

INTRODUCED BY: Cosent

PROPOSED BY: PUBLIC WORKS

DATE INTRODUCED: 9/13/05

ORDINANCE NO: 2005-070

AN ORDINANCE IN THE MATTER OF GRANTING A NON-EXCLUSIVE FRANCHISE TO LAKE WHATCOM WATER & SEWER DISTRICT FOR A PERIOD OF 25 YEARS PURSUANT TO STATE LAW AND SECTION 9.30 OF THE WHATCOM COUNTY HOME RULE CHARTER, TO OPERATE AND MAINTAIN WATER MAINS, WATER DISTRIBUTION LINES, SEWER MAINS, SEWER COLLECTION LINES, AND ALL ELECTRICAL AND COMMUNICATIONS UTILITIES (OWNED AND OPERATED BY THE DISTRICT) FOR OPERATION OF THE WATER AND SEWER UTILITIES, ALONG CERTAIN ROADS WITHIN THE UNINCORPORATED AREAS OF WHATCOM COUNTY

WHEREAS, the Home Rule Charter for Whatcom County authorizes the County Council to grant non-exclusive franchises for a fixed term not to exceed 25 years for the use of any street, road or public place;

WHEREAS, R.C.W. 36.55.010 provides that the county legislative authority may grant franchises to persons or private or municipal corporations to use the right-of-way of County roads in their respective counties for the construction and maintenance of water works, gas pipes, telephones, telegraph and electrical light lines, sewers and other such facilities and including cable television wires and other cable television facilities; and

WHEREAS, Lake Whatcom Water & Sewer District, formerly Whatcom County Water District No. 10, has operated a system of water mains and water distribution lines and other facilities within a portion of Whatcom County under a previous twenty-five year franchise ordinance, adopted by the County Council on July 5, 1979 and approved by the County Executive on August 13, 1979; and

WHEREAS, said District has operated a system of sewer force and gravity mains, collector sewers, and pump stations within a portion of Whatcom County under a previous fifty year franchise ordinance, adopted by the Board of County Commissioners on October 7, 1971; and

WHEREAS, the twenty-five year water franchise ordinance states that, if the grantee seeks renewal of this franchise at the end of the twenty-five year term and has observed the material terms of the franchise, renewal shall not be unreasonably withheld;

WHEREAS, Lake Whatcom Water & Sewer District has applied for a 25-year nonexclusive franchise for installation, operation, maintenance, repair and replacement of water mains and water distribution lines, sewer force and gravity mains, collector sewers and sewer pump stations, and related facilities in and along certain roads in Whatcom County, Washington, and notice of this hearing having been duly published on Sept. 17., 2005 and September 24 2005 in the Bellingham Herald, the official newspaper for Whatcom County, and it appearing to the County Council that notice of said hearing has been given as required by law and that it is in the public interest to renew the franchise for a period of 25 years; and

WHEREAS, this matter has come on regularly for hearing before the Whatcom County Council at 7:00 p.m. on the 27th day of Sept, 2005 in accord with the notice given; and

WHEREAS, Lake Whatcom Water & Sewer District has agreed to the addition of certain administrative provisions to the franchise as provided herein;

NOW, THEREFORE, BE IT ORDAINED by the Council of Whatcom County, Washington:

Section 1. Franchise Granted.

A non-exclusive franchise for Lake Whatcom Water & Sewer District, together with any successors and assigns, referred to herein as the grantee, is hereby granted for a period of 25 years, the non-exclusive right and privilege to construct, erect, operate, maintain, repair and replace water mains and water distribution lines, sewer force and gravity mains, collector sewers and pump stations, and electrical and communications utilities, and related facilities (hereafter collectively referred to as "facilities") in, along and across public county roads and county property within the boundaries of the Lake Whatcom Water & Sewer District, within an area generally described as follows:

Sections 23, 24, 25, 26, 27, 34, 35, and 36, Township 38 North, Range 3 East; Sections 19, 29, 30, 32 and 33, Township 38 North, Range 4 East; Sections 1, 2, and 3, Township 37 North, Range 3 East; Sections 4, 5, 6, 7, 8, 9, 15, 16, 17, 20, 21, 22, 23, 25, 26, 27, 28, and 29, Township 37 North, Range 4 East, and Section 30, Township 37 North, Range 5 East of the Willamette Meridian, in Whatcom County, Washington.

