

# Ordinance No. 00139

[\(Council Minutes 97/09/15\)](#)

## ORDINANCE NO. 139

AN ORDINANCE OF THE CITY OF LAKEWOOD, WASHINGTON, GRANTING UNTO THE CITY OF TACOMA DEPARTMENT OF PUBLIC UTILITIES, LIGHT DIVISION, A MUNICIPAL CORPORATION, ITS SUCCESSORS AND ASSIGNS, THE RIGHT, PRIVILEGE, AUTHORITY AND NONEXCLUSIVE FRANCHISE FOR TWENTY YEARS, TO CONSTRUCT, MAINTAIN, OPERATE, REPLACE AND REPAIR AN ELECTRICAL LIGHT AND POWER SYSTEM, IN, ACROSS, OVER, ALONG, UNDER, THROUGH AND BELOW CERTAIN DESIGNATED PUBLIC RIGHTS-OF-WAY OF THE CITY OF LAKEWOOD, WASHINGTON.

WHEREAS, the City of Tacoma Department of Public Utilities, Light Division has requested that the City Council grant it a nonexclusive franchise; and

WHEREAS, the City Council has the authority to grant franchises for the use of its streets and other public properties (RCW 35A.47.040); NOW, THEREFORE,

THE CITY COUNCIL OF THE CITY OF LAKEWOOD, WASHINGTON, DO ORDAIN as follows:

**Section 1. Franchise Granted. Pursuant to RCW 35A.47.040, the City of Lakewood, a Washington municipal corporation (hereinafter the "City"), hereby grants to City of Tacoma, Department of Public Utilities, Light Division, a municipal corporation organized under the laws of the State of Washington (hereinafter "Grantee"), its heirs, successors, legal representatives and assigns, subject to the terms and conditions hereinafter set forth, a franchise for a period of 20 years, beginning on the effective date of this ordinance.**

Pursuant to RCW 35A.47.040, the City of Lakewood, a Washington municipal corporation (hereinafter the "City"), hereby grants to City of Tacoma, Department of Public Utilities, Light Division, a municipal corporation organized under the laws of the State of Washington (hereinafter "Grantee"), its heirs, successors, legal representatives and assigns, subject to the terms and conditions hereinafter set forth, a franchise for a period of 20 years, beginning on the effective date of this ordinance. Grantee and City may agree to extend the term of this franchise on substantially the same terms and conditions as set forth herein for up to two extensions of five years per extension.

This franchise grants the Grantee the right, privilege and authority to construct, operate, maintain, replace, and use all necessary equipment and facilities including communication infrastructure therefor for an electric utility system, in, under, on, across, over, through, along or below the public right-of-ways and public places located in the City of Lakewood, as approved under City permits issued pursuant to this franchise.

For the purposes of the franchise the following words and phrases shall have the following meaning:

(1) Aelectric utility system@ means all plant, facilities, equipment, wires, conduit, meters, communication infrastructure, generation equipment, transmission and distribution poles as may be necessary to provide electric utility service for customers. It does not include accessory or energy services, including but not limited to technical energy usage assistance, and (non-traditional) business activities such as telecommunications including cable television, or other business activities.

(2) Aelectric utility service@ means all actions directly related to providing electric power and energy to customers for lighting, appliances, fixtures, space heating and cooling, water heating and other energy uses. It does not include accessory or energy services, including but not limited to technical energy usage assistance, and (non-traditional) business activities such as information services, appliances, and telecommunications including cable television, or other business activities.(3)

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revenue@ means money or funds received by reason of transaction of electric utility service business including sales of electric power and energy to customers. Gross revenue does not include: (a) uncollected amounts; (b) amounts received from condemnation award or condemnation settlement; (c) amounts received as compensation or reimbursement of damages to or protection of any property of Grantee; (d) amounts received as compensation for or in aid to construction; (e) discounts, returns, allowances and reposessions; and (f) amounts received for street light maintenance and operation.

**Section 2. Non-Exclusive Franchise Grant.** This franchise is granted upon the express condition that it shall not in any manner prevent the City from granting other or further franchises in, along, over, through, under, below or across any of said right-of-ways, streets, avenues or all other public lands and properties of every type and description. Such franchise shall in no way prevent or prohibit the City from using any of said roads, streets or other public properties or affect its jurisdiction over them or any part of them, and the City shall retain power to make all necessary changes, relocations, repairs, maintenance, establishment, improvement, dedication of same as the City may deem fit, including the dedication, establishment, maintenance, and improvement of all new rights-of-ways, thoroughfares and other public properties of every type and description. It is provided, however, City agrees not to compete with Grantee as an electric utility system or provider of electric utility service in the current service area of the Grantee during the period of this franchise.

This franchise is granted upon the express condition that it shall not in any manner prevent the City from granting other or further franchises in, along, over, through, under, below or across any of said right-of-ways, streets, avenues or all other public lands and properties of every type and description. Such franchise shall in no way prevent or prohibit the City from using any of said roads, streets or other public properties or affect its jurisdiction over them or any part of them, and the City shall retain power to make all necessary changes, relocations, repairs, maintenance, establishment, improvement, dedication of same as the City may deem fit, including the dedication, establishment, maintenance, and improvement of all new rights-of-ways, thoroughfares and other public properties of every type and description. It is provided, however, City agrees not to compete with Grantee as an electric utility system or provider of electric utility service in the current service area of the Grantee during the period of this franchise.

