

ORDINANCE No. 1914

AN ORDINANCE OF THE CITY OF MILWAUKIE GRANTING PORTLAND GENERAL ELECTRIC COMPANY A NONEXCLUSIVE FRANCHISE FOR TEN YEARS TO ERECT, CONSTRUCT, MAINTAIN AND OPERATE AN ELECTRIC POWER SYSTEM WITHIN THE CITY OF MILWAUKIE AND SETTING THE TERMS AND CONDITIONS OF THE FRANCHISE.

WHEREAS, Portland General Electric Company (“PGE”) has been providing electrical power service within the City of Milwaukie pursuant to an existing franchise that is set to expire on December 31, 2002;

WHEREAS, PGE is duly authorized by the Oregon Public Utilities Commission to supply electric power within the City;

WHEREAS, the City has the authority to regulate the use of rights of way within the City and to charge for the use of those rights of way, and

WHEREAS, the City and PGE both desire PGE to continue to provide electrical service within the City of Milwaukie and to establish the terms by which PGE shall use rights of way within the City;

NOW THEREFORE, the City of Milwaukie does ordain as follows:

Section 1. **Rights Granted**

- A. The City of Milwaukie (“City”) grants to Portland General Electric Company (“PGE”), its successors and assigns, subject to the terms and conditions in this ordinance, a nonexclusive franchise to erect, construct, maintain and operate an electric power system within the City as it now exists or may be extended in the future. The franchise includes the privilege, consistent with the terms of this ordinance, to install, maintain and operate poles, wires, fixtures, equipment, underground circuits necessary to supply electric energy for light, power and other purposes, upon, over, along, under, and across the streets, alleys, roads and other public ways, parks and places, including but not limited to private property on which a preliminary subdivision plat has been approved by the City for the provision of public utility services within the City as it now exists or is extended in the future. Nothing in this agreement limits the City from granting others the right to carry on activities similar to or different from the ones described in this agreement. The rights granted herein do not include the right to build or site electric generating facilities in the locations described in this section.

- B. All facilities in possession of PGE currently located within rights of way are covered by this agreement and are deemed lawfully placed in their current locations. The City may require relocation as further specified in Section 7 of this agreement.

Section 2. **Term**

This agreement shall be effective as of January 1, 2003 and shall remain effective through December 31, 2013, unless sooner terminated as provided in this agreement.

Section 3. **Construction Work**

- A. Before PGE conducts underground work involving excavation, new construction or major relocation work in public rights of way, property or place, PGE shall first notify the City Engineer and shall comply with any special conditions relating to scheduling, coordination and public safety as determined by the City Engineer. Special conditions would include work being done in the right of way by the City or other third parties. Work could include open cuts, boring, excavations, digging new pole holes in streets or sidewalks in the right of way. In emergencies, PGE may conduct emergency work at any time and must provide the City Engineer with written or oral notice of emergency work as soon as reasonably possible, no later than five (5) business days after the emergency work has commenced.

- B. The Company shall file preliminary maps or drawings of its proposed construction work within the City with the City Engineer showing the location of the construction, extension or relocation of its facilities and services in public rights of way, property or place of the City. In emergencies, PGE will provide the City Engineer a map of any excavations, repavings, and new facilities conducted on an emergency basis within 30 days of completion of the work. No facility may be placed other than in a location approved by the City, except in the event of an emergency.

- C. **Reasonable care.** All work by PGE within the rights of way shall be conducted with reasonable care and with the goal of eliminating or minimizing the risk to those using City rights of way and to eliminate or minimize the risk of damage to public or private property. All work shall be performed in accordance with all applicable laws and regulations and the National Electric Safety Code. Any work within the right of way may be inspected by the City and its officers to determine whether it has been placed in its approved location. If emergency work has been done and is determined to be in a place not approved by the city, the City will notify PGE and give 60 days for the work to be corrected once the emergency has passed. Within 30 days of the effective date of this agreement, PGE shall provide City with a copy of PGE's safety standards manual it follows and shall provide the City with a copy of any changes to its safety standards within 30 days of the effective date of the changes.