The rights and privileges shall also apply to the portions of roads and rights-of-way that are part of or that abut those portions of roads that lie just over the section lines that bisect or intersect the roads in the above-listed areas.

Section 2. Acceptance of Franchise.

(a) No franchise hereunder shall become effective for any purpose unless and until written acceptance therefor shall have been filed with the Whatcom County Council and County Director of Public Works and such written acceptance shall be in 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 in this ordinance, and in such franchise;

(b) Such written acceptance shall be filed by Grantee not later than the thirtieth day

following the effective date of the ordinance granting such franchise; and in default of the filing of such written acceptance as herein required, Grantee shall be deemed to have rejected the same.

Section 3. Entering Rights of Way.

The Grantee, its successors and assigns, shall, subject to the requirements of Section 5 below, have the right and authority to enter upon the above-mentioned county roads, rights-of-way and other county property as designated hereinbefore, for the purposes of constructing, operating, maintaining, repairing, and replacing water and sewer lines and facilities.

Section 4. Construction Standards.

All construction and installation work along and under county roads or rights-of-way or other County property outside the corporate limits of any incorporated town shall be subject to the approval and pass the inspection of the Director of Public Works and shall conform to all applicable County and State codes or regulations, and the County expressly reserves the right to prescribe how and where the facilities shall be installed and may from time to time, upon six months or otherwise reasonable notice, whichever is longer,¹ require the removal and replacement thereof in the public interest, at the expense of the franchise holder.

Section 5. Construction Application.

(a) Prior to commencement of construction of said water and sewer mains, lines and other facilities, Grantee shall first file with the Director of Public Works its application for permit to do such work, together with plans and specifications in duplicate showing the position and location of all such lines and facilities sought to be constructed, laid, installed or erected at that time, showing their relative position to existing county roads, rights-of-way or other county property upon plans drawn to scale, hereinafter collectively referred to as the "map of definite location."

(b) The water and sewer lines and related facilities shall be laid in exact conformity with said map of definite location, except in instances in which deviation may be allowed thereafter in writing by the Director of Public Works pursuant to application by Grantee. The plans and specifications shall specify the class and type of material and equipment to be used, the manner of excavation, construction, installation, backfill, erection of temporary structures, erection of permanent structures, traffic control, traffic turn-outs and road obstruction, etc. No such construction shall be commenced without the Grantee first securing a written permit from the Director of Public Works, including approval endorsed on one set of plans and specifications returned to the Grantee. All such work shall be subject to the approval of and shall pass the inspection of the Director of Public Works. The Grantee shall pay all actual and necessary costs of and expenses incurred in the examination, inspection and approval of such work on account of granting said permits.

Section 6. Construction on Roadways/Other County Property.

¹ While the period of time is stated as "six months or otherwise reasonable notice, whichever is longer", the parties are generally willing to work to accommodate each other.

(a) In any work which requires the breaking of soil of county roads, rights-of-way or other county property subject to this franchise for the purpose of laying, relaying, connecting, disconnecting and repairing the said lines and facilities, and making connections between the same to structures and buildings of consumers or making connections to other facilities of the Grantee now in existence or hereafter constructed, the Grantee shall be governed by and conform to the general rules adopted by the officers charged with the supervision and care of such county roads, rights-of-way, and other county property; and the Grantee at its own expense and with all convenient speed shall complete the work for which the soil has been broken and forthwith replace the work and make good the county road, rights-of-way or other county property and leave the same in as good condition as before the work was commenced.

