

ORDINANCE No. 185951

Grant a franchise to Lucid Energy, Inc. for a renewal energy project in conjunction with the Water Bureau for a period of 20 years (Ordinance)

The City of Portland ordains:

Section 1. NATURE AND TERM OF GRANT

1.1 Grant of Franchise.

(A) The Climate Action Plan 2009 (CAP) establishes a 2030 Objective 3, “Produce 10 percent of the total energy used within Multnomah County from on-site renewable resources...” The 2012 Action states, “Facilitate the installation of at least ten megawatts of on-site renewable energy...”

(B) The CAP Objective 18 was adopted to “reduce carbon emissions from City and County operations by 50 percent from 1990 levels.” Objective 18 also states that by 2012 the objective is to “purchase or generate 100 percent of all electricity required for City operations from renewable resources, with at least 15 percent from on-site...sources.”

(C) Portland Water Bureau (PWB) and Lucid Energy Inc (LEI) have negotiated a “final term sheet which describes an anticipated agreement” which will allow LEI access to PWB facilities to generate renewable electricity. PWB anticipates potentially receiving financial benefits by sharing in the proceeds from the electricity generation.

(D) The LEI project will be located on public property, and will use City renewable resources. The City is requesting a right of first refusal if the generation facility is sold. LEI will sell electricity generated by the project to the local electric utility pursuant to a Power Purchase Agreement. LEI will deliver the environmental attributes of electricity generated at this project to Energy Trust of Oregon under a separate contract.

(E) In the Memorandum of Understanding separately entered into between the City of Portland, Portland Water Bureau, Portland Development Commission and LEI, the parties recognized Portland’s status as a global leader in clean energy and view their prospective partnership as an opportunity to leverage Portland’s leadership in clean and green innovation and extend Portland’s expertise in environmental technologies and advanced manufacturing, thereby addressing goals of the City’s economic development strategy.

(F) Due to the unique nature of LEI’s renewable energy project and LEI’s proposal for limited use of City Streets, some standard City provisions have been modified to reflect the singular nature of the renewable hydroelectric project.

(G) The City of Portland (City), grants to Lucid Energy, Inc., a Delaware corporation qualified to do business in Oregon, and to its successors and assigns as approved by the City

under Section 12, a franchise to install, operate and maintain a Renewable Energy System with all necessary Facilities, located within the Streets.

(H) Throughout this Franchise, the City of Portland, Oregon, shall be referred to as the "City," and Lucid Energy Inc. shall be referred to as the "Grantee."

1.2 Duration of Franchise. The term of this Franchise, and all rights and obligations pertaining thereto, shall be twenty (20) years from the effective date of this Franchise, unless revoked sooner as provided herein.

1.3 Effective Date. The effective date of this Franchise shall be sixty (60) days after passage of the Franchise by the City Council unless Grantee fails to file an unconditional written acceptance of this Franchise in accordance with Section 16.10, in which event this Franchise shall be null and void. The passage date of this Franchise is set forth on the last page of the original hereof, as stamped by the Council Clerk.

1.4 Franchise Not Exclusive. This Franchise is not exclusive. The City expressly reserves the right to grant franchises, licenses, permits or other similar rights to other Persons, as well as the right in its own name as a municipality, to use the Streets for similar or different purposes allowed Grantee under this Franchise.

1.5 Charter and General Ordinances to Apply. To the extent authorized by law, this Franchise is subject to the Charter of the City of Portland and general ordinance provisions passed pursuant thereto, affecting matters of general City concern and not merely existing contractual rights of Grantee, now in effect or hereafter made effective. Section 10-201 through 10-218, inclusive, of the Charter of the City of Portland, (1942 compilation, as revised in part by subsequent amendments), are hereby incorporated by reference and made a part of this Franchise, to the extent authorized by law. Nothing in this Franchise shall be deemed to waive the requirements of the various codes and ordinances of the City regarding permits, fees to be paid or the manner of construction.

