

ORDINANCE NO. 18-1105

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF BLACK DIAMOND, KING COUNTY, WASHINGTON, AUTHORIZING THE RE-ESTABLISHMENT OF A NON-EXCLUSIVE, TEN-YEAR FRANCHISE WITH PUGET SOUND ENERGY, INC., TO PROVIDE ELECTRIC SERVICE WITHIN THE CITY LIMITS; PROVIDING FOR SEVERABILITY; AND ESTABLISHING AN EFFECTIVE DATE.

WHEREAS, the original term of the previous electric franchise with Puget Sound Energy, Inc. (formerly known as Puget Sound Power & Light Company), is set to expire; and

WHEREAS, the City and Puget Sound Energy, Inc., desire to have electric service provided for the current and future citizens and businesses of Black Diamond; and

WHEREAS, the City and Puget Sound Energy, Inc., desire to formalize their cooperative and mutually beneficial relationship for the provision of electric service within the City of Black Diamond;

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF BLACK DIAMOND, WASHINGTON, DOES HEREBY ORDAIN AS FOLLOWS:

Section 1. The Mayor is authorized to execute a non-exclusive Franchise Agreement with Puget Sound Energy, Inc., to provide electric service for a period of ten (10) years within the City of Black Diamond on the terms and conditions set forth in the Franchise Agreement attached hereto as Exhibit A.

Section 2. Effective Date. This Ordinance shall be in full force and effect five (5) days after its passage, approval, posting, and publication as provided by law. A summary of this Ordinance may be published in lieu of publishing the Ordinance in its entirety.

Section 3. Severability. If any section, sentence, clause or phrase of this Ordinance is held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of any other section, sentence, clause or phrase of this Ordinance.

INTRODUCED ON THE 7TH DAY OF JUNE 2018.

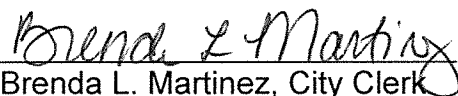
**PASSED BY A MAJORITY OF THE CITY COUNCIL AT A MEETING HELD ON THE
7TH DAY OF JUNE 2018.**

CITY OF BLACK DIAMOND:



Carol Benson, Mayor

Attest:


Brenda L. Martinez, City Clerk

Approved as to form:

David Linehan, City Attorney

Published: JUNE 12, 2018

Posted: JUNE 8, 2018

Effective Date: JUNE 17, 2018

EXHIBIT A
To
Black Diamond Ordinance No.18-1105

FRANCHISE AGREEMENT
BETWEEN
THE CITY OF BLACK DIAMOND AND PUGET SOUND ENERGY, INC.

1. Parties and Effective Date. This Franchise Agreement (“Franchise”) is entered into between the City of Black Diamond, a Washington municipal corporation (“City”), and Puget Sound Energy, Inc., a Washington corporation (“PSE”). This Franchise takes effect on the effective date referenced in the Ordinance (“Effective Date”).

2. Definitions.

2.1. Where used in this Franchise:

2.1.1. “PSE” means Puget Sound Energy, Inc., a Washington Corporation, and its successors and assigns.

2.1.2. “City” means the City of Black Diamond, a code city of the State of Washington, and its successors and assigns.

2.1.3. “Franchise Area” means any, every, and all of the roads, streets, avenues, alleys, highways and public rights-of-way controlled by the City as now laid out, platted, dedicated or improved; and any, every, and all roads, streets, avenues, alleys, highways and public rights-of-way controlled by the City that may hereafter be laid out, platted, dedicated or improved within the territorial limits of the City as they presently exist or may be hereafter extended by annexation or otherwise.

2.1.4. “Facilities” means, collectively, any and all electric transmission and distribution systems, including, but not limited to, poles (with or without crossarms), wires, lines, conduits, cables, braces, guys, anchors and vaults, meter-reading devices, and Communication Systems (as defined in Section 2.1.5); and any and all other equipment, appliances, attachments, appurtenances and other items necessary, convenient, or in any way pertaining to any and all of the foregoing, whether the same be located over or under ground.

2.1.5. “Communication Systems” means equipment, devices, and other items used for communication purposes in connection with PSE's construction, use, operation, maintenance, repair or replacement of its Facilities in the Franchise Area and other permitted activities under this Franchise, including, without limitation, the operation and management of its utility systems. Communications Systems specifically excludes any equipment, devices, or systems installed or

constructed to provide consumer telecommunications, cable television, or broadband data services at wholesale or retail within the City, whether by wire or wireless means, to persons other than PSE agents, employees, affiliates, contractors, or consultants.

2.1.6. "Ordinance" means Ordinance No.18-1105, by which the City Council approves, adopts, and establishes the Effective Date of this Franchise.

