



ORDINANCE NO. 27957

1 AN ORDINANCE relating to communications facilities, electrical power
2 transmission, and use of City right-of-way; granting to the Puyallup Tribe of
3 Indians the nonexclusive right, privilege, and authority through a limited
4 franchise to install conduits in East "R" Street between East 29th Street and
5 East 32nd Street for the future development of a private electrical and
6 communications network.

7 WHEREAS the Puyallup Tribe of Indians ("Puyallup Tribe") is obtaining
8 permit approval to construct road and infrastructure improvements to the
9 East "R" Street right-of-way, and

10 WHEREAS, as part of this project, the Puyallup Tribe would like to install
11 conduits into East "R" Street for the future development of a private electrical
12 and communications network, and

13 WHEREAS a limited franchise is required to allow the Puyallup Tribe to
14 occupy City right-of-way with private utility infrastructure, and

15 WHEREAS General Government and Public Utilities staff have reviewed
16 the plans for installation of the conduits and have determined that the plans do
17 not interfere with the City's current or planned use of the East "R" Street
18 right-of-way, and

19 WHEREAS the City and the Puyallup Tribe have negotiated a franchise
20 agreement, which establishes the contractual and legal charges, terms, and
21 conditions for the construction, maintenance, and repair of its system in
22 conformance with applicable laws, City standards, and City codes; Now,
23 Therefore,
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BE IT ORDAINED BY THE CITY OF TACOMA:

Section I. Definitions.

For the purposes of this Franchise and all exhibits attached hereto (all of which are hereby incorporated herein by this reference), the following terms, phrases, and words shall have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future, words in the plural include the singular, and words in the singular include the plural. Words not defined shall be given their common and ordinary meaning.

1.1 "Construct or Construction" shall mean initial installation, removing, replacing, and repairing existing Facilities and may include, but are not limited to, digging and/or excavating for the purposes of initial installation, removing, replacing, and repairing existing conduit(s) and/or Facilities.

1.2 "Effective Date" shall mean the date designated herein, after passage, and approval of this Ordinance and acceptance by Grantee, upon which the rights, duties and obligations shall become effective and the date from which the time requirement for any notice, extension and/or renewal will be measured.

1.3 "Facilities" shall mean the Grantee's conduit, raceways, appurtenances, and all other Facilities necessary for the purpose of facilitating Grantee's utilities.

1.4 "Franchise" shall mean this Franchise and any amendments, exhibits, or appendices to this Franchise.

1.5 "Franchise Area" means that certain area within the jurisdictional boundaries of the Grantor designated on Exhibit A.

1.6 "Hazardous Substance" shall mean any hazardous, toxic, or dangerous substance, material, waste, pollutant, or contaminant. The term shall specifically include natural gas, petroleum and petroleum products and their bi-products, residue, and remainder in whatever form or state. The term shall also be interpreted to include any substance which, after release into the environment, will or may reasonably be anticipated to cause death, disease, injury, sickness, illness, behavior abnormalities or, genetic abnormalities.

1.7 "Maintenance" or "Maintain" shall mean examining, testing, inspecting, repairing, maintaining and replacing the Facilities to be constructed or any part thereof as required and necessary for safe operation of the Facilities.



1 1.8 "Utility Corridor" shall mean the utility pathway through the Franchise Area
2 in which the conduit(s) and or Facilities of the Grantee are located, including
any Rights-of-Way, Public Property, and/or easement over and through private
property.

3 1.9 "Public Properties" shall mean the present and/or future property owned or
4 leased by Grantor within the present and/or future corporate limits or
5 jurisdictional boundaries of the Grantor that are to become part of the Franchise
Area.

6 1.10 "Operate" or "Operations" shall mean the use of Grantee's Facilities to
7 supply utility services.

8 1.11 "Rights-of-Way" means the surface and the space above and below
9 streets, roadways, highways, avenues, courts, lanes, alleys, sidewalks,
10 easements, rights-of-way and similar public property and areas located within
the Franchise Area.

11 Section 2. Grant of Authority.

12 2.1 Grantor hereby grants to Grantee, a sovereign, federally-recognized Tribal
13 government which is authorized to transact business within the State of
14 Washington, its successors and assigns (as provided in Section 4), the right,
privilege, authority and Franchise to Construct, Operate and Maintain the
Facilities in the Franchise Area.

15 2.2 This Franchise is non-exclusive. Grantor reserves all rights to its property,
16 including, without limitation, the right to grant additional Franchises, easements,
17 licenses and permits to others to use the Rights-of Way and Public Properties,
provided that the Grantor shall not grant any other Franchise, license,
18 easement or permit that would unreasonably interfere with Grantee's permitted
use under this Franchise. For purposes hereof, "unreasonably interfere" shall
19 not include any requirement to relocate the Facilities. This Franchise shall in no
manner prohibit the Grantor or limit its power to perform work upon its Rights-
20 of-Way, Public Properties or make all necessary changes, relocations, repairs,
21 maintenance, establishment, improvement thereto, or from using any of the
Rights-of Way and Public Properties, or any part of them, as the Grantor may
22 deem fit from time to time, including the dedication, establishment, maintenance
and improvement of all new Rights-of-Way and other Public Properties of every
23 type and description.

24 2.3 This Franchise is conditioned upon the terms and conditions contained
25 herein and Grantee's compliance with all applicable federal, state, local or other
regulatory programs that currently exist or may hereafter be enacted by any
26 regulatory agencies with jurisdiction over the Franchise Area.



