

**RETURN TO:**

City Clerk  
City of Oak Harbor  
865 SE Barrington Drive  
Oak Harbor, WA 98277

**GRANTOR:** City of Oak Harbor  
**GRANTEE:** Puget Sound Energy, Inc.

ORDINANCE NO. 1763

AN ORDINANCE GRANTING PUGET SOUND ENERGY, INC., A WASHINGTON CORPORATION, ITS SUCCESSORS AND ASSIGNS, THE RIGHT, PRIVILEGE, AUTHORITY AND FRANCHISE TO 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 ELECTRIC ENERGY FOR POWER, HEAT AND LIGHT, AND ANY OTHER PURPOSES FOR WHICH ELECTRIC ENERGY MAY BE USED

THE CITY COUNCIL OF THE CITY OF OAK HARBOR do ordain as follows:

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**Section One. Definitions.**

- (1) Where used in this franchise (the "Franchise") the following terms shall mean:
- (a) "PSE" means Puget Sound Energy, Inc., a Washington corporation, and its successors and assigns.
  - (b) "City" means the City of Oak Harbor, a non-charter code city within the State of Washington, and its successors and assigns.
  - (c) "Franchise Area" means any, every and all of the right-of-way for public roads, streets, avenues, alleys, highways and other public ways of the City as now laid out, platted, dedicated or improved; and any, every and all right-of-way for public roads, streets, avenues, alleys, highways and other public ways that may hereafter be laid out, platted, dedicated or improved within the present limits of the City and as such limits may be hereafter extended. For the purpose of this definition, right-of-way includes, without limitation, property owned by the City in fee and used for public roads and other public ways of the City.
  - (d) "Facilities" means, collectively, any and all
    - (i) electric transmission and distribution systems, including but not limited to, poles (with or without cross-arms), wires, lines, conduits, cables, braces, guys, anchors and vaults, meter-reading devices, and communication systems; and
    - (ii) 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.
  - (e) "Ordinance" means this ordinance which sets forth the terms and conditions of this Franchise.
  - (f) "Franchise" means the grant of rights, privileges, and authority embodied in this Ordinance.

- (g) “WUTC” means the Washington Utilities and Transportation Commission or such successor regulatory agency having jurisdiction over public service companies.
- (h) “Tariff” means tariff as that term is defined in WAC 480-80-030(3), or such similar definition describing rate schedules, rules and regulations relating to charges and service as may hereinafter be adopted by the regulatory authority with jurisdiction, under the laws of the State of Washington, over public service companies.

**Section Two. Facilities within Franchise Area.**

- (1) The City does hereby grant to PSE the right, privilege, authority and franchise to 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 electric energy for power, heat, light and such other purposes for which electric energy may be used.
- (2) This Franchise shall not govern or apply to Facilities located on PSE owned or leased properties or easements inside or outside of the Franchise Area under rights that are now or hereafter granted by any public or private person or entity. Such Facilities are not and will not be considered to be located pursuant to rights derived from this Franchise.

**Section Three. Non-Franchise Area City Property**

- (1) Subject to Subsection (2), below, this Franchise shall not convey any right to PSE to install Facilities on or to otherwise use City-owned or leased properties or easements outside the Franchise Area.
- (2) Existing Facilities installed or maintained by PSE in accordance with prior franchise agreements on public grounds and places within the City (but which are not a part of the Franchise Area as defined by this Franchise) may be maintained, repaired and operated by PSE at the location where such Facilities exist as of the effective date of this Franchise for the term of this Franchise; provided, however, that no such Facilities may be enlarged, improved or expanded without the prior review and approval of the City pursuant to the provisions of any applicable City codes, ordinances, regulations, standards, procedures and/or permits, as now exist or as may be hereafter amended or superseded, provided that such provisions are not in conflict or inconsistent with the express terms and conditions of this Franchise.