2.1.7. "Public Improvement" means any capital improvement or repair within the Franchise Area that is undertaken by or on behalf of the City and is funded by the City (either directly with its own funds or with other public monies obtained by the City). For the avoidance of doubt, the term "Public Improvement" shall include any such capital improvement or repair undertaken by the City which requires the relocation of PSE's Facilities within the Franchise Area, even if the capital improvement or repair entails, in part, related work performed for a third party county or municipality under a valid interlocal agreement between the City and such county or municipality (except to the extent the relocation of PSE's Facilities is caused by the work done for such third party), but shall not include, without limitation, any other improvements or repairs undertaken for the benefit of third party private entities.

3. Franchise Granted; Facilities Within Franchise Area.

3.1. Pursuant to RCW 35A.47.040, the City hereby grants to PSE the right, privilege, authority, and franchise to set, erect, lay, construct, extend, support, attach, connect, maintain, repair, replace, enlarge, operate, and use Facilities in, upon, over, under, along, across and through the Franchise Area to provide for the transmission, distribution, and sale of energy for any purpose for which energy may be used.

3.2. This Franchise shall not convey any right to PSE to install its Facilities outside the Franchise Area; provided, however, that PSE shall retain the right to maintain, repair, and operate Facilities installed pursuant to prior franchise agreements with the City regardless of whether said Facilities are outside the Franchise Area, but such right shall be subject to the provisions of Section 3.3.

3.3. Existing Facilities installed or maintained by PSE on public grounds and places within the City in accordance with prior franchise agreements (but which are not within the Franchise Area as defined in this Franchise) may continue to be maintained, repaired, and operated by PSE at the location such Facilities exist as of the Effective Date of this Franchise for the term of this Franchise; provided, however, that no such Facilities may be enlarged, improved or expanded without the prior review and approval of the City pursuant to applicable ordinances, codes, resolutions, standards, and procedures.

4. Noninterference and Maintenance of Facilities.

4.1. PSE's Facilities shall be constructed, installed, maintained, and repaired within the Franchise Area so as not to unreasonably interfere with the free passage of traffic, and in accordance with the laws of the State of Washington, and the ordinances, rules, and regulations of the City that are not inconsistent with the terms of this Franchise. PSE shall exercise its rights within the Franchise Area in accordance with applicable City codes and ordinances governing use and occupancy of the Franchise Area; provided, however, that in the event of any conflict or inconsistency of such codes and ordinances with the terms of this Franchise, the terms of this Franchise shall govern and control; provided further that nothing herein shall be deemed to waive, prejudice, or otherwise limit any right of appeal afforded PSE by such City codes and ordinances.

4.2. Any repair of PSE's Facilities within the Franchise Area shall be made within the time and in a manner that conforms with generally accepted customs, practices, and standards in the industry. In the event of any emergency in which PSE's Facilities located in or under the Franchise Area break or are damaged, or if PSE's Facilities within the Franchise Area are otherwise in a condition as to immediately endanger the property, life, health, or safety of any individual, PSE shall, upon receipt of notification from the City of the existence of such condition, take all reasonable actions to correct the dangerous condition.

4.3. Whenever PSE permanently discontinues use of any above-ground or at-grade Facilities within the Franchise Area due to modifications or upgrades to PSE's Facilities within the Franchise Area, the discontinued Facilities shall be removed promptly. If PSE permanently discontinues use of and abandons any underground Facilities within the Franchise Area and the parties thereafter determine that the removal of any such Facilities is required to avoid interference with a Public Improvement undertaken by the City, PSE will, upon request by the City, remove any such Facilities that require removal within ninety (90) days after its receipt of the City's written request. The parties will work together in good faith to avoid or minimize the need to remove any permanently discontinued and abandoned underground Facilities within the Franchise Area.

5. Permits; Restoration.

5.1. Whenever it is necessary for PSE to engage in any work within the Franchise Area, PSE shall apply for all necessary City permits to do such work, and shall, except to the extent inconsistent with the terms and conditions of this Franchise or where expressly provided otherwise herein, comply with all requirements and conditions of such permits, including but not limited to location restrictions, traffic control, and restoration, repair, or other work to restore the surface of the Franchise Area, as nearly as practicable, to its condition immediately prior to the work, or as otherwise specified in the permit issued by the City in connection with the work. If, at any time during the term of this Franchise, a PSE Facility or trench within the Franchise Area causes a street to crack, settle or otherwise fail, the City will notify PSE of the deficiency and PSE will correct the deficiency and repair the damage within thirty (30) days after its receipt of written notice from the City. Such restoration responsibility shall include restoration performed

by PSE prior to the execution of this Agreement and shall continue for ten years or the remaining life of the existing structure, pavement, and/or surface in which the work was accomplished, whichever is longer, but shall not apply to any subsequent repair or restoration made necessary by the acts or omissions of the City or any third party. It is further provided that in the event that PSE has any work in the Franchise Area completed by any of its authorized agents or subcontractors, PSE shall remain fully responsible for the permit, permitted work, and any other permit requirements, notwithstanding any provisions of this Franchise to the contrary.

