

**ORDINANCE No. 2074**

**AN ORDINANCE OF THE CITY OF MILWAUKIE GRANTING PORTLAND GENERAL ELECTRIC COMPANY A NON-EXCLUSIVE FRANCHISE FOR TEN YEARS TO ERECT, CONSTRUCT, MAINTAIN, REPAIR, UPDATE AND OPERATE AN ELECTRIC LIGHT AND POWER SYSTEM WITHIN THE CITY OF MILWAUKIE, SETTING THE TERMS AND CONDITIONS OF THE FRANCHISE AND PROVIDING AN EFFECTIVE DATE.**

**WHEREAS**, Portland General Electric Company (“Grantee”) has been providing electric light and power service within the City of Milwaukie (“City”); and

**WHEREAS**, Grantee is duly authorized by the Oregon Public Utility Commission (“OPUC”) to supply electric light and power within the City; and

**WHEREAS**, the City has the authority to regulate the use of the Public ROW (as defined below) within the City and to receive compensation for the use of the Public ROW; and

**WHEREAS**, the City and Grantee both desire Grantee to continue to be able to provide electrical service within the City and to establish the terms by which Grantee shall use and occupy the Public ROW;

**NOW THEREFORE, THE CITY OF MILWAUKIE DOES ORDAIN AS FOLLOWS:**

**SECTION 1. NATURE AND TERM OF FRANCHISE.**

(A) The City hereby grants to Grantee and its successors and assigns, subject to the terms and conditions in this Franchise, a nonexclusive franchise to erect, construct, repair, maintain, upgrade and operate an electric light and power system within the City as it now exists or may be extended in the future, including related communication equipment and Grantee Facilities (as defined below). This Franchise includes the privilege to install, repair, maintain, upgrade and operate Facilities necessary for the operation of Grantee’s Electric Light and Power System (as defined below) upon, over, along, and across the surface of and the space above and below the streets, alleys, roads, highways, sidewalks, bridges, and other public ways over which the City has jurisdiction (collectively, “Public ROW”), as well as Public Utility Easements (“PUEs”) for the provision of public utility

services within the City as Grantee's Electric Light and Power System now exists or is extended or upgraded in the future. Nothing in this Franchise limits the City from granting others the right to carry on activities similar to, or different from the ones described in this Franchise. The rights granted herein do not include the right to build or site electric generating facilities in the Public ROW.

**(B)** All Grantee Facilities in possession of Grantee currently or during the Term (as defined in Section 2(A) that are located within the Public ROW are covered by this Franchise and are deemed lawfully placed in their current locations. The City may require relocation of Grantee Facilities as further specified in Section 8. 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 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 4(C) 4(D), 6, 7 and 8 herein.

**(C)** Grantee may provide telecommunications services via Grantee's Electric Light and Power System if it obtains all necessary and applicable authorizations from the OPUC regarding the provision of telecommunications service to the public and obtains any necessary, lawful and applicable authorization from the City for use of the Public ROW for such provision, including entering into a separate franchise with the City.

## **SECTION 2. TERM AND EFFECTIVE DATE.**

**(A) Effective Date.** The effective date of this Franchise shall be January 1, 2014 ("Effective Date"). Upon becoming effective, this Franchise shall supersede and replace any and all other franchise agreements that may be or have been in place between Grantee and the City as of or prior to the Effective Date.

**(B) Duration of Franchise.** The term of this Franchise ("Term") shall commence on the Effective Date and all rights and obligations pertaining thereto shall expire 10 years after the Effective Date, unless renegotiated or terminated as provided herein.

**(C) Charter and General Ordinances to Apply.** To the extent authorized by law, this Franchise is subject to the Charter of the City of Milwaukie and general ordinance provisions passed pursuant thereto, including the applicable provisions of Milwaukie Municipal Code Chapters 15.36.010 and 17.32.020 and Section 5.0191 of the Public Works Standards requiring underground utilities in subdivisions or partitions, and state statutes and regulations existing during the Term. Nothing in this Franchise shall be deemed to waive the requirements of the various codes and ordinances of the City regarding permits, fees to be paid that are generally applicable to other similar businesses operating within the City, or the manner of construction.

### **SECTION 3. DEFINITIONS.**

**(A) Captions.** Throughout this Franchise, captions to sections are intended solely to facilitate reading and to reference the provisions of this Franchise. The captions shall not affect the meaning and interpretation of this Franchise.

**(B) Definitions.** For purposes of this Franchise, the following terms, phrases, and their derivations shall have the meanings given below unless the context indicates otherwise. When not inconsistent with the context, words used in the present tense include the future tense, words in the plural number include the singular number, and words in the singular number include the plural number. The word "shall" is always mandatory and not merely directory.

**(1)** "City" means the City of Milwaukie, Oregon, a municipal corporation, and all of the territory within its corporate boundaries, as such may change from time to time.

**(2)** "City Council" means the Council of the City.

**(3)** "City Manager" means the City Manager of the City.

**(4)** "City Recorder" means the Recorder of the City.

**(5)** "Emergency" means a situation involving (a) an unscheduled outage affecting one or more customers, or (b) danger to public safety. Emergency also includes situations where the failure of Grantee to act would result in (a) or (b).