**Section Four. Non-Interference of Facilities.**

- (1) PSE's Facilities shall be maintained within the Franchise Area so as not to unreasonably interfere with the free passage of traffic and in accordance with the laws of the State of Washington and the City; provided, however, in the event of any conflict or inconsistency between such laws of the City and the terms and conditions of this Franchise, the terms and conditions of this Franchise shall govern and control; provided, further, nothing herein shall be deemed to waive, prejudice or otherwise limit any right of appeal afforded

- PSE by such City laws. PSE shall exercise its rights within the Franchise Area in accordance with applicable City 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; provided, further, nothing herein shall be deemed to waive, prejudice or otherwise limit any right of appeal afforded PSE by such City codes and ordinances.
- (2) PSE shall provide the City, upon the City's reasonable request, copies of available drawings in use by PSE showing the location of its Facilities at specific locations within the Franchise Area in connection with the design of any public improvement (as defined in Subsection (1) of Section Six, below). As to any such drawings so provided, PSE does not warrant the accuracy thereof and, to the extent the location of Facilities is shown, such Facilities are shown in their approximate location. With respect to any excavations within the Franchise Area undertaken by or on behalf of PSE or the City, nothing herein is intended (nor shall be construed) to relieve either party of their respective obligations arising under applicable law with respect to determining the location of utility facilities.
  - (3) All work by PSE pursuant to this Section shall be performed in accord with the permit(s) issued by the City, together with the laws of the State of Washington and the provisions of any applicable City codes, ordinances, regulations, standards and procedures as now exist or as may be hereafter amended or superseded, provided that such provisions are not in conflict or inconsistent with the express terms and conditions of this Franchise.
  - (4) The City may require PSE to post an appropriate bond, as reasonably 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.
  - (5) Upon the City's reasonable request, in connection with the design of any public improvement (as defined in Subsection (1) of Section Six, below), PSE shall verify the location of its underground Facilities within the Franchise Area by excavating (e.g., pot holing) at no expense to the City. In the event PSE performs such excavation, the City shall not require any restoration of the disturbed area in excess of restoration to the same condition as existed immediately prior to the excavation.
  - (6) PSE shall, after installation, construction, relocation, maintenance, removal or repair of any of PSE's Facilities within the Franchise Area, restore the surface of the Franchise Area and any other City property within the Franchise Area which may be disturbed or damaged by such work, to at least the same condition as it was immediately prior to any such work. The City shall have final approval of the condition of the Franchise Area after restoration pursuant to the provisions of applicable City codes, ordinances, regulations, standards and procedures, as now exist or as may be hereafter amended or superseded, provided that such provisions are not in conflict or inconsistent with the express terms and conditions of this Franchise.
  - (7) All survey monuments which are disturbed or displaced by PSE in its performance of any work under this Franchise shall be referenced and restored by PSE, as per WAC 332-120,

as from time to time amended, and all pertinent federal, state and local standards and specifications.

**Section Five. Undergrounding of Facilities**

- (1) PSE acknowledges that the City desires to promote a policy of undergrounding of Facilities within the Franchise Area. The City acknowledges that PSE provides electrical service on a non-preferential basis subject to and in accordance with applicable Tariffs on file with the WUTC. Subject to and in accordance with such Tariffs, PSE will cooperate and participate with the City in the formulation of policies and regulations concerning the undergrounding of PSE aerial Facilities within the Franchise Area.
- (2) If, during the term of this Franchise, the City shall direct PSE in any manner, including pursuant to the provisions of any applicable City codes, ordinances, regulations, standards or procedures, to underground overhead electrical Facilities within the Franchise Area, such undergrounding shall be arranged and accomplished subject to and in accordance with Tariffs on file with the WUTC. This Section Five shall govern all matters related to the undergrounding of PSE's overhead electrical Facilities within the Franchise Area.

**Section Six. Relocation of Facilities.**

- (1) Whenever the City causes a public improvement to be undertaken within the Franchise Area, and such public improvement requires the relocation of PSE's then existing Facilities within the Franchise Area (for purposes other than those described in Subsection (2) below), the City shall:
  - (a) provide PSE, within a reasonable time prior to the commencement of such public improvement, written notice requesting such relocation; and
  - (b) provide PSE with reasonable plans and specifications for such public improvement.After receipt of such notice and such plans and specifications, PSE shall relocate such Facilities within the Franchise Area at no charge to the City within a reasonable amount of 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 Subsection (1), the City shall bear the entire cost of such subsequent relocation. As used in herein, the term "public improvement" is a City-funded (whether directly with its own funds or with other public monies obtained by the City) capital improvement within the Franchise Area.
- (2) Whenever:
  - (a) any public or private development within the Franchise Area, other than a public improvement, requires the relocation of PSE's Facilities within the Franchise Area to accommodate such development; or
  - (b) the City requires the relocation of PSE's Facilities within the Franchise Area for the benefit of any person or entity other than the City;

then in such event, PSE shall have the right as a condition of such relocation, to require such developer, person or entity to make payment to PSE, at a time and upon terms acceptable to PSE, for any and all costs and expenses incurred by PSE in the relocation of PSE's Facilities.

