

NO. 84824-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CITY OF TACOMA, a municipal corporation,

Appellant,

v.

CITY OF BONNEY LAKE, CITY OF FIRCREST, CITY OF
UNIVERSITY PLACE, CITY OF FEDERAL WAY, PIERCE COUNTY
and KING COUNTY,

Respondents.

APPELLANT'S OPENING BRIEF

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ASSIGNMENTS OF ERROR

The City of Tacoma (“Tacoma”), the plaintiff in the underlying declaratory judgment action and the appellant in this proceeding, makes the following assignments of error:

1. The Trial Court erred when it denied Tacoma’s motion for partial summary judgment by order dated June 30, 2010, and concluded as a matter of law that indemnification language in the parties’ franchise agreements entered into prior to *Lane v. City of Seattle*, 164 Wn.2d 875, 194 P.3d 977 (2008) applied to the payment of costs associated with utility provided fire hydrant services. See Order Granting Defendant’s Motion for Summary Judgment and Denying Tacoma’s Motion for Partial Summary Judgment (“Order”), CP 730-31 (copy attached as App. A).

2. The Trial Court erred when it granted defendants’ Federal Way, Fircrest, University Place, and Pierce County (collectively referred to hereafter as the “General Governments”) motions for summary judgment by order dated June 30, 2010, and concluded as a matter of law that the utility was precluded from collecting payment for fire hydrant services from the General Governments. Order, CP 730-31.

3. The Trial Court erred when it granted Federal Way’s motion for summary judgment by order dated June 30, 2010, and found that the indemnification language in its franchise agreement required Tacoma to defend Federal Way in this action. Order, CP 730-31.

4. The Trial Court erred when it granted the General Governments request to be dismissed by order dated June 30, 2010,

without entering findings delineating the rights of the parties with respect to all questions posed as required by the Declaratory Judgments Act.

5. The Trial Court erred in entering the following findings of fact and conclusions of law:

- Finding “[t]he individual franchise agreements between the City of Tacoma and the Defendants City of Fircrest, City of University Place, City of Federal Way, and Pierce County are valid binding contracts” with respect to the payment of fire hydrant services provided by Tacoma to these General Governments. Order, CP 730.

- Finding “[t]he indemnification provisions of the above referenced individual franchise agreements preclude the City of Tacoma from advancing this action against Defendants City of Fircrest, City of University Place, City of Federal Way, and Pierce County.” Order, CP 730.

- Finding “[t]he indemnification provision in the City of Federal Way’s franchise agreement requires that the City of Tacoma defend Federal Way in this action.” Order, CP 730-31.

- Finding “[t]he Court does not reach a decision on any other issue as the Court’s findings on the indemnity provisions are dispositive of all other claims in this action.” Order, CP 731.

STATEMENT OF ISSUES

The following issues pertain to the assignments of error:

1. Attempted Imposition of Illegal Tax. Whether an unlawful tax is imposed on Tacoma utility ratepayers contrary to state law and public policy, when the indemnification and hold harmless provisions of the franchise agreements between the General Government parties and Tacoma are read to require Tacoma ratepayers to bear the expense of providing fire hydrant services to the General Governments. (Assignments of Error Nos. 1-3 & 5.)

2. Scope of Indemnification and Hold Harmless Agreements. Whether the indemnification and hold harmless provisions of the parties' franchise agreements operate to prevent Tacoma ratepayers from recovering reimbursement from the General Government parties for the expenses incurred by Tacoma to provide fire hydrant services to the General Governments, when such services are required to be paid for by the General Governments under this Court's decision in *Lane v. City of Seattle*, 164 Wn.2d 875, 194 P.3d 977 (2008). (Assignments of Error Nos. 1-3 & 5.) Relatedly, whether the filing of a declaratory judgment action by Tacoma to determine the rights of the parties under *Lane* constitutes "damage" caused by an act of the Franchisee for purposes of triggering the duty to defend provision under Respondent Federal Way's franchise agreement. (Assignments of Error Nos. 1-3 & 5.)

3. Scope of Declaratory Relief. Whether the Declaratory Judgment Act as interpreted by this Court in *Greyhound Corp. v. Division*

1384, 44 Wn.2d 808, 271 P.2d 689 (1954), allows a trial court to dismiss defendants from an action prior to entering findings delineating the rights of the parties with respect to all questions posed. (Assignments of Error Nos. 4 & 5.)

I. SUMMARY INTRODUCTION

This case is about an attempt by a group of local general governments to avoid the implications of this Court's 2008 decision in *Lane v. City of Seattle*, which held that charges for local fire hydrants are a tax, not a fee, and must be paid for by a general government's taxpayers instead of a utility's ratepayers. The Respondent General Governments -- City of Federal Way, City of Fircrest, City of University Place, and Pierce County -- now assert that preexisting franchise agreements entered into years before this Court's decision in *Lane* contracted away this taxpayer obligation to ratepayers in exchange for allowing water utilities to continue to operate in the public rights-of-way, through the standard form indemnification and hold harmless provisions of those agreements. The General Governments claim their authority to enter into franchise agreements grants them the power to transfer taxpayer obligations onto ratepayers, thereby circumventing this Court's ruling in *Lane*, and further assert that this practice does not result in an impermissible tax in violation Washington State Constitution Article VII, Section 5 and Section 9. The General Governments make this claim even though other local governments including Tacoma, Puyallup, Bonney Lake, Ruston, and King County, have paid their hydrant charges.

This Court has held local general governments must pay for local fire hydrant services provided to them by municipal water utilities. As a general government obligation, charges for fire hydrant services are considered taxes, not fees. A city must have explicit statutory authority to impose a tax; absent such authority, a charge will be found to be an illegal tax. The General Governments claim that their statutory authority to enter into franchise contracts somehow transforms these taxes into a fee for use of the public street. The General Governments, however, cannot demonstrate that explicit statutory authority exists to allow them to impose a tax as part of their authority to set terms in franchise agreements with municipal water utilities, which is the only contractual authority they point to for achieving this act of legal alchemy.

Moreover, even if such authority did exist, it is unreasonable and against public policy to assume that the parties here had intended for utility ratepayers to accept a multimillion-dollar taxpayer responsibility without express consideration. The subject agreements fail to mention fire hydrants, fail to detail the intent of the parties regarding fire hydrants, and fail to state what consideration was paid for providing fire hydrants. The hydrant costs were part of the existing water rates at the time franchise agreements were formed, so it should be clear that such charges were never part of any consideration paid by Tacoma. It simply makes no sense to interpret generic indemnification language in the parties' franchise agreements as precluding collection of charges by Tacoma for services it provides to the General Governments. If this Court were to find that the

indemnification clauses of the franchise agreements are applicable and effective in the fashion urged by the General Governments, the Court would reach the anomalous result of requiring Tacoma to treat its own citizens who created the water utility differently from those residing in the General Governments to whom it provides services. Even though City of Tacoma ratepayers cannot pay for their own hydrants, they would be forced to pay for hydrants located in jurisdictions outside the city.

This Court need not and should not endorse such anomalous results, all of which derive from an attempt to distort the ordinary meaning and purpose of general issue indemnification and hold harmless clauses. Tacoma's right to compensation for providing fire hydrant services cannot be waived by Tacoma as matter of public policy under *Lane*. Nor can Tacoma pay for the services it provides to other governmental entities without violating the State Accountancy Act. This Court should find as a matter law that (1) the franchise agreements are not applicable to this situation, (2) the General Governments must pay Tacoma for the costs of hydrant services plus interest, and (3) reaffirm that this Court's holding in *Lane* requires the ongoing maintenance, operation and replacement costs associated with providing a sufficient supply of water for fire suppression must be included in the hydrant charges that Tacoma collects from the General Governments.

II. STATEMENT OF THE CASE

A. Tacoma's Water Utility and Its Relationship With General Governments and the Areas It Serves.

Tacoma operates a water utility that serves customers inside and outside the city limits of Tacoma pursuant to RCW 35.92.010. *See* Declaration of Tacoma Water Superintendent Linda McCrea in Support of Tacoma's Motion for Partial Summary Judgment ("Dec. of McCrea") pp. 1-2, ll. 17-25, CP 476-477. Even though portions of the utility's water system were in place prior to incorporation of the General Government cities, each General Government (including Pierce County) required Tacoma to enter into an agreement in order to construct, operate, and maintain its water system in the General Governments' streets. Dec. of McCrea, p. 3, 1-5, CP 478. The General Governments approved these agreements by incorporating their terms into ordinances passed by their City Councils or as an independent franchise passed by the Pierce County Council. *See* Franchise Agreements, attached as Exs. 1, 2, 3, and 4 to Declaration of William C. Fosbre in Support of Tacoma's Motion for Partial Summary Judgment ("Dec. of Fosbre"), CP 319-409.

The General Governments served by Tacoma require, through local laws, that Tacoma provide local fire hydrants and the ongoing infrastructure necessary to support the use of the hydrants. *See* Dec. of McCrea, p. 3, ll. 12-15, CP 478; *see also Lane v. City of Seattle*, 164 Wn.2d 875, 880, 194 P.3d 977 (2008). Infrastructure costs include installation and maintenance

of sufficiently sized water mains, reservoirs, and hydrants. *See* Dec. of McCrea, p. 3, ll. 13-15, CP 478; p. 4, ll. 12-17, CP 479.

B. The Indemnification and Hold Harmless Clauses in the Franchise Agreements, Between Tacoma and the Respondent General Governments.

All of the franchise agreements between Tacoma and the General Governments use the term “water system” when describing the purpose of Tacoma’s grant to use the General Governments’ rights-of-way. *See* Dec. of McCrea, p. 3, ll. 6-8, CP 478. None of the agreements defines “water system” as including fire hydrants, fire protection, or the necessary fire flows. *Id.*

All of the agreements contain an indemnification clause that requires Tacoma to hold harmless the General Governments from claims for damages. *See* Fircrest Franchise Agreement, Section 11, CP 375; University Place Franchise Agreement, Section 11, CP 358-360; Federal Way Franchise Agreement, Section 23, CP 333; and Pierce County Franchise Agreement, Section V, CP 385 (copies attached as App. B). The indemnification clauses in the four agreements do not materially differ in their terms. Thus, the University Place agreement provides:

The Grantee hereby releases, covenants not to bring suit and agrees to indemnify, defend and hold harmless the City, its officers, employees, agents and representatives from any and all claims, costs, judgments, awards or liability to any person, including claims by the Grantee’s own employees to which the Grantee might otherwise be immune under the Title 51 RCW, arising from injury or death of any person or damage to property, monetary losses, including refunds of charges or fees paid by customers, of which it is alleged or proven that the acts or omissions of the Grantee, its agents, servants, officers or employees in performing this franchise caused or contributed thereto, including claims

arising against the City by virtue of the City's ownership or control of the rights-of-way or other public properties, by virtue of the Grantee's exercise of the rights granted herein, including payment of any monies to the City or by virtue of the City's permitting the Grantee's use of the City's rights-of-way or other public property, based upon the City's inspection or lack of inspection of work performed by the Grantee, its agents and servants, officers or employees in connection with work authorized on the City's property or property over which the City has control, pursuant to this franchise or pursuant to any other permit or approval issued in connection with this franchise.

CP 358-359.

None of the agreements' indemnification clauses expressly includes claims related to payments for expenses related to providing local fire hydrant services. *Id.* None of the agreements expressly state which entity is responsible for paying the costs of local fire hydrant services; nor do the agreements list any express consideration paid to Tacoma for providing local fire hydrants and the infrastructure necessary to render them operational to the General Government where the hydrants are located. *Id.*

All of the agreements either explicitly or implicitly require Tacoma to abide by all federal, state, and local laws, including requirements to install, maintain, and replace fire hydrants and an oversized water system to provide necessary water pressure for fire flows/suppression. *See* App. B. Hydrants and oversized water lines are unnecessary to provide domestic water to Tacoma's residential and commercial customers located within the General Governments' boundaries. *See* Dec. of McCrea, p. 4, ll. 10-11, CP 479. But for the requirements of the General Governments, Tacoma would not have had to construct, install, maintain, and operate an oversized system needed to supply sufficient water flow to local fire hydrants in order to provide water

to its residential and commercial customers. *See* Dec. of McCrea, p. 4, ll. 5-11, CP 479. The costs associated with operating, maintaining, and replacing the oversized system and local fire hydrants have been borne by Tacoma water ratepayers during the term of these agreements. *See* Dec. of McCrea, p. 4, ll. 12-15, CP 479; p. 5, ll. 18-25, CP 480. During the 2009-2010 Tacoma water utility biennium, utility ratepayers will pay approximately \$1.2 million annually to provide fire hydrant services to the General Governments in this case. *See* Dec. of McCrea, p. 5, ll. 23-25, CP 480. Even though hydrant expenses were removed from the rates, the hydrant expenses of the General Governments refusing to pay are being “paid” by the Tacoma ratepayers.

C. The Supreme Court’s Decision in *Lane v. City of Seattle*.

For years, the City of Seattle’s water utility (Seattle Public Utilities, or “SPU”) paid for fire hydrants by charging its water ratepayers a flat hydrant fee added to their water charges. *Lane*, 164 Wn.2d at 779-880. In 2003, this Court in *Okeson v. City of Seattle*, 150 Wn.2d 540, 78 P.3d 1279 (2003), held that Seattle City Light could not charge its ratepayers for streetlights. *See Lane* at 880. Providing streetlights is a government function, and this Court held that a municipal government must pay for that function out of the city's general fund. *Id.* Recognizing the legal equivalence between hydrants and streetlights expressed in that decision (and argued by the City of Seattle), Seattle had SPU stop charging ratepayers for hydrants; instead, Seattle began to pay for the hydrants out of its general fund. *Lane* at 880.

SPU also provides local hydrants to areas outside the city of Seattle and concluded that those municipal governments should pay their share. SPU sent a bill for hydrants to Lake Forest Park, Burien, Shoreline, and King County, all of which refused to pay. *Lane* at 880-881. As is the case here with the General Governments, in *Lane* Shoreline and King County refused payment based on the indemnification and hold harmless clauses in their franchise agreements with SPU. King County Verbatim Report of Proceedings (VRP) on Summary Judgment Order, pp. 8, 11. 24-10, 11.8, CP 419-421, attached as Exhibits to Dec. of Fosbre, CP 319-561. Meanwhile, a class made up of ratepayers sued SPU for hydrant payments made by ratepayers for the preceding three years. *Lane* at 881. The ratepayers demanded interest on the illegal payments. *Lane* at 880-881.

The trial judge held (1) SPU could not charge ratepayers to pay for hydrants; (2) Lake Forest Park and Burien had to pay Seattle for their share of the hydrant costs; (3) SPU had to pay back the ratepayers, but only at one percent interest, *Lane* at 881; and (4) Shoreline and King County were excused from paying based on the hold harmless clauses in their franchise agreement, King County VRP, pp. 8,11.22-10, 11.8, CP 419-421, Ex. 5 to Dec. of Fosbre. Lake Forest Park and Burien appealed. Seattle cross appealed only on the issue of interest. No appeal was taken by Seattle against Shoreline and King County, resulting in Seattle ratepayers paying for the costs of the hydrants in these jurisdictions. This Court granted direct review. *Lane* at 881. After review had been granted but before oral argument, Burien withdrew, indicating it had spent too

much litigating the matter, which left Lake Forest Park as the only municipal appellate. *Id.*

This Court's analysis of the issues started with the black letter law that "[no] tax shall be levied except in pursuance of law; and every law imposing a tax shall state distinctly the object of the same to which only it shall be applied," Wash. Const. art. VII, § 5. If providing hydrants is a government function, and if charging ratepayers for those hydrants is a tax, not a fee, the charge violates this part of the constitution. *Lane* at 881. Seattle imposed a "charge" rather than a tax, which it was not authorized by law to impose. *Lane* at 882.

This Court held that "(1) providing hydrants is a government responsibility for which the general government of the area must pay; (2) charging every SPU ratepayer a flat hydrant fee amounted to an improper tax; (3) the ratepayers may recover past improper hydrant fees, together with interest at the judgment rate . . . and (5) Lake Forest Park must pay for the hydrants within its boundary." *Lane* at 891.¹

D. Tacoma's Compliance with the Decision in *Lane*.

In response to, and in reliance on, this Court's decision in *Lane*, on January 6, 2009, the Tacoma City Council passed ordinance no. 27778, which removed from the rates paid by all water utility customers the costs

¹ Neither Shoreline nor King County were parties to the *Lane* decision on appeal, so the trial court's decision regarding the application of the franchises was not reviewed. A decision on the applicability of the franchise agreements is the next logical step in determining whether ratepayers can be contractually bound to pay for general government responsibilities.

associated with fire hydrant services including the ongoing costs of providing the necessary components, infrastructure, and maintenance required to supply sufficient water for fire suppression. *See* Dec. of McCrea, p. 5, ll. 1-5, CP 480. These costs were invoiced to the various local government customers, including the City of Tacoma (*e.g.* its general fund). The fire hydrant services charge was apportioned based on the number of fire hydrants located within each of the General Government's boundaries. *See* Dec. of McCrea, p. 5, ll. 1-11, CP 480. The cities of Tacoma, Puyallup, Bonney Lake, the Town of Ruston, and King County paid their local fire hydrant costs. *See* Dec. of McCrea, p. 5, ll. 11-13, CP 480.

However, the General Governments of Fircrest, Federal Way, University Place, and Pierce County refused payment. *See* Dec. of McCrea, p. 5, ll. 14-15, CP 480.

Instead of shutting off the General Government's access to the fire hydrants for non-payment, Tacoma filed a declaratory judgment action pursuant to Chapter 7.24 RCW to determine applicability of the franchise agreements and confirm that the Supreme Court intended that the ongoing costs associated with the components, infrastructure and maintenance required to supply sufficient water for fire suppression were to be included in the charges billed to the General Governments. *See* City of Tacoma Complaint, CP 183-188.

Tacoma argued to the trial court that *Lane* required that charges for hydrants must be paid by the General Governments, not the ratepayers. Tacoma's Motion for Partial Summary Judgment, p. 7, ll. 16-22, CP 488.

On their face, the franchise agreements do not cover the scope of the *Lane* decision, and, even if the agreements were applicable, General Governments did not have statutory authority to force such charges on ratepayers. Tacoma's Motion for Partial Summary Judgment, p. 13, ll 1-19, CP 494. Tacoma also argued that it cannot be inferred from the generic indemnification and hold harmless language contained in the franchise agreements that Tacoma ratepayers accepted a million dollar plus annual responsibility to provide the General Governments with fire hydrant services. *See* Tacoma's Motion for Partial Summary Judgment, p. 11, ll. 10-23, p. 12, ll. 1-19, CP 492-493.

The principal argument of the General Governments in response was that their indemnification clauses were similar to those found in the Shoreline and King County franchise agreements. The General Governments relied heavily on the portions of the trial court's decision in *Lane* that were not appealed and therefore were never reviewed by this Court, excusing Shoreline and King County from having to pay for hydrants in their local areas.

The General Governments argued to the trial court that Tacoma is considered a person under the hold harmless clauses, meaning that if Tacoma demands payment from the General Governments for services rendered, Tacoma must pay itself through operation of the indemnification provisions.²

² "Rather, the indemnity is much broader and includes 'claims arising against the City by virtue of the City's ownership or control of the rights-of-way or other public properties
(footnote continued on next page)

King County Superior Court Judge Douglass North heard the matter on summary judgment. Judge North entered a brief written order agreeing with the General Governments but failed to rule on Tacoma's question that hydrant costs must include the on-going costs associated with providing the necessary components, infrastructure, and maintenance required to supply sufficient water for fire suppression.

Tacoma moved for reconsideration, which Judge North granted in part. Judge North once again ruled in favor of the General Governments, dismissed Tacoma's entire action with prejudice, and entered the following pertinent findings:

The individual franchise agreements between the City of Tacoma and the Defendants City of Fircrest, City of University Place, City of Federal Way, and Pierce County are valid binding contracts;

The indemnification provisions of the above referenced individual franchise agreements preclude the City of Tacoma from advancing this action against Defendants City of Fircrest, City of University Place, City of Federal Way, and Pierce County;

The indemnification provision in the City of Federal Way's franchise agreement requires that the City of Tacoma defend the City of Federal Way in this action;

...

The Court does not reach a decision on any other issue as the Court's findings on the indemnity provisions are dispositive of all other claims in this action.

Order, CP 730-731.

by virtue of grantee's exercise of the rights granted herein, *including payment of any monies to the City*' (emphasis added). TPU claims that the utility ratepayers are providing the City of University Place with a valuable service for which they are not paid and demand a refund. This is precisely the type of claim that is covered within the language of the franchise." See University Place's Response to Tacoma's Motion for Partial Summary Judgment and University Place's Brief in Support of its Cross Motion for Summary Judgment, p. 6, ll. 1-8, CP 629.

III. ARGUMENT.

A. The General Governments Are Responsible for Hydrant Charges.

1. Charges for Local Fire Hydrants Are Taxes, Not Fees.

This Court treats governments differently if they are acting as governments or as businesses. *Lane* at 882. The principal test in distinguishing governmental functions versus proprietary functions is whether the act performed is for the common good of all, or whether it is for the special benefit or profit of the corporate entity. *Okeson v. City of Seattle*, 150 Wn.2d 540, 550, 78 P.3d 1279 (2003).