**(6)** "Engineering Director" means the Engineering Director of the City.

**(7)** "Finance Director" means the Finance Director of the City.

**(8)** "Franchise" means this Franchise Agreement as fully executed by the City and Grantee and adopted by the City Council pursuant to Ordinance No. 2074.

- (9) "Grantee" means Portland General Electric Company, an Oregon corporation.
- (10) "Grantee Facility" means any tangible component of Grantee's Electric Light and Power System, including but not limited to any poles, guy wires, anchors, wire, fixtures, equipment, conduit, circuits, vaults, switch cabinets, transformers, secondary junction cabinets, antennas, communication equipment and other property necessary or convenient to supply electric light and power by Grantee within the City.
- (11) "Grantee's Electric Light and Power System" means all real property and Grantee Facilities used by Grantee in the transmission and distribution of its services that are located inside the boundaries of the City.
- (12) "Gross Revenues" shall be deemed to include any and all revenues derived by Grantee within the City from Grantee'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 Grantee 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 Franchise, revenue from joint pole use includes any revenue collected by Grantee from other franchisees, permittees, or licensees of the City for the right to attach wires, cable or other facilities or equipment to Grantee's poles or place them in Grantee's conduits.
- (12) "NESC" means the National Electrical Safety Code.
- (13) "OPUC" means the Oregon Public Utility Commission.
- (14) "Person" means any individual, sole proprietorship, partnership, association, corporation, cooperative, People's Utility District, or other form of organization authorized to do business in the State of Oregon, and includes any natural person.
- (15) "Public ROW" shall have the meaning described in Section 1(A).
- (16) "PUE" shall mean an easement, not within the public right-of-way, that is designated for providers of utility services and regulated under the City's municipal code.
- (17) "Term" shall have the meaning described in Section 2(B).



(18) "Year," "annual," or "annually" means the period consisting of a full calendar year, beginning January 1 and ending December 31, unless otherwise provided in this Franchise.

#### **SECTION 4. CONSTRUCTION**

**(A) Construction.** Subject to the NESC, Grantee's Electric Light and Power System shall be constructed and maintained in such manner as not to interfere with sewers, water pipes, or any other property of the City, or with any other pipes, wires, conduits or other facilities that may have been laid in the Public ROW by or under the City's authority. Assuming there is sufficient space in the Public ROW that meets the Grantee's construction standards as provided to the OPUC and NESC requirements, all above ground facilities shall be placed between the curb and the edge of the Public ROW, as approved by the Engineering Director, or within an abutting public utility easement unless another location is approved by the Engineering Director. If there is not sufficient space in the Public ROW, the City agrees to provide a suitable alternative location, as mutually agreed, that meets Grantee's construction standards as provided to the OPUC and NESC requirements in order to maintain sufficient service. The foregoing sentence shall not apply if the Grantee's construction activities are undertaken by Grantee for a system improvement or an addition to Grantee's Electric Light and Power System.

**(B) Acquisition.** Subsequent to the Effective Date, upon Grantee's acquisition of additional Grantee Facilities in the Public ROW, or upon any addition or annexation to the City of any area in which Grantee retains Grantee Facilities in the Public ROW of such addition or annexation, Grantee shall submit to the City Manager and Finance Director a statement describing all Grantee Facilities involved, whether authorized by a franchise agreement or upon any other form of prior right, together with a map, as described in Section 5, specifying the location of all such Grantee Facilities. Such Grantee Facilities shall immediately be subject to the terms of this Franchise.

**(C) Emergency Repairs.** In the event emergency repairs to Grantee Facilities are necessary, Grantee shall as soon as reasonably possible notify the Engineering Director of the need for such repairs. Grantee may immediately initiate such Emergency repairs and, if permits are required by City, apply for appropriate permits the next business day

or as soon as reasonably possible following discovery of the Emergency. In the event excavation is necessary in conjunction with the repairs, Section 6 shall also apply.

**(D) Reasonable Care.** All work completed by Grantee within the Public ROW shall be conducted with reasonable care and with the goal of minimizing the risk to those using the Public ROW and to minimize the risk of damage to public and third party property. All work shall be performed in accordance with all applicable laws and regulations, including but not limited to the NESC. Any work completed by Grantee within the Public ROW may be inspected by the City to determine whether it has been placed in its approved location according to Grantee's permit issued by the City. If Emergency work has been completed by Grantee in the Public ROW and the City determines such work was not completed in a City approved location, the City shall notify Grantee and provide Grantee with sixty (60) days after the Emergency has passed to reperform the work in a City approved location, in accordance with the NESC.

**(E) Cooperation between Grantee and City.** In accordance with state law, rules and regulations, for purposes of this Franchise, including but not limited to Sections 4, 8 and 10, Grantee and City shall work together during any design process affecting the Public ROW to establish suitable locations for Grantee's Facilities and cooperate to minimize the economic impact associated with any relocation of Grantee Facilities; however, the City retains its authority and discretion in accordance with applicable law to design and manage the public right of way. The Grantee and City shall meet at least annually to forecast potential construction, relocation and other activities which may be subject to this Franchise.

