

ORDINANCE NO. 20-1143

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF BLACK DIAMOND, KING COUNTY, WASHINGTON, GRANTING TO THE CITY OF TACOMA A NON-EXCLUSIVE FRANCHISE TO CONSTRUCT, MAINTAIN, OPERATE, REPLACE AND REPAIR A WATER SYSTEM WITHIN PUBLIC RIGHTS-OF-WAY OF THE CITY OF BLACK DIAMOND, WASHINGTON; PROVIDING FOR SEVERABILITY; AND ESTABLISHING AN EFFECTIVE DATE.

WHEREAS, the City of Black Diamond ("Black Diamond") and the City of Tacoma ("Tacoma") entered into a Franchise Agreement memorialized in City of Black Diamond Ordinance No. 121 adopted January 15, 1970;

WHEREAS, that Franchise Agreement's term expired on January 15, 2020;

WHEREAS, Black Diamond and Tacoma now desire to enter into a new Franchise Agreement setting forth the rights and responsibilities of each party relative to Black Diamond's rights-of-way and Tacoma's use of the same;

WHEREAS, RCW 35A.11.020 grants Black Diamond broad authority to regulate the use of the public rights-of-way;

WHEREAS, RCW 35A.47.040 authorizes the Black Diamond "to grant nonexclusive franchises for the use of public streets, bridges or other public ways, structures or places above or below the surface of the ground for ... facilities for public conveyances, for poles, conduits, tunnels, towers and structures, pipes and wires and appurtenances thereof for transmission and distribution of electrical energy, signals and other methods of communication, for gas, steam and liquid fuels, for water, sewer and other private and publicly owned and operated facilities for public service;" and

WHEREAS, the Black Diamond City Council finds that it is in the best interests of the health, safety and welfare of residents of the Black Diamond community to grant a non-exclusive franchise to Tacoma for the operation of a water system within the Black Diamond rights-of-way; and

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

Section 1. Franchise Award. The City Council hereby awards a nonexclusive water utility franchise to the City of Tacoma to use the public rights-of-way within the

franchise area for purposes of owning, operating, constructing, installing, repairing, and maintaining a water utility system within the City of Black Diamond. The Mayor is authorized and approved to execute a Franchise Agreement in a form substantially similar to the one attached hereto as Exhibit 1.

Section 2. Severability. Should any section, paragraph, sentence, clause, or phrase of this Ordinance, or its application to any person or circumstance, be declared unconstitutional or otherwise invalid for any reason, or should any portion of this Ordinance be pre-empted by state or federal law or regulation, such decision or pre-emption shall not affect the validity of the remaining portions of this Ordinance or its application to other persons or circumstances.

Section 3. Effective Date. This Ordinance, or a summary hereof, shall be published in the official newspaper of the City, and shall take effect and be in full force five (5) days after the date of publication.

ADOPTED BY THE CITY COUNCIL OF THE CITY OF BLACK DIAMOND AT A REGULAR MEETING THEREOF ON THE 2ND DAY OF JULY, 2020.

CITY OF BLACK DIAMOND



Carol Benson, Mayor

Attest:



Brenda L. Martinez, City Clerk

Approved as to form:

David Linehan, City Attorney

Filed with the City Clerk: 07/02/2020
Passed by the City Council: 07/02/2020
Ordinance No. 20-1143
Date of Publication: 07/08/2020
Effective Date: 07/13/2020

EXHIBIT 1

To Black Diamond Ordinance No. 20-1143

**FRANCHISE AGREEMENT
BETWEEN
CITY OF BLACK DIAMOND AND CITY OF TACOMA**

SECTION 1. Definitions. Where used in this franchise (the "Franchise") these terms have the following meanings:

A. "Black Diamond" means the City of Black Diamond, a Washington municipal corporation, and its respective successors and assigns.

B. "Facility" or "Facilities" means tanks, reservoirs, water treatment facilities, meters, pipes, mains, services, valves, blow offs, vaults, fire suppression water facilities, risers, generators, electrical control panels, power meters, telephone connections, pressure reducing valves ("PRVs"), pump stations, meter stations, interties, lines, and all other necessary or convenient facilities and appurtenances thereto for the purpose of operating a water utility system, whether the same be located over or under ground.

D. "Fire Suppression Water Facilities" means water supply transmission and distribution facilities, interties, pipes, valves, control systems, lines, storage, pumps, fire hydrants, and other facilities, or any part thereof, used or usable for the delivery of water for fire suppression purposes as defined in RCW 70.315.020 (1).

E. "Fire Suppression Water Services" or "Services" means the operation and maintenance of Fire Suppression Water Facilities and the delivery of water for fire suppression purposes as defined in RCW 70.315.020 (2).

F. "Franchise Area" means the public roads, streets, avenues, alleys, highways and public rights-of-way of the City as shown on the attached Exhibit B.

G. "Ordinance" means this Ordinance No. 20-1143, which sets forth the terms and conditions of this Franchise.

H. "Party" or "Parties" means Black Diamond or Tacoma individually, or collectively as addressed in this Franchise.

I. "Tacoma" means the City of Tacoma, a municipal corporation.

SECTION 2. Franchise.

A. Black Diamond does hereby grant to Tacoma the right, privilege, authority and franchise to construct, install, lay, support, attach, maintain, repair, renew, replace, remove, enlarge, operate and use Facilities in, upon, over, under, along, through and across open Black

Diamond rights-of-way within the Franchise Area for purposes of its water utility functions beginning on the Effective Date of this Franchise.

B. Nothing contained in this Ordinance is to be construed as granting permission to Tacoma to go upon any other public place other than those types of public places specifically designated as the Franchise Area in this Ordinance. Permission to go upon any other property owned or controlled by Black Diamond must be sought on a case-by-case basis from Black Diamond.

C. At all times during the term of this Franchise, Tacoma shall fully comply with all applicable federal, state, and local laws and regulations.

SECTION 3. Non-interference of Facilities.