**Section 3. Relocation of Electrical Transmission Facilities.** The Grantee agrees and covenants at its sole cost and expense, to protect, support, temporarily disconnect, relocate or remove from any street, any component of its electric utility system when so required by the City by reason of traffic conditions or public safety, dedications of new rights-of-way and the establishment and improvement thereof, widening and improvement of existing rights-of-way, street vacations, freeway construction, change or establishment of street grade, or the construction of any public improvement or structure by the City, provided that the Grantee shall in all such cases have the privilege to temporarily bypass, in the authorized portion of the same street upon approval by the City, any section of electrical line or facility required to be temporarily disconnected or removed. The provisions of this section shall not be applicable if the relocation need results from a private development, use or activity.

The Grantee agrees and covenants at its sole cost and expense, to protect, support, temporarily disconnect, relocate or remove from any street, any component of its electric utility system when so required by the City by reason of traffic conditions or public safety, dedications of new rights-of-way and the establishment and improvement thereof, widening and improvement of existing rights-of-way, street vacations, freeway construction, change or establishment of street grade, or the construction of any public improvement or structure by the City, provided that the Grantee shall in all such cases have the privilege to temporarily bypass, in the authorized portion of the same street upon approval by the City, any section of electrical line or facility required to be temporarily disconnected or removed. The provisions of this section shall not be applicable if the relocation need results from a private development, use or activity.

If the City determines that the project necessitates the relocation of the Grantee's then existing facilities, the City shall:

(1) At least ninety (90) days prior to commencement of construction of such improvement project, provide the Grantee with written notice and plans requiring such relocation, unless another time period for the notice is agreed to by the parties for a particular project.

(2) Provide the Grantee with copies of pertinent portions of the plans and specifications for such improvement project and a proposed location for the Grantee's facilities so that the Grantee may relocate its facilities in other City right-of-way in order to accommodate such improvement project. After receipt of such notice and such plans and specifications, the Grantee shall complete relocation of its facilities at no charge or expense to the City (except as hereinafter provided) so as to accommodate the improvement project construction schedule.

The Grantee may, after receipt of written notice requesting a relocation of its facilities, submit to the City written alternatives to such relocation. The City shall evaluate such alternatives and advise the Grantee in writing if one or more of the alternatives is suitable to accommodate the work which would otherwise necessitate relocation of the facilities. If so requested by the City, the Grantee shall submit additional information to assist the City in making such evaluation. The City shall give each alternative proposed by the Grantee full and fair consideration. In the event the City ultimately determines that there is no other reasonable alternative, the Grantee shall relocate its facilities as otherwise provided in this Section. Provided, however, the parties agree to exercise good faith, reasonable and timely decision making especially when issues arise in the field pertaining to relocations. The provisions of this Section shall survive the expiration or termination of this franchise agreement.

The provisions of this Section shall in no manner preclude or restrict the Grantee from making any arrangements it may deem appropriate when responding to a request for relocation of its facilities by any person or entity other than the City, where the facilities to be constructed by said person or entity are not or will not become City-owned, operated or maintained facilities, provided that such arrangements do not unduly delay a City construction project. The City on occasion will be constructing, reconstructing and/or relocating roads, streets, public ways, areas or facilities within the right-of-way or property which will require Grantee to install and/or relocate part of its electric utility system. Grantee will be relying on the alignment, lines and grades as set forth in City=s approval plans wherein Grantee thereafter constructs or reconstructs its electric utility system in accordance with City=s requirements and City standards. Therefore, if City thereafter again adjusts and/or revises the alignment, line or grade for a road, street, public way or area, before this part of the Grantee=s electric utility system has been in place for fifteen (15) years (commencing with the initial City revision), then City agrees to reimburse Grantee a pro rata share of the total relocation costs based on fifteen (15) year life expectancy for the portion of Grantee=s electric utility system that is affected by the City revision unless differently agreed to in writing by City and Grantee at the time of the installation or relocation. City recognizes and acknowledges that Grantee owns utility poles and other parts of its electric utility system that may on occasion be of special benefit to certain customers. City also recognizes that Grantee has the right to require an additional charge for the privilege and special use of its electric utility system including its poles. Grantee agrees to allow the City to apply temporary banners and decorations to Grantee=s poles at no charge so long as it does not impede use of Grantee=s poles by Grantee, and is consistent with all appropriate safety regulations.

**Section 4. Consideration For Agreement. (1) The consideration for this agreement includes, but is not limited to, the mutual and individual benefits of this agreement that allow each of the parties the ability to make long term planning decisions in light of the provisions set forth herein, the waiver of permit fees after the first three years of this agreement, as provided in Section 11 of this agreement, the non-competition provisions as provided in Section 18 of this agreement, and any fees that may be charged pursuant to RCW 35.21.860(b).**

(1) The consideration for this agreement includes, but is not limited to, the mutual and individual benefits of this agreement that allow each of the parties the ability to make long term planning decisions in light of the provisions set forth herein, the waiver of permit fees after the first three years of this agreement, as provided in Section 11 of this agreement, the non-competition provisions as provided in Section 18 of this agreement, and any fees that may be charged pursuant to RCW 35.21.860(b). (2) If the City grants to any other energy provider a franchise or allows any other energy provider to operate under terms that are over-all more favorable to the other energy provider than those set forth herein, Grantee shall have the right to renegotiate the provisions of this franchise that Grantee believes are over-all less favorable to it than those authorized or allowed to said energy provider. Provided, however, Grantee may not exercise this above re-negotiation right for a period of two years from the effective date of this franchise. Grantee shall also have the right to renegotiate the provisions of this franchise that are affected by a substantial change in state or federal law that would allow the City the opportunity to tax and assess additional revenue from the Grantee=s operations within the corporate boundaries of the City.

