

ORDINANCE NO. \_\_\_\_\_

**AN ORDINANCE OF THE CITY OF SAN JOSE GRANTING HUMMINGBIRD ENERGY STORAGE, LLC, A FRANCHISE TO USE OR TO LAY AND USE, INTERCONNECTION AND TRANSMISSION WIRING AND APPURTENANCES FOR THE PURPOSE OF TRANSMITTING AND DISTRIBUTING ELECTRICITY IN, ALONG, ACROSS, UPON AND UNDER CERTAIN PUBLIC STREETS AND RIGHTS-OF-WAY WITHIN THE CITY OF SAN JOSE**

**WHEREAS**, under Article XIII of the San José City Charter, the City Council is empowered to grant by ordinance a franchise to any person, firm or corporation to furnish the City of San José (“City”) or its inhabitants with water, light, heat, gas, electricity, power, or any other public utility or service using or proposing to use any public street, way, alley or place in the City for any of such purposes or for the operation of any plants, works or equipment for the furnishing thereof, or exercising or proposing to exercise any public utility franchise right or privilege in the City; and

**WHEREAS**, subject to the provisions of Article XIII of the San José City Charter, the Council may grant a franchise pursuant to a procedure prescribed by ordinance or by State law; and

**WHEREAS**, Chapter 15.32 of the San José Municipal Code sets forth the City’s exclusive procedures applicable to the granting of gas and electrical franchises by the City including the procedure by which the City may grant a franchise to construct or use, poles, wires, conduits, and appurtenances for transmitting and distributing electricity for any purpose; and

**WHEREAS**, on May 4, 2020 Hummingbird Energy Storage, LLC, a Delaware limited liability company (“Franchisee”), submitted an application to the City requesting that it

be granted an electric franchise as required by Section 15.32.030 of the San José Municipal Code; and

**WHEREAS**, Franchisee has agreed to reimburse the City for the reasonable costs incurred by the City in relation to the preparation of this Franchise Ordinance and the review and inspection of the electric interconnection and transmission facilities, in addition to providing statutorily required annual payments to the City; and

**WHEREAS**, pursuant to Resolution No. 79671, the City declared its intention to grant the franchise pursuant to this Ordinance and notice thereof was published as required by Chapter 15.32.040 of the San José Municipal Code; and

**WHEREAS**, pursuant to this Ordinance, Franchisee may construct and operate its electric interconnection and transmission facilities and related appurtenances within the alignment described in Exhibit A, which is attached hereto and incorporated by this reference, subject to Section 3 and Section 4 of this Ordinance; and

**WHEREAS**, this Ordinance provides the terms and conditions under which Franchisee may construct and operate its electric interconnection and transmission facilities and related appurtenances; and

**WHEREAS**, the City is the lead agency under the California Environmental Quality Act of 1970 (“CEQA”), and the City Council is the decision-making body for this Ordinance; and

**WHEREAS**, the Franchise project has been determined to be an exempt project as defined by CEQA;

**NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF SAN JOSE:**

## **SECTION 1. Definitions**

The definitions set forth in this Ordinance shall govern the application and interpretation of this Ordinance.

- A. “Actual Cost” means the direct costs associated with purchasing materials and services and paying personnel.
- B. “Administrative Cost” means the City’s expenses for staff, equipment, supplies and overhead associated with the administration, implementation, and enforcement of this Ordinance.
- C. “Applicable Law” means all present or future federal, state, municipal, or local laws, rules, regulations, ordinances, codes, orders, permit requirements, judgments, injunctions, or decrees, or any judgment or order or decree by a court applicable to the Franchisee or any of its Facilities or activities. This includes but is not limited to any regulations and orders of the Office of the California State Fire Marshal or any successor entity having authority to implement the electric line safety laws and regulations referenced above, and any testing or operational compliance requirements which are not preempted by or otherwise in conflict with applicable federal or state laws and regulations and which may be validly established by the City Manager or his or her designee covering operations under this Franchise.
- D. “City” means the City of San José, California.
- E. “City Clerk” means the City Clerk of the City.
- F. “City Engineer” means the Director of Public Works of the City.

- G. “City Manager” means the City Manager of the City.
- H. “City Property” means the property or facilities owned by the City.
- I. “Claims” means all claims, losses, liabilities, causes of action, demands, damages, suits, judgments, debts, costs, contribution or indemnity, expenses (including, but not limited to, attorney's fees and costs), fines, penalties, judgments, orders, injunctions and liens of every kind and nature, including, but not limited to, claims relating to any Environmental Condition or any Release of any Contaminant, claims for inverse condemnation, claims for personal or bodily injury, wrongful death, injury to real or personal property, natural resources damages, and including claims based on active or passive negligence, gross negligence, contractual, statutory or strict liability, or otherwise, and any claims seeking judicial or administrative relief, or relating to any administrative proceedings by any governmental agency, whether or not any such claim is ultimately defeated.
- J. “Code” means the San José Municipal Code.
- K. “Contaminant” means any material, substance or constituent originating from the Facilities or activities, whether solid, liquid, semi-solid, or gaseous in nature, including any hazardous substance or waste, hazardous material, chemical compound, petroleum (or fraction thereof), or any hydrocarbon substance, pollutant or contaminant, as those terms are defined by any federal, state or local law, rule, regulation or order.
- L. “Council” means the City Council of the City of San José.
- M. “Day” means calendar day unless otherwise provided.
- N. “Department” means the Department of Public Works of the City.

O. “Encroachment Ordinance” means Chapter 15.50 of Title 15 of the Code, or any successor ordinance or Code sections adopted by the City.

P. “Environmental Condition” means the presence or evidence of the likely presence of any Contaminant originating from the Facility(ies) or from Franchisee’s activities, in surface water, groundwater, drinking water supply, soil, land surface, subsurface strata or the air.

Q. “Facility” or “Facilities” means all property owned, controlled, or used by the Franchisee in connection with the Franchise, including, but not limited to, electric interconnection and transmission lines, inverters, transformers, integrators, all electrical lines and conduits required to collect and transmit electrical energy and such additional utility lines, cables, conduits, transformers, wires, meters, monitoring equipment and other necessary and convenient equipment and appurtenances common in the interconnection of electric battery storage systems to public utility facilities, whether installed by the Franchisee or not, erected, constructed, laid, operated or maintained in, upon, over, under, along or across any Street pursuant to any right or privilege granted by the Franchise.

R. “Fire Chief” means the Fire Chief of the City.

S. “Franchise” means the non-exclusive right to construct, use, maintain, operate, and repair the Facilities as described in Section 2 of this Ordinance.

T. “Franchisee” means Hummingbird Energy Storage, LLC, a Delaware limited liability company, or any Person to whom it is lawfully assigned, and any Person acting on behalf of the Franchisee, including its officers, employees, agents, consultants, and contractors.

U. “Franchise Fees” means the fees described in Section 33 of this Ordinance.

V. “Interconnection Lines” means the electric lines installed for purposes of interconnection of the Franchisee’s battery storage project with (“the Utility”) transmission facilities, and transmission of electricity from such battery storage project to the Utility’s power grid, owned and operated by Franchisee.