**SECTION 5. SUPPLYING MAPS.** Grantee shall maintain maps and data pertaining to the location of Grantee Facilities on file at its corporate offices or at an office in Oregon. After providing Grantee with twenty-four (24) hours prior notice, the City may inspect the maps (excluding Grantee proprietary information) at any time during Grantee's business hours. Upon request of the City and without charge, Grantee shall furnish current maps to the City by electronic data in read-only format showing the general location of Grantee Facilities, excluding Grantee proprietary information. Unless required by law, the City will not sell or provide Grantee prepared maps or data to third parties without written permission from Grantee. Upon request of Grantee, the City will

make available to Grantee any relevant City prepared maps or data at no charge to Grantee.

**SECTION 6. EXCAVATION.** Subject to Sections 4 and 7, and after obtaining any permits required by the City, as well as complying with ORS 757.542 et seq. (Oregon Utility Notification Center) as they may be amended from time to time, Grantee may make all necessary excavations within the Public ROW for the purpose of installing, repairing, upgrading or maintaining Grantee Facilities, except that in the case of an Emergency, no permit shall be required prior to excavation. Should there be a direct conflict between any terms or conditions stated in a permit granted by the City and the terms of this Franchise, the terms of this Franchise shall control. All excavations made by Grantee in the Public ROW shall be properly safeguarded for the prevention of accidents in accordance with applicable local, state, and federal laws and regulations. All of Grantee's work under this Section shall be completed in strict compliance with all applicable rules, engineering standards, regulations and ordinances of the City. Should a customer of Grantee be required, pursuant to Grantee's tariff on file with the OPUC, to make excavations that are located in the Public ROW, the City agrees that Grantee shall not be responsible or liable for any failure by such customer to comply with any applicable rules, regulations, ordinances of the City and/or with City standards, but Grantee shall verify that the customer has a permit before connecting its facilities.

**SECTION 7. RESTORATION AFTER EXCAVATION.** Except as otherwise provided for in this Section, Grantee shall restore the surface of the Public ROW in the area disturbed by any excavation by Grantee to at least the same condition that it was in prior to excavation, in accordance with generally applicable published City standards; provided, however, Grantee shall not be required, at Grantee's expense, to pave a gravel street that was gravel prior to the excavation, install sidewalk panels or curbs that did not exist prior to the excavation, or construct additional improvements in the Public ROW that did not exist prior to the excavation. If Grantee fails to restore the Public ROW to at least the same condition that it was in prior to the excavation, in accordance with generally applicable published City standards, the City shall give Grantee written notice and provide Grantee a reasonable period of time, not to exceed thirty (30) days, to restore the Public ROW. If the work of Grantee creates a public safety hazard as determined by

the Engineering Director, Grantee may be required to repair or restore the Public ROW within twenty-four (24) hours notice from the City, or such time as agreed between the Engineering Director and Grantee, taking into consideration weather and other relevant factors. Should Grantee fail to make such repairs or restorations within the aforementioned time frames, the City may, after providing notice to Grantee and a reasonable opportunity to cure, refill or repave (as applicable) any opening made by Grantee in the Public ROW and the expense thereof shall be paid by Grantee. The City reserves the right, after providing notice to Grantee, to remove or repair any work completed by Grantee, which, in the determination of the Engineering Director is inadequate, using a qualified contractor in accordance with applicable state and federal safety laws and regulations, and Grantee's construction standards as provided to the OPUC. The cost thereof, including the cost of inspection and supervision, shall be paid by Grantee. In the event that Grantee's work is coordinated with other construction work in the Public ROW, the Engineering Director may excuse Grantee from restoring the surface of the Public ROW, providing that as part of the coordinated work, the Public ROW is restored to good order and condition.

#### **SECTION 8. RELOCATION.**

**(A) Permanent Relocation Required by City –** This subsection (A) covers permanent relocation of overhead Grantee Facilities that will remain overhead, and underground Grantee Facilities that will remain underground. The City shall have the right to require Grantee to change the location of Grantee's Electric Light and Power System located in the Public ROW when it is necessary for any public project or public improvement in the Public ROW, and, unless otherwise agreed, the expenses thereof shall be paid by Grantee. The foregoing sentence shall not apply if any of the of the following is true: a) the project or improvement necessitating the change in location will not be owned 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 located in the Public ROW. The City agrees to provide a suitable location in the Public ROW, as mutually agreed, or, failing that, to provide either the necessary easements from the private property owners or PUEs for Grantee Facilities, that meet the Grantee's construction standards as provided to the OPUC and NESC

requirements, to accommodate and permit upgrade of Grantee Facilities in order to maintain sufficient service. Should Grantee fail to remove or relocate any such Grantee Facilities within ninety (90) days after the date established by the City, which, except in the event of a public Emergency, shall not occur sooner than ninety (90) days after the City provides written notice to remove/relocate to Grantee, the 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 Grantee's construction standards as provided to the OPUC, and the expense thereof shall be paid by Grantee. However, when the City requests a subsequent relocation of all or part of the same Grantee Facilities less than two years after the initial relocation that is necessary or convenient for a public project, and not at the request of or to accommodate a third party, the subsequent relocation shall be at the expense of the City, 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.

**(B) Notice.** The City will endeavor to provide as much notice prior to requiring Grantee to relocate Grantee Facilities as reasonably possible. The notice shall specify the date by which the existing Grantee Facilities must be removed or relocated. Nothing in this Section 8 shall prevent the City and Grantee from agreeing, either before or after notice is provided, to a mutually acceptable schedule for relocation. The City and Grantee agree to cooperate in the design phase to minimize the economic impact of such relocation on Grantee and the City.