- (3) Any condition or requirement imposed by the City upon any person or entity, other than PSE, that requires the relocation of PSE's Facilities shall be a required relocation for purposes of Subsection (2) above (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).
- (4) Nothing in Section Four "Relocation of Facilities" shall require PSE to bear any cost or expense in connection with the location or relocation of any Facilities then existing pursuant to easements or such other rights not derived from this Franchise, including easements or other rights now or hereafter granted by any public or private person or entity on property located inside or outside of the Franchise Area and regardless of whether this Franchise co-exists with such easement or other rights.

#### **Section Seven. Indemnification.**

- (1) PSE hereby agrees to indemnify, defend and hold harmless the City, its officers, employees, agents and representatives, from any and all claims and demands brought by any third party on account of injury or death of any person or damage to property to the extent caused by or arising out of the negligent acts or omissions of PSE, its agents, servants, officers or employees in the performance of this Franchise or the exercise of any rights granted hereunder.
- (2) Inspection or acceptance by the City of any work performed by PSE at any time of completion of construction shall not be grounds for avoidance by PSE of any of its obligations under this Section. Said indemnification obligations shall extend to claims which are not reduced to a suit and any claims which may be compromised prior to the culmination of any litigation or the institution of any litigation.
- (3) In the event that PSE refuses the tender of defense in any suit or any claim, said tender having been made pursuant to the indemnification provision contained herein, and said refusal is subsequently determined by a court having jurisdiction (or such other tribunal that the parties shall agree to decide the matter), to have been a wrongful refusal on the part of PSE, then PSE shall pay all of the City's costs for defense of the action, including all expert witness fees, costs, and attorney's fees, including costs and fees incurred in recovery under this indemnification provision.
- (4) In the event of liability for damages arising out of bodily injury to persons or damages to property caused by or resulting from the concurrent negligence of PSE and the City, its

officers, employees and agents, PSE's liability hereunder shall be only to the extent of PSE's negligence.

- (5) It is further specifically and expressly understood that, solely to the extent required to enforce the indemnification provided herein, PSE waives its immunity under RCW Title 51; provided, however, the foregoing waiver shall not in any way preclude PSE from raising such immunity as a defense against any claim brought against PSE by any of its employees. This waiver has been mutually negotiated by the parties.
- (6) The provisions of this Section shall survive the expiration or termination of this Franchise.

**Section Eight. Insurance.**

- (1) PSE shall procure and maintain for the duration of this Franchise, insurance against claims for injuries to persons or damages to property which may arise from or in connection with the exercise of the rights, privileges and authority granted hereunder to PSE, its agents, representatives or employees. PSE shall provide a copy of a Certificate of Insurance to the City for its inspection prior to the adoption of this Franchise Ordinance, and such insurance certificate shall evidence a policy of insurance that includes:
  - (a) Automobile Liability insurance with limits no less than \$1,000,000 Combined Single Limit per occurrence for bodily injury and property damage; and
  - (b) Commercial General Liability insurance, written on an occurrence basis with limits no less than \$1,000,000 per occurrence and \$2,000,000 aggregate for personal injury, bodily injury and property damage. Coverage shall include but not be limited to: blanket contractual; products and completed operations; property damage; explosion, collapse and underground (XCU); and employer's liability.

In lieu of the insurance requirements set forth in Section Eight, PSE may self-insure against such risks in such amounts as are consistent with prudent utility practice and the coverage amounts specified above. Upon the City's request, PSE shall provide the City with reasonable written evidence that PSE is maintaining such self-insurance.

**Section Nine. Vacation or Disposal of Franchise Area.**

- (1) In the event the City vacates or disposes of any portion of the Franchise Area during the term of this Franchise, the City shall provide PSE prior notice of same to allow PSE the opportunity to review and comment on the proposed vacation or disposal, and in its vacation or disposal procedure shall reserve an easement for utilities suitable for PSE's Facilities for the duration of the term of this Franchise (or such longer period of time as the Oak Harbor City Council may determine appropriate) unless otherwise requested by PSE.