W. “Ordinance” means this Ordinance granting the Franchise to Franchisee, unless some other ordinance is mentioned.

X. “Person” means any individual, person, firm, partnership or corporation.

Y. “Public Entity” means a county, city, district, local public body, state board, state commission, federal agency, or joint powers authority. Public Entity does not include any investor or other privately owned public utility.

AA. “Release” means any “release” (as that term is defined in 42 U.S.C. § 9601(22)), or “disposal” (as that term is defined in 42 U.S.C. § 6903(3)), or any discharge, active or passive migration, deposit, storage, burial, emplacement, seepage, filtration or disposal of a Contaminant into the environment originating from any Facility or from Franchisee's activities.

BB. “Remediation Costs” means all Actual and Administrative Costs incurred by the City, whether in house or by contract, in performing and monitoring any Remedial Work.

CC. “Remedial Work” means all "Remedial Action" (as that term is defined in 42 U.S.C. § 9601(24)), and all other actions as are necessary or required to remediate a Release of any Contaminant or an Environmental Condition to a condition which would allow unimpaired and unrestricted use and development and would comply with Applicable Law, and including, but not limited to, all actions necessary to “Remove”, to

“Remedy”, or “Respond” (as those terms are defined in 42 U.S.C. § 9601(23), (24) and (25) respectively), a Release of a Contaminant or Environmental Condition.

DD. “Shall” is mandatory; “may” is permissive.

EE. “Street” means any public street, road, highway, alley, lane, court, right-of-way, property, place or other public easement, which now exists or may hereafter exist in the City and over which the City has the authority to grant a Franchise.

FF. “Utility” means Pacific Gas and Electric Company, a California corporation.

## **SECTION 2. Scope of Franchise**

A. The City Council hereby grants this Franchise to Franchisee, to, in accordance with the terms hereof, construct, use, maintain, operate, repair, relocate and remove Interconnection Lines for the transportation of electricity, together with Facilities necessary or convenient for the operation of said Interconnection Lines including conduits, cathodic protection devices, wires, cables and other appurtenances necessary or convenient for the exercise of the Franchise in, along, across, upon and under the Streets within the City designated by this Ordinance as described in Exhibit A and as may be amended by the City Council from time to time, subject to the provisions of Section 3 and Section 4 herein below.

B. Franchisee shall not extend or expand its Facilities described in Exhibit A, or increase the capacity of any portion of its Interconnection Lines beyond the diameter of forty-eight (48) inches, or install new Facilities that are not replacing existing Facilities, unless the City Council adopts an amendment to this Ordinance and Franchise and Franchisee complies with Applicable Law. Franchisee shall have no recourse whatsoever against the City or any official, officer, employee or agent thereof for any loss, cost, expense or damage arising out of any provision or requirement of this

Franchise or the enforcement thereof. No privilege or exemption is granted or conferred by this Franchise except those specifically prescribed herein.

C. The following rules shall apply to the construction of this Ordinance unless the context requires otherwise: (i) the singular includes the plural, and the plural includes the singular; (ii) words imparting any gender include the other gender; (iii) references to statutes are to be construed as including all statutory provisions consolidating and amending, and all regulations promulgated pursuant to, such statutes; (iv) references to “writing” include printing, photocopy, typing, lithography and other means of reproducing words in a tangible visible form; (v) the words “including,” “includes” and “include” shall be deemed to be followed by the words “without limitation”; (vi) references to the introductory paragraph, recitals, articles, sections (clauses or subdivisions of sections), exhibits, appendices, annexes or schedules are to those of this Ordinance unless otherwise indicated; (vii) references to agreements and other contractual modifications shall be deemed to include all subsequent amendments or other modifications to said instruments, but only to the extent such amendments or other modifications are permitted or not prohibited by the terms of this Ordinance; (viii) section headings in this Ordinance are included herein for convenience of reference only and shall not constitute a part of this Ordinance for any other purpose; (ix) references to Persons include their respective permitted successors and assigns and, in the case of governmental Persons, Persons succeeding to their respective functions and capacities; and (x) in the computation of a period of time from a specified date to a later specified date, the word “from” means “from and including” and the words “to” and “until” each means “to but excluding.”

### **SECTION 3. Condition Precedent**

In entering into this Franchise and authorizing Franchisee to occupy the Streets as described herein, City and Franchisee acknowledge that the Facilities will also traverse private real properties as described in Section 4 of this Ordinance. Franchisee agrees

to obtain, and expressly acknowledges that City is relying upon Franchisee to obtain, prior to the commencement of any operation of the Facilities, all permits, real property interests and other approvals or authorities required for Franchisee to construct and operate the Facilities on those private real properties traversed by the Facilities, and all other permits and approvals that may be necessary for the construction and operation of the Facilities. City and Franchisee agree that Franchisee's acquisition of such required permits and other approvals or authorities is and shall be a condition precedent to the effectiveness of this Ordinance and the rights granted to Franchisee under this Ordinance.

#### **SECTION 4. Location of Facilities**

- A. The Facilities subject to this Ordinance shall be located within the alignment described in Exhibit A.
- B. The Franchisee shall submit a report to the City Engineer following the completion of the condition precedent described in Section 3 for the City Engineer to determine whether the condition precedent has been satisfied. Upon the City Engineer's determination that the condition precedent has been satisfied, the City Engineer shall issue a notice stating that the condition precedent has been satisfied. For purposes of this Ordinance, the date of the notice shall be the date the condition precedent shall be deemed satisfied.
- C. Upon the completion of the construction of the Facilities, Franchisee shall provide the City Engineer with the "as built" plans and specifications as required by Section 17(C) of this Ordinance identifying the actual location of the Facilities. Franchisee shall simultaneously provide the City Engineer with a map and meets and bounds description (legal description), depicting the actual location of the Facilities for the City Engineer's review and approval. Once approved, the City Engineer shall file the legal description with the City Clerk.

**SECTION 5. Pole Lines**

Nothing in this Ordinance shall be construed to permit the Franchisee to construct poles or other Facilities above ground, unless approval is obtained pursuant to Applicable Law.

**SECTION 6. Nonexclusive Franchise**

The granting of this Franchise shall not prevent the City from granting any similar franchise to any Person other than the Franchisee.

**SECTION 7. Acceptance of Franchise**

The Franchisee shall, within thirty (30) days after the adoption of this Ordinance, file with the City Clerk a written acceptance of the terms and conditions of said Ordinance. The Franchise shall be null and void if the written acceptance is not filed within the prescribed time.

**SECTION 8. Term**

The term of the Franchise shall be twenty-five (25) years from the effective date of this Ordinance. The effective date of this Ordinance shall be at such time as described in Section 34 of this Ordinance.

**SECTION 9. Intentionally Omitted**

## **SECTION 10. Forfeiture**

The Franchise is granted and shall be held and enjoyed upon each and every condition contained in this Ordinance and shall be strictly construed against the Franchisee. The Franchise shall grant only those rights that are stated in plain and unambiguous terms. Failure or refusal to comply with any of the conditions of the Franchise, including the failure to comply with all Applicable Law, shall constitute grounds for the suspension or forfeiture of the Franchise. The Council, prior to any suspension or forfeiture of the Franchise, shall give to the Franchisee (in accordance with Section 19 hereinafter) not less than thirty (30) days notice in writing of any default thereunder. If the Franchisee does not, within ten (10) days of receiving the written notice, begin the work of compliance or after such beginning does not prosecute the work with due diligence to completion, the City Council may hold a hearing, at which the Franchisee shall have the right to appear and be heard, and thereupon the City Council may determine, in its sole discretion, whether such conditions are material and essential to the Franchise and whether the Franchisee is in default with respect thereto and may declare the Franchise suspended or forfeited, or whether the City Council will impose additional conditions on the Franchisee as an alternative to suspension or forfeiture. Notice of said hearing shall be given to the Franchisee by certified mail not less than ten (10) days before said hearing.