In *Lane*, this Court found that “all benefit by having water available to put out fires.” *Lane* at 883. Water is made available to put out fires through a hydrant system. “The direct benefit of a hydrant system is enhanced fire suppression, which is a shared benefit” of all citizens. *Id.* This Court then formally confirmed in *Lane* what it had strongly suggested in *Okeson* that providing fire hydrants is a general government expense for which a general government must pay. *Lane* at 884.

A local government does not have the power to impose taxes without statutory or constitutional authority. *Okeson* at 551; *Covell v. City of Seattle*, 127 Wn.2d 874, 879, 905 P.2d 324 (1995). “Where the charge is related to a direct benefit or service, it is generally not considered a tax or assessment.” *Okeson* at 551-552 (quoting *King County Fire Prot. Dist. No. 16 v. Hous. Auth. of King County*, 123 Wn.2d 819, 833, 872 P.2d 516

(1994)). A local government may impose a fee under its general police power. Wash. Const. art. XI, § 11; *Okeson* at 552.

Because of the different restrictions on imposing taxes versus imposing fees, correctly classifying a charge as either a tax or a fee is critical. As this Court warned in *Okeson* “[t]here is thus an inherent danger that legislative bodies might circumvent constitutional constraints . . . by levying charges that, while officially labeled ‘regulatory fees,’ in fact possess all the basic attributes of a tax. *Okeson* at 552 quoting *Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 805, 23 P.3d 477 (2001). For example, “[a] city could then avoid the constitutional limitations on taxes by simply charging its citizens a ‘fire department fee’ . . .” *Okeson* at 552. To determine whether a charge is a tax or fee this Court uses a three-part test as outlined in *Covell*.

This Court used the *Covell* factors to review the charges imposed for hydrants costs. As with streetlights in *Okeson*, this Court found that shifting the hydrants costs to ratepayers was designed to raise revenue for the general funds of the local governments. *Lane* at 883; *Okeson* at 558. “Thus, charges for hydrants are taxes, not fees.” *Lane* at 884

2. **Hydrant Charges Must be Collected from the General Governments from the Areas in Which the Hydrants are Found.**

Tacoma’s water utility, like Seattle, provides hydrant services to other general governments. In *Lane*, Seattle argued, and the trial court held, that RCW 43.09.210 (the “State Accountancy Act”) makes the local governments liable for hydrant services charges. *Lane* at 889. RCW

43.09.210 reads in relevant part: “All service rendered by ... one department ... to another, shall be paid for at its true and full value by the department ... receiving the same[.]”

This law applies to services that one government provides to another. *Lane* at 889. Because Seattle provided a service to Lake Forest Park, Lake Forest Park was held liable by this Court for Seattle’s hydrant costs. “RCW 43.09.210 requires Lake Forest Park to pay for the hydrants within its boundary.” *Lane* at 890. To rule otherwise would mean that “resident taxpayers of the providing city would be paying for services to others.” *Id.*, footnote 3 at 889.

In addition, this Court held Lake Forest’s liability for hydrant costs was not limited by RCW 43.09.210. *Id.* Seattle was required to collect for all past amounts so that it would not be unlawfully paying for the services of another general government.

Like Seattle, Tacoma provides hydrant services to other general governments. A majority of these entities (Tacoma’s general government, King County, Puyallup, Bonney Lake, the Town of Ruston) have paid their hydrant charges. Tacoma has invoiced the General Governments in this case for hydrants charges as of January 2009. Arguably under the State Accountancy Act, Tacoma should be collecting for all of its costs incurred dating back to the original installation (or acceptance into its system) of the hydrants.

Tacoma’s water utility operates on cost-of-service basis, so the hydrant charges only relate to the services provided. *Dec. of McCrea*, p. 2

ll. 6-9, CP 477. The hydrant charges are placed in a separate water utility fund and are accounted and audited separately. Dec. of McCrea, p. 2, ll. 10-13, CP 477. The water utility funds are not commingled with the City's general fund, and the Tacoma City Charter, Section 4.15, prohibits the water utility from using its funds for non-utility purposes or from loaning its funds to other entities (including the City's general fund). Dec. of McCrea, p. 2, ll. 11-16, CP 477.

This Court has made it clear that fire hydrant charges must be paid for by the local general government where the hydrants are located. This Court has also held that interest on unpaid amounts is due at the judgment interest rate, and that RCW 43.09.210 contains no limitation on the period in which the providing government must seek repayment for the services it provides to the receiving government. *Lane* at 890. Tacoma cannot pay for the services it provides to the General Governments. The General Governments are liable under RCW 43.09.210 to pay Tacoma for its costs and ongoing maintenance associated with providing local fire hydrants, as well as past costs plus interest at the judgment interest rate. *Lane* at 891. To rule otherwise, would violate this Court's holding in *Lane* and the State Accountancy Act.

3. **The General Governments Cannot, as a Matter of Law, Impose a Tax on Tacoma Under Their Authority to Grant Franchise Agreements.**

“There must be express statutory or constitutional authority for a local government to impose a tax.” *Okeson* at 558; *Hillis Homes v. Snohomish County*, 97 Wn.2d 804, 809, 650 P.2d 193 (1982). If there is

any doubt about a legislative grant of taxing authority to a municipality, it must be denied. *Id.*

As discussed, this Court in *Lane* explained that taxes, not fees imposed on ratepayers, must be used to pay for local fire hydrants, and that there is no taxing authority to collect hydrant charges from ratepayers:

“No tax shall be levied except in pursuance of law; and every law imposing a tax shall state distinctly the object of the same to which only it shall be applied,” Wash. Const. art. VII, § 5. If providing hydrants is a government function, and if charging ratepayers for those hydrants is a tax, not a fee, the charge violates this part of the constitution. Seattle imposed a “charge” rather than a tax, which it was not authorized by law to impose.

Id. at 881-882.

In *Lane*, Seattle’s historical practice of charging its ratepayers for hydrant costs was ruled an impermissible tax without statutory authority and found to be unconstitutional. *Id.* at 884.

The General Governments in this case argue that they can pass on the hydrant charges to the water ratepayers through their franchising authority. *See, e.g.,* City of University Place’s Response to Tacoma’s Motion for Partial Summary Judgment and University Place’s Brief in Support of Its Cross-Motion for Summary Judgment, p. 4, ll. 2-13, CP 627.

“A city has statutory authority to ‘grant’ a franchise, not to ‘require’ one.” *Burns v. City of Seattle*, 161 Wn.2d 129, 142, 164 P.3d 475 (2007), *citing City of Lakewood v. Pierce County*, 106 Wn. App. 63, 73, 23 P.3d 1 (2001). A “city cannot . . . compel the [utility] to accept its terms for the continued occupation of the streets.” *Id.* Citation omitted.

Any fee charged for use of the City's rights-of-way must relate solely to the administrative costs associated with the oversight of the franchisee's use, fees collected in excess of costs will be deemed revenue, which constitutes an impermissible tax. *City of Lakewood v. Pierce County*, 106 Wn. App. 63, 76-78, 23 P.3d 1 (2001). This is also why the General Governments' argument that they have paid for these services through consideration for the franchise fails, because these are not costs associated with the oversight of the franchisee's use given that the costs at issue are unrelated to the franchisee purpose (i.e. operation of a water system); instead the costs relate only to the General Governments' use of the streets for fire suppression as required by their own local laws.

There is no express authority for cities to impose a tax under its franchising authority. The cities in this case have previously cited RCW 35A.47.040 in their franchise agreements as their authority to enter into a contract with Tacoma. This statute reads in pertinent part:

Every code city shall have authority to permit and regulate under such restrictions and conditions as it may set by charter or ordinance and to grant nonexclusive franchises for the use of public streets, bridges or other public ways, structures or places above or below the surface of the ground for . . . water. . . . The power hereby granted shall be in addition to the franchise authority granted by general law to cities.

Suffice it to say that this statute, by its terms, does include a grant of the authority to tax.

Similarly, the counties statutory authority for regulating use of its rights-of-way also lacks express authority to impose a tax for use of the streets. *See* RCW 36.55.010. Nor is there any authority allowing the

General Governments to require a franchisee to collect by fee funds that can only be collected by tax.

As discussed, cities and counties may not impose taxes without express legislative authority. The General Governments do not have authority to impose a tax on Tacoma for fire hydrant services through their authority to grant franchise agreements. Consequently, if the General Governments create conditions (or reinterpret existing terms) in their franchise agreements to accomplish the goal of passing on general government costs to ratepayers (*e.g.* raise revenue), it has the same effect as an illegal tax. As this Court cautioned in *Okeson*, the General Governments cannot label a tax a condition of a contract to avoid the constitutional requirement of “stat[ing] distinctly the object of the [tax] to which only it shall be applied.” *Okeson* at 556, quoting WASH. CONST. ART. VII, § 5. This would be the case for both preexisting and future agreements between the parties.

As a matter law, the General Governments cannot compel Tacoma’s water utility and its ratepayers to pay for the General Government’s fire hydrant charges as a condition of granting a franchise agreement, nor can Tacoma voluntarily pay such costs for the General Governments under RCW 43.09.210. To allow the General Governments to pass on this taxpayer obligation by contract using their franchise authority would contravene (1) this Court’s decision in *Lane*, (2) the constitutional requirement for express taxing authority, and (3) the Accountancy Act’s prohibition against one governmental entity paying for

the services of another governmental entity. If the superior court decision stands, general local governments will be able to gut *Lane* by holding franchise applicants hostage until they agree to relieve the general governments of the obligation to pay for the fire hydrants they themselves have required, by acquiescing to the scope given such agreements' general indemnification and hold harmless clauses by the trial court here.

B. The Franchise Agreements' Indemnification and Hold Harmless Clauses Cannot Sustain the Trial Court's Judgment in Favor of the General Governments.

As just discussed, it is beyond the authority of a municipal entity such as the General Governments to impose a tax under their authority to grant franchise agreements. Yet the General Government parties in this case managed to persuade the trial court that the indemnification and hold harmless clauses of their franchise agreements with Tacoma allow them to do precisely that. If the trial court was correct in its interpretation of the scope of those clauses, then the agreements themselves must be invalidated as illegal under well-established principles of Washington municipal law. *See, e.g., Chemical Bank v. Washington Public Power Supply System*, 99 Wn.2d 772, 796-797, 666 P.2d 329 (1983) (invalidating "dry hole" contractual obligations as beyond the scope of authority granted to the participating municipalities) ("As a general rule, the unauthorized contracts of governmental entities are rendered void and unenforceable under the ultra vires doctrine" (citing *Noel v. Cole*, 98 Wn.2d 375, 378, 655 P.2d 245 (1982))).

Fortunately, such a drastic result is not required to remedy the error of the trial court. Instead, this Court may and should hold that the trial court's interpretation of the indemnification and hold harmless clauses was itself an error -- that those clauses cannot reasonably be read to manifest an intent of the parties under which Tacoma's demand for payment of the costs at issue is deemed a claim by a "person" that triggers Tacoma's obligation to hold the General Governments harmless and to indemnify them against that demand. The purpose of indemnification and hold harmless clauses has repeatedly been recognized by Washington courts, including this Court. In *Stocker v. Shell Oil Co.*, 105 Wn.2d 546, 716 P.2d 306 (1986), this Court described indemnity agreements as "essentially agreements for contractual contribution, whereby one tortfeasor, against whom damages in favor of an injured party have been assessed, may look to another for reimbursement." *Stocker*, 105 Wn.2d at 549 (citing *Redford v. Seattle*, 94 Wn.2d 198, 615 P.2d 1285 (1980)). As the Court of Appeals observed in *Parks v. Western Washington Fair Association*, 15 Wn. App. 852, 553 P.2d 459 (1976), "[i]ndemnity agreements are to be viewed realistically as efforts by businessmen to allocate as between them the cost or expense of the risk of accidents." *Parks*, 15 Wn. App. at 857.

The General Governments' reading of the indemnity provisions of the franchise agreements at issue cannot reasonably be reconciled with this recognized purpose. The cost of providing fire hydrants is not the result of an "accident" arising out of operations governed by the franchise

agreements. Nor is Tacoma's demand for reimbursement of those expenses a claim by some third party seeking compensation for damage caused by those operations. The indemnity provisions at issue are typical, garden-variety indemnification and hold harmless clauses, which can be found in a wide variety of contracts. The General Government's reading of these provisions could be applied to any demand for reimbursement of normal contract expenses. It would allow parties entitled to indemnity to avoid paying their otherwise indisputable contract obligations by claiming that the demand by their contractual co-party for such payment is a "claim" by a "person" triggering the claimant's duty to indemnify.³ It is hornbook contract law that contracts will be construed whenever possible to avoid unreasonable results, and the General Governments have not offered one scrap of evidence suggesting that the parties to the franchise agreements at issue here actually intended such a result.

Accordingly, this Court should hold that the indemnification and hold harmless clauses of the franchise agreements cannot shield the General Governments from their obligation to reimburse Tacoma for the expenses at issue here. And without that single legal shield provided for them by the trial court, the General Governments have no other basis to

³ The *Lane* decision is certainly not a triggering event under these agreements. *Lane* did not reverse a statute or create new law; this Court simply enunciated how existing law should be applied in water rate making practices. See, e.g., *Cornish College of the Arts v. 1000 Virginia Limited Partnership*, __ Wn. App. __, __ P.3d __, 2010 WL 4159298 (Div. 1), *8, ¶37 (Oct. 25, 2010) (citing and quoting *Arnim v. Shoreline School Dist. No. 412*, 23 Wn. App. 150, 153,594 P.2d 1380 (1979)) ("One of the basic principles of contract law is that the general law in force at the time of the formation of the contract is a part thereof").

offer for being relieved of their obligation to reimburse Tacoma for the expenses at issue.⁴

Judge North's order requiring Tacoma to pay Federal Way's defense in this action fails for much the same reason. Federal Way is no more entitled to have Tacoma pay for the fees and costs incurred in defending against Tacoma's suit for declaratory relief, than are any of the General Governments entitled to convert a garden-variety indemnification clause into a device for avoiding their obligation to reimburse Tacoma for expenses that it has incurred on behalf of the General Governments and their taxpayers.

⁴ The City's proposed reading of the indemnification and hold harmless clauses also allows this Court to avoid the issue of whether a local government has the authority to agree to indemnify another local government for claims brought by third parties. *See Barendregt v. Walla Walla School District No. 140*, 26 Wn. App. 246, 250-251, 611 P.2d 1385, *review denied*, 94 Wn.2d 1005 (1980) (state or local government cannot agree to indemnify another entity, including another local government, against claims brought by third parties) (reversing summary judgment in favor of school district on indemnification claim against the state). Here, Tacoma's charter does not authorize indemnification, and the City's Municipal Code only authorizes indemnification of officers and employees in certain limited circumstances. *See Tacoma Muni. Code* § 1.12.920 (protection of officers and employees against personal liability). Although this issue was not raised before the trial court, this Court has the discretion to consider an issue not raised in the trial court, *e.g.*, *Obert v. Environmental Research & Dec. Corp.*, 112 Wn.2d 323, 333, 771 P.2d 340 (1989), and such discretion is often exercised to consider issues that affect a party's ability to maintain an action, *e.g.*, *Parentage of M.S.*, 128 Wn. App. 408, 412, 115 P.3d 405 (Div. 1, 2005) (citations in footnote omitted). Here, whether Tacoma has the authority to agree to indemnify the General Governments directly affects the General Governments' ability to defeat Tacoma's right to declaratory relief.

C. **Hydrant Charges to be Paid by the General Governments Include the Ongoing Costs of Providing the Necessary Components, Infrastructure and Maintenance Required to Supply Sufficient Water for Fire Suppression.**

Water utilities providing local fire hydrant services must charge for the ongoing costs associated with providing the infrastructure necessary to make the hydrants operational and compliant with local/state law. In *Lane*, Seattle Public Utilities (“SPU”) billed local governments for both the hydrant and ongoing infrastructure costs. The trial court in *Lane* ruled “[i]t is a function of government to provide fire protection and that, therefore, the cost of fire hydrant service and maintenance is properly borne by the relevant jurisdiction’s general fund....Individual ratepayers are not obligated to provide water for fire protection services. Cities and counties are.” See King County Verbatim Report of Proceedings Summary Judgment Order, p. 4, ll. 12-16, CP 415, p. 8, ll. 11-12, CP 419, attached as Exhibit 5 to Dec. of Fosbre, CP 319-561.

In describing what costs were at issue before this Court in *Lane*, the appellants City of Burien described the term “fire hydrant” to include the cost sought to be paid to SPU for “providing the necessary components, infrastructure and maintenance required to supply sufficient water for fire suppression.” See Appellant City of Burien’s Supreme Court Brief, p. 1, footnote 1, CP 428; see also Appellant City of Lake Forest Park’s Supreme Court Brief, CP 672-73. Burien goes on to state that SPU’s infrastructure costs include the installation and maintenance of sufficient water mains, reservoirs, fire hydrants and water. Appellant City of Burien’s Brief, pp. 4, 17, CP 438, 451. Following the trial court

decision in *Lane*, none of the defendants (including King County) appealed the inclusion of the on-going infrastructure costs in the charges for hydrant services. No doubt the reason that the inclusion of these costs was not appealed is that the hydrants would be worthless if they did not have sufficient water pressure and water storage necessary for operation. Ongoing maintenance, operation, and replacement costs should be borne by the local general governments who demanded the fire hydrants, not the water utility and its ratepayers. Consequently, this Court understood that the breadth of its holding included charging for the ongoing maintenance, operation, and replacement costs associated with providing hydrants.

The City of Tacoma filed this current action under the authority of the Declaratory Judgments Act (Chapter 7.24), which states in relevant part:

A person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

RCW 7.24.020. This Court has previously interpreted the Act as requiring the trial court to make an express determination regarding the rights of the parties. *Greyhound Corp. v. Division 1384*, 44 Wn.2d 808, 271 P.2d 689 (1954). In *Greyhound*, the Court held the trial court's judgment in dismissing the action with prejudice on the ground that the company's complaint was insufficient to state a cause of action did not constitute an

adequate disposition of the case under the Declaratory Judgments Act. *Greyhound*, 44 Wn.2d at 822-823.

The General Governments have asserted they are not responsible for paying the ongoing costs of the necessary infrastructure needed to render the hydrants operational. Judge North failed to answer this question and instead he dismissed Tacoma's complaint with prejudice. As matter of judicial economy and to avoid needless litigation between public entities, clarification of this issue by the Court is warranted.

IV. RAP 18.1 FEE REQUEST AGAINST RESPONDENT FEDERAL WAY

Federal Way has been awarded its attorney's fees and costs, under the hold harmless provisions of its franchise agreement with Tacoma. For the reasons set forth previously, this award should be reversed. Moreover, Tacoma should be awarded its attorney's fees and costs incurred in defeating Federal Way's claimed right to fees under the hold harmless provision of the parties' franchise agreement. *See, e.g., Herzog Aluminum, Inc. v. General American Window Corp.*, 39 Wn. App. 188, 190-191, 692 P.2d 867 (1984) (whether defeats claim or defense, that party may recover attorney fees where the basis for the claim or defense provides for a right to recover fees).

V. CONCLUSION

This Court should hold that the General Governments are required to pay current and past hydrant charges, together with interest at the judgment rate. This Court should further declare that the hydrant charges

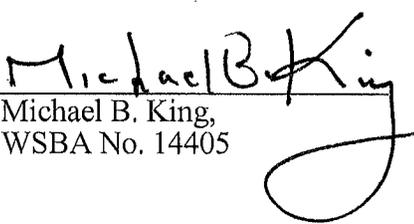
that Tacoma is required to collect from the General Governments must include the costs associated with the on-going maintenance, operation and replacement of the infrastructure needed to render the hydrants operational.

RESPECTFULLY SUBMITTED this 3rd day of November, 2010.

CITY OF TACOMA

CARNEY BADLEY SPELLMAN, P.S.

By 
Elizabeth A. Pauli
WSBA No. 18254

By: 
Michael B. King,
WSBA No. 14405

By 
William Cody Fosbre,
WSBA No. 27825
Office of the City Attorney

Attorneys for Appellant City of Tacoma

APPENDICES

APPENDIX A	Judge North's Court Order	CP 728-732
APPENDIX B	Federal Way Franchise Agreement University Place Franchise Agreement Fircrest Franchise Agreement Pierce County Franchise Agreement	CP 322-346 CP 348-368 CP 370-380 CP 382-409

APPENDIX

A

ATTACHMENT 2

FILED
KING COUNTY, WASHINGTON
JUN 30 2010
SUPERIOR COURT CLERK

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

CITY OF TACOMA, a municipal corporation,

Plaintiff,

NO. 09-2-45435-3 SEA

vs.

CITY OF BONNEY LAKE, CITY OF FIRCREST, CITY OF UNIVERSITY PLACE, CITY OF FEDERAL WAY, PIERCE COUNTY and KING COUNTY,

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING TACOMA'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants.

~~PROPOSED~~ *D.A.N.*

This ORDER clarifies and replaces the ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANTS issued by this Court in this matter on May 14, 2010.

