



RETURN DOCUMENT TO:

**MARINA ENGELS**  
**WHATCOM COUNTY**  
**COUNCIL OFFICE**

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DOCUMENT TITLE(S): FRANCHISE

***Ordinance No. 2014-087 granting Public Utility District No. 1 of Whatcom County, a Washington Municipal Corporation, a franchise and the right, privilege, and authority thereunder to locate, set, erect, lay, construct, extend, support, attach, connect, maintain, repair, replace, enlarge, operate and use facilities in, upon, over, under, along, across and through the franchise area to allow for the provision of water services***

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REFERENCE NUMBER(S) OF DOCUMENTS ASSIGNED OR RELEASED:

***Ordinance Number: 2014-087***

Additional reference numbers found on page \_\_\_\_\_ of document.

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GRANTOR(S):

***Whatcom County***

Additional grantors found on page \_\_\_\_\_ of document.

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GRANTEE(S):

***Public Utility District No. 1 of Whatcom County***

Additional grantees found on page \_\_\_\_\_ of document.

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ABBREVIATED LEGAL DESCRIPTION (Lot, block, plat, or section, township, range)

***All roads and public ways and county property in Whatcom County, Washington.***

Additional legal description can be found on page 2, Section 1.1.3 of document.

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ASSESSOR'S PARCEL NUMBER:

***None - roads***

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SPONSORED BY: Consent  
PROPOSED BY: Executive  
INTRODUCTION DATE: 6/3/2014

ORDINANCE NO. 2014-087

GRANTING PUBLIC UTILITY DISTRICT NO. 1 OF WHATCOM COUNTY, A WASHINGTON MUNICIPAL CORPORATION, A FRANCHISE AND THE RIGHT, PRIVILEGE, AND AUTHORITY THEREUNDER TO LOCATE, SET, ERECT, LAY, CONSTRUCT, EXTEND, SUPPORT, ATTACH, CONNECT, MAINTAIN, REPAIR, REPLACE, ENLARGE, OPERATE AND USE FACILITIES IN, UPON, OVER, UNDER, ALONG, ACROSS AND THROUGH THE FRANCHISE AREA TO ALLOW FOR THE PROVISION OF WATER SERVICES.

WHEREAS, Public Utility District No. 1 of Whatcom County (hereinafter referred to as "Whatcom PUD"), a Washington municipal corporation, has applied for a twenty-five (25) year franchise; and

WHEREAS, RCW 36.55.010, Whatcom County Charter Section 9.30, and Whatcom County Code Chapter 12.24 address the requirements pertaining to the granting of franchises by the County; and

WHEREAS, Whatcom PUD desires a non-exclusive franchise to construct, erect, alter, lay, support, connect, improve, renew, replace, repair, operate and maintain water transmission and distribution facilities upon, under, over, across and along certain roads and other areas in Whatcom County, Washington; and

WHEREAS, said application has come on regularly to be heard by the County Council on the 9th day of December, 2014, and notice of this hearing having been duly published on the 21st day of June, 2014, and the 28th day of June, 2014, in the Bellingham Herald, a daily newspaper published in Whatcom County having county-wide circulation; and

WHEREAS, it appears to the Council that notice of said application and hearing thereon has been given as required by law in RCW 36.55.040; and

WHEREAS, this Council finds, after having considered said application and being otherwise fully advised in the premises, that it is in the public interest for this Council to grant the franchise; and

WHEREAS, Whatcom County and PUD #1 intend that the previous franchises granted to Whatcom PUD that pertain to water lines for the provision of water services shall be terminated and be replaced by this Franchise;

NOW, THEREFORE, BE IT ORDAINED by the Whatcom County Council that the language set forth hereinbelow, Sections 1 through 20, shall constitute the franchise agreement between Whatcom County and Whatcom PUD, which shall be and become effective as set forth in Section 13 thereof:

## **Section 1. Definitions.**

1.1 Where used in this franchise agreement (“Franchise”), the following terms shall mean:

1.1.1 “County” means the County of Whatcom, a political subdivision of the State of Washington, and its successors and assigns.

1.1.2 “Whatcom PUD” means Public Utility District No. 1 of Whatcom County, a Washington municipal corporation, and its successors and assigns.

1.1.3 “Franchise Area” means any, every and all of the public roads, streets, avenues, alleys, highways, grounds, and other public places of the County as now laid out, platted, dedicated, or improved; and any, every and all of the public roads, streets, avenues, alleys, highways, grounds and other public places that may hereafter be laid out, platted, dedicated or improved within the present limits of the County and as such limits may be hereafter extended.

1.1.4 “Facilities” means, collectively, any and all water transmission and distribution systems, including but not limited to tanks, meters, pipes, mains, services, valves, manholes, pressure reducing valves (“PRVs”), pump stations, meter stations and any and all other equipment, appliances, attachments, appurtenances and other items necessary, convenient, or in any way appertaining to any and all of the foregoing, whether the same be located over or under ground.

1.1.5 “Ordinance” means Ordinance No. 2014-087, which sets forth the terms and conditions of this Franchise.

