ORDINANCE NO. 2016-2797

AN ORDINANCE GRANTING PORTLAND GENERAL ELECTRIC COMPANY, AN OREGON CORPORATION, A FRANCHISE AGREEMENT INTENDED TO CLARIFY, ENHANCE, EXPAND, WAIVE OR VARY THE PROVISIONS OF NMC 12.05

RECITALS:

1. The city has jurisdiction and exercises regulatory management over all public rights-of-way within the city, under authority of the city Charter and state law.

2. Portland General Electric Company operates an electric utility within the jurisdiction of the City of Newberg.

3. Utilities which own or control utility facilities within the public rights-of-way are required to obtain a license from the city and operate under the terms of NMC 12.05.

4. There are some unique features of electric utilities that require clarification or modification of the terms of NMC 12.05.

5. NMC 12.05.310(E) contemplates and allows for situations when the city and utility operator will enter into a written franchise agreement that includes terms that clarify, enhance, expand, waive or vary the provisions of this article.

6. The franchise may conflict with the terms of NMC 12.05, with the review and approval of the city council.

7. The council finds that the public interest warrants a grant of a franchise to Portland General Electric Company.

THE CITY OF NEWBERG ORDAINS AS FOLLOWS:

Section 1. Franchise Granted. Portland General Electric Company is hereby granted a franchise for the right and privilege to erect, construct, maintain and operate an electric light and power system within the corporate limits of Newberg, Oregon.

Section 2. Term and Conditions of Franchise Agreement. The term and conditions of the franchise are set forth in the attached "AGREEMENT BETWEEN CITY OF NEWBERG AND PGE ON TERMS TO CONSTRUCT AND OPERATE UTILITY FACILITIES WITHIN THE CITY RIGHTS OF WAY," which is marked "Exhibit A" and incorporated by this reference as if set out in full. Except as specifically modified in this agreement, the terms of NMC 12.05 shall be fully applicable.

Section 3. **Authority.** The City Manager Pro Tem is hereby authorized to execute the franchise agreement, upon approval by the City Attorney as to form and content. The City Manager or City Manager Pro Tem is authorized to interpret the terms of the agreement.

Section 4. **Repeal.** Ordinance No. 92-2348, by its terms, expired on or about June 30, 2012. To the extent that Ordinance No. 92-2348 remains active or valid it is hereby repealed.

- **EFFECTIVE DATE** of this ordinance is 30 days after the adoption date, which is: March 17, 2016.

ADOPTED by the City Council of the City of Newberg, Oregon, this 16th day of February, 2016, by the following votes:

AYE: 7 **NAY: 0** **ABSENT: 0** **ABSTAIN: 0**

Sue Ryan

Sue Ryan, City Recorder

ATTEST by the Mayor this 19th day of February, 2016.

Bob Andrews

Bob Andrews, Mayor

AGREEMENT BETWEEN CITY OF NEWBERG AND PGE ON TERMS TO CONSTRUCT AND OPERATE UTILITY FACILITIES WITHIN THE CITY RIGHTS OF WAY

Whereas Newberg Municipal Code Chapter 12.05 regulates use of city rights of way ("City ROW") by utilities; and

Whereas there are some unique features of electric utilities that require clarification or modification of the terms of NMC 12.05;

NOW, THEREFORE, THE PARTIES AGREE AS FOLLOWS:

1. Term and effective date. This Agreement ("Agreement") takes effect upon the signature of both parties (the "Effective Date"), and continues for five years from the Effective Date (the "Term"). The Term shall automatically renew for an additional five (5) years, unless either party provides the other party one hundred eighty (180) days advanced written notice of its desire not to renew this Franchise prior to the expiration of the initial Term or renewal Term. The Agreement may be amended at any time by mutual agreement of the parties.