In the case where the parties do not agree on the renegotiation or identification of affected provisions of this franchise, the parties agree to a binding arbitration process as follows: Each of the parties shall select an arbitrator, and the two arbitrators shall select a third arbitrator. If the two arbitrators are unable to select a third arbitrator, the third arbitrator shall be selected by the presiding judge of the Pierce County Superior Court. In accordance with the procedures of Chapter 7.04 of the Revised Code of Washington, the panel of three arbitrators shall review the evidence and authorities presented by the parties and hear the argument of the parties, and thereafter decide the issue(s) presented for arbitration. The arbitrators shall be authorized to require each party to provide to the other reasonable discovery. The arbitrators shall render their decision based upon their interpretation of the provisions of this franchise agreement. The arbitrators are not empowered to modify or amend the text of this franchise agreement. The parties agree to be bound by the decisions of the panel of arbitrators as to the identification of affected provisions of this franchise and/or the re-negotiation thereof.

If there is a substantial change in the law or circumstances beyond the control of a party hereto that substantially adversely affects said party, then said party may re-open this agreement to address the terms affected by the change in the law or

circumstances, and the parties agree to negotiate in good faith to address said concerns and to accomplish the original intent of both parties.

**Section 5. Undergrounding of Facilities.** In any area of the City in which there are no aerial facilities, or in any area in which telephone, electric power wires and cables have been placed underground, the Grantee shall not be permitted to erect poles or to run or suspend wires, cables or other facilities thereon, but shall lay such wires, cables or other facilities underground in the manner required by the City. Provided that except for high voltage lines, the electric service and distribution lines to new construction in areas that are to be served by the Grantee and that were not previously served by the Grantee shall be undergrounded.

In any area of the City in which there are no aerial facilities, or in any area in which telephone, electric power wires and cables have been placed underground, the Grantee shall not be permitted to erect poles or to run or suspend wires, cables or other facilities thereon, but shall lay such wires, cables or other facilities underground in the manner required by the City. Provided that except for high voltage lines, the electric service and distribution lines to new construction in areas that are to be served by the Grantee and that were not previously served by the Grantee shall be undergrounded.

(1) Whenever the City may desire the undergrounding of the aerial utilities in an area of the City, the Grantee agrees to cooperate with the City in City's proposal to create a Local Improvement District (L.I.D.) as follows:

(a) Seventy percent (70%) of the total actual cost of converting the existing overhead primary electrical distribution system (i.e. 15 KV and less) to underground shall be provided from assessments against the property owners within the L.I.D. Assessments will be in accordance with applicable law;

(b) Thirty percent (30%) of the total actual cost of converting the existing overhead primary electrical distribution system to underground shall be provided for by the Grantee;

(c) Any charges made against the L.I.D. for undergrounding other than the electrical distribution system covered under this franchise (i.e. secondary services, telephone, fire alarm, cable TV, and street lighting circuits) will not be included when determining the amount to be paid by the Grantee;

(d) Conversion of the secondary electrical service on private property is not to be included in the computation of the allocation of payments to be made by the Grantee in the L.I.D. The customer must supply and install the secondary conductor and conduit from the meter to the secondary service box located near the property line;

L.I.D. The customer must supply and install the secondary conductor and conduit from the meter to the secondary service box located near the property line;

(e) For the purposes hereof, L.I.D. includes other mutually agreed to methods to finance undergrounding of aerial facilities, in addition to local improvement district financing pursuant to RCW 35.43 et. seq.

(2) Whenever the City may desire the undergrounding of the aerial utilities in an area of the City in conjunction with a Public Works Improvement Project (street widening, sewer installation, curb and sidewalk installation, street lighting, traffic signal, etc.) and more than 50% of these aerial facilities are in conflict with the Public Works Improvement Project, the Grantee agrees to cooperate with the City with City's proposal to underground the aerial facilities as follows:

(a) Fifty percent (50%) of the total actual cost of converting the existing overhead primary electrical distribution system to underground shall be provided by the City. (Total actual cost shall include trenching, vaults, conduit, cable, switch gears, transformers, restoration, etc.)

(b) Fifty percent (50%) of the total actual cost of converting the existing overhead electrical distribution system covered under this franchise to underground shall be provided by the Grantee. (Total actual cost shall include trenching, vaults, conduit, cable, switch gears, transformers, restoration, etc.)

(c) Any charges made against the project for undergrounding the secondary services, telephone, fire alarm, cable TV, and street lighting circuits will not be included when determining the amount to be paid by the Grantee.

