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STATE OF WASHINGTON

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NO. 78449-3

**SUPREME COURT
OF THE STATE OF WASHINGTON**

DORIS BURNS, RUD OKESON, ARTHUR T. LANE, KENNETH
GOROHOF and WALTER L. WILLIAMS, individually, and on
behalf of the class of all persons similarly situated,

Appellants,

v.

THE CITY OF SEATTLE, THE CITY OF SHORELINE, THE CITY
OF BURIEN, THE CITY OF LAKE FOREST PARK, THE CITY OF
SEATAC and THE CITY OF TUKWILA,

Respondents.

**BRIEF OF AMICUS CURIAE
THE CITY OF TACOMA**

FILED
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BY
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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The City of Tacoma, Washington, is a first class city that owns and operates a municipal electric utility through its Department of Public Utilities, Light Division, dba Tacoma Power (“Tacoma Power”). Tacoma Power provides electric service to an area that extends beyond the Tacoma City limits, including the Pierce County cities of Lakewood, University Place, Fife, and Fircrest, among others. Tacoma Power also has franchise agreements with each of these cities. Tacoma Power has an interest in supporting the decision of the trial court in this matter because, like the City of Seattle, many of Tacoma Power’s franchise agreements with its suburban cities for electric service contain annual payments to the suburban cities that constitute negotiated consideration for valuable concessions the granting cities were not required to provide. Tacoma, however, negotiated and executed its franchise agreements before Seattle entered into any similar type arrangements with its suburban cities.

II. STATEMENT OF THE CASE

Tacoma Power, like Seattle, has provided electric service outside of Tacoma’s city limits for decades. Tacoma also has

significant investment in a great deal of capital infrastructure that supports its electric service customer base, including a number of owned hydroelectric power generating facilities and transmission facilities.

During the 1990's, many urban areas in the Puget Sound region began to consider incorporation. In Pierce County, Lakewood and University Place were both incorporated by the mid-1990s. CP 1669-70. Prior to incorporation, the City of Tacoma supplied both electric and water service to both areas. CP 1671, 1923-24.

Upon incorporation, both Lakewood and University Place undertook evaluations of service levels and the mix of services for all municipal services. CP 1671, 1679, 1923. University Place included in its evaluation an examination of projected revenues and costs, as well as citizen satisfaction surveys to determine the services most needing improvement. CP 1671. University Place specifically included in its evaluation an option to form its own electric utility to provide electric service. CP 1671. University Place's City Manager had experience in owning a municipal electric utility, in purchasing energy separately, and in contracting with both

public and private electric providers. CP 1671. University Place also evaluated its options for purchasing electricity for its own uses, including options to contract with the City of Fircrest and with Puget Sound Energy, in addition to contracting with Tacoma Power. CP 1671-72.

Tacoma Power then engaged in extensive negotiations with both Lakewood and University Place to develop agreements for service. In developing terms and conditions of the agreements for service in these suburban cities, Tacoma did not draw upon models developed by any other cities. Instead the parties made an independent evaluation of the applicable statutory limitations as well as their own circumstances. These negotiations culminated in 20-year franchise agreements that were passed by Lakewood and University Place in mid-September, 1997; were accepted by Tacoma Power on October 9, 1997, and became effective on October 15, 1997. CP 1878, 1894-95, 1919-21. Tacoma Power subsequently entered into substantially similar franchise agreements with the cities of Fife, Fircrest, and Steilacoom. CP 1878. Both the Lakewood and University Place franchise agreements predate similar arrangements negotiated by Seattle.

The incorporation of the suburban cities of Lakewood and University Place immediately posed a potential threat to the stability of Tacoma Power's customer base because each of these new cities has the power to form its own municipal electric utility. Also, at the time these negotiations were conducted, there was increasing pressure to deregulate the marketing and sale of electricity. A version of large scale electricity deregulation already had been adopted in California between 1995 and 1996. See California ex. rel. Lockyer v. Federal Energy Regulatory Commission, 383 F.3d 1006, 1008-09 (9th Cir. 2004). The threat of deregulation also focused more attention on securing a stable customer base across which to spread risk and costs.