**(C) Permanent Relocation - Undergrounding.** This subsection (C) applies to conversions of Grantee Facilities from overhead to underground regardless of whether or not such conversion is made in conjunction with a public project. As permitted by, and in accordance with City ordinance and any applicable law, administrative rule, or regulation, the City may require Grantee to convert any overhead Grantee Facilities to underground Grantee Facilities at the same or different locations, subject to the NESC and Grantee's engineering and safety standards. This subsection shall not apply to

Grantee Facilities used for or in connection with the transmission of electric energy at nominal voltages in excess of 35,000 volts or to pedestals, cabinets or other above-ground equipment. Any such underground relocation shall be consistent with applicable long-term development plans or projects of the City, or as approved by the City. The expense of such a conversion shall be paid by Grantee, and Grantee may recover its costs from its customers in accordance with state law, administrative rule, or regulation. The City agrees to provide a suitable location in the Public ROW, as mutually agreed, or, failing that, some other suitable location on city-owned land, if reasonably available, that meets the Grantee's construction standards as provided to the OPUC and NESC requirements to accommodate and permit upgrade of Grantee Facilities in order to maintain sufficient service. Nothing in this subsection prevents the City and Grantee from agreeing to a different form of cost recovery on a case-by-case basis consistent with applicable statutes, administrative rules, or regulations.

**(D) Temporary Relocation at Request of City.** This subsection (D) covers temporary relocation of overhead Grantee Facilities that will remain overhead, as well as underground Grantee Facilities that will remain underground. The City may require Grantee to temporarily remove and relocate Grantee Facilities by giving sixty (60) days notice to Grantee. Prior to such relocation, the City agrees to provide a suitable location for Grantee facilities in the Public ROW, as mutually agreed, or a temporary construction easement that meets the NESC requirements and the Grantee's construction standards as provided to the OPUC. Such temporary construction easement shall allow the Grantee to place its Facilities on the easement in order to maintain sufficient service until such time as the Grantee moves its Facilities to their permanent location. The cost of temporary removal or relocation of Grantee Facilities that is necessary or convenient for public projects, as well as cost of replacing Grantee Facilities in their permanent location, shall be paid by Grantee. However, when the City requests a subsequent relocation of all or part of the same Grantee Facilities less than two years after the initial relocation, that is necessary or convenient for a public project and not at the request of or to accommodate a third party, the subsequent relocation shall be at the expense of the City, 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.

**(E) Relocation at Request of or to Accommodate Third Party.** In the event that any relocation of Grantee Facilities is requested by or is to accommodate a third party, Grantee shall seek reimbursement from the third party consistent with the Grantee's tariff on file with the OPUC and not from the City. Such relocation shall be consistent with any applicable long-term development plan or projection of the City or approved by the City. If the relocation of Grantee Facilities is caused or required by the 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 8.

**(F) Temporary Relocation at Request of Third Parties.** Whenever it is necessary to temporarily relocate or rearrange any Grantee Facility in order to permit the passage of any building, machinery or other object, Grantee shall perform the work after receiving sixty (60) business days written notice from the persons desiring to move the building, machinery or other object. The notice shall: (1) demonstrate that the third party has acquired at its expense all necessary permits from the City; (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 Grantee's costs; (4) provide that the requestor shall indemnify and hold harmless the City and Grantee 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 Grantee Facilities; and (5) be accompanied by a cash deposit or other security acceptable to Grantee for the costs of relocation. Grantee in its sole discretion may waive the security obligation. The cash deposit or other security shall be in an amount reasonably calculated by Grantee to cover Grantee's costs of temporary relocation and restoration. All temporary relocations under this subsection shall comply with ORS 757.805.

**SECTION 9. PUBLIC ROW VACATION.** If all or a portion of the Public ROW used by Grantee is vacated by the City during the Term, and if reasonably possible, the City shall either condition the approval of the vacation on the reservation of an easement for Grantee Facilities in their then-current location that prohibits any use of the vacated



property that interferes with Grantee's full enjoyment and use of its easement, or permit Grantee Facilities to remain in a PUE. If neither of these options is reasonably possible, Grantee shall, after notice from the City and without expense to the City, remove Grantee Facilities from such vacated Public ROW, restore, repair or reconstruct the Public ROW where such removal has occurred in accordance with Section 7. In the event of failure, neglect or refusal of Grantee, after providing Grantee with ninety (90) days prior written notice, to repair, restore, or reconstruct such Public ROW, the City may complete such work or cause it to be completed by a qualified contractor in accordance with applicable state and federal safety laws and regulations, and the cost thereof shall be borne by the Grantee. Upon request, the City will cooperate with Grantee to identify alternative locations within the Public ROW for Grantee Facilities if they are not permitted to remain in the vacated area.

**SECTION 10. CITY PUBLIC WORKS AND IMPROVEMENTS.** Nothing in this Franchise shall be construed in any way to prevent the City from excavating, grading, paving, planking, repairing, widening, altering, or completing any work that may be needed or convenient in the Public ROW that is consistent with the NESC. The City shall coordinate any such work with Grantee to avoid, to the extent reasonably foreseeable, any obstruction, injury or restrictions on the use by Grantee of any Grantee Facilities. Nothing in this Section relieves either party from its obligations set forth in Sections 4(E) and 8.