A. Tacoma's Facilities shall be located, relocated, and maintained within the Franchise Area so as not to unreasonably interfere with the free and safe passage of pedestrian and vehicular traffic and ingress or egress to or from the abutting property and in accordance with the laws of the State of Washington and the ordinances, rules, and regulations of Black Diamond. Nothing herein shall preclude Tacoma from effecting temporary road closures as reasonably necessary during construction or maintenance of its Facilities provided Tacoma receives prior Black Diamond approval pursuant to Black Diamond ordinances, regulations, and policies, and, provided further, that Tacoma shall have the right to effect temporary road closures in the event of emergencies immediately threatening the public health and safety to maintain, repair and replace its Facilities without prior Black Diamond approval but Tacoma shall obtain Black Diamond approval of such road closure within one business day of the closure.

B. Whenever it is necessary for Tacoma, in the exercise of its rights under this Franchise, to make any excavation in the Franchise Area, Tacoma shall, upon completion of such excavation, restore the surface of the Franchise Area to Black Diamond standards and as good as or better than its condition prior to any such excavation, installation, construction, relocation, maintenance or repair. Survey monuments shall not be removed or destroyed without Tacoma first obtaining the required Department of Natural Resources (DNR) permit in accordance with RCW 58.09.130 and WAC 332-120-030, and as such statute and regulation may be modified and amended. All survey monuments, which have been distributed or displaced by such work, shall be restored pursuant to all federal, state and local standards and specifications. Tacoma agrees to promptly complete all restoration work and to promptly repair any damage caused by such work at its sole expense.

C. If it is determined that Tacoma has failed to restore the right-of-way in accordance with this Section, Black Diamond shall provide Tacoma with written notice, which shall include a description of actions Black Diamond believes necessary to restore the right-of-way. If the right-of-way is not restored in accordance with Black Diamond's notice within fifteen (15) days of that notice, or such longer period as may be specified in the notice, Black Diamond, or its authorized agent, may restore the right-of-way and Tacoma shall be responsible for all costs and expenses incurred by Black Diamond in restoring the right-of-way in accordance with this Section. The

rights granted to Black Diamond under this Section shall be in addition to those otherwise provided by this Franchise.

SECTION 4. Relocation of Facilities.

A. Whenever Black Diamond causes the grading or widening of the Franchise Area or undertakes construction of storm drainage lines, lighting, signalization, sidewalk improvement, pedestrian amenities, or other public street improvements (for purposes other than those described in Section 4.D below) and such project requires the relocation of Tacoma's then existing Facilities within the Franchise Area, Black Diamond shall:

(1) Pursuant to RCW 35.21.905, or as amended, consult with Tacoma in the predesign phase of any such project; and

(2) After receipt of written notice from Black Diamond, Tacoma shall design and relocate such Facilities within the Franchise Area within sixty (60) days for a smaller project and one year for a larger project to accommodate the Black Diamond project, unless the Parties agree on a different time. As used herein, the term "smaller project" includes projects involving appurtenances to Tacoma's pipeline but not involve any realignment of Tacoma's pipeline. Projects involving any realignment of Tacoma's pipeline will be considered a "larger project." Likewise, any project by Tacoma that is not requested by Black Diamond, but will require significant roadway restoration (consisting of a minimum longitudinal trench cut through the paved roadway surface 50' or greater, or four or more transverse trench cuts per 300' of roadway) will be considered a "larger project." A smaller project may also include the following types of work: adjusting, at minimal time and cost, a water service line or a meter to a new grade or location, relocation or extension of a fire hydrant, or relocation of an air vac assembly, valve lid, vault lid or blow off. Likewise, any project by Tacoma that is not requested by Black Diamond, but will require minor roadway restoration (consisting of a longitudinal trench cut through the paved roadway surface less than 50', or less than four transverse trench cuts per 300' of roadway) will be considered a "smaller project." In any event, Black Diamond and Tacoma will, in good faith, use their best efforts to coordinate their project schedules to avoid delay to Black Diamond's project. Notwithstanding the above, Tacoma may, at any time within thirty (30) days after receipt of written notice requesting the relocation of its Facilities, submit to Black Diamond written alternatives to such relocations. Black Diamond shall evaluate such alternatives and advise Tacoma in writing whether one or more of the alternatives is suitable to accommodate work that would otherwise necessitate relocation of the Facilities. If so requested by Black Diamond, Tacoma shall submit such additional information as is necessary to assist Black Diamond in making such evaluation. Black Diamond shall give each alternative full and fair consideration. In the event Black Diamond determines there is no other reasonable or feasible alternative, Black Diamond shall provide Tacoma with further written notice to that effect. In that event, Black Diamond shall provide Tacoma with conceptual plans and specifications for the Black Diamond project and Tacoma shall then relocate its Facilities by the date so established.

(3) Coordinate and work with Tacoma to minimize conflicts between existing Facilities and the public improvements where possible, and to avoid having Tacoma relocate its Facilities whenever possible.

B. When relocation of a “larger project” as described in Section (4)(A)(2) is necessary, Black Diamond shall pay forty percent (40%) of the cost of the required relocation and Tacoma shall pay the remaining sixty percent (60%) of the cost of the required relocation. “Costs of the required relocation” shall mean only directly applicable costs to the project, such as design, engineering, project management, construction, and inspections. “Costs of the required relocation” shall not include overhead charges, attorneys’ fees, or review costs. Black Diamond shall not be responsible for any costs associated with “smaller projects” as described in Section (4)(A)(2).

(1) In the event a project not requested by Black Diamond will meet the “larger project” threshold based on roadway restoration, Black Diamond shall pay fifty percent (50%) of the cost of the restoration of the roadway surface (consisting of up to 8” of gravel base, 2” crushed surfacing top course, and hot mix asphalt per Black Diamond’s Engineering and Construction Standards), sidewalks, and other streetside features (including landscaped area and trees) and Tacoma shall pay the remaining fifty percent (50%) of the required restoration cost; Tacoma shall further pay all other costs of the relocation in such event.

