

**ORDINANCE NO. 1321**

**AN ORDINANCE GRANTING TO TILLAMOOK PEOPLE'S UTILITY DISTRICT A  
FRANCHISE AGREEMENT WITHIN THE CITY OF TILLAMOOK OREGON**

**WHEREAS**, Tillamook People's Utility District (PUD) provides electric services within the City of Tillamook, Oregon; and

**WHEREAS**, PUD has applied for an electrical franchise pursuant to local ordinances relating to electrical lines located in the public rights of way, and the City of Tillamook ("City") has reviewed said application and has determined that it meets the requirements of the City's Ordinance subject to the terms and conditions stated in the attached Franchise Agreement (Exhibit A);

**NOW THEREFORE**, the City of Tillamook Ordains as Follows:

**Section 1. Franchise Approval.**

The City of Tillamook and Tillamook People's Utility District Franchise Agreement is hereby adopted as set forth in the attached Exhibit A; and

**Section 2. Effective Date.**

This Ordinance shall be in effect 30 days after adoption.

**PASSED FIRST READING** by the City Council this 7<sup>th</sup> day of November, 2016.

**PASSED SECOND READING** by the City Council this 21<sup>st</sup> day of November, 2016.

**ADOPTED** by the City Council this 21<sup>st</sup> day of November, 2016.

**APPROVED** by the Mayor this 21<sup>st</sup> day of November, 2016.

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Suzanne Weber, Mayor

Attest:

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Abigail Donowho, City Recorder

## CITY OF TILLAMOOK AND TILLAMOOK PEOPLE'S UTILITY DISTRICT

### FRANCHISE AGREEMENT

THIS FRANCHISE AGREEMENT ("Agreement"), entered into and effective this 18<sup>th</sup> day of October, 2016, by and between the CITY OF TILLAMOOK, a municipal corporation of the State of Oregon, hereinafter referred to as the "City," and the TILLAMOOK PEOPLE'S UTILITY DISTRICT, a people's utility district of the State of Oregon, hereinafter referred to as the "District."

#### WITNESSETH:

WHEREAS, the District is a people's utility district formed and operating within the City pursuant to ORS Ch. 261; and

WHEREAS, the City provides general governmental services to its residents; and as provided by ORS 221.410 to 221.475, ORS 758.210 to 758.270 and ORS 758.470, has the legal authority to regulate publicly owned right-of-way under its control and issue franchises and/or impose charges upon publicly and privately owned suppliers of electrical energy, as well as take any other action or activity specified therein and/or any other State or Federal law; and

WHEREAS, the District is authorized by law to enter into this Agreement with the City; and

WHEREAS, the Franchise Fee payable pursuant to this Agreement is intended to generate revenues used by the City for the provision of general governmental services to its residents; and

WHEREAS, the City and the District both desire the District to continue to provide electrical services within the City pursuant to the terms by which District will use and occupy the City Right-Of-Way described below;

NOW, THEREFORE, the District and the City agree as follows:

#### **Section 1: Grant of Exclusive Franchise**

A. The District is hereby granted an exclusive franchise right to conduct its electrical distribution business within the corporate limits of the City as the same now exist, or may hereafter be constituted. However, nothing herein contained shall in any way limit the City's ability to grant easement and/or franchise rights to other entities providing services other than electrical distribution services.

B. The District is hereby granted the right and privilege to construct, maintain, repair, replace, upgrade, and operate poles, wires, internal District communication lines, fixtures, transformers, substations, other equipment, underground ducts and circuits and any other facilities ("Facilities") necessary or convenient to provide electric power services and products upon, over, along, under and across the streets, alleys, roads, sidewalks, public easements and rights-of-way within the corporate limits or under the control of the City ("City Rights-Of-Way")

as the same now exist, or may be hereafter constituted. If either existing or impractical to avoid, District's use of the City Rights-Of-Way may include minor aerial encroachments into other public places immediately adjacent to City Rights-Of-Way, provided that all structures associated with such encroachments are affixed within the City Rights-of-Way. By way of example and not limitation, the foregoing provisions do not allow the District to construct new Facilities outside of City Rights-of-Way through City parks where poles or structures will be affixed to the ground in the park and outside of a City Right-of-Way.