**SECTION 11. USE OF GRANTEE FACILITIES.** City shall have the right to string wires on Grantee's poles or run wires in Grantee's trenches and/or available conduit for municipal purposes and to attach fire and police alarm, communication equipment and traffic control signs/devices to, as well as to hang flower baskets provided and maintained by the City or a City approved non-governmental organization on Grantee's poles, provided that such wires, equipment, sign, devices and flower baskets: a) do not unreasonably interfere with Grantee operations; b) conform to the NESC; and c) the City's excess capacity on any wires and equipment is not leased to, sold to or otherwise used by non-governmental third parties. Grantee shall not charge the City for such attachments to its poles or in its conduits; however, the City shall maintain permits for these attachments and be responsible to pay for any make-ready and inspections Grantee

must perform in order to provide access to Grantee Facilities for City wires and equipment in accordance with the NESC. Should any of the City's attachments to Grantee Facilities violate the NESC, the City shall work with Grantee to address and correct such violations in an agreed-upon period of time. The City shall indemnify and hold Grantee harmless from loss or damage resulting from the presence of City's wires and equipment on or in Grantee Facilities. For purposes of this Franchise, "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.

**SECTION 12. PAYMENT FOR USE OF PUBLIC ROW.**

**(A) Use of Public ROW.** In consideration for its use of the Public ROW in accordance with the terms of this Franchise, Grantee agrees to pay the City an amount equal to 3 1/2 percent of the Gross Revenue received by Grantee from its customers within the City. The current year's franchise fee shall be based on the Gross Revenue collected by Grantee during the previous calendar year from Grantee's customers, and shall be paid on an annual basis. To the extent permissible under state law and regulation, the payment imposed by this subsection shall be considered an operating expense of Grantee and shall not be itemized or billed separately to consumers within the City.

**(B) Property Tax Limitations Do Not Apply.** The payment described in this Section 12 is not subject to the property tax limitations of Article XI, Sections 11(b) and 11(19) of the Oregon Constitution and is not a fee imposed on property or property owners by fact of ownership.

**(C) Privilege Tax.** The City shall retain the right, as permitted by Oregon law, to charge a privilege tax based on a percentage of the Gross Revenue earned from Grantee's customers within the City in addition to the payment amounts set forth in subsection (A). The City shall provide Grantee at least ninety (90) days notice prior to any privilege tax or increase in privilege tax becoming effective. Grantee shall follow state regulations regarding the inclusion of such privilege tax as an itemized charge on the electricity bills of its customers within the City.

**(D) Remittance of Annual Payment.** Grantee shall remit to the Director of Finance on or before the first (1st) day of April of each year, the annual 3 1/2% franchise fee payment,

as well as payment of any additional privilege tax, to be made in such year. Payment must be made in immediately available federal funds. No later than the date of the annual payment, Grantee shall provide the City a statement, under oath, showing the Gross Revenue for the preceding year.

**(E) Acceptance of Payment.** Acceptance by the City of any payment due under this Section shall not be a waiver by the City of any breach of this Franchise occurring prior to the acceptance, nor shall the acceptance by the City preclude the City from later establishing that a larger amount was actually due, or from collecting the balance due to the City.

**(F) Late Payments.** Interest on late payments shall accrue from the due date based on the statutory rate designated in ORS 82.010 as of the due date, not to exceed 9% per annum, 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.

**(G) No Exemption From Other Fees or Taxes.** Payment of the amounts described in this Section 12 shall not exempt Grantee from the payment of any other license fee, tax or charge on the business, occupation, property or income of Grantee that may be lawfully imposed by the City or any other taxing authority, except as may otherwise be provided in the ordinance or laws imposing such other license fee, tax or charge.

**(H) Direct Access and Volumetric Methodologies.** The City may, consistent with state law, direct that the payments made under this Section 12 be based on volume-based methodologies as specifically described in ORS 221.655 instead of the formula set out in subsections 12 (A) and (C). Notice must be given to Grantee in writing for the subsequent payments to be made using volume-based methodology. The volumetric calculation shall apply to payments made in one calendar year (based on January 1 to December 31 billings from the previous calendar year). The choice to use volumetric methodology must be renewed annually by the City. No notice is necessary if the City chooses to remain on the revenue-based calculation.

**(I) Payment Obligation Survives Franchise.** If prior to the expiration of this Franchise the parties do not finish negotiation of a new franchise agreement, the obligation to make the payments imposed by this Section 12 shall survive expiration of this Franchise until a

new franchise agreement becomes effective and supersedes this Franchise. In the event this Franchise is terminated before expiration, Grantee shall make the remaining payments owed, if any, within ninety (90) days of the termination date.

### **SECTION 13. AUDIT.**

**(A) Audit Notice and Record Access.** The City may audit Grantee's calculation of Gross Revenues. Within ten (10) business days after receiving a written request from the City, or such other time frame as agreed by both parties, Grantee shall furnish the City and any auditor retained by the City: (1) information sufficient to demonstrate that Grantee is in compliance with this Franchise; and (2) access to all books, records, maps and other documents maintained by Grantee with respect to Grantee Facilities that are necessary for the City to perform such audit. Grantee shall provide access to such information to City within the City, or the Portland, Oregon metropolitan area, during regular Grantee business hours.