## **Section 2. Facilities Within Franchise Area.**

2.1 The County does hereby grant to Whatcom PUD the Franchise, and the right, privilege, and authority thereunder, to locate, set, erect, lay, construct, extend, support, attach, connect, maintain, repair, replace, enlarge, operate and use Facilities in, upon, over, under, along, across and through the Franchise Area to provide for the transmission, distribution and sale of water for agricultural, municipal, domestic, commercial, industrial and any other lawful purpose for which water may be used.

## **Section 3. County Authority.**

3.1 The County, in granting this Franchise, does not waive any rights which it now has or may hereafter acquire with respect to the Franchise Area, and this Franchise shall not be construed to deprive the County of any powers, rights, or privileges which it now has, or may hereafter acquire, to regulate the use of and to control the Franchise Area.

## **Section 4. Noninterference of Facilities.**

4.1 As to new Facilities, Whatcom PUD’s Facilities shall be placed and maintained within the Franchise Area so as not to unreasonably interfere with the free passage of traffic and in accordance with all applicable laws, rules, and regulations. Prior to the installation of new

Facilities within the Franchise Area, Whatcom PUD may request that the County determine whether the proposed placement of the Facilities will unreasonably interfere with the free and safe passage of traffic, and the County shall make such determination in writing within a reasonable period of time. If the proposed location is not approved by the County Engineer, the County Engineer shall advise in writing what reasonable modifications to the proposed location of the Facilities are necessary for the County Engineer to issue a determination that the proposed location of the Facilities will not unreasonably interfere with the free and safe passage of traffic.

If Whatcom PUD proceeds to install new Facilities without first obtaining the County Engineer's determination that the proposed location of the Facilities will then unreasonably interfere with the free and safe passage of traffic then, upon determination by the County that current placement of particular Facilities unreasonably interferes with free or safe passage of traffic, the County shall notify Whatcom PUD which shall, at its own expense, act promptly to rectify the problem in consultation with the County. Whatcom PUD shall exercise its rights under this Franchise and within the Franchise Area in accordance with all County codes and ordinances governing use and occupancy of the Franchise Area; provided, however, in the event of any conflict or inconsistency of such codes and ordinances with the terms and conditions of this Franchise, the terms and conditions of this Franchise shall govern and control to the extent authorized by law; provided, further, nothing herein shall be deemed to waive, prejudice or otherwise limit any right of appeal afforded Whatcom PUD by such County codes and ordinances.

4.2 Except as provided in Section 6 below, Whatcom PUD's existing Facilities shall be maintained within the Franchise Area so as not to unreasonably interfere with the free passage of traffic and in accordance with all applicable laws, rules, and regulations. Except as provided in Section 6 below, upon determination by the County that current placement of particular Facilities unreasonably interferes with free or safe passage of traffic, the County shall notify Whatcom PUD which shall, at its own expense, act promptly to rectify the problem in consultation with the County. Whatcom PUD shall exercise its rights under this Franchise and within the Franchise Area in accordance with all County codes and ordinances governing use and occupancy of the Franchise Area; provided, however, in the event of any conflict or inconsistency of such codes and ordinances with the terms and conditions of this Franchise, the terms and conditions of this Franchise shall govern and control to the extent authorized by law; provided, further, nothing herein shall be deemed to waive, prejudice or otherwise limit any right of appeal afforded Whatcom PUD by such County codes and ordinances.

4.3 All construction or installation of such Facilities, service, repair, or relocation of the same, performed over, above, along or under the Franchise Area shall be done in such a manner as not to interfere unreasonably with the construction and maintenance of other existing utilities, lines, public or private, drains, drainage ditches and structures, irrigation ditches and structures, located therein, nor with the grading or improvement of the Franchise Area. The owners of all utilities, public or private, installed in the Franchise Area prior in time to the Facilities of Whatcom PUD shall have preference as to the positioning and location of such utilities so installed with respect to Whatcom PUD. Such preference shall continue in the event of the necessity of relocating or changing the grade of the Franchise Area. Whatcom PUD shall have such preference as to owners of all utilities, public or private, initially installed in the Franchise Area subsequent in time to Whatcom PUD's Facilities.

4.4 The locating, laying, construction, operation and maintenance of Whatcom PUD's Facilities authorized by this Franchise shall not preclude the County, its agents or its contractors from blasting, grading, excavating, or doing other necessary road work contiguous to Whatcom PUD's Facilities, provided that Whatcom PUD and the County shall first check with the locator service to determine whether or not any of Whatcom PUD's lines are located in the proposed work area. Upon finding from the locator service that Whatcom PUD does have lines located within the proposed work area, the County shall provide Whatcom PUD with seventy-two (72) hours notice of proposed work, except if a lesser time for notice is warranted by emergency, in order that the Whatcom PUD may protect its Facilities. Failure of Whatcom PUD to properly notify the locator service of the location of its lines and Facilities shall relieve County of its duty to provide Whatcom PUD the otherwise-required advance notice of proposed work. The County acknowledges that the Facilities may include high pressure water lines. As such, the County acknowledges that any work in, around or near such Facilities require the exercise of reasonable standard professional engineering and construction caution and practices in, around or near such Facilities. Accordingly, the County acknowledges that upon receipt of notice of the location of such Facilities the County shall undertake all reasonable standard professional engineering and construction caution practices and/or requirements when conducting or permitting any work in, around or near such Facilities.