ORDER

THIS MATTER came before the Court for hearing on May 14, 2010, on Tacoma's Motion for Partial Summary Judgment and Defendants' Cross Motion for Summary Judgment on Indemnity. The Court heard the oral argument of counsel for Plaintiff City of Tacoma ("Tacoma") and Defendants City of Fircrest, City of University Place, City of Federal Way, and Pierce County, and having considered the records and files contained herein, including

{WDT795971.DOC;1\00054.050002\} ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING TACOMA'S MOTION FOR PARTIAL SUMMARY JUDGMENT - 1

Pierce County Prosecuting Attorney/Civil Division
955 Tacoma Avenue South, Suite 301
Tacoma, Washington 98402-2160
Main Office: (253) 798-6732
Fax: (253) 798-6713

1 the following:

- 2 1. Tacoma's Motion for Partial Summary Judgment;
- 3 2. Declaration of Tacoma Water Superintendent Linda McCrea in Support of Tacoma's
- 4 Motion for Partial Summary Judgment;
- 5 3. Declaration of Thomas Gould, Tacoma Water Rates Consultant, in Support of
- 6 Tacoma's Motion for Partial Summary Judgment;
- 7 4. Declaration of Kim Wilson in Support of Tacoma's Motion for Partial Summary
- 8 Judgment;
- 9 5. Declaration of William C. Fosbre in Support of Tacoma's Motion for Partial Summary
- 10 Judgment;
- 11 6. Defendants' Cross Motion for Summary Judgment on Indemnity;
- 12 7. City of Federal Way's Cross-Motion for Partial Summary Judgment and Response to
- 13 Tacoma's Motion for Partial Summary Judgment;
- 14 8. Declaration of Peter B. Beckwith in Support of City of Federal Way's Cross-Motion
- 15 for Partial Summary Judgment and Response to Tacoma's Motion for Partial
- 16 Summary Judgment;
- 17 9. City of University Place's Response to Tacoma's Motion for Partial Summary
- 18 Judgment and University Place's Brief in Support of Its Cross-Motion for Summary
- 19 Judgment;
- 20 10. Declaration of David Swindale in Support of Defendant City of University Place's
- 21 Motion for Summary Judgment (revised);
- 22 11. Declaration of Bob Jean in Support of Defendant City of University Place's Motion
- 23 for Summary Judgment;
- 24
- 25

{WDT795971.DOC;1100054.050002} ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT AND DENYING TACOMA'S MOTION
FOR PARTIAL SUMMARY JUDGMENT - 2

Pierce County Prosecuting Attorney/Civil Division
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Tacoma, Washington 98402-2160
Main Office: (253) 798-6732
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1 12. Declaration of Wayne D. Tanaka in Support of Defendant City of University Place's
2 Motion for Summary Judgment;

3 13. Defendant Pierce County's Response to City of Tacoma's Motion for Partial Summary
4 Judgment and Brief in Support of Pierce County's Cross-Motion for Summary
5 Judgment;

6 14. Declaration of David B. St.Pierre in Opposition to Tacoma's Motion for Partial
7 Summary Judgment and in Support of Pierce County's Cross-Motion for Summary
8 Judgment;

9 15. City of Fircrest's Brief in Support of Its Cross-Motion for Summary Judgment and in
10 Response to Tacoma's Motion for Partial Summary Judgment;

11 16. Plaintiff Tacoma's Reply Brief on Partial Summary Judgment;

12 17. Declaration of William C. Fosbre in Support of Tacoma's Reply;

13 And the Court being otherwise fully advised;

14
15 **NOW, THEREFORE, the Court finds:**

16 A. There are no material facts in dispute;

17 B. The individual franchise agreements between the City of Tacoma and the Defendants
18 City of Fircrest, City of University Place, City of Federal Way, and Pierce County are
19 valid binding contracts;

20 C. The indemnification provisions of the above-referenced individual franchise
21 agreements preclude the City of Tacoma from advancing this action against
22 Defendants City of Fircrest, City of University Place, City of Federal Way, and Pierce
23 County;

24 D. The indemnification provision in the City of Federal Way's franchise agreement
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requires that the City of Tacoma defend the City of Federal Way in this action.

E. In its briefing, the City of Federal Way withdraws its Consumer Protection Act claim;

F. The Court does not reach a decision on any other issue as the Court's findings on the indemnity provisions are dispositive of all other claims in this action.

THEREFORE, it is hereby

ORDERED, ADJUDGED AND DECREED that Defendants' Cross-Motion on Indemnity is granted; that Tacoma's Motion for Partial Summary Judgment is denied; and that the above-entitled matter is hereby dismissed, with prejudice, and with statutory costs awarded to Defendants

DATED this 29th day of June, 2010.

Douglas A. North
JUDGE DOUGLASS A. NORTH

Presented by:

PIERCE COUNTY

MARK LINDQUIST
Prosecuting Attorney

by: _____
David B. St.Pierre, WSBA #27888
Deputy Prosecuting Attorney
Attorneys for Defendant Pierce County

OGDEN MURPHY WALLACE, PLLC

by: _____
Wayne D. Tanaka, WSBA #6303

{WDT795971.DOC;100054.050002} ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING TACOMA'S MOTION FOR PARTIAL SUMMARY JUDGMENT - 4

Pierce County Prosecuting Attorney/Civil Division
955 Tacoma Avenue South, Suite 301
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Main Office: (253) 798-6732
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1 Attorneys for Defendant City of University Place
2 CITY OF FEDERAL WAY

3 by: _____
4 Peter Beckwith, WSBA #34141
5 Attorney for Defendant City of Federal Way

6 COMFORT DAVIES & SMITH

7
8 by: _____
9 Michael B. Smith, WSBA #13747
10 Attorneys for Defendant City of Fircrest

11 Approved as to form;
12 Presentation Waived By:

13 CITY OF TACOMA

14 ELIZABETH A. PAULI
15 Tacoma City Attorney

16 by: _____
17 William C. Fosbre, WSBA #27825
18 Chief Deputy City Attorney
19 Attorney for Plaintiff City of Tacoma
20
21
22
23
24
25

APPENDIX

B

ORDINANCE NO. 99-344

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF FEDERAL WAY, WASHINGTON, GRANTING CITY OF TACOMA DEPARTMENT OF PUBLIC UTILITIES, WATER DIVISION, A MUNICIPAL CORPORATION AND PUBLIC UTILITY SELLING AND DISTRIBUTING WATER WITHIN KING COUNTY, A NONEXCLUSIVE FRANCHISE TO OCCUPY THE RIGHTS-OF-WAY OF THE CITY OF FEDERAL WAY, WASHINGTON, THROUGH THE FRANCHISE AREA FOR THE PURPOSES OF CONSTRUCTING, MAINTAINING, REPAIRING, RENEWING AND OPERATING A WATER DISTRIBUTION AND TRANSMISSION SYSTEM AND ACCESSORIES WITHIN AND THROUGH THE CITY OF FEDERAL WAY.

WHEREAS, the City Council of Federal Way finds that it is in the public interest to specify the rights and duties of the water utility through a franchise; and

WHEREAS, in exercising said authority pursuant to RCW 35A.47.040 relating to franchises and permits, the City of Federal Way reserves such other powers and authorities held by Washington code cities; now therefore,

THE CITY COUNCIL OF THE CITY OF FEDERAL WAY, WASHINGTON, DOES HEREBY ORDAIN AS FOLLOWS:

Section 1. Definitions

Where used in this Franchise the following terms shall be defined as follows:

- 1.1 "City" means the City of Federal Way, Washington, a municipal corporation of the State of Washington, and its respective successors and assigns.
- 1.2 "Council" means the City of Federal Way Council acting in its official capacity.

ORIGINAL

1.3 "Director" means the Public Works Director, or designee, of the City of Federal Way Public Works Department.

1.4 "Facilities" means water pipes, and mains and appurtenances and accessories necessary for the transmission and distribution of water within the City of Federal Way.

1.5 "FWCC" means the Federal Way City Code.

1.6 "Franchise Area" means rights-of-way for public roads, streets, avenues, alleys, highways, and the BPA corridor of the City as set forth in Exhibit A. The Franchisee shall place Facilities on the right-of-way in the Franchise Area, but not on any other public property owned, in whole or in part, leased, or otherwise occupied by the City.

1.7 "Franchisee" means ^{City of Tacoma, WA} Tacoma Public Utilities, a municipal corporation, and public utility, and its respective successors and assigns.

Section 2. Grant/Acceptance

2.1 Grant of Franchise. The City does hereby grant to Franchisee, subject to the terms of this Franchise, the right, privilege, authority and franchise to:

(a) Lay, construct, extend, repair, renew, and replace Facilities in the Franchise Area; and

(b) To charge and collect tolls, rates and compensation for such water service and such uses.

2.2 Acceptance by Franchisee. Franchisee shall have no rights under this Franchise, nor shall Franchisee be bound by the terms and conditions of this Franchise, unless Franchisee shall, within sixty (60) days after the effective date of this Franchise, file with the City its written acceptance of this Franchise and all of its terms and conditions.

Section 3. Non-Franchise Area City Property

This Franchise does not and shall not convey any right to Franchisee to install its Facilities on, under, over, across, or to otherwise use City-owned or leased properties of any kind outside the Franchise Area, or to install Facilities on, under, over, across or otherwise use any City owned or leased property within the Franchise Area other than public roads, streets, avenues, alleys, and highways, AND THE BPA CORRIDOR OF THE CITY AS SET FORTH IN EXHIBIT A.

Section 4. Term

Subject to Franchisee filing its acceptance pursuant to Subsection 2.2, the term of this Franchise shall be for a period of ten (10) years commencing on the effective date of this Franchise, unless terminated earlier pursuant to the terms of this Franchise or other applicable law.

Section 5. Location of Facilities

5.1 Location. The location of existing water pipes, laterals, and appurtenances, their depths below surface of ground or grade of a right-of-way (if available), shall be submitted to the City in the form of a map(s) showing the approximate location of Franchisee's existing water system within the Franchise Area. Upon written request of the City, Franchisee shall update such map to reflect actual or anticipated improvements to the system. Any such map (or update thereof) so submitted shall be for informational purposes only and shall not obligate Franchisee to undertake any specific improvements, nor shall such map be construed as a proposal to undertake any specific improvements.

5.2 GIS Data. The Franchisee shall provide, at such time as Franchisee develops and employs, Geographic Information System ("GIS") technology for its water utility maps and records throughout its service area and has such information available in digital GIS format for its Facilities within the Franchise Area.

5.3 Design Markings. In the event the City desires to design new streets or intersections, renovate existing streets, or make any other public improvements, Franchisee shall at the City's reasonable request, provide the location of Franchisee's underground Facilities within the Franchise Area by either field markings or by locating the Facilities on the City's design drawings, and shall provide all other reasonable cooperation and assistance to the City.

5.5 No Warranty or Waiver. Nothing herein is intended to relieve the parties of their respective obligations arising under Chapter 19.122 RCW or other applicable law with respect to determining the location of utility facilities prior to construction. Further, neither the provisions of this Franchise nor the absence of any specific provision in this Franchise is intended to limit, detract from or render ineffective any disclaimer (including, without limitation, any disclaimer as to accuracy or completeness) placed by Franchisee on any map furnished to the City pursuant to Section 5.2 of this Franchise.

Section 6. Noninterference of Facilities

Franchisee agrees to maintain its Facilities and perform all work within the Franchise Area: (1) so as not to unreasonably interfere with the free passage of traffic, (2) in accordance with the laws of the State of Washington and City ordinances, regulations resolutions and rules, and (3) as required by the Director.

Section 7. Requirement to Obtain Permits

Franchisee shall, at its expense, obtain all permits, (including rights-of-way permits), and pay all permit fees required by applicable City ordinances, regulations, resolutions and rules prior to commencing any work within the Franchise Area. Franchisee permit applications shall show the position and location of the mains, laterals, and extensions to be constructed, laid, installed, or erected at that time, show their relative position to existing rights-of-way or property lines upon prints drawn to scale, designate rights-of-way by their names and improvements, such as, but not limited to, sidewalks, curbs, gutters, shoulders of roadway, ditches, paved roadways, roadways to property lines, turnouts, parking strips, telephone or electric distribution poles, and water pipes existing on the ground to be occupied, or as required by the Director. The level of detail for water services and hydrant laterals shall be commensurate with the complexity of the work to be performed. The Franchisee shall specify the class and type of materials to be used, equipment to be used, and mode of safeguarding and facilitating the public traffic during construction. Materials and equipment shall be in new or like-new condition for its type and kind. The manner of excavation, construction, installation, backfill, and temporary structures such as, but not limited to, traffic turnouts and road obstructions shall meet the standards of the FWCC and be satisfactory to the Director. All traffic control shall be in accordance with the right-of-way permit, and shall be in accordance with the Manual on Uniform Traffic Control Devices (MUTCD). The Franchisee shall indicate on the right-of-way use permit application the time needed to complete the work. The time needed to complete the work is subject to approval by the City as a condition of the issuance of the right-of-way permit.

In the event of an emergency in which Franchisee's Facilities within the Franchise Area are in a condition as to immediately endanger the property, life, health or safety of any individual,

Franchisee may take action immediately to correct the dangerous condition without first obtaining any required permit so long as such permit is obtained by Franchisee as soon as practicable thereafter.

Section 8. Standard of Performance

The Franchisee shall not excavate for a distance of more than one hundred feet (100') without immediately backfilling and compacting to surface grade and permit requirements. Backfilled trench areas within a driving lane must be patched, either temporarily or permanently, before the end of the workday in which they have been opened. Trench areas within the right-of-way, but not in a driving lane must also be patched within the time limits specified by the City on the right-of-way use permit. Final surface restoration shall be completed within thirty (30) days and shall be equal to or better than the surface condition prior to permit issuance.

Any street asphalt overlay in the Franchise area within five (5) years of the date of a permit application, shall not be open cut by the Franchisee unless in an emergency. Streets that are open cut will require asphalt overlay for approximately one (1) blocks in length or as determined by the Director.

Franchisee shall, in carrying out any authorized activities within the Franchise Area, comply with all applicable laws, ordinances, codes and standards, as now existing or hereafter adopted or amended, and shall comply with the terms of this Franchise, whether or not the work is performed by the Franchisee, its agents, employees, subcontractors, or other third parties at Franchisee's direction. Upon completion of any water main installation of Franchisee's Facilities within the Franchise Area, the "as-built" location of the Facilities shall be within two (2) feet of the location of the Facilities shown in the plans submitted by Franchisee to the City's Public Works Department or closer if required by State law. Nothing herein is intended to relieve the

parties of their respective obligations arising under applicable law with respect to determining the location of utility facilities.

Section 9. Survey Markers and Monuments

Franchisee shall, using a licensed surveyor, immediately replace all markers or monuments disturbed during any work by Franchisee within the Franchise Area. Franchisee shall pay all costs associated with such lost, destroyed or disturbed monuments or markers.

Section 10. Surface Markings/Stakes

Prior to Franchisee commencing any excavation work within the Franchise Area, Franchisee shall reference all monuments and markers relating to subdivisions, plats, highway, and other surveys. The reference points shall be located so that they shall not be disturbed during the Franchisee's operations under this franchise. The method referencing these monuments or other points shall be approved by the City before placement. The construction shall be made as expeditiously as conditions permit, and as directed by the City. The cost of monuments or other markers lost, destroyed, or disturbed, and the expense of replacement of the monuments, shall be borne solely by the Franchisee. A complete set of reference notes for monuments and other ties shall be filed with the City. In the event of any conflict or inconsistency between this Section 10 and Chapter 19.122 RCW, as now existing or hereafter amended, Chapter 19.122 RCW will control.

Section 11. Notification to fire district

If it is necessary to shut down or diminish the water pressure so that fire hydrants may be affected, the Franchisee shall notify the appropriate fire district by telephone followed by faxed transmittal or written notification, that water pressure or fire flow conditions have been affected. In case of a planned shutdown or diminished water flow, at least forty-eight (48) hour prior

notification to the fire district is required. If more than one fire hydrant is affected, Franchisee must provide a map of the affected area to the appropriate fire district.

Section 12. Right of City to Undertake Maintenance Work

The laying, construction, maintenance, and operation of Franchisee's system of water pipe, laterals and appurtenances granted under this franchise shall not preclude the City, its accredited agents or its contractors from doing necessary maintenance work contiguous to the Facilities, provided that the Franchisee shall have sufficient notice of blasting or excavating in order that Franchisee may protect its lines or pipe or property.

Section 13. Right of City to Complete Work

In the event Franchisee fails to comply with any applicable federal, state or City laws, ordinances, rules, regulations or standards or with any of the terms of this Franchise, and such noncompliance continues for a period of ten (10) days after Franchisee receives written notice from the City regarding the noncompliance, the City may, but in no event is the City obligated to, order any work completed, including without limitation Franchisee's obligation to repair pursuant to Section 8 herein and Franchisee's obligation to remove Facilities pursuant to Section 14 herein. If the City causes such work to be done by its own employees or by any person or entity other than Franchisee, Franchisee shall, upon the City's written request, immediately reimburse the City for all reasonable costs and expenses incurred by the City in having such work performed, which costs may include the City's reasonable overhead expenses and attorneys fees. However, the City shall not have any plumbing work accomplished by any person or entity other than Franchisee or a qualified and licensed plumbing contractor.

Section 14. Notice to Franchisee of Work by City

14.1 City Reservation of Rights. The City reserves the right to use, occupy and enjoy

the Franchise Area for any purpose that is not inconsistent with the terms and conditions of this Franchise. The rights reserved herein include, without limitation, the construction of any electrical, water, sewer or storm drainage line, installation of traffic signals, street lights, trees, landscaping, bicycle paths and lanes, equestrian trails, sidewalks, other pedestrian amenities, and other public street improvement projects.

This Franchise is not an exclusive franchise. Without limiting Franchisee's rights under this Franchise, this Franchise shall not in any manner prohibit the City from granting other and further franchises in, under, over, upon, and along the Franchise Area.

14.2 City's Duties. In the event the City undertakes any work, including necessary maintenance within a right-of-way in which Franchisee's Facilities are located, and such work necessitates the relocation of Franchisee's then existing Facilities within the Franchise Area, the City shall:

- (a) Provide written notice to Franchisee requesting such relocation within a reasonable time prior to the commencement of such City work; and
- (b) Provide Franchisee with copies of pertinent portions of the City's plans and specifications for such City work so that Franchisee may relocate its Facilities to accommodate such City work.

14.3 Franchisee's Duties. After receipt of the City notice requesting the relocation of the Facilities pursuant to Subsection 14.2(a) and receipt of the plans and specifications pursuant to Subsection 14.2(b), Franchisee shall, within thirty (30) days of notification, or such time as approved by the Director, raise, lower, or move such Facilities within the Franchise Area at its sole cost and expense so as to conform to such new grades as may be established, and place the pipe in a location or position causing the least interference with the improvement, repair, or

alteration contemplated by the City. If the City improves a right-of-way, Franchisee shall, at its sole cost and expense, upon receipt of notice, replace the pipe or pipes located in the improved subgrade of the improvement with pipe or pipes conforming to the specifications for the improvement of the right-of-way.

14.4 Exclusivity. This Section 14 shall govern all relocations of Franchisee's Facilities required in accordance with this Franchise. Nothing in this Section 14 shall require Franchisee to bear any cost or expense in connection with the location or relocation of any Facilities existing under benefit of easement on property owned by a person or entity other than the City.

Section 15. Damage Repair

In case of damage by the Franchisee or by the Facilities of the Franchisee to rights-of-way, or to public and private improvements to rights-of-way, the Franchisee agrees to repair the damage at its own cost and expense. The Franchisee shall, upon discovery of any such damage, immediately notify the City. The City will inspect the damage, and set a time limit for completion of the repair. If the City discovers damage caused by the Franchisee to rights-of-way, or to public and private improvements to rights-of-way, the City shall give the Franchisee notice of the damage and set a time limit in which the Franchisee must repair the damage. In the event the Franchisee does not repair a right-of-way or an improvement to a right-of-way as required in this section, the City may repair the damage pursuant to Section 13 of this Agreement.

Section 16. Default

16.1 Notice of Default. If Franchisee shall fail to comply with any of the provisions of this Franchise, the City may serve a written notice to Franchisee ordering such compliance and Franchisee shall have sixty (60) days from the receipt of such notice in which to comply.

16.2 Revocation of Franchise. If Franchisee is not in compliance with this Franchise after the expiration of the sixty (60) day period, the City may, by ordinance, declare an immediate forfeiture of this Franchise.

Section 17. Limited Rights

This Franchise is intended to convey only a limited right and interest to Franchisee in the Franchise Area. This Franchise is not a warranty of title or conveyance of any ownership interest in or to the Franchise Area to Franchisee.

Section 18. Eminent Domain

The existence of this Franchise shall not preclude the City from acquiring by condemnation, in accordance with applicable law, all or a portion of Franchisee's Facilities within the Franchise Area for the fair market value thereof. In determining the value of such Facilities, no value shall be attributed to the right to occupy the Franchise Area conferred by this Franchise.

Section 19. Vacation

If at any time the City, by ordinance, vacates all or any portion of public streets, roads and/or rights-of-way within the Franchise Area, the City will not be liable for any damages or loss to the Franchisee by reason of such vacation. The City agrees to exert reasonable good faith efforts to reserve an easement for Franchisee's lines and Facilities when a street, public way, or area is vacated. The City may, after thirty (30) days written notice to Franchisee, terminate this Franchise with respect to any such vacated area.

