

ORDINANCE NO. 951
GRANTING A FRANCHISE TO
BIG BEND ELECTRIC COOPERATIVE,
INC. FOR THE CONSTRUCTION,
OPERATION AND MAINTENANCE OF
ELECTRIC FACILITIES WITHIN THE
CITY OF OTHELLO

The City Council of the City of Othello does ordain as follows:

An ordinance granting a non-exclusive franchise to Big Bend Electric Cooperative, Inc., (hereinafter referred to as "Grantee"), a corporation organized under the laws of the State of Washington, to occupy and use the public rights of way, and upon approval, other public places in the City of Othello, (hereinafter referred to as "Grantor"), for the purpose of providing electrical utility service to the public for a term of twenty-five (25) years, subject to prior termination or amendment under certain conditions subjecting such franchise privilege at all times to regulation by state and local public authority and specifying other limitations, terms, and conditions governing the exercise of said franchise.

SECTION I: GRANT OF FRANCHISE

A. The purpose of this ordinance is to grant a franchise for the construction, operation, and maintenance of electric transmission and distribution facilities for the distribution of electrical power by Grantee within the City of Othello, Washington. The franchise shall not be construed to extend privileges beyond this grant. It is an additional purpose of this franchise to set forth Grantee's responsibilities and obligations, accepted and agreed upon by Grantee, as reasonably related to the enjoyment of franchise privileges.

B. The Grantee is hereby granted for a term of twenty-five (25) years from the date this ordinance becomes effective unless sooner abandoned, revoked, terminated, or amended under the provisions of Section 1.C., a franchise to establish, construct and maintain, extend and operate, over, along, across, and under the streets, avenues, alleys, bridges, and, upon specific approval, other public places and ways, hereafter referred to as "franchised areas," within the corporate limits of the City of Othello, facilities and equipment used or to be used for the purpose of an electric distribution system in said areas of the City of Othello, including all poles, towers, underground conduits and lines, wires and cables, vaults and manholes for the installation, storage, operation, and maintenance of electrical equipment so used or to be used. This provision shall not be construed to waive any requirement of Grantee to obtain public or private easements or comply with other requirements of state or federal law.

C. The grant of the franchise under this ordinance is non-exclusive. The City expressly reserves the right to grant similar permission to others and the right of the City itself to engage in such business at any time.

D. The City hereby reserves the right to amend this franchise ordinance to adjust to conditions created by significant technological innovations or advancements in the electrical

transmission and distribution industry, following a determination by the City Council that such innovations or advancements are feasible and cost effective and affect, or may affect Grantee's exercise of the franchise rights granted by this ordinance. Prior to any amendment of the franchise ordinance by the City under the authority of this section, Grantee and the City shall conduct negotiations and discussions on the best manner of making the necessary adjustments to the Grantee's franchise obligations.

SECTION 2: GRANTEE'S COMPLIANCE WITH LAWS:
 CITY'S RESERVATION OF POWERS
 AND AUTHORITY

- A. A condition of this franchise is Grantee's acceptance of the obligation to comply with all federal, state, or local laws or regulations applicable to the exercise of franchised functions or franchise obligations.
- B. By way of limitation of the foregoing and in addition, the City reserves all lawful powers and franchise authority. This franchise is subject to exercise of such power and authority as the City may now or hereafter determine proper, whether by ordinance, resolution, or administrative orders.
- C. The authority reserved by the City shall relate, not by way of limitation, to the location of Grantee's facilities or other matters to the extent the same may affect municipal interests. It shall include the right to curtail or exclude on a temporary or permanent basis a specific route or installation of Grantee's facilities because of inadequate space or other reasonable cause.
- D. Whenever any City requirement or proposal shall be asserted to be prohibited or limited by any regulatory authority, whether because of preemption, conflict, inconsistency, or for any other reason, Grantee agrees, in good faith, to seek a modification thereof to accommodate the City or, where this is not possible, to cooperate with the City to make such adjustments in the relationship of the parties as may be possible. The City, likewise, agrees to cooperate with Grantee in good faith so as not to unreasonably intrude into Grantee's business operations. Grantee shall not rely upon this franchise or any prior City action or inaction as an estoppel or bar to invoke this provision.