Section 4. **Supplying Maps**

PGE shall maintain maps and data pertaining to its facilities located as described in Section 1 (A) in the City on file at an office in Oregon. With 24 hours prior notice, the City may inspect the maps at any time during business hours. Upon request of the City and without charge, PGE shall furnish current maps to the City, either in a printed form, or, if the City maintains compatible data base capability, then by electronic data in read-only format, showing the location of any electrical system facilities, but not other proprietary information, used in operating PGE's transmission and distribution facilities within the City's Urban Growth Boundary area served by PGE. The City will not sell or transmit PGE maps or data to third parties unless permitted by PGE. The City will make available to PGE any City-prepared maps or data.

Section 5 **Excavation**

Subject to Sections 3 and 6 of this agreement, PGE may make all necessary excavations within any right of way for the purpose of installing, repairing or maintaining any facility. Assuming sufficient right of way, all poles shall be placed between the sidewalk and the edge of the right of way unless another location is approved by the City Engineer. PGE shall take all reasonable precautions to minimize interruption to traffic flow, damage to property or creation of a hazardous condition.

Section 6. **Restoration after Excavation**

Except as otherwise provided in this section, PGE shall restore the surface of any right of way disturbed by any excavation by PGE to the same condition it was in prior to its excavation. In the event that PGE's work is coordinated with other construction work in the right of way, the City Engineer may excuse PGE from restoring the surface of the right of way, providing that as part of the coordinated work, the right of way surface is restored at least to the condition it was in prior to any excavation. All restoration of right of way surface shall be subject to the approval of the City Engineer, who may issue an order requiring correction of the restoration work. If the correction order is not complied with within 30 days or such other time as may be specified in the order, the City may restore the surface of the right of way, in which case PGE shall pay the City for the cost of resurfacing, including all administrative costs of resurfacing and of issuing the correction order.

Section 7. **Relocation**

- A. **Permanent Relocation - General.** In accordance with ORS 221.420, City may by written order require PGE to move any facility in the right of way. If the relocation is the result of a public project, PGE shall be responsible for the costs of relocation. If the relocation is required to accommodate a private party development or project, PGE shall have the right to seek reimbursement from the private party. In such event the City shall not be responsible for the costs of relocation of any of PGE's facilities.

- B. **Permanent Relocation - Undergrounding.** As permitted by law, administrative rule, or regulation, the City may require PGE to remove any overhead facilities and replace those facilities within underground facilities at the same or different locations subject to PGE's engineering and safety standards. The expense of such a conversion shall be paid by PGE, and PGE shall recover its costs of from its customers in accordance with state law, administrative rule, or regulation. Nothing in this paragraph prevents the City and PGE from agreeing to a different form of cost recovery consistent with applicable statutes, administrative rules, or regulations on a case-by-case basis.
- C. **Temporary Relocation at Request of Third Parties.** Whenever it is necessary to temporarily relocate or rearrange any facility of PGE to permit the passage of any building, machinery or other object, PGE shall perform the work on 15 business days written notice from the persons desiring to move the building, machinery or other object. The notice shall: (1) bear the approval of the City Engineer; (2) detail the route of movement of the building, machinery, or other object; (3) provide that the person requesting the temporary relocation shall be responsible for PGE's costs; (4) provide that the requestor shall indemnify and hold harmless the City and PGE from any and all damages or claims resulting either from the moving of the building, machinery or other object or from the temporary relocation of PGE facilities; and (5) be accompanied by a cash deposit or other security acceptable to PGE for the costs of relocation. PGE in its sole discretion may waive the security. The cash deposit or other security shall be in an amount reasonably calculated by PGE to cover PGE's costs of temporary relocation and restoration.
- D. **Temporary Relocation at Request of City.** In accordance with ORS 221.420, the City may require the Company to remove and relocate transmission and distribution facilities maintained by the Company in any public rights of way, property or place of the City by giving notice to the Company. Prior to such relocation the city agrees to provide a suitable location which includes a minimum or maximum square footage set by the Company and the required easements from private property owners for such relocated facilities sufficient to maintain service. The cost of removal or relocation of its facilities for public projects shall be paid by the Company; however when relocation is to be temporary and both the initial and subsequent relocations are for public projects and not at the request of or to accommodate a private party, the initial relocation shall be at the expense of the Company and subsequent relocations occurring less than two years after the initial relocation shall be at the expense of the City. In the event that any relocation is requested by or is to accommodate a private party, PGE shall seek reimbursement from the private party and not from the City. The City and the Company agree to cooperate to minimize the economic impact of such temporary relocation on each party.