Section 20. Compliance with Laws

Franchisee shall comply with all applicable federal, state and City laws, ordinances, resolutions, regulations, standards and procedures, as now existing or hereafter amended or adopted, including without limitation the State Environmental Protection Act, the Federal

Occupational Safety and Health Act of 1970 (OSHA), and the Washington Safety and Health Act of 1973 (WISHA); provided, however, that if any term or condition of this Franchise and any term or condition of any City law, code, ordinance, resolution, regulation, standard, procedure, permit or approval are in conflict, the term or condition of this Franchise will control.

Section 21. Guarantee

Franchisee shall guarantee work completed by the Franchisee under this franchise for a period of twenty (20) years against settlement or repair.

Section 22. Charge for Administrative Costs

Franchisee agrees to pay a fee or charge to recover the actual reasonable administrative expenses incurred by the City which are directly related to preparing and approving this Franchise. Nothing herein shall preclude the City from recovering any administrative costs incurred by the City in the approval of permits or in the supervision, inspection or examination of all work by Franchisee in the Franchise Area as prescribed in accordance with applicable provisions of the Federal Way City Code.

Section 23. Indemnification

Franchisee agrees to indemnify and hold harmless and defend the City, its elected officials, officers, employees, agents, and volunteers from any and all claims, demands, losses, actions and liabilities (including costs and all attorney fees) to or by any and all persons or entities, including, without limitation, their respective agents, licensees, or representatives, arising from, resulting from, or connected with this Franchise to the extent caused in part or in whole by the acts, errors or omissions of the Franchisee, its officers, partners, shareholders, agents, employees, or by the Franchisee's breach of any provisions of this Franchise; provided, however, that this section shall not be construed as requiring Franchisee to indemnify, hold harmless or defend the City against

claims or damages arising from the negligence of the City, its agents or employees. In the event any claim, demand, suit or action is commenced against the City which gives rise to Franchisee's obligation pursuant to this Section 23, the City shall promptly notify Franchisee thereof, and Franchisee shall use attorneys selected by the City. Franchisee shall not settle or compromise any such suit or action except with prior written consent of the City, which shall not be unreasonably withheld. The City shall have the right at all times to participate through its own attorney in any suit or action which arises pursuant to this Franchise when the City determines that such participation is required to protect the interest of the City or the public. In the event it is determined that RCW 4.24.115 applies to this Franchise, Franchisee agrees to defend, hold harmless and indemnify the City to the Maximum extent permitted thereunder, to the full extent of Franchisee's negligence.

Section 24. Insurance

24.1 Minimum Limits. The Franchisee agrees to carry as a minimum, the following insurance, in such forms and with such carriers as are satisfactory to the City.

(a) Workers compensation and employer's liability insurance in amounts sufficient pursuant to the laws of the State of Washington;

(b) Commercial general liability insurance with combined single limits of liability not less than ~~\$2,000,000~~ \$5,000,000 for bodily injury, including personal injury or death, products liability, contractual coverage, operations, explosion, collapse, underground and property damage; and

(c) Automobile liability insurance with combined single limits of liability not less than ~~\$2,000,000~~ \$5,000,000 for bodily injury, including personal injury or death and property damage.

24.2 Mandatory Insurance Provisions. The comprehensive general liability insurance and automobile liability insurance policies shall be endorsed to contain the following provisions:

(a) The City, its officers, elected officials, employees, and volunteers are to be named as additional insured;

(b) Coverage shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability;

(c) Coverage shall not be suspended, canceled, modified or reduced except after thirty (30) days prior written notice to the City delivered by certified mail, return receipt requested; and

(d) Coverage shall be primary as to the City, its officers, officials, employees and volunteers. Any insurance or self-insurance by the City, its officers, officials, employees or volunteers shall be in excess of Franchisee's required insurance.

24.3 Verification of Coverage. Franchisee shall furnish the City with certificates of insurance and original endorsements evidencing the coverage required by this Section. The certificates and endorsements shall be signed by a person authorized by the insurer to bind coverage on its behalf and must be received and approved by the City prior to the commencement of any work. At the City's request, Franchisee shall deliver certified copies of all required insurance policies.

24.4 Self-Insurance. In satisfying the insurance requirements set forth in this Section, Franchisee may self-insure against such risks in such amounts as are consistent with good

utility practices. Franchisee shall provide the City with sufficient written evidence, upon request, that such insurance (or self-insurance) is being so maintained by Franchisee. Such written evidence shall include, to the extent available from Franchisee's insurance carrier, a written certificate of insurance with respect to any insurance maintained by Franchisee in compliance with this Section.

Section 25. Franchise Fees

If, during the term of the Franchise, the Washington State Legislature authorizes the City to impose a franchise fee or other charge upon the sale of water, the City shall have the right, at its discretion, to impose such a fee or charge within the legal limits prescribed by the authorizing legislation.

Section 26. General Provisions

26.1 Entire Agreement. This Franchise contains all of the agreements of the Parties with respect to any matter covered or mentioned in this Franchise and no prior agreements or understandings pertaining to any such matters shall be effective for any purpose.

26.2 Modification. No provision of this Franchise may be amended or added to except by agreement in writing signed by both of the Parties.

26.3 Assignment. Franchisee shall not have the right to transfer or assign, in whole or in part, any or all of its obligations and rights hereunder without the prior written consent of the City. Any assignee shall, within thirty (30) days of the date of any approved assignment, file written notice of the assignment with the City together with its written acceptance of all terms and

conditions of this Franchise. Notwithstanding the foregoing, Franchisee shall have the right, without such notice or such written contest, to mortgage its rights, benefits and privileges in and under this Franchise to the Trustee for its bondholders.

26.4 Attorney Fees. In the event the City or the Franchisee defaults on the performance of any terms in this Franchise, and the Franchisee or the City places the enforcement of the Franchise or any part thereof or the collection of any monies due, or to become due hereunder, in the hands of an attorney, or files suit upon the same, the prevailing party shall be entitled to an award of all reasonable attorneys' fees, costs and expenses. The venue for any dispute related to this Franchise shall be King County, Washington.

26.5 No Waiver. Failure of either party to declare any breach or default by the other party immediately upon the occurrence thereof, or delay in taking any action in connection therewith, shall not waive such breach or default, but such party shall have the right to declare any such breach or default at any time. Failure of either party to declare one breach or default does not act as a waiver of such party's right to declare another breach or default.

26.6 Governing Law. This Franchise shall be made in and shall be governed by and interpreted in accordance with the laws of the State of Washington.

26.7 Authority. Each individual executing this Franchise on behalf of the City and Franchisee represents and warrants that such individual is duly authorized to execute and deliver this Franchise on behalf of the Franchisee or the City.

26.8 Notices. Any notices required to be given by the City to Franchisee or by Franchisee to the City shall be delivered to the parties at the following addresses:

Franchisee:
Tacoma Public Utilities

City:
City of Federal Way

ORD # 99-344, PAGE 16
Rev. 5/18/99

P.O. Box 11007
Tacoma, WA 98411-0007

Attn: City Attorney
33530 1st Way South
Federal Way, WA 98003-6210

ORD # 99-344, PAGE 17
Rev. 5/18/99

Any notices may be delivered personally to the addressee of the notice or may be deposited in the United States mail, postage prepaid, to the address set forth herein. Any notice so posted in the United States mail shall be deemed received three (3) days after the date of mailing.

26.9 Captions. The respective captions of the sections of this Franchise are inserted for convenience of reference only and shall not be deemed to modify or otherwise affect in any respect any of the provisions of this Franchise.

26.10 Remedies Cumulative. Any remedies provided for under the terms of this Franchise are not intended to be exclusive but shall be cumulative with all other remedies available to the City at law, in equity or by statute.

Section 27. Severability

If any section, sentence, clause, or phrase of this Ordinance should be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of any other section, sentence, clause or phrase of this Ordinance.

Section 28. Ratification

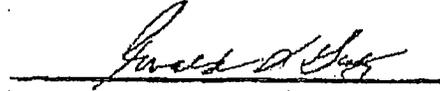
Any act consistent with the authority and prior to the effective date of this Ordinance is hereby ratified and affirmed.

Section 29. Effective Date

This Ordinance shall take effect and be in full force five (5) days after its passage, approval and publication, according to law.

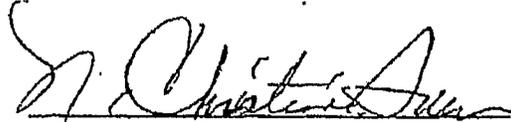
PASSED by the City Council of the City of Federal Way this 15th day of
JUNE, 1999.

CITY OF FEDERAL WAY



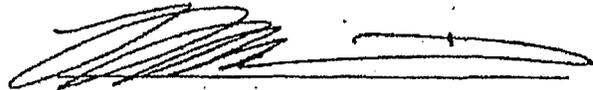
MAYOR, RONALD L. GINTZ

ATTEST:



CITY CLERK, N. CHRISTINE GREEN

APPROVED AS TO FORM:



CITY ATTORNEY, LONDI K. LINDELL

FILED WITH THE CITY CLERK: 5/28/99

PASSED BY THE CITY COUNCIL: 6/15/99

PUBLISHED: 6/19/99

EFFECTIVE DATE: 6/24/99

KAORDINTACWATER.FRN

ORD # 99-344, PAGE 19
Rev. 5/18/99

ACCEPTANCE:

The undersigned hereby accepts all the rights and privileges of the above granted Franchise and acknowledges that such rights and privileges are subject to and limited by all of the terms, conditions and obligations contained therein.

Dated this _____ day of _____, 1999.

CITY OF TACOMA DBA
TACOMA PUBLIC UTILITIES

By: John C. Kimes
SCKJM

Its: Deputy Director, Water Division

Approved as to form & legality:

Mark Blank
City Attorney

EXHIBIT A

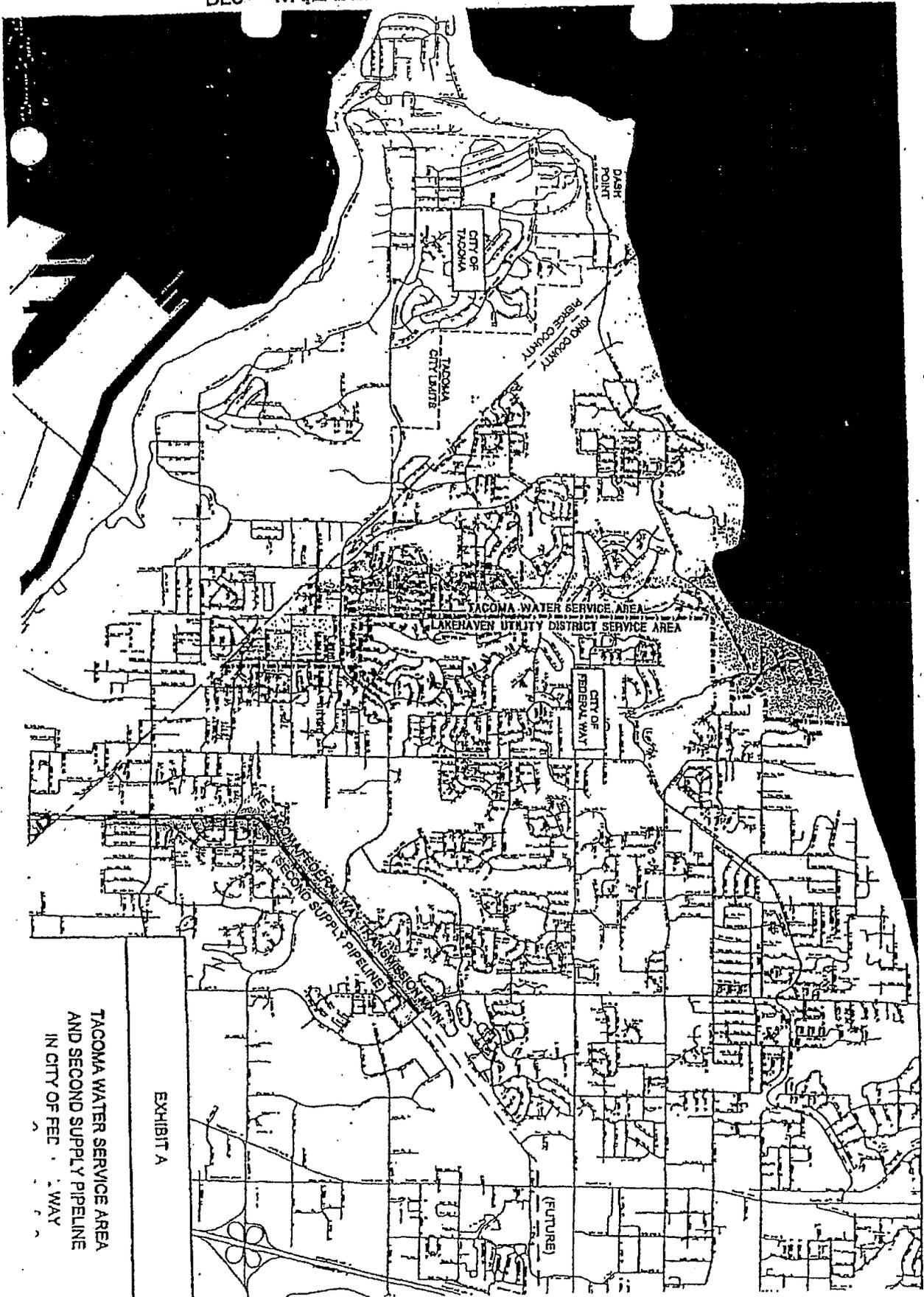
Legal Description for Tacoma Water's service area in the City of Federal Way

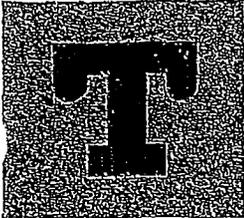
Beginning at the intersection of the Government meander line of Puget Sound and the King-Pierce County line in Section 10, Township 21 North, Range 3 East, W.M. thence easterly along the meander line of Puget Sound to the north-south centerline of Section 1, thence southerly along the centerline of Section 1 to the north line of Section 12, thence westerly to the centerline of 28th Avenue SW, thence southeasterly along 28th Avenue SW to a point approximately 450 feet north of the east-west centerline of the NW1/4 of Section 12, thence westerly along a line parallel with said east-west centerline to the centerline of SW Dash Point Road, thence southeasterly along Dash Point Road to said east-west centerline, thence westerly along said east-west centerline to the west line of Section 12, thence southerly along the west line of Sections 12, 13, and 24 to a point 825 feet south of the north line of Section 24, thence easterly 1470 feet parallel to said north line, thence southerly parallel to the west line of Section 24 to the King-Pierce County line, thence northwesterly along the county line to the point of beginning all being in Township 21 North, Range 3 East, W.M.

Legal Description for the Second Supply Project

The southerly and easterly 80 feet of the Bonneville Power Administration (BPA) right-of-way and the adjoining 20 feet along the BPA right-of-way from 1st Way South to the Federal Way/Pierce County boundary.

Page 1 of 2





TACOMA PUBLIC UTILITIES
 3628 South 35th Street
 Tacoma, Washington 98409-3192

June 3, 2009

Mr. Marwan Salloum, P.E.
 Public Works Director/Street Systems Manager
 City of Federal Way
 PO Box 9718
 Federal Way, WA 98063-9718

Dear Mr. Salloum:

Subject: Acceptance of Ordinance 09-615.
 Franchise Extension, Terms, and Conditions

By this letter and pursuant to Section 2 of the Franchise Agreement extension, Ordinance number 09-615, the City of Tacoma, dba Tacoma Public Utilities, accepts all the rights and privileges of the Franchise, including the extension of its term for an additional one year period for a total of eleven (11) years. Tacoma Public Utilities acknowledges that such rights and privileges are subject to and limited by all of the terms, conditions, and obligations contained therein.

John C. Kirner
 for John C. Kirner
 Tacoma Water Superintendent

William A. Gaines
 William A. Gaines
 Director of Utilities/CEO

Approved as to form and legality:

Bill Fosbre
 Bill Fosbre
 Chief Deputy City Attorney

Attachment



ORDINANCE NO. 09-615

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF FEDERAL WAY, WASHINGTON, GRANTING CITY OF TACOMA DEPARTMENT OF PUBLIC UTILITIES, WATER DIVISION, AN EXTENSION TO A NONEXCLUSIVE FRANCHISE TO OCCUPY THE RIGHTS-OF-WAY OF THE CITY OF FEDERAL WAY, WASHINGTON, THROUGH THE FRANCHISE AREA FOR THE PURPOSES OF CONSTRUCTING, MAINTAINING, REPAIRING, RENEWING AND OPERATING A WATER DISTRIBUTION AND TRANSMISSION SYSTEM AND ACCESSORIES WITHIN AND THROUGH THE CITY OF FEDERAL WAY.

WHEREAS, Ordinance 99-344 granted City of Tacoma, dba Tacoma Public Utilities, ("Franchisee") a franchise to operate a water utility within the City of Federal way; and

WHEREAS, the franchise will expire on June 24, 2009; and

WHEREAS, the City and Franchisee are currently negotiating a new franchise and have agreed to extend the expiration of the current franchise for one year in order to give the parties additional time to negotiate the new franchise.

NOW, THEREFORE THE CITY COUNCIL OF THE CITY OF FEDERAL WAY, WASHINGTON, DOES HEREBY ORDAIN AS FOLLOWS:

Section 1. Ordinance 99-344, Section 4 Term shall be amended to read as follows:

Subject to Franchisee filing its acceptance pursuant to Subsection 2.2, the term of this Franchise shall be for a period of ~~ten (10)~~ eleven (11) years commencing on the effective date of this Franchise, unless terminated earlier pursuant to the terms of this Franchise or other applicable law.

Section 2. Acceptance by Franchisee. Franchisee shall have no rights nor shall Franchisee be bound by the terms and conditions of this ordinance unless, prior to June 24, 2009, Franchisee files with the City its written acceptance of the terms and conditions of this ordinance.

Section 3. Corrections. The City Clerk and the codifiers of this ordinance are authorized to

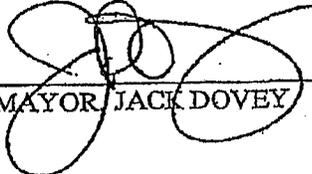
make necessary corrections to this ordinance including, but not limited to, the correction of scrivener/clerical errors, references, ordinance numbering, section/subsection numbers and any references thereto.

Section 4. Ratification. Any act consistent with the authority and prior to the effective date of this ordinance is hereby ratified and affirmed.

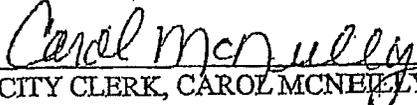
Section 5. Effective Date. By unanimous consent, the Council finds that this ordinance is needed for the immediate support of city government and is not subject to initiative or referendum. This ordinance shall take effect and be in force five (5) days from the time of its final passage, and publication, as provided by law.

PASSED by the City Council of the City of Federal Way this 2nd day of June, 2009.

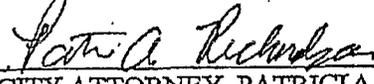
CITY OF FEDERAL WAY


MAYOR JACK DOVEY

ATTEST:


CITY CLERK, CAROL MCNEELY, CMC

APPROVED AS TO FORM:


CITY ATTORNEY, PATRICIA A. RICHARDSON

FILED WITH THE CITY CLERK: 5-12-2009
PASSED BY THE CITY COUNCIL: 6-2-2009
PUBLISHED: 6-6-2009
EFFECTIVE DATE: 6-11-2009
ORDINANCE NO.: 09-615

Ordinance No. 09-615

Page 2 of 2

HONORABLE MAYOR AND CITY COUNCIL
CITY OF UNIVERSITY PLACE, WASHINGTON

In the matter of the application of the City) Franchise Ordinance No. 166
of Tacoma Department of Public Utilities,)
~~Light~~ ^{Water} Division, a Municipal Corporation,) ACCEPTANCE
for a franchise to construct, operate and)
maintain facilities in, upon, over, under,)
along, across and through the franchise)
area of the City of University Place,)
Washington)

WHEREAS, the City Council of the City of University Place, Washington has granted a franchise to the City of Tacoma Department of Public Utilities, Water Division, a Municipal Corporation, its successors and assigns, by enacting City of University Place Ordinance No. 166, bearing the date of September 15, 1997.

WHEREAS, a copy of said Ordinance granting said franchise was received by the City of Tacoma Department of Public Utilities, Water Division on September 24, 1997, from said City of University Place, Pierce County, Washington.

NOW, THEREFORE, the City of Tacoma Department of Public Utilities, Water Division, a Municipal Corporation, for itself, its successors and assigns, hereby accepts said Ordinance and all the terms and conditions thereof, and files this, its written acceptance, with the City of University Place, Pierce County, Washington.

IN TESTIMONY WHEREOF said Franchise Grantee, City of Tacoma Department of Public Utilities, Water Division has caused this written Acceptance to be executed in its name by its undersigned Water Superintendent thereunto duly authorized on this 9th day of October, 1997.