5.2. In the event of an emergency situation in which PSE's Facilities within the Franchise Area cause or are in a condition that immediately endangers the property, life, health, or safety of any individual, PSE must take immediate action to correct the dangerous condition without first obtaining any required permit, provided that PSE shall notify the City telephonically or in person within twenty-four (24) hours of the event, and provided that PSE applies for any necessary permit(s) from the City for such work as soon as reasonably practicable thereafter. For the purposes hereof, "as soon as reasonably practicable" means that the permit application shall be submitted to the City not later than ten (10) business days after the date of the commencement of the action that requires such permit.

5.3. Nothing in this Franchise is intended, nor shall it be construed, as a hindrance to PSE's ability to take such actions as it deems necessary to discharge its public service obligations in accordance with the laws of the State of Washington.

6. Maps and Drawings.

6.1. PSE shall provide the City, upon the City's reasonable request, copies of available drawings in use by PSE showing the location of its Facilities within the Franchise Area, provided the request is limited to Facilities at specific locations in the Franchise Area and is made in connection with the City's planning of Public Improvements. Further, PSE shall, upon the City's reasonable request, discuss and explore ways in which PSE and the City may cooperate and coordinate activities with respect to the development of drawing file layers compatible with the City's Geographic Information System ("GIS") which show PSE's Facilities at specific locations in the Franchise Area.

6.2. As to any such drawings and drawing file layers so provided, PSE does not warrant the accuracy thereof and, to the extent the locations of Facilities are shown, such Facilities are shown in their approximate locations. With respect to any excavations within the Franchise Area undertaken by or on behalf of PSE or the City, nothing herein is intended (nor shall be construed) to relieve either party of their respective obligations arising under applicable law with respect to determining the location of utility facilities.

6.3. Upon the City's reasonable request in connection with the City's design of new streets and intersections and major renovations of existing streets and intersections, and any other Public Improvement undertaken by the City, PSE shall further provide to the City (a) the location and grade of PSE's underground Facilities at those specific locations within the Franchise Area

affected by the project by either field markings or by locating the Facilities in the City's design drawings, and (b) other reasonable cooperation and assistance; provided, however, that nothing in this Section 6.3 or any other provision of this Franchise is intended to (or shall) relieve any person or entity of its obligations under applicable law with respect to determining the location of underground facilities.

7. Right to Complete Work.

7.1. In the event that PSE fails to perform any work to restore the surface of the Franchise Area to enable the free passage of traffic by the traveling public as required by this Franchise or any permit issued by the City relating to such work, and such failure continues for a period of ten (10) days after PSE receives written notice from the City regarding such failure (or, in the event of an emergency situation, such shorter period of time after receipt of notice from the City as is reasonably required in the circumstances), the City may, but in no event is obligated to, perform or contract for such work and, thereafter, PSE shall, upon the City's written request, reimburse the City for the reasonable costs incurred by the City in having such work performed.

8. Relocation of Facilities.

8.1. Whenever the City causes a Public Improvement to be undertaken within the Franchise Area, and such Public Improvement requires the relocation of PSE's then existing Facilities within the Franchise Area (for purposes other than those described in Section 8.2 below), the City shall:

8.1.1. Provide PSE, within a reasonable time prior to the commencement of such Public Improvement, written notice requesting such relocation; and

8.1.2. Provide PSE with reasonable plans and specifications for such Public Improvement, including a proposed relocation of PSE's Facilities.

After receipt of such notice and such plans and specifications, PSE shall relocate such Facilities within the Franchise Area at no charge to the City. If the City requires the subsequent relocation of any Facilities within five (5) years from the date of relocation of such Facilities pursuant to this Section 8.1, the City shall bear the entire cost of such subsequent relocation.

8.2. Whenever (i) any public or private development within the Franchise Area, other than a Public Improvement, requires the relocation of PSE's Facilities within the Franchise Area to accommodate such development; or (ii) the City requires the relocation of PSE's Facilities within the Franchise Area for the benefit of any person or entity other than the City, then in such event, PSE shall have the right as a condition of such relocation, to require such benefitted developer, person, or entity to make payment to PSE, at a time and upon terms acceptable to PSE, for any and all costs and expenses incurred by PSE in the relocation of PSE's Facilities.

8.3. Any condition or requirement imposed by the City upon any person or entity, other than PSE, that requires the relocation of PSE's Facilities shall be a required relocation for purposes of Section 8.2 above (including, without limitation, any condition or requirement imposed pursuant to any contract or in conjunction with approvals or permits for zoning, land use, construction or development).