## **SECTION 11. State Highways**

If any Street or portion thereof becomes a state highway, except for such rights as by law remain with the City, the State of California shall succeed to all rights reserved to the City by the Franchise. This Section does not apply to any change of location in a State highway for a temporary purpose.

## **SECTION 12. Eminent Domain**

The Franchise granted hereunder shall not in any way to any extent impair or affect the right of the City to acquire the property of the Franchisee hereof either by purchase or through the exercise of the right of eminent domain, and nothing herein contained shall be construed to contract away or to modify or abridge, either for a term or in perpetuity, the City's or the Franchisee's rights of eminent domain before any court or other public authority in any proceeding of any character. Notwithstanding the foregoing or anything contained in the Franchise granted hereunder, all Facilities shall remain the personal property of Franchisee, removable by Franchisee at any time during the term of the Franchise (subject to Section 21 hereinafter).

## **SECTION 13. Assignment**

A. The Franchisee shall not directly or indirectly sell, transfer, assign, lease, mortgage, encumber with a deed of trust, or otherwise hypothecate the Franchise or any part thereof, or allow another Person or entity (which for the avoidance of doubt excludes the Franchisee's contractors) to operate the Facilities subject to the Franchise, except with the prior written consent of the City Manager, which consent shall not be unreasonably withheld. In no event shall Franchisee have the right to encumber, in any manner whatsoever, City's fee or other underlying ownership interest in the Streets subject to the Franchise.

B. All of the limitations, uses, obligations, covenants, restrictions, permissions and conditions stated herein shall run with the terms of this Franchise and shall be binding on all parties having or acquiring any right, title or interest in the Franchise, and shall inure to the benefit of and be binding upon each lawful successor in interest of the owners thereof. Each and all these limitations, uses, obligations, covenants, conditions, permissions, and restrictions shall be deemed to be and shall be construed, as

equitable servitudes, enforceable by the City against any other owner, contractor, subcontractor or supplier of Franchisee.

#### **SECTION 14. City Officers**

Any right or power conferred, or duty imposed upon any officer, employee or department of the City shall be subject to transfer to any other officer, employee, or department of the City.

#### **SECTION 15. City Approval of Location of Facilities**

Franchisee may not install or operate any Facilities in any Street or other public place without first obtaining the prior written approval of the City Engineer and any necessary encroachment permit. Franchisee acknowledges that as of the effective date of this Ordinance, Franchisee is aware of all zoning regulations, governmental requirements, site and physical conditions (including sub-surface conditions) and other matters affecting the use and condition of any Street in which the Facilities are to be located.

#### **SECTION 16. Release of Products or Contaminants**

Notwithstanding any other provision herein, in the event of Release of a Contaminant by Franchisee or from any Facility of Franchisee or the discovery of an Environmental Condition caused by Franchisee or any Facility of Franchisee, Franchisee shall immediately conduct such Remedial Work and pay all Remediation Costs, at its sole expense, as is necessary to fully mitigate and remediate the same in accordance with all Applicable Law; provided, however, that Franchisee shall have no obligation or liability for any Release preexisting the grant of this Franchise or otherwise not caused by Franchisee. In the event that Franchisee fails to perform necessary remediation work in accordance with Applicable Law as required by any final Remedial Action plan approved by the regulatory agency with oversight responsibility, City may commence a

nuisance abatement action or take any other legal action the City deems appropriate in the circumstances to cause the conduct of the Remedial Work and, as may be applicable, to recover any and all Remediation Costs.

## **SECTION 17. General Requirements**

- A. Interconnection Line Condition Report. Franchisee, at its sole cost and expense and upon City's request, shall periodically provide to the City a written statement summarizing the current physical condition of its Facilities based on the results of the most recent testing of its Facilities.
- B. Hazardous Substance Testing. Franchisee shall provide to the City the results of any hazardous substances testing conducted during construction of any Facilities.
- C. Plans and Specifications. Franchisee shall provide to the City Engineer three sets of "as-built" plans and specifications for its Facilities within the City's public right-of-way, in addition to an AutoCAD computer disk version, no later than 30 days after the Facilities have been constructed. Franchisee shall maintain for the term of this Ordinance, a current and accurate set of maps and plans showing all of the Facilities as installed. Franchisee shall make such maps and plans available to the public at no cost in order to facilitate other projects within the Streets and for public safety purposes.
- D. Fire Risk Training. Franchisee shall annually meet with Fire Department staff having fire suppression responsibilities to discuss and review contingency plans for electric line emergencies. Franchisee shall also provide specialized training to Fire Department staff on handling and responding to battery storage emergencies at least once every three (3) years.
- E. Leaks or Breaks in Facilities. Franchisee shall promptly repair any leaks or breaks in its Facilities. If any private property shall be damaged by any leaks or breaks

in the Facilities or by reason of any cause arising from the operation or existence of the Franchise, Franchisee shall, at its own cost and expense, immediately repair and restore such private property to as good condition as the same was before the commencement of such work to the satisfaction of the City Engineer and affected private property owner.

**SECTION 18. Compliance with Applicable Law**

A. Until such time as (i) the Franchise terminates; and (ii) the decommissioning or abandonment in place by Franchisee of all of its Facilities in accordance with Section 21 (Removal or Abandonment of Facilities); and (iii) the completion by Franchisee of any necessary Remedial Work, Franchisee will comply with all Applicable Law. All work performed by Franchisee or at the behest of Franchisee within the Streets shall be in accordance with the provisions of this Franchise, including but not limited to this Section 18, and all Applicable Law.

B. Upon City's request, Franchisee shall annually file with the City Engineer in a form and manner acceptable to the City Engineer a certificate under penalty of perjury that states that Franchisee has complied with Applicable Law.

**Section 19. Notices and Records**

Upon City's request, Franchisee will transmit to City copies of all notices, orders or statements, other than those relating to taxes, sent to or received from any governmental agency concerning the safety or maintenance of any Facility or any operations conducted by Franchisee in the City pursuant to the Franchise, including but not limited to repair, replacement or the physical condition of any Facility.