- E. **Notice.** The notice required by Section 7 (A), (B), (C) and (D) shall be in writing and shall be provided at least 15 business days before the date that PGE is required to move its facilities. The City will endeavor to provide as much notice as possible. The notice shall specify the date by which the existing facilities must be removed. Nothing in this provision shall prevent the City and PGE from agreeing, either before or after notice is provided, to a schedule for relocation. In the event that PGE fails to comply with a notice to relocate and the City and PGE have not reached agreement on a schedule for relocation, the City may remove or relocate PGE's facilities that were the subject of the relocation notice at PGE's expense.
- F. **Location for Relocated Facilities.** The City shall provide PGE with a suitable location in existing right of way sufficient to maintain service for all facilities required to be relocated pursuant to Section 7 (A), (B), and (D).

Section 8. City Public Works and Improvements

Nothing in this agreement shall be construed in any way to prevent the City from excavating, grading, paving, planking, repairing, widening, altering, or doing any work that may be needed or convenient in any rights of way. The City shall coordinate any such work with PGE to avoid, to the extent reasonably foreseeable, any obstruction, injury or restrictions on the use of any of PGE's facilities.

Section 9. Payment by PGE for Use of Rights of Way

- A. In consideration for its use of rights of way and for the City's administration of the rights of way, PGE agrees to pay the City a franchise fee of 3.5 percent of the gross revenue received by PGE from customers within the City, provided however, that revenue from rent, lease or other use of PGE's lines within the City under tariffs filed with and approved by the OPUC, shall be considered gross revenue, even if the person renting, leasing or otherwise using the lines is not a customer of PGE or a resident of the City. The fee for each year shall be based on PGE's gross revenue during the previous calendar year. To the extent permissible under state law and regulation, the franchise fee imposed by this subsection shall be considered an operating expense of PGE and shall not be itemized or billed separately to consumers within the City. The meaning of "gross revenue" as used in this ordinance shall be amended and interpreted consistently with regulations prescribed by the OPUC for determining the amount of franchise fees allowed as operating expenses of a utility for rate-making purposes.
- B. PGE shall pay the franchise fee to the City Finance Director on or before April 1 of each year. Interest on late payments shall accrue from the due date at a rate equal to the prime rate of interest as established by the Bank of America or its successor, and shall be computed based on the actual number of days elapsed from the due date until payment. Interest shall accrue without regard to whether

the City has provided notice of delinquency. However, should payment be insufficient due to an error in computation, interest payments shall not begin to accrue until after the discovery of the error by PGE or receipt by PGE of notice of the error.