8.4. Nothing in this Section 8 "Relocation of Facilities" shall require PSE to bear any cost or expense in connection with the location or relocation of any Facilities then existing pursuant to easement or such other rights not derived from this Franchise.

9. Shared Use of Excavation.

9.1. In the event either PSE or the City shall cause excavations to be made within the Franchise Area, the party causing such excavation shall afford the other, upon receipt of a written request to do so, an opportunity to use such excavation so long as such joint use is arranged and accomplished upon terms and conditions reasonably satisfactory to the party causing such excavation.

10. Indemnification.

10.1. PSE shall indemnify, defend and hold harmless the City, its elected and appointed officials, officers, employees, agents, representatives, volunteers, engineers, and consultants from any and all claims, costs (including reasonable attorney fees), judgments, awards, liability, and demands made against it on account of injury or death to any person or damage to property of another, to the extent such injury, death, or damage is caused by the negligent acts or omissions of PSE, its agents, servants, officers, or employees in exercising the rights granted to PSE in this Franchise. This covenant of indemnification shall include, but not be limited by this reference, to claims against the City arising as a result of the negligent acts or omissions of PSE, its agents, servants, officers, or employees in barricading, instituting trench safety systems, or providing other adequate warnings of any excavation, construction, or work in the Franchise Area or in any other public place in performance of work or services permitted under this Franchise.

10.2. In the event any such claim or demand for which indemnification is provided under Section 10.1 is presented to or filed with, or suit or action is commenced against, the City based upon any such claim or demand, the City shall promptly notify PSE thereof, and PSE may elect, at its sole cost and expense, to settle and compromise such claim, demand, suit, or action, or defend the same with attorneys of its choice; provided further, that in the event any suit or action is begun against the City based upon any such claim, demand, suit, or action, the City shall likewise promptly notify PSE thereof, and PSE shall have the right, at its election and its sole cost and expense, to settle and compromise such claim, demand, suit or action, or defend the same at its sole cost and expense, by attorneys of its own election.

10.3. Inspection or acceptance by the City of any work performed by PSE at the time of completion of construction shall not be grounds for avoidance of any of these covenants of

indemnification. Said indemnification obligations shall extend to claims that are not reduced to a suit and any claims that may be compromised prior to the culmination of any litigation or the institution of any litigation.

10.4. In the event that PSE refuses the tender of defense in any suit or any claim for which indemnification is provided under Section 10.1, said tender having been made pursuant to this indemnification clause, and said refusal is subsequently determined by a court having jurisdiction (or such other tribunal that the parties shall agree to decide the matter) to have been a wrongful refusal on the part of PSE, then PSE shall pay all of the City's costs for defense of the action, including all reasonable expert witness fees and reasonable attorneys' fees, and the reasonable costs of the City, including reasonable attorneys' fees, of recovering under this indemnification clause.

10.5. In the event of liability for damages arising out of bodily injury to persons or damages to property caused by or resulting from the concurrent negligence of PSE and the City, and their respective officers, employees, representatives, consultants, engineers, volunteers, and agents, PSE's liability hereunder shall be only to the extent of PSE's negligence. It is further specifically and expressly understood that, solely to the extent required to enforce the indemnification provided herein, PSE waives its immunity under RCW Title 51; provided, however, the foregoing waiver shall not in any way preclude PSE from raising such immunity as a defense against any claim brought against PSE by any of its employees. This waiver has been mutually negotiated by the parties.

10.6. In the event it is determined that RCW 4.24.115 applies to this Franchise, PSE's indemnification obligations under Section 10.1 shall apply to the maximum extent permitted thereunder, to the full extent of PSE's negligence. Further, the City shall have the right to participate, at its sole cost and expense, through its own attorney in any suit or action which arises pursuant to this Franchise when the City determines that such participation is in the City's best interest.

10.7. The provisions in this Section 10 shall survive the expiration or termination of this Franchise with respect to any claim, cost (including reasonable attorney fees), judgment, award, liability, demand, suit or action for which indemnification is provided under Section 10.1 and which is based on an act or omission that occurred during the term of this Franchise.

11. Reservation of Rights.

11.1. In the event the City vacates any portion of the Franchise Area during the term of this Franchise and PSE's Facilities are located within the area to be vacated, then the City shall, in its vacation procedure, reserve and grant an easement to PSE for PSE's existing Facilities unless the City reasonably determines that to do so would be impracticable or unlawful in light of the nature of the vacation. In cases where the City determines that reserving and granting an easement to PSE is impracticable or unlawful, the City will notify PSE thirty (30) business days prior to any final vacation action.

11.2. The existence of this Franchise shall not preclude the City from acquiring by condemnation, in accordance with applicable law, all or any portions of PSE's Facilities within the Franchise Area.