All notices permitted or required hereunder shall be addressed as follows and shall be deemed to have been completed at the time of deposit in the post office:

If to the City: City Engineer  
City of San José  
200 East Santa Clara Street, 5th Floor  
San José, CA 95113

and

City Manager  
City of San José  
200 East Santa Clara Street, 17th Floor  
San José, CA 95113

If to Franchisee: Hummingbird Energy Storage, LLC  
c/o esVolta, LP  
65 Enterprise, 3<sup>rd</sup> Fl  
Aliso Viejo, CA 92656  
Attn: Rishad Olpadwala

and

CIT Bank, N.A.  
As Administrative Agent  
11 W. 42<sup>nd</sup> Street  
New York, NY 10036  
Attn: Andre Vollbrecht  
Tel: (212) 771-9585  
Email: [PEIPortfolioMG@cit.com](mailto:PEIPortfolioMG@cit.com);  
[Andre.vollbrecht@cit.com](mailto:Andre.vollbrecht@cit.com)

## **SECTION 20. Access to Records and Property**

Upon request, the Franchisee shall permit the City or its duly authorized representative to examine all of its Facilities, together with any appurtenant property of the Franchisee; provided that Franchisee shall be entitled to accompany (through an agent of Franchisee's choosing) City or its duly authorized representative during any such inspection. At Franchisee's expense, Franchisee's maintenance and repair records concerning its operations under this Franchise shall be provided to the City for

examination and copying at City Hall located at 200 East Santa Clara Street in San José, within a reasonable time after City's request, during normal business hours.

**SECTION 21. Removal or Abandonment of Facilities**

A. Subject to Applicable Law, at the time of the expiration (unless renewed), revocation, or termination of this Franchise, or the permanent discontinuance of the use of its Facilities, or any portion thereof, the Franchisee shall, within thirty (30) days thereafter make written application to the City Engineer for authority to either abandon all or a portion of such Facilities in place or to remove all or a portion of such Facilities. For purposes of this Section "permanent discontinuance" shall mean the Facilities have either: (1) not been in use or (2) have not been functional, for a period of more than one calendar year. Thereupon the City Engineer shall determine whether any abandonment or removal is deemed necessary at some or all locations and whether any abandonment or removal which is thereby proposed may be effected without detriment to the public interest or under what conditions such proposal of abandonment or removal may be safely affected and shall then notify the Franchisee according to such requirements as shall be specified in the City Engineer's order. Within one hundred eighty (180) days thereafter Franchisee shall, pursuant to such order of the City Engineer, either (1) remove all or a portion of such Facilities; or (2) abandon in place all or a portion of such Facilities in accordance with all conditions prescribed.

B. The Franchisee shall pay to the City the Actual and Administrative Costs of all reasonable tests required to determine whether the Facilities shall be abandoned or removed.

C. If any Facilities to be abandoned in place, subject to prescribed conditions, are not abandoned in accordance with all of such conditions, then the City Engineer may make additional appropriate orders including, if deemed appropriate, an order that the Franchisee shall remove all such Facilities. If the Franchisee fails to comply therewith,

the City Engineer may cause said Facilities to be removed at the Franchisee's expense, and the Franchisee shall pay to the City the Actual and Administrative Costs of removing the Facilities.

D. If the Franchisee applies for authority to abandon all or a portion of its Facilities in place, and the City Engineer determines that abandonment in place of all or part of the Facilities may be effected without detriment to the public interest, the Franchisee shall pay to the City the Actual and Administrative Costs related to the abandonment.

E. Within ninety (90) days following the date in which any Facilities have been removed or abandoned under the Franchise, the Franchisee shall file a plan with the City Engineer showing the location, depth, and size of the Facilities so removed or abandoned.

## **SECTION 22. Appeal**

Any decision made by the City Engineer pursuant to authority delegated in this Ordinance may be appealed by Franchisee to the City Manager. For purposes of seeking judicial review, the decision of the City Manager shall be final when notice of the decision is given to the Franchisee in accordance with Section 1.04.140 of the Code.

## **SECTION 23. Maintenance and Replacement**

A. Maintenance Requirements. All Facilities shall be maintained in a good workman-like manner and in conformity with Applicable Law.

B. Replacement. Replacement of Facilities necessary for the installation, operation, maintenance, and safety of electric lines and conduits shall be laid and maintained pursuant to Applicable Law. All such installations or replacements shall be reviewed by

the City Engineer as to the most desirable location in the Streets of the City and his or her decision shall be final and binding on the Franchisee subject to appeal pursuant to Section 22.

C. Permits. Where the provisions of any Applicable Law, which shall be in force at the time, require the issuance of an excavation, encroachment or other type of permit, the Franchisee shall not commence any excavation or encroachment work under the Franchise until it shall have obtained such permits, except in cases of emergency affecting public health, safety or welfare or the preservation of life or property, in which case the Franchisee shall apply for such permits not later than the next business day or as otherwise required by Applicable Law. The Franchisee's application for a permit under Applicable Law shall show the length and proposed location of the Interconnection Lines and/or other Facility intended to be installed, and such other facts as the Department may require. The Franchisee shall pay any and all permit inspection fees established by Council resolution to the Department.

D. Work on and Restoration of Street. The work of constructing, replacing, maintaining, repairing, relocating or removing all electric lines and other Facilities authorized under the provisions of this Ordinance in, over, under, along or across any Street shall be conducted to minimize hindrance to the use of the Street for purposes of travel, and as soon as such work is completed, all portions of the Street which have been excavated or otherwise damaged thereby shall promptly and in a workman-like manner be repaired, replaced or restored and placed in as good condition as the same was before the commencement of such work. All restoration, relocation, repair, or replacement work shall be done to the satisfaction of the City Engineer at the expense of the Franchisee in accordance with all Applicable Law, including but not limited to the Encroachment Ordinance. All work within the Street shall be done in accordance with the then current City Standard Details and Specifications.

In the event that the Franchisee shall fail or neglect to commence to make such Street repair, replacement, or restoration work and complete such work within a period of time approved by the City Engineer, then ten (10) days after notice therefor has been given Franchisee by the City Engineer, the City may repair, replace or restore said Street at the expense of Franchisee. The Franchisee agrees to pay to the City the Actual Cost of performing such work. The amount so chargeable shall be the Actual Cost of such work plus the City's Administrative Costs.

E. Failure to Timely Comply. Whenever the Franchisee fails to complete any work required by the terms and conditions of the Franchise, and the permits issued thereunder, within the time limits required thereby, the City may complete or cause to be completed said work in compliance with Applicable Law at the expense of the Franchisee. The Franchisee agrees to pay to the City the Actual Cost of performing such work. The amount so chargeable to Franchisee shall be the Actual Cost of said work plus the City's Administrative Costs.

F. Completion Statement. Upon the completion of the construction of any Facilities constructed pursuant to the Franchise after the effective date of this Ordinance, the Franchisee shall submit a statement to the City Engineer, identifying the permit or permits issued by the Department, the total length of electric lines, line material, diameter of lines, the construction of which was authorized under such permit or permits, the total length of electric lines or other Facility actually laid, and as-built plans and specifications.

G. Facilities. The Franchisee shall have the right to construct, maintain and repair such Facilities as may be necessary or convenient for the proper maintenance and operation of the Facilities under said Franchise, and said Facilities within the Street shall be kept flush with the surface of the Street and so located as to conform to any ordinance, rule or regulation of the City, or of any permit issued by the Department in regard thereto and shall not interfere with the use of the Street for travel. The

Franchisee shall have the right, subject to Applicable Law, to make all necessary excavations in said Streets for the construction, maintenance and repair of said Facilities; provided, however, that the Franchisee shall first obtain an encroachment permit in accordance with the Encroachment Ordinance from the Department for doing any such work.

H. Repair. The Franchisee shall obtain an encroachment permit in accordance with the Encroachment Ordinance to perform ordinary repair work and emergency repair work.