C. All Facilities located within the corporate limits of the City as of the Effective Date of this Agreement shall be deemed to be covered by the terms of this Agreement, and the location and placement of such Facilities are hereby approved, unless such Facilities become subject to requirements of Section 7 hereto. The City will photo-document existing Facilities in Public Parks and the District will provide a map of existing Facilities within the City, which shall be retained confidentially for internal use only.

## **Section 2: Term and Termination**

A. This Agreement shall be effective as of the Effective Date and shall terminate five (5) years from said date ("Initial Term"), unless otherwise provided in this Agreement. No later than ninety (90) days prior to the expiration of the Initial Term, the Parties shall begin to discuss a successor agreement. If the Parties have not entered into a successor agreement prior to the expiration of the Initial Term, then this Agreement shall continue to be in effect for an additional six (6) months or until a successor agreement is adopted by the Parties, whichever occurs first. Either party may terminate the Agreement, effective on or after the expiration of the then-current term, by providing six (6) months advanced written notice to the other Party.

B. Notwithstanding any other term set forth in this Agreement, it is expressly agreed by the parties hereto that either party to this Agreement may at any time after giving sixty (60) days written notice to the other party requesting the opening of negotiations to amend or change any term of this Agreement, meet with the other party's representatives to review, negotiate and reach an agreement on the issues set forth in the aforesaid notice.

C. By City for Cause: If Grantee ceases to operate and maintain Grantee Facilities in compliance with industry-standard prudent utility practices and this causes an immediate or imminent safety risk to the public, the City shall notify Grantee and Grantee shall have thirty (30) days to eliminate such risk or, if, in Grantee's sole discretion, such risk cannot be eliminated within thirty (30) days, such mutually-agreed upon time period as is required to eliminate such risk. Grantee shall bear all costs related to remedying the risk. If Grantee does not eliminate the risk in accordance with the preceding sentence, the City may then terminate this Franchise by providing Grantee written notice of termination.

## **Section 3: Construction of District Facilities**

A. Within Right-of-Way. The District will complete all construction or repair work in a reasonable and safe manner in compliance with the requirements of applicable state laws and City ordinances. All new Facilities installed in the City during any term of this Agreement shall be located in accordance with prudent utility practice. Facilities located within a Right-of-Way

shall be governed by the terms of this Agreement and no other City land use standards shall apply. The District should notify the City prior to the installation of any new or replacement of Facilities to ensure that such installation(s) will not interfere with any planned City infrastructure project, as described in Section 7 herein. Upon request from the City, the District will provide the City any four (4) year work plan that has been approved by the District. Subsequent four (4) year work plans will be submitted to the City upon request as such work plans may be approved by the District.

B. Outside of Right-of-way. City's Zoning Code Section 153.023 (24) permits the erection, construction, alteration, or maintenance by utilities in any district in accordance with their franchise agreement. The following elements clarify the application of that Code Section for this franchise.

1. Where Facilities are permitted outright, all permitting authority is shifted to the franchise. Where Facilities are permitted conditionally, there may be a conditional use process to be followed. Therefore, Section 153.022 (5)(F)(1) shall not be interpreted to require a land use site plan review, but rather all new Facilities outside of a Right-of-Way shall be subject to the City's granting of a Public Works Permit. Any discretionary application of standards shall be determined by the Public Works Director.

2. For purposes of this Agreement, a "New Electrical Connection" shall mean only those Facilities constructed to serve a property that is not currently receiving service from the District, the upgrade of an existing service connection, or property subject to a pending application for electrical service as of the effective date of this Agreement. Additionally, "upgrade" means to make a change to existing Facilities to increase the level of service provided by those Facilities, such as, but not limited to, a change from residential to commercial or a significant increase in power capacity.

3. For avoidance of doubt, indeterminate services as defined in the District's Policy 4-2, 3.3 and in the District's Customer Guide to Electric Services Requirements Section 2.0, and new Facilities not associated with a New Electrical Connection, are not required to be placed underground. Further, for avoidance of doubt, District shall not be required to obtain a conditional use permit for any portion of its Facilities that constitutes a service to a customer on the subject property.

