

ORDINANCE NO. 2007-11

CITY OF BAINBRIDGE ISLAND

AN ORDINANCE granting to Puget Sound Energy, a Washington public service company, and its successors and assigns, for a period of fifteen (15) years, the right, privilege, authority, consent and approval to set, erect, lay, construct, extend, support, attach, connect and stretch Facilities between, maintain, repair, replace, enlarge, operate and use Facilities in, upon, over, under, along, across and through the Franchise Area for purposes of transmission, distribution and sale of electric energy for power, heat, light and any other purpose for which electric energy can be used.

WHEREAS, Puget Sound Energy (“PSE”) wishes to construct Facilities (as hereinafter defined) on the streets, alleys, or public places within the City of Bainbridge Island, Washington (the “City”), to be utilized by PSE in the operation of a plant or system for the transmission or distribution of electric energy for sale within the City, and, pursuant to RCW 35A.47.040, PSE wishes to obtain the consent and approval of the City Council of the City for such purpose; and

WHEREAS, the City Council is willing to grant PSE such consent and approval on a non-exclusive basis, in accordance with the provisions of RCW 35A.47.040, RCW 35.18.180, RCW 35A.12.120, RCW 35.21.860 and any other applicable law.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF BAINBRIDGE ISLAND DO ORDAIN AS FOLLOWS:

1. Definitions

1.1 When used in this Ordinance (this “Ordinance”) the following terms shall mean:

1.1.1. “BIMC” means the Bainbridge Island Municipal Code.

1.1.2 “City” means the City of Bainbridge Island, Washington, a non-charter code city subject to Title 35A of the Revised Code of Washington, and its respective successors and assigns.

1.1.3 “Director” means the Bainbridge Island Public Works Director or his designee.

1.1.4 “Facility” or “Facilities” means all electric transmission and distribution systems, including but not limited to, poles (with or

PSE must relocate its Facilities to eliminate such interference, such relocation shall be governed by Section 5.1 below or for any such interference resulting from new development ingress or egress to properties abutting the Franchise Area in proximity to PSE Facilities existing within the Franchise Area prior to the development shall be subject to Section 5.2.

- 4.3 Whenever it shall be necessary for PSE to engage in work within the Franchise Area, PSE shall inform the City of where and when such work will be done prior to such work being performed, and shall apply for all required permits and perform work in accordance with the permit and applicable requirements of the current City standards, BIMC, state and federal laws.
- 4.4 Whenever it shall be necessary for PSE, in the exercise of its rights under this Franchise, to make any excavation in the Franchise Area, PSE shall, upon completion of such excavation restore the surface of the Franchise Area to at least the same condition as it was immediately prior to such excavation.
- 4.5 The City may require PSE to post an appropriate bond, as determined by the City, to ensure satisfactory restoration of the Franchise Area following the completion of PSE's work therein. In lieu of a separate bond for routine individual projects involving work in the Franchise Area, PSE may satisfy the City's bond requirements by posting a single on-going performance bond, as established by the City.
- 4.6 All work performed by PSE pursuant to this Section shall be performed in accordance with the permit(s) issued by the City, as applicable, and shall further be designed, constructed and maintained in accordance with all applicable City, County, State, Federal and industry standards, codes, laws and regulations.

5. Relocation of Facilities.

5.1 Relocation Due to City Work.

5.1.1 Whenever the City causes a public works project or other improvement to be undertaken within the Franchise Area or other locations described in Section 3.1, and such project or improvement requires the relocation of PSE's then existing Facilities, the City shall:

- 5.1.1.1 Provide PSE, within a reasonable time prior to the commencement of such public right of way improvement, written notice of intent regarding such relocation.
- 5.1.1.2 Provide PSE with reasonable plans and specifications for such public right of way improvement.