2. Grandfathered Facilities. PGE shall furnish current maps to the City by electronic data in read-only format showing the general location of PGE Facilities in possession of PGE currently, excluding PGE proprietary information. Upon request of the City, PGE will also provide the City maps by electronic data in read-only format of all PGE Facilities in possession of PGE during the term of this Agreement, excluding PGE proprietary information. Such maps showing existing PGE Facilities as provided to the City are incorporated in this Agreement by this reference. All PGE Facilities in possession of PGE as currently shown on the map(s) provided to the City or during the Term that are located within the City ROW are covered by this Agreement and the location and placement of these PGE Facilities are approved for the purposes of this Agreement, subject to PGE's acknowledgement that the City has not inventoried or evaluated PGE Facilities to ensure their compliance with applicable state and federal laws, regulations and orders. This Agreement also includes the privilege to repair, maintain, upgrade and operate Grantee Facilities located in City park property that are existing as of the Effective Date of this Agreement. Installation of Grantee Facilities in City park property on or after the Effective Date of this Agreement, and the right to repair, maintain, upgrade and operate such after-installed Grantee Facilities, shall be subject to applicable City Municipal Code provisions. With respect to Grantee Facilities located in City park property existing as of the Effective Date of this Agreement, as well as those whose locations are approved by the City during the Term, City park property shall be treated the same as the Public ROW for purposes of Sections 3 and 6 herein.

3. Construction. While the PGE Facilities used by PGE in the transmission and distribution of its services (PGE's "Electric Light and Power System") that are located inside the boundaries of the City are generally required to be constructed and maintained in accordance with NMC 12.05.320 and 12.05.330, should there be a conflict between NMC 12.05.320 or 12.05.330 and either PGE's construction standards as provided to the Oregon Public Utility Commission ("OPUC") or the National Electrical Safety Code ("NESC"), or both, it shall not be a violation of NMC 12.05.320 or 12.05.330 for PGE to follow its construction standards and the NESC.

4. Restoration. NMC 12.05.320.E requires ROW or property to be restored to the "same or better condition as existed before the work was undertaken." PGE shall not be required, at its expense, to pave a gravel street that was gravel prior to the excavation. PGE shall not be required, at its expense, to install sidewalk panels or curbs

that did not exist prior to the excavation, except to the extent such panels or curbs are required to bring an existing sidewalk or curb up to current generally applicable published City standards. In the event that PGE's work is coordinated with other construction work in the City ROW, the City Engineer may excuse Grantee from restoring the surface of the City ROW, providing that as part of the coordinated work, the City ROW is restored to good order and condition.

5. Excavation. Should a customer of PGE be required, pursuant to PGE's tariff on file with the OPUC, to make excavations that are located in the City ROW under the customer's own permit with the City, the City agrees that PGE shall not be responsible or liable for any failure by such customer to comply with any applicable rules, regulations, and ordinances of the City and/or with City standards.

6. Relocation.

(A) Permanent Relocation Required by City. This subsection (A) covers permanent relocation of overhead PGE Facilities that will remain overhead, and underground PGE Facilities that will remain underground. The City shall have the right to require PGE to change the location of PGE's Electric Light and Power System located in the City ROW in accordance with NMC 12.05.330.C unless one of the following is true: a) the project or improvement necessitating the change in location will not be owned or managed by the City; or b) the majority of the funding for the project or improvement does not come from City, county, state, or federal government sources; or c) the public project or public improvement is not, or will not be, located in the City ROW. Notwithstanding NMC 12.05.330.C, when the City requests a subsequent relocation of all or part of the same PGE Facilities less than two years after the initial relocation, the subsequent relocation shall be at the expense of the City.

(B) Notice. The City will endeavor to provide as much notice prior to requiring PGE to relocate PGE Facilities as possible. The City and PGE may agree, either before or after notice is provided, to a mutually acceptable schedule for relocation, but unless agreed to otherwise, such timeframe shall be not later than 60 days from notice by the City, except in the event of a public emergency. Should PGE fail to relocate PGE facilities within the agreed upon time frame or 60 days, whichever is longer, PGE shall pay to the City $500 for each business day beyond the deadline, orthe City may cause or effect such removal or relocation, performed by a qualified contractor in accordance with applicable state and federal safety laws and regulations, and the expense thereof shall be paid by PGE.

(C) Permanent Relocation - Undergrounding. Regardless of whether or not such conversion is made in conjunction with a public project, should the City require PGE to convert any overhead PGE Facilities to underground PGE Facilities at the same or different locations, such underground conversion shall be subject to the NESC and PGE's engineering and safety standards, and it shall not be a violation of NMC 12.05 for PGE to follow such standards and the NESC. Nothing in NMC 12.05 or this Agreement shall be read to prevent the City and PGE from agreeing to a different form of cost recovery than that provided in NMC 12.05.330 on a case-by-case basis consistent with applicable statutes, administrative rules, or regulations.