C. Upon written request by the City, current utility maps incorporating construction completed by the District within the City shall be provided to the City for the City's use, at no expense to the City. The District and the City shall use map information for their exclusive use only and to the extent allowed by law, will not disclose that information to the public.

D. Upon written request by the District, current City maps regarding tax lots, roads, streets, alleys, and zoning shall be provided to the District for the District's use at no expense to the District.

E. The District may perform emergency construction or repair work on any Facilities located within the City without providing prior notice to, or obtaining prior approval from, the City. The District shall notify the City of necessary changes to Facilities resulting from

emergency work any time that the City's infrastructure is materially affected, not including detours of less than four (4) hours. "Emergency" means a situation involving: (a) an unscheduled outage affecting one or more customers or (b) imminent danger to public safety. "Emergency" also includes situations where the failure of the District to act would result in either (a) or (b).

F. The District shall have the right to cut, trim, and control the growth by chemical means, machinery or otherwise remove and dispose of trees, shrubbery, vegetation and undergrowth in any City Rights-Of-Ways that interfere with the District's permitted use. District shall comply with any applicable provisions of state administrative rules, including OAR 860-024-0016 and OAR 860-024-0017, regarding vegetation management.

G. The District shall obtain prior written permission from the City before cutting, trimming or otherwise controlling in any way any tree, shrubbery, vegetation or undergrowth within the City Rights-Of-Way for reasons other than those specifically listed in subsection (F) above.

H. Any vegetation waste shall be disposed of by District consistent with applicable local, state and federal laws.

#### **Section 4: District Excavations of City Rights-Of-Way**

A. The District may make all necessary excavations in the City Rights-Of-Way for the purpose of constructing, repairing, maintaining, removing and/or relocating any Facilities. All excavation work shall be done at the District's sole expense and in compliance with applicable Oregon laws and the applicable rules and regulations of the District and the City.

B. Whenever the District performs an excavation pursuant to this Agreement, the District shall restore the affected portion of the City Rights-Of-Way to the same or better condition that it was in prior to the excavation.

#### **Section 5: Work By City In City Rights-Of-Way**

A. The City will provide advance notice to the District, as early as possible, of any City plans to widen streets, relocate public ways, or other major public improvements within the City that could require relocation of Facilities.

B. The City will give notice of any plans to vacate any City Rights-Of-Way, if the District's Facilities are located within such City Rights-Of-Way. The City will cooperate with the District to avoid unnecessary relocation of such Facilities. In the event of such vacation by the City, the City shall provide the District with the first right of refusal to convert a portion of the vacated City Rights-Of-Way to a utility easement.

C. Nothing in this Franchise shall be construed in any way to prevent the City from excavating, grading, paving, planking, repairing, widening, altering, or completing any work that may be needed or convenient in the City's Rights-of-Way. The City shall inform District of any

such work which may cause an obstruction or any injury to District's Facilities. City shall be responsible for the costs to repair any damage to District's Facilities caused by such City's work.

D. All work by the City within the City Rights-Of-Way shall be done, to the extent possible, in such a manner so as not to obstruct or prevent the District from freely using and operating its Facilities.

**Section 6: New Development Within The City**

A. The City will provide the District with the opportunity to review all new street and subdivision designs prior to plat approval by the City.

B. The City and the District will work together to determine the best non-exclusive utility corridor in all new street layouts, whenever reasonably possible.

C. The City shall require zoning clearance applicants to notify the District of building permit applications at the time of such permit application, if the applicant is seeking or will be seeking to construct a new structure.

D. The City will provide notice, as early as possible, of any new construction or any expansion of existing commercial or industrial properties that may significantly increase the need for electrical power within the City.

**Section 7: Relocation of District Facilities**

Notwithstanding Section 5(d) above, the City may cause the District to relocate any Facilities within the City Rights-Of-Way to the same or another City Right-of-Way, whenever relocation is necessary as part of a City-related infrastructure project. Infrastructure projects are defined as: widening or otherwise modifying or constructing streets or bridges; installing or modifying sidewalks; installing, modifying, or relocating water facilities, fire hydrants, valves, blow-offs; installing, modifying, or relocating storm drain or sewer facilities. The expense of relocating such Facilities to the same or another City Right-of-Way, or public utility easement, will be paid solely by the District. The District will respond with a plan to relocate within sixty (60) days and complete construction within one hundred eighty (180) days from the date of notification by the City, unless otherwise agreed to in writing by the District and the City. The location, design and construction specifications of any Facilities relocated pursuant to this Section shall be determined by the District in its sole discretion so long as such location, design and construction specifications otherwise comply with the provisions of this Agreement.