4.5 Whatcom PUD shall maintain all above-ground Facilities that it places in the Franchise Area. In order to avoid interference with the County's ability to maintain the Franchise Area, Whatcom PUD shall provide a clear zone of five (5) feet on all sides of such above-ground Facilities. If Whatcom PUD fails to comply with this provision, and by its failure, property is damaged, then Whatcom PUD shall be deemed responsible for all damages caused thereby and the County shall be released from any responsibility therefore. For these purposes, "clear zone" means an area that is mowed or otherwise maintained so that the Facilities are readily visible to County maintenance operations.

## **Section 5. Construction Within the Franchise Area.**

5.1 All construction and installation work within the Franchise Area shall be subject to the approval and pass the inspection of the County Engineer, and shall conform to all applicable local, state and federal standards, codes or regulations, and the County expressly reserves the right to prescribe standards as to how and where Facilities shall be installed. The standards shall be consistent with reasonable standards and standard engineering practices in the applicable industries.

5.2 Prior to commencement of construction of any new Facilities, Whatcom PUD shall first file with the County Engineer its application for permits to do such work, together with plans and specifications in duplicate showing the position and location of all such Facilities sought to be constructed, laid, installed or erected at that time showing their position relative to existing County roads, rights-of-way, or other County property within the Franchise Area upon plans drawn to scale. The Facilities shall be laid in conformity with said plans and specifications of definite location, except in instances in which deviation may be allowed thereafter in writing by the County Engineer. The plans and specifications shall specify the class and type of material and equipment to be used, manner of excavation, construction, installation, backfill, erection of temporary structures, erection of permanent structures, traffic control, traffic turnouts and road obstructions, etc. No such construction shall be commenced without Whatcom PUD first

securing a written permit from the County Engineer, including approval endorsed on one set of plans and specifications returned to Whatcom PUD. All such work shall be subject to the approval of and shall pass the inspection of the County Engineer. Whatcom PUD shall pay all costs of and expenses incurred in the examination, inspection and approval of such work on account of granting the said permits.

5.3 In any work which requires breaking of soil within the Franchise Area for the purpose of laying, relaying, connecting, disconnecting, constructing, maintaining and repairing Whatcom PUD's Facilities, and making connections between the same to structures and buildings of consumers or making connections to other Facilities now in existence or hereafter constructed, Whatcom PUD shall be governed by and conform to the general rules adopted by the County Engineer; and Whatcom PUD at its own expense and with due diligence shall complete the work for which the soil has been broken and forthwith replace the work and make good the Franchise Area and leave the same in as good condition as before the work was commenced; provided, however, that no such breaking of the soil within the Franchise Area shall be done prior to the obtaining of a permit issued by the County Engineer. Applications for such a permit shall be accompanied by specifications for the restoration of the Franchise Area to the same condition as it was in prior to such breaking, and such specifications must be approved by the County Engineer before such breaking of the soil is commenced; provided further, that the County Engineer may require a performance bond in a reasonable sum sufficient to guarantee that such Franchise Area shall be restored to the same condition as it was in prior to such breaking of the soil, the amount of said bond to be fixed by the County Engineer. Whatcom PUD shall pay all costs of and expenses incurred in the examination, inspection and approval of such restoration. The County Engineer may at any time do, order, or have done, any and all work that the County Engineer considers necessary to restore to a safe condition any Franchise Area left by Whatcom PUD or its agents in a condition dangerous to life or property, and Whatcom PUD upon demand shall pay to the County all costs of such work, the County having first provided notice of such condition to Whatcom PUD and a reasonable time to cure such unsafe condition, provided however, in the event of damage to the Franchise Area caused by Whatcom PUD that necessitates immediate repair by the County or its agents on an emergency basis where notice to Whatcom PUD or providing an opportunity to cure is not feasible considering nature of the emergency and necessary repair, as determined by the County Engineer using professional engineering standards, no such notice and reasonable time to cure shall be required as a condition of repayment by the PUD.

5.4 In preparing plans and specifications for the installation of Facilities within the Franchise Area, Whatcom PUD shall reasonably conform to the standards and specifications established by the County Engineer. Whatcom PUD shall consult with the County Engineer in case it plans to deviate from the established standards and specifications in the course of installing Facilities within the Franchise Area and must demonstrate to the satisfaction of the County Engineer that its plans will achieve a legal and functionally equivalent result.

5.5 All work done by and for Whatcom PUD under this Franchise shall be done in a thorough and workmanlike manner. In the construction of Facilities and the opening of trenches within and the tunneling under the Franchise Area, Whatcom PUD shall leave such trenches and tunnels in such a way as to interfere as little as possible with public travel, and shall take all due and necessary precautions to guard the same, so that damage or injury shall not occur or arise by reason of such work. Where any of such trenches, ditches, or tunnels are left open at

night, the Whatcom PUD shall place warning lights and barricades at such a position as to give adequate warning of such work, per the MUTCD (Manual on Uniform Traffic Control Devices). Whatcom PUD shall be liable for any injury to person or persons or damage to property to the extent proximately caused by its carelessness or neglect, or to the extent proximately caused by any failure or neglect to properly guard or give warning of any trenches, ditches or tunnels dug or maintained by Whatcom PUD.