(d) Conversion of the secondary electrical service on private property is not included in the project. The customer must supply and install the secondary conductor and conduit from the meter to the secondary service box.

If in the event that insufficient right-of-way is available to allow relocation of the Grantee's existing aerial system due to the

requirements for a City Public Works Project, and undergrounding is therefore required, all of the above provisions (Subsection (2)(a) - (d)) shall apply.

Notwithstanding anything to the contrary in this section, this Section 5 shall not apply to high voltage lines of greater than 15 KV.

**Section 6. The Grantee's Maps, Records and Plans. After construction is complete, and at a reasonable time thereafter, the Grantee shall provide to the City upon request and at no cost, a copy of all as-built plans, maps and records.**

After construction is complete, and at a reasonable time thereafter, the Grantee shall provide to the City upon request and at no cost, a copy of all as-built plans, maps and records.

**Section 7. Excavations. During any period of relocation, construction or maintenance, all surface structures, if any, shall be erected and used in such places and positions within said public right-of-ways and other public properties so as to interfere as little as practicable with the free passage of traffic and the free use of adjoining property, and the Grantee shall at all times post and maintain proper barricades and comply with all applicable safety regulations during such period of construction as required by the ordinances of the City or the laws of the State of Washington.**

During any period of relocation, construction or maintenance, all surface structures, if any, shall be erected and used in such places and positions within said public right-of-ways and other public properties so as to interfere as little as practicable with the free passage of traffic and the free use of adjoining property, and the Grantee shall at all times post and maintain proper barricades and comply with all applicable safety regulations during such period of construction as required by the ordinances of the City or the laws of the State of Washington.

Whenever the Grantee shall excavate in any public right-of-way or other public property for the purpose of installation, construction, repair, maintenance or relocation of its cable or equipment, it shall apply to the City for a permit to do so and upon obtaining a permit shall give the City at least twenty-four (24) hours notice during the normal work week of the Grantee's intent to commence work in the public right-of-way. In no case shall any work commence within any public right-of-way or other public property without a permit, except as otherwise provided in this franchise ordinance. During the progress of the work, the Grantee shall not unnecessarily obstruct the passage or proper use of the right-of-way, and shall file as-built plans or maps with the City showing the proposed and final location of its facilities.

If either the City or the Grantee shall at any time plan to make excavations in any area covered by this franchise and as described in this Section, the party planning such excavation shall afford the other, upon receipt of a written request to do so, an opportunity to share such excavation, PROVIDED THAT:

- (1) Such joint use shall not unreasonably delay the work of the party causing the excavation to be made;
- (2) Such joint use shall be arranged and accomplished on terms and conditions satisfactory to both parties; and
- (3) Either party may deny such request for safety reasons. The provisions of this Section shall survive the expiration or termination of this franchise agreement.

**Section 8. Restoration after Construction. The Grantee shall, after abandonment approved under Section 15 herein, or installation, construction, relocation, maintenance, or repair of electrical facilities within the franchise area, restore the surface of the right-of-way or public property to at least the same condition the property was in immediately prior to any such installation, construction, relocation, maintenance or repair. The Public Works Director shall have final approval of the condition of such streets and public places after restoration. All concrete encased monuments which have been disturbed or displaced by such work shall be restored pursuant to all federal, state and local standards and specifications. The Grantee agrees to promptly complete all restoration work and to promptly repair any damage caused by such work to the franchise area or other affected area at its sole cost and expense. The provisions of this Section shall survive the expiration, revocation or termination by other means of this franchise.**

The Grantee shall, after abandonment approved under Section 15 herein, or installation, construction, relocation, maintenance, or repair of electrical facilities within the franchise area, restore the surface of the right-of-way or public property to at least the same condition the property was in immediately prior to any such installation, construction, relocation, maintenance or repair. The Public Works Director shall have final approval of the condition of such streets and public places after restoration. All concrete encased monuments which have been disturbed or displaced by such work shall be restored pursuant to all federal, state and local standards and specifications. The Grantee agrees to promptly complete all restoration work and to promptly repair any damage caused by such work to the franchise area or other affected area at its sole cost and expense. The provisions of this Section shall survive the expiration, revocation or termination by other means of this franchise.

**Section 9. Emergency Work – Permit Waiver.** In the event of any emergency in which any of the Grantee's facilities located in or under any street, breaks, are damaged, or if the Grantee's construction area is otherwise in such a condition as to immediately endanger the property, life, health or safety of any individual, the Grantee shall immediately take the proper emergency measures to repair its facilities, to cure or remedy the dangerous conditions for the protection of property, life, health or safety of individuals without first applying for and obtaining a permit as required by this franchise. However, this shall not relieve the Grantee from the requirement of obtaining any permits necessary for this purpose, and the Grantee shall apply for all such permits not later than the next succeeding day during which City Hall is open for business.

In the event of any emergency in which any of the Grantee's facilities located in or under any street, breaks, are damaged, or if the Grantee's construction area is otherwise in such a condition as to immediately endanger the property, life, health or safety of any individual, the Grantee shall immediately take the proper emergency measures to repair its facilities, to cure or remedy the dangerous conditions for the protection of property, life, health or safety of individuals without first applying for and obtaining a permit as required by this franchise. However, this shall not relieve the Grantee from the requirement of obtaining any permits necessary for this purpose, and the Grantee shall apply for all such permits not later than the next succeeding day during which City Hall is open for business.