- 5.1.1.3 The City may request that existing overhead PSE facilities be relocated within underground duct in conformance with Section 14 hereof or as addressed elsewhere in this Ordinance.
- 5.1.1.4 After receipt of such notice and such plans and specifications, PSE shall relocate such Facilities to a mutually agreeable location within the Franchise Area or other public location at no charge to the City. The relocation shall occur within one hundred twenty (120) calendar days or other mutually agreed upon time. If the City requires the subsequent relocation of any Facilities within five (5) years from the date of relocation of such Facilities pursuant to this Section, the City shall bear the entire cost of such subsequent relocation.
- 5.1.1.5 As used in this Section, the term “public works project or other improvement” shall mean a City-funded capital improvement to the public right of way or other City property for the primary benefit of the City and its constituents, including but not limited to, City roads and streets and City utility facilities.
- 5.1.2 Notwithstanding its obligations set forth in Section 5.1.1, within sixty (60) days of receipt of notice of relocation from the Director as provided in Section 5.1.1, PSE may propose in writing to the City alternatives to relocation of PSE’s Facilities. Upon the City’s receipt from PSE of such written alternatives, the City shall evaluate such alternatives and shall advise PSE in writing if one or more of such alternatives is suitable to accommodate the work which would otherwise necessitate relocation of PSE’s Facilities. In evaluating such alternatives, the City shall give each alternative proposed by PSE full and fair consideration with due regard to all the facts and circumstances which bear upon the practicality of relocation and alternatives to relocation. In the event the City reasonably determines that such alternatives are not appropriate, PSE shall relocate its Facilities as otherwise provided in this Section.
- 5.1.3 If, during the construction of any public works project or other improvement undertaken by the City, an emergency posing a threat to public safety or welfare, or a substantial risk of severe economic consequences to the City, arises requiring the relocation of PSE’s Facilities, the City shall give PSE notice of the emergency as soon as reasonably practicable. Upon receipt of such notice from the City, PSE shall endeavor to respond as soon as reasonably practicable to relocate the affected Facilities.

5.2 Relocation Due to Third Party Work.

- 5.2.1 Whenever any Third Party requires the relocation of PSE's Facilities to accommodate the work of such person or entity within the Franchise Area or other locations described in Section 3.1; or whenever the City requires the relocation of PSE's Facilities within the Franchise Area or other locations described in Section 3.1 for the benefit of any Third Party, then PSE shall have the right as a condition of such relocation to require such person or entity to:
- 5.2.1.1 Make payment to PSE at a time and upon terms reasonably acceptable to PSE, for any and all costs and expenses incurred by PSE in the relocation of PSE's Facilities; and
 - 5.2.1.2 Indemnify and save PSE 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 PSE's Facilities, to the extent such injury or damage is caused by the negligence of the person or entity requesting the relocation of PSE's Facilities or the negligence of the agents, servants or employees of the person or entity requesting the relocation of PSE's Facilities.
- 5.2.2 Any condition or requirement imposed by the City upon any Third Party (including, without limitation, any condition or requirement imposed pursuant to any contract or in conjunction with approvals or permits for zoning, land use, construction or development) which requires the relocation of PSE's Facilities shall be a required relocation for purposes of this Section 5.2; provided, that if the primary purpose of imposing such condition or requirement upon such person or entity is to cause the grading or widening of the Franchise Area on the City's behalf consistent with the City's six-year Transportation Improvement Program, Capital Investment Plan or Transportation Facilities Program, then PSE shall relocate its Facilities within the Consent Area in accordance with Section 5.1.
- 5.2.3 PSE shall coordinate with other persons having the right to use the Franchise Area or other City property for the location or relocation of Facilities, and shall cooperate to the extent reasonably required by the City with other users of the right of way to coordinate construction activities.
- 5.2.4 Nothing in this Section 5 "Relocation of Facilities" shall require PSE to bear any cost or expense in connection with the location or

relocation of any Facilities then existing under benefit of easement or such other rights not derived from this Ordinance.