**Section 8: Monthly Fee**

A. In consideration of the rights and privileges granted in this Agreement, the District shall pay to the City, for each month during the Term of this Agreement a Franchise Fee equal to seven percent (7%) of the District's gross revenues, as defined below, less adjustments described below, collected during the previous month from customers whose meters are located within the City ("Franchise Fee").

B. The term “Gross Revenues” includes any amount billed to customers within the corporate limits of the City for the sale of electric energy by the District. Gross Revenues do not include sales of electric energy by the District to the City or any other municipal corporation or public taxing body with the corporate limits of the City. Gross Revenues do not include sales of electric energy by the District to any electric utility that is not the ultimate consumer. An electric utility, as used in this Agreement, is any individual, partnership, cooperative, and corporation or government agency buying electric energy from the District for purposes of distributing such electric energy to retail customers outside of the City or for purposes of transferring such electric energy in wholesale electric markets. Gross Revenues also do not include proceeds received by the District from the sale of bonds, mortgages, securities or other evidences of indebtedness. Additionally, gross revenues earned in interstate commerce by the District or on the business of the United States Government, as specified in ORS 221.450, shall not be included. This subsection shall be in accordance with ORS 221.655.

C. The District will withhold 2.5% of the Franchise Fee as compensation for the administrative costs incurred by the District in calculating, billing, collecting and paying the Franchise Fee.

D. The City agrees that no other license, tax or charge on the business, occupation or franchise of the District shall be imposed upon, exacted from or required of the District by the City during the term of this Agreement, except that nothing in this Agreement shall exempt the property of the District from lawful *ad valorem* taxes. This provision does not apply, however, to District contractors working within the City who are required to have City licenses and permits, building permits issued directly to the District, or any utility charge (i.e., water, sewer, etc.) due to the City by the District as a utility customer of the City or any other fee owed to the City that is not directly attributable to the provisions contained within this Agreement.

E. The District shall, by policy and in its sole discretion, determine the method of allocating, billing and collecting from its customers the Monthly Franchise Fee imposed under this Agreement. The District may at any time, as determined by its Board of Directors, alter its policy for allocating or billing customers for the purpose of collecting the Monthly Franchise Fee. The City expressly acknowledges and agrees that all or part of the Monthly Franchise Fee may be allocated to and collected solely from District customers within the City as a separately identified item on the District’s bills to such customers. The City agrees not to challenge, in a court of law, arbitration, mediation or otherwise, the District’s method of allocating, billing or collecting the Monthly Franchise Fee from District customers as long as the District complies with applicable Oregon and/or federal law governing such matters. The District shall notify the City no less than forty-five (45) days prior to changing its method of allocating, billing or collecting the Franchise Fee before any such changes take effect.

F. At the City’s request, the District shall file a report showing District’s gross revenues as defined herein for the previous calendar year and the amount of Franchise Fees due to the City. The District shall have an obligation to maintain financial records of its gross revenues and Franchise Fee payments for audit purposes for the term of this Agreement, and the District will keep its books according to generally accepted accounting principles. The City may, at its own expense, and with five (5) business days’ notice, audit those books that are maintained in the ordinary course of business at the District’s Offices.

G. **Property Tax Limitations Do Not Apply:** The payment described in this Section 16 is not subject to the property tax limitations of Article XI, Sections 11(b) and 11(19) of the Oregon Constitution and is not a fee imposed on property or property owners by fact of ownership.

**Section 9: Pole Attachments**

A. If the City wishes to make any attachment of any type to the poles or other Facilities of the District, the City must execute the District’s pole attachment agreement.

B. The City will notify the District of any request for new cable television or telecommunications franchises or expansion or renewal of existing cable television or telecommunications franchises with the City insofar as attachment of cable or wires to the District’s poles is concerned.