**Section 10. Dangerous Conditions, Authority for City to Abate.** Whenever construction, installation or excavation of facilities authorized by this franchise has caused or contributed to a condition that appears to substantially impair the lateral support of the adjoining street or public place, or endangers the public, an adjoining public place, street utilities or City property, the Public Works Director may direct the Grantee, at the Grantee's own expense, to take actions to protect the public, adjacent public places, City property or street utilities; and such action may include compliance within a prescribed time.

Whenever construction, installation or excavation of facilities authorized by this franchise has caused or contributed to a condition that appears to substantially impair the lateral support of the adjoining street or public place, or endangers the public, an adjoining public place, street utilities or City property, the Public Works Director may direct the Grantee, at the Grantee's own expense, to take actions to protect the public, adjacent public places, City property or street utilities; and such action may include compliance within a prescribed time.

In the event that the Grantee fails or refuses to promptly take the actions directed by the City, or fails to fully comply with such directions, or if emergency conditions exist which require immediate action, the City may enter upon the property and take such actions as are necessary to protect the public, the adjacent streets, or street utilities, or to maintain the lateral support thereof, or actions regarded as necessary safety precautions; and the Grantee shall be liable to the City for the costs thereof. The provisions of this Section shall survive the expiration, revocation or termination of this franchise. Grantee shall relocate, at its cost, poles or other structures that the City Engineer objectively determines are located in a place or in a way so as to constitute a danger to the public.

## **Section 11. Permits and Fees.**

Grantee shall be required to obtain all permits from the City necessary for work in the City and/or in the City's rights-of-way. During the first three years of this franchise, Grantee and contractors of Grantee shall pay for all permit fees associated with projects of Grantee located within the corporate limits of the City, pursuant to the applicable City fee schedules, Provided, however, that permit fees shall be based on actual costs to the City. Thereafter, in consideration of this agreement, including

the factors set forth in Section 4, and the non-competition fees provided in Section 18 hereof, Grantee shall not further be subject to any permit fees associated with Grantee's activities (except those undertaken for a private development customer) through the authority granted in this franchise ordinance or under the laws of the City. In addition to the above, the Grantee shall promptly reimburse the City for any and all costs the City reasonably incurs in response to any emergency caused by the negligence of the Grantee. City agrees to process Grantee's and Grantee's contractors permits in the same expeditious manner as other permit applicants' permits are processed. Permits may be processed by facsimile or electronic mail.

**Section 12. City's Reservation of Rights. Pursuant to RCW 35.21.860, the City is precluded from imposing a franchise fee on an electrical energy business, except for administrative expenses directly related to receiving and approving a permit, and to inspecting plans and construction.**

Pursuant to RCW 35.21.860, the City is precluded from imposing a franchise fee on an electrical energy business, except for administrative expenses directly related to receiving and approving a permit, and to inspecting plans and construction. The City hereby reserves its right to impose a franchise fee on the Grantee for purposes other than to recover its administrative expenses, if the Grantee's operations as authorized by this franchise change so that not all uses of the franchise are those of an electrical energy business or, if statutory prohibitions on the imposition of such fees are removed. In either instance, the City also reserves its right to require that the Grantee obtain a separate franchise for its change in use, which franchise may include provisions intended to regulate the Grantee's operations, as allowed under applicable law.

**Section 13. Indemnification. The Grantee hereby releases, covenants not to bring suit and agrees to indemnify, defend and hold harmless the City, its officers, employees, agents and representatives from any and all claims, costs, judgments, awards or liability to any person, including claims by the Grantee's own employees to which the Grantee might otherwise be immune under Title 51 RCW, arising from injury or death of any person or damage to property, monetary losses, including refunds of charges or fees paid by customers, of which it is alleged or proven that the acts or omissions of the Grantee, its agents, servants, officers or employees in performing this franchise caused or contributed thereto, including claims arising against the City by virtue of the City's ownership or control of the rights-of-way or other public properties, by virtue of the Grantee's exercise of the rights granted herein, including payment of any monies to the City, or by virtue of the City's permitting the Grantee's use of the City's rights-of-way or other public property, based upon the City's inspection or lack of inspection of work performed by the Grantee, its agents and servants, officers or employees in connection with work authorized on the City's property or property over which the City has control, pursuant to this franchise or pursuant to any other permit or approval issued in connection with this franchise.**

The Grantee hereby releases, covenants not to bring suit and agrees to indemnify, defend and hold harmless the City, its officers, employees, agents and representatives from any and all claims, costs, judgments, awards or liability to any person, including claims by the Grantee's own employees to which the Grantee might otherwise be immune under Title 51 RCW, arising from injury or death of any person or damage to property, monetary losses, including refunds of charges or fees paid by customers, of which it is alleged or proven that the acts or omissions of the Grantee, its agents, servants, officers or employees in performing this franchise caused or contributed thereto, including claims arising against the City by virtue of the City's ownership or control of the rights-of-way or other public properties, by virtue of the Grantee's exercise of the rights granted herein, including payment of any monies to the City, or by virtue of the City's permitting the Grantee's use of the City's rights-of-way or other public property, based upon the City's inspection or lack of inspection of work performed by the Grantee, its agents and servants, officers or employees in connection with work authorized on the City's property or property over which the City has control, pursuant to this franchise or pursuant to any other permit or approval issued in connection with this franchise. Inspection or acceptance by the City of any work performed by the Grantee at the time of completion of construction shall not be grounds for avoidance of any of these covenants of indemnification. Said indemnification obligations shall extend to claims which are not reduced to a suit and any claims which may be compromised prior to the culmination of any litigation or the institution of any litigation.