I. Traffic Hazards and Nuisances. In order to minimize traffic hazards and public nuisances arising out of Franchisee's installation and operation of the Facilities pursuant to this Franchise within the Street, Franchisee shall ensure that adjacent properties and improved surfaces of surrounding streets stay free and clear of silt, tracked mud, dust, and the like, coming from or any way related to its Facilities. In the event Franchisee fails to comply with this condition, Franchisee grants the City the rights to take or cause to be taken, without prior notice to Franchisee, immediate corrective action, with all costs incurred by City to be reimbursed by Franchisee upon City's written demand.

J. Facilities Location. Visible markings will be set and maintained by Franchisee sufficient to identify the location and depth of its underground facilities.

#### **SECTION 24. Relocation/Repair**

A. The City Engineer shall have the right to require relocation and/or repairs of the Facilities for any public project including but not limited to the construction, repair, relocation or new installation of any aboveground or underground City facility, utility, storm drain, sewer, waterline or roadway improvement (such as any lawful change of grade, alignment or width of any Street). "Public project" means projects initiated by a Public Entity. The Franchisee shall relocate/repair its Facilities, or portion thereof, to the

reasonably nearest alternative location or other location in the Street mutually agreeable to the City and the Franchisee, either permanently or temporarily, as is determined by the City Engineer and within the time required by the City Engineer. Said relocation/repair shall be accomplished at the Franchisee's sole expense, including any additional expense of paying prevailing wages as determined by the City.

B. If the Franchisee fails to relocate its Facilities within the timeline set forth in the City Engineer's notice of relocation or repair, or to complete construction and/or site restoration, the City may, provided that it complies with Applicable Law, cause the work to be done and the Franchisee shall reimburse the City or other Public Entity for such cost within sixty (60) days after presentation to Franchisee of an itemized account of such costs. The Franchisee shall hold harmless the City, its officers, contractors, agents and employees from any liability which may arise or be claimed to arise from the moving, cutting, or alteration of any of the Facilities, or the turning on or off of utilities including water, oil, or other liquid, gas, or electricity required to be accomplished by City as a result of the Franchisee's failure to relocate said Facility by the date established by the City. The Franchisee shall also be liable for any consequential damages incurred by the City arising from the Franchisee's failure to timely complete the work required by this Section.

C. Any City payment to Franchisee of the costs of relocation of Facilities from private property or private easement for the public reasons stated above shall be offset by the added value to Franchisee of any upgraded or improved Facilities.

## **SECTION 25. Emergency Preparedness and Response**

A. Emergency Response Plan. Franchisee, at its sole cost and expense, shall provide to the City its Emergency Response Plan (the "Plan") that analyzes the risks associated with Franchisee's Facilities and identifies elements including Interconnection Line failure and the monitoring, inspection, and emergency response procedures that

Franchisee will maintain to ensure there will be no detrimental impact to City's facilities or the public. The Plan shall specifically include procedures which Franchisee has established for informing local fire and other City emergency personnel of steps to take in the event of an emergency. The Plan shall be subject to the review and approval of the City, and shall contain all of the following information:

1. A diagram showing the as-built or modified locations of the Facilities, including all block valves or other mechanical devices situated along the Interconnection Lines.
2. A description of the electricity transported in the Interconnection Lines, including sufficient technical information to identify the fire extinguishing procedure.
3. Other information which may be validly required in conformance with Applicable Law and by the Council and/or City Manager.

B. Changes to Plan or Transported Products. Franchisee shall promptly notify the City Engineer and Fire Chief of any changes in the procedures previously established in the Plan and any different products which Franchisee is or will be transporting through its Facilities, if not previously listed and reported by Franchisee to the City Engineer and Fire Chief.

C. Emergency Crews and Equipment. At all times during the term of this Franchise, Franchisee shall maintain on a twenty-four (24) hour basis adequate emergency equipment and properly trained emergency crews within a radius of 50 miles from any Facilities installed or maintained pursuant to said Franchise, for the purpose of shutting off pressure and flow of contents of such Facilities in the event of an emergency resulting from an earthquake, fire, flood, explosion, an act of war or terrorism, civil disturbance or other cause. Franchisee shall at all times maintain in the offices of the

City Clerk, City Engineer and the Fire Department an emergency telephone number whereby and through such number such emergency crew may be reached.

D. City Mitigation of Emergencies. In the event of an emergency, or where Facilities create or are contributing to an imminent danger to health, safety or property (“Emergency”), City shall first use all reasonable efforts under the circumstances to contact Franchisee using the contact information provided by Franchisee to City (as the same may change from time to time). In the event that City is unable to contact Franchisee using such contact information, then City shall have the right to take appropriate action to mitigate such Emergency, at Franchisee’s expense, provided that Franchisee’s acts or omissions or any disaster (such as an earthquake, fire, flood, explosion, an act of war or terrorism, civil disturbance or other cause) directly or indirectly caused the Emergency. Such expenses shall consist of the Actual Costs and Administrative Costs of such mitigation undertaken by City.

**SECTION 26. Reservation of City Rights**

A. There is hereby reserved to the City every right and power which is required or permitted to be herein reserved or provided by any provision in federal or state law or City ordinance, resolution or regulation, and Franchisee by its acceptance of this Franchise agrees to be bound thereby and to comply with any action or requirement of the City in its exercise of any such power. Neither the granting of this Franchise nor any provision hereof shall constitute a waiver or bar to the exercise of any governmental right or power of the City.

B. The Franchise herein granted to Franchisee, and all rights and privileges granted thereunder, are and shall be subordinate to the right of the City, and of the general public, to use and occupy, and to any occupancy by them, of any public right-of-way for any private or public uses or purposes.

## **SECTION 27. Indemnification**

A. The Franchisee shall indemnify to the fullest extent permitted by law, and defend and hold the City, and its elected officials, officers, employees and agents (hereinafter “Indemnified Parties”) free and harmless from and against all Claims arising from or in any way related to the Franchise or activities conducted by or on behalf of Franchisee (“Events”).

B. The Indemnified Parties shall have the right to approve the attorneys selected by Franchisee to represent them. In the event Franchisee does not provide attorneys acceptable to the Indemnified Parties, the Indemnified Parties may select attorneys of their choice, so long as the attorney’s rates are reasonable for services provided in the San Francisco Bay Area.

C. The aforesaid hold harmless and indemnification obligation shall apply to all Claims of every kind, suffered, or alleged to have been suffered, by reason of any of the aforesaid Events, regardless of whether or not Indemnified Parties have prepared, supplied, or approved of plans submitted in connection with work to be performed in the Street and irrespective of the grant of permission contained herein and irrespective of Indemnified Parties’ inspection of the works performed or the improvements constructed within the Street. Said indemnification and hold harmless obligation shall not include damages, liabilities and/or Claims to the extent arising out of or caused by the Indemnified Parties’ gross negligence or willful misconduct.

## **SECTION 28. Insurance**

A. Franchisee, at its sole expense, throughout the duration of this Franchise (or for such longer periods as are specified in this Section 28), shall maintain or cause to be maintained insurance to cover Claims arising out of or in connection with any work or other operations under this Franchise. This Section 28 identifies the minimum

insurance requirements with which Franchisee shall comply; however, the minimum insurance requirements shall not relieve Franchisee of any other performance responsibilities under this Franchise (including the indemnity requirements), and Franchisee may carry, at its own expense, any additional insurance it deems necessary or prudent. Prior to the commencement of any work or other operations under the Franchise, the Franchisee shall furnish certificates of insurance and all endorsements affecting required coverage to the City. Thereafter, Franchisee shall provide substitute certificates and endorsements no later than thirty (30) days prior to the expiration date of any insurance policy required by this Franchise.