Attest:

CITY OF TACOMA, DEPARTMENT OF
PUBLIC UTILITIES, WATER DIVISION

Lydia Stevenson
Clerk, Public Utility Board

By: Kenneth J. Merry
Kenneth Merry
Water Superintendent

Copy received for City of
University Place on: 10-16-97
By: Debra M. ...
City Clerk

ORDINANCE NO. 166

I, Susan Matthew, City Clerk of the City of University Place, Washington, do hereby certify that this is a true and correct copy
Ordinance No. 166
approved by the City Council at its meeting
September 15, 1997
Dated this *18th* day of *October*
Susan Matthew
Susan Matthew, City Clerk

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

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

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

THE CITY COUNCIL OF CITY OF UNIVERSITY PLACE, WASHINGTON, DOES ORDAIN AS FOLLOWS:

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

Grantee and City may agree to extend the term of this franchise on substantially the same terms and conditions as set forth herein for up to two extensions of five years per extension.

This franchise grants the Grantee the right, privilege and authority to construct, operate, maintain, replace, and use all necessary equipment and facilities for a water system, in, under, on, across, over, through, along or below the public rights-of-way and public places located in the City of University Place, as approved under City permits issued pursuant to this franchise.

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

Section 3. Relocation of Water Facilities. The Grantee agrees and covenants at its sole cost and expense, to protect, support, temporarily disconnect, relocate or remove from any street, any component of its installations when so required by the City by reason of traffic conditions or public safety, dedications of new rights-of-way and the establishment and improvement thereof, widening and improvement of existing rights-of-way, street vacations, freeway construction,

change or establishment of street grade, or the construction of any public improvement or structure by the City, provided that the Grantee shall in all such cases have the privilege to temporarily bypass, in the authorized portion of the same street upon approval by the City, any section of water line or facility required to be temporarily disconnected or removed. The provisions of this section shall not be applicable if the relocation need results from a private development, use or activity.

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

- A. At least ninety (90) days prior to commencement of construction of such improvement project, provide the Grantee with written notice and plans requiring such relocation, unless another time period for the notice is agreed to by the parties for a particular project; and
- B. Provide the Grantee with copies of pertinent portions of the plans and specifications for such improvement project and a proposed location for the Grantee's facilities so that the Grantee may relocate its facilities in other City rights-of-way in order to accommodate such improvement project.

After receipt of such notice and such plans and specifications, the Grantee shall complete relocation of its facilities at no charge or expense to the City (except as hereinafter provided) so as to accommodate the improvement project construction schedule.

The Grantee may, after receipt of written notice requesting a relocation of its facilities, submit to the City written alternatives to such relocation. The City shall evaluate such

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

The provisions of this Section shall in no manner preclude or restrict the Grantee from making any arrangements it may deem appropriate when responding to a request for relocation of its facilities by any person or entity other than the City, where the facilities to be constructed by said person or entity are not or will not become City-owned, operated or maintained facilities, provided that such arrangements do not unduly delay a City construction project. The City on occasion will be constructing, reconstructing and/or relocating roads, streets, public ways, areas or facilities within the right-of-way or property which will require Grantee to install and/or relocate part of its water system. Grantee will be relying on the alignment, lines and grades as set forth in City's approval plans wherein Grantee thereafter constructs or reconstructs its water system in accordance with City's requirements and City standards. Therefore, if City thereafter again adjusts and/or revises the alignment, line or grade for a road, street, public way or area, before this part of the Grantee's water system has been in place for fifteen (15) years

(commencing with the initial City revision), then City agrees to reimburse Grantee a pro rata share of the total relocation costs based on fifteen (15) year life expectancy for the portion of Grantee's water system that is affected by the City revision unless differently agreed to in writing by City and Grantee at the time of the installation or relocation.

Section 4. Consideration For Agreement. (a) 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 10 of this agreement, the non-competition provisions as provided in Section 16 of this agreement.

(b) If the City grants to any other water provider a franchise with terms that are over-all more favorable than those set forth herein, Grantee shall have the right to renegotiate the provisions of this franchise that Grantee believes are over-all more favorable than those set forth herein. 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 that undermines the ability of one or both of the parties to receive the benefits of this agreement, one or both of the parties may re-open this agreement to address the terms affected by the substantial change in the law.

Section 5. The Grantee's Maps, Records and Plans. After construction is complete, and at a reasonable time thereafter, the Grantee shall provide to the City upon request and at no cost, a copy of all as-built plans, maps and records.

Section 6. Excavations. During any period of relocation, construction or maintenance, all surface structures, if any, shall be erected and used in such places and positions within said public rights-of-way and other public properties so as to interfere as little as practicable with the free passage of traffic and the free use of adjoining property, and the Grantee shall at all times post and maintain proper barricades and comply with all applicable safety regulations during such period of construction as required by the ordinances of the City or the laws of the State of

Washington.

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

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

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

Section 7. Restoration after Construction. The Grantee shall, after abandonment approved under Section 13 herein, or installation, construction, relocation, maintenance, or repair of water facilities within the franchise area, restore the surface of the right-of-way or public property to at least the same condition the property was in immediately prior to any such installation, construction, relocation, maintenance or repair. The Public Works Director shall have final approval of the condition of such streets and public places after restoration. All concrete encased monuments which have been disturbed or displaced by such work shall be restored pursuant to all federal, state and local standards and specifications. The Grantee agrees to promptly complete all restoration work and to promptly repair any damage caused by such work to the franchise area or other affected area at its sole cost and expense. The provisions of this Section shall survive the expiration, revocation or termination by other means of this franchise.

Section 8. 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 9. 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, any 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 10. 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 agreement provided in Section 16 hereof, Grantee shall not further be subject to any permit fees associated with Grantee's activities (except those undertaken for a private development customer) through the authority granted in this franchise ordinance or under the laws of the City.

In addition to the above, the Grantee shall promptly reimburse the City for any and all costs the City reasonably incurs in response to any emergency caused by the negligence of the Grantee. City agrees to process Grantee's and Grantee's contractors permits in the same expeditious manner as other permit applicants' permits are processed. Permits may be processed by facsimile or electronic mail.

Section 11. Indemnification. The Grantee hereby releases, covenants not to bring suit and agrees to indemnify, defend and hold harmless the City, its officers, employees, agents and representatives from any and all claims, costs, judgments, awards or liability to any person, including claims by the Grantee's own employees to which the Grantee might otherwise be immune under Title 51 RCW, arising from injury or death of any person or damage to property, monetary losses, including refunds of charges or fees paid by customers, of which it is alleged or proven that the acts or omissions of the Grantee, its agents, servants, officers or employees in performing this franchise caused or contributed thereto, including claims arising against the City by virtue of the City's ownership or control of the rights-of-way or other public properties, by virtue of the Grantee's exercise of the rights granted herein, including payment of any monies to

the City, or by virtue of the City's permitting the Grantee's use of the City's rights-of-way or other public property, based upon the City's inspection or lack of inspection of work performed by the Grantee, its agents and servants, officers or employees in connection with work authorized on the City's property or property over which the City has control, pursuant to this franchise or pursuant to any other permit or approval issued in connection with this franchise.

Inspection or acceptance by the City of any work performed by the Grantee at the time of completion of construction shall not be grounds for avoidance of any of these covenants of indemnification. Said indemnification obligations shall extend to claims which are not reduced to a suit and any claims which may be compromised prior to the culmination of any litigation or the institution of any litigation.

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

In the event of liability for damages arising out of bodily injury to persons or damages to property caused by or resulting from the concurrent negligence of the Grantee and the City, its officers, employees and agents, the Grantee's liability hereunder shall be only to the extent of the Grantee's negligence unless otherwise provided by law. It is further specifically and expressly

understood that the indemnification provided herein constitutes the Grantee's waiver of immunity under Title 51 RCW, solely for the purposes of this indemnification. This waiver has been mutually negotiated by the parties.

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

Section 12. Insurance. Grantee is currently self insured and has excess insurance coverage for potential liability in excess of its self insured retention amounts. To the extent that Grantee is legally obligated by this franchise, Grantee's self insurance fund and/or insurance policies shall provide adequate protection to City in amounts equivalent to the levels set forth herein below. Grantee's general comprehensive liability policy which includes automobile liability coverage (if such a policy continues to be obtained), shall have an endorsement naming City and its officers and employees as additional insureds for their actions pursuant to this franchise.

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

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

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

collapse and underground (ACU); and employer's liability.

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

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

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

Section 13. Abandonment of the Grantee's Facilities. No water line larger than 12 inches or significant facility installed by the Grantee under street pavement may be abandoned by the Grantee without the express written consent of the City. Any proposal for abandonment that

requires City consent or removal of the Grantee's facilities subject to this section must be first approved by the Public Works Director, and all necessary permits must be obtained prior to such work. If any abandoned facility conflicts with City projects (i.e., storm sewer improvements or lowering the profile of a road), the Grantee will remove the abandoned facility at its own expense. The provisions of this Section shall survive the expiration, revocation or termination of this franchise agreement.

Section 14. 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 the City) as part of land use or other permitting approvals, to reimburse Grantee all costs to relocate said line(s) and facilities.

Section 15. 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 16. Exercise of City Authority. The parties acknowledge that the City has authority to operate its own water system and also has authority to contract with other public or private entities for the purchase of water. 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 water system in the service area served by Grantee, or not contracting with other public or private entities for the purchase of water 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 \$75,000 for 1998; in the amount of \$125,000 for 1999; in the amount of \$150,000 for 2000; and in the amount of \$200,000 for 2001 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 eight percent (8%) of the total gross revenues Grantee receives from Grantee's water system customers served from Grantee's water system located within City's street rights-of-way. Gross revenues means money or funds received by reason of transaction of water utility service business including sales of water to customers. Gross revenue does not include: (a) uncollected amounts; (b) amounts received from condemnation award or condemnation settlements; (c) amounts received as compensation or reimbursement of damages to or protection of any property of Grantee; (d) amounts received as compensation for or in aid to construction; (e) amounts collected as sales tax; (f) discounts, returns, allowances and repossessions; and (g) amounts received from surcharge to water rates for system improvements necessary to meet Grantee's standards.

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 each year during the term hereof. It is provided, however, that absent any Federal, State or other governmental laws or regulations to

the contrary, such payments made by the Grantee to the City shall not result in a surcharge to the customers in the City of University Place. It is further provided that nothing herein shall be deemed to impair the authority of the City to exercise its governmental powers.

Section 17. 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 University Place 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 18. 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 19. 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 20. Cost of Publication. The cost of the publication of this Ordinance shall be borne by the Grantee.

Section 21. 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 22. Survival. All of the provisions, conditions and requirements of Sections 3, Relocation of Water Facilities; 9, Dangerous Conditions; 11, Indemnification; and 13, Abandonment of the Grantee's Facilities, of this franchise shall be in addition to any and all other obligations and liabilities the Grantee may have to the City at common law, by statute, or by contract, and shall survive the City's franchise to the Grantee for the use of the areas mentioned in Section 1 herein, and any renewals or extensions thereof (however, such survival period extends only through the applicable statute of limitations period). All of the provisions, conditions, regulations and requirements contained in this franchise Ordinance shall further be

binding upon the heirs, successors, executors, administrators, legal representatives and assigns of the Grantee and all privileges, as well as all obligations and liabilities of the Grantee shall inure to its heirs, successors and assigns equally as if they were specifically mentioned wherever the Grantee is named herein.

Section 23. Severability. If any section, sentence, clause or phrase of this Ordinance should be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of any other section, sentence, clause or phrase of this franchise Ordinance. In the event that any of the provisions of this franchise are held to be invalid by a court of competent jurisdiction, the City reserves the right to reconsider the grant of this franchise and may amend, repeal, add, replace or modify any other provision of this franchise, or may terminate this franchise.

Section 24. Assignment. This agreement may not be assigned or transferred without the written approval of the City, except the Grantee may freely assign this Agreement in whole or in part to a parent, subsidiary, or affiliated corporation or as part of any corporate financing, reorganization or refinancing and provided that the City's approval shall not be unreasonably withheld. In the case of transfer or assignment as security by mortgage or other security instrument in whole or in part to secure indebtedness, such consent shall not be required unless and until the secured party elects to realize upon the collateral. The Grantee shall provide prompt, written notice to the City of any such assignment.

Section 25. Notice. Any notice or information required or permitted to be given to the parties under this franchise agreement may be sent to the following addresses unless otherwise

specified:

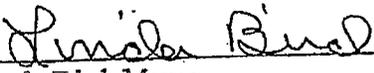
City of University Place
Windmill Village
3715 Bridgeport Way West, Suite B
University Place, WA 98466

City of Tacoma
Department of Public Utilities
Water Division
3628 South 35th Street
Tacoma, WA 98409
Attention: Water Superintendent

Section 26. **Effective Date.** This Ordinance has first been submitted to the University Place City Attorney; granted an approving vote of at least a majority of the City Council at a regular meeting after initial introduction on September 2, 1997, and a summary of the ordinance has been published at least once in a newspaper of general circulation in the City of University Place. This franchise ordinance shall be effective five (5) days after passage and publication as provided for by law.

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

CITY OF UNIVERSITY PLACE



Linda Bird, Mayor

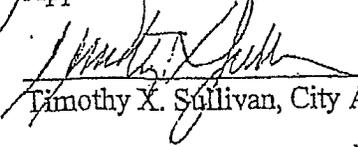
Attest:



Susan Matthew, City Clerk

- 19 -

Approved as to Form:



Timothy X. Sullivan, City Attorney

Published: September 17, 1997

Effective: September 22, 1997

HONORABLE MAYOR AND CITY COUNCIL
CITY OF FIRCREST, WASHINGTON

In the matter of the application of the City)
of Tacoma Department of Public Utilities,)
Water Division, a Municipal Corporation,)
for a franchise to construct, operate and)
maintain water facilities in, upon, under,)
along, across and through certain)
franchise areas of the City of Fircrest)
Washington)

ACCEPTANCE OF FRANCHISE

WHEREAS the City Council of the City of Fircrest, Washington has granted a franchise to the City of Tacoma Department of Public Utilities, Water Division, a Municipal Corporation, its successors and assigns, by enacting City of Fircrest Ordinance No. 1354, adopted on the 12th day of October, 2004, and amended by Ordinance No. 1363, adopted on the 23rd day of November, 2004;

WHEREAS copies of said Ordinances received from the City of Fircrest granting said franchise were approved by the Public Utility Board for the City of Tacoma Department of Public Utilities on January 12, 2005;

NOW, THEREFORE, the City of Tacoma Department of Public Utilities, Water Division, a Municipal Corporation, for itself, its successors and assigns, hereby accepts said Ordinance granting a franchise, and all the terms and conditions thereof, and files this, its written acceptance, with the City of Fircrest, Pierce County, Washington.

IN TESTIMONY WHEREOF said Franchise Grantee, City of Tacoma Department of Public Utilities, Water Division has caused this written Acceptance to be executed in its name by its undersigned Water Superintendent thereunto duly authorized on this 14th day of January, 2005.

CITY OF TACOMA, DEPARTMENT OF
PUBLIC UTILITIES, WATER DIVISION

Attest:

Elizabeth Larson
Clerk, Public Utility Board

By: John C. Kirner
John C. Kirner
Water Superintendent

Copy received for City of
Fircrest: Jan. 19, 2005

By: Rick Dambrecht
City Clerk

CITY OF FIRCREST
ORDINANCE NO. 1354

1
2
3 AN ORDINANCE OF THE CITY OF FIRCREST, WASHINGTON,
4 GRANTING UNTO THE CITY OF TACOMA DEPARTMENT OF
5 PUBLIC UTILITIES, WATER DIVISION, A MUNICIPAL
6 CORPORATION, ITS SUCCESSORS AND ASSIGNS, THE RIGHT,
7 PRIVILEGE, AUTHORITY AND NONEXCLUSIVE FRANCHISE FOR
8 TWENTY YEARS, TO CONSTRUCT, MAINTAIN, OPERATE,
REPLACE AND REPAIR ANY WATER SYSTEM, IN, ACROSS,
OVER, ALONG, UNDER, THROUGH AND BELOW CERTAIN
DESIGNATED PUBLIC RIGHTS-OF-WAY OF THE CITY OF
FIRCREST, WASHINGTON.

9 WHEREAS, the City of Fircrest requires that the Tacoma Department of Public
10 Utilities, Water Division obtain a non-exclusive franchise for the purpose of operating
potable water systems within portions of the City of Fircrest; and

11 WHEREAS, the five year extension period, pursuant to RCW 35A.14.900 and
12 approved by City of Fircrest Ordinance No. 1242 has expired, and

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

15 NOW THEREFORE, THE CITY COUNCIL OF THE CITY OF
16 FIRCREST, WASHINGTON, DO ORDAIN AS FOLLOWS:

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

24 This franchise grants the Grantee the right, privilege and authority to construct,
25 operate, maintain, replace, and use all necessary equipment and facilities for a water
26 system, in, under, on, across, over, through, along or below the public rights-of-way
27 and public places located in the City of Fircrest, as approved under City permits issued
28 pursuant to this franchise.

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

37 Section 3. Relocation of Water Facilities. The Grantee agrees and covenants at
38 its sole cost and expense, to protect, support, temporarily disconnect, relocate or
39 remove from any street, any component of its installations when so required by the
40 City by reason of traffic conditions or public safety, dedications of new rights-of-way
41 and the establishment and improvement thereof, widening and improvement of
42 existing rights-of-way, street vacations, freeway construction, change or establishment
of street grade, or the construction of any public improvement or structure by the City,

1 provided that the Grantee shall in all such cases have the privilege to temporarily
2 bypass, in the authorized portion of the street upon approval by the City, any
3 section of water line or facility required to be temporarily disconnected or removed.
4 The provisions of this section shall not be applicable if the relocation need results
5 from a private development, use or activity.

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

8 (A) At least ninety (90) days prior to commencement of construction of such
9 improvement project, provide the grantee with written notice and plans requiring such
10 relocation, unless another time period for the notice is agreed to by the parties for a
11 particular project; and

12 (B) Provide the Grantee with copies of pertinent portions of the plans and
13 specifications for such improvement project and a proposed location for the Grantee's
14 facilities so that the Grantee may relocate its facilities in other City rights-of-way in
15 order to accommodate such improvement project.

16 After receipt of such notice and such plans and specifications, the Grantee shall
17 complete relocation of its facilities at no charge or expense to the City (except as
18 hereinafter provided) so as to accommodate the improvement project construction
19 schedule.

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

32 The provisions of this Section shall in no manner preclude or restrict the Grantee
33 from making any arrangement it may deem appropriate when responding to a request
34 for relocation of its facilities by any person or entity other than the City, where the
35 facilities to be constructed by said person or entity are not or will not become City-
36 owned, operated or maintained facilities, provided that such arrangements do not
unduly delay a City construction project. The City on occasion will be constructing,
reconstructing and/or relocating roads, streets, public ways, areas or facilities within
the right-of-way or property, which will require Grantee to install and/or relocate part
of its water system. Grantee will be relying on the alignment, lines and grades as set
forth in City's approved plans wherein Grantee thereafter constructs or reconstructs its
water system in accordance with City's requirements and City standards. Therefore, if
City thereafter again adjusts and/or revises the alignment, line or grade for a road,
street, public way or area, before this part of the Grantee's water system has been in
place for fifteen (15) years (commencing with the initial City revision), then City
agrees to reimburse Grantee a pro rata share of the total relocation costs based on
fifteen (15) year life expectancy for the portion of Grantee's water system that is
affected by the City revision unless differently agreed to in writing by City and
Grantee at the time of the installation or relocation.

37 Section 4. Consideration For Agreement

38 (A) The consideration for this agreement includes, but is not limited to, the
39 mutual and individual benefits of this agreement that allow each of the parties the
40 ability to make long term planning decisions in light of the provisions set forth herein,
41 and the non-competition provisions as provided in Section 16 of this agreement.

1 (B) If the City grants to any other provider a franchise with terms that are
2 overall more favorable than those set forth herein, Grantee shall have the right to
3 renegotiate the provisions of this franchise that Grantee believes are overall more
4 favorable than those set forth herein. Grantee shall also have the right to renegotiate
5 the provisions of this franchise that are affected by a substantial change in state or
6 federal law that would allow the City the opportunity to tax and assess additional
7 revenue from the Grantee's operations within the corporate boundaries of the City.

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

21 If there is a substantial change in the law that undermines the ability of one or
22 both of the parties to receive the benefits of this agreement, one or both of the parties
23 may re-open this agreement to address the terms affected by the substantial change in
24 the law.

25 Section 5. The Grantee's Maps, Records and Plans. After any construction is
26 complete, and at a reasonable time thereafter, the Grantee shall provide to the City
27 upon request and at no cost, a copy of all as-built plans, maps and records.

28 Section 6. Excavations. During any period of relocation, construction or
29 maintenance, all surface structures, if any, shall be erected and used in such places and
30 positions within said public rights-of-way and other public properties so as to interfere
31 as little as practicable with the free passage of traffic and the free use of adjoining
32 property, and the Grantee shall at all times post and maintain proper barricades and
33 comply with all applicable safety regulations during such period of construction as
34 required by the ordinances of the City or the laws of the State of Washington.

35 Whenever the Grantee shall excavate in any public right-of-way or other public
36 property for the purpose of installation, construction, repair, maintenance or relocation
37 of its facilities, it shall apply to the City for a permit to do so and upon obtaining a
38 permit shall give the City at least forty-eight (48) hours notice during normal work
39 week of the Grantee's intent to commence work in the public right-of-way. In no case
40 shall any work commence within any public right-of-way or other public property
41 without a permit, except as otherwise provided in this franchise ordinance. During the
42 progress of the work the Grantee shall not unnecessarily obstruct the passage or proper
43 use of the right-of-way, and shall file as-built plans or maps with the City showing the
44 proposed and final location of its facilities.