**(B) Audit Payment.** If the City's audit shows that the amounts due to the City are higher than those based on the Grantee's calculation of Gross Revenue, then Grantee shall make a payment for the difference within sixty (60) days after the delivery to Grantee of the audit results. In addition to paying any underpayment, Grantee shall pay interest from the original due date based on Grantee's cost of debt as approved by the OPUC as of the due date plus 1%, but not penalties, as specified in this Franchise. In the event the City's audit shows that Grantee's calculation of Gross Revenue resulted in an overpayment to the City by five percent (5%) or more in any one year, the Grantee may deduct such overpayment from the next annual franchise fee payment. If the City's audit shows that the amounts due to the City based on the Grantee's calculation of Gross Revenue deviated by five percent (5%) or more in any one year from the City's calculation during the audit, Grantee shall reimburse the City for the incremental cost associated with the audit, not to exceed one percent (1%) of the total annual franchise fee payment for the applicable audit period.

### **SECTION 14. TERMINATION AND REMEDIES.**

**(A) By City for Cause.** If Grantee ceases to maintain Grantee Facilities in accordance with the maintenance commitments outlined in the Service Quality Measures Review filed with the OPUC, and this causes an increase in the risk to the public of personal

injury or property damage, the City shall notify Grantee and Grantee shall have thirty (30) days after the date of the notice to eliminate such risk or, if such risk can not be eliminated within thirty (30) days, such reasonable time period as is required to eliminate such risk and Grantee shall bear all costs related to remedying the risk. If Grantee does not eliminate the risk in accordance with the preceding sentence, the City may then terminate this Franchise by providing Grantee written notice of termination.

**(B) By City if City Will Provide Service.** The City may terminate this Franchise upon one year's written notice to Grantee in the event that the City decides to engage in public ownership of the electric facilities located in the Public ROW and the public distribution of electric energy to customers throughout the City in accordance with ORS 758.470.

**(C) City Reserves Right to Terminate.** In addition to any other rights provided for in this Franchise, the City reserves the right, subject to subsections 14 (E) and (F), to terminate this Franchise in the event that:

- (1) The Grantee materially violates any material provision of this Franchise;
- (2) The Grantee is found by a court of competent jurisdiction to have practiced any material fraud or deceit upon the City;
- (3) There is a final determination that Grantee has failed, refused, neglected or is otherwise unable to obtain or maintain Grantee's service territory designation required by any federal or state regulatory body regarding Grantee's operation of Grantee's Electric Light and Power System; or
- (4) Grantee becomes unable or unwilling to pay its debts, or is adjudged bankrupt.

**(D) Material Provisions.** For purposes of this Section 14, the following are material provisions of this Franchise, allowing the City to exercise its rights under this Section 14 or as set forth elsewhere in this Franchise:

- (1) The invalidation, failure to pay or any suspension of Grantee's payments of franchise fees or privilege taxes to the City for use of the Public ROW under this Franchise;
- (2) Any failure by Grantee to submit timely reports as may be requested by the City, regarding the calculation of its franchise fees or privilege taxes paid or to be paid to the City;
- (3) Any failure by Grantee to maintain the liability insurance or self insurance required under this Franchise;

(4) Any failure by Grantee to provide copies of requested information as provided under Sections 4, 5, and 13 above; and

(5) Any failure by Grantee to otherwise substantially comply with the requirements of Section 4 through Section 20 of this Franchise, unless otherwise agreed.

**(E) Notice and Opportunity to Cure.** The City shall provide Grantee thirty (30) days prior written notice of its intent to exercise its rights under this Section 14, stating the reasons for such action. If Grantee cures the basis for termination or if Grantee initiates efforts satisfactory to the City to remedy the basis for termination and the efforts continue in good faith within the thirty (30) day notice period, the City shall not exercise its remedy rights. If Grantee fails to cure the basis for termination or if Grantee does not undertake and/or maintain efforts satisfactory to the City to remedy the basis for termination within the thirty (30) day notice period, then the City Council may impose any or all of the remedies available under this Section 14.

**(F) Remedies.** In determining which remedy or remedies are appropriate, the City shall consider the nature of the violation, the person or persons burdened by the violation, the nature of the remedy required in order to prevent further such violations, and any other matters the City deems appropriate.

**(G) Financial Penalty.** In addition to any rights set out elsewhere in this Franchise, as well as its rights under the City Code or other law, the City reserves the right at its sole option to impose a financial penalty of up to \$500.00 per day per material violation of a material provision of this Franchise when the opportunity to cure has passed.

**SECTION 15. ASSIGNMENT OF FRANCHISE.** Grantee may not sell, assign, transfer, or convey this Franchise to a third party without the City Council giving its consent in a duly passed ordinance. Upon obtaining such consent, this Franchise shall inure to and bind such third party. Grantee shall not sell or assign this Franchise to an entity that is not authorized by the OPUC to provide electric service to retail consumers in the City or is not otherwise authorized to provide electric service to retail consumers under Oregon law. Prior to any proposed transfer, Grantee shall be in full compliance with this Franchise and the proposed transferee shall agree in writing to be bound by this Franchise. In the event Grantee is purchased by or merged into another entity and Grantee survives such purchase or merger as a public utility, Grantee shall provide notice



to the City of such purchase or merger, but shall have no obligation under this Franchise to obtain the consent of the City Council for such purchase or merger.