SECTION 3: GRANTEE'S GENERAL
 OBLIGATIONS

- A. The Grantee acknowledges that its franchise privileges involve utilization of a scarce public resource: the area above, over, along, and below the public rights of way of the City. This scarcity arises from current or projected space and use limitations on public rights of way and public property in franchised areas and the public and municipal accommodations to Grantee's enjoyment of this franchise. The Public Works Director may determine, in the exercise of reasonable discretion, when and where reasonable accommodation shall be made by Grantee to the City for public needs or, where requested, other third party needs. For items involving substantial cost or other burdens on the Grantee, the Grantee may request City Council review of the Public Works Director's decision.

B. All of Grantee's property and facilities shall be constructed, operated, and maintained in good order and condition and in accordance with standard engineering practice. The electrical portions of Grantee's systems, including standards and/or poles, will be in accordance with applicable portions of the National Electric Safety Code and the State of Washington Electrical Construction Code and other applicable industry standards, the latter as determined by the Grantee.

C. The Grantee shall allow the minimum separation required by the State of Washington Electrical Construction Code and the National Electric Safety Code and the Grantee's construction standards, if applicable, between any city attachments and the Grantee's power conductors on the poles.

D. The minimum height of lines above the ground shall be in compliance with applicable provisions of the National Electrical Safety Code or Washington State Electrical Construction Code.

**SECTION 4: GRANTEE'S OBLIGATIONS RE:
RELOCATION OF FACILITIES**

The City reserves the right, as defined by city ordinance or when required to conform to city construction or reconstruction of public projects, at Grantee's sole expense and liability at all times to require the relocation, modification, or reconstruction of any vault, poles, power lines, and/or other physical facilities installed by the Grantee, its successors, assigns, or permittees, whether under or above the surface of any public right of way, public property, or other franchised area, whenever, in the judgment of the City, such relocation or reconstruction is deemed necessary.

**SECTION 5: UNDERGROUNDING OF FACILITIES
GENERAL REQUIREMENTS**

A. The city may require the Grantee to install its wires underground as defined by city ordinance. Permission to Grantee to place facilities underground, subject to the requirements of this franchise is hereby granted. For the purpose of carrying into effect the privileges granted thereunder, Grantee is authorized at any time to make all necessary excavations in the streets, alleys, roads, rights of way and public grounds within the franchised area, but such excavation shall be carried out with reasonable dispatch and with as little interference with or inconvenience to the rights of the public as may be feasible. Grantee shall restore all streets, alleys, roads, rights of way and public grounds in as good and safe condition in all respects as before the commencement of such work. Once a paved surface in any franchised area has been cut by the Grantee, it shall be properly maintained in good condition and repair by Grantee until such time as the area is resurfaced or reconstructed by the City.

B. In case any obstruction caused by Grantee shall remain longer than seven (7) days after notice to remove it, or in case of neglect by Grantee to safeguard any dangerous places, Grantor may remove such obstruction or safeguard such dangerous places at the

expense of Grantee.

C. Where wires in the franchised area are removed from aboveground and placed underground, the installation shall be so installed underground by the Grantee and the area shall be restored to original condition or such equivalent condition as directed by the Public Works Director.

SECTION 6: GRANTEE'S OBLIGATIONS
OF NON-OBSTRUCTION

A. The Grantee, in the exercise of the rights herein granted, shall erect poles, string wires, and build conduits in such a manner as to not unreasonably interfere with other uses of franchised areas. This obligation shall not permit unreasonable interference with Grantee's installations by other City permittees or franchisees. City installed utilities and support of their utilities shall have first priority in the allocation of space and routes.

B. It remains the responsibility of the Grantee to anticipate and avoid duplicating service, facilities, installation, or conflicts with other electric power franchises or other utilities, franchisees, or permittees. The City assumes no responsibility for such conflicts or errors.