Section 2. DEFINITIONS.

2.1 Captions. Throughout this Franchise, captions to sections are intended solely to facilitate reading and to reference the sections and provisions of this Franchise. The captions shall not affect the meaning and interpretation of this Franchise.

2.2 Definitions. For the purpose of this Franchise, the following terms, phrases, and their derivations shall have the meanings given below unless the context indicates otherwise. When not inconsistent with the context, words used in the present tense include the future tense, words in the plural number include the singular number, and words in the singular include the plural number. The word "shall" is always mandatory and not merely directory.

(A) "City" means the City of Portland, Oregon, a municipal corporation, and all of the territory within its corporate boundaries, as such may change from time to time.

(B) "City Council" means the Council of the City of Portland.

(C) "Facility" means any tangible component of the Grantee's Renewable Energy System.

(D) "Franchise" means this ordinance, as approved by the City Council and accepted by the Grantee pursuant to Section 16.10.

(E) "Gross Revenues" means, after adjustment for the net write-off of uncollectible accounts, revenues derived from the sale of electricity generated by Grantee's Renewable Energy System. "Gross Revenues do not include funds received in payment for environmental, economic and social benefits associated with generation of electricity from a renewable resource such as hydroelectric facilities.

(F) "Hazardous Substances" has the meaning given by ORS 465.200 (2011).

(G) "Person" means any individual, sole proprietorship, partnership, association, corporation or other form of organization authorized to do business in the State of Oregon, and includes any natural person.

(H) "Renewable Energy System" or "System" means all wires, conduits, vaults, electrical equipment, turbines and associated Facilities owned or used by the Grantee for the purpose of generating renewable electricity through generating in-pipe hydropower turbines within large diameter water pipes. This Franchise does not authorize Grantee to use any Portland Water Bureau facilities. Grantee must separately apply for and obtain such permission and authority as is necessary from the Portland Water Bureau for use of its facilities.

(I) "Streets" means the surface of, and the space below, the public streets, roads, alleys or highways, used or intended to be used by the general public to the extent the City has the right to allow the Grantee to use them.

(J) "Year", "Annual", or "Annually" means the period consisting of a full calendar year, beginning January 1 and ending December 31, unless otherwise provided in this Franchise.

Section 3. COMPENSATION AND AUDITING.

3.1 Amount of Franchise Compensation.

(A) As compensation for the benefits and privileges under this Franchise, and in consideration of permission to use the Streets, Grantee shall pay a Franchise Fee of \$1,000 annually to the City.

(B) In any year in which Grantee's annual Gross Revenues exceed a threshold of \$200,000, Grantee shall pay a Minimum Annual Franchise Fee of \$10,000 or 5% of gross revenue annually to the City. Grantee shall provide written notice to the City in any year in which its Gross Revenue exceed the \$200,000 threshold.

3.2 Payment of Compensation.

(A) Grantee's first Franchise Fee payable under Section 3.1 shall be paid to the City thirty (30) days after the effective date of this franchise, as defined in Section 1.3. Thereafter, Grantee shall pay each Franchise Fee on or before April 15.

(B) Late Payments: Any payment not paid when due shall be subject to a delinquency penalty charge of five percent (5%) of the unpaid amount. Failure to make full payment and penalty charges within sixty (60) days of the applicable payment date shall constitute a violation of this Franchise. In addition, all overdue amounts, including penalty charges, shall bear interest, until paid, at the rate of one percent (1%) per month.

(C) Grantee shall set up electronic fund transfer within sixty (60) days of the franchise effective date to submit payments to the City by Automated Clearing House (ACH) payment receipts. The City may grant any written requests for waivers from the ACH requirement.

3.3 Reports. Prior to making each payment to the City under Section 3.1, Grantee shall file with the City a written report containing an accurate statement in summarized form, as well as in detail, of its calculation of the amount of the payment, verified by an officer or other authorized representative of Grantee, setting forth its Gross Revenues according to their accounting subdivisions, any deductions claimed for the period upon which the payment is computed. Such reports shall be in form satisfactory to the City.