Resolution of these concerns are reflected in the negotiated franchise agreements. Section 4 of each agreement is entitled "Consideration for Agreement," and describes a number of items of negotiated consideration that support the franchise agreement. CP 1885, 1902. These include: (a) the mutual and individual benefits of the ability to make long-term planning decisions in light of the provisions of the franchise agreement; (b) the waiver of permit fees after the first three years of the 20-year franchise

agreement; (c) the non-competition provisions in Section 18 of the franchise agreement, and waiver of any fees that might be charged as franchise administration fees under RCW 35.21.860(1)(b). Id.

In particular, Section 18 of each franchise agreement is entitled "Exercise of City Authority." This section explicitly recognizes the specific consideration provided, that is, that Lakewood's and University Place's agreement not to exercise their authority to operate their own electric utility. CP 1891, 1915. The agreement also specifically states that this concession provides specific benefits to Tacoma Power in improving its long range planning and stabilizing its rate structure. Id.

In exchange for this consideration, Tacoma Power agreed to pay an annual fee in varying amounts that correspond to and are capped at specified percentages of the gross revenues that Tacoma Power received during the prior year from its electric utility service customers served from Tacoma's system located within the granting city. CP 1891, 1915.

Each of the items recited in these franchise agreements has actual and substantive value to Tacoma Power. The waiver of permit fees set forth in Section 11 of the franchise agreements

benefits Tacoma Power by eliminating the cost of paying permit fees that would otherwise be required for each and every operation and maintenance activity that Tacoma Power undertakes on its system within the public rights of way over 17 of the 20 years of the franchise agreement.

The franchise agreements enhance Tacoma Power's ability to secure a stable customer and rate base, and therefore to conduct long-range planning and enter into corresponding cost-effective long-term financial and operational commitments. The more planning certainty an electric utility has, the better it is able to reduce risks and make the necessary long-term investments that support cost-effective and reliable electric service. CP 1879. The agreements also benefit Tacoma Power's ability to keep its electric service rates low and competitive. A stable and robust customer base is critical in order to produce a steady revenue stream to pay the fixed costs associated with the intensive capital investments that are typical in the electric utility industry. CP 1879-80. Direct loss in customer base can cause the remaining customers' rates to increase in order to cover the fixed costs associated with long-term investments and commitments. CP 1880. Also, the typical high

debt levels associated with electrical utilities require stable customer revenues to establish satisfactory ratings from debt rating agencies to enable borrowing at the lowest interest rates. Id.

The parties to the negotiations did not intend the annual payments to substitute for taxes or franchise fees, but they were specifically intended as consideration for valuable concessions the cities were not required to provide. CP 1880, 1924.

III. ARGUMENT

In this case, the trial court properly rejected Plaintiffs' attempts to invalidate franchise agreements entered into by and between the City of Seattle and suburban cities such as Shoreline, Tukwila, Lake Forest Park, Burien, and SeaTac, on the grounds that the annual payments by Seattle under these franchise agreements were prohibited by RCW 35.21.860.

The trial court decided that, knowing the meaning of its terms, the legislature only prohibited the coercive "imposition" of a fee, but it did not prohibit the voluntary negotiation of contractual obligations. Tacoma concurs with the positions and arguments offered by Respondent City of Seattle in this matter, including the position that an unambiguous statute must be given its plain

meaning, and under the plain meaning of this statute, RCW 35.21.860 does not prohibit voluntary agreements, but only limits a city or town's ability to "impose" a franchise fee.

Tacoma does not intend to repeat all of these arguments here. Rather, Tacoma offers additional demonstration that the franchises before this Court contain consideration that is not a "franchise fee" because it is not a payment for the use of the public right of way. Instead these franchise agreements contain bargained for payments in consideration for valuable long term commitments not to form an electric utility. They should be upheld because they are voluntary contractual arrangements within the legal authority of the contracting parties. They are not prohibited by RCW 35.21.860 because they do not fall within its scope.

A. The Consideration in the Franchise Agreements Is Not a "Franchise Fee" for Purposes of RCW 35.21.860.

The annual payments provided to the suburban cities under the agreements are not franchise fees under RCW 35.21.860 because the payment, by definition, is not for use of the right of way. All of the agreements at issue in this matter specifically recite that the payment is tied to the commitment not to form a new electric utility, by contract or otherwise.