C. All construction, installation, repair or relocation of lines and appurtenances performed by Grantee along or under the roads, rights of way or properties subject to this franchise shall be done in such a manner as not to interfere with the construction and maintenance of other utilities, public or private, drains, drainage ditches and structures, irrigation ditches and structures located therein, nor with the grading or improvement of such roads, rights of way or other public property subject to this franchise.

SECTION 7: NECESSARY CONSTRUCTION
MAINTENANCE BY GRANTOR

The laying, construction, operation and maintenance of Grantee's lines and appurtenances authorized by this franchise shall not preclude the Grantor, its agents or its contractors, from blasting, grading, excavating, or doing other necessary road work contiguous to the said lines and facilities of Grantee, provided that Grantee shall be given not less than five (5) days notice of said blasting or other work, and provided further that the Grantor, its agents and contractors shall be liable for any damages, including any consequential damages to third parties, caused by said work to any installations belonging to Grantee, if as a result of the negligence of the Grantor or Grantor's agent.

SECTION 8: EMERGENCY REMOVAL BY GRANTOR

The Grantor reserves the right to remove any such wires, poles, or apparatus ("Grantee's facilities") herein provided for in case of general conflagration or in other cases of extreme emergency where there is neither the time nor the opportunity for Grantee to perform such work. Grantor shall use reasonable care in the exercise of such emergency powers. Grantor shall indemnify and hold harmless the Grantee, its successors and assigns, against any and all property damage, personal injury, death, or other liability to third parties sustained

as a result of the negligent exercise of such reserved emergency powers, and shall, at its expense, restore Grantee's facilities removed as a result of such exercise.

SECTION 9: ADDITIONAL SPECIFIC
GRANTS OF AUTHORITY

A. The grant of this franchise specifically includes the permission by the City and acceptance of a reciprocal obligation by the Grantee to trim or otherwise remove any overhanging or interfering tree, shrub, bush, or other obstruction interfering with the Grantee's facilities. Grantee shall obtain necessary City permits for activities subject to its authority and conduct such tree trimming activities in a prudent manner. Grantee shall be fully responsible for any property damage or bodily injury claims arising from this section as provided in Section 25.

B. Grantee further agrees to temporarily raise or lower its wiring for purposes of building moving or other temporary purposes approved by the City. Where this request is made by an entity other than the City, Grantee may assess a reasonable charge therefore, including demand for payment or deposit in advance.

SECTION 10: GRANTEE'S OBLIGATIONS RE:
TAXATION, FEES, AND FINANCIAL REPORTING

A. The parties understand that the restrictions of RCW 35.21.860 forbid the imposition of a franchise fee. If, at some time, the restrictions of this statute should be removed, the Grantee and City may negotiate a fair and reasonable franchise fee.

B. This section and any franchise fee or tax, which might now or thereafter be assessed, shall not be deemed to be assessed or charged in lieu of any other lawful charge or actual administrative expense or any other source of municipal authority to receive payments in contract or law. No definition, policy, or practice of the Grantee, the WUTC, or any other third party or agency shall bind the City in computation or assessment of any fee, tax, cost, or interpretation of this franchise.

C. State statutes allow the city to impose a utility tax on sales of electrical energy within the city and that tax rate may be subject to adjustment from time to time.

D. The City reserves the right to impose financial reporting and public information requirements and designate the time and manner of payment of all fees or taxes owed by Grantee.

SECTION 11: VACATION OF PROPERTIES
BY GRANTOR

If, at any time, the Grantor shall vacate any road, right of way or other public property which is subject to rights granted by this franchise, such vacation shall be subject to the granting of a perpetual easement in favor of Grantee, its successors and assigns, for overhead and underground transmission and distribution lines and installations in place at the

time of vacation and for the purpose of operating and maintaining such facilities (except that all rights and privileges of the Grantor as defined in this agreement, shall remain in force.) Such vacation shall, by its terms, expressly prohibit any use of the vacated properties which will interfere with Grantee's full enjoyment of rights under said easement.