In the event that the Grantee refuses the tender of defense in any suit or any claim, said tender having been made pursuant to the indemnification clauses contained herein, and said refusal is subsequently determined by a court having jurisdiction (or such other tribunal that the parties shall agree to decide the matter), to have been a wrongful refusal on the part of the Grantee, then the Grantee shall pay all of the City's costs for defense of the action, including all reasonable expert witness fees and reasonable attorneys' fees and the reasonable costs of the City, including reasonable attorneys' fees of recovering under this indemnification clause.

In the event of liability for damages arising out of bodily injury to persons or damages to property caused by or resulting from the concurrent negligence of the Grantee and the City, its officers, employees and agents, the Grantee's liability hereunder shall be only to the extent of the Grantee's negligence unless otherwise provided by law. It is further specifically and expressly understood that the indemnification provided herein constitutes the Grantee's waiver of immunity under Title 51 RCW, solely for the purposes of this indemnification. This waiver has been mutually negotiated by the parties.

The provisions of this Section shall survive the expiration or termination of this franchise agreement.

**Section 14. Insurance.** Grantee is currently self insured and has excess insurance coverage for potential liability in excess of its self insured retention amounts. To the extent that Grantee is legally obligated by this franchise, Grantee's self insurance fund and/or insurance policies shall provide adequate protection to City in amounts equivalent to the levels set forth hereinbelow. Grantee's general comprehensive liability policy which includes automobile liability coverage (if such a policy continues to be obtained), shall have an endorsement naming City and its officers and employees as additional insureds for their actions pursuant to this franchise.

The amounts of insurance coverage that the grantee shall maintain, whether by self insurance or insurance policies shall not be the equivalent of less than the following:

A. Automobile Liability insurance with limits no less than \$1,000,000 Combined Single Limit per accident for bodily injury and property damage; and

B. Commercial General Liability insurance, written on an occurrence basis with limits no less than \$1,000,000 combined single limit per occurrence and \$2,000,000 aggregate for personal injury, bodily injury and property damage. Coverage shall include but not be limited to: blanket contractual; products/completed operations; broad form property damage; explosion, collapse and underground (XCU); and employer's liability.

Any deductibles or self-insured retentions must be declared to and approved by the City. Payment of deductible or self-insured retention shall be the sole responsibility of the Grantee.

Any insurance policy(ies) obtained by the Grantee to comply herewith shall name the City (its officers, employees and volunteers,) as an additional insured with regard to activities performed by or on behalf of the Grantee. The coverage shall contain no special limitations on the scope of protection afforded to the City, its officers, officials, employees or volunteers. In addition, the insurance policy 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. The Grantee's insurance shall be primary insurance with respect to the City, its officers, officials, employees and volunteers. Any insurance policy or policies obtained by the Grantee to comply with this clause shall be endorsed to state that coverage shall not be suspended, voided, canceled by either party, reduced in coverage or in limits except after thirty (30) days' prior written notice by certified mail, return receipt requested, has been given to the City.

Any failure to comply with the insurance reporting provisions of the policies required herein shall not affect coverage provided to the City, its officers, officials, employees or volunteers.

**Section 15. Abandonment of the Grantee's Facilities.** Except for underground conduit or wires, no electrical system facility located within the public right-of-way by the Grantee may be abandoned by the Grantee without the express written consent of the City. Any plan for abandonment or removal of the Grantee's facilities must be first approved by the Public Works Director, and all necessary permits must be obtained prior to such work. The provisions of this Section shall survive the expiration, revocation or termination of this franchise agreement. Underground conduit or wires may be left in place and abandoned by Grantee.

Except for underground conduit or wires, no electrical system facility located within the public right-of-way by the Grantee may be abandoned by the Grantee without the express written consent of the City. Any plan for abandonment or removal of the Grantee's facilities must be first approved by the Public Works Director, and all necessary permits must be obtained prior to such work. The provisions of this Section shall survive the expiration, revocation or termination of this franchise agreement. Underground conduit or wires may be left in place and abandoned by Grantee.



**Section 16. Street Vacations.** City may have occasion to vacate certain streets, public ways or areas that have Grantee=s lines and facilities located thereon. City agrees to exert reasonable good faith efforts to reserve an easement for Grantee=s lines and facilities when a street, public way or area is vacated. If it is not feasible for City to reserve an easement for Grantee=s line(s) and facilities, the proponents of the vacation shall be required (by City) as part of land use or other permitting approvals, to reimburse Grantee all costs to relocate said line(s) and facilities.

**Section 17. Modification.** The City and the Grantee hereby reserve the right to alter, amend or modify the terms and conditions of this franchise upon written agreement of both parties to such alteration, amendment or modification.

The City and the Grantee hereby reserve the right to alter, amend or modify the terms and conditions of this franchise upon written agreement of both parties to such alteration, amendment or modification.