(D) Temporary Relocation at Request of City. The cost of temporary removal or relocation of PGE Facilities, as well as cost of replacing PGE Facilities in their permanent location, shall be paid by PGE unless one of the following is true: a) the project or improvement necessitating the change in location will not be owned or managed by the City; or b) the majority of the funding for the project or improvement does not come from City, county, state, or federal government sources; or c) the public project or public improvement is not, or will not

be, located in the City ROW. However, when the City requests a subsequent relocation of all or part of the same PGE Facilities less than two years after the initial relocation, the subsequent relocation shall be at the City's expense unless the relocation is necessitated by an event or circumstance beyond the reasonable control of the City including, but not limited to, Acts of God, earthquake, severe storm, flood or other natural disaster. For the purposes of the preceding sentence, events or conditions beyond the City's control do not include events or conditions related solely to the City's receipt or expected receipt of funds from third parties. The City may make available a temporary construction easement on which the PGE may place its Facilities that meets NESC requirements and PGE's construction standards as provided to the OPUC if the City secures such easement for its own use, until such time as the PGE moves its Facilities to their permanent location.

(E) Relocation at Request of or to Accommodate Third Party. If the relocation of PGE Facilities is caused or required by legally enforceable conditions placed by the City on approval for projects of third parties, such relocation shall in no event fall under the provisions of subsections (A), (C) or (D) of this Section 6 or NMC 12.05.330.C. However, PGE agrees that, if the PGE Facilities are located in the existing City ROW, or on property that the third party has agreed to dedicate to the City for City ROW, and the third party has both provided reasonable advance written notice of the need for relocation of the PGE Facilities and has met with PGE and attempted to agree on a mutually acceptable relocation schedule, then unless PGE and the third party have agreed to a relocation schedule, PGE shall relocate the PGE Facilities within 60 days from the date of the meeting, except in the event of a public emergency.

7. Use of PGE facilities. City shall be permitted to string wires on all PGE poles or run wires in PGE's trenches and/or available conduit for any municipal purpose including the provision of Internet service to residents and businesses, provided that such wires and related equipment: a) do not unreasonably interfere with PGE operations; b) conform to the NESC; and c) the City's excess capacity on such wires and equipment is not leased to, sold to or otherwise used by non-governmental third parties. The City shall maintain permits from PGE for such use. PGE shall not charge the City for such attachments to its poles or in its conduits; however, the City shall be responsible to pay for any make-ready and inspections PGE must perform in order to provide access to PGE Facilities for City wires and equipment in accordance with the NESC. Should any of the City's attachments to PGE Facilities violate the NESC, the City shall work with PGE to address and correct such violations in an agreed-upon period of time. The City shall indemnify and hold PGE harmless from loss or damage resulting from the presence of City's wires and equipment on or in PGE Facilities. For purposes of this agreement, "make-ready" shall mean engineering or construction activities necessary to make a pole, conduit, or other support equipment available for a new attachment, attachment modifications, or additional facilities and "wires" includes fiber optic cable. PGE shall meet with the City at least yearly to discuss its plans for new or expanded pole and conduit facilities in the City in order to explore opportunities for City use of such facilities.

8. Payment for use of City ROW.

(A) Franchise Fee and Privilege Tax. The City retains the right, as permitted by Oregon law, to charge a privilege tax based on a percentage of the Gross Revenues earned from PGE's customers within the City for the privilege of using the City ROW as permitted by Oregon law. Should such privilege tax be in the amount of 3 ½ percent or more of the Gross Revenues received by PGE from its customers within the City, PGE agrees to pay such privilege tax as follows: (a) to the City as a franchise fee in the amount of 3 1/2 percent of the Gross Revenues received by PGE from its customers within the City; and (b) the balance of the privilege tax to the City at the same time as the payment of the franchise fee. The franchise fee and privilege tax shall be paid annually for each year during the term of the license on or before April 1. The amounts shall be based on the Gross Revenues received from PGE's customers within the City during the prior calendar year. Each payment shall be accompanied by an accounting of gross revenues, if applicable, and a calculation of the amount payable. To the

extent permissible under state law and regulation, the franchise fee shall be considered an operating expense of PGE and shall not be itemized or billed separately to consumers within the City. The City shall provide PGE at least ninety (90) days' notice prior to any privilege tax or increase in privilege tax becoming effective. PGE shall follow state regulations regarding the inclusion of any part of such privilege tax as an itemized charge on the electricity bills of its customers within the City.