12. Abandonment.

12.1. No above-ground Facilities of PSE within the Franchise Area may be abandoned by PSE without the express written consent of the City. Any plan for abandonment or removal of PSE's above-ground Facilities within the Franchise Area must be first approved by the Public Works Director, and all necessary permits must be obtained prior to such work. The provisions of this Section shall survive the expiration, revocation, or termination of this Franchise.

13. Recovery of Costs: Permit Fees.

13.1. As specifically provided by RCW 35.21.860, which is applicable to the City pursuant to RCW 35A.21.160, the City may not impose a franchise fee or any other fee or charge of whatever nature or description upon PSE as a result of this Franchise. However, as provided in RCW 35.21.860, the City may recover from PSE, and PSE agrees to pay, the actual administrative expenses incurred by the City including, but not limited to the reasonable costs of outside consultants and legal fees incurred by the City, that are directly related to: (i) receiving and approving a permit, license or this Franchise, (ii) inspecting plans and construction, or (iii) preparing a detailed statement pursuant to Chapter 43.21C RCW. With respect to its payment of such administrative expenses, the City shall submit to PSE statements/billings which specify the amounts due. PSE shall make payment to the City in reimbursement of such expenses within thirty (30) days of the receipt of such statements/billings. Failure by PSE to pay such amount within such thirty (30) day time period shall constitute a failure to comply with the Franchise for the purposes of Section 14, Default, hereof. Additionally, the failure by PSE to timely pay said amounts shall be grounds for the City to preclude the processing of any applications and/or issuing permits until payment has been fully made. Furthermore, any late payment shall also accrue interest computed at the rate of twelve percent (12%) per annum from the thirtieth day.

13.2. With respect to the payment of permit fees, PSE shall comply with all applicable payment terms set forth in applicable codes, ordinances, or permits of the City, including, without limitation, any such terms relating to the schedule for payment and the City's right to withhold permits or charge interest in connection with any payment default by PSE; provided, however, the City shall accept payment of such permit fees directly from contractors of PSE that perform work in the Franchise Area on behalf of PSE so long as PSE has notified the City in writing that the contractor is authorized to do so on PSE's behalf and PSE remains responsible for compliance with the terms of the permit.

14. Default.

14.1. If PSE shall fail to comply with the provisions of this Franchise, the City may, without limiting any injunctive relief that the City may be entitled to by applicable law, serve upon PSE a written order to so comply within thirty (30) days from the date such order is received by PSE. If PSE is not in compliance with this Franchise after the expiration of said thirty (30) day period, the City may, by ordinance, declare an immediate forfeiture of this Franchise. The parties expressly acknowledge and agree, however, that the forgoing rights and obligations of the parties are subject in all respects to excused performance based on a Force Majeure Event (as defined in Section 23.14).

15. Nonexclusive Franchise.

15.1. This Franchise is not, and shall not be deemed to be, an exclusive Franchise. This Franchise shall not in any manner prohibit the City from granting other and further franchises over, upon, and along the Franchise Area that do not interfere with PSE's rights under this Franchise. This Franchise shall not prohibit or prevent the City from using the Franchise Area or affect the jurisdiction of the City over the same or any part thereof.

16. Franchise Term.

16.1. This Franchise is and shall remain in full force and effect for a period of ten (10) years from and after the Effective Date of the Ordinance; provided, however, PSE shall have no rights under this Franchise nor shall PSE be bound by the terms and conditions of this Franchise unless PSE shall, within sixty (60) days after the Effective Date of the Ordinance, file with the City its written acceptance of the Ordinance. It is further provided that upon PSE's request for an extension, this Franchise may be extended by the City, upon approval of the Mayor, for up to five (5) additional years beyond the initial term, provided that PSE is in full compliance with the terms and conditions of the Franchise. In any such extension, the terms and conditions of this Franchise shall remain in full force and effect, except as may be otherwise mutually agreed by the parties hereto.

17. Insurance; Bond.

17.1. PSE shall maintain the following liability insurance coverages, insuring PSE and including the City and its elected and appointed officers, officials, agents, employees, representatives, engineers, consultants, and volunteers as additional insureds against claims for injuries to persons or damages to property which may arise from or in connection with the exercise of the rights, privileges, and authority granted to PSE under this Franchise, or the use, construction, installation, removal, or maintenance of any PSE Facilities under this Franchise:

17.1.1. General liability insurance, to include a combination of self-insurance and excess/umbrella liability policies as PSE may elect, with limits not less than \$5 million per occurrence/\$5 million general aggregate. Coverage shall not exclude:

- (a) bodily injury or death;
- (b) property damage, including loss of use;
- (c) sudden and accidental pollution;
- (d) premises-operations,
- (e) explosions, collapse and underground hazards; and
- (f) products - completed operations hazard

17.1.2. Automobile liability for owned, non-owned and hired vehicles with a combined single limit of \$5,000,000.

17.1.3. Worker's compensation with statutory limits and employer's liability insurance with limits of not less than \$1,000,000.