**Section Ten. Moving Buildings within the Franchise Area.**

- (1) If any person or entity 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 person or entity to arrange with PSE for the temporary adjustment of PSE's overhead wires necessary to accommodate the moving or removal of such building or other object. Such person or entity shall make arrangements, upon terms and conditions acceptable to PSE, not less than thirty (30) days prior to the moving or removal of such building or other object. In such event, PSE 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 overhead wires which may obstruct the moving or removal of such building or object, provided that:
  - a. 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; and
  - b. The person or entity other than the City obtaining such permission from the City to move or remove such building or other object shall be required to indemnify and hold the City and 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 moving or removal of such building or other object, to the extent such injury or damage is caused by the negligence of the person or entity moving or removing such building or other object or the negligence of the agents, servants or employees of the person or entity moving or removing such building or other object.

**Section Eleven. Default.**

- (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 to comply with this Franchise by PSE cannot be corrected with due diligence 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 (a) notifies the City of the need for an extension, (b) engages in good faith discussions with the City as to the need for the extension and steps that are or may be taken to minimize the length of the extension, and (c) commences promptly and diligently to effect such compliance.

**Section Twelve. Remedies to Enforce Compliance.**

- (1) The City may elect, in lieu of the provisions of Section Eleven above and without any prejudice to any of its other legal rights and remedies, to seek an order from the superior court having jurisdiction compelling PSE to comply with the provisions of this Franchise



and to recover damages and costs incurred by the City by reason of PSE's failure to comply. In addition to any other remedy provided herein, the City reserves the right to pursue any remedy to compel or force PSE and/or its successors and assigns to comply with the terms hereof, and the pursuit of any right or remedy by the City shall not prevent the City from thereafter declaring a forfeiture or revocation for breach of the conditions herein in accordance with Section Eleven.

**Section Thirteen. City Ordinances and Regulations.**

- (1) The City may adopt and enforce, and PSE will comply with, all necessary and appropriate ordinances regulating PSE's use of the Franchise Area under this Franchise (including all construction, maintenance and other work undertaken by PSE within the Franchise Area), including any valid ordinance made in the exercise of its police powers in the interest of public safety and for the welfare of the public; provided, however, in the event of any conflict or inconsistency of such ordinances with the terms and conditions of this Franchise, the terms and conditions of this Franchise shall govern and control; provided, further, nothing herein shall be deemed to waive, prejudice or otherwise limit any right of appeal afforded PSE by such City ordinances. The provisions of Oak Harbor Municipal Code shall apply to performance of the conditions of this Franchise except as may be inconsistent or in conflict with the provisions of this Franchise.

**Section Fourteen. City Use of Facilities.** During the term of this Franchise, the City may, subject to PSE's prior written consent which shall not be unreasonably withheld, install and maintain City-owned overhead fiber optic and other wires for traffic signalization and police, fire and other internal City communications upon PSE's poles which are Facilities located within the Franchise Area. The foregoing rights of the City to install and maintain such wires are further subject to the following:

- (1) The City shall perform such installation and maintenance at its sole risk and expense with all applicable laws and in accordance with such reasonable terms and conditions as PSE may specify from time to time (including, without limitation, requirements accommodating Facilities or the facilities of other parties having the right to use the Facilities);
- (2) PSE shall have no obligation under Section Seven of this Franchise in connection with any City-owned wires installed or maintained on PSE's poles. The City shall indemnify, defend and hold harmless PSE in connection with the City's use of PSE's poles.

Nothing in this section is intended or shall be deemed to amend, alter or limit any provisions, terms or conditions of any other agreement between PSE and the City with respect to attachments of City-owned equipment to PSE's Facilities existing as of the date of this Franchise.

**Section Fifteen. Non-exclusive Franchise.**

- (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 franchises over, upon, and along the Franchise Area that 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.

**Section Sixteen. Franchise Term.**

- (1) This Franchise is and shall remain in full force and effect for a period of ten (10) years from and after the effective date of the Ordinance.
- (2) This Franchise may be renewed, at the sole discretion of the Oak Harbor City Council, for one additional five (5) year period upon the written request of PSE, such request to be submitted not more than two (2) years nor less than one-hundred-eighty (180) days prior to the expiration of the initial ten (10) year term.

