

ORDINANCE NO. 1440-20

AN ORDINANCE GRANTING PORTLAND GENERAL ELECTRIC A FRANCHISE FOR FIVE YEARS TO ERECT, CONSTRUCT, MAINTAIN AND OPERATE AN ELECTRIC LIGHT AND POWER SYSTEM WITHIN THE CITY OF TUALATIN

WHEREAS, the City adopted Tualatin Municipal Code (TMC) Chapter 3-6 (Utility Facilities in the Rights-of-Way) to permit and manage reasonable access to the City's rights-of-way for utility purposes;

WHEREAS, TMC 3-6-270 allows the City to enter into franchise agreements to clarify, enhance, expand, waive, or vary the provisions of TMC Chapter 3-6, consistent with applicable state and federal law; and

WHEREAS, the City and PGE negotiated a "short-form" franchise agreement;

THE CITY OF TUALATIN ORDAINS AS FOLLOWS:

**FRANCHISE AGREEMENT**

This Franchise Agreement ("Franchise") grants Portland General Electric Company ("Utility") a non-exclusive franchise for five (5) years to erect, construct, maintain, repair, update and operate an electric light and power system within the City of Tualatin ("City"). Capitalized terms used in this Franchise that are not defined herein shall have the meanings provided in Tualatin Municipal Code ("TMC") Chapter 3-06.

**Section 1. Nature and Term of Franchise.**

(A) As permitted by TMC 3-6-270, the City grants to Utility and its successors and assigns, subject to the terms and conditions in this Franchise, a nonexclusive franchise to erect, construct, repair, maintain, upgrade, and operate an electric light and power system within the City as it now exists or may be extended in the future, including related communication equipment and Utility Facilities. All requirements for Utility to obtain, maintain and renew a License under TMC Chapter 3-06 are hereby waived by City during the Term of this Franchise.

(B) This Franchise also includes the privilege to repair, maintain, upgrade and operate Utility Facilities located in City park and greenway property that are existing as of the effective date of this Franchise. Utility's right to install Utility Facilities in City park property on or after the effective date of this Franchise, and to repair, maintain, upgrade and operate such after-installed Utility Facilities, shall be subject to the City's permitting process. With respect to Utility Facilities located in City park or greenway property existing as of the effective date of this Franchise, and Utility Facilities installed in City park property on or after the effective date of this Franchise in accordance with the City permitting process, City park property shall be subject to the same terms and conditions of this Franchise, unless the provisions of this Franchise conflict with City Charter Article XI, then City Charter Article XI controls.

(C) All Utility Facilities in possession of Utility currently or during the Term (as defined in Section 2(B)) that are located within the Rights-of-Way are covered by this Franchise and the placement thereof is hereby subject to the Rights-of-Way License and this Franchise.

(D) To the extent subject matter is expressly covered under this Franchise and TMC Chapter 3-06, the provisions in this Franchise shall apply rather than the provisions set forth in TMC Chapter 3-06 (e.g., the relocation provisions in Section 5 of this Franchise apply during the Term of this Franchise and the provisions of TMC 3-6-340 shall not apply during the Term of this Franchise). TMC Chapter 3-06 shall govern all subject matter not expressly covered under this Franchise.

## **Section 2. Term and Effective Date.**

**(A) Effective Date.** The effective date of this Franchise shall be thirty (30) days after the City Council passes an ordinance adopting this Franchise and both parties have executed this Franchise.

**(B) Duration of Franchise.** The term of this Franchise, and all rights and obligations pertaining thereto, shall be five (5) years from the effective date of the Franchise (“Term”) unless terminated earlier as provided in this Franchise. The Term shall automatically renew for an additional five (5) years after the expiration of the initial Term; unless either party provides the other party written notice, at least 180 days prior to the expiration of the initial Term, that it does not desire to renew this Franchise.

## **Section 3. Construction.**

**(A) Programmatic Permit.** This Franchise grants PGE a blanket permit for all work related to Street Lighting maintenance and replacement in the Rights-of-Way performed on behalf of or in conjunction with the City. PGE will provide the City with a weekly notification spreadsheet, which itemizes all work locations for the week with associate project information. City staff may still require submission of Traffic Control Plans (including ADA compliant pedestrian accommodations), underground profiles, or any other construction related documentation deemed necessary by the City prior to work being performed by Utility in the Rights-of-Way.