**SECTION 16. REMOVAL OF FACILITIES.** If this Franchise is terminated or expires on its own terms and is not replaced by a new franchise agreement or similar authorization, the City may determine whether Grantee Facilities are to be removed from the Public ROW or remain in place. The City shall provide written notice of any requirement to remove Grantee Facilities and shall provide Grantee sixty (60) days to comment on such requirement to move Grantee Facilities. Following consideration of any such comments, the City Manager may issue an order requiring removal of Grantee Facilities within nine (9) months after such order is declared unless Grantee has requested permission to abandon facilities in place and City has granted permission to do so. The City and Grantee may mutually agree to longer time period for removal of abandoned facilities.

**SECTION 17. NONDISCRIMINATION.** Grantee shall provide service to electric light and power consumers in the City without undue discrimination or undue preference or disadvantage, in accordance with Oregon law.

**SECTION 18. INDEMNIFICATION.** To the fullest extent permitted by law, Grantee shall indemnify and hold harmless the City against any and all claims, damages, costs and expenses, including attorney's fees and costs, to which the City may be subjected as a result of any negligent or willful misconduct of Grantee, or its affiliates, officers, employees, agents, contractors or subcontractors, arising out of the rights and privileges granted by this Franchise. The obligations imposed by this Section are intended to survive termination of this Franchise.

**SECTION 19. INSURANCE.** Grantee shall obtain and maintain in full force and effect, for the entire Term, the following insurance covering risks associated with Grantee's ownership and use of Grantee Facilities and the Public ROW:

(A) Commercial General Liability insurance covering all operations by or on behalf of Grantee for Bodily Injury and Property Damage, including Completed Operations and Contractors Liability coverage, in an amount equal to Two Million Dollars (\$2,000,000.00) per occurrence and Three Million Dollars (\$3,000,000.00) in the aggregate.



**(B)** Business Automobile Liability insurance to cover any vehicles used in connection with its activities under this Franchise, with a combined single limit equal to Two Million Dollars (\$2,000,000.00) per accident.

**(C)** Workers' Compensation coverage as required by law and Employer's Liability Insurance with limits of \$1,000,000. With the exception of Workers' Compensation and Employers Liability coverage, Grantee shall name the City as an additional insured on all applicable policies. All insurance policies shall provide that they shall not be canceled or modified unless thirty (30) days prior written notice is provided to the City. Grantee shall provide the City with a certificate of insurance evidencing such coverage as a condition of this Franchise and shall provide updated certificates upon request.

**(D) Index for minimum coverage.**

**(1)** The minimum coverages required in subsections A through C of this Section shall be automatically adjusted to track percentages of statutory increases to the City's exposure under the Oregon Tort Claims act. For every year this Franchise is in effect, Grantee shall ensure it has insurance coverage in the amount stated in subsections A through C, increased as follows:

(a) On or before July 1, 2015, Grantee shall obtain or maintain insurance policies with minimum coverage amounts stated in the Franchise, increased by 5.25%.

(b) On or before July 1, 2016, and on July 1 of every year thereafter, Grantee shall obtain or maintain policies with minimum coverage calculated by increasing the coverage amounts applicable to the previous year by the lesser of (i) three percent, or (ii) the percentage increase, if any, in the cost of living for the previous calendar year, based on changes in the Portland-Salem, OR-WA Consumer Price Index for All Urban Consumers for All Items as published by the Bureau of Labor Statistics of the United States Department of Labor.

**(2)** Grantee is responsible for ensuring that its insurance coverage satisfies the increased minimums embodied in this subsection (E). The City reserves the right to request copies of updated certificates of insurance for inspection.

**(E) In Lieu of Insurance.** In lieu of the insurance policies required by this Section 19, Grantee shall have the right to self-insure any and all of the coverage outlined hereunder. If Grantee elects to self-insure, it shall do so in an amount at

least equal to the coverage requirements of this Section 19 in a form acceptable to the City. Grantee shall provide proof of self-insurance to the City before this Franchise takes effect and thereafter upon request by the City.

**SECTION 20. DAMAGE TO FACILITIES.** Should the City damage Grantee's Facilities as a result of or in connection with any work by or for the City in the Public ROW, the City shall be liable for any damage or loss of such Facilities arising out of the negligent, willful, intentionally tortuous, 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 City shall not be liable for any consequential damages or losses resulting from any damage to or loss of any facility as a result of or in connection with any work by or for the City unless the damage or loss is the direct and proximate result of willful, intentionally tortious, or malicious acts or omissions by the City, its employees, or agents. In such case, the City shall indemnify and hold harmless Grantee against any and all claims, damages, costs and expenses, including attorney's fees and costs, arising from, 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 Franchise.

**SECTION 21. LIMITATION ON PRIVILEGES.** All rights and authority granted to Grantee by the City under this Franchise are conditioned on the understanding and agreement that the privileges in the Public ROW shall not be an enhancement of Grantee's properties or an asset or item of ownership of Grantee.