17.2. PSE's maintenance of insurance as required by this Franchise shall not be construed to limit the liability of PSE to the coverage provided by such insurance, or otherwise limit the City's recourse to any remedy to which the City is otherwise entitled at law or in equity.

17.3. The liability insurance described herein shall be maintained by PSE throughout the term of this Franchise, and such other period of time during which PSE is operating its Facilities within the Franchise Area without a franchise, or is engaged in the removal of its Facilities from the Franchise Area. Payment of deductibles and self-insured retentions shall be the sole responsibility of PSE. Coverage under applicable policies shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability. The City shall be included as an insured under PSE's excess/umbrella liability insurance policy. PSE shall be the primary insured as respects the City, its officers, officials, employees, agents, consultants, and volunteers. Any insurance maintained by the City, its officers, officials, employees, consultants, agents, and volunteers shall be in excess of PSE's insurance and shall not contribute with it.

17.4. The liability insurance described herein, and any subsequent replacement policies, shall provide that insurance shall not be cancelled or materially changed so as to be out of compliance with these requirements without first providing thirty (30) days' written notice to the City. If the insurance is cancelled or materially altered so as to be out of compliance with the requirements of this subsection within the term of this Franchise, PSE shall provide a replacement policy. PSE agrees to maintain continuous uninterrupted insurance coverage, or provide self-insurance, in at least the amounts required for the duration of this Franchise and, in the case of any policy written on a "claims-made" form, for at least three (3) years after expiration of the term of

this Franchise. Any lapse in the required insurance coverage shall be cause for termination of this Franchise.

17.5. In lieu of the insurance requirements set forth in this Section 17, PSE may self-insure against such risks in such amounts as are consistent with good utility practice. Upon the City's request, PSE shall provide the City with reasonable written evidence that PSE is maintaining such self-insurance.

17.6. Any PSE insurance policies used to meet the insurance obligations set forth in this Section 17 will be placed with insurers licensed to do business in the state of Washington and with a current A.M. Best rating of not less than A-VII, or financial equivalent. PSE shall provide the City with certificates of the required insurance within twenty (20) days of the Effective Date of the Ordinance.

18. Assignment.

18.1. PSE shall not assign or transfer its rights, benefits and privileges in and under this Franchise without the prior written consent of the City, which consent shall not be unreasonably withheld or delayed. Prior to any assignment, the intended assignee shall, within thirty (30) days of the proposed date of any assignment, file written notice of the intended assignment with the City together with its written acceptance of all terms and conditions of this Franchise. Notwithstanding the foregoing, PSE shall have the right, without such notice or such written acceptance, to mortgage its rights, benefits and privileges in and under this Franchise for the benefit of bondholders.

19. City Ordinances and Regulations.

19.1. Nothing herein shall be deemed to direct or restrict the City's ability to adopt and enforce all necessary and appropriate ordinances made in the exercise of its police powers in the interest of public safety and for the welfare of the public, including regulations adopted by ordinance relating to the use of the City's property, streets, and rights-of-ways; provided, however, the City shall adopt and enforce those ordinances in a manner consistent with the terms and conditions of this Franchise.

20. Acceptance.

20.1. Within sixty (60) days after the passage and approval of this Ordinance, PSE may accept this Franchise by filing with the City Clerk an unconditional written acceptance thereof. PSE's failure to so accept this Franchise within said period of time shall be deemed a rejection thereof by PSE, and the rights and privileges herein granted shall, after the expiration of the sixty (60) day period, absolutely cease and terminate, unless the time period is extended by ordinance duly passed for that purpose.

21. Notice.

21.1. Any notice or other communication required or permitted to be given to the parties under this Franchise shall be sent to the following addresses unless otherwise specified in writing:

City of Black Diamond
P.O. Box 599
Black Diamond, WA 98010
Attn: Public Works Director

Puget Sound Energy, Inc.
3130 S. 38th Street
Tacoma, WA 98409
Attn: Municipal Liaison Manager

With a copy to:

Puget Sound Energy, Inc.
P.O. Box 90868
Bellevue, WA 98009-0868
Attn: General Counsel

The City and PSE may change their respective notice addresses and designated recipient by written notice to the other party at any time.

22. No Third Party Beneficiary.

22.1. Nothing in this Franchise shall be construed to create any rights in or duties to any third party, nor any liability to or standard of care with reference to any third party. This Franchise shall not confer any right or remedy upon any person other than the City and PSE. No action may be commenced or prosecuted against either the City or PSE by any third party claiming as a third-party beneficiary of this Franchise. This Franchise shall not release or discharge any obligation or liability of any third party to either the City or PSE.