(B) Definition of Gross Revenues. For the purposes of this Agreement, Gross Revenues shall mean any and all revenues derived by PGE within the City from PGE's Electric Light and Power System, and includes, but is not limited to, the sale of and use of electricity and electric service, and the use, rental, or lease of PGE Facilities, after adjustment for the net write-off of uncollectible accounts. Gross Revenues do not include proceeds from the sale of bonds, mortgages or other evidence of indebtedness, securities or stocks, or sales at wholesale by one public utility to another of electrical energy when the utility purchasing such electrical energy is not the ultimate consumer. Gross Revenues also do not include revenue from joint pole use. For purposes of this Agreement, revenue from joint pole use includes any revenue collected by PGE from other franchisees, permittees, or licensees of the City for the right to attach wires, cable or other facilities or equipment to PGE's poles or place them in PGE's conduits. This definition supersedes any definition that may be contained in NMC 12.05 or City resolution during the Term.

9. Financial Assurance. Notwithstanding any provision of NMC 12.05.320.C, the City shall not require PGE to provide a performance bond or other form of surety or financial security unless PGE has demonstrated a pattern of failing to correct material violations of applicable provisions of NMC 12.05. For the purposes of this Section, a "pattern" shall consist of three or more incidents of PGE's failure to correct material violations within the Term after notice from the City and a reasonable opportunity to cure such violations.

10. Damage to PGE's Facilities. The City has required PGE to defend and indemnify the City, and hold the City harmless, in accordance with NMC 12.05.390.C. In the event that the City should damage PGE's Facilities in the course of work performed by or for the City as described in NMC 12.05.310.I, the City shall hold PGE harmless from any and all damage to or loss of such Facilities arising out of the negligent, willful, intentionally tortious, or malicious acts or omissions of the City, its employees or agents in the performance of such work, subject to any applicable limitations in the Oregon Constitution and the Oregon Tort Claims Act. The obligations imposed by this Section are intended to survive termination of this Agreement.

11. Notice. Any notice provided for under this Agreement shall be sufficient if in writing and (1) delivered personally to the following addressee, (2) deposited in the United States mail, postage prepaid, certified mail, return receipt requested, (3) sent by overnight or commercial air courier (such as Federal Express or UPS), or (4) sent by facsimile transmission with verification of receipt, addressed as follows, or to such other address as the receiving party hereafter shall specify in writing:

If to the City: City Manager, City of Newberg, Oregon
PO Box 970
Newberg, Oregon 97132
FAX # (503) 537-5013

With a copy to: City Attorney, City of Newberg
PO Box 970

Newberg, OR 97132
FAX # (503) 537-5013

If to the PGE: Government Affairs
Portland General Electric Company
121 SW Salmon St, 1WTC03
Portland, Oregon 97204
FAX: (503) 464-2354
With a copy to: Portland General Electric Company
Attn: General Counsel
One World Trade Center, 17th Floor
121 SW Salmon Street
Portland, Oregon 97204
FAX: (503) 464-2200

Any such notice, communication or delivery shall be deemed effective and delivered upon the earliest to occur of actual delivery, three (3) business days after depositing in the United States mail, one (1) business day after shipment by commercial air courier or the same day as confirmed facsimile transmission (or the first business day thereafter if faxed on a Saturday, Sunday or legal holiday).

12. Termination. The City may terminate this Agreement under the same terms as provided in NMC 12.05.310.M for termination of a utility license. Such termination shall not affect PGE's right to provide electric service in the City, which shall be determined in accordance with Oregon statutes and regulations.

13. Limitations of Agreement. All provisions of NMC 12.05 not addressed in this Agreement continue to apply to PGE's use of City ROW.

IN WITNESS WHEREOF, the parties, through their duly authorized representatives, have executed this Agreement as of the dates indicated below.

PORTLAND GENERAL ELECTRIC COMPANY	CITY of NEWBERG
By: _____	By: _____
Name: _____	Name: _____
Title: _____	Title: _____
Date: _____	Date: _____