**SECTION 22. FRANCHISE NOT EXCLUSIVE.** This Franchise is not exclusive and shall not be construed to limit the City from granting rights, privileges and authority to other persons similar to or different from those set forth in this Franchise.

**SECTION 23. REMEDIES AND PENALTIES NOT EXCLUSIVE.** All remedies and penalties under this Franchise, including termination, are cumulative and not exclusive, and the recovery or enforcement by one available

remedy or imposition of a penalty is not a bar to recovery or enforcement by any other remedy or imposition of any other penalty. The City reserves the right to enforce the penal provisions of any City ordinance or resolution and to avail itself to any and all remedies available at law or in equity. Failure to enforce any term, condition or obligation of this Franchise shall not be construed as a waiver of a breach of any term, condition or obligation of this Franchise. A specific waiver of a particular breach of any term, condition or obligation of this Franchise shall not be a waiver of any other, subsequent or future breach of the same or any other term, condition or obligation of this Franchise.

**SECTION 24. SEVERABILITY CLAUSE.** If any section, subsection, sentence, clause, phrase, or other portion of this Franchise is, for any reason, held to be invalid or unconstitutional by a court of competent jurisdiction, all portions of this Franchise that are not held to be invalid or unconstitutional shall remain in effect until this Franchise is terminated or expired. After any declaration of invalidity or unconstitutionality of a portion of this Franchise, either party may demand that the other party meet to discuss amending the terms of this Franchise to conform to the original intent of the parties. If the parties are unable to agree on a revised franchise agreement within ninety (90) days after a portion of this Franchise is found to be invalid or unconstitutional, either party may terminate this Franchise by delivering one hundred and eighty (180) days notice to the other party.

**SECTION 25. ACCEPTANCE.** Within thirty (30) days after the ordinance adopting this Franchise is passed by the City Council, Grantee shall file with the City Recorder its written unconditional acceptance or rejection of this Franchise. If Grantee files a rejection, this Franchise shall be null and void. If Grantee fails to file a written unconditional acceptance or rejection of this Franchise, the City may withdraw this Franchise at any time prior to January 31, 2014.

**SECTION 26. NOTICE.** Any notice provided for under this Franchise 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 Milwaukie, Oregon  
10722 SE Main St.  
Milwaukie, Oregon 97222  
FAX # (503) 652-4443**

**With a copy to:**

**Jordan Ramis PC  
Two Centerpointe Drive  
6th Floor  
Lake Oswego, OR 97035 FAX # (503) 598-7373**

**If to the Grantee:**

**Portland General Electric Company  
Att: Government Affairs  
121 SW Salmon St  
Portland, OR 97204  
FAX: (503) 464-2354**

**With a copy to:**

**Portland General Electric Company  
Att: General Counsel  
One World Trade Center, 17<sup>th</sup> Floor  
121 SW Salmon Street  
Portland, OR 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).

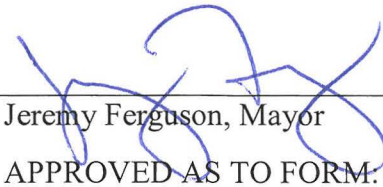
IN WITNESS WHEREOF, the parties, through their duly authorized representatives, have executed this Franchise as of the dates indicated below.


Read for the first time on **11/19/2013**, and moved to second reading by **5:0** vote of the City Council.

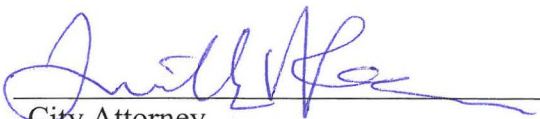
Read for the second time and adopted by the City Council on **11/19/2013**.

Signed by the Mayor on **11/21/2013**.

ATTEST:

  
\_\_\_\_\_  
Jeremy Ferguson, Mayor  
APPROVED AS TO FORM:  
Jordan Ramis PC

  
\_\_\_\_\_  
Pat DuVal, City Recorder

  
\_\_\_\_\_  
City Attorney

## ACCEPTANCE OF FRANCHISE

WHEREAS, the City of Milwaukie, Oregon , on the Date of November 19, 2013, passed Ordinance 2074 which is to take effect January 1, 2014 and is entitled as follows, to-wit:

AN ORDINANCE OF THE CITY OF MILWAUKIE GRANTING PORTLAND GENERAL ELECTRIC COMPANY A NON-EXCLUSIVE FRANCHISE FOR TEN YEARS TO ERECT, CONSTRUCT, MAINTAIN, REPAIR, UPDATE AND OPERATE AN ELECTRIC LIGHT AND POWER SYSTEM WITHIN THE CITY OF MILWAUKIE, SETTING THE TERMS AND CONDITIONS OF THE FRANCHISE AND PROVIDING AN EFFECTIVE DATE.

NOW, RHREFORE, the undersigned Portland General Electric Company, the grantee named in said Ordinance, does for itself and its successors and assigns accept the terms, conditions and provisions of Ordinance No. 2074 and agrees to be bound thereby and comply therewith.

PORTLAND GENERAL ELECTRIC COMPANY

By: Bill Richardson

Title: SR VICE PRESIDENT

Date: 12/23/13