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

49 (A) Such joint use shall not unreasonably delay the work of the party causing the
50 excavation to be made;

51 (B) Such joint use shall be arranged and accomplished on terms and conditions
52 satisfactory to both parties; and

53 (C) Either party may deny such request for safety reasons. The provisions of this
54 Section shall survive the expiration or termination of this franchise agreement.

1 (D) Such joint use shall be in compliance with Tacoma Water's utility separation
2 requirements, as detailed in Attachment " of this agreement.

3 Section 7. Restoration after Construction. The Grantee shall, after
4 abandonment approved under Section 13 herein, or installation, construction,
5 relocation, maintenance, or repair of water facilities within the franchise area, restore
6 the surface of the right-of-way or public property to at least the same condition the
7 property was in immediately prior to any such installation, construction, relocation,
8 maintenance or repair. The Public Works Director shall have final approval of the
9 condition of such streets and public places after restoration. All concrete encased
10 monuments which have been disturbed or displaced by such work shall be restored
11 pursuant to all federal, state and local standards and specifications. The Grantee
12 agrees to promptly complete all restoration work and to promptly repair any damage
13 caused by such work to the franchise area or other affected area at its sole cost and
14 expense. The provisions of this Section shall survive the expiration, revocation or
15 termination by other means of this franchise.

16 Section 8. Emergency Work - Permit Waiver. In the event of any emergency
17 in which any of the Grantee's facilities located in or under any street, breaks, are
18 damaged, or if the Grantee's construction area is otherwise in such a condition as to
19 immediately endanger the property, life, health, or safety of any individual, the
20 Grantee shall immediately take the proper emergency measures to repair its facilities,
21 to cure or remedy the dangerous condition for the protection of property, life, health or
22 safety of individuals without first applying for and obtaining a permit as required by
23 this franchise. However, this shall not relieve the Grantee from the requirement of
24 obtaining any permits necessary for this purpose, and the Grantee shall apply for all
25 such permits not later than the next succeeding day during which City Hall is open for
26 business. Grantee shall make every reasonable effort to notify Grantor of the
27 necessity to perform emergency work prior to conducting such work.

28 Section 9. Dangerous Conditions. Authority for City to Abate. Whenever
29 construction, installation or excavation of facilities authorized by this franchise has
30 caused or contributed to a condition that appears to substantially impair the lateral
31 support of the adjoining street or public place, or endangers the public, an adjoining
32 public place, street utilities or City property, the Public Works Director may direct the
33 Grantee, at the Grantee's own expense, to take actions to protect the public, adjacent
34 public places, City property or street utilities, and such action may include compliance
35 within a prescribed time.

36 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, any structures that the City Public
Works Director objectively determines are located in a place or in a way so as to
constitute a danger to the public.

Section 10. 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 term 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.

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 other electronic means.

1 Section 11. Indemnification. The Grantee hereby releases, covenants not to
2 bring suit and agrees to indemnify, defend and hold harmless the City, its officers,
3 employees, agents and representatives from any and all claims, costs, judgments,
4 awards or liability to any person, including claims by the Grantee's own employees to
5 which the Grantee might otherwise be immune under Title 51 RCW, arising from
6 injury or death of any person or damage to property, monetary losses, including
7 refunds of charges or fees paid by customers, of which it is alleged or proven that the
8 acts or omissions of the Grantee, its agents, servants, officers or employees in
9 performing this franchise caused or contributed thereto, including claims arising
10 against the City by virtue of the City's ownership or control of the rights-of-way or
11 other public properties, by virtue of the Grantee's exercise of the rights granted herein,
12 including payment of any monies to the City, or by virtue of the City's permitting the
13 Grantee's use of the City's rights-of-way or other public property, based upon the
14 City's inspection or lack of inspection of work performed by the Grantee, its agents
15 and servants, officers or employees in connection with work authorized on the City's
16 property or property over which the City has control, pursuant to this franchise or
17 pursuant to any other permit or approval issued in connection with this franchise.

18 Inspection or acceptance by the City of any work performed by the Grantee at the
19 time of completion of construction shall not be grounds for avoidance of any of these
20 covenants of indemnification. Said indemnification obligations shall extend to claims
21 which are not reduced to a suit and any claims which may be compromised prior to the
22 culmination of any litigation or the institution of any litigation.

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

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

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

Section 12. Insurance. Grantee is currently self-insured and has excess
insurance coverage for potential liability in excess of its self-insured retention
amounts. To the extent that Grantee is legally obligated by this franchise, Grantee's
self insurance fund and/or insurance policies shall provide adequate protection to the
City in amounts equivalent to the levels set forth herein below. Grantee's general
comprehensive liability policy, which includes automobile liability coverage (if such a
policy continues to be obtained), shall have an endorsement naming the City and its
officers and employees as additional insured for their actions pursuant to this
franchise.

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

(A) Automobile Liability insurance with limits no less than \$1,000,000 combined
single limit per accident for bodily injury and property damage; and

(B) Commercial General Liability insurance, written on an occurrence basis with
limits no less than \$1,000,000 combined single limit per occurrence and \$2,000,000

1 aggregate for personal injury, bodily injury and property damage. Coverage shall
2 include but not be limited to: blanket actual; products/completed operations;
3 broad form property damage; explosion, collapse and underground (XCU); and
4 employer's liability.

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

8 Any insurance policy(ies) obtained by the Grantee to comply herewith shall name
9 the City (its officers, employees and volunteers), as an additional insured with regard
10 to activities performed by or on behalf of the Grantee. The coverage shall contain no
11 special limitations on the scope of protection afforded to the City, its officers,
12 officials, employees or volunteers. In addition, the insurance policy shall contain a
13 clause stating that coverage shall apply separately to each insured against whom claim
14 is made or suit is brought, except with respect to the limits of the insurer's liability.
15 The Grantee's insurance shall be primary insurance with respect to the City, its
16 officers, officials, employees and volunteers. Any insurance policy or policies
17 obtained by the Grantee to comply with this clause shall be endorsed to state that
18 coverage shall not be suspended, voided, canceled by either party, reduced in coverage
19 or in limits except after thirty (30) days' prior written notice by certified mail, return
20 receipt requested, has been given to the City.

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

24 Section 13. Abandonment of the Grantee's Facilities. No water line larger
25 than 12 inches or significant facility installed by the Grantee under street pavement
26 may be abandoned by the Grantee without the express written consent of the City.
27 Any proposal for abandonment that requires City consent or removal of the Grantee's
28 facilities subject to this section must be first approved by the Public Works Director,
29 and all necessary permits must be obtained prior to such work. If any abandoned
30 facility conflicts with City projects (i.e., storm sewer improvement or lowering the
31 profile of a road), the Grantee will remove the abandoned facility at its own expense.
32 The provisions of this Section shall survive the expiration, revocation or termination
33 of this franchise agreement.

34 Section 14. Street Vacations. City may have occasion to vacate certain streets,
35 public ways or areas that have Grantee's lines and facilities located thereon. City
36 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 the City) as part of land use or other permitting
approvals, to reimburse Grantee all costs to relocate said line(s) and facilities.

Section 15. 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 16. Exercise of City Authority. The parties acknowledge that the City
has authority to operate its own water system and also has authority to contract with
other public or private entities for the purchase of water. 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
water system in the service area served by Grantee, or not contracting with other
public or private entities for the purchase of water 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 6% of gross revenues Grantee receives from
Grantee's water system customers served from Grantee's water system located within
City's street rights-of-way, as defined further in this section. Gross revenues means

1 money or funds received by reason of transaction of water utility service business
2 including sales of water to customers. () revenue does not include: (a) uncollected
3 amounts; (b) amounts received from condemnation award or condemnation
4 settlements; (c) amounts received as compensation or reimbursement of damages to or
5 protection of any property of Grantee; (d) amounts received as compensation for or in
6 aid to construction; (e) amounts collected as sales tax; (f) discounts, returns,
7 allowances and repossessions; and (g) amounts received from surcharge to water rates
8 for system improvements necessary to meet Grantee's standards.

9 The payments to the City shall be made quarterly in four equal payments each
10 year, on or before March 31, June 30, September 30, and December 31 each year
11 during the term hereof. It is provided, however, that absent any Federal, State or other
12 governmental laws or regulations to the contrary, such payments made by the Grantee
13 to the City shall not result in a surcharge to the customers in the City of Firecrest. It is
14 further provided that nothing herein shall be deemed to impair the authority of the City
15 to exercise its governmental powers.

16 **Section 17. Forfeiture and Revocation.** If the Grantee willfully violates or fails
17 to comply with any of the provisions of this franchise, or through willful misconduct
18 or gross negligence fails to heed or comply with any notice given the Grantee by the
19 City under the provisions of this franchise, then the Grantee shall, at the election of the
20 Firecrest City Council, forfeit all rights conferred hereunder and this franchise may be
21 revoked or annulled by the Council after a hearing held upon reasonable notice to the
22 Grantee. The City may elect, in lieu of the above and without any prejudice to any of
23 its other legal rights and remedies, to obtain an order from the superior court having
24 jurisdiction compelling the Grantee to comply with the provisions of this Ordinance
25 and to recover damages and costs incurred by the City by reason of the Grantee's
26 failure to comply.

27 **Section 18. Remedies to Enforce Compliance.** In addition to any other remedy
28 provided herein, the City reserves the right to pursue any remedy to compel or force
29 the Grantee and/or its successors and assigns to comply with the terms hereof, and the
30 pursuit of any right or remedy by the City shall not prevent the City from thereafter
31 declaring a forfeiture or revocation for breach of the conditions herein.

32 **Section 19. City Ordinances and Regulations.** Nothing herein shall be deemed
33 to direct or restrict the City's ability to adopt and enforce all necessary and appropriate
34 ordinances regulating the performance of the conditions of this franchise, including
35 any valid ordinance made in the exercise of its police powers in the interest of public
36 safety and for the welfare of the public. The City shall have the authority at all times
37 to control by appropriate regulations the location, elevation, manner of construction
38 and maintenance of any facilities by the Grantee, and the Grantee shall promptly
39 conform with all such regulations, unless compliance would cause the Grantee to
40 violate other requirements of law.

41 **Section 20. Cost of Publication.** The cost of the publication of this Ordinance
42 shall be borne by the Grantee.

43 **Section 21. Acceptance.** Within sixty days after the passage and approval of this
44 Ordinance, this franchise may be accepted by the Grantee by its filing with the City
45 Clerk an unconditional written acceptance thereof. Failure of the Grantee to so accept
46 this franchise within said period of time shall be deemed a rejection thereof by the
47 Grantee, and the rights and privileges herein granted shall, after the expiration of the
48 sixty (60) day period, absolutely cease and determine, unless the time period is
49 extended by ordinance duly passed for that purpose.

50 **Section 22. Survival.** All of the provisions, conditions and requirements of
51 Section 3, Relocation of Water Facilities; 9, Dangerous Conditions; 11, Indemnification;
52 and 13, Abandonment of the Grantee's Facilities, of this franchise
53 shall be, in addition to any and all other obligations and liabilities the Grantee may
54 have to the City at common law, by statute, or by contract, and shall survive the City's
55 franchise to the Grantee for the use of the areas mentioned in Section 1 herein, and any

1 renewals or extensions thereof (however such survival period extends only through
2 the applicable statute of limitations []). All of the provisions, conditions,
3 regulations and requirements contained in the franchise ordinance shall further be
4 binding upon the heirs, successors, executors, administrators, legal representatives and
5 assigns of the Grantee and all privileges, as well as all obligations and liabilities of the
6 Grantee shall inure to its heirs, successors, executors, administrators, legal
7 representatives and assigns of the Grantee and all privileges, as well as all obligations
8 and liabilities of the Grantee shall inure to its heirs, successors and assigns equally as
9 if they were specifically mentioned wherever the Grantee is named herein.

10 **Section 23. Severability.** If any section, sentence, clause or phrase of this
11 Ordinance should be held to be invalid or unconstitutional by a court of competent
12 jurisdiction, such invalidity or unconstitutionality shall not affect the validity or
13 constitutionality of any other section, sentence, clause or phrase of this franchise
14 Ordinance. In the event that any of the provisions of this franchise are held to be
15 invalid by a court of competent jurisdiction, the City reserves the right to reconsider
16 the grant of this franchise and may amend, repeal, add, replace or modify any other
17 provisions of this franchise, or may terminate this franchise.

18 **Section 24. Assignment.** This agreement may not be assigned or transferred
19 without the written approval of the City, except the Grantee may freely assign this
20 Agreement in whole or in part to a parent, subsidiary, or affiliated corporation or as
21 part of any corporate financing, reorganization or refinancing and provided that the
22 City's approval shall not be unreasonably withheld. In the case of transfer or
23 assignment as security by mortgage or other security instrument in whole or in part to
24 secure indebtedness, such consent shall not be required unless and until the secured
25 party elects to realize upon the collateral. The Grantee shall provide prompt, written
26 notice to the City of any such assignment.

27 **Section 25. Notice.** Any notice or information required or permitted to be given
28 to the parties under this franchise agreement may be sent to the following addresses
29 unless otherwise specified:

30 City of Fircrest
31 Attn: City Manager or designee
32 115 Ramsdell Street
33 Fircrest, WA 98466

34 City of Tacoma
35 Department of Public Utilities
36 Water Division
3628 South 35th Street
Tacoma WA 98409
Attention: Water Superintendent

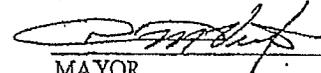
37 **Section 26. Effective Date.**

38 (A) This Franchise and the rights, privileges, and authority granted hereunder and
39 the contractual relationship established hereby shall take effect and be in force from
40 and after the effective date of this Franchise as specified in this Section.

41 (B) Within sixty (60) days after passage of this ordinance by the Fircrest City
42 Council, Grantee shall signify its acceptance of this Franchise by executing a written
43 acceptance of this Franchise

44 (C) The effective date of this Franchise shall be the date on which it is accepted in
45 writing by Grantee.

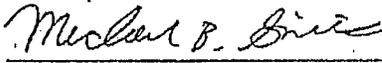
46 APPROVED AND ADOPTED this 12th day of October 2004 at the regular
47 meeting of the City Council of the City of Fircrest.


MAYOR

ATTEST:


City Clerk

APPROVED AS TO FORM:


City Attorney

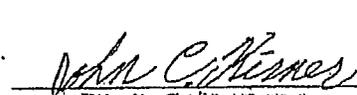
Date of Publication:

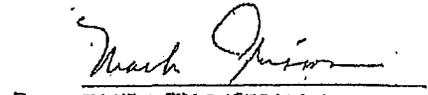
Effective Date:

Franchise Ordinance No. 1354

ACCEPTED this 13th day of January, 2007, subject to applicable federal, state and local law.

City of Tacoma Department of Public Utilities, Water Division, (dba) Tacoma Water, providing water services as Tacoma Water

By: 
Water Superintendent

By: 
Director of Utilities,

Approved As To Form & Legality:


Chief Assistant City Attorney

Attachment A

It shall be understood that when the City of Fircrest is installing new infrastructure within public rights of way or within private property within the city limits of the City of Fircrest, such infrastructure shall be constructed so as to provide clearances from Tacoma Water facilities as follows:

Sanitary Sewer facilities shall maintain 10-foot horizontal (minimum) clearance in all cases, except as allowed in the Department of Ecology manual "Criteria for Sewage Works Design", latest edition.

Storm mains or any other City of Fircrest owned facilities shall maintain 5-foot horizontal clearance from any Tacoma Water facilities, including services, meters, hydrants and hydrant laterals.

Where proposed construction and/or maintenance of Fircrest facilities will occur in proximity to Tacoma Water, Tacoma Water, (502-8246) shall be notified in the design phase, where practical, or with as much lead time as possible.

It is further understood that any Tacoma Water owned facilities, whether planned or maintained, shall be designed and maintained as to comply with these same clearance criteria. Likewise notification shall be made to the City of Fircrest, (564-8900) when construction of Tacoma Water facilities will occur in proximity of City of Fircrest facilities.

4714-1

FILE NO. 81

In the Matter of the Application of CITY OF TACOMA, DEPARTMENT OF PUBLIC UTILITIES, WATER DIVISION, a Municipal Corporation of Pierce County, Washington, for a Franchise to construct, operate and maintain water pipelines for a Water System in, under, along and upon certain Public Roads and Highways in Pierce County, Washington

F R A N C H I S E

Application of the CITY OF TACOMA, DEPARTMENT OF PUBLIC UTILITIES, WATER DIVISION, a Municipal Corporation of Pierce County, Washington, organized and existing under and by virtue of the Laws of the State of Washington, for a Franchise to construct and maintain water pipelines for a Water System in, under, along and over the public roads and highways in Pierce County, Washington, as hereinafter set forth, having come on regularly for hearing before the County Commissioners of Pierce County, Washington, on the 27TH day of FEBRUARY, 19 78, at the hour of ten o'clock A.M., under the provisions of Chapter 80.32, Revised Code of Washington, and it appearing to the Board that notice of said Hearing has been duly given as required by Law, and that it is in the public interest to grant the Franchise herein granted;

FRANCHISE NO. 163

WHEREAS, said City of Tacoma, Department of Public Utilities, Water Division, has existing Pierce County franchises with supplemental franchises and amendments thereto; and

WHEREAS, that certain franchise granted to said City of Tacoma on the 26th day of April, 1965, was granted for a term of fifty (50) years ending on the 26th day of April, 2015;

NOW, THEREFORE, IT IS ORDERED that a franchise combining and replacing all previously granted franchises and supplementals thereto be, and the same is hereby given and granted to the CITY OF TACOMA, DEPARTMENT OF PUBLIC UTILITIES, WATER DIVISION, a Municipal Corporation of Pierce County, Washington, hereinafter called the

"Grantee" and to its successors, and assigns, for a term ending on the 26th day of April, 2015, the right, privilege, and authority to construct, maintain, and operate for the said period of time, a water pipeline for a Water System, in, under, along, and over the public roads and highways in Pierce County, Washington, to-wit:

See EXHIBIT "A" - Attached hereto.

I

That in the working of breaking the soil of the said County roads and highways for the purpose of laying, relaying, connecting, disconnecting, and repairing said mains and pipes and making connections between the same to the dwellings and other buildings of the consumers, the said Grantee, its successors and assigns, shall be governed by and conform to the general rules adopted by the officers charged with the supervision and care of such County roads and highways in said Pierce County, Washington, as in this franchise granted; and the said Grantee, its successors and assigns, at its and their expense, with all convenient speed shall complete the work for which the soil has been broken, and forthwith replace the work and make good the said County roads and highways and leave the same in as good condition as before the work was commenced; PROVIDED, HOWEVER, that no such breaking of the soil of said County roads and highways shall be done prior to the obtaining of a permit therefor issued by the Pierce County Public Works Director, which permit shall contain specifications for the restoration of said roads to the same condition as they were prior to such breaking; and PROVIDED FURTHER, that said Pierce County Public Works Director may in his discretion require a bond in a sum sufficient to guarantee to Pierce County that such road shall be restored to the same condition as it was prior to such breaking.

II

The water mains and pipes shall be laid down as directed by the County Public Works Director at a depth of not less than thirty-six (36) inches below the surface of the ground along the County roads and highways, and in such a manner as not to interfere unnecessarily with the construction of sewers and drains, nor with the grading of the public highways.

III

That all work done under this franchise shall be done in a thorough and workmanlike manner, that in the laying of water pipes and conduits and the digging of ditches therefor, the Grantee herein, its successors and assigns, shall leave such ditches in such a way as to interfere as little as possible with public travel and shall take all due and necessary precautions to guard the same that damage or injury shall not occur or arise by reason of such work; and that where any of such ditches or trenches are left open at night, the Grantee shall place at all crossings suitable lights in such a position to guard against danger, and that the Grantee, its successors and assigns, shall be liable for all damage which may be caused by reason of any injury sustained through its carelessness or neglect, or by reason of any person, animal or property being injured herein through any failing or neglect of the Grantee, herein, its successors and assigns, or by reason of any damage caused through the neglect to properly guard any ditches or trenches dug or maintained by the Grantee herein, its successors and assigns.

IV

That the County of Pierce, in the granting of this franchise does not waive any rights which it now holds or may hereafter acquire and this order shall not be construed so as to deprive the County of Pierce of any powers, rights, or privileges which it now has or may hereafter acquire, to regulate the use and control of the

County roads and highways covered by this franchise, or to go upon any and all County roads and highways for the purpose of constructing and improving the same in such a manner as the County of Pierce, or its representatives may elect; and that the Grantee herein, its successors and assigns, shall place such water pipes and conduits in the ground at such a depth of not less than thirty-six (36) inches and in such a manner as shall be satisfactory to the Board of County Commissioners of Pierce County.

V.

Grantee, its successors and assigns, agrees to defend, indemnify and save harmless Pierce County, its appointed and elective officers and employees, from and against all liability, loss, cost, damage, and expense, including costs and attorney fees in defense thereof, because of actions, claims, or lawsuits against the County, its elected or appointed officials or employees for damages because of personal or bodily injury, including death at any time resulting therefrom, sustained or alleged to have been sustained by any person or persons and on account of damage to property including loss of use thereof, asserted or arising or alleged to have arisen out of or in consequence of the condition of any equipment or facilities, inclusive of appurtenances thereto, included under this franchise, or asserted or arising or alleged to have arisen out of or in consequence of the construction, installation, operation or maintenance of any equipment or facilities, inclusive of appurtenances thereto, under the franchise, whether such injuries to persons or damage to property is due to the negligence of the Grantee, its successors and assigns, or Pierce County, its appointed and elective officers, employees, or their agents; and further Grantee shall indemnify Pierce County against damages or losses, if any, that may result arising out of the construction, installation, maintenance, condition, or operation of equipment and facilities, inclusive of appurtenances thereto, under this franchise.