B. Minimum Scope of Insurance. Coverage shall be at least as broad as:

1. The coverage provided by Insurance Services Office Commercial General Liability coverage ("occurrence") Form Number CG 0001, including products and completed operations and explosion, collapse and underground coverages, and coverage for economic loss; and

2. The coverage provided by Insurance Services Office Form Number CA 0001 covering Automobile Liability. Coverage shall be included for all owned, non-owned and hired automobiles; and

3. Contractor's Pollution Liability with respect to initial construction of Facilities and, thereafter, site-specific Pollution Legal Liability, insurance applying to both sudden conditions for all operations, completed operations and professional services, and including coverage for on-site and off-site bodily injury, property damage, clean up and defense costs and economic loss; and.

4. Workers' Compensation insurance as required by the California Labor Code and Employer's Liability insurance; and

5. Builder's Risk during construction/replacement of Facilities and, with respect to completed Facilities, Property, insurance providing "all risk" coverage for the Facilities.

6. There shall be no endorsement reducing the scope of coverage required above unless approved by the City's Risk Manager.

C. Minimum Limits of Insurance. Limits may be satisfied through an excess liability (umbrella) policy, and shall be no less than:

1. Commercial General Liability: the greater of either (i) \$1,000,000 per occurrence and \$2,000,000 in the aggregate annually, or (ii) in an amount of coverage consistent with the amount of financial responsibility required by the California State Fire Marshal in accordance with California Civil Code Section 3333.5(j).

2. Automobile Liability: \$5,000,000 per accident for bodily injury and property damage.

3. Pollution Liability: the greater of either (i) \$10,000,000 per occurrence and \$10,000,000 in the aggregate annually, or (ii) in an amount of coverage consistent with the amount of financial responsibility required by the California State Fire Marshal in accordance with California Civil Code Section 3333.5(j).

4. Workers' Compensation: coverage as required by the State of California, and Employer's Liability \$1,000,000 per accident.

5. Builder's Risk and Property: full replacement value.

6. An excess liability (umbrella) policy in an amount equal to, and not less than, \$20,000,000.00 per occurrence and in the aggregate.

D. Deductibles and Self-Insured Retentions. Any deductibles or self-insured retentions must be declared to, and approved by, the City's Risk Manager. The City's Risk Manager, may from time to time request that Franchisee's insurer reduce or eliminate such deductibles or self-insured retentions as respects the City, its officers, employees and agents; Upon receipt of such a request of the City's Risk Manager, Franchisee shall undertake commercially reasonable efforts to cause its insurers to institute such changes. If Franchisee is unable to cause its insurers to institute such changes, the City's Risk Manager may require that the Franchisee shall procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses in an amount specified by the City's Risk Manager.

E. Endorsements. The insurance policies shall be endorsed (or shall contain provisions) as follows:

1. Commercial General Liability, Automobile Liability and Pollution Liability.

a. The City, its officers, employees and agents are to be covered as additional insureds as respects: Liability arising out of activities performed by or on behalf of, Franchisee; products and completed operations of Franchisee; premises owned, leased or used by Franchisee; and automobiles owned, leased, hired or borrowed by Franchisee. The scope of protection afforded to City, its officers, employees and agents shall extend to cover their concurrent negligence.

b. Franchisee's insurance coverage shall be primary insurance as respects City, its officers, employees and agents. Any insurance or self-insurance maintained by City, its officers, employees or agents shall be excess of Franchisee's insurance and shall not contribute with it.

c. Any failure to comply with reporting provisions of the policies by Franchisee shall not affect coverage provided City, its officers, employees or agents.

d. Coverage shall state that Franchisee's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

e. Coverage shall contain waiver of subrogation in favor of the City, its officers, employees and agents.

2. Workers' Compensation and Employers' Liability; Builder's Risk and Property. Coverage shall contain waiver of subrogation in favor of the City, its officers, employees and agents.

3. All Coverages. Each insurance policy required by this Franchise shall be endorsed to state that coverage shall not be suspended, voided, canceled, or reduced in limits or coverage except after thirty (30) days' prior written notice has been given to City, except that ten (10) days' prior written notice shall apply in the event of cancellation for non-payment of premium.

F. Duration.

1. Commercial General Liability (or the completed operations component thereof) and Pollution Liability coverages shall be maintained continuously for a minimum of five (5) years after the later to occur of expiration of this Franchise or completion of work or other operations under this Franchise.

2. If any of such coverages, which are permitted to be written on a claims-made basis, are written on a claims-made basis, the following requirements apply:

a. The policy retroactive date must precede the effective date of this Franchise.

b. If the policy is cancelled or non-renewed and coverage cannot be procured with the original retroactive date, Franchisee must purchase an extended reporting period equal to or greater than five (5) years after completion of work under this Franchise.

G. Acceptability of Insurers. All insurance companies providing coverage to Franchisee shall have an A.M. Best's rating of not less than "A-:VII".

H. Verification of Coverage. Franchisee shall furnish City with certificates of insurance and with endorsements affecting coverage required by this Franchise. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf.

Proof of insurance shall be either emailed in pdf format to: [Riskmgmt@sanjoseca.gov](mailto:Riskmgmt@sanjoseca.gov), or mailed to the following postal address (or any subsequent email or postal address as may be directed in writing by the Risk Manager):

City of San José – Finance Department  
Risk Management  
200 East Santa Clara St., 14th Floor  
San José, CA 95113-1905

City reserves the right to require complete copies of all required insurance policies at any time.

All policies, endorsements (including, without limitation, all endorsements required above, and any endorsement reducing the scope of coverage provided by any

insurance policy) and certificates (including, without limitation, those evidencing coverage for third parties as are specified in Paragraph H., below), shall be subject to review and approval by the City's Risk Manager as to form and content; however, the failure to do so shall not operate as a waiver of these insurance requirements.

These insurance requirements are subject to amendment or waiver if so approved in writing by the City's Risk Manager.

City reserves the right to review these insurance requirements from time to time and at anytime during the term of this Franchise and to make reasonable adjustments thereto when deemed necessary and prudent by the City's Risk Manager based upon (by way of example only) changes in law, principles of sound risk management practice, or inflation. Should the City's Risk Manager request adjustments in writing to Franchisee, Franchisee shall use commercially reasonable efforts to cause its insurers to implement such adjustments.

I. Coverage for Third Parties. Franchisee shall include all contractors and other parties with whom it is contracting (whether directly or indirectly) in connection with work or other operations under this Franchise ("Third Parties") as insured under its policies or shall obtain separate certificates and endorsements for each such Third Party evidencing their compliance with these insurance requirements, including without limitation additional insured's coverage and waivers of subrogation. Notwithstanding the generality of the foregoing, the City's Risk Manager may from time to time approve amendments of these requirements as they apply to Third Parties (such as, by way of example only, reduction of limits), provided the Franchisee has requested such amendment in writing and the City's Risk Manager has determined in its sole but reasonable discretion that such amendment is acceptable based upon principles of sound risk management practice.