SECTION 12: PRESERVATION OF GRANTOR'S RIGHTS TO CONTROL

The Grantor, in granting this franchise, does not waive any rights which it may now have or may hereafter acquire with respect to road rights of way or other property of Grantor under this franchise, and this franchise shall not be construed to deprive the Grantor of any such powers, rights or privileges which it now has or may hereafter acquire to regulate the use of and to control the Grantor's roads, rights of way and other public property covered by this franchise.

SECTION 13: FRANCHISE ADMINISTRATION

A. Except where otherwise specified, the general administration of this franchise for the City is under the authority of the City Administrator. He may promulgate reasonable administrative rules consistent herewith, interpret provisions, resolve conflicts, and develop procedures needed to implement and enforce the franchise provisions. He may grant exceptions or impose additional requirements in particular circumstances in the exercise of reasonable discretion. He may issue compliance orders with a compliance schedule and terms thereof, with or without notice, and failure to adhere to the terms thereof shall be a violation of this franchise. He must give reasonable notice to Grantee and provide an opportunity for the Grantee to respond to any order or requirements, except in case of emergency or danger to the public health and safety. Grantee reserves the right to request the City council to review or clarify any action taken by the City Administrator in the administration of this franchise. For the performance of all franchise obligations, time is of the essence.

B. All City acts undertaken pursuant to this franchise shall be deemed discretionary, guided by the purpose and considerations of the public health, safety, esthetics, and convenience.

C. Any waiver by the City of any specific provision of this franchise in any particular circumstance must be in writing and signed by the City Administrator. Such waiver shall not comprise a franchise amendment and shall be effective only for such time or circumstances specified and until rescinded or modified. No action, inaction, or interpretation of the requirements of the franchise by the City shall otherwise waive or estop municipal power or authority, whether or not specifically reserved herein.

SECTION 14: CITY'S AUTHORITY RE: REVOCATION OR FORFEITURE OF FRANCHISE

A. The franchise hereby granted may be revoked by the City Council by duly enacted ordinance in the event the Grantee or any lessee or other user shall fail after

reasonable notice of demand to comply with any of the terms, conditions, or obligations imposed upon the Grantee hereunder, but the City shall have no obligation to do so. No forbearance by the City shall comprise a waiver of the City's right to enforce any provision of this franchise.

B. Upon lawful revocation or expiration of the terms of this franchise and if no renewal or extension thereof is granted, Grantee may, at the discretion of the City Council, be required, in part or entirely, to remove all its wires, poles, fixtures, conduits, and other facilities or equipment installed or used in the enjoyment of the franchise or the removal, sale, or use of such facilities and equipment may be directed, limited, or conditioned by the City by agreement or through means of any other lawful municipal power or right. The City may continue to invoke any or all provisions of this franchise against Grantee or any successor entity enjoying *de facto* franchise privileges after revocation or expiration. The City may take all other actions deemed necessary and proper by the City to accommodate the transition and to any successor as may be in the best interests of the City and its residents.

SECTION 15:

EXPANSION OF
GRANTEE'S FACILITIES

Any facilities and appurtenances in streets, alleys, rights of way and public places, incidental to the franchise system, that have been, or are at any future time acquired, leased, or utilized in any manner by Grantee are thereupon to be deemed authorized by and shall be subject to all provisions of this franchise.

SECTION 16:

CHANGE OF BOUNDARIES OF GRANTOR

Any subsequent additions or modifications of the boundaries of the Grantor, whether by annexation, consolidation or otherwise, shall be subject to the provisions of this franchise as to all such areas. Grantor shall notify Grantee of any change in boundaries as soon as the change in boundaries has been approved by the Council.

SECTION 17:

PRIOR FRANCHISES SUPERSEDED

This franchise shall update and supersede all prior franchises heretofore granted to Big Bend Electric Cooperative, Inc. or its predecessors, by Grantor, or its predecessors, and shall affirm, authorize and ratify all prior installations authorized by permits or other action not previously covered by this franchise.