RCW 35.21.860 clearly provides that “No city or town may impose a franchise fee or any other fee or charge of whatever nature or description upon the light and power, or gas distribution businesses, . . . for use of the right of way.” (emphasis added). RCW 35.21.860(1). For use of the right of way, a city can only impose “[a] fee . . . that recovers actual administrative expenses incurred by a city or town that are directly related to receiving and approving a permit, license, and franchise, to inspecting plans and construction, or to the preparation of a detailed statement pursuant to chapter 43.21C RCW.” RCW 35.21.860(1)(b).

There is nothing in RCW 35.21.860, however, that purports to limit a city’s general authority to enter into contracts that are in the city’s best interests, or to limit the consideration a city might negotiate in exchange for additional terms the parties are willing to agree upon. A franchise is a contract between the granting city and the franchisee. Lakewood v. Pierce County, 106 Wn. App. 63, 23 P.3d 1 (2001). As a contract, it may have additional terms, such as those agreed to between Tacoma Power and its suburban Pierce County cities, that are not strictly necessary to a franchise.

A long term commitment by a suburban city not to form its own electric utility is not a required or typical term of a utility franchise.

There also is good reason for municipalities to use a contract mechanism to define and allocate their rights and responsibilities. Municipalities, both those that issue franchises for electric service by another municipality, as well as the municipally owned utility providing service, rely upon contracts as the primary legal mechanism by which they each can ensure certainty with respect to service territory, customer base, conditions of service, and long range planning. There is no state law mechanism in Washington that provides a means for an electric utility to establish an exclusive service territory. Municipally owned utilities also are not subject to the jurisdiction of the Utilities and Transportation Commission. RCW 80.04.500.

Plaintiffs essentially argue that the payment must be a “franchise fee” in disguise simply because it is contained within a franchise. But the bargained for consideration in Section 18 of the Lakewood and University Place agreements, for example, does not relate to Tacoma’s “use of the right of way,” but only to the suburban cities’ commitment not to form an independent electric

utility.¹ Indeed, if Section 18 of the Lakewood and University Place franchise agreements stood alone as separate contracts, plaintiffs would have no argument whatsoever.

Cities have a clear right under RCW 35.92.050 to form their own electric utilities, or to purchase electricity for the needs of their inhabitants. This right is independent of any authority to grant franchises to other utilities for the use of a city's rights of way. In exercising its powers to form its own electric utility, a city is acting in a proprietary capacity. Tacoma v. Taxpayers of Tacoma, 108 Wn.2d 679, 696, 743 P.2d 793 (1987). When acting within its proprietary capacity, a municipality's right to contract is coextensive with that of a private business or individual under similar circumstances, and the courts will not interfere with the discretionary exercise of those powers unless the action was arbitrary, capricious or unreasonable. Hite v. Public Utility Dist. No. 2 of Grant County, 112 Wn.2d 456, 463, 772 P.2d 481 (1989).

¹ The analysis would not be any different even if these specific words were missing from RCW 35.21.860. Even if one read the statute as prohibiting the imposition of a fee for the operation of the electric business within the city or town's boundaries, it still would not prohibit a city such as Tacoma or Seattle from negotiating a contract with one of its suburban cities that exchanges payments in consideration for a valuable long term commitment by the granting city not to form its own independent electric utility.

A suburban city's commitment to forego forming its own utility also has significant value to an entity such as Seattle or Tacoma Power. The Lakewood and University Place franchise agreements, for example, contain a commitment by those cities not to form an electric utility for a period of at least 20 years, with two additional optional 5 year extensions. CP 1882, 1897. A decision to form its own utility would have immediate adverse consequences for an entity such as Tacoma Power because it entails a significant and sudden loss of customer and rate base. Such loss of customer and rate base could result in stranded costs to acquire resources, higher rates for the remaining customers, and consequently might adversely affect the municipal utility's bond rating and ability to issue debt. CP 1879-80.

B. The Franchise Agreements Are Interpreted As Contracts and the Parties' Contractual Terms are Clear.

Plaintiffs' argument that the annual payments required by these franchise agreements are franchise fees in disguise or excessive administrative costs contradicts the plain language of the contracts themselves. Plaintiffs cannot rewrite the contracts under the auspices of "interpreting" the agreements consistent with basic contract interpretation principles.