VIII

The said Grantee, its successors and assigns, shall not sell, transfer, or assign this franchise without first securing the written permission so to do of the Board of County Commissioners of Pierce County.

IX

This franchise is granted upon the further express condition that it shall not be an exclusive franchise and shall not, in any manner prohibit the County of Pierce from granting any and every further franchise over, along, upon, and across any of the said County roads and highways of any kind and character that may be deemed proper by the Board of County Commissioners of Pierce County, Washington, and this franchise shall not in any way prevent the County of Pierce from using the said County roads and highways, or affect the jurisdiction over them and every part of them by the County of Pierce with full power to make the necessary repairs, changes and alterations in the same and like manner as though this franchise had never been granted.

X

In the event that the territory covered by this franchise shall at any time during the franchise period be included within the limits of any incorporated city or town, the authorities of said city or town shall have the right, to be exercised at their discretion, to acquire by purchase or condemnation, any part of such pipes, conduits and water system other than transmission lines at a price to be based upon the reasonable value of the same at the time, without any additional value for the franchise or any unexpired period thereof, and upon such acquirement, this grant and franchise shall immediately terminate.

XI

Any failure to render adequate service to the patrons of said water system, or the discontinuance of such water services without fault on the part of the patron or patrons involved, for a period of thirty (30) days, shall work a forfeiture of this franchise, at the discretion of the County Commissioners unless the failure should result from causes beyond human control.

XII

The full acceptance of this Franchise and all its terms and conditions must be received by Pierce County within thirty (30) days from receipt thereof, by the CITY OF TACOMA, DEPARTMENT OF PUBLIC UTILITIES, WATER DIVISION, a Municipal Corporation of Pierce County, organized and existing under and by virtue of the Laws of the State of Washington, in writing, is to be filed with the Clerk of the Board of County Commissioners of Pierce County and shall be a condition precedent to its taking effect, and unless the Franchise is accepted within such time, this grant shall be null and void.

Dated at Tacoma, Washington this 27TH day of FEBRUARY, 1978.

Clayton L. Galt
Chairman

Joe Stanton

Patricia G. Neale
Board of Pierce County Commissioners

Approved as to Form:

John W. Marshall
Deputy Prosecuting Attorney

W.P. Hunter
Public Works Director

EXHIBIT "A"

Said Exhibit "A" incorporates all those County Roads included in all previous franchises and supplementals thereto granted to and/or applied for by the City of Tacoma and will, therefore, when approved, supercede all said franchises and supplementals thereto;

Reserving, however, all rights previously granted said City of Tacoma in any vacated or non-maintained streets, roads, alleys or other county property not specifically mentioned herein;

SECTION 10, TOWNSHIP 20 NORTH, RANGE 2 EAST, W.M.

All county roads within the following described boundaries:

Beginning at the northwest corner of the East One-half ($E\frac{1}{2}$) of the Northeast Quarter ($NE\frac{1}{4}$) of Section 10; thence south on the west line of said subdivision to the southwest corner thereof; thence east to a point lying south of the southeast corner of Lot 10, Oas Addition; thence north to the intersection of the east line of said lot with the north right of way line of 27th Street West; thence northeasterly along the westerly right of way line of Regents Boulevard West to the west right of way line of 67th Avenue West; thence north on said west line to a point lying 375 feet south of the south line of 19th Street West; thence west on a line 375 feet south of and parallel to said south line a distance of 680 feet; thence north to the north line of Section 10; thence west to beginning.

SECTION 11, TOWNSHIP 20 NORTH, RANGE 2 EAST, W.M.

All county roads in the Northwest Quarter ($NW\frac{1}{4}$) of Section 11 lying outside the corporate limits of the Town of Fircrest and east and north of the following described line:

Beginning at the northwest corner of said section; thence south 450 feet; east 530 feet; south 200 feet; east 125 feet; thence south to the corporate limits of the Town of Fircrest, a distance of 330 feet, more or less.

SECTIONS 23 & 26, TOWNSHIP 20 NORTH, RANGE 2 EAST, W.M.

All county roads in said sections lying within the following boundaries:

Beginning at the east quarter corner of Section 23; thence north 30 feet; thence west on a line 30 feet

EXHIBIT "A" - Cont'd.

SECTIONS 23 & 26, TOWNSHIP 20 NORTH, RANGE 2 EAST, W.M. - (cont'd.)

north of and parallel with the east-west centerline of said section to a point 30 feet north and 30 feet west of the center of said section; thence south to the intersection of the west line of Alameda Avenue West with the south right of way line of 64th Street West; thence east on said south line to the east right of way line of Lakewood Drive West; thence south to the centerline of 70th Street West and east on said centerline to the corporate limits of the City of Tacoma; thence northerly along said corporate limits to beginning.

SECTIONS 1, 2, 11 through 15, and 22 through 24, TOWNSHIP 19 NORTH, RANGE 3 EAST, W.M.

All county roads within said sections lying within the boundaries described as follows:

Beginning on the west line of Section 11 at a point 200 feet north of the south line of said section; thence east on a line 200 feet north of and parallel to said south line to a point 300 feet west of the west right of way line of 34th Avenue East; thence north parallel to said west line to a point 300 feet south of the south line of 112th Street East; thence west parallel with said south line a distance of 600 feet; thence north 660 feet; thence east parallel with the north line of 112th Street East 600 feet; thence north on a line parallel to the centerline of 34th Avenue East to the southerly right of way line of State Highway S.R. 512; thence easterly along said southerly right of way line to a point 300 feet easterly of the east line of 40th Avenue East; thence south parallel with said east line to a point 200 feet north of the south line of Section 12; thence east on a line parallel to and 200 feet north of said south line to the centerline of the Nisqually Transmission Line right of way; thence southerly on said centerline to the northerly right of way of Brookdale Road East; thence south-easterly along said right of way to the north-south centerline of Section 24; thence south to the north line of the Plat of Newtown Railway Addition; thence west on said north line to a point 200 feet distant at right angles to the southerly right of way line of Brookdale Road East; thence northwesterly parallel with said southerly line to a point 200 feet north of the north line of 152nd Street East; thence west parallel with said north line to the centerline of Clover Creek; thence along said creek centerline to the east line of the West One-Half ($W\frac{1}{2}$) of the Southwest Quarter ($SW\frac{1}{4}$) of Section 14; thence south along said east line and on said line extended to the north line of the Plat of Pleasant Valley East in Section 23; thence east to the northeast corner of said Plat; thence south to the southeast corner thereof; thence west to the east line of Pleasant Valley 4th Addition; thence south to the north right of way line of 152nd Street East; thence west along said right of way to the east line of

EXHIBIT "A" - Cont'd.

SECTIONS 1, 2, 11 through 15, and 22 through 24, TOWNSHIP 19 NORTH, RANGE 3 EAST, W.M. - (cont'd.)

Harmon's Addition; thence north to the northeast corner of said plat; thence west to the west line of the East One-Half (E½) of the Christopher Mahon Donation Claim; thence north along said west line to the east-west centerline of Section 15; thence east to the east quarter corner thereof; thence north to beginning;

EXCEPT therefrom the following:

- (1) An area 660 feet wide, more or less, being 300 feet on each side of Vickery Avenue East from 128th Street East south to a point 300 feet south of 138th Street East,
- (2) 138th Street East - from Vickery Avenue East west to Waller Road East

SECTION 4, TOWNSHIP 19 NORTH, RANGE 3 EAST, W.M.

- "A" Street - From 96th Street East south to Aqueduct Drive East
- "C" Street East - From 96th Street East south 600 feet, more or less
- "D" Street East - From 96th Street East south 600 feet, more or less

SECTIONS 4 & 10, TOWNSHIP 19 NORTH, RANGE 3 EAST, W.M.

- Aqueduct Drive East - From "A" Street East southeasterly to 128th Street East

SECTION 5, TOWNSHIP 19 NORTH, RANGE 3 EAST, W.M.

- Sheridan Avenue South - From 96th Street South south 900 feet, more or less

SECTIONS 10 & 15, TOWNSHIP 19 NORTH, RANGE 3 EAST, W.M.

- 128th Street East - From Aqueduct Drive East east to the section corner common to Sections 10, 11, 14 & 15 in said township and range

SECTIONS 13 & 24, TOWNSHIP 19 NORTH, RANGE 3 EAST, W.M.

- Canyon Road East - From 128th Street East south to 160th Street East

SECTIONS 1 & 2, TOWNSHIP 20 NORTH, RANGE 3 EAST, W.M.

All county roads within said sections lying outside the corporate limits of the Cities of Tacoma and Fife.

EXHIBIT "A" - Cont'd.

SECTION 27, TOWNSHIP 20 NORTH, RANGE 3 EAST, W.M.

72nd Street East - From McKinley Avenue East, east
2,500 feet, more or less

SECTIONS 27 & 34, TOWNSHIP 20 NORTH, RANGE 3 EAST, W.M.

McKinley Avenue East - From 72nd Street East south
to 85th Street East

SECTION 31, TOWNSHIP 20 NORTH, RANGE 3 EAST, W.M.

96th Street East - From the corporate limits of the
City of Tacoma west to Interstate
Freeway No. 5

SECTIONS 14 & 15, TOWNSHIP 21 NORTH, RANGE 3 EAST, W.M.

All county roads within said sections lying southwesterly
of the King County line, excluding those portions of
Section 15 within the corporate limits of the City of
Tacoma; also excluding Dash Point State Park

SECTION 16, TOWNSHIP 21 NORTH, RANGE 3 EAST, W.M.

All county roads within the Plat of Olympic Heights.

All county roads within that portion of Cha-Alco Addition
lying easterly of Eastside Drive (State Highway S.R. 509)

SECTIONS 1, 2, 10 through 15, 23 & 24, TOWNSHIP 19 NORTH, RANGE 4
EAST, W.M.

All county roads within said sections lying within the
following described boundaries:

Beginning at the center of Section 1 in said township
and range; thence west to the west quarter corner
thereof; thence south to the north line of Lot 1,
Block 1, Plat of Cascade Terrace No. 1; thence east
to the northeast corner of said lot; thence southerly
along the easterly boundaries of the Plats of
Cascade Terrace Nos. 1 & 2 to the northeast corner
of the Southeast Quarter (SE $\frac{1}{4}$) of the Southeast
Quarter (SE $\frac{1}{4}$) of the Southeast Quarter (SE $\frac{1}{4}$) of
Section 2; thence west to the northwest corner
thereof; thence south to a line 460 feet south of
and parallel with the north line of Section 11;
thence west on said parallel line and on said line
extended to the east right of way line of State
Highway S.R. 161 (Meridian Street South) in Section 10;
thence south along said right of way to the north
line of 132nd Street East; thence east on said
north line a distance of 843.02 feet; thence north
on a line parallel with the east line of S.R. 161
to the south line of the Northeast Quarter (NE $\frac{1}{4}$)
of the Northwest Quarter (NW $\frac{1}{4}$) of the Northwest
Quarter (NW $\frac{1}{4}$) of Section 15; thence east on said
south line to the west line of the Northeast
Quarter (NE $\frac{1}{4}$) of the Northwest Quarter (NW $\frac{1}{4}$) of

EXHIBIT "A" - Cont'd.

SECTIONS 1, 2, 10 through 15, 23 & 24, TOWNSHIP 19 NORTH,
RANGE 4 EAST, W.M. - (cont'd.)

said section; thence south to the southwest corner of said subdivision; thence east to the southeast corner thereof; thence south to the centerline of 136th Street East; thence east on said centerline to the centerline of 122nd Avenue East; thence south to intersect the centerline of 144th Street East; thence east on said centerline to the centerline of 126th Avenue East; thence south on said centerline a distance of 150 feet; thence east on a line 150 feet south of and parallel with the north line of Section 23 to the east line of said section; thence south on said east line to the most easterly southwest corner of the Plat of Alderwood Estates; thence west 324.77 feet; thence south to the east-west centerline of Section 23; thence west to the center of said section; thence south to the southwest corner of the North One-Half ($N\frac{1}{2}$) of the Southeast Quarter ($SE\frac{1}{4}$) thereof; thence east to the southeast corner of said subdivision; thence north to the quarter corner common to Sections 23 & 24; thence east to the southwest corner of Government Lot 4 in Section 24; thence north to the northwest corner of Government Lot 3; thence west to the southeast corner of Section 14; thence north on the east line of said Section 14 to the southwest corner of the Northwest Quarter ($NW\frac{1}{4}$) of the Northwest Quarter ($NW\frac{1}{4}$) of Section 13; thence east to the east line of the West One-half ($W\frac{1}{2}$) of the East One-half ($E\frac{1}{2}$) of the West One-half ($W\frac{1}{2}$) of the West One-half ($W\frac{1}{2}$) of Section 13; thence north on said east line to the south line of Section 12; thence east to the east line of the West One-half ($W\frac{1}{2}$) of the West One-half ($W\frac{1}{2}$) of said Section 12; thence north 493.56 feet; thence northeasterly to a point on the south line of the Southeast Quarter ($SE\frac{1}{4}$) of the Northwest Quarter ($NW\frac{1}{4}$) of said section which lies 900 feet east from the southwest corner thereof; thence north on a line parallel with the west line of said subdivision to the north line thereof; thence west 900 feet to the east line of the West One-half ($W\frac{1}{2}$) of the West One-half ($W\frac{1}{2}$) of Section 12; thence north on said east line to the north line of said section; thence east to the quarter corner common to Sections 12 & 1, Township 19 North, Range 4 East, W.M.; thence north to beginning.

SECTIONS 7, 8, 16 through 20 & 30 through 32, TOWNSHIP 19
NORTH, RANGE 4 EAST, W.M.; AND SECTIONS 25 & 36, TOWNSHIP
19 NORTH, RANGE 3 EAST, W.M.

All county roads in said sections which are contained within the boundaries described as follows:

Beginning at the intersection of the north right of way line of 128th Street East with the centerline of 78th Avenue East in Section 8, Township 19 North, Range 4

EXHIBIT "A" - Cont'd.

SECTIONS 7, 8, 16 through 20 & 30 through 32, TOWNSHIP 19 NORTH, RANGE 4 EAST, W.M.; AND SECTIONS 25 & 36, TOWNSHIP 19 NORTH, RANGE 3 EAST, W.M. - (cont'd.)

East, W.M.; thence west along the north line of 128th Street East to the centerline of Canyon Road East; thence south along said centerline to the northeast corner of Section 25, Township 19 North, Range 3 East, W.M.; thence west on the north line of said section a distance of 230 feet; thence south on a line parallel with and 230 feet west of the east lines of Sections 25 and 36 in said township and range to a point in Section 36 which lies 230 feet west and 230 feet south of the northeast corner thereof; thence east to the west line of Section 30, Township 19 North, Range 4 East, W.M.; thence east on a line 200 feet south of and parallel with the south right of way line of 176th Street East to a point lying 230 feet east of the west line of Section 32 in said township and range; thence north on a line parallel to the west lines of Sections 32, 29 & 20 to the northerly right of way line of the Bonneville Power Administration transmission line, Chehalis to Covington Section; thence northeasterly along said transmission line right of way to the north-south centerline of Section 20; thence north on said centerline and continuing north to the center of Section 17; thence east to a point on the east right of way line of 86th Avenue East which lies 30 feet east of the west quarter corner of Section 16; thence north on said east line to intersect the north right of way line of 128th Street East; thence west along said right of way to beginning.

SECTIONS 9 & 16, TOWNSHIP 19 NORTH, RANGE 4 EAST, W.M.

128th Street East

- From 86th Avenue East east to State Highway S.R. 161 (Meridian Street)

SECTIONS 5 & 6, TOWNSHIP 19 NORTH, RANGE 4 EAST, W.M., AND SECTIONS 29 through 32, TOWNSHIP 20 NORTH, RANGE 4 EAST, W.M.

All county roads contained within the following boundaries:

Beginning on the south line of the North One-half ($N\frac{1}{2}$) of Section 5, Township 19 North, Range 4 East, W.M., at its intersection with the east line of Woodland Avenue East (70th Avenue East); thence south on said east line 345 feet; thence west parallel with the centerline of 104th Street East to a point 180 feet east of the centerline of 66th Avenue East; thence north to a point 180 feet south of the centerline of 104th Street East; thence west parallel with 104th Street East to the centerline of 66th Avenue East; thence north on said centerline to the centerline of 104th Street East; thence west on said centerline to the west line of the East One-half ($E\frac{1}{2}$) of the West One-half ($W\frac{1}{2}$) of the East One-half ($E\frac{1}{2}$) of Section 6, Township 19 North, Range 4 East, W.M.; thence north on said west line to a point on a line 150 feet southwesterly and parallel with the

EXHIBIT "A" - Cont'd.

SECTIONS 5 & 6, TOWNSHIP 19 NORTH, RANGE 4 EAST, W.M., AND
SECTIONS 29 through 32, TOWNSHIP 20 NORTH, RANGE 4 EAST, W.M.

south line of the City of Tacoma Pipeline No. 4 right of way; thence northwesterly on said parallel line to the east line of Canyon Road East; thence north on said east line to the north line of Government Lot 4 in Section 31, Township 20 North, Range 4 East, W.M.; thence east on said north line and on said line extended to the west line of the East One-half ($E\frac{1}{2}$) of the East One-half ($E\frac{1}{2}$) of the West One-half ($W\frac{1}{2}$) of the East One-half ($E\frac{1}{2}$) of Section 31; thence north on said west line to the centerline of 84th Street East; thence east along said centerline to the centerline of 66th Avenue East; thence north to a point on the south line of Section 30, Township 20 North, Range 4 East, W.M., 1200 feet west of the centerline of Woodland Avenue East (70th Avenue East); thence northeasterly to a point 900 feet north of the south line of said Section 30 and 800 feet west of the centerline of Woodland Avenue East; thence northerly parallel with said road to the east-west centerline common to said Section 30 and Section 29; thence east on said east-west centerlines to the east line of the West One-half ($W\frac{1}{2}$) of Sections 29 and 32, Township 20 North, Range 4 East, W.M.; thence south on said east line to a point on a line 655 feet north of and parallel with the centerline of 96th Street East; thence west on said parallel line to a point 304 feet east of the east line of 72nd Avenue East; thence southerly parallel with the east line of 72nd Avenue East and said line extended to a point lying 286 feet south of the centerline of 96th Street East; thence west parallel with said centerline to the east line of the West One-half ($W\frac{1}{2}$) of the West One-half ($W\frac{1}{2}$) of Section 5, Township 19 North, Range 4 East, W.M.; thence south on said east line to the centerline of 100th Street East on said centerline to the east line of the West One-half ($W\frac{1}{2}$) of the East One-half ($E\frac{1}{2}$) of the West One-half ($W\frac{1}{2}$) of the West One-half ($W\frac{1}{2}$) of said Section 5; thence south on said east line to the south line of the North One-half ($N\frac{1}{2}$) thereof; thence west along said south line to the east line of Woodland Avenue and the point of beginning.

SECTIONS 13, 24 & 25, TOWNSHIP 19 NORTH, RANGE 4 EAST, W.M.,
AND SECTIONS 19 & 30, TOWNSHIP 19 NORTH, RANGE 5 EAST, W.M.

All county roads within the following:

Beginning at the northwest corner of the South One-half ($S\frac{1}{2}$) of the North One-half ($N\frac{1}{2}$) of Section 13, Township 19 North, Range 4 East, W.M.; thence east along the north line of said subdivision to the westerly right of way line of State Highway S.R. 162 (East Pioneer Way East); thence southeasterly along said right of way line through Sections 13 and 24; Township 19 North, Range 4 East, W.M. and Sections 19 and 30, Township 19 North, Range 5 East, W.M. to the northerly extension of the centerline of 159th Avenue East; thence southwesterly along said northerly extension and continuing southwesterly and southerly on the centerline of 159th Avenue East and on the southerly extension thereof to the centerline of the

EXHIBIT "A" - Cont'd.

SECTIONS 13, 24 & 25, TOWNSHIP 19 NORTH, RANGE 4 EAST, W.M.,
AND SECTIONS 19 & 30, TOWNSHIP 19 NORTH, RANGE 5 EAST, W.M.

south fork of the Puyallup River; thence northwesterly along said centerline to the south line of the North One-half (N $\frac{1}{2}$) of the South One-half (S $\frac{1}{2}$) of the North One-half (N $\frac{1}{2}$) of Section 30; thence west on said south line and on said line extended to the east line of Government Lot 4 in Section 25, Township 19 North, Range 4 East, W.M.; thence south to the southeast corner of said lot; thence west to the southwest corner thereof; thence north on the west line of Lot 4 to the meander line of the right bank of the south fork of the Puyallup River; thence northerly along said meander line to the south line of the Northwest Quarter (NW $\frac{1}{4}$) of Section 24, Township 19 North, Range 4 East, W.M.; thence west on said south line to the west line of the East One-half (E $\frac{1}{2}$) of said subdivision; thence north along said west line to the southeast corner of the Northwest Quarter (NW $\frac{1}{4}$) of the Southwest Quarter (SW $\frac{1}{4}$) of Section 13, Township 19 North, Range 4 East, W.M.; thence west along the south line of said subdivision to the west line thereof; and thence north to the point of beginning.