3.4 Cost of Pre-franchising and Publication. Grantee shall pay the pre-franchising costs associated with this Franchise, including publication of this Franchise, as such publication is required by the City Charter.

3.5 Acceptance of Payment and Recomputation. No acceptance of any payment pursuant to Section 3 shall be construed as an accord that the amount paid is, in fact, the correct amount, nor shall any acceptance of payments be construed as a release of any claim the City may have for further or additional sums payable. All amounts paid under Section 3 shall be subject to audit by the City, provided that only payments which occurred during a period of sixty (60) months prior to the date the City notifies Grantee of its intent to perform an audit shall be subject to such audit. The Grantee agrees to pay the City for:

(A) The reasonable costs of such confirmation if the City's recomputation discloses that Grantee had paid 95% or less of the franchise fees owing for the period at issue upon receipt of an invoice from the City showing such costs were actually incurred and directly related to the audit.

(B) One-half of the reasonable costs of such confirmation if the City's recomputation discloses that Grantee had paid more than 95% but less than 98% of the franchise fees owing for the period at issue. The City's costs which may be reimbursed under this Section shall not exceed \$5,000.00 per audit or financial review.

(C) If the City determines that Grantee made any underpayment, and that the underpayment exceeded 5% of the amount due, Grantee shall pay late fees pursuant to Section 3.2(C) of this Franchise.

3.6 Escrow. If the Grantee disputes the City's determination of underpayment under Section 3, the Grantee shall immediately place the disputed amount in an escrow account at a financial institution acceptable to the City, with instructions agreed to by the City, until final resolution.

3.7 Authority to Audit. The City and its agents and representatives shall have authority to arrange for and conduct audits or reviews of the relevant financial obligations payable under Section 3. The City may determine the scope of audit or review in each instance. All amounts paid by Grantee shall be subject to audit or review by the City, provided that such audit or review be completed within five (5) years from the date payment was due. City requests for audits or reviews shall be in writing. If Grantee has not provided copies of all information reasonably within the scope of the audit or review to the City within 30 days from the date of the written request, Grantee shall provide access within the Portland metropolitan region, during normal business hours, upon 48 hours prior written notice. If the City requests in writing that the Grantee provide, or cause to be provided, copies of any information reasonably within the scope of the audit or review, and the Grantee fails within 30 days of receipt of the request to provide, or cause to be provided, such information, then the five (5) year period shall be extended by one day for each day or part thereof beyond 30 days that Grantee fails to provide, or fails to cause to be provided, such requested information.

3.8 No Credit Against Other City Charges. Payment of the compensation owed pursuant to Section 3 shall not exempt Grantee from the payment of any license fee, tax or charge on the business, occupation, property or income of Grantee that may be lawfully imposed by the City or other taxing authority, except as may otherwise be provided in the ordinance or ordinances imposing such other license fee, tax or charge.

Section 4. GENERAL FINANCIAL AND INSURANCE PROVISIONS.

4.1 Insurance.

(A) At all times during which Grantee's Facilities are in the Streets as described in Section 1 of this Agreement, Grantee shall comply with the requirements for insurance and other applicable forms of financial guaranty for right-of-way permits, as established by applicable Portland City Code and implementing regulations in effect as of the date of this Franchise, along with any revisions implemented by the City during the term of this Agreement. Until the time when such administrative regulations are effective, Grantee shall maintain insurance with the requirements as set forth in Exhibit A.

(B) The Grantee shall maintain on file with the City a certificate of insurance certifying the coverage required above. The adequacy of the insurance shall be subject to the approval of the City Attorney. Failure to maintain liability insurance shall be cause for revocation of this Franchise by the City.