C. Whenever any person or entity, other than Black Diamond, requires the relocation of Tacoma Facilities to accommodate the work of such person or entity within the Franchise Area, Black Diamond agrees not to use its authority to require Tacoma to relocate its Facilities. Tacoma shall have the right as a pre-condition of such relocation to require such person or entity to:

(1) Make payment to Tacoma at a time and upon terms acceptable to Tacoma for any and all costs and expense incurred by Tacoma in the relocation of Tacoma Facilities; and

(2) Protect, defend, indemnify and save Tacoma harmless from any and all claims and demands made against it on account of injury or damage to the person or property of another arising out of or in conjunction with the relocation of Tacoma Facilities, to the extent such injury or damage is caused by the negligence or willful misconduct of the person or entity requesting the relocation of Tacoma Facilities or other negligence or willful misconduct of the agents, servants or employees of the person or entity requesting the relocation of Tacoma Facilities.

D. This Section 4 shall govern all relocations of Tacoma's Facilities required in accordance with this Franchise. Relocation of facilities within the Franchise Area, even if established under benefit of easement or other right apart from this Franchise, shall be governed by this Franchise.

E. For the purpose of this Section 4, a project or improvement is considered to be caused by Black Diamond (as described in Section 4.A above) if it is permitted by Black Diamond and both of the following conditions exist:

(1) Black Diamond is the lead agency for the project or improvement; and

(2) Black Diamond is responsible for the majority of the overall costs of the improvement or project, which, if applicable, includes any grant money received by Black Diamond from any federal or state agency as well as any funds received by Black Diamond from third parties such as developer assessments, impact fees, contributions in aid of construction, and contributions in lieu of construction.

F. If a Black Diamond project requires the relocation of the existing Facilities within the Franchise Area as provided in this Section 4, Tacoma shall have the right by interlocal agreement with Black Diamond to include the relocation of any Facilities as required by Black Diamond as part of Black Diamond's public works project. Such interlocal agreement shall include and provide for, but not be limited to, the following terms and conditions:

(1) The inclusion of Tacoma's work as part of Black Diamond's project;

(2) For "smaller projects" as described in section 4(A)(2), Tacoma to provide plans and specifications of Tacoma's work to Black Diamond in a timely manner for inclusion as a separate bid schedule in Black Diamond project. For "larger projects," Tacoma to provide plans and specifications of Tacoma's work to Black Diamond in a timely manner to allow Black Diamond the opportunity to review and comment on the plans and specifications;

(3) Black Diamond bidding the project, including Tacoma's work by separate bid schedule, and Tacoma's approval of the contractor's bid for Tacoma's work in the separate bid schedule, or, alternatively, Tacoma's rejection of the contractor's bid for Tacoma work and Tacoma's right to perform Tacoma's work through a Tacoma contractor, provided that in so doing Black Diamond's project is not delayed;

(4) Black Diamond's contractor to install both the Black Diamond work and Tacoma work (if applicable and agreeable to both parties), Black Diamond's obligation to pay Black Diamond's contractor for both the Black Diamond work and the Tacoma work, and Tacoma's obligation to reimburse Black Diamond for the cost of the Tacoma work performed by the Black Diamond contractor;

(5) Tacoma's obligation to reimburse Black Diamond for Tacoma project direct administration and inspection fees and costs incurred by Black Diamond, based on a time and materials basis, provided Black Diamond and Tacoma may negotiate a lump sum payment on a per project basis, or a percentage of the total Tacoma project construction cost, and provided Tacoma shall not be required to pay for any City-issued permits related to the Black Diamond work and the Tacoma work.

SECTION 5. Right-of-Way Management.

A. City of Black Diamond Engineering Design and Construction Standards. Whenever Tacoma engages in any activity requiring a permit to do so in the right-of-way, it shall apply to Black Diamond for such a permit and it shall be required to submit plans in accordance with and demonstrate that the proposed activity will meet Black Diamond Engineering Design and Construction Standards for civil plan review and approval. Notwithstanding the foregoing, Tacoma can utilize its own standards for water facility design and construction.

B. Excavation. Whenever Tacoma excavates in any right-of-way for the purpose of installation, construction, operation, maintenance, repair or relocation of its Facilities, it shall apply to Black Diamond for a permit to do so in accordance with the ordinances and regulations of Black Diamond requiring permits to operate in Black Diamond right-of-way. No Tacoma work shall commence within any Black Diamond right-of-way without a permit, except as otherwise provided in this Franchise and applicable Black Diamond ordinance. Tacoma shall comply with any applicable provisions of chapter 19.122 RCW. During the progress of the work, Tacoma shall not unnecessarily obstruct the passage or use of the right-of-way.

During any period of relocation or maintenance, all surface structures, if any, shall be erected and used in such places and positions within the right-of-way so as to interfere as little as possible with the safe and unobstructed passage of traffic and the unobstructed use of adjoining property. Tacoma shall at all times post and maintain proper barricades and comply with all applicable safety regulations during such period of construction as required by the ordinances of Black Diamond or state law, including RCW 39.04.180, for the construction of trench safety systems.

C. Restoration after Construction. Tacoma shall, after any installation, construction, relocation, operation, maintenance, or repair of Facilities within the Franchise Area, restore the right-of-way to at least the condition the same was in or in better condition than immediately prior to any such abandonment, installation, construction, relocation, maintenance or repair. All concrete encased monuments, which have been disturbed or displaced by such work, shall be restored pursuant to all federal, state and local standards and specifications. Tacoma agrees to promptly complete all restoration work and to promptly repair any damage to the right-of-way caused by such work at its sole cost and expense.

If it is determined that Tacoma has failed to restore the right-of-way in accordance with this Franchise and other applicable Black Diamond regulations, Black Diamond shall provide Tacoma with written notice including a description of the actions Black Diamond believes necessary to restore the right-of-way. If the right-of-way is not restored in accordance with Black Diamond's notice within fifteen (15) days of that notice, Black Diamond, or its authorized agent, may restore the right-of-way. Tacoma is responsible for all costs and expenses incurred by Black Diamond in restoring the right-of-way in accordance with this Section. The rights granted to Black Diamond under this Paragraph shall be in addition to those otherwise provided by this Franchise.