SECTION 18: PROHIBITION ON TRANSFER OF FRANCHISE RIGHTS

The franchise hereby granted shall not be sold, leased, assigned, or otherwise alienated without the express consent of the City, expressed by ordinance of the City Council passed for that purpose, and no rule of estoppel shall be invoked against the City in case it shall assert the invalidity of any attempted transfer in violation of this section. Such consent shall not be unreasonably withheld. The consent of the City is hereby expressly given to the mortgaging of the electric utility property and facilities of the Grantee within the City, under any presently outstanding or future mortgage or mortgages given to secure any bonds or other bona fide

indebtedness of the Grantee, and the purchase at any foreclosure sale, may operate the properties under this franchise upon complying with the applicable provisions of the City charter, ordinances, regulations, and this franchise. The City reserves the right to invoke any or all provisions of this franchise upon the Grantee's successors, assigns, judgment creditors, or distributee of facilities or property used in enjoyment of privileges conferred herein, whether or not stated elsewhere, all without waiver of the right to withhold consent not expressly given of any such transfer and/or require a new franchise.

SECTION 19: EFFECT OF INVALIDITY

The franchise is granted pursuant to the laws of the state of Washington relating to the granting of such rights and privileges by Grantor. If any article, section, sentence, clause, or phrase of this Ordinance is for any reason held illegal, invalid, or unconstitutional, such invalidity shall not affect the validity of the Ordinance or any of the remaining portions. The invalidity of any portion of this Ordinance shall not abate, reduce, or otherwise affect any obligation required of Grantee.

SECTION 20: FRANCHISE ORDINANCE AS CONTRACT

This Ordinance shall have the effect of and shall be a contract between Grantor and Grantee and shall be the measure of the rights and liabilities of the Grantor as well as of Grantee.

SECTION 21: HOLD HARMLESS

A. The Grantee shall at all times fully defend, indemnify, and hold the City, its agencies, boards, officers, agents, and employees harmless from any and all claims, accidents, losses, or liabilities (including those relating to the placement of Grantee's facilities insofar as the same may affect the surrounding environment), arising from or by reason of any intentional or negligent act, occurrence, or omission of the Grantee, singularly or jointly with others, its representatives, permittees, or employees in the construction, operation, use, or maintenance of any of the Grantee's electric utility property or facilities and/or enjoyment of any privileges granted by this franchise or because of Grantee's performance of franchise obligations. Such indemnity shall include costs of negotiation or defense, any other costs incurred and reasonable attorney's fees.

B. Grantee shall not be responsible for damages determined to arise out of the City's sole negligence or, in the case where damages are determined to arise out of concurrent negligence of the parties, Grantee's liability shall extend to damages determined to arise beyond the extent of Grantee's concurrent negligence only so far as permitted by law.

C. It is not the intent of this franchise to acknowledge, create, imply, or expand any duty or liability of the City with respect to its role as franchising authority in the exercise of its police power or for any other purpose. Any City duty, nonetheless deemed created, shall be a duty to the general public and not to any specific party, group, or entity.

SECTION 22: ABANDONMENT OF FRANCHISE

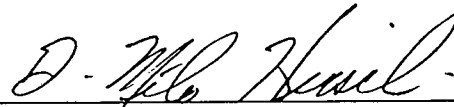
Grantee may at any time abandon the rights and authorities granted hereunder, provided that twelve (12) months written notice of intention to abandon is given to Grantor.

SECTION 23: ACCEPTANCE OF FRANCHISE

Grantee shall notify Grantor in writing of its acceptance of this franchise within thirty (30) days of the approval of this franchise by Grantor. Grantee accepts the responsibility to pay the publication cost applicable through passage of this ordinance.

SECTION 24: This Ordinance shall be in full force and effect five (5) days after passage and publication as provided by law.

PASSED by the City Council of the City of Othello, Washington, this 14th day of August, 1995.



D. MILO HIRSCHI, Mayor

ATTEST:



DEBBIE L. KUDRNA, City Clerk

APPROVED AS TO FORM:



JAMES A. WHITAKER, City Attorney