(b) Applications for permits referred to in Section 5 above shall be accompanied by specifications for the restoration of the county road, rights-of-way or other county property to the same condition it was prior to such breaking of the soil, and such specifications must be approved by the Director of Public Works before such breaking of the soil is commenced. Provided, that the Director of Public Works may require a performance bond in the sum sufficient to guarantee that such county roads, rights-of-way or other county property shall be restored to the same condition as they were prior to the breaking of the soil. Said bond shall be in addition to any other such requirements contained herein.

(c) The Director of Public Works may at any time order, or have done, any and all work that it considers necessary to restore to a safe condition any such county road, rights-of-way or other county property left by the Grantee or its agents in a condition dangerous to life or property, and the Grantee upon demand shall pay to the County all costs of such work; provided that, where reasonably feasible, the Grantee shall be provided prior notice of the condition and allowed seventy-two (72) hours to complete the necessary restoration work itself.

Section 7. Construction—Other Lines and Facilities.

(a) All construction or installation of such mains, lines or other facilities, service, repair or relocation of same, performed above, along or within the county rights-of-way or other county property subject to this franchise shall be done in such a manner as not to interfere with the construction and maintenance of other utilities' lines, public or private, drains, drainage ditches and structures, irrigation ditches and structures located therein, nor change the drainage flow therein, nor interfere with the grading or improvement of such county roads, rights-of-way or other county property.

(b) The owners of all utilities, public or private, installed prior in time to the line and facilities of the Grantee shall have preference as to the positioning and location of such utilities so installed with respect to the Grantee. Such preference shall continue in the event of the necessity of relocating or changing the grade of any such county road or right-of-way.

Section 8. Construction – Public Safety and Inconvenience.

All work done under this franchise shall be done in a thorough and workmanlike manner. In the laying of water and sewer lines and the construction of facilities within rights-of-way or other county property, the Grantee shall leave such trenches, ditches 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; and where any of such trenches, ditches, or tunnels are left open at night, the Grantee 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). The Grantee shall be liable for any injury to person or persons or damage to property sustained through its carelessness or neglect, or through any failure or neglect to properly guard or give warning of any trenches, ditches or tunnels dug or maintained by the Grantee.

Section 9. County Rights Reserved.

The County of Whatcom in granting this franchise, does not waive any rights which it has now or may hereafter acquire with respect to county roads, rights-of-way or other county property 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 county roads, rights-of-way or other County property covered by this franchise. This franchise shall be subject to the power of eminent domain, and in any proceeding under eminent domain, the franchise itself shall have no value.

Section 10. Relocation of Lines and Facilities.

(a) If at any time the County of Whatcom shall improve or change any county road, right-of-way or other county property subject to this franchise by grading or regrading, planking or paving the same, changing the grade, altering, changing, repairing or relocating the same or by constructing drainage facilities, or in the event that such county road, right-of-way or other county property subject to this franchise shall become a Primary State Highway as provided by law, the Grantee upon written notice from the Director of Public Works or the Director of Highways, shall at its sole expense and within six months or a reasonable time, whichever is longer,² change the location or readjust the elevation of its lines and other facilities so that the same shall not interfere with such County work and so that such lines and facilities shall conform to such new grades or routes as may be established. The County of Whatcom shall in no way be held liable for any damage to said Grantee that may occur by reason of any of the County's improvements, changes or works above enumerated.

(b) All work to be performed by the Grantee under this section shall be under the direction and approval, and shall pass the inspection of the Director of Public Works. The Grantee shall pay all actual and necessary costs and expenses incurred in the examination, inspection and approval of such work.

Section 11. County Road Work Permitted.

The laying, construction, operation and maintenance of the Grantee's lines and facilities authorized by this franchise shall not preclude the County of Whatcom, its agents or its contractors from blasting, grading, excavating or doing other necessary road work contiguous to the said lines and facilities of the Grantee provided that the Grantee shall be given forty-eight (48) hours notice of said blasting or other work in order that the Grantee may protect its lines and

² See footnote 1.

facilities.

Section 12. Monuments and Survey Markers.