D. Bonding Requirement. Tacoma, as a municipal corporation, shall not be required to comply with Black Diamond's standard bonding requirement for working in Black Diamond's right-of-way.

E. Emergency Work, Permit Waiver. In the event of an emergency where any Tacoma Facilities located in the right-of-way are broken or damaged, or if Tacoma's construction area for Tacoma's Facilities is in a condition as to place health or safety of any person or property in imminent danger, Tacoma shall immediately take any necessary emergency measures to repair, replace or remove its Facilities without first applying for and obtaining a permit as required by this Franchise; provided Tacoma shall notify Black Diamond within one business day after such emergency activity and shall immediately obtain a permit for such activity thereafter, if required by this Franchise or Black Diamond ordinance. In the event of an emergency declared by the Governor of the State of Washington and that said emergency impacts Tacoma Facilities, Black Diamond may waive the permitting times required by this subsection. However, nothing in this subsection 5.E abrogates Black Diamond's available remedies pursuant to Subsection 5.K of this Franchise.

F. Black Diamond Work Zones. Tacoma shall not be required to obtain a Black Diamond right-of-way permit to undertake utility work to accommodate a Black Diamond-initiated project when Black Diamond and Tacoma are jointly undertaking a project in the Franchise Area and the Tacoma work is located within the Black Diamond "work zone" for which Black Diamond has already approved a traffic control, pedestrian safety or other applicable plans.

G. Complete Right-of-Way Permit Applications. If Tacoma is required to obtain a permit from Black Diamond to undertake utility work in the Franchise Area, including a Black Diamond right-of-way permit or any other Black Diamond issued permit, Black Diamond shall complete and provide written review comments on the permit application or issue the permit(s) within ten (10) calendar days of receiving a complete application for such permit from Tacoma. If the permit application requires resubmittal by Tacoma, Black Diamond shall complete all subsequent reviews within ten (10) calendar days of the receipt of such resubmittal.

H. Payment. Tacoma shall pay fees and charges relating to the issuance of any Black Diamond permits to Tacoma, such as a Black Diamond right-of-way permit, to undertake utility work in the Franchise Area, including inspection fees and charges.

For relocation cost reimbursement from Black Diamond to Tacoma as provided within Section 4(B), Tacoma shall invoice Black Diamond incrementally. Black Diamond shall have forty (40) days from receipt of such invoice to remit payment to Tacoma.

Within forty (40) days of receipt of invoice from Black Diamond, Tacoma shall reimburse Black Diamond for the costs associated with preparing this Franchise Ordinance.

I. Regular Maintenance and Minor Activities. Black Diamond will not require Tacoma to obtain a right-of-way permit, or any other Black Diamond-issued permit, to conduct regular maintenance of Tacoma's Facilities or other minor activities, including, but not limited to, flushing mains, video inspecting mains, valve, blow-off or hydrant adjustments, hydrant painting and maintenance, leak testing, locating or marking, meter box and meter replacement,

repairing surface areas around existing Facilities, and other activities where traffic control is not needed and where no excavation is needed.

J. Safety. Tacoma, in accordance with applicable federal, state, and local safety rules and regulations shall, at all times, employ ordinary care in the installation, maintenance, and repair utilizing methods and devices commonly accepted in their industry of operation to prevent failures and accidents that are likely to cause damage, injury, or nuisance to persons or property. All of Tacoma's Facilities in the right-of-way shall be constructed and maintained in a safe and operational condition.

K. Dangerous Conditions, Authority for Black Diamond to Abate. Whenever Facilities or the operations of Tacoma cause or contribute to a condition that appears to endanger any person or substantially impair the lateral support of the adjoining right-of-way, public or private property, Black Diamond's Public Works Director may direct Tacoma, at no charge or expense to Black Diamond, to take actions to resolve the condition or remove the endangerment. Such directive may include compliance within a prescribed time period.

In the event Tacoma fails or refuses to promptly take the directed action, or fails to fully comply with such direction, or if emergency conditions exist which require immediate action to prevent imminent injury or damages to persons or property, Black Diamond may take such actions as it believes are necessary to protect persons or property and Tacoma shall be responsible to reimburse Black Diamond for its costs.

SECTION 6. Planning Coordination.

A. The Parties agree to participate in the development of, and reasonable updates to, the other Party's planning documents as follows:

(1) For Tacoma's service area within the Black Diamond city limits, Tacoma will participate in a cooperative effort with Black Diamond to develop Black Diamond's Comprehensive Plan Utilities Element that meets the requirements described in RCW 36.70A.070(4).

(2) Tacoma will participate in a cooperative effort with Black Diamond to ensure that the Utilities Element of Black Diamond's Comprehensive Plan is accurate as it relates to Tacoma's operations and is updated to ensure continued relevance at reasonable intervals.

(3) Tacoma shall submit information related to the general location, proposed location, and capacity of all existing and proposed Tacoma Facilities within the City of Black Diamond as requested by Black Diamond within a reasonable time, not exceeding sixty (60) days from receipt of a written request for such information, provided that such information is in Tacoma's possession, or can be reasonably developed from the information in Tacoma's possession.

(4) Black Diamond will provide information relevant to Tacoma's operations within a reasonable period of written request to assist Tacoma in the development or update of Tacoma's Comprehensive Water Comprehensive Plan(s), provided that such information is in Black Diamond 's possession, or can be reasonably developed from the information in Black Diamond 's possession.

B. Tacoma and Black Diamond shall each assign a representative whose responsibility shall be to coordinate planning for capital improvement plan projects including those that involve undergrounding. At a minimum, such coordination shall include:

(1) For the purpose of planning, Tacoma and Black Diamond shall provide each other with a copy of their respective current adopted Capital Improvement Plan annually and upon request by the other Party.

(2) By February 1st of each year, Tacoma shall provide Black Diamond with a schedule of Tacoma's planned capital improvements which may affect the Black Diamond rights-of-way for that year.

(3) By February 1st of each year, Black Diamond shall provide Tacoma with a schedule of Black Diamond's planned capital improvements which may affect Black Diamond rights-of-way for that year including but not limited to street overlays and repairs, storm drainage improvements and construction, and all other rights-of-way activities that could affect Tacoma capital improvements and infrastructure.

