

ORDINANCE NO. 2546

AN ORDINANCE GRANTING TO PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY A FRANCHISE TO LOCATE, CONSTRUCT, OPERATE AND MAINTAIN FACILITIES WITHIN ALL CITY RIGHTS-OF-WAY AND OTHER PUBLIC PROPERTY IN THE CITY OF MOSES LAKE, WASHINGTON

SECTION 1. FINDINGS: Public Utility District No. 2 of Grant County, Washington, a municipal corporation organized under the laws of the state of Washington (hereinafter referred to as "District" or "Grantee") has requested from the City of Moses Lake, Washington, (hereinafter referred to as "Grantor" or "City"), a franchise to locate, construct, operate, and maintain poles, wires, underground cables, and appurtenances (hereinafter "facilities") over, under, across, along and parallel to all city rights of way and public property in the City of Moses Lake, Washington.

SECTION 2. GRANT OF FRANCHISE

2.1 Grant:

- A. Grantor hereby grants to Grantee a nonexclusive authorization to construct, operate, maintain, reconstruct, replace, upgrade and repair electrical and telecommunications facilities for the purpose of carrying out the Grantee's functions authorized under Title 54 RCW. Said facilities may be located under, over along, adjacent, or parallel to all present and future streets, alleys, rights of way and other public property belonging to the Grantor (hereinafter referred to as the "Franchise Area"). "Streets" means each of the following which have been dedicated to the public or are hereafter dedicated to the public and maintained under public authority or by others and located within the Franchise Area: Streets, roadways, highways, avenues, lanes, alleys, sidewalks, easements (dedicated for compatible uses), rights-of-way and similar public property and areas.
- B. The term "facilities" shall include, but not be limited to: all such wires, cables, hubs (neighborhood fiber distribution points), poles, conductors, ducts, conduits, vaults, amplifiers, pedestals, attachments and other property and equipment not to exceed six feet (6') wide by six feet (6') long in size as are reasonably necessary to the operation of an electrical system and/or telecommunication system for the provision of electrical power and wholesale telecommunication service within the Franchise Area, as determined by the Grantee in its sole discretion. Facilities larger than six feet (6') wide by six feet (6') long in size may only be installed with prior permission of the Grantor.
- C. This Franchise is intended to convey limited rights and interests only as to those Streets in which the Grantor may lawfully convey such rights and interests. It is not a warranty of title or interest in any right-of-way; it does not provide the Grantee any interest in any particular location within the right-of-way; and it does not confer rights other than as expressly provided in the grant hereof. This Franchise does not deprive the Grantor of any powers, rights or privileges it now has, or may later acquire in the future, to use, perform work on or to regulate the use of and to control the Grantor's streets, alleys, rights of way and other public property belonging to the Grantor covered by this Franchise, including without limitation the right to perform work on its roadways, right-of-way or appurtenant drainage facilities, including constructing, altering, paving, widening, grading, or excavating thereof.
- D. Grantor may at any time grant authorization to use the public rights-of-way for any purpose not incompatible with Grantee's authority, rights, privileges and interests under this Franchise. The non-exclusive provisions of this franchise shall not authorize the Grantor to locate other facilities on Grantee-owned poles or wires without the Grantee's consent or affect the service or services provided under this franchise, or permit facilities of third parties to create a hazard to Grantee owned facilities.