**Section 18. Exercise of City Authority.** The parties acknowledge that the City has authority to operate its own electric utility and also has authority to contract with other public or private entities for the purchase of electrical energy. Grantee's long range planning would be improved, and its rate structure stabilized if the City did not elect to exercise its authority in the service area of the Grantee. Therefore, Grantee agrees that for and in consideration of the City not exercising its authority to operate its own electric utility in the service area served by Grantee, or not contracting with other public or private entities for the purchase of electrical energy in said service area, and the other factors of consideration set forth in Section 4 of this agreement, Grantee shall pay to the City an annual fee in the amount of \$80,000 for 1998, provided that the total payment to the City shall not exceed one percent (1%) of the total gross revenues Grantee received during the prior year from Grantee=s electric utility service customers served from Grantee=s electric utility system located within City=s street rights-of-way; in the amount of \$170,000 for 1999, provided that the total payment to the City shall not exceed two percent (2%) of such total gross revenues received during the prior year; in the amount of \$265,000 for 2000, provided that the total payment to the City shall not exceed three percent (3%) of such total gross revenues received during the prior year; in the amount of \$370,000 for 2001, provided that the total payment to the City shall not exceed four percent (4%) of such total gross revenues received during the prior year; in the amount of \$480,000 for 2002, provided that the total payment to the City shall not exceed five percent (5%) of such total gross revenues received during the prior year; in the amount of \$595,000 for 2003 and each year thereafter provided that the amount thereof shall be adjusted annually thereafter by an amount equal to the percentage of the difference in the Grantee=s annual gross revenues derived from the franchise area as indicated in the two most recent financial reports, and further provided that the total payment to the City shall not exceed six percent (6%) of the total gross revenues Grantee received during the prior year from Grantee=s electric utility service customers served from Grantee=s electric utility system located within City=s street rights-of-way. The payments to the City shall be made quarterly, in four equal payments each year, on or before March 31, June 30, September 30, and December 31 of each year during the term hereof. It is provided, however, that absent any federal, state or other governmental laws or regulations to the contrary, such payments made by the Grantee to the City shall not result in a surcharge to customers in the City of Lakewood. It is further provided that nothing herein shall be deemed to impair the authority of the City to exercise its governmental powers.

**Section 19. Forfeiture and Revocation.** If the Grantee willfully violates or fails to comply with any of the provisions of this franchise, or through willful misconduct or gross negligence fails to heed or comply with any notice given the Grantee by the City under the provisions of this franchise, then the Grantee shall, at the election of the Lakewood City Council, forfeit all rights conferred hereunder and this franchise may be revoked or annulled by the Council after a hearing held upon reasonable notice to the Grantee. The City may elect, in lieu of the above and without any prejudice to any of its other legal rights and remedies, to obtain an order from the superior court having jurisdiction compelling the Grantee to comply with the provisions of this Ordinance and to recover damages and costs incurred by the City by reason of the Grantee's failure to comply.

If the Grantee willfully violates or fails to comply with any of the provisions of this franchise, or through willful misconduct or gross negligence fails to heed or comply with any notice given the Grantee by the City under the provisions of this franchise, then the Grantee shall, at the election of the Lakewood City Council, forfeit all rights conferred hereunder and this franchise may be revoked or annulled by the Council after a hearing held upon reasonable notice to the Grantee. The City may elect, in lieu of the above and without any prejudice to any of its other legal rights and remedies, to obtain an order from the superior court having jurisdiction compelling the Grantee to comply with the provisions of this Ordinance and to recover damages and costs incurred by the City by reason of the Grantee's failure to comply.

**Section 20. Remedies to Enforce Compliance.** In addition to any other remedy provided herein, the City reserves the right to pursue any remedy to compel or force the Grantee and/or its successors and assigns to comply with the terms hereof, and the pursuit of any right or remedy by the City shall not prevent the City from thereafter declaring a forfeiture or revocation for breach of the conditions herein.

In addition to any other remedy provided herein, the City reserves the right to pursue any remedy to compel or force the Grantee and/or its successors and assigns to comply with the terms hereof, and the pursuit of any right or remedy by the City shall not prevent the City from thereafter declaring a forfeiture or revocation for breach of the conditions herein.

**Section 21. City Ordinances and Regulations.** Nothing herein shall be deemed to direct or restrict the City's ability to adopt and enforce all necessary and appropriate ordinances regulating the performance of the conditions of this franchise, including any valid ordinance made in the exercise of its police powers in the interest of public safety and for the welfare of the public. The City shall have the authority at all times to control by appropriate regulations the location, elevation, manner of construction and maintenance of any facilities by the Grantee, and the Grantee shall promptly conform with all such regulations, unless compliance would cause the Grantee to violate other requirements of law.

Nothing herein shall be deemed to direct or restrict the City's ability to adopt and enforce all necessary and appropriate ordinances regulating the performance of the conditions of this franchise, including any valid ordinance made in the exercise of its police powers in the interest of public safety and for the welfare of the public. The City shall have the authority at all times to control by appropriate regulations the location, elevation, manner of construction and maintenance of any facilities by the Grantee, and the Grantee shall promptly conform with all such regulations, unless compliance would cause the Grantee to violate other requirements of law.