This Court recently affirmed that Washington uses the objective manifestation theory of contracts. The courts will “attempt to determine the parties' intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties.” Hearst v. Seattle Times, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). Surrounding circumstances and other extrinsic evidence are to be used to determine the meaning of specific words and terms used and not to show an intention independent of the instrument or to vary, contradict or modify the written word. Hollis v. Garwall, Inc., 137 Wn.2d 683, 695-96, 974 P.2d 836 (1999).

In particular, extrinsic evidence cannot be used under the guise of “interpretation” to delete a term or give it no effect. In re Marriage of Schweitzer, 132 Wn.2d 318, 326-27, 937 P.2d 1062 (1997). The court generally will not look to extrinsic evidence if the intent can be determined from the actual words used. Hearst, 154 Wn.2d at 504 (citing Everett v. Estate of Sumstad, 95 Wn.2d 853, 855, 631 P.2d 366 (1981)).

In their franchise agreements, the parties clearly expressed their intent in plain terms. Section 4 of each Tacoma Power

franchise agreement, for example, is entitled “Consideration for Agreement,” and describes a number of items of negotiated consideration that support the franchise agreement. These include:

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 might be charged pursuant to RCW 35.21.860 [(1)](b).

CP 1885, 1902.

In particular, Section 18 of each franchise agreement is entitled “Exercise of City Authority.” This section explicitly recognizes the specific consideration provided, that is, that Lakewood’s and University Place’s agreement not to exercise their authority to operate their own electric utility. CP 1891, 1915. The agreement also specifically states that these concessions provide specific benefits to Tacoma Power in improving its long range planning and stabilizing its rate structure. CP 1891, 1915.

In exchange for this consideration, Tacoma Power agreed that:

[F]or 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 the City an annual fee.
...”

CP 1891, 1915. The fees set forth include varying amounts that correspond to and are capped at specified percentages of the gross revenues that Tacoma Power received during the prior year from its electric utility service customers served from Tacoma’s system located within the granting city. Id.

By specifically addressing the administrative costs that can be charged under RCW 35.21.860(1)(b), the parties also clearly demonstrated they were aware of the limitations on administrative costs in that statute, and understood that the payments set forth in Section 18 of the agreements served a different purpose.

The intent of these agreements could not be more clear. The parties carefully and deliberately recited the specific actions for which the annual payment consideration given, i.e., forbearance in forming a new municipal utility, and specifically noted that this action conferred value. CP 1891, 1915.

The parties to these agreements also have settled expectations, and have relied upon the terms of these agreements, for example in making long range planning decisions and power resource planning and acquisition decisions.

IV. CONCLUSION

This case does not involve or require statutory interpretation of RCW 35.21.860 because the contracts at issue in this suit do not contain "franchise fees" or other fees governed by that statute. The consideration included in the franchise agreements specifically and explicitly relates to independent promises that are not covered by RCW 35.21.860 and that have independent value. Under the appropriate contract interpretation principles described above, the franchise agreements should be upheld as valid contracts, and Tacoma respectfully requests that the Petition for Review be denied.

Submitted this 12th day of October, 2006.

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APPENDIX

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

DORIS BURNS, RUD OKESON, ARTHUR T.
LANE, KENNETH GOROHOF and
WALTER L. WILLIAMS, individually and on
behalf of the class of all persons similarly
situated,

Plaintiffs,

vs.

THE CITY OF SEATTLE, THE CITY OF
SHORELINE, THE CITY OF BURJEN, THE
CITY OF LAKE FOREST PARK, THE CITY
OF SEATAC and THE CITY OF TUKWILA,

Defendants.

CLASS ACTION

No. 05-2-24680-4SEA

DECLARATION OF STEVEN J. KLEIN

Steven J. Klein declares as follows, under penalty of perjury under the laws of the State
of Washington:

1. I am the Superintendent of the Light Division of the City of Tacoma, Tacoma Public
Utilities, which does business as Tacoma Power. I have held this position since 1993. I make
this declaration on the basis of my personal knowledge.

1 2. I was personally involved in negotiations that led to franchise agreements between the
2 Cities of Lakewood and University Place, Washington, and Tacoma Power. These agreements
3 gave Tacoma Power the right, privilege and authority to construct, operate, maintain, replace and
4 use an electric utility system and to provide electric service, using public rights of way within
5 each of those jurisdictions.

6 3. True and correct copies of the franchise agreements currently in effect between Tacoma
7 Power and the Cities of Lakewood and University Place are attached as Exhibits 1 and 2,
8 respectively. The franchise agreements are substantially the same.