- E. To the extent permitted under applicable federal and state law, this Franchise shall authorize the Grantee the right or privilege to install its facilities in any manner on specific utility poles or equipment owned by Grantee or any other Person with their permission.
 - F. Grantee promises, as a condition of exercising the privileges granted by this Franchise, that Grantee will comply with the terms and conditions of this Franchise.
- 2.2 **Master Permit:** This Franchise shall constitute the Master Permit for all facilities. The Grantee shall continue to notify the Grantor of plans to work within the right-of-way and provide written plans for review and approval, but no permit shall be required provided that such facilities are located pursuant to the terms of this Franchise.
- 2.3 **Duration:** The term of this Franchise and all rights, privileges, obligations and restrictions pertaining thereto shall be from the effective date of this Franchise through April 30, 2035.
- 2.4 **Effect of Acceptance:** Upon acceptance by the Grantee, this Franchise shall supersede all prior franchises and shall affirm, authorize and ratify all prior activity authorized by permits or other action not previously covered by this Franchise.
- 2.5 **Effective Date** The effective date of this Franchise shall be the date upon which it is accepted by the Grantee, provided that such acceptance shall occur on or before April 30, 2010. If not accepted by that date this Franchise shall be null and void.
- 2.6 **Grant of Other Franchises :** In the event the Grantor enters into a Franchise, permit, license, authorization, or other agreement of any kind with any other Person or entity other than the Grantee to enter into the Grantor's streets for the purpose of constructing or operating electrical facilities or wholesale telecommunications facilities, the material provisions thereof shall be reasonably comparable to those contained herein, in order that one operator not be granted an unfair competitive advantage over another, and to provide all parties equal protection under the law.
- 2.7 **Police Powers:** Grantee's rights hereunder are subject to the rights and powers of Grantor to adopt and enforce ordinances necessary to the safety, health, and welfare of the public. In the event of conflicts between provisions of this Franchise and other ordinances of the Grantor, the terms of this Franchise shall prevail except as to health and safety issues. This Franchise is purposefully silent on the issue of whether or not construction of facilities within the right-of-way must be underground. All undergrounding issues will be dealt with outside of this Franchise.
- 2.8 **Relations to Other Provisions of Law:** This Franchise does not confer rights or immunities upon the Grantee other than as expressly provided herein. Grantee does not waive its right to challenge the lawfulness of a particular enactment, including on the grounds that a particular action is an unconstitutional impairment of contractual rights. The Franchise issued is in lieu of any other required permit, or authorization.
- 2.9 **Costs of Publication:** Grantee shall pay the reasonable cost of newspaper notices and publication pertaining to this Franchise and any amendments thereto, as such notice or publication is reasonably required by Grantor or applicable law.

SECTION 3. AUTHORITY: Grantor and Grantee both represent that they have the authority to enter into and execute this document.

SECTION 4. GENERAL STREET USE AND CONSTRUCTION:

- 4.1 **Tree Trimming and Removal:** Grantee's right to maintain its facilities shall include the right to trim and remove all trees or other vegetation that overhang a public right-of-way of the Grantor so as to prevent the branches of such trees from coming in contact with its Electrical system or Telecommunications system, or that interfere with or may interfere with Grantee's facilities located pursuant to the terms of this franchise.

4.2 Construction:

- A. Subject to applicable state and federal laws and regulations and ordinances of Grantor and the provisions of this Franchise, Grantee may perform all construction necessary for the operation of its electrical system or telecommunications system. All construction and maintenance of any and all facilities within Streets incident to Grantee's electrical system or telecommunication system shall, regardless of who performs the construction, be and remain Grantee's responsibility.
- B. Prior to May of each year, Grantor and Grantee and other parties shall meet to discuss street construction planned for the following construction season or such longer period as necessary to fully plan for the development of City streets and other rights of way. Grantor and Grantee shall disclose to each other, their plans and schedules for development, including other construction currently in progress, planned or proposed, in order to investigate thoroughly all opportunities for sharing costs and to minimize the interruptions in the use of City streets. Whenever it is possible and reasonably practicable, Grantee and Grantor shall cooperate in planning efforts so as to reduce the number of street cuts, minimize interference with existing utilities and/or reduce the overall cost to each party.

4.3 One Call Locator Service: The Grantor and the Grantee shall use the one call locator service prior to performing any excavation in the Grantor's Streets.

4.4 Relocation: Grantor shall have the right to reasonably require, Grantee to change the location of any part of Grantee's electrical system or telecommunication system within the Streets when a street improvement project requires such change, and the expense thereof shall be paid by Grantee. Should Grantee fail to remove or relocate any such facilities by the date reasonably established by Grantor, Grantor may effect such removal or relocation, and the expense thereof shall be paid by Grantee, including all reasonable costs and expenses incurred by Grantor due to Grantee's delay. If Grantor requires Grantee to relocate its facilities located within the right of way, Grantor shall make a reasonable effort to provide Grantee with an alternate location within the right of way.