(4) Tacoma shall meet with Black Diamond, and other franchisees and users of the right-of-way, as necessary, to schedule and coordinate construction activities.

(5) All construction locations, activities, and schedules shall be coordinated to minimize public inconvenience, disruption or damages.

(6) Black Diamond and Tacoma agree to cooperate in the planning and implementation of emergency operations response procedures.

(7) Without charge to either Party, both Parties agree to provide each other with as-built plans, maps and records as available that show the location of its facilities within Black Diamond rights-of-way.

SECTION 7. Indemnification.

A. Tacoma shall indemnify, defend and hold Black Diamond, its agents, officers, elected officials, employees, volunteers, and assigns harmless from and against any and all claims, demands, liability, loss, cost, damage or expense of any nature whatsoever, including all costs and attorney's fees, made against them on account of injury, sickness, death or damage to persons or property which is caused by or arises out of, in whole or in part, the willful, tortious or negligent acts, failures and/or omissions of Tacoma or its agents, servants, employees, contractors,

subcontractors or assigns in exercising the rights granted Tacoma in this Franchise; provided, however, such indemnification shall not extend to injury or damage to the extent caused by the negligence or willful misconduct of Black Diamond, its agents, officers, employees, volunteers or assigns. Tacoma shall further defend, indemnify and hold the City of Black Diamond, its officers, officials, employees and volunteers harmless from any and all claims, injuries, damages, losses or suits including attorney fees, arising out of or resulting from the acts, errors or omissions of Tacoma in performance of this Agreement, except for injuries and damages caused by the sole negligence of Black Diamond.

B. Black Diamond shall indemnify, defend and hold Tacoma, its agents, officers, employees, volunteers and assigns harmless from and against any and all claims, demands, liability, loss, cost, damage or expense of any nature whatsoever, including all costs and attorney's fees, made against them on account of injury, sickness, death or damage to persons or property which is caused by or arises out of, in whole or in part, the willful, tortious or negligent acts, failures and/or omissions of Black Diamond or its agents, servants, employees, contractors, subcontractors or assigns in exercising the rights granted Black Diamond in this Franchise; provided, however, such indemnification shall not extend to injury or damage to the extent caused by the negligence or willful misconduct of Tacoma, its agents, officers, employees, volunteers or assigns.

C. In the event any such claim or demand be presented to or filed with Tacoma or Black Diamond arising out of or relating to the acts or omissions in whole or in part of the other Party, the Party shall promptly notify the other Party thereof, and the notified Party shall have the right, at its election and at its sole cost and expense, to settle and compromise such claim or demand.

D. Should a court of competent jurisdiction determine that this Franchise is subject to RCW 4.24.115, then, 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 Black Diamond and Tacoma, their officers, employees and agents, Tacoma's liability hereunder shall be only to the extent of Tacoma's negligence. It is further specifically and expressly understood that the indemnification provided herein constitutes the Parties' waiver of immunity under Industrial Insurance, Title 51 RCW, solely for the purposes of this indemnification. This waiver has been mutually negotiated by the Parties.

SECTION 8. Default. If Tacoma fails to comply with any of the provisions of this Franchise, unless otherwise provided for herein, Black Diamond may serve upon Tacoma a written order to so comply within thirty (30) days from the date such order is received by Tacoma. If Tacoma is not in compliance with this Franchise after expiration of said thirty (30) day period, Black Diamond may act to remedy the violation and may charge Tacoma costs and expenses of such action to Tacoma. Black Diamond may act without the thirty (30) day notice in case of an emergency.

SECTION 9. Non-exclusive Franchise. This Franchise is not and shall not be deemed to be an exclusive Franchise. This Franchise is limited to the rights-of-way located within the

Franchise Area and shall not in any manner prohibit Black Diamond from granting other and further franchises over, upon, and along the Franchise Area, which do not interfere with Tacoma's rights under this Franchise. This Franchise shall not prohibit or prevent Black Diamond from using the Franchise Area or affect the jurisdiction of Black Diamond over the same or any part thereof.

SECTION 10. Franchise Term. This Franchise shall have a term of twenty (20) years from its Effective Date as defined in Section 30 herein; provided, this Franchise shall be automatically extended for up to three additional one (1) year periods unless either Party at least one hundred eighty (180) days prior to the termination date of the Franchise provides written notice to the other Party of its intent to terminate the Franchise at the end of the Franchise term.

SECTION 11. Publication. In accord with state law, this ordinance shall be published in full. Tacoma shall reimburse Black Diamond for the cost of publishing this Franchise Ordinance within sixty (60) days of receipt of an invoice from Black Diamond.

SECTION 12. Compliance with Codes and Regulations; Annexations; Service Area Boundary.

A. The rights, privileges and authority herein granted are subject to and governed by this Ordinance and all other applicable Black Diamond ordinances and codes, as they now exist or may hereafter be amended, provided Black Diamond shall not unreasonably affect or modify any portion of this Franchise without giving Tacoma written notice. Nothing in this Ordinance limits Black Diamond's lawful power to exercise its police power to protect the safety and welfare of the general public. Any location, relocation, erection or excavation by Tacoma shall be performed by Tacoma in accordance with applicable federal, state and Black Diamond rules and regulations, including the Black Diamond public works policies and pre-approved plans, and any required permits, licenses or regulatory fees, and applicable safety standards then in effect.

B. If any territory encumbered by Tacoma's facilities is annexed to Black Diamond after the Effective Date of this Franchise, this Franchise shall be deemed to be the new agreement required to be granted to a franchisee in annexed territory by RCW 35A.14.900 for whatever period of time is then remaining under this Franchise for the Franchise Area, unless a longer time period is required by that statute. Such territory shall then be governed by the terms and conditions contained herein upon the effective date of such annexation.