**(B) Construction.** Subject to the NESC, Utility Facilities shall be constructed and maintained in such manner as to not interfere with sewers, water pipes, fiber, or any other property of the City, or with any other pipes, wires, conduits or facilities that may have been laid in the Rights-of-Way by or under the City’s, County’s, or State’s authority. Utility and the City shall work together during any design process affecting the Rights-of-Way to establish suitable locations for Utility’s Facilities using commercially reasonable efforts to minimize the cost impact to both parties. Assuming there is sufficient space in the Rights-of-Way, all poles shall be placed between the sidewalk and the edge of the Rights-of-Way unless the City Engineer approves another location. For any land use development in the City requiring Utility’s services, the City shall notify Utility of such pending land use development and Utility shall notify the City of Utility’s construction standards that are provided to the OPUC and NESC requirements that are applicable to the pending land use development. The City shall impose a

condition on its land use development approval, in accordance with Tualatin Development Code 74.330 and Tualatin Public Works Code Section 207.3.00, that the developer either (i) provide a sufficient location in the Rights-of-Way located in the land use development for Utility Facilities that meet the applicable construction standards and NESC requirements, or (ii) obtain an easement for Utility Facilities that meet the applicable construction standards and NESC requirements.

- (C) **Emergency Repairs.** In the event emergency repairs to Utility's Facilities are necessary, Utility shall as soon as reasonably possible notify the City of the need for such repairs. Utility may immediately initiate such emergency repairs and apply for appropriate permits the next business day or as soon as reasonably possible following discovery of the emergency. If emergency work has been completed by Utility in the Rights-of-Way and the City determines such work was not completed in a City approved location, the City shall notify Utility and provide Utility with sixty (60) days after the emergency passed to reperform the work in a City approved location in the Rights-of-Way.

**Section 4. Excavation/Restoration.** PGE shall not be required, at its expense, to pave a gravel street that was gravel prior to the excavation, nor install sidewalk panels or curbs that did not exist prior to the excavation. In the event that PGE's work is coordinated with other construction work in the Rights-of-Way, the City Engineer may excuse Utility from restoring the surface of the Rights-of-Way, provided that as part of the coordinated work, the Rights-of-Way is restored to City standards as defined in Public Works Construction Code. If a customer of Utility is required to make excavations that are located in the Rights-of-Way pursuant to Utility's tariff on file with the OPUC, the City agrees that Utility shall not be responsible or liable for any failure by such customer to comply with any applicable rules, regulations, or ordinances of the City and/or with City standards.

#### **Section 5. Relocation.**

**(A) Permanent Relocation Required by City and Commission Projects.** This subsection (A) covers permanent relocation of overhead Utility Facilities that will remain overhead, and underground Utility Facilities that will remain underground. When it is necessary or convenient in the interest of the public for a City or a Tualatin Development Commission project, the City has the right to require Utility to change the location of Utility Facilities located in the Rights-of-Way, and unless otherwise agreed Utility shall pay the expenses of the relocation. However, when the City requests a subsequent relocation of all or part of the same Utility Facilities less than one (1) year after the initial relocation that is necessary or convenient for a public project, and not at the request of or to accommodate a third party, the subsequent relocation shall be at the expense of the City. The City will not be responsible for relocation costs if either of the following is true: (1) the project or improvement necessitating the change in location will not be owned by the City or Commission; or (2) the majority of the funding for the project or improvement does not come from the City, state or federal government sources. If Utility fails to remove or relocate such Utility Facilities within ninety (90) days after the date established by the City, which, except in the event of a public emergency,

shall not occur sooner than ninety (90) days after the City provides written notice to remove/relocate to Utility, the City may cause or effect such removal or relocation, performed by a qualified contractor in accordance with applicable state and federal safety laws and regulations and Utility's construction standards as provided to the OPUC, and Utility shall pay that expense.

In the event a public project is delayed and could result in damages to the City, City agrees to use its best efforts to convene a meeting with all parties who potentially could have caused the delay to discuss who is responsible for the delay. City shall provide notice to Utility of anticipated damages as a result of a public project delay as soon as reasonably practicable after City has received notice of such anticipated damages. Unless otherwise agreed to by the parties, Utility will not be liable for any delay damages before the delayed public project is completed. The City shall use commercially reasonable efforts to mitigate any damages it may incur as a result of a delay in the completion of a public project. If the City incurs delay damages as a result of Utility's negligence or willful misconduct, as determined by the City, Utility and City agree to negotiate a mutually agreeable settlement with the City. In the event a settlement is not reached between the City and Utility within ninety (90) days after the completion of the delayed public project, City may pursue any other remedies at law or equity available to City.