9 4. Tacoma Power also has substantially similar franchise agreements with the cities of
10 Fircrest, Fife and Steilacoom in Pierce County.

11 5. Section 4 of each agreement is entitled "Consideration for Agreement," and describes a
12 number of items of negotiated consideration that support the franchise agreement.

13 6. In consideration of certain payments by Tacoma Power, Lakewood and University Place
14 agreed to the following: (a) the mutual and individual benefits of the ability to make long-term
15 planning decisions in light of the provisions of the franchise agreement; (b) the waiver of permit
16 fees after the first three years of the 20-year franchise agreement; (c) the non-competition
17 provisions in Section 18 of the franchise agreement, and waiver of any fees that might be
18 charged as franchise administration fees under RCW 35.21.860(b).

19 7. In addition, Section 4 recites as consideration the ability of Tacoma Power to reopen and
20 renegotiate the terms of the franchise agreement in the event the granting municipality allows
21 any other energy provider to operate within the jurisdiction under more favorable terms, a
22 binding arbitration provision to resolve renegotiation disputes, and the ability of both parties to
23

1 reopen and renegotiate the franchise agreement to address substantial changes in law or
2 circumstances beyond the control of a party that substantially adversely affect either party.

3 8. Section 18 of each franchise agreement is entitled "Exercise of City Authority." This
4 section explicitly recognizes the specific consideration provided, that is, that Lakewood's and
5 University Place's agreement not to exercise their authority to operate their own electric utility or
6 to contract with any other public or private entity for the purchase of electric energy, provides
7 the benefits to Tacoma Power of improving its long range planning, stabilizing its rate structure,
8 and revenue stream, and spreading inherent utility risks across a broader customer base.

9 9. Although not quantifiable in each case, each of the items recited in these franchise
10 agreements has actual value to Tacoma Power, as described in more detail below.

11 10. The waiver of permit fees set forth in Section 11 of the franchises agreements benefits
12 Tacoma Power by eliminating the cost of paying permit fees that would otherwise be required
13 for each and every operation and maintenance activity that Tacoma Power undertakes on its
14 system within the public rights of way over 17 of the 20 years of the franchise agreement.

15 11. The franchise agreements benefit Tacoma Power's ability to conduct long-range planning
16 and enter into corresponding cost-effective long-term financial and operational commitments.
17 The more planning certainty an electric utility has, the better it is able to reduce risks and make
18 the necessary long-term investments that support cost-effective and reliable electric service.

19 12. The franchise agreements benefit Tacoma Power's ability to create a stable rate base
20 because it establishes a long-term supplier/customer relationship that is predictable and not
21 subject to unexpected changes.

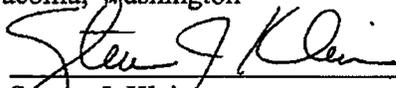
22 13. The franchise agreements benefit Tacoma Power's ability to keep its electric service rates
23 low and competitive. A stable and robust customer base is critical in order to produce a steady

1 revenue stream to pay the fixed costs associated with the intensive capital investments that are
2 typical in the electric utility industry. Direct loss in customer base and associated revenue
3 reduction can cause the remaining customers' rates to increase in order to cover the fixed costs
4 associated with long-term investments and commitments. Also the typical high debt levels
5 associated with electrical utilities require stable customer revenues to establish satisfactory
6 ratings from debt rating agencies to enable borrowing at the lowest interest rates.

7 14. I understand that third parties have said that Tacoma Power's intent in negotiating
8 franchise agreements with the cities of Lakewood and University Place was simply to avoid a
9 restriction in state law on the imposition of franchise fees or utility taxes by "not calling it a
10 franchise fee, or a utility tax rebate." This is a misperception by persons not involved in our
11 negotiations.

12 15. Having personally led the negotiations with these cities on behalf of Tacoma, I am in the
13 best position to know that Tacoma Power's intent was to obtain valuable concessions that the
14 granting municipalities were not required to provide, in exchange for the annual fees that the
15 granting municipalities negotiated in the franchise agreements.

16 DATED this 31st day of January, 2006, at Tacoma, Washington

17 
18 _____
19 Steven J. Klein
20
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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).

(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

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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.

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.

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.

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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.

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

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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.

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.

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.

Section 22. Cost of Publication. 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.

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