SECTION 13. Location of Facilities and Equipment. With the exception of components that are traditionally installed above ground such as fire hydrants, blow offs, vault lids, risers, pump stations, generators, electrical control panels, power meters, telephone connections, automated reading equipment and appurtenances, and utility markers, all Facilities and equipment to be installed within the Franchise Area shall be installed underground; provided, however, that such Facilities may be installed above ground if so authorized by Black Diamond, consistent with the provisions of Black Diamond's land use and zoning code and applicable development pre-approved plans.

SECTION 14. Record of Installations and Service. With respect to excavations by Tacoma and Black Diamond within the Franchise Area, Tacoma and Black Diamond shall each comply with its respective obligations pursuant to chapter 19.122 RCW, and as such statute may be modified and amended, and any other applicable state law.

Upon written request of Black Diamond, Tacoma shall provide Black Diamond with the most recent update available of any plan of potential improvements to its Facilities within the Franchise Area; provided, however, any such plan so submitted shall only be for informational purposes within the Franchise Area, nor shall such plan be construed as a proposal to undertake any specific improvements within the Franchise Area.

Upon written request of Tacoma, Black Diamond shall provide Tacoma with the most recent update available of any plan of potential improvements to its improvements located within the Franchise Area; provided, however, any such plan so submitted shall only be for informational purposes within the Franchise Area, nor shall such plan be construed as a proposal to undertake any specific improvements within the Franchise Area.

Available as-built drawings of the location of any Facilities located within the Franchise Area, shall be made available to the requesting Party within ten (10) working days of request.

SECTION 15. Shared Use of Excavations.

A. Tacoma and Black Diamond shall exercise best efforts to coordinate construction work that either Party may undertake within the Franchise Area so as to promote the orderly and expeditious performance and completion of such work as a whole. Such efforts shall include, at a minimum, reasonable and diligent efforts to keep the other Party and other utilities within the Franchise Area informed of its intent to undertake such construction work. Tacoma and Black Diamond shall further exercise best efforts to minimize any delay or hindrance to any construction work undertaken by themselves or other utilities within the Franchise Area.

B. If at any time, or from time to time, either Tacoma, Black Diamond, or another franchisee, shall cause excavations to be made within the Franchise Area, the Party causing such excavation to be made shall afford the others, upon receipt of a written request to do so, an opportunity to use such excavation, provided that:

(1) No statutes, laws, regulations, or ordinances prohibit or restrict the proximity of other utilities or facilities to Tacoma's Facilities installed or to be installed within the area to be excavated; and

(2) Such joint use shall not unreasonably delay the work of the Party causing the excavation to be made.

SECTION 16. Insurance.

(1) Tacoma shall procure and maintain for the duration of the Agreement, insurance against claims for injuries to persons or damage to property which may arise from or in connection with the performance of the work hereunder by Tacoma, its agents, representatives, employees, or subcontractors. Tacoma's maintenance of insurance as required by the agreement shall not be construed to limit the liability of Tacoma to the coverage provided by such insurance, or otherwise limit Black Diamond's recourse to any remedy available at law or in equity.

(2) Tacoma shall obtain insurance of the types described below:

a. Automobile Liability insurance covering all owned, non-owned, hired and leased vehicles. Coverage shall be written on Insurance Services Office (ISO) form CA 00 01 or a substitute form providing equivalent liability coverage. If necessary, the policy shall be endorsed to provide contractual liability coverage.

b. Commercial General Liability insurance shall be written on ISO occurrence form CG 00 01 and shall cover liability arising from premises, operations, stop gap liability, independent contractors, products-completed operations, personal injury and advertising injury, and liability assumed under an insured contract. The Commercial General Liability insurance shall be endorsed to provide the Per Project Aggregate Endorsement ISO form CG 25 03 11 85. There shall be no endorsement or modification of the Commercial General Liability insurance for liability arising from explosion, collapse or underground property damage. Black Diamond shall be named by endorsement as an additional insured under Tacoma's Commercial General Liability insurance policy with respect to the work performed for the City using ISO Additional Insured endorsement CG 20 10 10 01 and Additional Insured-Completed Operations endorsement CG 20 37 10 01 or substitute endorsements providing equivalent coverage.

c. Workers' Compensation coverage as required by the Industrial Insurance laws of the State of Washington.

d. Tacoma will provide a Pollution Liability Insurance Policy, including contractual liability, written on an occurrence basis, in adequate quantity to protect against legal liability arising out of contract activity. This insurance shall be primary over any and all insurance the agency may have in place. Additionally, Tacoma is responsible for ensuring that any subcontractor provide adequate insurance coverage for the activities arising out of subcontracts. The Pollution Liability may be either a separate policy or an endorsement on Tacoma's General Liability Coverage.

(3) Tacoma shall maintain at least the following insurance limits:

a. Automobile Liability insurance with a minimum Combined Single Limit for bodily injury and property damage of \$1,000,000 per accident.

b. Commercial General Liability insurance shall be written with limits no less than \$3,000,000 each occurrence, and a \$5,000,000 aggregate limit.

c. Workers Compensation and Employers' Liability \$1,000,000 Employers' Liability each accident, \$1,000,000 Employers' Liability Disease-each employee, \$1,000,000 Employers' Liability Disease-policy limit.

d. Pollution Liability insurance shall be written with a limit no less than \$2 million per occurrence, \$2 million aggregate.

(4) The insurance policies are to contain, or be endorsed to contain, the following provisions for Automobile Liability, Commercial General Liability and Pollution Liability insurance:

a. Tacoma's insurance coverage shall be primary insurance as respect Black Diamond. Any insurance, self-insurance, or insurance pool coverage maintained by Black Diamond shall be excess of Tacoma's insurance and shall not contribute with it.

b. Tacoma's insurance shall be endorsed to state that coverage shall not be cancelled by either party, except after thirty (30) days prior written notice by certified mail, return receipt requested, has been given to t Black Diamond.

(5) Tacoma, its subcontractors, sub-subcontractors, agents, and employees, waive all rights of subrogation against Black Diamond, for damages caused by fire or other perils to the extend covered by the General Liability or other property insurance obtained pursuant to the Insurance Requirements Section of this Contract or other property insurance applicable to the work. The policies shall provide such waivers by endorsement.