**Section Seventeen. Assignment.**

- (1) All of the provisions, conditions and requirements herein contained shall be binding upon PSE and the City. This Franchise may not be assigned or transferred without the written consent of the City, which consent shall not be unreasonably withheld or delayed. Without limiting the foregoing, PSE will not have any right to assign or apportion its rights under this Franchise to any third party attaching equipment to PSE's poles or other Facilities within the Franchise Area except for third party equipment that is attached and used to support the utility operations of PSE. Notwithstanding the foregoing, PSE shall have the right, without such notice or such written acceptance, to mortgage its rights, benefits and privileges in and under this Franchise for the benefit of bondholders.

**Section Eighteen. Acceptance.**

- (1) Within sixty (60) days after the passage and approval of the Ordinance, the Ordinance may be accepted by PSE by its filing with the City Clerk an unconditional written acceptance thereof. Failure of PSE to so accept the Ordinance within said period of time shall be deemed a rejection thereof by PSE, and the rights and privileges herein granted shall, after the expiration of the sixty (60) day period, absolutely cease and determine, unless the time period is extended by ordinance duly passed for that purpose.

**Section Nineteen. Survival.**

- (1) All of the provisions, terms, conditions and requirements of Sections Four, Relocation of Facilities; 5, Indemnification; and 6, Insurance; of this Franchise shall survive the termination or expiration of this Franchise and any renewals or extensions thereof.

Further, each party reserves all other rights that such party may have at common law, by statute or by contract that are not in conflict or inconstant with the terms of this Franchise.

**Section Twenty. Notice.**

- (1) Any notice or information required or permitted to be given to the parties under this Franchise agreement may be sent to the following addresses unless otherwise specified by the applicable party through notice given in accordance with this section:

CITY OF OAK HARBOR  
Public Works Director  
865 SE Barrington Drive  
Oak Harbor, WA 98277

PUGET SOUND ENERGY  
Community Services  
P O Box 97034 EST-11W  
Bellevue, WA 98009-9734

**Section Twenty-one. Severability.** If any section, sentence, clause or phrase of this Franchise should be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of any other section, sentence, clause or phrase of this Franchise unless such invalidity or unconstitutionality materially alters the rights, privileges, duties, or obligations hereunder, in which event either party may request renegotiation of those remaining terms of this Franchise materially affected by such courts' ruling.

**Section Twenty-two. Miscellaneous**

- (1) If any provision, term, 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.
- (2) This Franchise may be amended only by written instrument set forth in writing in the form of a City ordinance, 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 Seven 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 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 permit, approval, license, agreement or other document specifically:

- (a) references this Franchise; and
- (b) 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.

- (3) This Franchise is subject to the provisions of any applicable tariff on file with the WU TC or its successor. In the event of any conflict or inconsistency between the provisions of this Franchise and such Tariff, the provisions of such Tariff shall control.
- (4) Notice of Tariff Changes. PSE shall, when making application for any changes in Tariffs affecting the provisions of the Franchise, notify the City in writing of the application and provide City with a copy of the submitted application within five (5) days of filing with the WUTC. PSE shall further provide the City with a copy of any actual approved Tariff(s) affecting the provision of this Franchise.

**Section Twenty-three. No Third Party Beneficiary**

- (1) Nothing in this Franchise shall be construed to create any rights in or duties to any third party, nor any liability to or standard of care with reference to any third party, no confer any right or remedy upon any person other than the City and PSE. No action may be commenced or prosecuted against either the City or PSE by any other party claiming beneficiary of this Franchise and nothing this Franchise shall release or discharge any obligation or liability of any third party to either the City or PSE.

**Section Twenty-four. Effective Date.**

- (1) This Franchise and the Ordinance, being an exercise of a power specifically delegated to the City legislative body, is not subject to referendum, and shall take effect (5) days after passage and publication of an approved summary thereof consisting of the title.


**Section Twenty-five. Cost of Publication.**

- (1) The cost of the publication of this Ordinance shall be borne by PSE.

Passed by the City Council of the City of Oak Harbor the 10<sup>th</sup> day of MAY, 2017.

Approved by the Mayor of the City of Oak Harbor the 10<sup>th</sup> day of MAY, 2017.

CITY OF OAK HARBOR

By   
Robert Severns, Mayor

Attest/Authenticated:

  
DEPUTY City Clerk NICOLE TESCH

Approved as to Form:

  
Nikki Esparza, City Attorney

Published: 05/25/2017