### **SECTION 29. Faithful Performance Bond**

On or before the effective date of this Ordinance, Franchisee shall file and thereafter at all times during the life of the Franchise keep on file with the City Clerk a corporate surety bond in a form approved by the City Attorney running to the City in the penal sum of five hundred thousand dollars (\$500,000.00), with a surety licensed to do business in California. The bond shall provide that Franchisee shall well and truly observe, fulfill and perform each condition of the Franchise and that in case of any breach of condition of the bond the damages arising from such breach shall be recoverable from the principal and sureties of the bond. If said bond is not filed prior to the effective date of this Ordinance, the award of the Franchise may be set aside and this Ordinance may be repealed at any time prior to the filing of said bond and any money paid in consideration for the award of the Franchise shall be deemed forfeited. In the event that said bond, after it has been so filed, shall at any time during the life of the Franchise become insufficient, in the sole opinion of the City Engineer, the Franchisee agrees to renew said bond within ten (10) days after written notice to do so from the City Engineer.

### **SECTION 30. Liability**

The Franchisee shall be liable to the City for damage to City Property, including but not limited to any Street, or any other cost incurred by the City caused by Franchisee, any of the Facilities or by any Person acting on Franchisee's behalf. The Franchisee shall be held to a standard of strict liability to City for any activity conducted pursuant to or in connection with the Franchise. The Franchisee's strict liability shall extend to any costs, including Remediation Costs, incurred by the City for control or abatement of any Environmental Condition, Release of Contaminants, Remedial Work or resulting from any activity conducted by or on behalf of Franchisee pursuant to the Franchise.

**SECTION 31. City Costs**

- A. Franchisee shall reimburse the City for all Actual and Administrative Costs incurred by the City related to the development and approval of the Ordinance and the granting of the Franchise which includes, but is not limited to, drafting and negotiating the Ordinance, preparing reports, statements, and studies pursuant to CEQA and any similar Federal statute, or any successor statute, and for all advertising and publishing costs.
- B. Franchisee shall reimburse the City for all Actual and Administrative Costs incurred by the City, in connection with the administration, implementation, and enforcement of the Franchise no later than thirty (30) days of the date of City's invoices.
- C. The grant of this Franchise and its continued effectiveness shall be conditioned upon Franchisee's full payment of the City's Actual and Administrative Costs relating therefor. Payment of the City's Actual and Administrative Costs incurred by the City in relation to the Franchise is not and will not be considered in any manner as compensation to the City for occupation of the Streets.

**SECTION 32. Damage to City Property**

Any damage done to property of the City by Franchisee in exercising any right, power, or privilege under this Franchise, or in performing any duty under or pursuant to the provisions of this Ordinance, shall be promptly repaired by Franchisee at its sole cost and expense as it reasonably was before such damage was incurred, to the satisfaction of the City Engineer. If the Franchisee, within ten (10) days after receipt of written notice from the City instructing it to repair such damage, shall fail to commence to comply with such instructions, or, thereafter, shall fail diligently to prosecute such work to completion, then the City immediately may do work necessary to carry out said instructions at the cost and expense of the Franchisee, which cost and expense, by the

acceptance of the Franchise, the Franchisee agrees to pay upon demand and receipt of reasonably acceptable supporting documentation. If such damage constitutes an immediate danger to the public health or safety requiring the immediate repair thereof, the City without notice may repair such damage and the Franchisee agrees to pay all Actual and Administrative Costs incurred.

**SECTION 33. Compensation**

A. Rates. As consideration for the Franchise granted, the Franchisee shall pay to the City in lawful money of the United States the following:

1. Annual Fee. The Franchisee, as consideration for the Franchise, shall, within sixty (60) days after the end of each calendar year and during the life of the Franchise for each and every year, including the year of granting the Franchise, annually pay to the City in lawful money of the United States, a fee in the following amounts:

| <u>Pipelines With<br/>Internal Diameter of</u> | <u>Base Rate<br/>Per Lineal Foot</u> |
|--|--------------------------------------|
| 4 inches                                       | \$0.114                              |
| 6 inches                                       | \$0.171                              |
| 8 inches                                       | \$0.228                              |
| 10 inches                                      | \$0.285                              |

For pipelines with an internal diameter greater than 10 inches, the fees shall be at the rate of \$0.029 per inch of diameter per lineal foot.

The annual payment shall be submitted by Franchisee to the City Engineer without the City submitting an invoice and shall be accompanied by a schedule of lineal feet of electric lines by internal diameter, price per foot paid and extension. The annual payment shall be in the form of a check payable to the City.

2. Penalty/Late Charge. If the annual payment is sent more than thirty (30) days after the date on which it is due, then there shall be immediately due as an additional payment a sum equal to 10% of the delinquent amount. On the first day of each month following nonpayment of all or part of the base delinquent amount and 10% payment and on the first day of each successive month of nonpayment, an additional 10% of the unpaid total shall become immediately due and payable.

B. Adjustments. The amount of the fee provided for in Section 33(A)(1) shall be adjusted every January, beginning with the second January following the effective date of this Franchise, to the extent of any percentage change which occurred in the Consumer Price Index (hereinafter "CPI") for the calendar year just ended. The City Engineer shall provide notice of the amount of the adjusted annual fee to the Franchisee.

The base for computing the adjustment shall be the CPI for All Urban Consumers (with a base year of 1982-1984=100) for the San Francisco-Oakland-San Jose area, published by the United States Department of Labor, Bureau of Labor Statistics ("Index"), the annual average which is published most immediately preceding the adjustment period. For example, the fee adjustment effective January 1, 2022 will be based on a beginning CPI Index of 2019 and an ending index of 2020, using the annual CPI average as described above. Notwithstanding the foregoing, in no event shall the annual fee be less than the annual fee calculated for the previous year.

For the purposes of illustration only, if a beginning CPI index is 216.048 and the ending index is 222.767, the fee to be paid for the ensuing calendar year shall be \$ X (the then expiring fee) multiplied by  $222.767/216.048$ .

The Index specified in Section 33(B) is calculated and published by the United States Department of Labor, Bureau of Labor Statistics. If the Bureau discontinues the calculation or publication of the Consumer Price Index, all Urban Consumers for the

San Francisco – Oakland – San Jose Area (All Items. Base 1982-1984=100), and no transposition table is available to convert to another index, then the amount of each annual adjustment of all fees shall be computed by using a comparable governmental index, as determined by City's Engineer.

C. No waiver of Franchisee's Liability or Obligations. Franchisee's payment of the statutorily required annual payments under Section 33(A)(1) shall not constitute a waiver or release, nor relieve the Franchisee, in whole or in part, of any of its liability under the terms of the Franchise and/or Applicable Law. Nothing contained in this Section 33(C) shall constitute a waiver or relinquishment by Franchisee of any of its rights or defenses under this Franchise and/or Applicable Law.

D. Publication Costs. Franchisee shall pay to the City within thirty (30) days after receiving a statement therefore, the advertising and publishing costs stated therein, including the cost of publishing the Ordinance, if necessary, incurred in connection with the granting of the Franchise.