**Section 10: District Property Values**

The franchise and privilege to operate in the City Rights-Of-Way shall not be an enhancement of the District’s properties or values or qualify as an asset or item of ownership in any appraisal thereof.

**Section 11: Dispute Resolution**

Unless otherwise provided herein, in the event a dispute arises relative to any aspect of this Agreement, the parties shall make a good faith effort to resolve the same as follows:

A. **First Step:** Informal meetings between the Managers of the parties, at which a simple statement of the issue or dispute is reduced to writing and an attempt made to resolve the same. If Agreement is reached and approved by the respective governing bodies of the parties, then no further action is required.

B. **Second Step: Notice and Opportunity to Cure.** Each Party shall provide the other Party thirty (30) days prior written notice of its intent to exercise its rights under this Section 11, stating the reasons for such action, including any dispute or potential claim for breach. If the other Party cures the basis for the dispute or potential breach to the Party’s reasonable satisfaction, or initiates efforts satisfactory to that Party and the efforts continue in good faith within the thirty (30) day notice period, the Party shall not exercise its rights under this Section 11. If the other Party fails to cure the basis for the dispute or potential claim for breach or does not undertake and/or maintain efforts satisfactory to the Party within the thirty (30) day notice period, then the Party may pursue any or all of the remedies available under this Section 11.

C. **Third Step:** If a resolution is not reached at “First Step,” then the statement of the dispute shall be referred to the respective governing bodies of the parties. A Dispute Resolution Committee of four (4) shall be appointed from the governing bodies of each party, with two (2) being appointed by the Mayor of the City from its Council and two (2) being appointed by the President of the District from its Board, at the next ensuing regular meetings of the District and the City. The Dispute Resolution Committee shall meet as soon as practicable following the completion of the process, but in no event not later than forty-five (45) days after the last

appointment is made. Said Committee shall attempt to reach a resolution of the issues and/or dispute.

D. Fourth Step: In the event a resolution is not reached at “Third Step,” then either party may institute such legal action as may be deemed appropriate, whether in law, in equity or in both.

E. Litigation Costs: In the event suit, action or proceedings are instituted or had to collect any sums payable under the terms of this Agreement, or to enforce any provision of this Agreement, or to protect, assert or determine in any way, either party’s rights, the prevailing party shall be entitled to collect as part of the costs in such suit, action or proceedings, the costs of collection in addition to such sum as the judge of the court may adjudge reasonable as attorneys’ fees; and in the event of any appeal to an appellate court, the prevailing party shall be entitled to collect such sums as such court shall adjudge reasonable as attorneys’ fees on said appeal.

### **Section 12: City Charter and Ordinances to Apply**

This Franchise is subject to the Charter of the City of Tillamook and general ordinance provisions passed pursuant thereto. District agrees to comply with all city, state and federal laws and ordinances previously enacted, by the City or any other legally constituted governmental unit having jurisdiction over the subject matter hereof.

### **Section 13: Construction**

Subject to the National Electrical Safety Code, new Facilities shall be constructed and maintained in such manner as not to interfere with existing sewers, water pipes, or any other real or personal property of the City, or with any other existing pipes, wires, conduits or other facilities within the City Rights-of-Way. District shall at its own expense repair, renew, remove, relocate, change or improve its Facilities from time to time as may be necessary to accomplish this purpose. District and City shall work together during any design process affecting the City Rights-of-Way to identify suitable locations for Facilities.

### **Section 14: Indemnification**

Subject to the limitations set forth in the Oregon Constitution and the Oregon Tort Claims Act, each Party hereby agrees and covenants to indemnify, defend, and hold the other Party, its elected and appointed officials, officers, directors, agents, and employees harmless from any claims for injury, damage, loss, liability, cost, or expense, including court and appeal costs and attorney fees or expenses, arising from any negligent act or omission or willful misconduct of the indemnifying Party related to this Agreement. The duty to indemnify shall not extend to any gross negligence or willful misconduct by the indemnified Party, its elected and appointed officials, officers, directors, agents, and employees. The indemnified Party shall provide the indemnifying Party with prompt notice of any such claim, which the indemnifying Party shall defend at the indemnifying Party’s sole cost and expense. The indemnified Party and its agents, employees, and contractors shall consult and cooperate with the indemnifying Party while the

indemnifying Party is conducting its defense. The indemnified Party may, at its own cost, defend or participate in the defense of a claim. This duty to indemnify shall survive the Term of this Agreement.