23. Miscellaneous.

23.1. If any term, provision, condition, or portion of this Franchise is held to be invalid, or is held to be inapplicable to any person or circumstance, such invalidity or inapplicability shall not affect the validity or applicability of the remaining portions of this Franchise, which shall continue in full force and effect, and its application to other persons and circumstances shall not be affected. The headings of sections and paragraphs of this Franchise are for convenience of reference only and are not intended to restrict, affect, or be of any weight in the interpretation or construction of the provisions of such sections or paragraphs.

23.2. This Franchise may be amended only by written instrument, signed by both parties, which specifically states that it is an amendment to this Franchise and is approved and executed in accordance with the laws of the State of Washington. Without limiting the generality of the foregoing, this Franchise (including, without limitation, Section 10 above) shall govern and

supersede and shall not be changed, modified, deleted, added to, supplemented, or otherwise amended by any permit, approval, license, agreement, or other document required by or obtained from the City in conjunction with the exercise (or failure to exercise) by PSE of any and all rights, benefits, privileges, obligations, or duties in and under this Franchise, unless such permit, approval, license, agreement, or other document specifically:

23.2.1. references this Franchise; and

23.2.2. states that it supersedes this Franchise to the extent it contains terms and conditions that change, modify, delete, add to, supplement, or otherwise amend the terms and conditions of this Franchise.

In the event of any conflict or inconsistency between the provisions of this Franchise and the provisions of any such permit, approval, license, agreement or other document, the provisions of this Franchise shall control.

23.3. This Franchise is subject to the provisions of any applicable tariff on file with the Washington Utilities and Transportation Commission or its successor. In the event of any conflict or inconsistency between the provisions of this Franchise and such tariff, the provisions of such tariff shall control, subject only to Section 25 with respect to any such tariff that is adopted after the date of this Franchise.

23.4. PSE shall bear the cost of the publication of this Franchise Ordinance as and to the extent permitted and required under Section 13.

23.5. All of the provisions, conditions, and requirements of Section 8 “Relocation of Facilities,” Section 10 “Indemnification,” and Section 12 “Abandonment” shall survive the expiration or termination of this Franchise (however, such survival period extends only through the applicable statute of limitations period). All of the provisions, conditions, regulations and requirements contained in this Franchise shall be binding upon the successors, legal representatives, and assigns of each party and all privileges, as well as all obligations and liabilities of each party shall inure to its successors, legal representatives and assigns equally as if they were specifically mentioned wherever such party is named herein.

23.6. In connection with its performance of work under this Franchise, PSE shall, during the term of this Franchise, fully comply with all applicable equal employment or nondiscrimination provisions and requirements of federal, state and local laws.

23.7. PSE and the City shall, as reasonably requested by the other party from time to time, discuss and coordinate their activities with respect to construction that may affect the public ways in any manner in an effort to minimize public inconvenience, disruption or damages.

23.8. This Franchise is binding upon the parties hereto and their permitted successors and assigns.

23.9. Nothing herein is intended to create a joint venture or principal-agent relationship between the parties, and neither party is authorized to, nor may either party, act toward third persons or the public in any manner that would indicate any such relationship with the other.

23.10. The failure of either party at any time to require performance by the other party of any provision hereof in no way affects the right of such party thereafter to enforce the same. Nor may the waiver by a party of any breach of any provision hereof by the other party be taken or held to be a waiver of any succeeding breach of such provision, or as a waiver of the provision itself or any other provision.

23.11. This Franchise is governed by and shall be construed in accordance with the laws of the State of Washington, excluding its choice-of-law rules. Any dispute related to this Franchise shall be brought in the King County Superior Court, Regional Justice Center, Kent, Washington (or, if the Regional Justice Center is no longer in operation, such other local facility as is then operated by the King County Superior Court), which the parties agree has exclusive jurisdiction and is the exclusive venue for resolving such disputes.

23.12. If either party brings any action to enforce or interpret any provision of this Franchise, or is required to defend any action brought by the other party with respect to this Franchise, and in the further event that one party shall prevail in such action, the other party shall, in addition to all other payments required therein, pay all of the prevailing party's reasonable costs in connection with such action, including such sums as the court or courts may adjudge reasonable as attorney's fees in the trial court and in any appellate courts.

23.13. This Franchise represents the entire understanding and agreement between the parties hereto with respect to the subject matter hereof and supersedes all prior oral negotiations between the parties.