**(B) Notice.** The City will provide as much notice prior to requiring Utility to relocate Utility Facilities as is reasonably practical. The notice shall specify the date by which the existing Utility Facilities must be removed or relocated. Nothing in this provision shall prevent the City and Utility from agreeing, either before or after notice is provided, to another schedule for relocation. The City and Utility agree to cooperate in the design phase to minimize the economic impact of such relocation on Utility and the City.

**(C) Permanent Relocation- Undergrounding.** This subsection (C) applies to conversions of Utility Facilities from overhead to underground regardless of whether or not such conversion is made in conjunction with a public project. As permitted by, and in accordance with City Ordinance and any applicable law, administrative rule, or regulation, the City may require Utility to convert any overhead Utility Facilities to underground Utility Facilities at the same or different locations, subject to the NESC and Utility's engineering and safety standards. This subsection does not apply to Utility Facilities used for or in connection with the transmission of electric energy at nominal voltages in excess of 35,000 volts or to pedestals, cabinets or other aboveground equipment. In the event aboveground equipment must be relocated as part of the conversion of overhead Utility Facilities, Utility agrees to provide City an opportunity to comment on the location and aesthetic design of such aboveground equipment. Such relocation shall be consistent with applicable long-term development plans or projects of the City or Commission, or as approved by the City. Utility shall pay the expense of such conversion, and Utility may recover its costs from its customers in accordance with state law, administrative rule, or regulation. The City agrees to provide a suitable location in the Rights-of-Way, as mutually agreed, that meets Utility's construction standards as provided to the OPUC and NESC requirements and if sufficient space is not available in the Rights-of-Way, then the City will obtain sufficient easements from private property owners to accommodate Utility Facilities in order to maintain service

and permit upgrades of Utility Facilities. Nothing in this subsection prevents the City and Utility from agreeing to a different form of cost recovery consistent with applicable statutes, administrative rules, or regulations on a case-by-case basis.

Within sixty (60) days, or as mutually agreed upon by the Utility and the City, the Utility shall remove the overhead facilities that have been replaced by underground facilities.

**(D) Temporary Relocation at Request of City.** This subsection (D) covers temporary relocation of overhead Utility Facilities that will remain overhead, as well as underground Utility Facilities that will remain underground. The City may require Utility to temporarily remove and relocate Utility Facilities by giving sixty (60) days notice to Utility. Prior to such relocation, the City agrees to provide a suitable location in the Rights-of-Way, as mutually agreed, that meets the Utility's construction standards as provided to the OPUC and NESC requirements, or a temporary construction easement that meets the Utility's construction standards as provided to the OPUC and NESC requirements, and that allows Utility to place Utility Facilities on the easement, in order to maintain sufficient service and permit upgrades to Utility Facilities until such time as the Utility moves such Utility Facilities to their permanent location. The City will assist in acquiring easements from private property owners if sufficient square footage is not available in the Rights-of-Way or the City has not obtained construction easements for the public project necessitating the temporary relocation of Utility Facilities. The cost of temporary removal or relocation of Utility Facilities that is necessary or convenient for public projects, as well as the cost of replacing Utility Facilities in their permanent location, shall be paid by Utility. However, when the City requests a subsequent relocation of all or part of the same Utility Facilities less than one (1) year after the initial relocation, that is necessary or convenient for a public project and not at the request of or to accommodate a third party request, the subsequent relocation shall be at the expense of the City.

**(E) Permanent Relocation at Request of Third Party.** If a relocation is requested by or is to accommodate a third party, Utility shall seek reimbursement from the third party and not from the City. Such relocation shall be consistent with any applicable long-term development plan or projection of the City or approved by the City; however, if relocation of Utility Facilities is caused or required by conditions placed by the City on approval for projects of third parties, such relocation shall in no event fall under the provisions of subsections (A), (C) or (D) of this Section 5. The City and Utility agree to cooperate to minimize the economic impact of such relocation on each party.

**(F) Temporary Relocation at Request of Third Parties.** Whenever it is necessary to temporarily relocate or rearrange a Utility Facility in order to permit the passage of a building, machinery or other object, Utility shall perform the work after receiving sixty (60) business days written notice from the persons desiring to move the building, machinery or other object. The notice shall:

- (1) demonstrate that the third party has acquired at its expense all necessary permits from the City;
- (2) detail the route of movement of the building, machinery, or other object;
- (3) provide that the person requesting the temporary relocation is responsible for Utility's costs;
- (4) provide that the requestor shall indemnify and hold harmless the City and Utility from all damages or claims resulting either from moving the building,

machinery or other object or from the temporary relocation of Utility Facilities;  
and

(5) be accompanied by a cash deposit or other security acceptable to Utility for the costs of relocation.