6. Indemnification.

- 6.1 PSE shall indemnify, defend and hold the City, its elected officials, agents, officers or employees harmless from and against any and all claims, demands, liability, loss, cost, damage or expense of any nature whatsoever including all costs and attorneys' fees, made against the City, its elected officials, agents, officers and/or employees on account of injury, harm, death or damage to persons or property which is caused by, in whole or in part the willfully tortuous, negligent acts, and/or negligent omissions of Puget Sound Energy and/or its directors, officers, agents, servants, employees, contractors, or subcontractors in the exercise of the rights granted to PSE by this Franchise.
- 6.2 In the event that both PSE and the City are both negligent, then PSE's liability for indemnification of the City shall be limited to the contributory negligence for any resulting suits, actions, claims, liability, damages, judgments, costs and expenses (including reasonable attorney's fees and disbursements) that can be apportioned to PSE, its officers, employees, and agents.
- 6.3 PSE's indemnification obligations pursuant to Subsection 6.1 shall include assuming potential liability for actions brought by PSE's own employees and the employees of PSE's agents, representatives, contractors, and subcontractors even though PSE might be immune under Title 51 RCW from direct suit brought by such employees. It is expressly agreed and understood that this assumption of potential liability for actions brought by the aforementioned employees is limited solely to claims against the City arising by virtue of PSE's exercise of the rights set forth in this Franchise. The obligations of PSE under this Subsection 6.3 have been mutually negotiated by the parties hereto, and PSE acknowledges that the City would not enter into this Franchise without PSE waiver thereof. To the extent required to provide this indemnification and this indemnification only, PSE waives its immunity under Title 51 RCW as provided in RCW 4.24.115.
- 6.4 In the event any matter (for which the City intends to assert its rights under this Section 6) is presented to or filed with the City, the City shall promptly notify PSE thereof and PSE shall have the right, at its election and at its sole cost and expense, to settle and compromise such matter as it pertains to PSE's responsibility to indemnify, defend and hold harmless the City, its elected officials, agents, officers and/or employees. In the event any suit or action be started against the City based upon any such matter, the City shall likewise promptly notify PSE thereof, and PSE shall have the right, at its election and at its sole cost and expense, to settle and compromise such suit or action, or defend the same at its sole cost and expense, by attorneys of its own election, as it pertains to

PSE responsibility to indemnify, defend and hold harmless the City, its elected officials, agents, officers and/or employees.

6.5 Nothing contained in this Section or Agreement shall be construed to create a liability or a right of indemnification by any third party.

6.6 The provisions of this Section shall survive the expiration or termination of this Agreement with respect to any event occurring prior to such expiration or termination.

7. Moving Buildings within the Franchise Area.

7.1 If any Third Party obtains permission from the City to use the Franchise Area for the moving or removal of any building or other object, the City shall, prior to granting such permission, require such Third Party to make any necessary arrangements with PSE for the temporary adjustment of PSE's wires to accommodate the moving or removal of such building or other object. Such necessary arrangements with PSE shall be made, to PSE's satisfaction, not less than fourteen (14) days prior to the moving or removal of said building or other object. In such event, PSE shall, at the expense of the person or entity desiring to move or remove such building or other object, adjust any of its wires which may obstruct the moving or removal of such building or other object, provided that:

7.1.1 The moving or removal of such building or other object which necessitates the adjustment of wires shall be done at a reasonable time and in a reasonable manner so as not to unreasonably interfere with PSE's business;

7.1.2 Where more than one route is available for the moving or removal of such building or other object, such building or other object shall be moved or removed along the route which causes the least interference with PSE's business, taking into account interference that alternatives would cause with other overhead Facilities.

8 City use of Facilities.

8.1 During the term of this Franchise, and with respect to poles which are Facilities and which are (i) wholly owned by PSE and (ii) are located within the Franchise Area, the City, subject to PSE's prior written consent which shall not be unreasonably withheld, may install and maintain City-owned overhead wires, and cables for police, fire, traffic control, communications and other non-commercial municipal purposes. The foregoing rights of the City to install and maintain such wires, and cables are further subject to the following:

- 8.2 Such installation and maintenance shall be performed by the City at its sole risk and expense, in accordance with all applicable laws, codes and subject to such reasonable requirements as PSE may specify from time to time (including, without limitation, requirements accommodating PSE's Facilities or the facilities of other parties having the right to use PSE's Facilities); and
- 8.3 PSE shall have no obligation under Section 10 in connection with any City-owned wires installed or maintained on PSE's poles.
- 8.4 The City shall indemnify, defend and hold harmless PSE in connection with the City's use of PSE Facilities.
- 8.5 PSE shall not charge the City a fee for the use of such poles in accordance with this Section; provided, however, that nothing herein shall require PSE to bear any cost or expense in connection with such installation and maintenance by the City.