- C. With its annual payment, PGE shall provide the City a statement under oath showing PGE's gross revenue for the preceding year.
- D. The City may audit PGE at any time while this agreement is in effect to determine the accuracy of the reporting of gross revenues. PGE shall make all records available to the City and any auditor retained by the City on demand.
- E. The City shall retain the right, as permitted by Oregon Law, to charge a privilege tax in addition to the franchise fee set forth herein. PGE agrees to pay the City's Public Utilities Privilege Tax so long as the combined franchise fee and privilege tax does not exceed the maximum limit set by ORS 221.450 for utilities operating without a franchise. The City agrees to notify PGE of the privilege tax in writing, 60 days prior to the date the tax goes into effect. The privilege tax is paid by customers within the city and is separately stated on the regular billings, pursuant to the regulations of the Oregon Public Utility Commission.
- F. In consideration of PGE's agreement to pay the franchise fee and the City's Public Utilities Privilege Tax, if implemented, the City shall not impose other business license fees or taxes on the Company during the term of this ordinance. This provision does not exempt the property of the company from lawful ad valorem taxes, local improvement district assessments, or conditions, exactions, fees and charges that are generally applicable to businesses within the City as required by city ordinance.
- G. As direct access has been implemented by PGE in accordance with state law and regulations, the City may, consistent with state law, direct that the franchise fee and privilege tax, if implemented, be based on volume-based methodologies as specifically described in ORS 221.655 instead of the formula set out in Section 9 (A). Notice must be given to the Company in writing, by October 30th of each calendar year for implementation of volume based methodology beginning January 1st of the following year. The volumetric calculation must remain in effect for an entire calendar year. (January 1 to December 31 billings.) No notice is necessary if the City chooses to remain on the current revenue-based calculation.
- H. The obligation to pay the franchise fee imposed by Section 9 (A) shall survive expiration of this agreement as long as PGE continues to exercise the rights granted in section (1). In the event this agreement is terminated before expiration, PGE shall pay the City the franchise fee based on gross revenue through the date of termination within 90 days of the termination date.
- I. PGE shall be responsible for all costs associated with its work and facilities in the

right of way, except as otherwise specifically provided in this agreement.

Section 10. Vacation of Right of Way

Whenever the City initiates any proceeding to vacate any rights of way within which PGE has a facility, the City will notify PGE. The City will maintain a public utility easement for PGE's facility, if requested by PGE.

Section 11.

A) City's Right to Use PGE Facilities

PGE shall permit City, without charge, to string wires on PGE poles or run wires in PGE trenches and/or conduit for municipal purposes and to attach fire and police alarm and communication equipment to PGE poles, provided that such wires and equipment do not unreasonably interfere with PGE operations and conform to the National Electric Safety Code, and the City's excess capacity of such wires and equipment is not leased to, sold to or otherwise used by third parties. 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's facilities.

B) Use of PGE Facilities by Wireless Communications Facilities

PGE shall allow third parties to place wireless communications facilities on PGE poles provided that (1) the placement will not interfere with PGE's operations, (2) the placement and operations of the wireless communications facilities will be consistent with all safety and other applicable regulations, and (3) PGE agrees to the amount of compensation from the third party. The third party shall be contractually responsible for compliance with all safety and other applicable regulations. PGE may extend any existing pole to allow such co-location, consistent with the City's regulations of wireless communications facilities. The City shall have no liability arising from the co-location of third party facilities on PGE poles.

Section 12. Termination

- A. **By City if City Will Provide Service.** The City may terminate this agreement upon one year's written notice to PGE in the event that the City decides to engage in public ownership of light and power facilities and the public distribution of electric energy to customers throughout the City.
- B. **By City for Nonpayment.** City may terminate this agreement and PGE's franchise if PGE fails to pay the franchise fee. The City shall provide 30 days' notice of termination prior to any termination for non-payment. The agreement shall not be terminated if PGE pays the full amount, including interest, within 30 days of the notice.
- C. **By City for Cause.** If PGE ceases to maintain its facilities and the lack of

maintenance increases the risk of personal injury or property damage, the City may terminate this agreement by providing PGE 30 days' notice of termination. The agreement shall not be terminated if PGE substantially eliminates such risk within 30 days of the notice.

Section 13. Sale of Franchise

PGE shall not sell or assign this franchise to an entity that is not authorized by the Oregon Public Utilities Commission to provide service as an electric utility in the City.

Section 14. Removal of Facilities

If this agreement is terminated or expires on its own terms and is not replaced by a new franchise agreement or similar authorization, PGE and the City shall by mutual agreement decide whether PGE's facilities are to be removed or remain in place. In the event that PGE and the City are unable to reach agreement on the disposition of PGE facilities after termination, the City Engineer may issue an order requiring removal.

Section 15. Nondiscrimination

PGE shall provide service to electric consumers in the City without undue discrimination or undue preference or disadvantage.