E. Proration of Payments. In the event of abandonment of Facilities in compliance with Section 21 or in the event of removal of such Facilities by the Franchisee, the annual Franchise Fee required under subsection (A) of this Section 33 shall be prorated for the calendar year in which such removal or abandonment occurs as of the end of the calendar month in which such Facilities are removed or abandoned, upon Franchisee remitting payment required under Section 21(D). In the event the annual Franchise Fee required under subsection (A) of this Section 33 covers a period of less than a full calendar year due to the commencement or expiration of the term of the Franchise, the annual Franchise Fee for such year shall be prorated.

F. Records. The Franchisee shall keep and preserve for a period of five (5) years subsequent to the date of the most recent Franchise Fee determination all the records necessary to determine the amount of such Franchise Fee.

**SECTION 34. Effective Date**

This Ordinance shall take effect when the Ordinance has been adopted by the Council and the condition precedent contained in Section 3 of this Ordinance has been satisfied by Franchisee. If the condition precedent contained in Section 3 of this Ordinance has not been satisfied by June 30, 2021 Franchisee shall withdraw its Franchise application.

**SECTION 35. Time**

Time is of the essence. Franchisee shall not be relieved of its obligation to promptly comply with any provision hereof by any failure of the City to enforce prompt compliance with the same or any other provision.

**SECTION 36. Cumulative Remedies**

No provision herein made for the purpose of securing the performance of the terms and conditions of this Franchise shall be deemed an exclusive remedy, or to afford the exclusive procedure, for the enforcement of said terms and conditions, but the remedies and procedures herein provided, in addition to those provided by Applicable Law, shall be deemed to be cumulative.

**SECTION 37. Amendments**

To the extent not contrary to Applicable Law, the Council may amend this Ordinance from time to time consistent with any amendments to its Municipal Code of general application to electric line franchises in the City, provided said amendment does not result in a forfeiture of the Ordinance without following the procedures set forth in Section 10 (Forfeiture).

**SECTION 38. Severability**

If any part of this Ordinance or the application thereof to any Person or circumstances is for any reason held invalid by a court of competent jurisdiction, the validity of the remainder of the Ordinance or the application of such provision to other Persons or circumstances shall not be affected.

**SECTION 39. Survival**

Franchisee's obligations contained herein that by their nature would continue beyond the termination or expiration of the Ordinance, including without limitation, the obligations set forth in Sections 16 (Release of Products or Contaminants), 21 (Removal or Abandonment of Facilities), 24 (Relocation/Repair), and 27 (Indemnification), shall survive termination or expiration.

**SECTION 40. Governing Law**

California law governs the construction and enforcement of this Ordinance.

**SECTION 41. Disputes**

Any litigation resulting from this Ordinance will be filed in and resolved by a federal or state court in California.

NVF:JLP:AHT  
8/13/2020

PASSED FOR PUBLICATION of title this \_\_\_\_\_ day of \_\_\_\_\_, 2020, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

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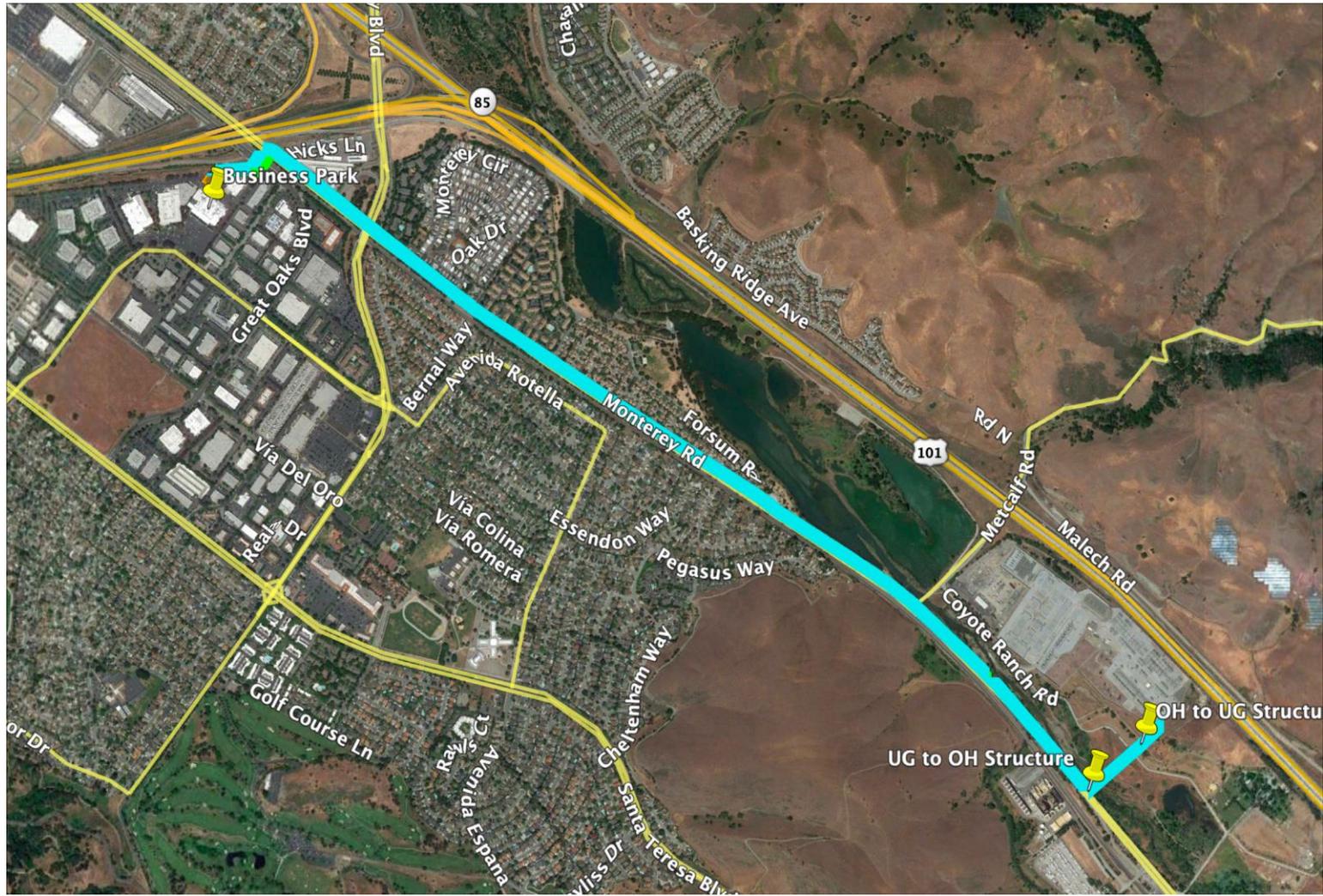
SAM LICCARDO  
Mayor

ATTEST:

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TONI J. TABER, CMC  
City Clerk

**Exhibit A**



**ACCEPTANCE**

ORDINANCE NO. \_\_\_\_\_

Hummingbird Energy Storage, LLC hereby accepts and agrees to the Franchise, as contained in Ordinance No. \_\_\_\_\_, and agrees to abide by and to be bound by all of its terms, conditions and provisions.

HUMMINGBIRD ENERGY STORAGE  
LLC., a Delaware corporation authorized  
to do business in California

Dated: \_\_\_\_\_

By \_\_\_\_\_

Name:

Title:

Address: