to this Franchise shall be effective until and unless mutually agreed upon by the City and PUD and formally adopted as an ordinance amendment.

Section 15. Non-Contestability – Breach of Contract. In the event PUD or the City fails to fulfill any of their respective obligations under this Franchise, the City or PUD, whichever the case may be, will have a breach of contract claim and remedy against the other in addition to any other remedy provided by law, provided that no remedy which would have the effect of amending the specific provisions of this Franchise shall become effective without such action which would be necessary to formally amend the Franchise.

SECTION 16. Notices. Unless otherwise specified herein, all notices from PUD to the City pursuant to or concerning this Franchise shall be delivered to the City Clerk's Office, 501 N. Anderson St., Ellensburg, WA 98926 and such other office as the City may advise PUD of by written notice. Unless otherwise specified herein, all notices from the City to PUD pursuant to or concerning this Franchise shall be delivered to PUGET SOUND ENERGY, P. O. Box 90868 EST-11 W, Bellevue WA 98009-0868, and such other office as PUD may advise the City of by written notice.

Section 17. No Third Party Beneficiary. Nothing in this Franchise shall be construed to create any right in or duties to any third party, or any liability to a standard of care with reference to any third party. This Franchise shall not confer any right or remedy upon any person other than the City or PUD. No action may be commenced or prosecuted against either the City or PUD by any third party beneficiary of this Franchise. This Franchise shall not release or discharge any obligation or liability of any third party to either the City or PUD.


Section 18. Governing Law / Venue. This Franchise shall be governed by and construed in accordance with the laws of the state of Washington. The venue and jurisdiction over any dispute related to this Franchise shall be with the Kittitas County Superior Court.

Section 19. Severability. If any section, sentence, paragraph, term or provision hereof is for any reason determined to be illegal, invalid, or superseded by other lawful authority including any state or federal regulatory authority having jurisdiction thereof or unconstitutional, illegal or invalid by any court of common jurisdiction, such portion shall be deemed a separate, distinct,

and independent provision and such determination shall have no effect on the validity of any other section, sentence, paragraph, term or provision thereof, all of which will remain in full force and effect for the term of the Franchise or any renewal or renewals thereof.

Section 20. This ordinance shall take effect and be in force five (5) days after its passage, approval and publication.

The foregoing ordinance was passed and adopted at a regular meeting of the City Council on the 6th day of Jan., 2014.


MAYOR

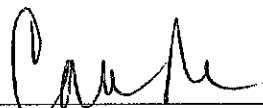
ATTEST: 
CITY CLERK

Approved as to form:


CITY ATTORNEY

Publish: 1-9-14

I, Coreen M. Reno, City Clerk of said City, do hereby certify that Ordinance No. 4659 is a true and correct copy of said Ordinance of like number of said City as the same was passed by said Council, that Ordinance No. 4659 was published as required by law.


COREEN M. RENO, CMC

ACCEPTANCE OF FRANCHISE

In the matter of the agreement between the City of Ellensburg, Washington and the Kittitas County Public Utility District No. 1 ("PUD"), a Washington municipal corporation, for a franchise to construct, operate and maintain facilities in, upon, over under, along, across and through the franchise area of the City of Ellensburg, Washington, Ordinance No. 4659

WHEREAS, the City Council of the City of Ellensburg, Washington, has granted a franchise to PUD, its successors and assigns, by enacting Ordinance No. 4659, bearing the date of 1/6, 2014; and

WHEREAS, a copy of said Ordinance granting said franchise was received by the PUD on 1/7, 2014, from said City of Ellensburg, Kittitas County, Washington.

NOW, THEREFORE, PUD for itself, its successors and assigns, hereby accepts said Ordinance and all the terms and conditions thereof, and files this, its written acceptance, with the City of Ellensburg, Kittitas County, Washington.

IN TESTIMONY WHEREOF said PUD has caused this written Acceptance to be executed in its name by its undersigned General Manager (title) thereunto duly authorized on this 7th day of January, 2014.

Kittitas Public Utility District No. 1

By: [Signature]

Copy received by City of Ellensburg on January 10, 2014

By: [Signature]
City Clerk