(6) Insurance is to be placed with insurers with a current A.M. Best rating of not less than A:VII.

(7) Tacoma shall furnish Black Diamond with original certificates and a copy of the amendatory endorsements, including but not necessarily limited to the additional insured endorsement, evidencing the Automobile Liability and Commercial General Liability insurance of Tacoma before commencement of this Franchise. Before any exposure to loss may occur, Tacoma shall file with Black Diamond a copy of the Builders Risk insurance policy that includes all applicable conditions, exclusions, definitions, terms and endorsements related to this project.

(8) *Subcontractors.* Tacoma shall ensure that each subcontractor, sub-subcontractors, agents and employees of every tier obtain at a minimum the same insurance coverage and limits as stated herein for Tacoma (with the exception of Builders Risk insurance). Upon request by Black Diamond, Tacoma shall provide evidence of such insurance.

(9) In satisfaction of the insurance requirements set forth in this Section 18, Tacoma may maintain a full funded self-insurance program for its liability exposures in this agreement, which are consistent with good utility practice. Tacoma agrees to provide Black Diamond with at least forty-five (45) days prior written notice of any material change in Franchisee's self-funded insurance program and will provide a letter of self-insurance as adequate proof of coverage. If

Tacoma decides to no longer maintain a self-insurance program for its liabilities, Tacoma must promptly notify Black Diamond and provide certificates of insurance and corresponding endorsements evidencing the insurance requirements in this agreement have been satisfied.

SECTION 17. Abandonment and/or Removal of Tacoma Facilities. The Parties agree that the standard practice will be to abandon underground Tacoma Facilities in-place whenever practical, subject to the following conditions:

(1) Tacoma shall continue to own and be responsible for any such facilities abandoned within the Franchise Area.

(2) Black Diamond shall have the right to require Tacoma to remove any Facilities abandoned within the Franchise Area if Black Diamond reasonably determines the removal of the abandoned Facility is required to facilitate the construction or installation of a Black Diamond project within the Franchise Area and Black Diamond determines there is no other reasonable or feasible alternative to the removal of the Facility. Black Diamond will make reasonable efforts to avoid conflicts with abandoned Facilities whenever possible; however, whenever a conflict cannot be resolved except by removal from the right-of-way of previously abandoned Tacoma Facilities, then Tacoma shall, at Tacoma's expense, remove such abandoned Facilities by their own forces or by participating in Black Diamond's public works project. When necessary, removal of abandoned Facilities shall be limited to the area of direct conflict. In removing such material, Tacoma shall conform to all local, state, and federal regulations applicable to asbestos abatement, when applicable.

(3) Within forty-five days (45) of Tacoma's permanent cessation of use of any of its Facilities as determined by Tacoma, or any portion thereof, Tacoma shall document abandoned Facilities. Tacoma shall provide Black Diamond with such documentation of abandoned Facilities within ten (10) days of the receipt of a written request from Black Diamond for such documentation. If the Facilities to be abandoned include asbestos pipe, Tacoma will, in good faith, use its best efforts to provide documentation locating the asbestos pipe and provide the most complete and accurate drawings Tacoma can make available to provide adequate notice of the location of all abandoned asbestos pipe. Tacoma shall remain responsible for abandoned in place asbestos pipe until its eventual removal at Tacoma's sole cost and expense.

(4) Tacoma Facilities that are abandoned in-place shall be abandoned pursuant to Black Diamond Standards, to the satisfaction of the Public Works Director.

(5) Tacoma agrees that in carrying out activities under this Franchise, neither Tacoma nor its agents will cause or permit, in any manner through act or omission, the release, leak, deposit, seepage, spill, or escape of any Hazardous Material (collectively or individually a "Release") in any Black Diamond right-of-way or in, on, under, or through other property, whether public or private.

(6) The Parties expressly agree that this Section shall survive the expiration, revocation, or termination of this Franchise, unless modified by separate agreement.

SECTION 18. Vacation of Franchise Area. If Black Diamond determines to vacate any right-of-way which is part of the Franchise Area where Tacoma Facilities are located or maintained, any ordinance vacating such right-of-way shall provide and condition such vacation on Tacoma obtaining, at no cost to Tacoma, a permanent easement at least thirty (30) feet wide in such vacated right-of-way for the construction, operation, maintenance, repair and replacement of its Facilities located and to be located in such vacated right-of-way unless Black Diamond reasonably determines that to do so would be impracticable or unlawful in light of the nature of the vacation. In cases where Black Diamond determines that reserving and granting an easement to Tacoma is impracticable or unlawful, Black Diamond will notify Tacoma thirty (30) business days prior to any final vacation action.

SECTION 19. Assignment. This franchise shall not be sold, transferred, assigned, or disposed of in whole or in part either by sale, voluntary or involuntary merger, consolidation, or otherwise, without the written approval of Black Diamond. Any costs associated with Black Diamond's review of any transfer proposed by Tacoma shall be reimbursed to Black Diamond by Tacoma. The terms and conditions set forth herein shall be binding on Tacoma's successors and assigns unless amended by Black Diamond. Except as otherwise provided herein, Tacoma shall promptly notify Black Diamond prior to any proposed change in, or transfer of, or acquisition by any other party of control of Tacoma. Every change, transfer, or acquisition of control of Tacoma shall cause a review of the proposed transfer. In the event that Tacoma denies its consent and such change, transfer or acquisition of control has been affected, the Franchise is terminated.