5.6 Before any work is performed under this Franchise which may affect any existing monuments or markers of any nature relating to subdivisions, plats, roads and all other surveys, Whatcom PUD shall reference all such monuments and markers. The reference points shall be so located that they will not be disturbed during Whatcom PUD's operations under this Franchise. The method of referencing these monuments or other points to be referenced shall be approved by the County Engineer. The replacement of all such monuments or markers disturbed during construction shall be made as expeditiously as conditions permit, and as directed by the County Engineer. The cost of monuments or other markers lost, destroyed, or disturbed, and the expense of replacement by approved monuments shall be borne by Whatcom PUD. A complete set of reference notes for monuments and other ties shall be filed with the County Engineer's Office.

## **Section 6. Relocation of Facilities.**

6.1 Whatcom PUD shall, at its sole expense and with due diligence, relocate or adjust the elevation of any of its Facilities upon receipt of written request from the County Engineer when determined reasonably necessary based upon sound engineering principles by the County Engineer for improvement to the County facilities in the Franchise Area, provided that the elevations required by the County are not in violation of local, state or federal law and are reasonable necessary for safety purposes. Whatcom PUD shall coordinate such relocation or adjustment of its Facilities with the County and shall perform the same in a timely fashion so that, absent conditions beyond the control of Whatcom PUD, such relocation or adjustment of Whatcom PUD's Facilities will not impede or delay pending changes to the Franchise Area.

6.1.1 Notwithstanding the foregoing, except where no other reasonable engineering alternative exists, the County shall not require Whatcom PUD to relocate or adjust the elevations of any water lines measuring twelve inches (12") or larger in diameter located in the following areas with pressure of at least 100 psi (referred to herein as the "High Pressure Water Lines") (copies of the as-built drawings were provided by Whatcom PUD to the County on May 29, 2013 and August 22, 2013 with said copies to be retained in the Whatcom County Public Works Engineering Services Records Vault):

- A. Along, under or within the Douglas Road right of way
- B. Along, under or within the Aldergrove Road Right of Way
- C. Along, under or within the Rainbow Road Right of Way.
- D. Along, under, or within the Lake Terrell Road Right of Way
- E. Along, under, or within the Trigg Road Right of Way

6.1.2 In the event the County constructs or extends any roadway over any High Pressure Water Lines, the County does so at its own risk and expense. Pursuant to the terms and conditions set forth in Section 7, below and to the extent permitted by law, and to the extent consistent with all reasonable standard professional engineering and construction practices

and/or requirements when conducting or permitting any work in, around or near such Facilities the County shall defend, indemnify and hold Whatcom PUD harmless from any and all claims arising out of or resulting from the County's or its employees, agents and/or contractor's negligent acts or omissions that proximately cause damage to or interruption to the operation of the High Pressure Water Lines..

6.1.3 The County may, at its sole cost and risk, and with Whatcom PUD's prior written consent, which consent shall not be unreasonably conditioned nor withheld, relocate or adjust the elevations of the High Pressure Water Lines, provided that service to Whatcom PUD's customers is not interrupted.

6.2 Whatcom PUD may propose to the County alternatives to reduce or eliminate the need for relocation of its Facilities pursuant to Section 6.1. Upon the County's receipt from Whatcom PUD of such alternatives in writing, the County shall evaluate such alternatives and shall advise Whatcom PUD in writing if one or more of such alternatives are suitable to accommodate the work that would otherwise necessitate relocation of Whatcom PUD's Facilities. In evaluating such alternatives, the County shall give each alternative proposed by Whatcom PUD 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 County reasonably determines that such alternatives are not appropriate, Whatcom PUD shall relocate its Facilities as otherwise provided in Section 6.1. Any acceptance by the County of such alternatives shall not excuse (nor shall be construed to excuse) Whatcom PUD from future relocation or adjustment of Whatcom PUD's Facilities pursuant to this Section 6.

6.3 As qualified in Sections 6.1 and 6.2 above, and in Section 6.4 below, whenever any person or entity, other than the County, requires the relocation of Whatcom PUD's Facilities to accommodate the work of such person or entity within the Franchise Area, or whenever the County requires the relocation of Whatcom PUD's Facilities within the Franchise Area for the benefit of any person or entity other than the County, then Whatcom PUD shall have the right as a condition of such relocation to require such person or entity to:

6.3.1 Make payment to Whatcom PUD, at a time and upon terms acceptable to Whatcom PUD, which acceptance shall not be unreasonably withheld, for any and all costs and expenses incurred by Whatcom PUD in the relocation of Whatcom PUD's Facilities; and

6.3.2 Indemnify and save Whatcom PUD 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 Whatcom PUD's Facilities, to the extent such injury or damage is caused by the negligence of the person or entity requesting the relocation of Whatcom PUD's Facilities or the negligence of the agents, servants or employees of the person or entity requesting the relocation of Whatcom PUD's Facilities.

6.4 Any condition or requirement imposed by the County upon any person or entity, other than Whatcom PUD or the County (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 Whatcom PUD's Facilities shall be a required relocation for purposes of Section 6.3; provided, however:

6.4.1 If the County notifies Whatcom PUD in writing that 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 County's behalf consistent with the County's Six-Year Road Construction Program, then Whatcom PUD shall relocate its Facilities within the Franchise Area in accordance with Section 6.1 unless such Facility is otherwise exempt from relocation pursuant to Section 6.1.1 through 6.1.3.

6.4.2 Unless the relevant Facility is exempt from relocation pursuant to Section 6.1.1 through 6.1.3, if the County notifies Whatcom PUD in writing that the County will bear a portion of the costs of, or will provide funding towards, a project that includes grading or widening of the Franchise Area resulting from the imposition of such condition or requirement upon such person or entity, then Whatcom PUD agrees to bear a portion of its costs and expenses to relocate its Facilities to accommodate such grading or widening, such portion borne by Whatcom PUD being a percentage equal to that percentage of such project's costs borne or funded by the County (the "County Contribution"); provided, however, in no event shall such portion borne by Whatcom PUD exceed the dollar amount of such County Contribution. "Project" shall mean that work directly bearing on the area that necessitates relocation by Whatcom PUD, and shall not include other off-site improvements that may be performed at the same time. In all other respects such relocation shall be a required relocation for the purposes of Section 6.3 and without limiting the foregoing, Whatcom PUD shall have the right as a condition of such relocation to require such person or entity to pay to Whatcom PUD all relocation costs and expenses in excess of the portion borne by Whatcom PUD under this Section 6.4.2.

6.4.3 If the Facilities to be relocated pursuant to this subsection 6.4 have been located at or relocated within the preceding five (5) years to a location upon which the County had agreed at the time without reservation, then Whatcom PUD shall be entitled to recovery of all its costs and expenses incurred in the relocation of its Facilities from the party on whom the condition for road improvements was placed. Documentation of any such agreement between the County and Whatcom PUD shall be kept in conjunction with the encroachment permit issued by the County for the work of relocation.

6.5 Nothing in this Section 6 shall require Whatcom PUD to bear any cost or expense in connection with the location or relocation of any Facilities then existing pursuant to easement or such other rights not derived from or addressed by this Franchise.

## **Section 7. Indemnification.**

7.1 To the extent permitted by law, Whatcom PUD shall defend, indemnify and hold the County harmless from any and all claims, demands, suits, actions, costs and expenses, including but not limited to attorney's fees, made against it on account of injury or damage to the person or property of another, but only to the extent such injury or damage is caused by the actions or failure to act of Whatcom PUD, its agents, servants or employees in exercising the rights granted to Whatcom PUD in this Franchise; provided, however, that in the event any such claim or demand be presented to or filed with the County, the County shall promptly notify Whatcom PUD thereof, and Whatcom PUD shall have the right, at its election and at its sole cost and expense, to settle and compromise such claim or demand; provided further, that in the event any suit or action is begun against the County based upon any such claim or demand, the County shall likewise promptly notify Whatcom PUD thereof, and Whatcom PUD shall have the

right, at its election and 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. Notwithstanding the foregoing, if damages to another or others result from concurrent negligence of Whatcom PUD and the County, Whatcom PUD and the County shall each be responsible for, and this indemnification provision shall be operative so that each party bears, the proportionate share attributable to its own negligence. In case judgment which is not appealed shall be rendered against the County in such suit or action, Whatcom PUD shall fully satisfy said judgment within ninety (90) days after said suit or action shall have finally been determined. Upon Whatcom PUD's failure to satisfy said judgment within ninety (90) days, the County may elect to terminate this Franchise pursuant to the terms of Section 19 herein. The provision for reimbursement of the County shall survive the termination of this Franchise.

7.2 Acceptance by the County of any work performed by Whatcom PUD at the time of completion shall not be grounds for avoidance of the covenant in Section 7.1 above.

### **Section 8. Acquisition of Right-of-Way.**

8.1 In the event that Whatcom PUD proposes to acquire easements for the location or relocation of its Facilities outside of, and adjacent to the Franchise Area, Whatcom PUD shall notify the County of the same and the County shall have the option, with the concurrence of Whatcom PUD, to acquire in place of such Whatcom PUD proposed easements, additional public rights-of-way or equivalent public utility easements for use by Whatcom PUD. Any such public rights-of-way acquired by the County shall become Franchise Area. Any such public utility easements so acquired by the County shall not be Franchise Area (and shall not be subject to the terms and conditions of this Franchise) and Whatcom PUD's use of such public utility easements shall be subject to the terms and conditions of such public utility easements.<sup>1</sup>

### **Section 9. Vacation of the Franchise Area.**

9.1 If at any time the County shall seek to vacate any portion of the Franchise Area and said vacation shall be for the purpose of acquiring the fee or other property interest in said portion of the Franchise Area for the use of the County, in either its proprietary or governmental capacity, and there are no Facilities located in the Franchise Area. then the County Engineer may at his option and by giving thirty (30) days written notice to Whatcom PUD, terminate this franchise with reference to such portion of the Franchise Area so vacated, and the County shall not be liable for any damages or loss to Whatcom PUD allegedly incurred by reason of such termination. Nothing herein shall limit or prevent Whatcom PUD from exercising its powers of eminent domain. Should Whatcom PUD notify the County of its intent to consider exercising its power of eminent domain to obtain an easement for the Facilities located within the area of the Franchise to be terminated, the termination of the Franchise shall be tolled for a period of no less than one hundred and twenty (120) days from the date of notice.

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<sup>1</sup> A distinction is drawn here between public rights-of-way which are or shall become Franchise Area and thus governed by the terms of the franchise ordinance, and public utility easements which shall not become Franchise Area, the use of which shall be governed by the terms and conditions of the easements themselves and not by the franchise ordinance.

9.2 If at any time the County shall vacate any portion of the Franchise Area in which Facilities are installed at the time of said vacation, and said vacation shall be for the purpose of acquiring the fee or other property interest in said portion of the Franchise Area by other than the County, then the County shall, in its vacation procedure, unless otherwise waived in writing by Whatcom PUD, reserve an easement to Whatcom PUD for Whatcom PUD's Facilities as reasonably necessary for the continued use, operation, maintenance and repair of the Facilities as located in the portion of the Franchise Area to be vacated.

#### **Section 10. Moving Buildings within the Franchise Area.**

10.1 If any person or entity obtains permission from the County to use the Franchise Area for the moving or removal of any building or other object, the County shall, prior to granting such permission, direct such person or entity to arrange with Whatcom PUD for the temporary adjustment of Whatcom PUD's Facilities necessary to accommodate the moving or removal of such building or other object. Such person or entity shall make such arrangements, upon terms and conditions acceptable to Whatcom PUD, not less than fourteen (14) days prior to the moving or removal of such building or other object. In such event, Whatcom PUD shall, at the sole cost and expense of the person or entity desiring to move or remove such building or other object, adjust any of its Facilities which may obstruct the moving or removal of such building or object.

#### **Section 11. Locating Facilities.**

11.1 Whatcom PUD and the County acknowledge and commit to fully comply with their respective obligations, as the same may arise from time to time, under Chapter 19.122 RCW (Underground Utilities Locator Statute) or any other law applicable to determining the location of utility facilities.

#### **Section 12. Nonexclusive Franchise.**

12.1 This Franchise is not and shall not be deemed to be an exclusive franchise. It shall not in any manner prohibit the County from granting other franchises of a like nature or franchises for other public or private utilities under, along, across, over, and upon any part of the Franchise Area, and shall in no way prevent or prohibit the County from constructing, altering, maintaining, using, or vacating any part thereof, or affect its jurisdiction over any part thereof with full power to make all necessary changes, relocations, repairs, maintenance, etc., the same as the County may deem fit.

#### **Section 13. Franchise Term; Effect on Existing Franchises for Same Purpose.**

13.1 This Franchise is and shall remain in full force and effect for a period of twenty-five (25) years from and after the effective date of the Ordinance; provided, however, Whatcom PUD shall have no rights under this Franchise nor shall Whatcom PUD be bound by the terms and conditions of this Franchise unless Whatcom PUD shall, within thirty (30) days after the effective date of the Ordinance, file with the County its written acceptance of the franchise agreement contained within the Ordinance.

13.1.1 No franchise hereunder shall become effective for any purpose unless and

until written acceptance therefore shall have been filed with the Whatcom County Council and County Director of Public Works and such written acceptance shall be in the form and substance as shall be prescribed and approved by the County Prosecuting Attorney and operate as an acceptance of each and every term and condition and limitation contained in this ordinance, and in such franchise; and

13.1.2 Such written acceptance shall be filed by Whatcom PUD not later than the thirtieth (30th) day following the effective date of the Ordinance granting such franchise; and in default of the filing of such written acceptance as herein required, Whatcom PUD shall be deemed to have rejected the same. In case of Whatcom PUD's tardy acceptance of franchise, the County's recognition thereof shall be strictly at its discretion.

13.2 The existing franchises between the Parties pertaining to the same subject matter, i.e., PUD #1's water lines, which were granted by the County and accepted by PUD #1 on June 17, 1965, and January 29, 1970, shall be superseded and replaced by this franchise upon the effective date of this franchise as provided above.

**Section 14. Assignment.**

14.1 Neither this Franchise nor any interest herein shall be sold, transferred, or assigned without the prior consent in writing of the County Council, which consent shall not be unreasonably withheld, except that the Whatcom PUD may mortgage this Franchise to the trustee for its bond holders. Any approved assignee shall, within thirty (30) days of the date of any assignment, file written notice of the assignment with the County, together with its written acceptance of all terms and conditions of this Franchise.

14.2 All the provisions, conditions, and requirements herein contained shall be binding upon the successors and assigns of Whatcom PUD, and all privileges, as well as all obligations and liabilities of the grantee shall inure to its successors and assigns equally as if they were specifically mentioned wherever Whatcom PUD is mentioned.

