CITY OF BAY CITY, OREGON

ORDINANCE NO. 653

AN ORDINANCE GRANTING AN EXCLUSIVE FRANCHISE AGREEMENT AND CONTRACT APPROVAL TO THE TILLAMOOK PEOPLE'S UTILITY DISTRICT FOR THE RIGHT TO PROVIDE ELECTRICAL SERVICE WITHIN THE CITY OF BAY CITY AND TO UTILIZE THE PUBLIC RIGHT OF WAYS FOR SAID PURPOSE, REPEALING ORDINANCE 629 AND DECLARING AN EMERGENCY

THE CITY COUNCIL OF THE CITY OF BAY CITY, OREGON ORDAINS AS FOLLOWS:

Section 1. **REPEAL.** Bay City Ordinance 629 and all prior franchise agreements between the City of Bay City and the Tillamook People's Utility District shall be terminated and of no further force and effect upon the effective date of this Ordinance.

Section 2. **PURPOSE.** The City of Bay City hereby grants an exclusive franchise to the Tillamook People's Utility District to conduct its electric distribution business within the corporate limits of the City, upon the terms and conditions of the Franchise Agreement attached hereto as Exhibit A, and hereby incorporates the terms and conditions of the agreement as the terms and conditions of this Ordinance, in addition to any other term and condition set forth in this Ordinance.

Section 3. **TERM.** This Ordinance shall be in effect from May 1, 2012 until April 1, 2017. In the event a successor agreement is not executed prior to the expiration of this Ordinance, then the Ordinance, and the Agreement attached hereto as Exhibit 1, shall continue to be in effect for an additional six (6) months or until a successor agreement is executed, whichever first occurs, in accordance with the terms of the Franchise Agreement.

Section 4. **FRANCHISE FEE.** The District shall pay to the City, a Franchise Fee of 4% of the District's gross revenues within the City limits, less adjustments, as more particularly defined in the contract attached hereto, collected during the previous month from customers whose meters are located within the City, for each month during the life of this Agreement, beginning May 1, 2012.

Section 5. **SAVINGS CLAUSE**.

If any clause, sentence, paragraph, section, article, or portion of this ordinance shall, for any reason, be adjudged invalid or unenforceable by a court of competent jurisdiction, the remainder of the ordinance shall remain in full force and effect.

Section 6. **EFFECTIVE DATE.**

This Ordinance shall become effective immediately upon passage by the Council and approval of the Mayor due to the necessity for continued franchise payments to the City, which is necessary to protect the health, safety and welfare of the City's residents.

PASSED and ADOPTED by the City Council this 10th day of April, 2012 and APPROVED by the Mayor this 11th day of April, 2012.

Shaena E. Peterson, Mayor

ATTEST:

Linda Downey, City Recorder

First reading: April 10, 2012
Second reading: April 10, 2012
Ayes: 5
Nays: 0
Abstentions: 0

COPY

FRANCHISE AGREEMENT

THIS FRANCHISE AGREEMENT ("Agreement"), entered into and effective this 1st day of May, 2012 ("Effective Date"), by and between the CITY OF BAY CITY, 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 applicable Oregon 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

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, fixtures, transformers, substations, other equipment, underground ducts and circuits and any other facilities ("Facilities") necessary or convenient to provide services and products upon, over, along, under and across the streets, alleys, roads and other public places 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.

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 is hereby approved, unless such Facilities become subject to the requirements of Section 7 herein.

Section 2: Term and Termination

A. This Agreement shall be effective as of the Effective Date and shall terminate on April 1, 2017 ("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.

Section 3: Construction of District Facilities

A. The District will complete all construction or repair work in a reasonable and safe manner in compliance with the requirements of applicable Oregon laws and City ordinances. The District's four year construction work plans will be submitted to the City as such work plans may be approved by the District.

B. New District poles or other "ground-mounted" facilities installed in the City during any term of this Agreement shall be located, where applicable, behind the sidewalk toward the property owner's side, unless otherwise directed by the City; provided, however, that such facility location shall be in accordance with prudent utility practice and not in violation of any applicable law, rule, code or ordinance. This paragraph shall not apply to the replacement or upgrading of any pole or ground-mounted facility existing as of the Effective Date of this Agreement. After the District completes any such construction work, the District will, upon written request by the City, provide the City with any "as built" drawings and maps and/or sketches. The District should notify the City prior to the installation of any new or replacement pole or other "ground-mounted" facility to ensure that such installation(s) will not interfere with any planned City infrastructure project, as described in Section 7 herein.

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 electrical facilities resulting from emergency work any time that the City's infrastructure is materially affected, not including detours of less than four (4) hours.

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-Way that interfere with the District's permitted use.

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, Oregon 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 District 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 Agreement shall be construed as preventing the City from sewering, grading, paving, planking, repairing, widening, altering, or doing any work that may be reasonably necessary within any City Rights-Of-Way.

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 building permit applicants to notify the District of building permit applications at the time of such permit application, if such permit is 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 Facility 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; Installing or modifying sidewalks; Installing or relocating water lines, fire hydrants, valves, blow-offs, storm drains or sewers. The expense of relocating such Facilities will be paid solely by the District. The District will respond with a plan to relocate within 60 days and complete construction within 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 life of this Agreement beginning the Effective Date, a Franchise Fee equal to 4% of the District's gross revenues, as defined below, less adjustments described below, collected during the previous month from District 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, Oregon or federal governmental agency, or public taxing body within 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, 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 shall not be included.

C. The District will withhold and retain 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 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 Franchise Fee. The City expressly acknowledges and agrees that all or part of the 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 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 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 provide a report to the City showing the 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.

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 a mutually agreeable pole attachment agreement with the District.

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: 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 committee of four shall be appointed from the governing bodies of each party ("Dispute Resolution Committee"), with two being appointed by the Mayor of the City from its Council and two 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 appointment 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.

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

D. Litigation Costs: In the event suit, action or proceedings (other than the proceedings described in Sections 11.A and 11.B) 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: Miscellaneous Provision

A. Amendment: This Agreement may only be modified by written consent of both parties. This Agreement supercedes 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. Reservation: 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 _____, 2012

Tillamook People's Utility District

_____
President, Board of Directors

_____
General Manager

Executed this 11th day of April, 2012

City of Bay City

_____
Mayor

Linda Downey
_____
City Recorder