(a) 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, the Grantee shall reference all such monuments and markers. The reference points shall be so located that they will not be disturbed during the Grantee's operations under this franchise. The method of referencing these monuments or other points to be referenced shall be approved by the Director of Public Works. The replacement of all such monuments or other points to be referenced shall be approved by the Director of Public Works. The replacement of all such monuments or markers disturbed during construction shall be made as expeditiously as conditions permit, and as directed by the Director of Public Works. The cost of monuments or other markers lost, destroyed or disturbed, and the expense of replacement by approved monuments shall be borne by the Grantee.

(b) A complete set of reference notes for monuments and other ties shall be filed with the Whatcom County Director of Public Works.

Section 13. Vacations.

If at any time the County of Whatcom shall vacate any county road, right-of-way or other county property which is subject to the rights granted by this franchise and said vacation shall be for the purpose of acquiring the fee or other property interest in said road, rights-of-way or other county property for the use of Whatcom County, in either its proprietary or governmental capacity, then the Council of Whatcom County may at its option and by giving thirty (30) days written notice to the Grantee, terminate this franchise with reference to such county road, right-of-way or other county property so vacated and the County of Whatcom shall not be liable for any damages or loss to the Grantee by reason of such termination. Prior to vacation, the County of Whatcom shall reserve for use by the Grantee a minimum twenty-five foot (25') wide permanent easement for the existing water and/or sewer line and facilities in the subject right-of-way or County property.

Section 14. Indemnification.

(a) The Grantee by acceptance of the privileges granted hereunder, does hereby agree and covenant to indemnify, defend, and save harmless Whatcom County and those persons who were, are now, or shall be duly elected or appointed officials or members or employees thereof, against and from any loss, damage, costs, charges, expenses, liability, claims, demands or judgments of whatsoever kind or nature, whether to persons or property, arising wholly or partially out of any act, action, neglect, omissions or default on the part of the Grantee, its subcontractors and/or employees which may occur by reason of the construction, operation and maintenance of the Grantee's said lines and facilities. In case that suit or action is brought against the County of Whatcom for damages arising out of or by reason of the above-mentioned causes, the Grantee will upon notice to it of the filing of a claim or the commencement of said action, appear and defend the same at its sole cost and expense, and in case judgment shall be rendered against the County of Whatcom in suit or action, the Grantee will fully satisfy said judgment within ninety (90) days after said suit or action shall have finally been determined, if determined adversely to Whatcom County. Upon the Grantee's failure to satisfy said judgment

within a ninety (90) day period, this franchise shall at once cease and terminate and the County of Whatcom shall have a lien upon the lines and all other facilities used in the construction, operation and maintenance of the Grantee's system, which may be enforced against the property for the full amount of any such unsatisfied judgment so taken against Whatcom County.

(b) Acceptance by the County of any work performed by the Grantee at the time of completion shall not be grounds for avoidance of this covenant.

Section 15. Non-Exclusive Franchise.

This franchise shall not be deemed to be an exclusive franchise. It shall in no manner prohibit the County of Whatcom from granting other franchises of a like nature or franchises for other public or private utilities under, along, across, over and upon any of the county roads, rights-of-way, or other County property subject to franchise, and shall in no way prevent or prohibit the County of Whatcom from constructing, altering, maintaining, using or vacating any of said roads, rights-of-way, drainage structures or facilities, irrigation structures or facilities, or any other County property or affect its jurisdiction over them with full power to make all necessary changes, relocations, repairs, and maintenance as the County may deem fit.

Section 16. Successors and Assigns.

All the provisions, conditions, regulations and requirements herein contained shall be binding upon the successors and assigns of the Grantee, 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 the Grantee is mentioned herein.

Section 17. Transferability.

Neither this franchise nor any interest therein shall be sold, transferred or assigned without prior written consent of the Whatcom County Council, which consent shall not be unreasonably withheld.

Section 18. Incorporation.

Whenever any of the county roads, rights-of-way or other county property as designated in this franchise, 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 county roads, rights-of-way or other county property not so included in city or town limits.