4.5 Restoration of Streets:

- A. Whenever Grantee disturbs the surface of any Street for any purpose, Grantee shall promptly restore the Street to per the City's Community Street and Utility Standard. If public or private property is disturbed or damaged by Grantee, the Grantee shall reasonably restore the property to its former condition, normal wear and tear excepted which complies with the current Street and Utility Standard. In the case of fire or disaster, the Grantor may remove, replace, modify or disconnect Grantee's facilities and equipment located in the public right-of-way or on any other property of the Grantor. Following notice by the Grantor to Grantee of such emergency modification, Grantee may restore its facilities or equipment to their pre-existing condition at Grantor's expense.
- B. If any removal, replacement, modification or disconnection is required to accommodate the construction, operation or repair of the facilities or equipment of another Franchise holder, Grantee shall, after at least sixty (60) days' advance written notice, take action to effect the necessary changes requested by the other Franchise holder at the other Franchise holder's sole and pre-paid cost and expense.
- C. At the request of any Person holding a valid permit, issued by an agency having appropriate jurisdiction, and upon reasonable advance notice, Grantee shall temporarily raise, lower or remove its wires as necessary to permit the moving of a building, vehicle, equipment or other item. The permit holder must pay the expense of such temporary changes, and Grantee may require full payment in advance.

4.6 Maintenance and Workmanship:

- A. Grantee's electrical system or telecommunication system shall be constructed and maintained in such manner as not to interfere with sewers, water pipes, or any other property of Grantor, or with any other pipes, wires, conduits, pedestals, structures, equipment or other facilities that may have been laid in the Streets by, or under, Grantor's authority.
- B. Grantee, at its own expense, shall install, operate, repair, change and improve its facilities to keep them in good repair, and safe and reasonably presentable condition.

4.7 Reservation of Grantor Street Rights: Nothing in this Franchise shall prevent Grantor or utilities owned, maintained or operated by public entities other than Grantor, from constructing sewers; grading, paving, repairing or altering any street; repairing or removing water mains, or constructing or establishing any other public work or improvement. All such work shall be done, insofar as practicable, so as not to obstruct, injure or prevent the use and operation of Grantee's electrical system or telecommunication system. However, if any of Grantee's electrical system or telecommunication system interferes with the construction or repair of any street or public improvement, including construction, repair or removal of a sewer or water main, Grantee's electrical system or telecommunication system shall be relocated in accordance with 4.4.

4.8 Use of Conduits by Grantor: The Grantee and the City shall grant to each other, free of expense, joint use of any and all poles, ducts, conduits or equipment in the streets or other public places owned by either party for any proper purpose, insofar as the same may be done without interfering with the use and enjoyment of either party's own wires and other facilities and further provided that all such joint use shall be in full compliance with all rules, regulations, requirements and conditions of all applicable safety codes affecting electrical installations which may be presently in effect or future amendments thereto, as well as being subject to the City's obligations to any other franchise holder with which it may have a similar joint use agreement. The District shall be notified of any plans to use said facilities by the Grantor or any other franchise holder which the Grantor may have a similar joint use agreement with. The Grantor shall provide written plans for review and approval by the District prior to construction. The District's approval shall be signified by written approval on forms provided by the District. All other franchise holders shall be responsible to negotiate separate terms and conditions with the District for a joint use agreement for use of any District facilities.

4.9 Street Vacation: If, at any time, the Grantor shall sell, transfer or vacate any road, right-of-way or other public property which is subject to rights granted by this franchise, such sale, transfer or vacation shall be subject to a perpetual easement in favor of Grantee, its successors and assigns, for its facilities in place at the time of vacation and for the purpose of continued operation and maintenance of said facilities. The Grantor shall give the Grantee notice of any vacation proceedings as if it were an abutting landowner. Such vacation shall, by its terms, expressly prohibit any use of the vacated properties that will interfere with Grantee's full enjoyment of rights under said easement. The Grantor agrees to promptly execute any such documents as may be required to implement this section.

4.10 Hazardous Substances:

- A. Grantee shall comply with all applicable local, state and federal laws, statutes, regulations and orders concerning hazardous substances relating to Grantee's electrical system or telecommunications system in the Franchise Area.
- B. Grantee shall maintain and inspect its electrical system or telecommunications system located in the Streets. Upon reasonable written notice to Grantee, Grantor and Grantee may jointly inspect Grantee's facilities in the Streets to determine if any release of hazardous substances has occurred, or may occur, from or related to Grantee's electrical system or telecommunications system. In removing or modifying Grantee's facilities as provided in this Franchise, Grantee shall also remove all residues of hazardous substances related thereto.