4.2 Faithful Performance Bond.

(A) Upon the effective date of this Franchise, the Grantee shall furnish proof of the posting of a faithful performance bond or irrevocable letter of credit or other form of guaranty running to the City, with good and sufficient surety approved by the City, in the penal sum of One Hundred Thousand dollars (\$100,000), conditioned that the Grantee shall well and truly observe, fulfill, and perform each term and condition of this Franchise. Grantee shall pay all premiums or other costs associated with maintaining any such guaranty, and shall keep the same in full force and effect at all times throughout the like of this Franchise, including, if necessary, the time required for removal of all of Grantee's System installed in the City's Streets. The guaranty shall be conditioned that it shall not be terminated or otherwise allowed to expire without thirty (30) days' prior written notice first being given to the City. The guaranty shall be reviewed and approved as to form by the City Attorney as to its adequacy under the requirements of this Section. Any failure by Grantee to maintain or provide coverage as required under this Subsection shall be cause for revocation of this Franchise under Section 13.

(B) During the term of this Franchise, Grantee shall file with the City a duplicate copy of the bond or irrevocable letter of credit along with written evidence of payment of the required premiums. However, in no event shall the City exercise its rights against the performance bond or irrevocable letter of credit under Section 4.2 if a bona fide, good faith dispute exists between the City and the Grantee.

4.3 Construction Bond. At all times during which Grantee is constructing, repairing, replacing or maintaining is Facilities in the Streets, Grantee shall comply with the requirements for right-of-way permits established by applicable Portland City Code and implementing regulations in effect as of the date of this Agreement, along with any revisions implemented by the City during the term of this Agreement, for providing construction bonds or other forms of financial guaranty satisfactory to the City.

Section 5. COVENANT TO INDEMNIFY AND HOLD THE CITY HARMLESS.

5.1 Indemnification – General. Grantee agrees and covenants to indemnify, defend and hold the City, its officers, agents and employees, harmless from any claim for injury, damage, loss, liability, cost or expense, including court and appeal costs and attorney fees or expenses, arising from any casualty or accident to person or property by reason of any construction, excavation or any other act done under this Franchise, by or for Grantee, its agents or employees, or by reason of any neglect or omission of Grantee to keep its Facilities in a safe condition, but not if arising out of or by reason of any negligence or willful misconduct by the City, its officers, agents or employees. The City shall provide Grantee with prompt notice of any such claim which Grantee shall defend with counsel of its own choosing and no settlement or compromise of any such claim will be done by the City without the prior written approval of Grantee. Grantee and its agents, contractors and others shall consult and cooperate with the City while conducting its defense of the City.

5.2 Indemnification – Relocation. Grantee agrees to indemnify the City, its officers, agents and employees, for any damages, claims, additional costs or expenses assessed against or

payable by the City arising out of or resulting, directly or indirectly, from Grantee's failure to remove, adjust or relocate any of its Facilities in the Streets in a timely manner in accordance with Section 7, unless Grantee's failure arises directly from the City's negligence or willful misconduct.

5.3 Indemnification – Hazardous Substances. Grantee agrees to forever indemnify the City, its officers, agents, and employees, from and against any claims, costs, and expenses of any kind, whether direct or indirect, pursuant to any state or federal law, statute, regulation, or order, for the removal or remediation of any leaks, spills, contamination, or residues of Hazardous Substances, associated with, arising from or due to Grantee's Facilities in the Streets.

Section 6. CONSTRUCTION AND RESTORATION OF STREETS.

6.1 Permits.

(A) Subject to applicable regulations of the City and the terms of any agreement with the Water Bureau, Grantee may perform all necessary construction to install, operate, and maintain its Facilities. Regardless of who performs the installation and/or construction, all construction and maintenance of any and all Grantee's Facilities within the Streets shall be and remain the Grantee's sole responsibility. Grantee shall apply for and obtain all permits necessary for installation and/or construction of any such Facilities, and for excavation and laying of any Facilities within City Streets. Grantee shall pay all applicable fees due for Bureau of Transportation permits. In the event that emergency repairs are necessary for Grantee's underground Facilities in the Streets, Grantee shall immediately notify the City of the need for such repairs. Subject to the terms of any agreement with the Water Bureau, Grantee may immediately initiate such emergency repairs, and shall apply for appropriate permits the next business day following discovery of the emergency. Grantee must comply with all Charter and ordinance provisions relating to such excavation or construction, including the payment of permits or license fees.