23.14. In the event that either party is prevented or delayed in the performance of any of its obligations under this Franchise by any event or circumstance beyond its reasonable ability to control (a "Force Majeure Event"), then that party's performance shall be excused during the Force Majeure Event. Force Majeure Events shall include, without limitation, war; civil disturbance; flood, earthquake or other Act of God; storm or other condition which necessitates the mobilization of the personnel of a party or its contractors to restore utility service; laws, regulations, rules or orders of any governmental agency; sabotage; strikes or similar labor disputes involving personnel of a party, its contractors or a third party; or any failure or delay in the performance by the other party or a third party whose performance itself is prevented or delayed by a Force Majeure Event. Upon removal or termination of the Force Majeure Event, the party claiming a Force Majeure Event shall promptly perform the affected obligations in an orderly and expedited manner under this Franchise or procure a substitute for such obligation. The parties shall use all commercially reasonable efforts to eliminate or minimize any delay caused by a Force Majeure Event.

24. Dispute Resolution.

24.1. The parties recognize that cooperation and communication are essential to resolving issues quickly and efficiently. If any dispute arises in regard to the terms or conditions of this Franchise, then the parties shall meet and engage in good faith discussions with the objective of settling the dispute within ten (10) days after either party requests such a meeting. If the parties cannot resolve the dispute within such ten (10) day period, the parties will, upon the written request of either party, seek to resolve the dispute in accordance with the following dispute resolution process:

Level One — A representative from PSE and the Mayor (or the Mayor's delegate) shall meet to discuss and attempt to resolve the dispute in a timely manner. If these representatives cannot resolve the dispute within fourteen (14) calendar days after referral of the dispute to Level One, either party may by written notice to the other party refer the dispute to Level Two.

Level Two — In the event either party properly refers the dispute to Level Two, the parties shall mediate using a mediator mutually agreeable to the parties. The parties agree to use all reasonable efforts to resolve the dispute as expeditiously as possible. If the parties cannot resolve the dispute within sixty (60) calendar days after the date of the initial written request for mediation, then either party may seek resolution of the dispute through litigation or other judicial proceedings in the court specified in Section 23.11.

24.2. Notwithstanding Section 24.1 or any other provision of this Franchise to the contrary, with respect to any dispute arising under this Franchise, either party may commence litigation or other judicial proceedings within thirty (30) days prior to the date after which the commencement of litigation could be barred by any applicable statute of limitations or other law, rule, regulation, or order of similar import. In such event, the Parties will (except as may be prohibited by judicial order) nevertheless continue to follow the procedures set forth in this Section 24. Additionally, nothing in Section 24.1 or any other provision of this Franchise precludes either party from commencing a judicial action to request temporary or preliminary injunctive or other equitable relief necessary to prevent irreparable harm.

25. Changes in Laws.

25.1. If, during the term of this Franchise, there becomes effective any change in federal or state law (including, but not limited to, a change in any tariff filed by PSE with the Washington Utilities & Transportation Commission) and such change:

25.1.1. specifically requires the City to enact a code or ordinance which conflicts or is inconsistent with any provision of this Franchise; or

25.1.2. results in a PSE tariff which conflicts or is inconsistent with any provision of this Franchise;

then, in such event, either party may, within ninety (90) days of the effective date of such change, notify the other party in writing that such party desires to commence negotiations to amend this Franchise. Such negotiations shall only encompass the specific term or condition affected by such change in federal or state law and neither party shall be obligated to reopen negotiations on any other term or condition of this Franchise. Within thirty (30) days from and after the other party's receipt of written notice to so commence such negotiations, the parties shall, at a mutually agreeable time and place, commence such negotiations. The parties shall thereafter conduct such negotiations at reasonable times, in a reasonable manner, in good faith and with due regard to all pertinent facts and circumstances; provided, however, that (a) in the event the parties are unable, through negotiation, to reach mutual agreement upon terms and conditions of such amendment, then either party may, by written notice to the other, demand that the parties seek to arrive at such agreement through mediation or, if no such demand has previously been submitted, terminate this Franchise upon not less than ninety (90) days prior written notice to the other party; and (b) pending such negotiations, mediation and/or termination, and except as to any portion thereof which is in conflict or inconsistent with such change in federal or state law, the Franchise shall remain in full force and effect. For purposes of this Section, the term "mediation" shall mean mediation at the local offices of Judicial Arbitration and Mediation Services, Inc. ("JAMS") or a similar organization. The parties may agree on a jurist from the JAMS panel. If they are unable to agree, JAMS will provide a list of the three available panel members and each party may strike one. The remaining panel member will serve as the mediator

25.2. PSE shall, in connection with any application for changes in its tariffs that would be in conflict or inconsistent with the provisions of this Franchise or would modify the rights or responsibilities of either party under this Franchise, notify the City in writing of the application promptly after it is filed with the Washington Utilities & Transportation Commission.


26. Severability.

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

AGREED TO AND ACCEPTED BY:

CITY OF BLACK DIAMOND

PUGET SOUND ENERGY, INC.



Carol Benson, Mayor

By: _____

(Printed Name)

Its: _____

ATTEST:


Brenda L. Martinez, City Clerk

APPROVED AS TO FORM:

David Linehan, City Attorney