**Section 15. Amendment.**

15.1 Except as addressed in and through Section 15.3 below, this Franchise may be amended only by written instrument, signed by both parties, which specifically states that it is an amendment to this Franchise and is approved and executed in accordance with the laws of the State of Washington. Without limiting the generality of the foregoing, this Franchise (including, without limitation, Section 5 above) shall govern and supersede and shall not be changed, modified, deleted, added to, supplemented or otherwise amended by any permit, approval, license, agreement or other document required by or obtained from the County in conjunction with the exercise (or failure to exercise) by Whatcom PUD any and all rights, benefits, privileges, obligations or duties in and under this Franchise, unless such permit, approval, license, agreement or other document specifically:

15.1.1 References this Franchise; and

15.1.2 States that it supersedes this Franchise to the extent it contains terms and conditions that change, modify, delete, add to, supplement or otherwise amend the terms and

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

15.2 If, during the term of this Franchise, there becomes effective any change in federal or state law (including changes approved by the Washington Utilities and Transportation Commission) which:

15.2.1 Affords either party the opportunity to negotiate in good faith a term or condition of this Franchise which term or condition would not have, prior to such change, been consistent with federal or state law; or

15.2.2 Pre-empts or otherwise renders null and void any term or condition of this Franchise which has there-to-fore been negotiated in good faith;

then, in such event, either party may notify the other party in writing that such party desires to commence negotiations to amend this Franchise. Such negotiations shall encompass only the specific term or condition affected by such change in federal or state law and neither party shall be obligated to re-open negotiation on any other term or condition of this Franchise. 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 Franchise, adoption of such amendment by Ordinance by the County and acceptance of such Ordinance by Whatcom PUD, 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 Franchise shall remain in full force and effect.

15.3 Notwithstanding any language to the contrary contained herein, this Franchise is subject to the provisions of the Whatcom County Charter, Section 9.30, and all rights belonging to the County and its people as set forth therein are hereby reserved thereto.

## **Section 16. Miscellaneous**

16.1 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.

16.2 This Franchise is subject to the requirements of any and all applicable laws, rules, and regulations, including the Whatcom County Code, as currently enacted or hereafter modified. In the event of any actual conflict between the provisions of this Franchise and the requirements of the Whatcom County Code or County-enacted rules or regulations, the provisions of this Franchise shall control, to the extent authorized by law.

16.3 All notices, demands, requests, consents and approvals which may, or are required to be given by any party to any other party hereunder, shall be in writing and shall be deemed to have been duly given if delivered personally, sent by facsimile, sent by a nationally recognized overnight delivery service, or if mailed or deposited in the United States mail and sent by

registered or certified mail, return receipt requested, postage prepaid to:

**For County:** County Executive  
Whatcom County Courthouse  
311 Grand Ave.  
Bellingham, WA 98225

**For Whatcom PUD:** General Manager  
PUD # 1 of Whatcom County  
1705 Trigg Rd.  
Ferndale, WA 98248

or to such other address as the foregoing parties hereto may from time-to-time designate in writing and deliver in a like manner. All notices shall be deemed complete upon actual receipt or refusal to accept delivery. Facsimile transmission of any signed original document, and retransmission of any signed facsimile transmission shall be the same as delivery of an original document.

16.4 No failure by any of the foregoing parties to insist upon the strict performance of any covenant, duty, agreement, or condition of this Franchise or to exercise any right or remedy consequent upon a breach thereof shall constitute a waiver of any such breach or any other covenant, agreement, term or condition. No waiver shall affect or alter this Franchise, and each and every covenant, agreement, term and condition of this franchise shall continue in full force and effect with respect to other then existing or subsequent breach thereof.

#### **Section 17. Incorporation and Annexation.**

17.1 Whenever any part of the Franchise Area, by reason of the subsequent incorporation of any town or city, or extension of the limits of any town or city, shall fall within the city or town limits, this Franchise shall continue in force and effect as to all of the Franchise Area not so included in city or town limits.

#### **Section 18. Insurance.**

18.1 During the term of this Franchise Whatcom PUD shall keep in effect, a liability insurance policy covering all liability of Whatcom PUD to the County, including any assumed by contract between Whatcom PUD and any other party, with limits at least in the amount of \$1,000,000. In lieu of the insurance requirement of this Section, Whatcom PUD may self-insure against such risks. At the time of Whatcom PUD's acceptance of this Franchise and otherwise upon the County's request, Whatcom PUD shall provide the County with certificate(s) of insurance or evidence of self-insurance reflecting the requirements of this section.

#### **Section 19. Forfeiture and Termination of Franchise.**

19.1 If Whatcom PUD shall willfully violate or fail, through willful or unreasonable neglect, to comply with any of the provisions of this Franchise for sixty (60) days after receipt of

Whatcom PUD's forfeiture of all rights hereunder and to declare this Franchise terminated and of no further force or effect thereafter; provided, however, if any failure to comply with this Franchise by Whatcom PUD cannot be corrected with due diligence within said sixty (60) day period (Whatcom PUD'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 Whatcom PUD may so comply shall be extended for such time as may be reasonably necessary and so long as Whatcom PUD commences promptly and diligently to effect such compliance.

**Section 20. Effective Date.**

20.1 This Ordinance shall be effective ten (10) days after being signed by the County Executive, with the Franchise granted hereunder finally effective pursuant to the terms of Section 13.1, 13.1.1, and 13.1.2, having been: (i) introduced to the County Council not less than thirteen (13) days before its passage; (ii) brought to public notice by such notice having been posted in three (3) public places in Bellingham at least fifteen (15) days before the day fixed for the public hearing; (iii) published at least twice in the official newspaper for the County and no later than five (5) days prior to the day fixed for the hearing and as otherwise required by law; and (iv) passed at a regular meeting of the legislative body of the County of Whatcom by a vote of at least six members of the County Council on December 9th, 2014.