(B) Maps.

(1) Prior to beginning any new construction in the Streets, Grantee shall provide the City Engineer through the permitting process with an initial construction schedule for work in the Streets and the estimated total cost of such work together with its permit application. When Grantee's construction in the Streets is completed, Grantee shall provide the City with electronic maps showing the location of its installed System Facilities in the Streets, as built. Such "as-built" maps shall be in a form acceptable to the City Engineer.

(2) One (1) year after the effective date of this Franchise, and annually thereafter in the event of any alterations, Grantee shall provide an electronic map to the City Engineer and the City's Office for Community Technology, or its successor, showing the location of Grantee's Facilities in the Streets on a scale of three thousand five hundred feet (3,500') per inch or whatever scale the City and Grantee agree upon.

6.2 Locates. Grantee shall comply with the requirements of the Oregon Utility Notification Law, ORS Chapter 757, and the rules and regulations promulgated in OAR Chapter 952.

6.3 Relocation. Grantee shall relocate its System within the Streets when public convenience requires such change, in compliance with the requirements of applicable Portland City Code and implementing regulations, and the expense thereof shall be paid by Grantee.

6.4 Additional Facilities Subject to Franchise. Within thirty (30) days of Grantee's acquisition of any System Facilities in the Streets, or upon any addition or annexation to the City of any area in which Grantee retains any such Facilities in the Streets, the Grantee shall submit to the City a written statement describing all Facilities involved, whether authorized by franchise, license, permit or any other similar form of right granted by the City, and specifying the location of all such Facilities. At the City's sole option, as expressed by ordinance adopted by the City Council, such acquired Facilities shall be subject to the terms of this Franchise, including payment of appropriate franchise fees as determined by the City in accordance with Section 3.

6.5 Restoration of Streets. Grantee shall, after construction, maintenance or repair of Facilities, leave the Streets in as good or better condition in all respects as it was before the commencement of such construction, maintenance or repairs, excepting normal wear and tear in strict compliance with the requirements for right-of-way permits established by applicable Portland City Code and implementing regulations, and the expense thereof shall be paid by Grantee.

Section 7. RESERVATION OF CITY STREET RIGHTS.

Nothing in this Franchise shall be construed to prevent the City from constructing sewers, grading, paving, repairing and/or altering any Street or laying down, repairing or removing water mains or constructing or establishing any other public work or improvement. All such work shall be done, insofar as practicable, so as to not obstruct, injure or prevent the unrestricted use and operation of Grantee's System of the Grantee under this Franchise. However, if any portion of the Grantee's System interferes with the construction or repair of any Street or public improvement, including construction, repair or removal of a sewer or water main, the City may direct Grantee to relocate as provided in applicable regulations of the City.

Section 8. STREET VACATION.

Upon receipt of any request for vacation of any Street or portion thereof used by Grantee, the City shall provide the Grantee with the standard notice provided for street vacations. If any Street or portion thereof used by Grantee is vacated by the City during the term of this Franchise, unless the City Council specifically reserves to Grantee the right to continue its installation in the vacated Street area or Grantee secures such right from the third party that will have title to the area in which Grantee has its Facilities, Grantee shall, without expense to the City, remove its Facilities from such Street, restore, repair or reconstruct the Street area where such removal has occurred, and place the Street area in such condition as may be required by the Council, which shall be no worse than the condition of such Street immediately prior to removal. In the event of failure, neglect or refusal of Grantee, after thirty (30) days notice by City Council, to repair,

improve or maintain such Street portions, the City may do such work or cause it to be done, and the direct cost thereof, as found and declared by City Council, shall be entered in the Docket of City Liens against any property of Grantee which City may choose, and such lien shall be enforced in like manner and with like effect as other liens entered in such docket. The City shall make reasonable efforts to assist Grantee in identifying potential available alternative locations within the Streets, or, if requested by Grantee, will cooperate with Grantee's efforts to secure an alternate location in the vacated Street area from the third party that shall have ownership after vacation.