Utility in its sole discretion may waive the security obligation. The cash deposit or other security shall be in an amount reasonably calculated by Utility to cover Utility's costs of temporary relocation and restoration. All temporary relocations under this subsection shall comply with ORS 757.805.

**Section 6. Use of Utility Facilities.** City shall maintain attachment agreements and permits to string wires on Utility's poles or run wires in Utility's trenches and/or conduit for municipal purposes and to attach fire and police alarm and communication equipment to Utility's poles, provided that such wires and equipment: (a) do not unreasonably interfere with Utility's operations; (b) conform to the NESC; and (c) the City's excess capacity on such wires and equipment is not leased to, sold to or otherwise used by non-governmental third parties. Utility shall not charge the City for such attachments to its poles or in its conduits; however, the City shall be responsible for paying for any make-ready and inspections Utility must perform in order to provide access to Utility Facilities for City wires and equipment in accordance with the NESC. If any of the City's attachments to Utility Facilities violate the NESC, the City shall work with Utility to address and correct such violations in an agreed-upon period of time. The City shall indemnify and hold Utility harmless from loss or damage resulting from the presence of City's wires and equipment on or in Utility Facilities. For purposes of this Franchise, "make-ready" means engineering or construction activities necessary to make a pole, conduit, or other support equipment available for a new attachment, attachment modifications, or additional facilities.

**Section 7. Payment for use of Rights-of-Way**

**(A) Use of Rights-of-Way.** In consideration for its use of the Rights-of-Way in accordance with the terms of this Franchise, Utility agrees to pay the City an amount equal to 3 ½ percent of the Gross Revenue as defined below. To the extent permissible under state law and regulation, the payment imposed by this subsection shall be considered an operating expense of Utility and shall not be itemized or billed separately to consumers within the City.

**(B) Definition of Gross Revenue.** "Gross Revenues" shall include all revenues derived by Utility within the City from Utility providing Utility Service, and includes, but is not limited to, the sale and use of electricity and electric service, and the use, rental or lease of Utility Facilities, after adjustment for the net write-off of uncollectibles. "Gross Revenues" do not include proceeds from the sale of bonds, mortgages or other evidence of indebtedness, securities or stocks, any amounts collected from Utility customers that are subsequently passed through to one or more third party entities pursuant to law or a tariff or sales at wholesale by one public utility to another of electrical energy when the utility purchasing such electrical energy is not the ultimate customer. "Gross Revenue" also does not include revenue from joint pole use. For purposes of this Franchise, revenue from joint pole use includes any revenue collected by Utility from other franchisees, permittees, or licensees of the

City for the right to attach wires or cable to Utility's poles or places them in Utility's conduits. For purposes of this Franchise, revenue from joint pole use does not include rental or other similar revenue collected by Utility from other franchises, permittees, or licensees of the City for the right to pole attachments for small cell wireless antennas and distributed antenna systems (DAS).

**(C) Privilege Tax.** As permitted by Oregon law, the City retains the right, to charge a privilege tax based on a percentage of the Gross Revenue earned from Utility's customers within the City in addition to the payment amounts set forth in subsection (A). The City shall provide Utility at least ninety (90) days notice prior to such privilege tax becoming effective. Utility shall follow state regulations regarding inclusion of such privilege tax as an itemized charge on the electricity bills of its customers within the City. In no event shall any amounts of privilege tax collected from Utility customers in accordance with state regulation be treated or otherwise considered Gross Revenue for purposes of this Franchise.

**(D) Remittance of Annual Payment.** Utility shall remit the annual 3 ½% franchise fee payment, as well as payment of any additional privilege tax, to the Finance Director on or before the first (1<sup>st</sup>) day of April of each year. The payment for each year shall be based on the Gross Revenue collected by Utility during the previous calendar year from Utility's customers and shall be paid on an annual basis. Payment shall be made in immediately available federal funds. With its annual payment, Utility shall provide the City a statement under oath showing the Gross Revenue for the preceding year.