SECTION 6, TOWNSHIP 20 NORTH, RANGE 4 EAST, W.M.

All county roads within said section lying within the following described boundaries:

Beginning at a point on the north line of Section 6, 200 feet west of the north quarter corner thereof; thence south on a line 200 feet west of and parallel with the north-south centerline of said section to a point 150 feet south of the north line of the South One-half (S $\frac{1}{2}$) of the North One-half (N $\frac{1}{2}$) thereof; thence east to the west line of the East One-half (E $\frac{1}{2}$) of the West One-half (W $\frac{1}{2}$) of the West One-half (W $\frac{1}{2}$) of the East One-half (E $\frac{1}{2}$) of said Section 6; thence south on said west line to the centerline of Hylebos Creek; thence southeasterly along said centerline to the north line of the South One-half (S $\frac{1}{2}$) of the South One-half (S $\frac{1}{2}$) of said section; thence east on said north line to a point 165 feet west of the centerline of 68th Avenue East; thence north on a line 165 feet west of and parallel with said centerline to the south right of way line of 10th Street East (Shelton Link); thence east on said south right of way line to the centerline of 68th Avenue East; thence north on said centerline a distance of sixty (60) feet; thence east 30 feet and continuing east on the north right of way line of 10th Street East to the east line of the West One-half (W $\frac{1}{2}$) of the East One-half (E $\frac{1}{2}$) of the East One-half (E $\frac{1}{2}$) of the East One-half (E $\frac{1}{2}$) of Section 6, Township 20 North, Range 4 East, W.M.; thence north on said east line to the 5th Standard Parallel; thence west on said 5th Standard Parallel to beginning.

SECTIONS 30 through 32, TOWNSHIP 21 NORTH, RANGE 4 EAST, W.M.

All County roads within said sections lying southwesterly of the King County line.

SECTIONS 1, 2, 3 & 5 through 23, TOWNSHIP 19 NORTH, RANGE 5 EAST, W.M., & SECTIONS 4 through 9, TOWNSHIP 19 NORTH, RANGE 6 EAST, W.M.

All county roads in the above named sections in Township 19 North, Ranges 5 & 6 East, W.M., lying within the following described boundaries:

Beginning at the center of Section 8, Township 19 North, Range 5 East, W.M.; thence east to the center of Section 9 in said township and range; thence north on the north-south centerline of said Section 9 to the southerly right of way line of Rhodes Lake Road East; thence easterly along said southerly right of way line to its intersection with the line common to Sections 9 and 10; thence north on said common line and on the line common to Sections 3 and 4 to the northwest corner of the South One-half ($S\frac{1}{2}$) of the South One-half ($S\frac{1}{2}$) of Section 3; thence east on the north line of said subdivision to the southeast corner of the Plat of Ponderosa Estates, Division No. 3; thence north on the east line of said plat to the southerly right of way line of Ehlil Hill-South Prairie Road East; thence southeasterly along said southerly right of way line to the east right of way line of 214th Avenue East in Section 2; thence north on said east right of way line to the southerly right of way of State Highway S.R. 410 (Sumner-Buckley Highway); thence southeasterly along said southerly right of way in Sections 2 and 1 to the range line common to Ranges 5 and 6 East, W.M.; thence continuing southeasterly along said highway through Sections 6, 6 and 4, Township 19 North, Range 6 East, W.M.; to the north-south centerline of Section 4; thence south to the northeast corner of the Southeast Quarter ($SE\frac{1}{4}$) of the Northwest Quarter ($NW\frac{1}{4}$) of Section 9; thence west to the northwest corner thereof; thence south on the west line of said subdivision and on said line extended to the northerly line of the Burlington Northern Railroad right of way; thence westerly along said railroad right of way to the northerly right of way line of State Highway S.R. 162; thence westerly along said highway right of way to the east line of the South One-half ($S\frac{1}{2}$) of the Southwest Quarter ($SW\frac{1}{4}$) of Section 8; thence north to the northeast corner of said subdivision; thence west on the north line ($S\frac{1}{2}$) of the South One-half ($S\frac{1}{2}$) of Section 7, all in Township 19 North, Range 6 East, W.M., to the northwest corner of the South One-half ($S\frac{1}{2}$) of the Southeast Quarter ($SE\frac{1}{4}$) of Section 12, Township 19 North, Range 5 East, W.M.; thence south on the west line of said subdivision and on said west line extended to the centerline of South Prairie Creek in Section 13; thence southwesterly along said creek centerline to the northwesterly right of way of State Highway S.R. 162 (East Pioneer Way East) in Section 14; thence southerly along the northerly and westerly right of way of said highway to the east-west centerline of Section 23; thence west on said centerline and on the east-west centerlines of Sections 22, 21, 20 and 19, all in Township 19 North, Range 5 East, W.M. to the

EXHIBIT "A" - Cont'd.

SECTIONS 1, 2, 3 & 5 through 23, TOWNSHIP 19 NORTH, RANGE 5 EAST, W.M., & SECTIONS 4 through 9, TOWNSHIP 19 NORTH, RANGE 6 EAST, W.M. - (cont'd.)

easterly bank of the Carbon River in Section 19; thence northwesterly along said riverbank to its intersection with the easterly bank of the Puyallup River in Section 13, Township 19 North, Range 4 East, W.M.; thence northerly along the easterly bank of the Puyallup River through Sections 18 and 7, Township 19 North, Range 5 East, W.M.; and continuing along said riverbank to intersect the north line of the South One-half (S $\frac{1}{2}$) of the South One-half (S $\frac{1}{2}$) of Section 6 in said township and range; thence east on said north line and on the north line of the South One-half (S $\frac{1}{2}$) of the South One-half (S $\frac{1}{2}$) of Section 5 to the north-south centerline of said section; thence south to beginning.

Included in the foregoing Exhibit "A" are all county roads, streets, highways or other county property not specifically named therein upon which the City of Tacoma has existing at the time this franchise is granted gravity transmission pipe lines for the purposes of transporting water to or between the before described distribution areas, or across Pierce County.

Also included are all county roads, streets, highways or other county property lying within or crossed by the following City of Tacoma Gravity Transmission Pipe Line rights of way 100 feet in width, more or less:

- Green River Gravity Pipe Line No. 1
- Green River Gravity Pipe Line No. 2
- Green River Gravity Pipe Line No. 4
- Pipe Line No. 5

1 FILE NO. 81

PROPOSAL NO. 2003-46

2 Sponsored by: Councilmember Shawn Bunney -

3 Requested by: County Executive/Public Works & Utilities Dept.

4

5 ORDINANCE NO. 2003-46

6

7 AN ORDINANCE OF THE PIERCE COUNTY COUNCIL GRANTING SUPPLEMENTAL
8 FRANCHISE NO. 11 TO THE CITY OF TACOMA, DEPARTMENT
9 OF UTILITIES, WATER DIVISION, A MUNICIPAL
10 CORPORATION OF THE STATE OF WASHINGTON, FOR
11 LOCATION OF WATER LINES ON CERTAIN COUNTY-OWNED
12 RIGHTS-OF-WAY.

13

14 WHEREAS, The City of Tacoma, Department of Utilities, Water
15 Division, a Municipal Corporation of the State of Washington
16 (Tacoma Water), has applied for nonexclusive Supplemental
17 Franchise No. 11 to construct, operate, and maintain a waterline
18 system in, under, and along certain County roads, highways, and
19 other County properties (roads) in Pierce County, Washington, as
20 hereinafter set forth; and

21

22 WHEREAS, Said application came on regularly for hearing
23 before the Pierce County Council on the date set forth below
24 under the provisions of Chapter 36.55 Revised Code of Washington
25 (RCW); NOW, THEREFORE,

26

27 BE IT ORDAINED by the Council of Pierce County:

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Section 1. Supplemental Franchise, No. 11, a copy of which is attached hereto and identified as Exhibit "A" is hereby given and granted to Tacoma Water, hereinafter referred to as the Grantee, to construct, operate, and maintain a water line system in, under, and along those certain County roads in Pierce County, Washington, described in Supplemental Franchise No. 11.

Section 2. Supplemental Franchise No. 11 is granted for a period of 50 years from and after April 26, 1965, the date of the granting of the original Franchise to the Grantee.

Section 3. Supplemental Franchise No. 11 is granted on the express condition that Pierce County may unilaterally at any time upon ninety days written notice to the Grantee change, amend, modify, or amplify Supplemental Franchise No. 11 to conform to any State statute, order of the Washington Utilities and Transportation Commission, or County regulation, ordinance, or right-of-way regulation, as may hereafter be enacted, adopted, or promulgated, and this Franchise may be terminated at any time if the Grantee fails to comply with such change, amendment, modification, or amplification.

Section 4. This Franchise is in accordance with the Pierce County Coordinated Water System Plan and Regional Supplement for the area.

1 Section 5. The Executive of Pierce County is hereby
2 authorized to execute Supplemental Franchise No. 11.

3
4 PASSED this 1st day of July, 2003.

5
6 ATTEST: PIERCE COUNTY COUNCIL
PIERCE COUNTY, Washington

7
8 *Gerri Johnson*
9 Gerri Johnson
Clerk of the Council

Harold Moss
Councilmember Harold Moss
Council Chair

10
11 Approved As To Form Only: PIERCE COUNTY EXECUTIVE
John Ladenburg

12
13 *Roger W. Mendenhall*
14 Deputy Prosecuting Attorney

John Ladenburg
Approved *[initials]* Vetted
this 7 day of July, 2003.

15
16 *Mike Panagoras*
Risk Management

17 Date of Publication of
Notice of Public Hearing: June 11-18, 2003

18 Effective Date of Ordinance: July 17, 2003

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1 EXHIBIT "A" TO ORDINANCE NO. 2003-46

2 In the Matter of the Application of)
3 The City of Tacoma, Department of)
4 Utilities, Water Division, for a)
5 Supplemental Franchise to construct,)
6 operate, and maintain water pipelines)
7 for a Water System in, across, under)
8 and along certain Public Roads and)
9 Highways in Pierce County, Washington)

EXHIBIT "A"
ORDINANCE NO. 2003-46
S U P P L E M E N T A L
F R A N C H I S E
NO. 11

10 Application of The City of Tacoma, Department of Utilities,
11 Water Division, a Municipal Corporation of the State of Washington
12 (Tacoma Water), for Supplemental Franchise No. 11 to that certain
13 Franchise granted to Tacoma Water, dated April 26, 1965, bearing
14 File No. 81, having been before the Council of Pierce County,
15 Washington, for public hearing under the provisions of Chapter
16 36.55, Revised Code of Washington (RCW), and Notice of said hearing
17 has been duly given as required by law, and it appearing to the
18 Council that it is in the public interest to supplement said
19 Franchise of Tacoma Water by granting authority to construct,
20 operate, and maintain water pipelines for the purpose of
21 maintaining and operating a water system in, across, under, along
22 certain public roads and highways, and other County property(ies)
23 in Pierce County, Washington.

24 NOW, THEREFORE, IT IS ORDERED, that the Franchise granted to
25 Tacoma Water on April 26, 1965, bearing File No. 81, be hereby
26 supplemented to add thereto certain additional County roads,
27 highways, and other County owned property(ies) and by such

1 supplement give and grant unto Tacoma Water with respect to the
2 additional roads and highways hereinafter described, identical
3 Franchise rights, subject to the identical express terms and
4 conditions as are contained in said Franchise bearing File No. 81,
5 as follows:

6

7 The Franchise boundaries are hereby amended to include all
8 County roads, rights-of-way, highways, and other County
9 property lying within Townships 15 North through Townships 21
10 North inclusive of Range 2 East through Range 9 East,
11 Willamette Meridian, and lying East of The Narrows and lying
12 with the boundaries of unincorporated Pierce County,
13 Washington.

14

15 This Supplemental Franchise is granted on the condition that
16 Part VII of the original Franchise granted to Tacoma Water by the
17 County Council of Pierce County on April 26, 1965, be amended as
18 follows:

19

20 1. Pierce County shall make available to Grantee a list of
21 anticipated projects for each new budget period as soon as
22 is reasonably practicable.

23

24 2. Pierce County shall provide to Grantee two sets of
25 preliminary plans for individual projects as soon as such
26 plans are developed to a state of reasonable certainty,

27

1 and shall advise Grantee of the anticipated date of start
2 of work on such projects.

3
4 3. Grantee shall, when requested by Pierce County in writing,
5 locate their facilities in the field, show those locations
6 on one set of the preliminary plans provided, and return
7 that set to Pierce County Public Works and Utilities -
8 Transportation Services within four weeks of receiving the
9 written request.

10
11 4. Pierce County shall provide to Grantee final plans for
12 such projects as soon as such plans are available and
13 shall confirm or correct the anticipated date of start of
14 work on such projects.

15
16 5. Pierce County shall assist Grantee in determining how its
17 facilities shall be relocated. Such assistance by Pierce
18 County shall include, at a minimum, copies of plans (as
19 required above) and specifications for such County
20 projects, and information known to Pierce County as to
21 existing survey control available for location of such
22 County projects. Such assistance shall not subject Pierce
23 County to any liability for the costs of relocating the
24 subject facilities a second time if Grantee incorrectly
25 relocated its facilities the first time.

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6. When requested, Pierce County and Grantee shall meet to discuss how County projects and utility relocation can be accomplished with the least impact on the other. Pierce County's decision shall be final in such matters, but shall not be unreasonable.

7. Relocation of Grantee's facilities shall be completed in a timely manner defined as follows: Relocation of Grantee's facilities shall normally be accomplished in advance of County projects. In the event relocation of Grantee's facilities shall be done concurrently with such projects, Pierce County shall be so notified and agree to a written schedule for relocation. Compliance with such a written schedule shall be Grantee's duty. In no event shall relocation of Grantee's facilities interfere with the prosecution of County projects.

8. If Grantee shall not relocate its facilities in a timely manner as required above, Pierce County may relocate, or cause to be relocated, such facilities of Grantee as it deems necessary, and in the manner it deems necessary, at its sole discretion. Grantee hereby indemnifies and holds Pierce County, its employees, officers, officials, and agents totally free and harmless from all and any liability that may arise from damages caused by the relocation by Pierce County of the facilities of Grantee,

1 even if such damages and liability arise from the
2 negligence of Pierce County, its employees, officers,
3 officials, or agents.
4

5 9. Grantee hereby indemnifies and holds harmless Pierce
6 County, its officers, officials, and employees, from
7 damages that may arise from Grantee's failure to relocate
8 its facilities in accordance with the dates for completion
9 of relocation of facilities set forth above, or any other
10 act or omission by Grantee, its contractor(s), agents,
11 officers, or employees related to the provisions of this
12 Franchise.
13

14 10. It shall be conclusively presumed that Pierce County will
15 have suffered damages as a result of exercising its rights
16 as set forth in Item 8 above, and compensation for such
17 damages will be difficult to ascertain, and, therefore,
18 Grantee shall compensate Pierce County for such damages in
19 the amount of twice the amount of the cost of such
20 relocation of Grantee's facilities by Pierce County.
21

22 11. The exercise of its rights, as set forth in Item 8 above,
23 by Pierce County in no way relieves Grantee of completing
24 and/or finalizing the relocation of its facilities at no
25 expense to Pierce County if the relocation work done by
26 Pierce County is incomplete.
27

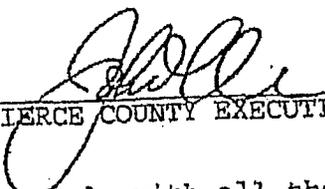
1 12. In the event a lawsuit is brought by Pierce County
2 against Grantee to collect damages presumed under Item
3 10 above, for the exercise by Pierce County of its
4 rights under Item 8, above, Grantee hereby agrees the
5 only issue will be the actual cost to Pierce County for
6 relocating Grantee's facilities. The party prevailing
7 in such an action shall be allowed its legal fees and
8 costs.

9
10 The full acceptance of this Supplement to the Franchise and
11 all its terms and conditions within 30 days from July 17, 2003,
12 by City of Tacoma, Department of Utilities, Water Division organized
13 and existing under and by virtue of the laws of the State of
14 Washington, in writing, is to be filed with the Clerk of the
15 Pierce County Council and shall be a condition precedent to its
16 taking effect, and unless this Supplemental Franchise No. 11 is
17 accepted within such time, said Supplemental Franchise No. 11
18 shall be null and void.

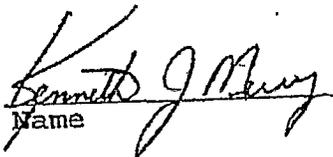
19
20 All other terms and conditions of the Franchise granted to
21 the City of Tacoma, Department of Utilities, Water Division,
22 remain in full force and effect.

1 Pursuant to RCW 36.55.080, a copy of Supplemental Franchise
2 No. 11 shall be recorded in the office of the Pierce County
3 Auditor.

4
5 DATED at Tacoma, Washington, this 29th day of
6 July, 2003.

7
8 
9 PIERCE COUNTY EXECUTIVE

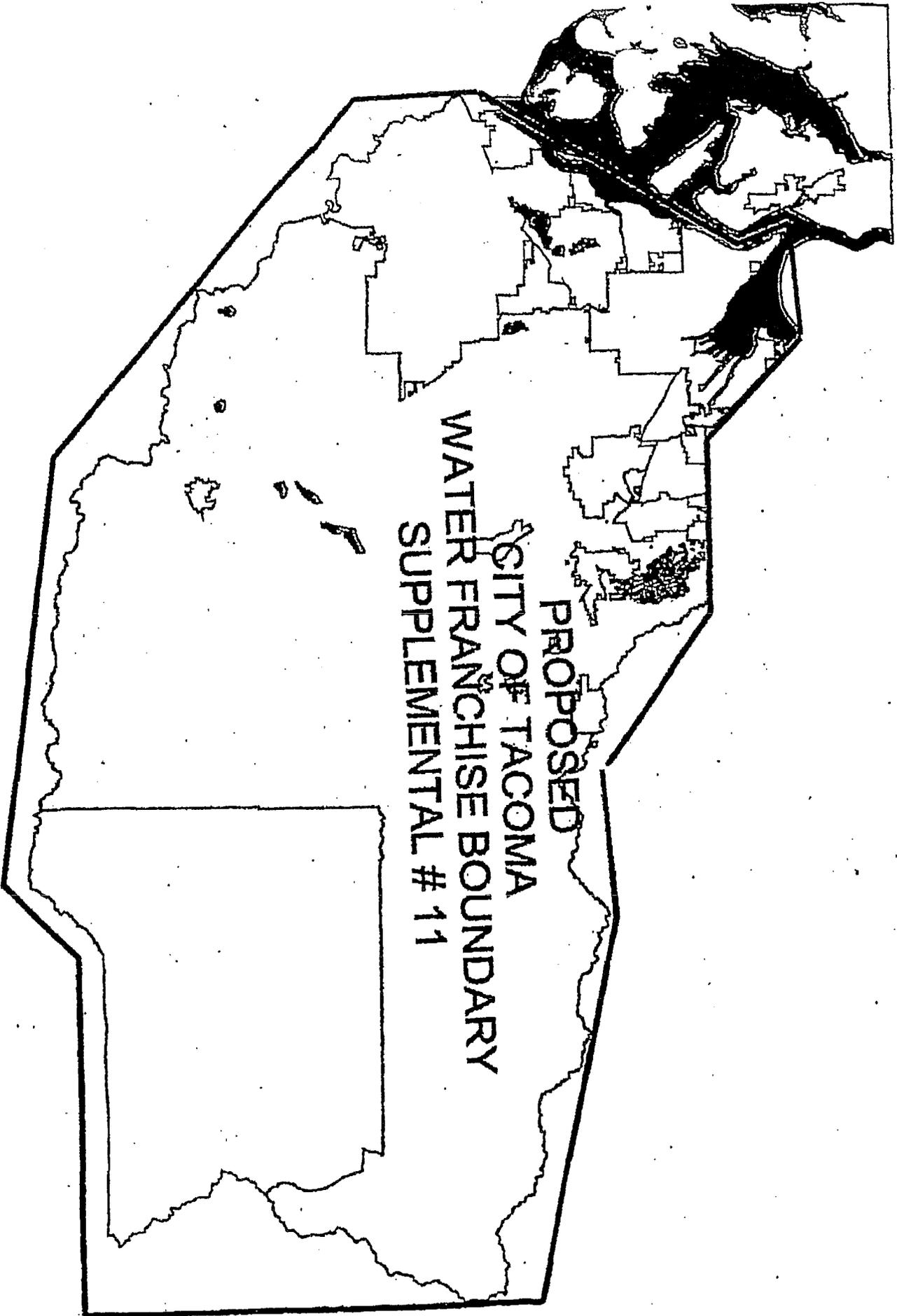
10 We hereby accept and agree to comply with all the terms and
11 conditions of this Franchise.

12 
13 Name

14 WATER SUPERINTENDENT
15 Title

16 7/18/03
17 Date

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**PROPOSED
CITY OF TACOMA
WATER FRANCHISE BOUNDARY
SUPPLEMENTAL # 11**