2.4 By granting this Franchise, the Grantor is not assuming any risks or liabilities therefrom, all of which shall be solely and separately borne by Grantee. Grantee agrees and covenants to, at its sole cost and expense, take all necessary and prudent steps to protect, support, and keep safe from harm its Facilities, or any part thereof, when necessary to protect the public health and safety.

2.5 This Franchise is only intended to convey a limited right and interest. It is not a warranty of title or interest in Grantor's Rights-of Way or other Public Property. None of the rights granted herein shall affect the Grantor's jurisdiction over its property, streets or Rights-of-Way.

2.6 The limited rights and privileges granted under this Franchise shall not convey any right to Grantee to install any new Facilities without the express written consent of Grantor.

Section 3. Term.

Each of the provisions of this Franchise shall become effective upon the Effective Date, subject to Grantee's acceptance of the terms and conditions of this Franchise and shall remain in effect for twenty (20) years thereafter. Subsequently, and in accordance with Tacoma Charter Article VIII, the City Council will consider renewing this Franchise, at the written request of Grantee, for an additional twenty (20) year renewal period at any time within two (2) years before the end of the Franchise's original twenty (20) year term, unless either party expresses its intention in writing to terminate this Franchise at the conclusion of the original twenty (20) year term.

Section 4. Assignment and Transfer of Franchise.

4.1 This Franchise shall not be leased, assigned or otherwise alienated without the express consent of the Grantor by ordinance, which approval shall not be unreasonably withheld.

4.2 Subject to the foregoing, Grantee and any proposed assignee or transferee shall provide and certify the following to the City not less than 120 days prior to the proposed date of transfer or assignment: (a) Complete information setting forth the nature, terms and conditions of the proposed assignment or transfer; (b) All information reasonably required by the City of a franchise applicant under applicable City of Tacoma policies and the Tacoma Municipal Code ("TMC") and City Charter with respect to the proposed assignee or transferee; c) Any other information reasonably required by the City, including information about



the proposed assignee's or transferee's safety record; and, d) An application fee which shall be set by the City, plus any other costs actually and reasonably incurred by the City in processing and investigating the proposed assignment or transfer.

4.3 No transfer shall be approved unless the assignee or transferee has at least the legal, technical, financial, and other requisite qualifications to carry on the activities of the Grantee.

4.4 Any transfer or assignment of this Franchise without the prior written consent of the City shall be void and result in revocation of the Franchise.

Section 5. Compliance with Laws and Standards.

5.1 In carrying out any authorized activities under the privileges granted herein, Grantee shall meet accepted industry standards and comply with all applicable laws of any governmental entity with jurisdiction over the Facilities and their operation. This shall include all applicable laws, rules and regulations existing at the Effective Date of this Franchise or that may be subsequently enacted by any governmental entity with jurisdiction over Grantee, the Franchise Area and/or the Facilities.

Section 6. Construction and Maintenance.

6.1 All Construction, Maintenance or Operation undertaken by Grantee, upon Grantee's direction or on Grantee's behalf shall be completed in a workmanlike manner.

6.2 Except in the case of an emergency, prior to commencing any Construction and/or Maintenance work in the Franchise Area, the Grantee shall first file with the Grantor such detailed plans, specifications and profiles of the intended work as may be required by the Grantor. Grantor may require such additional information, plans and/or specifications as are in Grantor's opinion necessary to protect the public health and safety during the Construction and/or Maintenance work and for the remaining term of this Franchise.

6.3 All Construction and/or Maintenance work shall be performed in conformity with the maps and specifications filed with the Grantor, except in instances in which deviation may be allowed thereafter in writing pursuant to an application by the Grantee.

6.4 All components of any Facilities used in Construction and/or Maintenance activities within the Franchise Area shall comply with applicable state, federal and local regulations, as from time to time amended.



6.5 Except in the event of an emergency, Grantee shall provide Grantor at least sixty (60) calendar days written notice prior to any Construction and/or Maintenance, or other substantial activity, other than routine inspections and maintenance, by Grantee, its agents, employees or contractors on Grantee's Facilities within the Franchise Area.

6.6 Work shall only commence upon the issuance of applicable permits by the City, which permits shall not be unreasonably withheld or delayed. However, in the event of an emergency requiring immediate action by Grantee for the protection of the Facilities, Grantor's property or other persons or property, Grantee may proceed without first obtaining the normally required permits. In such event Grantee must (1) take all necessary and prudent steps to protect, support, and keep safe from harm its Facilities, or any part thereof; Grantor's property; or other persons or property, and to protect the public health and safety; and (2) as soon as possible thereafter, must obtain the required permits and comply with any mitigation requirements or other conditions in the after-the-fact permit.

6.7 Unless such condition or regulation is in conflict with a federal requirement, the Grantor may condition the granting of any permit or other approval that is required under this Franchise, in any manner reasonably necessary for the safe use and management of the public right-of-way or the Grantor's property including, by way of example and not limitation, bonding, maintaining proper distance from other utilities, protecting the continuity of pedestrian and vehicular traffic and protecting any Right-of-Way improvements, private facilities and public safety.

6.8 Whenever necessary, after Constructing or Maintaining any of Grantee's Facilities within the Franchise Area, the Grantee shall, without delay, and at Grantee's sole expense, remove all debris and restore the surface as nearly as possible to as good or better condition as it was in before the work began. Grantee shall replace any property corner monuments, survey reference or hubs that were disturbed or destroyed during Grantee's work in the Franchise Area. Such restoration shall be done in a manner consistent with applicable codes and laws, under the supervision of the Grantor and to the Grantor's satisfaction and specifications. The restoration shall be done under a bond in an amount appropriate to guarantee adequate restoration.