- 4.11 No Interference: Grantee shall arrange its lines; cables and other appurtenances, on public property, in such a manner as to not cause unreasonable interference with the use of said public property by any person.

SECTION 5. INSURANCE REQUIREMENTS :

5.1 Insurance Requirements:

- A. **General Requirement.** Grantee must have adequate insurance during the entire term of this Franchise to protect against claims for injuries to Persons or damages to property which in any way relate to, arise from, or are connected with this Franchise or involve Grantee, its agents, representatives, contractors, subcontractors and their employees.
- B. **Initial Insurance Limits.** Grantee must keep insurance in effect in accordance with the minimum insurance limits herein set forth by the Grantor from time to time. The Grantee shall obtain policies for the following initial minimum insurance limits:
 - 1. **Commercial General Liability:** Two-million dollars (\$2,000,000) combined single limit per occurrence for bodily injury, personal injury, and property damage, and for those policies with aggregate limits, a two-and-one-half million dollars (\$2,500,000) aggregate limit,
 - 2. **Automobile Liability:** Two-million dollars (\$2,000,000) combined single limit per accident for bodily injury and property damage.
- C. **Self Insurance.** The insurance limits may be satisfied through self insurance up to the first \$500,000 with excess coverage that satisfies the requirements of this section.
- D. **All insurance limits set forth in this section shall be subject to review and adjustment by the Grantor every ten (10) years. Grantor shall give Grantee sixty (60) days to provide proof that increased limits are in place if so directed by the Grantor after its review.**

5.2 Indemnification:

- A. **Scope of Indemnity.** Grantee shall, at its sole cost and expense, indemnify, hold harmless, and defend the Grantor and its officers, boards, commissions, agents, and employees against any and all claims, including, but not limited to, third party claims, suits, causes of action, proceedings, and judgments for damages or equitable relief solely to the extent the Claims arise out of Grantee's or Grantee's agent's negligent acts or negligent omissions: provided, however, the Grantee will not be obligated to indemnify Grantor or its officers, commissions, agents, or employees in any proceeding regarding the grant of this Franchise. This indemnity provision shall include damages and liabilities, if and to the extent such damages and liabilities are a result of Grantee's or Grantee's agent's negligent acts or negligent omissions. This indemnity provision shall not apply to the extent of the Grantor's negligent acts or omissions or those of its officers, agents, contractors, or employees thereof.
- B. **Duty to Give Notice and Tender Defense.** The Grantor shall give the Grantee written notice within ten (10) days of receiving any claim or of the commencement of any action, suit or other proceeding covered by the indemnity in this Section. Failure of Grantor to provide such notice shall result in waiver of Grantee's indemnification obligations with respect to such action, suit or other proceeding otherwise covered by the indemnity in this Section. In the event any such claim arises, the Grantor or any other indemnified party, as defined by this Franchise, shall tender the defense thereof to the Grantee and the Grantee shall have the obligation and duty to defend, settle or compromise any claims arising thereunder, and the Grantor shall cooperate fully therein. Grantee shall accept or decline the tender within ten (10) days of its receipt of the written notice described above. In the event that the Grantee declines defense of the claim in violation

of this Section 5.2, the Grantor may defend such claim and seek recovery from Grantee its reasonable expenses for attorneys' fees and other expenses, including expert witness fees, incurred by Grantor for defense and in seeking such recovery.

- C. The provisions of Section 5.2 shall apply to claims by Grantee's own employees and the employees of Grantee's agents, representatives, contractors, and subcontractors to which Grantee might otherwise be immune under Title 51 RCW. This waiver of immunity under Title 51 RCW has been mutually negotiated by the parties hereto, and Grantee acknowledges that the City would not enter into this Franchise without Grantee's waiver thereof.