Section 19. Enforcement/Remedies.

If the Grantee shall willfully violate, or fail to comply with any of the provisions of this franchise through willful or unreasonable neglect, or fail to heed or comply with any notice given the Grantee under the provisions of this franchise, then the said Grantee shall forfeit all rights conferred hereby, and this franchise may be revoked or annulled by the Council of Whatcom County. In addition to any rights implied or set out elsewhere in this ordinance, the Council reserves the right to require the Grantee to specifically comply with the terms and conditions of the franchise ordinance, or any lawful order, statute, or regulation, and this franchise may be

terminated at any time if the Grantee's lines and facilities are not operated or maintained in accordance with such ordinance, order, statute, or regulation.

Section 20. Reservation of Home Rule Charter Rights.

This franchise is subject to the provisions of the Home Rule Charter for Whatcom County and, in particular, Section 9.30 thereof, which provides as follows: All franchises granted by the County Council shall be for a fixed term not to exceed twenty-five (25) years and no exclusive franchise shall be granted for the use of any street, road, or public place. All franchises shall be subject to the power of eminent domain and the right of the Council or the people acting for themselves through initiative or referendum to repeal, amend or modify the franchise in the interest of the public; and every ordinance granting a franchise shall contain a reservation of these rights. In any proceeding under eminent domain the franchise itself shall have no value.

Section 21. Compliance with Laws and Regulations.

This franchise is subject to, and the Grantee shall comply with, all applicable Federal, State, County or municipal laws, regulations and policies affecting performance under this franchise.

Section 22. Insurance.

(a) Upon acceptance of this franchise, the Grantee shall file with the Whatcom County Council, and shall thereafter, during the entire term of such franchise, maintain in full force and effect, a corporate insurance policy or other adequate surety agreement in the amount of ONE MILLION DOLLARS (\$1,000,000.00) for property damage coverage, and ONE MILLION DOLLARS (\$1,000,000.00) for public liability coverage, so as to protect the County against damages or costs as set forth in Section 14 above, and there shall be recoverable, jointly and separately from the principal and surety, any such damages or costs suffered or incurred by the County, including attorneys' fees and costs of any action, or proceedings, and including the full amount of any compensation, indemnification, cost of removal of any property or other costs which may be incurred up to the full principal amount of such insurance policy; and said condition shall be a continuing obligation during the entire term of such franchise and thereafter until Grantee shall have satisfied in full any and all obligations to the County and any user which arise out of or pertain to said franchise. Neither the provisions of this section, nor any insurance policy accepted by the County pursuant hereto, nor any damages recovered by the County thereunder, shall be construed to excuse faithful performance by the Grantee, or limit the liability of the Grantee under any franchise issued pursuant to this ordinance.

(b) The County reserves the right to have its legislative body review the dollar amount of said insurance policy and adjust the amount of coverage as deemed appropriate upon an annual basis.

Section 23. License, Tax and Other Charges.

No privileges or rights granted hereunder shall exempt Grantee from any future uniform rent, license, tax charge or impost which may hereafter be required by the Grantor, for revenue or as reimbursement for use and occupancy of public ways, and failure to timely remit any sums properly due thereby, shall be cause for forfeiture of rights hereunder.

Section 24. Repealer.

All other prior existing franchises granted to Lake Whatcom Water & Sewer District shall be repealed, and the terms of the franchise granted hereunder shall become effective at such time as an acceptance of franchise is filed by the Grantee with the County in accordance with Section 2 herein.

Section 25. Severability.


If any portion of this ordinance is deemed invalid, the remainder shall remain in effect.

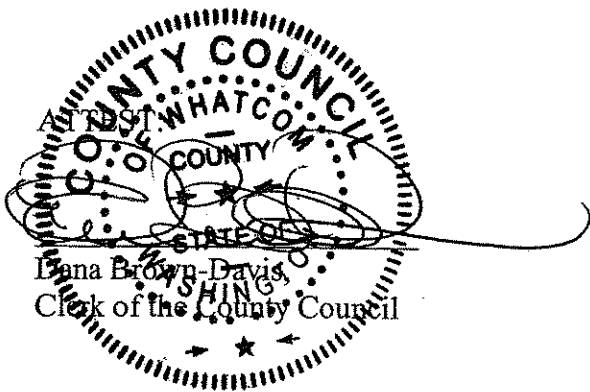
Section 26. Titles.