6.9 Grantee shall continuously be a member of the State of Washington one number locator service under RCW 19.122, or an approved equivalent, and shall comply with all such applicable rules and regulations. Grantee shall provide reasonable notice to the City prior to commencing any Maintenance or



1 Construction under this Franchise and additionally to those owners or other
2 persons in control of property in the Franchise Area when the Maintenance or
Construction will affect access or otherwise impact the property.

3 6.10 Upon acceptance of this Franchise by Grantee, the Grantee shall file and
4 thereafter maintain at all times with the Grantor a survey depicting the location
5 of the Utility Corridor within the Franchise Area as well as the approximate
6 location of Grantee's Facilities within the Utility Corridor along with all other
7 known utilities, landmarks, and physical features.

8 6.11 Grantee shall also provide detailed as-built design drawings showing the
9 size, depth and location of all appurtenances and Facilities within the Franchise
10 Area.

11 6.12 Within thirty (30) days of completing any Maintenance or Construction, or
12 any other substantial activity within the Franchise Area, the Grantee shall
13 provide updated and corrected as-built drawings and a survey showing the
14 location, depth and other characteristics of the Facilities within the Franchise
15 Area.

16 6.13 Nothing in this Franchise shall be deemed to impose any duty or obligation
17 upon Grantor to determine the adequacy or sufficiency of Grantee's plans and
18 designs or to ascertain whether Grantee's proposed or actual construction,
19 testing, maintenance, repairs, replacement or removal is adequate or sufficient
20 or in conformance with the plans and specifications reviewed by Grantor.

21 6.14 Grantee shall be solely and completely responsible for workplace safety
22 and safe working practices on its job sites within the Franchise Area, including
23 safety of all persons and property during the performance of any work.

24 6.15 All Construction, Maintenance, repair or other work on the Facilities
25 hereunder shall be completed in accordance with Grantor's right-of-way
26 restoration policy.

27 Section 7. Operations, Maintenance, Inspection, Testing.

28 7.1 Grantee shall Operate, Maintain, inspect and test its Facilities in the
29 Franchise Area in full compliance with the applicable provisions of all federal,
30 state and local laws, regulations and standards, as now enacted or hereafter
31 amended, and any other future laws or regulations that are applicable to
32 Grantee's Facilities, products and business operations.



Section 8. Encroachment Management.

8.1 Within ninety (90) days of entering into this Franchise, and on an annual basis thereafter, Grantee shall provide a written encroachment management plan that demonstrates how Grantee's Facilities are and will be protected against possible encroachment. This plan shall include at least the following: (1) education and one-call involvement as defined in State and/or Federal Regulations, and (2) an encroachment management process(es) demonstrating: (a) Grantee's process for monitoring activity in or near the Utility Corridor; (b) Grantee's field verification of the location of Facilities within the Utility Corridor; (c) Grantee's encroachment tracking system; (d) Grantee's review/coordination process for critical encroachments; (e) control center notification of existing or active encroachments; and f) assertive protection of the Rights-of-Way.

8.2 Upon notification to Grantee of planned construction by Grantor or any third party within ten (10) feet of Grantee's Utility Corridor, Grantee shall flag the precise location of its Facilities before the construction commences, provide a representative to inspect the construction when it commences, and periodically inspect thereafter to ensure that Grantee's Facilities are not damaged by the construction.

Section 9. INTENTIONALLY OMITTED

Section 10. Relocation.

10.1 Relocation for Public Work. Grantee shall, by a time specified by the Grantor, protect, support, temporarily disconnect, relocate, or remove any of its Facilities when required by Grantor for work in furtherance of the public health, safety, or welfare, which work includes, without limitation: traffic conditions; public safety; public right-of-way construction; public right-of-way repair (including resurfacing or widening); change of public right-of-way grade; construction, installation or repair of sewers, drains, water pipes, power lines, signal lines, tracks, or any other type of government-owned telecommunications or public transportation systems, public work, public facility, or improvement or any government-owned utility; public right-of-way vacation; or for any other public purpose where the work involved would be aided by the removal or relocation of the Facilities. Collectively, such matters are referred to as the "public work."

10.1.1 Grantee may, after receipt of written notice requesting a relocation of its Facilities under section 10.1, submit to Grantor written alternatives to such relocation within forty five (45) calendar days of receiving the plans and specifications. Grantor shall evaluate these alternatives and advise Grantee in writing if one or more of the alternatives are suitable to



1 accommodate the work that would otherwise necessitate relocation of
2 the Facilities. If so requested by Grantor, Grantee shall submit additional
3 information to assist Grantor in making such evaluation. Grantor shall
4 give each alternative proposed by Grantee full and fair consideration but
5 retains full discretion to decide for itself whether to utilize its original plan
6 or an alternative proposed by Grantee. In the event Grantor ultimately
7 determines that there is no other reasonable alternative, Grantee shall
8 relocate its facilities as otherwise provided in this Section.

9 10.1.2 Grantor shall work cooperatively with Grantee in determining a
10 viable and practical route within which Grantee may relocate its Facilities
11 under this section 10, in order to minimize costs while meeting the public
12 work project objectives. Upon receipt of Grantor's notice, plans and
13 specifications, Grantee shall complete relocation of such Facilities so as
14 to accommodate the improvement project at least ten (10) calendar days
15 prior to commencement of the public work project or such other time as
16 the parties may agree in writing.

17 10.2 Notice. Except in the case of emergencies, the City shall provide written
18 notice, describing where the public work is to be performed, at least sixty (60)
19 days prior to the deadline by which Grantee must protect, support, temporarily
20 disconnect, relocate or remove its Facilities. Grantee may seek an extension of
21 the time to perform such tasks where they cannot be performed in sixty (60)
22 days even with the exercise of due diligence, and such request for an extension
23 shall not be unreasonably refused.

24 10.3 Emergency Relocation or Repair. In the event of an emergency, or
25 where the Facilities create or are contributing to an imminent danger to health,
26 safety, or property, Grantor may protect, support, temporarily disconnect,
remove, repair, decommission, or relocate any or all parts of the Facilities,
without prior notice, and charge the Grantee for costs incurred.

10.4 Relocation for Other than Public Work. Grantor reserves its authority to
require relocation of the Facilities located within the public right-of-way, as
provided for under applicable state, federal, and local law.

10.5 Redesign Option. As an alternative to relocation, Grantee may propose
an alternative design for the pending public work in order to avoid any
relocation of Grantee's Facilities. Such redesign proposal shall be subject to
review and approval by Grantor and all costs of the redesign, including, without
limitation, the costs actually incurred in the public work as a result of the
redesign shall be solely for Grantee's account. Approval and acceptance of any
such redesign proposal shall be at the sole discretion of Grantor.



Section 11. Removal, Abandonment in Place

11.1 In the event of Grantee's permanent cessation of use of its Facilities, or any portion thereof, within the Franchise Area, the Grantee shall, within one hundred and eighty days (180) after the cessation of use, remove the Facilities or any portion thereof.

11.2 In the event of the removal of all or a portion of the Facilities, Grantee shall restore the Franchise Area to as good or better condition as it was in before the work began in compliance with Grantor's right-of-way restoration policy.

11.3 Removal and restoration work shall be done at Grantee's sole cost and expense and to Grantor's reasonable satisfaction. Grantee shall be responsible for any environmental review required for the removal of any Facility and the payment of any costs of the environmental review.

11.4 If Grantee is required to remove its Facilities and fails to do so and/or fails to adequately restore the Franchise Area or other mutually agreed upon action(s), Grantor may, after reasonable notice to Grantee, remove the Facilities, restore the Franchise Area and/or take other action as is reasonably necessary at Grantee's expense. This remedy shall not be deemed to be exclusive and shall not prevent the City from seeking a judicial order directing that the Facilities be removed.

11.5 With the express written consent of the Grantor, the Grantee may lawfully decommission its Facilities, as directed by Grantor, and abandon them in place. Grantee shall be responsible for any environmental review required for the abandonment of any Facilities and the payment of any costs of such environmental review. Grantor's consent to the abandonment of Facilities in place shall not relieve the Grantee of the obligation and/or costs to remove or to alter such Facilities in the future in the event it is reasonably determined that removal or alteration is necessary or advisable for the health and safety of the public, in which case the Grantee shall perform such work at no cost to the Grantor.

11.6 The parties expressly agree that paragraph 11.5 shall survive the expiration, revocation or termination of this Franchise.

Section 12. Violations, Remedies and Termination.

12.1 In addition to any rights set out elsewhere in this Franchise, or other rights it may possess at law or equity, the Grantor reserves the right to apply any of the following remedies, alone or in combination, in the event Grantee violates any material provision of this Franchise. The remedies provided for in this



1 Franchise are cumulative and not exclusive; the exercise of one remedy shall
2 not prevent the exercise of another or any rights of the Grantor at law or equity.

3 12.2 If Grantee fails or refuses to comply with this Franchise, or any of its terms
4 or provisions, the damages suffered by the Grantor as a result may include,
5 without limitation, increased costs of administration and other damages difficult
6 to measure. Therefore, Grantor and Grantee agree that liquidated damages up
7 to one thousand dollars (\$1,000) per day, per incident or other measure of
8 violation, may be assessed from the first day of the violation or incident. These
9 damages represent both parties' best estimate of the damages resulting from
10 the specified injury. The imposition of liquidated damages will invoke the
11 dispute resolution provisions as provided in this Franchise; provided, however,
12 that liquidated damages shall not accrue during the pendency of dispute
13 resolution proceedings.

14 12.3 Grantor may also terminate this Franchise if Grantee materially breaches
15 or otherwise fails to perform, comply with or otherwise observe any of the terms
16 and conditions of this Franchise, or fails to maintain all required licenses and
17 approvals from federal, state, and local jurisdictions, and fails to cure such
18 breach or default within thirty (30) calendar days of Grantor's providing Grantee
19 written notice thereof, or, if not reasonably capable of being cured within thirty
20 (30) calendar days, within such other reasonable period of time as the parties
21 may agree.

22 12.4 This Franchise shall not be terminated except upon a majority vote of the
23 City Council, after reasonable notice to Grantee and an opportunity to be heard,
24 provided that if exigent circumstances necessitate immediate termination, the
25 hearing may be held as soon as possible after the termination.

26 12.5 In the event of termination under this Franchise, Grantee shall immediately
discontinue operation of the Facilities through the Franchise Area. Either party
may in such case invoke the dispute resolution provisions. Alternatively,
Grantor may elect to seek relief directly in Pierce County Superior Court, in
which case the dispute resolution requirements shall not be applicable in this
limited situation. Once the Grantee's rights to Operate in the Franchise Area
have terminated, Grantee shall comply with the Franchise provision(s)
regarding removal and/or abandonment of Facilities.