**Section 22. Cost of Publication.** The cost of the publication of this Ordinance shall be borne by the Grantee.

The cost of the publication of this Ordinance shall be borne by the Grantee.

**Section 23. Acceptance.** Within sixty days after the passage and approval of this Ordinance, this franchise may be accepted by the Grantee by its filing with the City Clerk an unconditional written acceptance thereof. Failure of the Grantee to so accept this franchise within said period of time shall be deemed a rejection thereof by the Grantee, and the rights and privileges herein granted shall, after the expiration of the sixty day period, absolutely cease and determine, unless the time period is extended by ordinance duly passed for that purpose.

Within sixty days after the passage and approval of this Ordinance, this franchise may be accepted by the Grantee by its filing with the City Clerk an unconditional written acceptance thereof. Failure of the Grantee to so accept this franchise within said period of time shall be deemed a rejection thereof by the Grantee, and the rights and privileges herein granted shall, after the expiration of the sixty day period, absolutely cease and determine, unless the time period is extended by ordinance duly passed for that purpose.

**Section 24. Survival.** All of the provisions, conditions and requirements of [Sections 3, Relocation of Electrical Transmission Facilities; 10, Dangerous Conditions; 13, Indemnification; and 15, Abandonment of the Grantee's Facilities, of this franchise shall be in addition to any and all other obligations and liabilities the Grantee may have to the City at common law, by statute, or by contract, and shall survive the City's franchise to the Grantee for the use of the areas mentioned in Section 1 herein, and any renewals or extensions thereof (however, such survival period extends only through the applicable statute of limitations period). All of the provisions, conditions, regulations and requirements contained in this franchise Ordinance shall further be binding upon the heirs, successors, executors, administrators, legal representatives and assigns of the Grantee and all privileges, as well as all obligations and liabilities of the Grantee shall inure to its heirs, successors and assigns equally as if they were specifically mentioned wherever the Grantee is named herein.

All of the provisions, conditions and requirements of [Sections 3, Relocation of Electrical Transmission Facilities; 10, Dangerous Conditions; 13, Indemnification; and 15, Abandonment of the Grantee's Facilities, of this franchise shall be in addition to any and all other obligations and liabilities the Grantee may have to the City at common law, by statute, or by contract, and shall survive the City's franchise to the Grantee for the use of the areas mentioned in Section 1 herein, and any renewals or extensions thereof (however, such survival period extends only through the applicable statute of limitations period). All of the provisions, conditions, regulations and requirements contained in this franchise Ordinance shall further be binding upon the heirs, successors, executors, administrators, legal representatives and assigns of the Grantee and all privileges, as well as all obligations and liabilities of the Grantee shall inure to its heirs, successors and assigns equally as if they were specifically mentioned wherever the Grantee is named herein.

**Section 25. Severability.** If any section, sentence, clause or phrase of this Ordinance should be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of any other section, sentence, clause or phrase of this franchise Ordinance. In the event that any of the provisions of this franchise are held to be invalid by a court of competent jurisdiction, the City reserves the right to reconsider the grant of this franchise and may amend, repeal, add, replace or modify any other provision of this franchise, or may terminate this franchise.

If any section, sentence, clause or phrase of this Ordinance should be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of any other section, sentence, clause or phrase of this franchise Ordinance. In the event that any of the provisions of this franchise are held to be invalid by a court of competent jurisdiction, the City reserves the right to reconsider the grant of this franchise and may amend, repeal, add, replace or modify any other provision of this franchise, or may terminate this franchise.

**Section 26. Assignment.** This agreement may not be assigned or transferred without the written approval of the City, except the Grantee may freely assign this Agreement in whole or in part to a parent, subsidiary, or affiliated corporation or as part of any corporate financing, reorganization or refinancing and provided that the City's approval shall not be unreasonably withheld. In the case of transfer or assignment as security by mortgage or other security instrument in whole or in part to secure indebtedness, such consent shall not be required unless and until the secured party elects to realize upon the collateral. The Grantee shall provide prompt, written notice to the City of any such assignment.

**Section 27. Notice.** Any notice or information required or permitted to be given to the parties under this franchise agreement may be sent to the following addresses unless otherwise specified:

Any notice or information required or permitted to be given to the parties under this franchise agreement may be sent to the following addresses unless otherwise specified:

To City: To Grantee:

City of Lakewood Tacoma Public Utilities

10510 Gravelly Lake Drive, S.W. #206 3628 South 35th Street

Lakewood, WA 98499-5013 Tacoma, WA 98409-3115

**Section 28. Effective Date.** This Ordinance has first been submitted to the Lakewood City Attorney; granted an approving vote of at least a majority of the City Council at a regular meeting after initial introduction on September 2, 1997, and been published in summary at least once in a newspaper of general circulation in the City of Lakewood prior to its adoption.

This franchise ordinance shall be effective thirty (30) days after execution and upon publication of the Ordinance Summary, and pursuant to RCW 80.32.040 is subject to referendum under the general laws of this state.

ADOPTED by the City Council this 15th day of September, 1997.

CITY OF LAKEWOOD

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Bill Harrison, Mayor

Attest:

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Alice M. Bush, CMC, City Clerk

Approved as to Form:

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Daniel B. Heid, City Attorney

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