ADOPTED this 9th day of December, 2014.

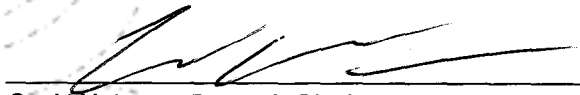
ATTEST

  
Dana Brown-Davis, Clerk of the Council

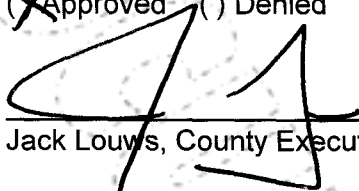
APPROVED AS TO FORM:

  
Daniel L. Gibson  
Chief Civil Deputy Prosecutor

WHATCOM COUNTY COUNCIL  
WHATCOM COUNTY, WASHINGTON

  
Carl Weimer, Council Chair

Approved  Denied

  
Jack Louws, County Executive

**Exhibit A  
To Ordinance 2014-087**

**ACCEPTANCE OF FRANCHISE**

**Public Utility District No. 1 of Whatcom County**

The Whatcom County Council at its meeting of December 9, 2014, adopted Ordinance 2014-087 approving the application for franchise filed by Public Utility District No. 1 of Whatcom County. The petition and all related documents are available for review in the Council Office as file number AB2014-180.

Public Utility District No. 1 of Whatcom County hereby accepts, subject to all the conditions contained in Ordinance 2014-087, that certain non-exclusive franchise to locate, set, erect, lay, construct, extend, support, attach, connect, maintain, repair, replace, enlarge, operate and use "Facilities" in upon, over, under, along, across and through the "Franchise Area" to provide for the transmission, distribution and sale of water for agricultural, municipal, domestic, commercial, industrial and any other lawful purpose for which water may be used.

"Facilities" means, collectively, any and all water transmission and distribution systems, including but not limited to tanks, meter, pipes, mains, services, valves, manholes, pressure reducing valves ("PRVs"), pump stations, meter stations and any and all other equipment, appliances, attachments, appurtenances and other items necessary, convenient, or in any way appertaining to any and all of the foregoing, whether the same be located over or under ground.

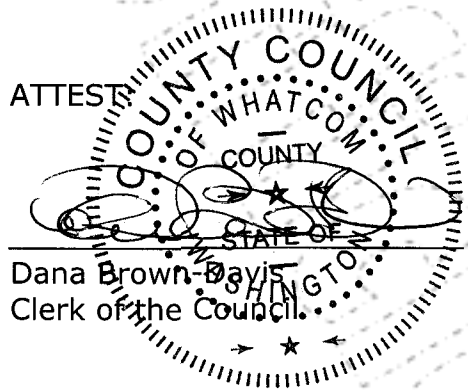
"Franchise Area" means any, every and all of the public roads, streets, avenues, alleys, highways, grounds, and other public places of the County as now laid out, platted, dedicated, or improved; and any, every and all of the public roads, streets, avenues, alleys, highways, grounds and other public places that may hereafter be laid out, platted, dedicated or improved within the present limits of the County and as such limits may be hereafter extended.



Granting of this franchise becomes official upon receipt from the petitioner of this signed and notarized document, and payment by petitioner of publication costs incurred by the County Council Office.


This franchise, when granted, shall be in effect for a period of twenty-five (25) years.

ATTEST



Dana Brown-Davis  
Clerk of the Council

WHATCOM COUNTY COUNCIL  
WHATCOM COUNTY, WASHINGTON

  
\_\_\_\_\_  
Carl Weimer  
Council Chair

Agent for the petitioner, Public Utility District No. 1 of Whatcom County:

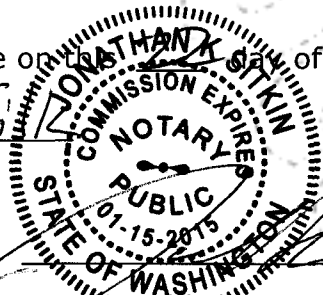
  
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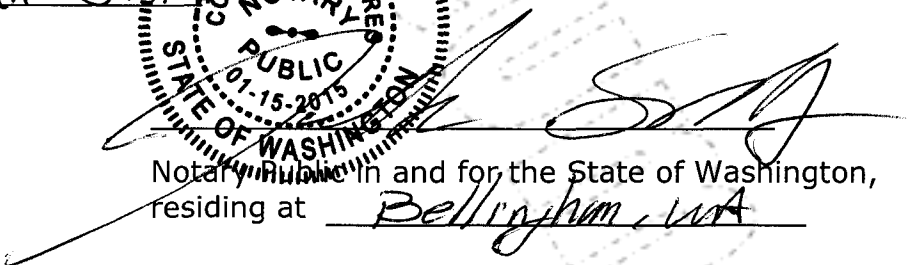
Date: 12-22-2014

State of Washington     )  
  ) ss.  
County of Whatcom     )

Signed and sworn to before me on this 22 day of December 2014, by

Stephan Jirka  
\_\_\_\_\_  
(Agent for petitioner)



  
\_\_\_\_\_  
Notary Public in and for the State of Washington,  
residing at Bellingham, WA

My notary commission expires 1-15-2015

Effective Date of this franchise 1-7-15