9. Default.

- 9.1 If PSE shall fail to comply with the provisions of this Franchise, the City may serve upon PSE a written order to so comply within sixty (60) days from the date such order is received by PSE. If PSE is not in compliance with this Franchise after expiration of said sixty (60) day period, the City may, by ordinance, declare an immediate forfeiture of this Franchise, provided, however, if any failure by PSE to comply with this Franchise cannot be corrected with due diligence by PSE within said sixty (60) day period (PSE's obligation to comply and to proceed with due diligence being subject to unavoidable delays and events beyond its control), then the time within which PSE may so comply shall be extended for such time as may be reasonably necessary and so long as PSE commences promptly and diligently to effect such compliance.
- 9.2 Notwithstanding PSE's obligation to comply and to proceed with due diligence to correct any default, the City recognizes that unavoidable delays and events beyond PSE's control may occur. In such event, the parties agree that PSE shall make a good faith effort to expeditiously remedy the default. In the event of a declaration of forfeiture, should either party commence litigation against the other to appeal (in the case of PSE) or enforce (in the case of the City) such declaration of forfeiture, the prevailing party in any such litigation shall be entitled to recover its costs, including reasonable attorneys' fees.

10. Nonexclusive Franchise.

- 10.1 This Franchise is not and shall not be deemed to be an exclusive franchise. This Franchise shall not in any manner prohibit the City from granting other and further consents, approvals, permits or franchises over, upon, and along the Franchise Area which do not interfere with PSE's rights under this Franchise.

This Franchise shall not prohibit or prevent the City from using the Franchise Area or affect the jurisdiction of the City over the same or any part thereof.

The City reserves the right to acquire, construct, own, operate and maintain a municipal electric utility to serve all or any portion of the City, at any time during the term of this Franchise and to fully exercise such right in accordance with applicable law.

11. Assignment.

11.1 If PSE shall assign or transfer rights, benefits and privileges in and under this Franchise, such assignee or transferee shall, within thirty (30) days of the date of any assignment or transfer, file written notice of the assignment or transfer with the City together with its written acceptance of and agreement to be bound by all terms and conditions of this Franchise. Nothing herein is intended to preclude PSE from exercising the right, without notice or written acceptance by the City, to mortgage its rights, benefits and privileges in and under this Franchise.

12. Modification and Amendment.

12.1 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 applicable laws of the State of Washington. Without limiting the generality of the foregoing, this Franchise shall govern and supersede and shall not be changed, modified, deleted, added to, supplemented or otherwise amended by any consent, approval, permit, license, agreement or other document required by or obtained from the City in conjunction with the exercise (or failure to exercise) by PSE of any and all rights, benefits, privileges, obligations or duties in and under this Franchise, unless such consent, approval, permit, license, agreement or other document specifically:

12.1.1 references this Franchise; and

12.1.2 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 consent, approval, permit, license, agreement or other document, the provisions of this Franchise shall control.

12.2 The parties agree to renegotiate the terms of this agreement, if, during the term of this Franchise:

12.2.1 There becomes effective any change in federal or state law which:

- 12.2.1.1 Affords either party the opportunity to negotiate in good faith a term or condition of this Franchise which term or condition would not, prior to such change, have been consistent with federal or state law; or
- 12.2.1.2 Pre-empted or otherwise renders null and void any term or condition of this Franchise which has there-to-fore been negotiated in good faith; or
- 12.2.2 If PSE agrees to any term or condition in a franchise agreement with another municipal corporation that is more favorable to the franchisor than a term in this agreement dealing with the same or similar subject matter.

Then, in such event, either party may, within one hundred eighty (180) days of the effective date of the change in federal law or the effectiveness of the more favorable franchise term, notify the other party in writing that such party desires to commence negotiations to amend this Ordinance. Such negotiations shall encompass only the specific term or condition affected by such change in federal or state law or other franchise agreement and neither party shall be obligated to re-open negotiations on any other term or condition of this Ordinance. Within thirty (30) days from and after the other party's receipt of such written notice, the parties shall, at a mutually agreeable time and place, commence such negotiations. Pending completion of such negotiations resulting in mutually agreeable amendment of this Ordinance, adoption of such amendment by ordinance by the City and acceptance of such ordinance by PSE, and except as to any portion thereof which has been pre-empted or otherwise rendered null and void by such change in federal or state law, this Ordinance shall remain in full force and effect.