SECTION 20. Notice. Unless applicable law requires a different method of giving notice, any and all notices, demands or other communications required or desired to be given hereunder by any Party (collectively, "notices") shall be in writing and shall be validly given or made to another Party if delivered either personally or by Federal Express or other overnight delivery service of recognized standing, or if deposited in the United States Mail, certified, registered, or express mail with postage prepaid, or if sent by e-mail with electronic confirmation. If such notice is personally delivered, it shall be conclusively deemed given at the time of such delivery. If such notice is delivered by Federal Express or other overnight delivery service of recognized standing, it shall be deemed given one (1) business day after the deposit thereof with such delivery service. If such notice is mailed as provided herein, such shall be deemed given three (3) business days after the deposit thereof in the United States Mail. If such notice is sent by email, it shall be deemed given at the time of the sender's receipt of electronic confirmation. Each such notice shall be deemed given only if properly addressed to the Party to whom such notice is to be given as follows:

To Black Diamond:

Public Works Director
City of Black Diamond
24301 Roberts Drive
P.O. Box 599
Black Diamond, WA 98010

Phone: (360) 851-4446
Email: sboettcher@blackdiamondwa.gov

To Tacoma:

Water Superintendent
City of Tacoma, Department of Public Utilities, Water Division (dba Tacoma Water)
3628 South 35th Street
Tacoma, WA 98409
Phone: (253) 502-8600
Email: sdewhirst@cityoftacoma.org

Any Party may change its mailing and/or email address for the purpose of receiving notices as herein provided by a written notice given in the manner required by this Section to the other Party.

SECTION 21. Non-Waiver. The failure of either Party to enforce any breach or violation by the other Party or any provision of this Franchise shall not be deemed to be a waiver or a continuing waiver by the non-breaching Party of any subsequent breach or violation of the same or any other provision of this Franchise.

SECTION 22. Dispute Resolution. 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 Tacoma and the Mayor of Black Diamond (or Mayor's delegee) 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. If these representatives cannot resolve the dispute within fourteen (14) calendar days after referral of the dispute to Level Two (or such reasonable additional period as is necessary to meet with the chosen mediator), either party may by written notice to the other party refer the dispute to Level Three.

Level Three — In the event either party properly refers the dispute to Level Three or the dispute is not resolved at Level Two within fourteen (14) calendar days after referral of that dispute to Level Two (or such reasonable additional period as is necessary to meet with the chosen mediator), either party may seek resolution of the dispute through litigation or other judicial proceedings in the court specified in this Franchise.

Additionally, nothing in Section 24 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.

SECTION 23. Governing Law/Venue. This Franchise shall be governed by the laws of the State of Washington. Any suit to enforce or relating to this Agreement shall only be filed in King County Superior Court, King County, Washington.

SECTION 24. Entire Agreement. The Recitals set forth above are hereby incorporated herein in full by this reference. This Franchise constitutes the entire understanding and agreement between the Parties as to the subject matter herein and no other agreements or understandings, written or otherwise, shall be binding upon the Parties upon execution and acceptance hereof. This Franchise shall supersede, rescind and cancel any prior franchise or agreement granted by Black Diamond to locate and operate a public water system within the Franchise Area.

SECTION 25. Amendment. 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 7 “Indemnification” 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 Black Diamond in conjunction with the exercise (or failure to exercise) by Tacoma of any and all rights, benefits, privileges, obligations, or duties in and under this Franchise, unless such permit, approval, license, agreement or document specifically:

- (1) References this Franchise; and
- (2) States that it supersedes this Franchise to the extent it contains terms and conditions which 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 that does not comply with Subsections (1) and (2) referenced immediately above, the provisions of this Franchise shall control.

SECTION 26. Directions to City Clerk. The Black Diamond City Clerk is hereby authorized and directed to forward a certified copy of this Ordinance to Tacoma as set forth in this Ordinance. Tacoma shall have one hundred and twenty (120) days from the date of receipt of the certified copy of this Ordinance to accept in writing the terms of the Franchise granted to Tacoma by this Ordinance and file with the Black Diamond City Clerk the executed statement of Acceptance of Franchise, attached hereto as **Exhibit A** and incorporated herein by this reference.

SECTION 27. Tacoma Acceptance of Franchise. Tacoma shall have no rights under this Franchise nor shall Tacoma be bound by the terms and conditions of this Franchise unless Tacoma shall, within thirty (30) days after the receipt of the certified copy of this Ordinance as addressed in Section 28 herein, file with the City its written acceptance of this Franchise.

SECTION 28. Effective Date of Franchise. The terms and conditions of this Ordinance shall not be binding on the City and Tacoma unless the Tacoma City Council within thirty (30) days of the receipt of the certified copy of this Ordinance as addressed in Section 28 herein adopts an ordinance accepting this Franchise, and the date of the adoption of such resolution by the Tacoma City Council shall be the effective date ("Effective Date") of the Franchise.

SECTION 29. Survival. All of the provisions, conditions and requirements of Section 4 (Relocation of Facilities), Section 5.B (Excavation), Section 5.C (Restoration after Construction), Section 5.K (Dangerous Conditions, Authority for Black Diamond to Abate), Section 7 (Indemnification) and Section 17 (Abandonment and/or Removal of Tacoma Facilities) of this Franchise shall be in addition to any and all other obligations and liabilities Tacoma may have to Black Diamond at common law, by statute, or by contract, and shall survive Black Diamond's Franchise to Tacoma for the use of the Franchise Area, and any renewals or extensions thereof. All of the provisions, conditions, regulations and requirements contained in this Franchise Ordinance shall further be binding upon the heirs, successors, executors, administrators, legal representatives and assigns of Tacoma and all privileges, as well as all obligations and liabilities of Tacoma shall inure to its heirs, successors and assigns equally as if they were specifically mentioned wherever Tacoma is named herein.

SECTION 30. Severability. If any one or more section, subsection, or sentence of this franchise is held to be unconstitutional or invalid, such decision shall not affect the validity of the remaining portion of this Franchise and the same shall remain in full force and effect.

CITY OF BLACK DIAMOND

CITY OF TACOMA

Carol Benson, Mayor

By: _____

(Printed Name)

Its: _____

ATTEST:

Brenda L. Martinez, City Clerk

APPROVED AS TO FORM:

David Linehan, City Attorney

EXHIBIT A

ACCEPTANCE OF FRANCHISE

On this ____ day of _____, 2020 the Grantee, City of Tacoma, hereby accepts the franchise upon the terms and conditions set forth in this Ordinance.

CITY OF TACOMA

BY: _____
Mayor Victoria Woodards
By Authority provided under
Ordinance No. _____

ATTEST:

APPROVED AS TO FORM:

Doris Sorum, City Clerk

Bill Fosbre, City Attorney