12.6 Grantor's failure to exercise a particular remedy at any time shall not waive
Grantor's right to terminate, assess penalties, or assert that or any other
remedy at law or equity for any future breach or default of Grantee.

12.7 Termination of this Franchise shall not release Grantee from any liability or
obligation with respect to any matter occurring prior to such termination, nor



shall such termination release Grantee from any obligation to remove or secure the Facilities pursuant to this Franchise and to restore the Franchise Area.

12.8 The parties acknowledge that the covenants set forth herein are essential to this Franchise, and, but for the mutual agreements of the parties to comply with such covenants, the parties would not have entered into this Franchise. The parties further acknowledge that they may not have an adequate remedy at law if the other party violates such covenant. Therefore, the parties shall have the right, in addition to any other rights they may have, to obtain in any court of competent jurisdiction injunctive relief to restrain any breach or threatened breach or otherwise to specifically enforce any of the covenants contained herein should the other party fail to perform them.

Section 13. Dispute Resolution.

13.1 In the event of a dispute between Grantor and Grantee arising by reason of this Franchise, the dispute shall first be referred to the operational officers or representatives designated by Grantor and Grantee to have oversight over the administration of this Franchise. The officers or representatives shall meet within thirty (30) calendar days of either party's request for a meeting, whichever request is first, and the parties shall make a good faith effort to achieve a resolution of the dispute

13.2 If the parties are unable to resolve the dispute under the procedure set forth in this section, the parties hereby agree that the matter shall be referred to mediation. The parties shall mutually agree upon a mediator to assist them in resolving their differences. If the parties are unable to agree upon a mediator, the parties shall jointly obtain a list of seven (7) mediators from a reputable dispute resolution organization and alternate striking mediators on that list until one remains. A coin toss shall determine who may strike the first name. If a party fails to notify the other party of which mediator it has stricken within two (2) business days, the other party shall have the option of selecting the mediator from those mediators remaining on the list. Any expenses incidental to mediation shall be borne equally by the parties.

13.3 If the parties fail to achieve a resolution of the dispute through mediation, either party may then pursue any available judicial remedies, provided that if the party seeking judicial redress does not substantially prevail in the judicial action, it shall pay the other party's reasonable legal fees and costs incurred in the judicial action.

Section 14. Indemnification.

14.1 General Indemnification. Grantee shall indemnify, defend and hold harmless Grantor from any and all liability, loss, damage, cost, expense, and



1 claim of any kind, including reasonable attorneys' and experts' fees incurred by
2 Grantor in defense thereof, arising out of or related to, directly or indirectly, the
3 installation, construction, operation, use, location, testing, repair, maintenance,
4 removal, or abandonment of Grantee's Facilities, or from the existence of
5 Grantee's Facilities, and the products contained in, transferred through,
6 released or escaped from said Facilities, including the reasonable costs of
7 assessing such damages and any liability for costs of investigation, abatement,
8 correction, cleanup, fines, penalties, or other damages arising under any
9 environmental laws; provided, however, that this provision shall not apply to the
10 extent liability results from the negligent action or inaction of the Grantor. If any
11 action or proceeding covered by this section is brought against Grantor by
12 reason of the Facilities, Grantee shall defend the Grantor at the Grantee's
13 complete expense, provided that, for uninsured actions or proceedings, defense
14 attorneys shall be approved by Grantor, which approval shall not be
15 unreasonably withheld.

16 14.2 Environmental Indemnification. Grantee shall indemnify, defend and save
17 Grantor harmless from and against any and all liability, loss, damage, expense,
18 actions and claims, either at law or in equity, including, but not limited to, costs
19 and reasonable attorneys' and experts' fees incurred by Grantor in defense
20 thereof, arising directly or indirectly from (a) Grantee's breach of any
21 environmental laws applicable to the Facilities or (b) from any release of a
22 Hazardous Substance on or from the Facilities or (c) other activity related to this
23 Franchise by Grantee, its agents, contractors or subcontractors. This indemnity
24 includes but is not limited to (a) liability for a governmental agency's costs of
25 removal or remedial action for Hazardous Substances; (b) damages to natural
26 resources caused by Hazardous Substances, including the reasonable costs of
assessing such damages; (c) liability for any other person's costs of responding
to Hazardous Substances; (d) liability for any costs of investigation, abatement,
correction, cleanup, fines, penalties, or other damages arising under any
environmental laws; and (e) liability for personal injury, property damage, or
economic loss arising under any statutory or common-law theory.

20 Section 15. Insurance and Bond Requirements.

21 15.1 During the term of this Franchise, Grantee shall provide and maintain, at
22 its own cost, insurance in the minimum amount of TWO MILLION UNITED
23 STATES DOLLARS (\$2,000,000.00) for each occurrence, in a form and with a
24 carrier reasonably acceptable to the Grantor, naming Grantor as an additional
25 insured, to cover any and all insurable liability, damage, claims and loss as set
26 forth in Section 14.1 above, and, to the extent such coverage is reasonably
available in the commercial marketplace, all liability, damage, claims and loss
as set forth in Section 14.2 above, except for liability for fines and penalties for
violation of environmental laws as otherwise provided below. Insurance
coverage shall include, but is not limited to, all defense costs. Such insurance



1 shall include, but is not limited to, pollution liability coverage, at a minimum
2 covering liability from sudden and accidental occurrences, subject to time
3 element reporting requirements, and such other applicable pollution coverage
4 as is reasonably available in the commercial marketplace.