13. Record of Installations and Planning.

- 13.1 Upon the City's reasonable request, and subject to applicable laws, PSE shall provide to the City copies of available drawings in use by PSE showing the approximate location of PSE's Facilities at specified locations within the Franchise Area. Notwithstanding the foregoing, however, PSE does not warrant the accuracy or sufficiency of any such drawings or other information provided by PSE, and PSE will not be liable to the City or others for any errors or defects in the same. Nothing in this section is intended (nor shall be construed) to relieve any party of their respective obligations under applicable law with respect to determining the location of utility facilities.
- 13.2 Upon the City's reasonable request, in connection with the design of any public works project or improvement, PSE shall physically verify the location of its underground Facilities within the Franchise Area or other location referenced in Section 3.1 by surface marking and/or excavating (e.g., pot holing) at no expense to the City. If PSE performs such excavation, the City shall not require any

18. Miscellaneous.

- 18.1 If any term, provision, condition or portion of this Franchise shall be held to be invalid; such invalidity shall not affect the validity of the remaining portions of this Franchise which shall continue in full force and effect. The headings of sections and paragraphs of this Franchise are for convenience of reference only and are not intended to restrict, affect or be of any weight in the interpretation or construction of the provisions of such sections or paragraphs.
- 18.2 Nothing in this Ordinance shall be construed as limiting any judicial remedies that the City may have, at law or equity, for enforcement of this ordinance.
- 18.3 PSE agrees that in accepting this Franchise, its rights hereunder are subject to the legitimate rights of the police power of the City to adopt and enforce general ordinances necessary to protect the safety and welfare of the public and it agrees to comply with all applicable general laws enacted by the City pursuant to such power.

HONORABLE MAYOR AND CITY COUNCIL
CITY OF BAINBRIDGE ISLAND, WASHINGTON

In the matter of the application :
of Puget Sound Energy, Inc., a : Ordinance No. 2007 - 11
Washington corporation, for a :
Franchise to construct, operate :
and maintain facilities in, upon :
over under, along, across and :
through the franchise area of the : ACCEPTANCE
City of Bainbridge Island :
Washington :

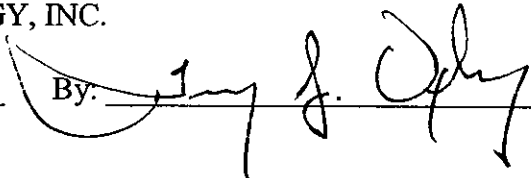
WHEREAS, the City Council of the City of Bainbridge Island, Washington, has granted a franchise to Puget Sound Energy, Inc., a Washington corporation, its successors and assigns, by enacting Ordinance No. 11, bearing the date of April 11, 2007; and

WHEREAS, a copy of said Ordinance granting said franchise was received by the Puget Sound Energy, Inc. on April 16, 2007, from said City of Bainbridge Island, Kitsap County, Washington.

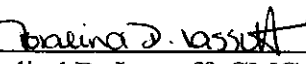
NOW, THEREFORE, Puget Sound Energy, Inc., a Washington corporation, for itself, its successors and assigns, hereby accepts said Ordinance and all the terms and conditions thereof, and files this, its written acceptance, with the City of Bainbridge Island, Kitsap County, Washington.

IN TESTIMONY WHEREOF said Puget Sound Energy, Inc. has caused this written Acceptance to be executed in its name by its undersigned Terry J. Oxley thereunto duly authorized on this 30 day of April, 2007.

ATTEST: PUGET SOUND ENERGY, INC.

By: 

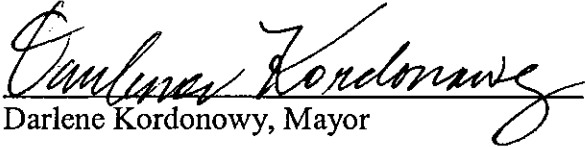
Copy received for City of Bainbridge Island
on May 10, 2007

By: 
Rosalind D. Lassoff, CMC, City Clerk


This Ordinance shall take effect and be in force five (5) days from and after its passage, approval and publication as required by law.

PASSED by the City Council this 11th day of April 2007.

APPROVED by the Mayor this 12th day of April 2007.


Darlene Kordonowy, Mayor

ATTEST/AUTHENTICATE:


Rosalind D. Lassoff, CMC, City Clerk

FILED WITH THE CITY CLERK:	March 6, 2007
PASSED BY THE CITY COUNCIL:	April 11, 2007
PUBLISHED:	April 18, 2007
POSTED:	April 13, 2007
EFFECTIVE DATE:	April 23, 2007
ORDINANCE NO.:	2007-11