### **Section 15: Insurance**

Grantee shall obtain and maintain in full force and effect, for the entire Term, the following insurance, covering risks associated with Grantee's ownership and use of Grantee Facilities and the City's Rights-of-Way and consistent with Grantee's risk management practices:

A. Commercial General Liability insurance covering all operations, subject to policy terms, conditions and exclusions, by or on behalf of Grantee for Bodily Injury and Property Damage, including Completed Operations and Contractors Liability coverage, in an amount not less than Two Million Dollars (\$2,000,000.00) per occurrence and in the aggregate.

B. Business Automobile Liability insurance to cover any vehicles used in connection with its activities under this Franchise, with a combined single limit not less than One Million Dollars (\$1,000,000.00) per accident.

C. Workers' Compensation coverage as required by law and Employer's Liability Insurance with limits of One Million Dollars (\$1,000,000).

D. The insurance shall be without prejudice to coverage otherwise existing and, with the exception of Workers' Compensation and Employers Liability, shall name as additional insureds the City, its elected and appointed officials, its officers, agents, and employees; provided, however, that such additional insured status shall only extend to the extent of Grantee's contractually assumed indemnity obligation as outlined under Section 20 of this Franchise Agreement. Notwithstanding the naming of additional insureds, the insurance shall protect each insured in the same manner as though a separate policy had been issued to each, but nothing in this subsection shall operate to increase the insurer's liability as set forth elsewhere in the policy beyond the amount or amounts for which the insurer would have been liable if only one person or interest had been named as insured. The coverage must apply as to claims between insureds on the policy. The insurance shall provide that the insurance shall not be canceled without thirty (30) days' prior written notice first being given to the City. If the insurance is canceled or materially altered within the term of this Franchise, Grantee shall provide a replacement policy with the same terms as required by this Franchise. Grantee shall maintain continuous uninterrupted coverage, in the terms and amounts required, upon and after the effective date of this Franchise. Grantee shall provide the City with a certificate of insurance evidencing such coverage as a condition of this Franchise and shall provide updated certificates upon request.

### **Section 16: Notice**

Any notice provided for under this Agreement 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) sent by facsimile transmission with verification of receipt,

addressed as follows, or to such other address as the receiving party hereafter shall specify in writing.

**Section 17: Successors and Assigns; Subcontractors**

The provisions of this Agreement shall be binding upon and shall inure to the benefit of the Parties hereto, and their respective agents, subcontractors, successors and assigns. Further, all work performed in relation to or in connection with this Agreement, whether by the District, District’s subcontractor or assignee, is subject to the terms of this Agreement.

**Section 18: Miscellaneous Provision**

A. Amendment: This Agreement may only be modified by written consent of both parties. This Agreement supersedes any existing or future ordinance or resolution enacted by either party that is inconsistent or conflicts with the provisions contained herein.

B. Complete Integration: This Agreement reflects the complete Agreement of the parties with respect to the subject matter contained herein. This Agreement fully replaces any prior writing or representation made by either party with respect to the subject matter contained herein.

C. Choice of Law: The terms of this Agreement and the authority of each party hereto to execute and perform this Agreement shall be governed by the laws of the State of Oregon.

D. Except as otherwise expressly stated herein, the District and the City reserve all rights and powers granted them under state and/or federal law as the same may be amended from time to time.

E. Severability: If any of provision in this Agreement is determined by a court of law to be illegal or unenforceable then the remainder of the Agreement shall remain fully effective and enforceable.

Executed this \_\_\_\_ day of \_\_\_\_\_, 2016      Executed this \_\_\_\_ day of \_\_\_\_\_, 2016

**Tillamook People’s Utility District**

**City of Tillamook**

\_\_\_\_\_  
President, Board of Directors

\_\_\_\_\_  
Mayor

\_\_\_\_\_  
General Manager

\_\_\_\_\_  
City Manager