**(E) Late Payments.** Interest on late payments shall accrue from the due date based on PGE's cost of debt as approved by the OPUC plus 100 basis points (1%) as of the due date, and shall be computed based on the actual number of days elapsed from the due date until payment. Interest shall accrue without regard to whether the City has provided notice of delinquency.

**Section 8. Supplying Maps and Records.** Upon providing Utility with five (5) business days' prior notice, the City has the right to inspect, at any time during normal business hours, all non-propriety or otherwise highly confidential books, records, maps, plans, tax returns, financial statements, service complaint logs, performance test results, record of requests for service and other like materials, in read-only format that relate to Utility's operation of Utility Service in the Rights-of-Way. Upon request of the City and without charge, Utility shall furnish current maps to the City by electronic data in read-only format showing the general location of Utility Facilities, excluding Utility proprietary information. Unless required by law, the City will not sell or provide Utility prepared maps or data to third parties without written permission from Utility. Upon request of Utility, the City will make available to Utility any relevant City prepared maps or data at no charge to Utility.

**Section 9. Financial Assurance.** City shall not require PGE to provide a performance bond or other form of surety or financial security unless PGE has demonstrated a pattern of failing to correct material violations of applicable provisions of TMC Chapter 3-06. For purposes of this Section 9, a "pattern" shall consist of three (3) or more

incidents of PGE's failure to correct material violations within the Term after notice from the City and a reasonable opportunity to cure such violations.

**Section 10. Termination.** City may terminate this Franchise under the same terms as provided in TMC 3-6-265 for termination of a License. Such termination shall not affect PGE's right to provide electric service in the City, which shall be determined in accordance with Oregon statutes and regulations.

**Section 11. Notice.** Any notice provided for under this Franchise shall be sufficient if in writing and (1) delivered personally to the following addressee, (2) deposited in the United States mail, postage prepaid, certified mail, return receipt requested, (3) sent by overnight or commercial air courier (such as Federal Express or UPS), or (4) by email to the contacts listed below, effective upon the sender's receipt of confirmation generated by the recipient's email system that the notice has been received by the recipient's email system, or to such other address as the receiving party hereafter shall specify in writing:

**If to the City: City Manager  
City of Tualatin, Oregon  
18880 SW Martinazzi  
Tualatin, Oregon 97062  
FAX # (503) 692-5421**

**With a copy to: City Attorney  
City of Tualatin, Oregon  
18880 SW Martinazzi  
Tualatin, OR 97062**

**With a copy to: Right of Way Manager  
City of Tualatin, Oregon  
18880 SW Martinazzi  
Tualatin, OR 97062**

**If to the Grantee: Regional Manager  
Portland General Electric Company  
2213 SW 153<sup>rd</sup> Drive  
Beaverton, Oregon 97006  
FAX: (503) 672-5595**

**With a copy to: Portland General Electric Company  
Attn: General Counsel  
One World Trade Center, 17<sup>th</sup> Floor  
121 SW Salmon Street  
Portland, Oregon 97204  
FAX: (503) 464-2200  
Portland General Electric,**



**Attn: Local Government Affairs  
One World Trade Center, 3rd Floor  
121 SW Salmon Street  
Portland, Oregon 97204**

**Portland General Electric, Beaverton Line Center  
Attn: Manager of Line Design and Crew Coordination  
2213 S.W. 153rd Dr.  
Beaverton, OR 97006**

Any such notice, communication or delivery shall be deemed effective and delivered upon the earliest to occur of actual delivery, three (3) business days after deposition in the United States mail, one (1) business day after shipment by commercial air courier or the same day as confirmed facsimile transmission (or the first business day thereafter if faxed on a Saturday, Sunday or legal holiday).

The parties, through their duly authorized representatives, have executed this Agreement as of the dates indicated below.

PORTLAND GENERAL ELECTRIC  
COMPANY

CITY OF TUALATIN

BY: \_\_\_\_\_  
NAME: Brad Jenkins  
TITLE: Vice President, Utility Operations  
DATE:

BY: \_\_\_\_\_  
NAME: Frank Bubenik  
TITLE: Mayor  
DATE:

BY: \_\_\_\_\_  
NAME: Sherilyn Lombos  
TITLE: City Manager  
DATE:

INTRODUCED AND ADOPTED by the City Council this 22<sup>nd</sup> day of June, 2020.

CITY OF TUALATIN, OREGON

BY \_\_\_\_\_  
Mayor

APPROVED AS TO FORM

ATTEST:

BY \_\_\_\_\_  
City Attorney

BY \_\_\_\_\_  
City Recorder