The section titles used herein are for reference only and should not be used for the purpose of interpreting this ordinance.

PASSED this 27th day of September, 2005.

WHATCOM COUNTY COUNCIL
WHATCOM COUNTY, WASHINGTON



LAURIE CASKEY-SCHREIBER,
CHAIRPERSON



APPROVED VETOED


PETE KREMEN, COUNTY EXECUTIVE

APPROVED AS TO FORM:


DANIEL L. GIBSON
Deputy Prosecuting Attorney

Published on Sept 17 and September 24, 2005

This ordinance shall become effective on October 9, 2005

Exhibit B

ACCEPTANCE OF FRANCHISE

Lake Whatcom Water & Sewer District

The Whatcom County Council at its meeting of September 27, 2005, adopted Ordinance 2005-070 approving the petition for franchise filed by Lake Whatcom Water & Sewer District. The petition and all related documents are available for review in the Council Office as file number 2005-361.

Lake Whatcom Water & Sewer District hereby accepts, subject to all the conditions contained in Ordinance 2005-070, that certain non-exclusive franchise to lay, construct, erect, install, operate, maintain, repair and/or replace water mains and water distribution lines, sewer force and gravity mains, collector sewers and pump stations, and electrical and communications utilities, and related facilities in, along and across public county roads and county property within the boundaries of the Lake Whatcom Water & Sewer District, within an area generally described as follows:

Sections 23, 24, 25, 26, 27, 34, 35, and 36, Township 38 North, Range 3 East; Sections 19, 29, 30, 32 and 33, Township 38 North, Range 4 East; Sections 1, 2, and 3, Township 37 North, Range 3 East; Sections 4, 5, 6, 7, 8, 9, 15, 16, 17, 20, 21, 22, 23, 25, 26, 27, 28, and 29, Township 37 North Range 4 East, and Section 30, Township 37 North, Range 5 East of the Willamette Meridian, in Whatcom County, Washington.

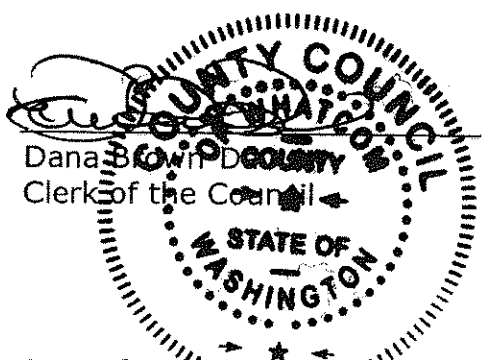
The rights and privileges shall also apply to the portions of roads and rights-of-way that are part of or that abut those portions of roads that lie just over the section lines that bisect or intersect the roads in the above-listed areas.

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:

WHATCOM COUNTY COUNCIL
WHATCOM COUNTY, WASHINGTON



Dana Brown
Clerk of the Council

Laurie Caskey-Schreiber
Laurie Caskey-Schreiber
Council Chair

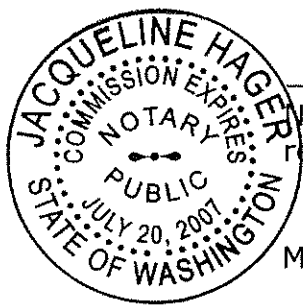
Agent for the petitioner, Lake Whatcom Water & Sewer District:

James F. Neher

Date: 10/5/05

State of Washington)
County of Whatcom) ss.

Signed and sworn to before me on this 5th day of October 2005, by
James F. Neher



Jacqueline Hager
Notary Public in and for the State of Washington,
residing at Bellingham

My notary commission expires: 7/20/07