

ORDINANCE NO. NS-2346

AN ORDINANCE GRANTING AN ELECTRIC POWER DISTRIBUTION FRANCHISE  
TO PACIFICORP DBA PACIFIC POWER

Findings

- A. PacifiCorp dba Pacific Power (Pacific Power) provides electric power distribution utility services in a portion of the City of Bend. Pacific Power has an existing franchise issued by the City of Bend. That franchise has been extended and currently expires on June 30, 2019.
- B. The City and Pacific Power have negotiated the terms of a new franchise. The new franchise increases the franchise fee, based on gross revenues, from 5% to 7%. The terms of the new franchise are included in the attached Exhibit A.

Based on the above findings,

THE CITY OF BEND ORDAINS AS FOLLOWS:

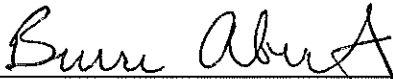
- 1. The City of Bend grants an electric power distribution franchise to PacifiCorp dba Pacific Power on the terms stated in the Non-exclusive Franchise Agreement (Exhibit A).
- 2. This ordinance is effective immediately upon its second reading. The ordinance may be voided if Pacific Power does not sign the agreement within 60 days of passage.
- 3. This ordinance includes an emergency clause because the revenue under the new franchise agreement is critical to accomplish City Council's adopted goals, and should be effectuated as soon as possible in order to accomplish those goals and other City priorities for the benefit of the public.

First Reading: June 19, 2019

Second Reading and Adoption by Roll Call Vote: July 17, 2019

YES: Bruce Abernethy  
Barb Campbell  
Bill Moseley  
Justin Livingston  
Gena Goodman-Campbell  
Chris Piper

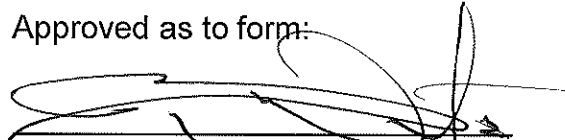
NO: none

  
\_\_\_\_\_  
Bruce Abernethy, Mayor Pro Tem

ATTEST:

  
\_\_\_\_\_  
Robyn Christie, City Recorder

Approved as to form:

  
\_\_\_\_\_  
Mary A. Winters, City Attorney

## **NON-EXCLUSIVE FRANCHISE AGREEMENT BETWEEN THE CITY OF BEND AND PACIFICORP dba PACIFIC POWER**

This agreement ("Agreement") is between the City of Bend, an Oregon Municipal Corporation ("City"), and PacifiCorp dba Pacific Power, an Oregon business corporation ("Franchisee").

### **Section 1. Definitions**

Any term defined in the Bend Code and not in this Agreement shall have the meaning provided by the Bend Code definition.

"Facilities" means Franchisee's electrical transmission, distribution and communication facilities, including lines, cables, conduit, poles, towers, wires, guys and anchors, vaults and boxes, transformers, fixtures, electric vehicle charging stations and other physical components of Franchisee's electric power distribution system located within any Right-of-Way or Public Place within the City by virtue of the rights granted under this Agreement or any predecessor franchise agreement.

"Gross Revenues" means "gross operating revenue" as defined in Bend Code 3.20.010A.

"Right-of-Way" means property owned by the City, or dedicated to the public or the City, for transportation purposes, including public streets, roads, highways, lanes, courts, ways alleys, boulevards, sidewalks, bicycles lanes, bridges and places used or intended to be used by the general public for travel as the same now or may hereafter exist.

"Public Place" includes any City-owned property that is open to the public and that is not a Right-of-Way and includes public squares and parks. Public Places do not include any public squares and parks owned by Bend Parks and Recreation District.

### **Section 2. Grant of Authority**

City grants to Franchisee the right to construct, install, maintain, repair, replace, upgrade and operate Facilities over, in, on and under (i) the present and future Right-of-Way and (ii) existing Public Places currently in use by Franchisee, in each case, for the purpose of providing electric power utility service on the terms stated in this Agreement. For the avoidance of doubt, except as may otherwise be agreed by Franchisee and City, Franchisee may not place new Facilities in any Public Places that are not in use by Franchisee as of the effective date of this Franchise. This franchise is not exclusive, and City reserves the right to grant a similar franchise to any other person or entity. This Franchise is subject to prior rights, interests, agreements, City codes, permits easements or licenses granted by the City, and to the City's and the public's right to use and administer rights-of-way.

### **Section 3. Compliance with Laws, Rules and Regulations**

Franchisee shall comply with all City laws and regulations (including Bend Code Title 3, other provisions or revisions of the Bend Code, and City ordinances, regulations, and standards and specifications and as directed by the City Engineer in accordance with the Bend Code) in constructing, installing, maintaining, repairing, replacing, upgrading and operating its Facilities in the Right-of-Way and in Public Places for which Franchisee is granted permission to occupy under this Franchise. Permits must be obtained prior to installation or construction of Facilities in Public Places. Where protection of the public health or safety or outage restoration requires emergency work to be performed, Franchisee may undertake work immediately to repair a break or restore service without a permit but must inform the City as soon as practical after the work is commenced, and, at the request of City, Franchisee shall submit documentation and/or a permit application in such form as is reasonably satisfactory to City describing the emergency work so performed. All Facilities shall be installed and at all times maintained by Franchisee in accordance with the National Electrical Safety Code, ANSI Standard C2 and any electric utility industry standards. The precise location of lines shall be determined through the permitting process.

### **Section 4. Franchisee Liability, Indemnification of City and Insurance**

A. Franchisee shall conduct its operations under this Franchise, including construction, installation, maintenance, repair, replacement, upgrade and operation of its Facilities, in a safe and workmanlike manner and all lawful governmental regulations.

B. Franchisee shall defend, indemnify and hold the City, its officers, agents, employees and volunteers harmless against all liability, claims, losses, demands, suits, fees and judgments (collectively known as 'claims') that may be based on, or arise out of damage or injury (including death) to persons or property caused by or resulting from any wrongful or negligent act or omission of Franchisee, its agents or employees in exercising its rights and obligations under this franchise. This indemnification required shall not apply to claims to the extent caused by the negligence or willful misconduct of the City, its officers, agents, employees and volunteers. Franchisee agrees that it is not an agent of the City and is not entitled to indemnification and defense under ORS 30.285 and ORS 30.287.

C. Franchisee shall purchase and maintain at Franchisee's expense, Commercial General Liability and Commercial Automobile insurance covering bodily injury and property damage in an amount of \$5 million per occurrence and \$10 million in aggregate. The insurance policy obtained by franchisee shall be primary and non-contributory. Franchisee shall remain fully responsible for any claims resulting from negligence or intentional misconduct of Franchisee or its subcontractors and their officials, agents and employees in performance of this Agreement, even if not covered by, or in excess of insurance limits. This insurance requirement may be met in part by self-insurance.

D. Franchisee shall obtain and maintain Workers' Compensation insurance required by ORS chapter 656. Franchisee shall ensure that each of its contractors obtains and maintains workers' compensation insurance and obtains proof of the coverage before performing work.

E. Coverages provided by Franchisee must be underwritten by an insurance company authorized to do business in the state of Oregon and with a Best's rating of A-VII or higher.

F. As evidence of the insurance coverage required by this Franchise, Franchisee shall provide proof of coverage required by acceptable Certificate of Insurance and Endorsement from the carrier(s). The Certificate and Endorsement shall provide that there will be no cancellation, termination, or reduction in limits of the insurance coverage without a minimum 30-day written notice to the City except if such cancellation is due to failure to pay premiums in which case 10 days' prior written notice of cancellation is given to Company. The Certificate and Endorsement shall also state the deductible or self-insured retention level. This Agreement shall not be in effect until the required certificates and signed endorsements have been received and approved by City. Renewal certificates and endorsements will be sent to City prior to coverage expiration. The City may terminate the Franchise for failure to maintain the required insurance.

G. Franchisee grants Waiver of Subrogation to the City, its officers, agents, employees and volunteers for any claims arising out of Franchisee's work or service. Further, Franchisee agrees that in the event of loss due to any of the risks for which it has agreed to provide insurance, recovery shall be solely with its insurance carrier, and also grants to City on behalf of any insurer providing coverage to either Franchisee or City with respect to the work or services of Franchisee a waiver of any right to subrogation which any insurer or subcontractor may acquire against City by virtue of the payment of any loss under the insurance coverage.

#### **Section 5. Construction and Conditions on Right-of-Way Occupancy**

A. Use. Except in the case of emergency work described in Section 3 above, all work involving street or sidewalk cuts or protracted lane closures in the City Right-of-Way will require a permit prior to any work being started, which permit may not be unreasonably withheld, conditioned or delayed, and will require a traffic plan that is fully compliant with the City of Bend Design Standards and Specifications.

B. Construction and Maps. Franchisee's electronic mapped facility data consisting of poles, pad mount transformers, and wire located within the city limits will be provided to the City on an annual basis (one time per year), upon City's request. Attribute information will be limited to facility identifiers. Data can be provided in a ESRI compatible geodatabase with associated metadata or other mutually agreed upon format.

With respect to any information, including but not limited to the data, which Franchisee furnishes or otherwise discloses to the City under this section, Franchisee does not make any representations or warranties as to the accuracy, completeness or fitness for a particular purpose thereof. It is further understood and agreed that Franchisee or its representatives shall not have any liability or responsibility to the City or another party or to any other person or entity resulting from the use of any information or data so furnished or otherwise provided. Maps/Data are for general location purposes only and may not accurately identify the exact location of facilities or current construction. No attempt has been made to verify the records to reflect current site conditions and Franchisee is not responsible or liable for any injury, death or damage that may result from differing site conditions.

The information furnished by Franchisee under this section is provided with the understanding that the City will treat the information as confidential to the extent possible under the Oregon Public Records Act. If a public records request is made for the information, the City will provide Franchisee with notice of the request and sufficient time to seek a protective order prior to providing the documentation to any third party.

C. Restoration. In case of any disturbance of pavement, sidewalk, driveway or other surfacing by Franchisee, Franchisee shall, at its own cost and expense and in compliance with the City's pavement restoration policy and standards and specifications, promptly replace and restore all paving, sidewalk, driveway, landscaping or surface of any street or alley. Franchisee warrants all restoration work for a period of one year from completion of the work. If Franchisee fails to make restoration as required by this section or if the restoration fails within the one year warranty period, City may, if Franchisee fails to make necessary repairs within a reasonable timeframe following written notice from City to Franchisee, cause the repairs to be made at the expense of Franchisee. If Franchisee fails to reimburse the City for any costs incurred under this section within 45 days' of demand for reimbursement and such failure is not a result of a good faith dispute between City and Franchisee, City may refuse to issue additional permits.

D. Notification. Franchisee shall comply with the requirements of Oregon Utility Notification Law and implementing rules and regulations.

E. Relocation. City may require Franchisee to relocate its Facilities as follows:

- 1) If the removal or relocation of Facilities is caused directly by development of private property or any project sponsored or funded by a third party (including but not limited to any governmental agency or instrumentality other than the City) and the removal or relocation of Facilities occurs within the area to be developed, or is made for the benefit or convenience of a third-party, Franchisee may charge the expense of removal or relocation of Facilities to the developer or other third-

party, including the cost of acquiring private rights, permits and other associated costs that result from the relocation. Franchisee shall be solely responsible for enforcing collection from the developer or other third-party, but Franchisee shall not be required to remove or relocate Facilities for the benefit of third-parties until it receives payment for the removal or relocation. For the purpose of this paragraph, the removal or relocation of Facilities shall be considered "caused directly" by a private development or third party project if, for example, the removal or relocation is necessary to enable the developer or third party to make any improvements or otherwise satisfy any conditions required under any permit, rule, regulation or other requirement applicable to the project.

2) If 5.E.1 does not apply, and subject to Section 5.G. below, if the removal or relocation of Facilities is requested by City for a City-funded project that serves a public purpose (e.g., a street widening project undertaken independently of a project described in Section 5.E.1), Franchisee will remove or relocate its Facilities at Franchisee's expense within a reasonable time after notification by City; provided that if the City requires the subsequent relocation of the same Facilities within five (5) years of the date of the last relocation, City shall bear the expense of the subsequent relocation; and provided further the removal and/or relocation of Facilities that are used to serve City as a customer of Franchisee shall be subject to terms of Franchisee's tariffs and not this Section 5.E.2. City will make a reasonable effort to provide Franchisee with an alternate location for its Facilities within the Right-of-Way or Public Places. The City will make every effort to coordinate with the Franchisee during project development to reduce or eliminate conflicts with existing facilities, including coordinating and communication with Franchisee and interested parties regarding the relocation project.

F. Right-of-Way Vacation; Transfer of Property in Right of Way or Public Place; Relocations into Right of Way.

1. City shall retain public utility easements or otherwise require the petitioner of the vacation to grant an easement or obtain an easement in such form and in a location acceptable to Franchisee if City vacates any public Right-of-Way or Public Place where Franchisee has Facilities. If Franchisee's Facilities must be relocated from a vacated public right-of-way, the petitioner of the vacation will bear the expense of moving the Facilities and obtaining alternate rights, permits or easements.

2. In the event City conveys, assigns or transfers title to any property within any Right of Way or Public Place in which Franchisee has Facilities, as part of said conveyance, City shall either (i) secure from such transferee an easement or other rights allowing for such Facilities to remain in place in a form acceptable to Franchisee or, (ii) if such Facilities are to be relocated, (x) City shall obtain an

easement or other rights in such form and in such location as are acceptable to Franchise, and (y) the expense of relocating the Facilities and obtaining the such easement or other rights shall be borne by City.

3. In the event Franchise has Facilities located on any private property that is condemned or otherwise acquired by City for the purpose of expanding any existing Right of Way or Public Place or creating any new Right of Way or Public Place, expenses related to relocation, including the expense of relocating the Facilities and acquiring a new easement or other rights in such form and location as is acceptable to Franchisee, shall be borne by City. In addition, in the event said Facilities remain in place or are relocated within the existing or expanded Right of Way or Public Place, notwithstanding the terms of Section 5.E.2, City shall be responsible for all related relocation costs, including expense of relocating the Facilities and acquiring a new easement or other rights in such form and location as is acceptable to Franchisee for each subsequent City requested relocation of said Facilities.

G. Underground Conversion. Franchisee shall remove and replace overhead Facilities with underground Facilities at the request of the City. Cost responsibility shall be allocated in accordance with all applicable Oregon Administrative Rules and a schedule agreed upon by the City and Franchisee. The City shall require that each customer served from the existing overhead Facilities shall make all facility changes to the customer's premises in accordance with Franchisee's policies and standards necessary to receive service from the underground facilities as soon as they become available.

#### **Section 6. Transfer of Franchise**

Franchisee shall not sell, assign, dispose of, lease or transfer in any manner whatsoever any interest in this Franchise, without written consent of City, which consent shall not be unreasonably withheld, conditioned or delayed. In the event the City provides such consent, the City may impose reasonable conditions, including but not limited to the requirement that the transferee acknowledge in writing and agree to be bound by the terms of this Franchise. City shall have the right to collect from Franchisee City's actual administrative costs associated with processing a transfer request, including the cost of ascertaining the financial responsibility of the proposed transferee. Franchisee may mortgage this franchise, together with its Facilities and properties within the City, in order to secure any legal bond issue or other indebtedness of Franchisee, with no requirement for City's consent or that the trustees acknowledge in writing and agree to be bound by the terms of this Franchise.

#### **Section 7. City Rights and Obligations in Franchise**

A. City Supervision and Inspection. City shall have the right to inspect all construction and installation of Franchisee's Facilities to insure compliance with governing laws, ordinances, rules and regulations as they relate to the City approved permit.



B. Termination or Abandonment of Franchise. Upon any termination of this Franchise, if City and Franchisee are not engaged in efforts to renew or renegotiate this Franchise, (i) all above ground Facilities installed or used by Franchisee shall be removed by Franchisee at Franchisee's expense or de-energized and abandoned in place with approval of the City and the property on which the Facilities were used restored by Franchisee to the condition it was in before installation; (ii) all underground Facilities installed or used by Franchisee shall be de-energized and abandoned in place.

C. City's Work in Right-of-Way. Whenever City shall perform or cause or permit to be performed any work in any Right-of-Way or Public Place where such work may disturb or interfere with Franchisee's Facilities, City shall, or shall require its permittee, to notify, in writing, Franchisee sufficiently in advance of the contemplated work to enable Franchisee to take such measures as may be necessary to protect its Facilities.

### **Section 8. Franchise Fee**

A. Franchisee shall pay monthly to City 7% of Franchisee's Gross Revenues received from customers within the City limits of the City excluding amounts charged and received for separately billed governmental taxes and governmental fees.

B. The fee required by this section shall be due and payable within 30 days after the end of each month. With respect to any amount or portion thereof due hereunder that is not disputed in good faith by Franchisee, City shall have the right to charge interest at the rate of 5% per annum.

C. With each payment, Franchisee shall furnish City with a written statement in the format as provided in Exhibit A, under oath, executed by an officer of Franchisee, verifying the amount of gross revenues of Franchisee within City for the monthly period covered by payment.

D. City's acceptance of any payments due under this section shall not be considered a waiver by City of any breach of this franchise.

E. City will provide notice of any annexation of territory, including a map of the annexed territory, a legal description of the boundary change, each site address to be annexed as recorded on county assessment and tax rolls and a copy of the annexation ordinance within 10 days of the annexation. Franchisee's obligation to pay franchise fees on revenue generated by service to the annexed property shall begin 10 days after notice is actually provided.

F. Franchisee is exempt from payment of business license fees required by City ordinance and any other occupation or excise taxes levied by City against businesses with operations within the City limits.

G. The parties agree to meet and confer in good faith on a semi-annual basis to discuss proposals for partnering to provide Franchisee's low income customers with financial assistance using proceeds from the franchise fees or other funding mechanisms.

### **Section 9. Franchisee Records and Reports**

Franchisee shall keep accurate books of financial accounts at an office within the State of Oregon throughout the term of this franchise and for six years after the expiration or termination of this Agreement. Franchisee shall produce all books and records directly concerning its gross revenues and other financial information necessary for calculation of the franchise fee for inspection by City, upon 10 days' written notice, during normal working hours provided that only records that support payments which occurred during a period of three (3) years prior to the date the City notifies Franchisee of its intent to conduct an inspection shall be subject to review. City may require periodic reports from Franchisee relating to its operation within City. City shall have the right during the term of this franchise or within 180 days after expiration or termination of the franchise to audit Franchisee's records for the period of three years prior to the audit. If the audit reveals underpayment of 5% or more, the City may expand the audit to cover up to 6 years. The audits shall be undertaken by a qualified person or entity selected by City. The cost of the audit shall be borne by City, unless the results of the audit reveal an underpayment of more than 5% of the franchise fee for the period audited. In the case of underpayment of 5% or more, the full cost of the audit shall be paid by Franchisee. Franchisee shall promptly pay the portion of the underpayment as determined by the audit not subject of a good faith dispute to City together with 9% annual interest from the date the payment should have been made to the date the payment is actually made. Any audit information obtained by City under these provisions shall be kept confidential to the maximum extent allowed by Oregon law, except that this obligation shall not prevent the City from introducing audit results in any forum where enforcement of the provisions of this franchise is at issue. Franchisee's obligations under this Section shall be subject to the requirements of applicable laws.

### **Section 10. Permit and Inspection Fees**

Subject to the limitations set forth in Section 8, nothing in this Agreement shall be construed to limit the right of City to require Franchisee to pay permit fees or reasonable costs incurred by City in connection with the issuance of a permit, making an inspection, or performing any other service for or in connection with Franchisee or its Facilities. The fees paid for Tier 1 and Tier 2 permits and associated traffic control plans may be credited against and deducted from the franchise fees payable under Section 8. For Tier 3 permits, franchisee may credit the fees paid against and deduct up to \$10,000 per calendar year from the franchise fees payable under Section 8.

### **Section 11. Subdivision Plat Notification**

City shall provide written notice of tentative subdivision approval, including a copy of the tentative plan, to Franchisee at least fourteen (14) days prior to approving the tentative plan to provide Franchisee an opportunity to comment on the portion(s) of the plan which impact Franchisee's facilities and/or easement rights. Further, City agrees that any public utility easements included on each final plat will be at least ten feet in width. City also will include a restrictive covenant or easement as part of the final plat limiting development on individual lots within Franchisee's easement corridors upon a timely request from Franchisee that is consistent with the restrictions set forth in the applicable easements held by PacifiCorp and that indicates that consent to install any fences, structures, buildings or other permanent facilities such swales, ponds or other hardscaping features within the easement area must be obtained from PacifiCorp. With respect to new public utility easement areas, the City will include a restrictive covenant or easement as part of the final plat prescribing that no fences, structures, buildings or other permanent facilities such swales, ponds or other hardscaping features may be installed or maintained in the public utility easement area.

### **Section 12. Enforcement and Termination of Franchise for Violation**

A. Default. City may terminate this franchise, as provided in Section 12.B. below, subject to Franchisee's right to a court review of the reasonableness of such action, upon the failure of Franchisee to perform promptly and completely any material term, condition or obligation imposed upon it under this franchise; provided that City shall first provide Franchisee written notice of any such failure and Franchisee shall have sixty (60) days from receipt of such notice to cure the failure, or if the failure cannot reasonably be cured within sixty (60) days, to commence and diligently pursue curing the failure. If Franchisee does not cure the failure within the sixty (60) day period, or does not commence and diligently pursue curing the failure within the sixty (60) day period, then the City Council may declare the franchise terminated.

B. Termination for Defaults Not Cured. The City may terminate this Franchise for defaults that are not cured within the time allowed by Subsection A of this section by providing a notice of termination to Franchisee following the declaration of termination by the City Council. Franchisee may challenge the notice of termination by providing a written protest to the City Manager within 10 business days of the date of the notice of termination. The City Manager, on receipt of the protest, shall refer the protest to the City Council for a decision. The termination will not become final until after the decision by the City Council. Because of the potential public health and safety risks that could arise as a result of cessation of power distribution within the City, if the City decides to terminate the franchise, it shall set a termination date that allows for implementation of a plan to assure continued electrical power delivery service.

### **Section 13. Remedies not Exclusive; Waiver**

All remedies granted the City under this Agreement are cumulative, and recovery or enforcement of one is not a bar to the recovery or enforcement of any other remedy.

Failure to enforce any provision of this Agreement shall not be construed as a waiver of a breach of any other term, condition or obligation of this Agreement.

**Section 14. Franchise Term; Acceptance; Effective Date**

This Franchise is granted for a term of 10 years beginning on the effective date, and shall renew each year thereafter up to 10 years if neither party provides written notice of non-renewal to the other party at least six months prior to the expiration of the initial term. The Franchisee shall, within sixty (60) days from the date the ordinance granting this franchise takes effect, file with the City its written unconditional acceptance of this franchise, and if the Franchisee fails to do so, this ordinance may be voided by the City. This Franchise shall be effective as of the first day of the month in which the ordinance granting the franchise is effective. In the event of any conflict between the terms of this Franchise and future City ordinance setting forth terms and conditions of general applicability to franchises, the terms and conditions of this Franchise shall govern; provided that City and Franchisee may amend this Franchise by any written agreement that is adopted by City and accepted in writing by Franchisee.

**Section 15. Severability**

If any section, subsection, sentence, clause or portion of this Agreement is for any reason held invalid or rendered unconstitutional by any Court of competent jurisdiction, that portion shall be deemed a separate, distinct, independent and severable provision and the holding shall not affect the validity or constitutionality of the remaining portion of this Agreement. If for any reason, the franchise fee is invalidated by any court or governmental agency, then the highest permissible franchise fee allowed shall be the franchise fee.

**Section 16. Notices**

Any notice required or permitted under this Agreement shall be in writing and delivered in person, by overnight courier or by registered or certified United States mail, addressed as follows:

TO CITY:

City Manager  
City of Bend  
710 NW Wall Street  
Bend, OR 97701

TO FRANCHISEE:

Customer and Community Affairs Vice President  
Pacific Power  
825 NW Multnomah  
Lloyd Center Tower Suite 2000  
Portland, OR 97232

or to other address specified by either party in writing in a notice conforming with these requirements. Notices shall be deemed effective when received or, (i) if sent via overnight courier, the next business day, and (ii) if deposited with postage prepaid in the United States Mail as registered or certified mail, two business days following the date of deposit.

**Section 17. Waiver of Jury Trial**

To the fullest extent permitted by law, each of City and Franchisee waives any right it may have to a trial by jury in respect of litigation directly or indirectly arising out of, under or in connection with this franchise. Each party further waives any right to consolidate any action in which a jury trial has been waived with any other action in which a jury trial cannot be or has not been waived.

**Section 18. Interpretation/Jurisdiction**

Interpretation of the Franchise shall be governed by laws of the State of Oregon and any legal action relating to this Franchise shall be brought in Deschutes County Circuit Court. Both parties waive any right to a jury trial for any dispute relating to this Agreement.

CITY OF BEND

\_\_\_\_\_  
Eric King, City Manager  
Date:

FRANCHISEE

By: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_