5 15.2 Proof of insurance and a copy of the insurance policy, including, but not
6 limited to, coverage terms and claims procedures, shall be provided to the
7 Grantor prior to the beginning of any substantial work, testing or construction or
8 reconstruction on the Facilities. Said insurance shall contain a provision that it
9 shall not be canceled without a minimum of thirty (30) days prior written notice
10 to the Grantor.

11 15.3 On or before the Effective Date of this Franchise, the Grantee shall furnish
12 a bond executed by the Grantee and a corporate surety authorized to do surety
13 business in the State of Washington, with an AM Best rating of A XII in the sum
14 of One Hundred Thousand Dollars (\$100,000.00) to insure performance of the
15 Grantee's obligations and performance under this Franchise, such bond to be
16 conditioned that the Grantee shall well and truly keep and observe all of the
17 covenants, terms and conditions and faithfully perform all of the Grantee's
18 obligations under this Franchise.

19 15.4 The indemnity, insurance and bond provisions contained herein shall
20 survive the termination of this Franchise and shall continue for as long as the
21 Grantee's Facilities shall remain in or on the Franchise Area or until the parties
22 execute a new Franchise Agreement which modifies or terminates these
23 indemnity, insurance and bond provisions.

24 Section 16. Receivership and Foreclosure.

25 16.1 Grantee shall immediately notify the Grantor in writing if it: files a voluntary
26 petition in bankruptcy, a voluntary petition to reorganize its business, or a
27 voluntary petition to effect a plan or other arrangement with creditors; files an
28 answer admitting the jurisdiction of the Court and the material allegations of an
29 involuntary petition filed pursuant to the Bankruptcy Code, as amended; or is
30 adjudicated bankrupt, makes an assignment for the benefit of creditors, or
31 applies for or consents to the appointment of any receiver or trustee of all or
32 any part of its property including all or any parts of its business operations, or
33 Facilities within or affecting the Franchise Area.

34 16.2 Upon the foreclosure or other judicial sale of all or a substantial part of
35 Grantee's business operations, or Facilities within or affecting the Franchise
36 Area, or upon the termination of any lease covering all or a substantial part of
37 the Facilities within or affecting the Franchise Area, or upon the occasion of
38 additional events which effectively cause termination of Grantee's rights or
39 ability to operate the Facilities within or affecting the Franchise Area, Grantee



1 shall notify the Grantor of such fact, and such notification or the occurrence of
2 such terminating events shall be treated as a notification that a change in
3 control of the Grantee has taken place, and the provisions of this Franchise
4 Agreement governing the consent of the Grantor to such change in control of
5 the Grantee shall apply.

6 16.3 The Grantor shall have the right to cancel this Franchise one hundred
7 twenty (120) days after the appointment of a receiver or trustee to take over and
8 conduct the business of Grantee, whether in receivership, reorganization,
9 bankruptcy, or other action or proceeding, unless such receivership or
10 trusteeship shall have been vacated prior to the expiration of said one hundred
11 twenty (120) days, or unless:

12 (a) Within one hundred twenty (120) days after the election or
13 appointment, such receiver or trustee shall have fully complied with all of
14 the provisions of this Franchise Agreement and remedied any existing
15 violations and/or defaults; and

16 (b) Within said one hundred twenty (120) days, such receiver or trustee
17 shall have executed an agreement, duly approved by the court having
18 jurisdiction, whereby such receiver or trustee assumes and agrees to be
19 bound by each and every provision of this Franchise Agreement granted
20 to the Grantee except where expressly prohibited by Washington law.

21 Section 17. Franchise Fee and Costs.

22 17.1 In consideration for granting this Franchise and for the use of the
23 Franchise Area, there is hereby established an annual fee equal to Three
24 Thousand Six Hundred Twenty-Three Dollars (\$3,623.00) per year.

25 17.2 The first installment shall be paid at the time Grantee accepts this
26 Franchise and shall cover the next twelve (12) months. Each succeeding
installment shall cover the next twelve (12) month period and shall be paid not
later than the anniversary date of the Effective Date of this Franchise.

17.3 Interest shall accrue on any late payment at the rate of twelve percent
(12%) per annum. The annual fee shall remain constant for the first three (3)
years of this Franchise and shall then subsequently increase at a rate of one
and a half percent (1 1/2%) every year thereafter beginning with year four (4)
for the Franchise's remaining term.

17.4 The Franchise Fee set forth in section 17.1 does not include any payments
associated with the Grantor licensing, permitting or granting any other
approvals necessary for Grantee to Construct, Operate or Maintain its Facilities
or for any inspection or enforcement costs hereunder. Grantee agrees that it



will obtain, at the Grantor's then-existing rate, any and all licenses, permits or other approvals necessary for Grantee to Construct, Operate and Maintain its Facilities in the Franchise Area.

Section 18. Legal Relations.

18.1 Nothing contained in this Franchise shall be construed to create an association, trust, partnership, agency relationship, or joint venture or to impose a trust, partnership, or agency duty, obligation or liability on or with regard to any party. Each party shall be individually and severally liable for its own duties, obligations, and liabilities under this Franchise.

18.2 Grantee accepts any privileges granted by Grantor to the Franchise Area, public Rights-of-Way and other Public Property in an "as is" condition. Grantee agrees that the City has never made any representations, implied or express warranties or guarantees as to the suitability, security or safety of Grantee's location of Facilities or the Facilities themselves in public property or right of way areas or possible hazards or dangers arising from other uses of the public rights of way or other public property by the City or the general public. Grantee shall remain solely and separately liable for the function, testing, maintenance, replacement and/or repair of the Facilities or other activities permitted under this Franchise.

18.3 Grantee waives immunity under Title 51 RCW in any cases involving the Grantor and affirms that the Grantor and Grantee have specifically negotiated this provision, to the extent it may apply. This Franchise shall not create any duty of the City or any of its officials, employees or agents and no liability shall arise from any action or failure to act by the City or any of its officials, employees or agents in the exercise of powers reserved to the Grantor. Further, this ordinance is not intended to acknowledge, create, imply or expand any duty or liability of the Grantor with respect to any function in the exercise of its police power or for any other purpose. Any duty that may be deemed to be created in the City shall be deemed a duty to the general public and not to any specific party, group or entity.

18.4 This Franchise shall be governed by and construed in accordance with the laws of the State of Washington and the parties agree that in any action, except actions based on federal questions, venue shall lie exclusively in Pierce County, Washington.



Section 19. Miscellaneous.

19.1 In the event that a court or agency of competent jurisdiction declares a material provision of this Franchise Agreement to be invalid, illegal or unenforceable, the parties shall negotiate in good faith and agree, to the maximum extent practicable in light of such determination, to such amendments or modifications as are appropriate actions so as to give effect to the intentions of the parties as reflected herein. If severance from this Franchise Agreement of the particular provision(s) determined to be invalid, illegal or unenforceable will fundamentally impair the value of this Franchise Agreement, either party may apply to a court of competent jurisdiction to reform or reconstitute the Franchise Agreement so as to recapture the original intent of said particular provision(s). All other provisions of the Franchise shall remain in effect at all times during which negotiations or a judicial action remains pending.

19.2 Whenever this Franchise sets forth a time for any act to be performed, such time shall be deemed to be of the essence, and any failure to perform within the allotted time may be considered a material violation of this Franchise.

19.3 In the event that Grantee is prevented or delayed in the performance of any of its obligations under this Franchise by reason(s) beyond the reasonable control of Grantee, then Grantee's performance shall be excused during the Force Majeure occurrence. Upon removal or termination of the Force Majeure occurrence, the Grantee shall promptly perform the affected obligations in an orderly and expedited manner under this Franchise or procure a substitute for such obligation or performance that is satisfactory to Grantor. Grantee shall not be excused by mere economic hardship or by misfeasance or malfeasance of its directors, officers or employees.

19.4 The Section headings in this Franchise are for convenience only, and do not purport to and shall not be deemed to define, limit, or extend the scope or intent of the Section to which they pertain.

19.5 By entering into this Franchise, the parties expressly do not intend to create any obligation or liability, or promise any performance to, any third party, nor have the parties created for any third party any right to enforce this Franchise.

19.6 This Franchise and all of the terms and provisions shall be binding upon and inure to the benefit of the respective successors and assignees of the parties.

19.7 Whenever this Franchise calls for notice to or notification by any party, the same (unless otherwise specifically provided) shall be in writing and directed to the recipient at the address set forth in this Section, unless written notice of



change of address is provided to the other party. If the date for making any payment or performing any act is a legal holiday, payment may be made or the act performed on the next succeeding business day which is not a legal holiday. Notices shall be directed to the parties as follows:

To the Grantor:

To Grantee:

City of Tacoma
ATTN: Real Property Services
747 Market Street, 7th Floor
Tacoma, WA 98402

Puyallup Tribe of Indians
Tribal Administrator
cc: Land Use Director
3009 E. Portland Ave.
Tacoma, WA 98404

19.8 The parties each represent and warrant that they have full authority to enter into and to perform this Franchise, that they are not in default or violation of any permit, license, or similar requirement necessary to carry out the terms hereof, and that no further approval, permit, license, certification, or action by a governmental authority is required to execute and perform this Franchise, except such as may be routinely required and obtained in the ordinary course of business.

19.9 This Franchise Agreement and the attachments hereto represent the entire Understanding and agreement between the parties with respect to the subject matter and it supersedes all prior oral negotiations between the parties. This Franchise can be amended, supplemented, modified or changed only by duly approved amending ordinance made in writing which makes specific reference to the Franchise or the appropriate attachment and which is signed by the party against whom enforcement of any such amendment, supplement, modification or change is sought. All previous franchise agreements between the parties pertaining to Grantee's Operation of its Facilities are hereby superseded.

19.10 Grantee shall, within thirty (30) days after passage of this Ordinance, file with the City Clerk, its unconditional written acceptance of all the terms and conditions of this Franchise. If Grantee shall fail to so file its written acceptance within such period, then the rights and privileges granted hereunder shall be deemed forfeited.



1 19.11 The Effective Date of this Franchise shall be the 16th day of January
2 2010, after passage, approval and legal publication of this Ordinance as
3 provided by law, and provided it has been duly accepted by Grantee as herein
4 above provided.

5 Passed DEC 14 2010

6 *Mark Stroh*
7 Mayor

8 Attest:

9 *Doris Seum*
10 City Clerk

11 Approved as to Form:

12 *[Signature]*
13 Deputy City Attorney



UNCONDITIONAL ACCEPTANCE BY GRANTEE:

I, the undersigned Chairman of the Puyallup Tribal Council, governing body of the Puyallup Tribe of Indians, am authorized to bind the Tribe and to unconditionally accept the terms and conditions of the foregoing Franchise (Ordinance No. _____), which are hereby accepted by the Puyallup Tribe this _____ day of _____, 2010.

PUYALLUP TRIBE OF INDIANS

Name: Herman Dillon, Sr.
Chairman, Puyallup Tribal Council

Subscribed and sworn to before me this _____ day of _____, 2010.