SECTION 6. NOTICE OF DEFAULT AND CURE:

6.1 **Default:** If the Grantee fails to comply with any material provisions of this ordinance or causes to be done, any act or thing prohibited by or in violation of the terms of this ordinance, the Grantor shall notify Grantee in writing, stating with reasonable specificity the nature of the alleged violation. Grantee shall have thirty (30) days from the date of receipt of such notice to:

- A. Respond to Grantor, contesting Grantor's assertion that a violation has occurred, and request to use the dispute resolution provisions of this franchise; or
- B. Cure the violation within 90 days of the date of the Grantee's response to the Grantor or within such longer period if necessary to cure the alleged violation; or
- C. Notify Grantor that Grantee cannot cure the alleged violation within ninety (90) days, and notify the Grantor in writing of what steps the Grantee shall take to cure the violation including the Grantee's projected completion date for such cure. In such case, Grantor and Grantee shall meet to discuss alternative methods to cure the violation.
- D. In the event a default or violation is not cured as provided herein, Grantor may remedy the default or violation as reasonably necessary in the interests of managing the right of way without disturbance, modification or relocation of Grantee's facilities other than that necessary to insure pedestrian and vehicle safety in use of rights-of-way and the Grantee shall reimburse Grantor for the reasonable costs incurred within thirty (30) days after receipt of an itemized list of the expenses incurred.

6.2 **Revocation of Franchise:** A default or violation may constitute grounds for forfeiting or revoking this Franchise. Being mindful that Grantee is entitled to a franchise to use the Grantor's Franchise Area upon reasonable terms and conditions, violations of such terms and conditions may, after a hearing before the City Council, be the basis for revoking this Franchise or otherwise securing compliance with the reasonable terms and conditions of this Franchise.

6.3 **Revocation Hearing Process:** Whenever a breach of this Franchise occurs as defined in section 6.1 (D), then the City Council may give written notice to the Grantee of its intent to conduct a hearing to consider sanctions against the Grantee for violations of the terms of this Franchise which violations are identified in such notice. Grantee shall have no less than (sixty) 60 days to answer the notice and admit, deny or conditionally admit or deny the claimed violations of this Franchise. If after receipt of the Grantee's answer, the City Council remains convinced that material violations of this Franchise remain unresolved, it shall schedule a hearing before the City Council to be held no sooner than sixty (60) days after receipt of the response of the Grantee. At such hearing, the burden of going forward shall be upon the City staff to establish the material violations of this Franchise. The Grantee may present evidence in response to the evidence of the City. At the conclusion of that hearing, the City Council shall determine if a material violation of this Franchise remains to be resolved. If a material violation of this Franchise remains, the City Council shall deliver written instructions to Grantee as to what action is necessary to cure such material violation or to insure such material violation does not occur again. Only if the Grantee refuses or fails to effect a cure acceptable to the City Council, may the City Council conclude that revocation of this Franchise may be a remedy. Revocation is a remedy of last resort.

SECTION 7. ABANDONMENT AND REMOVAL: In the event that the facilities are no longer useful in the conveyance of power or for communications, Grantee shall, at the Grantor's option, remove the facilities at the Grantees sole expense. The Grantee shall have one (1) nine (9) month period within which to sell, transfer or convey its electrical system or telecommunications system to a qualified purchaser, or to remove its plant, structures and equipment from the Grantor's Streets and other public places as directed by the Grantor.

SECTION 8. MISCELLANEOUS PROVISIONS:

- 8.1 **Severability:** If any section, subsection, paragraph, term or provision of this Franchise is determined to be illegal, invalid or unconstitutional by any court of competent jurisdiction or by any state or federal regulatory authority having jurisdiction thereof, such determination shall have no effect on the validity of any other section, subsection, paragraph, term or provision of this Franchise, all of which will remain in full force and effect for the term of the Franchise.
- 8.2 **Transfer:** Grantee shall give the Grantor sixty days notice of the Grantee's intention to transfer any facilities covered by this franchise to a third party. Any successor, whether by voluntary transfer or otherwise shall be subject to the terms of this franchise agreement until a new franchise is reached between the Grantor and such third party. All rights and privileges granted, and duties imposed by this franchise upon the Grantee shall extend to and be binding upon its successors and assigns.
- 8.3 **Nonenforcement by Grantor:** Grantee is not relieved of its obligation to comply with any of the provisions of this Franchise by reason of any failure of Grantor to enforce prompt compliance. Grantor's forbearance or failure to enforce any provision of this Franchise shall not serve as a basis to stop any subsequent enforcement. The failure of the Grantor on one or more occasions to exercise a right or to require compliance or performance under this Franchise or any applicable law shall not be deemed to constitute a waiver of such right or a waiver of compliance or performance, unless such right has been specifically waived in writing. Any waiver of a violation is not a waiver of any other violation; whether similar or different from that waived.
- 8.4 **Relationship of Remedies** The remedies provided for in this Franchise are cumulative and not exclusive; the exercise of one remedy shall not prevent the exercise of another, or any rights of the Grantor at law or equity.
- 8.5 **Notices:** Throughout the term of the Franchise, Grantee shall maintain and file with Grantor a designated legal or local address for the service of notices by mail. A copy of all notices from Grantor to Grantee shall be sent by U. S. mail, certified, return receipt requested, postage prepaid, to such address and such notices shall be effective upon three (3) days after the date of mailing. At the effective date of this Franchise, such addresses shall be:

Public Utility District No. 2 of Grant County
PO Box 878
Ephrata WA 98823
Attention: Manager

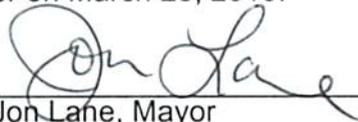
All notices to be sent by Grantee to Grantor under this Franchise shall be sent, U. S. mail, certified, return receipt requested, postage prepaid, and such notices shall be effective upon three (3) days after the date of mailing. At the effective date of this Franchise, such address shall be:

City of Moses Lake
PO Drawer 1579
Moses Lake WA 98837
Attention: City Manager

- 8.6 **Authority to Amend:** This Franchise may be amended at any time only by written agreement of the parties.

- 8.7 No Third Party Beneficiaries: This Franchise shall not be construed to create rights in, or to grant remedies to, any third party as a beneficiary of this Franchise or of any duty, obligation or undertaking established herein.
- 8.8 Applicable Law: This agreement shall be governed by and construed in accordance with the laws of the State of Washington. Venue for any action arising out of this agreement, include the interpretation of this agreement, shall be in the Superior Court of Grant County, Washington.
- 8.9 Captions: The captions and headings of this Franchise are for convenience and reference purposes only and shall not affect in any way the meaning or interpretation of any provisions of this Franchise.
- 8.10 Construction of Franchise: The provisions of this Franchise shall be liberally construed to promote the public interest.
- 8.11 Complete Agreement: This franchise constitutes the complete understanding between the parties. All understandings, written or oral, previously made between the parties, are hereby merged into this document which is a full and complete expression of the parties intentions. This franchise is subject to change only by an amendment that is duly adopted by the City Council and approved by the Grantee. Any rule of interpreting ambiguities against the interests of the drafting party shall not be applicable in resolving a dispute over the meaning of any provision of this franchise or the intent of the parties with respect to such a provision.
- 8.12 Force Majeure: In the event that either party is prevented or delayed in the performance of any of its obligations under this Agreement by a reason beyond its reasonable control (a "Force Majeure Event"), then that party's performance shall be excused during the Force Majeure Event. Force Majeure Events shall include, without limitation, war; civil disturbance; flood, storm, earthquake or other Act of God; or other condition which necessitates the mobilization of the personnel of a party or its contractors to restore utility service to customers; laws, regulations, rules or orders of any governmental agency; sabotage; strikes or similar labor disputes involving personnel of a party, its contractors or a third party; or any failure or delay in the performance by the other party, or a third party who is not an employee, agent or contractor of the party claiming a Force Majeure Event, in connection with the Work or this Agreement. Upon removal or termination of the Force Majeure Event, the party claiming a Force Majeure Event shall promptly perform the affected obligations in an orderly and expedited manner under this Agreement or procure a substitute for such obligation. The parties shall use all commercially reasonable efforts to eliminate or minimize any delay caused by a Force Majeure Event.
- 8.13 Time is of the Essence: Time is of the essence of this Franchise and each and all of its provisions in which performance is a factor.

Adopted by the City Council and signed by its Mayor on March 23, 2010.



Jon Lane, Mayor

ATTEST:



Ronald C. Cone, Finance Director

APPROVED AS TO FORM:



James A. Whitaker, City Attorney