Section 16. Hold Harmless

PGE shall indemnify and hold harmless the City, its public officials and employees against any and all claims, damages, costs and expenses to which they may be subjected as a result of any negligent or wrongful act or omission of PGE, or any act or omission of PGE that is alleged to be negligent or wrongful, under this agreement or otherwise arising from the rights and privileges granted by this agreement. The obligations imposed by this section are intended to survive termination of this agreement.

Section 17. Limitation on Privileges

All rights and authority granted to PGE by the City are conditioned on the understanding and agreement that the privileges in the rights of way are not to operate in any way so as to be an enhancement of PGE's properties or values or to be an asset or item of ownership in any appraisal thereof.

Section 18. Effect of Invalidity of a Portion of this Agreement

If any section, subsection, sentence, clause, phrase, or other portion of this ordinance is, for any reason, held to be invalid or unconstitutional by a court of competent jurisdiction, all portions of the agreement that are not held to be invalid or unconstitutional shall remain in effect until the agreement is terminated or expired. After any declaration of invalidity or unconstitutionality of a portion of this agreement, either party may demand that the other party

meet to discuss amending the agreement to adjust the relationship of the parties to conform to their original intent in entering into this agreement. If the parties are unable to agree on a revised franchise agreement within 90 days after a portion of the agreement is found to be invalid or unconstitutional, either party may terminate the agreement on 180 days' notice to the other party.

Section 19. Acceptance

Within 30 days after its adoption by the City Council, PGE shall file with the City Recorder its written unconditional acceptance of the franchise as detailed in this ordinance. If PGE fails to do so, the franchise granted by this ordinance may be withdrawn by the City at any time prior to December 31, 2002. If the City has not withdrawn the franchise, any provision of service by PGE within the City on or after January 1, 2003, shall be deemed an acceptance by PGE of the franchise as detailed in this ordinance, whether or not a signed acceptance has been filed with the City.

Section 20. Definitions

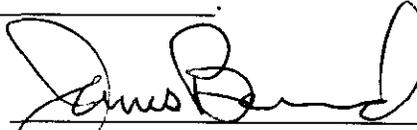
- A. "Facility" includes any poles, guy wires, anchors, wires, fixtures, equipment, conduit, circuits, vaults, ground mounted switch cabinets, ground mounted mineral oil filled transformers, ground mounted secondary junction cabinets, and other property necessary or convenient to the supply of electric energy owned or operated by PGE within the City.
- B. "Right of way" means any right of way or public utility easement within the City and under City ownership, control or administration. "Right of way" does not include any state highway or county road.
- C. "Install" means to erect, construct, build, replace or place.
- D. "Gross revenue" includes any and all revenue earned by PGE within the City from the sale of electric energy, including demand and facility charges, after adjustment for the net write-off of uncollectible accounts computed on the average annual rate for the entire company. Gross revenue shall also include revenue from the use, rental or lease of PGE's facilities under tariffs files with and approved by the OPUC. Gross revenues shall not include proceeds from the sale of bonds, mortgages, or other evidence of indebtedness, securities, or stocks, sales at wholesale to a public utility or other entity when the such public utility or other entity purchasing the service is not the ultimate consumer, revenue from joint pole use, or revenue paid directly by the United States of America or any of its agencies.

- E. "Public project" means any project for work in the right of way that is not undertaken to benefit a specific development or redevelopment project on private property and that is not undertaken to benefit a public utility or utility service provider other than the City.

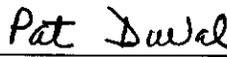
Read the first time on ^{12/17/02 pad}~~12/17/02~~ and moved to second reading by 3-0-1 vote of the City Council.

Read the second time and adopted by the Council on 12/17/02.

Signed by the Mayor on 12/17/02.


James Bernard, Mayor

ATTEST:


Pat DuVal, City Recorder

APPROVED AS TO FORM:
RAMIS, CREW, CORRIGAN &
BACHRAGH, LLP


City Attorney