Notary Public in and for the State of
Washington
My commission expires _____

Received on behalf of the City this _____ day of _____, 2010.

Name: _____
Title: _____



Schedule I

"Franchised Area"

All that portion of East "R" Street, lying between East 32nd Street and East 29th Streets, as dedicated to the City of Tacoma within the Map of Indian Addition to the City of Tacoma, according to the Plat thereof filed of record on May 1, 1896 in Book 7 of Plats at Pages 30 and 31, records of Pierce County, Washington.

All as specifically depicted within the City of Tacoma's Work Order 60000024831, on file with the City of Tacoma, Construction Division of Public Works.



REQUEST FOR

☒ ORDINANCE ☐ RESOLUTION

Request #:

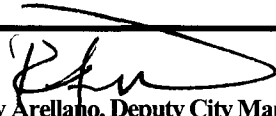
12777

Ord./Res. #:

27957

1. DATE: October 25, 2010

2. SPONSORED BY: COUNCIL MEMBER(S) N/A

3a. REQUESTING DEPARTMENT/DIVISION/PROGRAM Public Works, Facilities Management, Real Property Services 3b. "DO PASS" FROM Government Performance and Finance ☒ Yes <u>October 20, 2010</u> ☐ No ☐ To Committee as information only ☐ Did not go before a Committee 3c. DID THIS ITEM GO BEFORE THE PUBLIC UTILITY BOARD? ☐ Yes, on ☒ Not required	4a. CONTACT (for questions): Conor McCarthy	PHONE: 591-5320
	4b. Person Presenting: Conor McCarthy	PHONE: 591-5320
	4c. ATTORNEY: Jeff Capell	PHONE: 591-5638
 Richard E. McKinley, PW Director	N/A Robert K. Biles, Finance Director	 Rey Arellano, Deputy City Manager

5. REQUESTED COUNCIL DATE: November 23, 2010

6. SUMMARY AGENDA TITLE: (A concise sentence, as it will appear on the Council agenda.)

Granting a non-exclusive, limited franchise to the Puyallup Tribe to install conduits in East R Street between East 29th and East 32nd, for the future development of a private electrical and communications network.

7. BACKGROUND INFORMATION/GENERAL DISCUSSION: (Why is this request necessary? Are there legal requirements? What are the viable alternatives? Who has been involved in the process?)

The Puyallup Tribe is obtaining permit approval to construct road and infrastructure improvements to East R Street right-of-way. As part of this project, the Puyallup Tribe would like to install conduits into East R Street for the future development of a private electrical and communications network. A limited franchise is required to allow the Puyallup Tribe to occupy City right-of-way with private utility infrastructure. City and TPU staff have reviewed the plans for installation of the conduits and said plans do not interfere with the City's current or planned use of East R Street right-of-way. City staff and the Puyallup Tribe have negotiated a franchise agreement which establishes the contractual and legal charges, terms, and conditions for the construction, maintenance, and repair of its system in conformance with applicable laws, City standards and City codes.

8. LIST ALL MATERIAL AVAILABLE AS BACKUP INFORMATION FOR THE REQUEST AND INDICATE WHERE FILED:

Source Documents/Backup Material

Location of Document

Proposed Franchise Agreement

City Clerk

REQUEST (CONT)

CITY CLERK USE ONLY

Request #:

12777

Ord/Res #:

27957

9. WHICH OF THE CITY'S STRATEGIC GOALS DOES THIS ITEM SUPPORT? (CHECK THE GOAL THAT BEST APPLIES)

- A. ☐ A SAFE, CLEAN AND ATTRACTIVE COMMUNITY
B. ☒ A DIVERSE, PRODUCTIVE AND SUSTAINABLE ECONOMY
C. ☐ A HIGH-PERFORMING, OPEN AND ENGAGED GOVERNMENT

10. IF THIS CONTRACT IS FOR AN AMOUNT OF \$200,000 OR LESS, EXPLAIN WHY IT NEEDS LEGISLATIVE APPROVAL:

11. FINANCIAL IMPACT: ☐ EXPENDITURE ☒ REVENUE

- A. ☐ NO IMPACT (NO FISCAL NOTE)
B. ☐ YES, OVER \$100,000, Fiscal Note Attached
C. ☒ YES, UNDER \$100,000, (NO FISCAL NOTE)
Provide funding source information below:

FUNDING SOURCE: (Enter amount of funding from each source)

Fund Number & Name:	State \$	City \$	Other \$	Total Amount
1100 PROP, PW			\$72,460.00	\$72,460.00
Property Management			(\$3,623 per year for twenty years)	

If an expenditure, is it budgeted? ☐ Yes ☐ No Where? Cost Center:
Acct #:

Ordinance No. 27957

First Reading of Ordinance: NOV 23 2010

FINAL READING 12/14/10

Final Reading of Ordinance: DEC 14 2010

Passed: DEC 14 2010

Roll Call Vote:

MEMBERS	AYES	NAYS	ABSTAIN	ABSENT
Mr. Boe	✓			
Mr. Campbell				✓
Mr. Fey				✓
Mr. Lonergan	✓			
Mr. Manthou	✓			
Mr. Mello	✓			
Ms. Walker	✓			
Ms. Woodards	✓			
Mayor Strickland	✓			

MEMBERS	AYES	NAYS	ABSTAIN	ABSENT
Mr. Boe				
Mr. Campbell				
Mr. Fey				
Mr. Lonergan				
Mr. Manthou				
Mr. Mello				
Ms. Walker				
Ms. Woodards				
Mayor Strickland				