Section 9. FACILITY MAINTENANCE.

Grantee shall provide and put in use all Facilities and equipment necessary for the operation of its System in a manner that will not cause injury to the City's property or to any property within the City belonging to any Person. Notwithstanding the foregoing, it shall not be a breach of this Section 9 if such injury is not reasonable foreseeable by Grantee. Grantee, at no expense to the City, shall repair, renew, change and improve said Facilities and equipment from time to time as may be necessary to meet the requirement of Section 9. Grantee shall not require any customer (except the City) or any entity franchised or licensed by the City to install electric lines or cables in, under or over the Streets in order for such customer or entity to connect with or receive service from Grantee's System. The System constructed, owned or controlled by Grantee shall be of good quality and workmanship and shall be maintained in good repair and efficiency.

Section 10. DISCONTINUED USE OF FACILITIES.

If Grantee intends to discontinue using any Facilities in the Streets, Grantee shall comply with the requirements of applicable Portland City Code and implementing regulations regarding the discontinuation of the use of Facilities.

Section 11. HAZARDOUS SUBSTANCES.

As required by the City Code, Grantee shall comply with all applicable local, state and federal laws, statutes, regulations and orders concerning Hazardous Substances relating to its System and Facilities in the Streets. Grantee shall place utility corridor fill and use containment barriers in compliance with the requirements for right-of-way permits established by applicable Portland City Code and implementing regulations.

Section 12. CITY'S CONSENT REQUIRED FOR ASSIGNMENT, TRANSFER, MERGER, LEASE OR MORTGAGE.

12.1 Council Consent. Neither this Franchise, nor all or substantially all of Grantee's System located in the Streets by authority of this Franchise, shall be sold, leased, mortgaged, assigned, merged or otherwise transferred without the prior written consent of the City as expressed by ordinance, which consent shall not be unreasonably withheld, except to entities that control, are controlled by, or are under common control with the Grantee. Grantee shall give written notice to the City of any transfers to entities under such common control within ten (10) days of such transfers. The City's granting of consent in one instance shall not render unnecessary any

subsequent consent in any other instance. Nothing contained in this Franchise shall be deemed to prohibit the mortgage, pledge, or assignment of tangible assets of Grantee's System for the purpose of financing the acquisition of equipment for or the construction and operation of Grantee's System, within or outside the City, without the City's consent, but any such mortgage, pledge or assignment with respect to Grantee's System shall be subject to the City's other rights contained in this Franchise.

12.2. Review.

(A) In determining whether the City will consent to any sale, lease, mortgage, assignment, merger or transfer, the City may inquire into the technical, legal, and financial qualifications of the prospective party. Grantee shall assist the City in any such inquiry. The City may condition any sale, lease, mortgage, assignment, merger or transfer upon such conditions related to the technical, legal, and financial qualifications of the prospective party to perform according to the terms of this Franchise, as it deems appropriate. The City shall not unreasonably delay or withhold its consent to any such sale, lease, mortgage, assignment, transfer or merger.

(B) No sale, lease, mortgage, assignment, transfer or merger for which the City's consent by ordinance is required may occur until the successor, assignee or lessee has complied with the requirements of Section 4, including, but not limited to, providing certificates of insurance, unless the City Council waives such compliance by ordinance. Within ten (10) days after execution and delivery of any instrument so consented to by the City, Grantee shall file with the City an executed counterpart or certified copy thereof.

12.3 Leases. Grantee shall not lease any portion of its System without the City's prior consent as expressed by ordinance. However, and notwithstanding Section 12.1, Grantee may lease any portion of its System in the ordinary course of its business without otherwise obtaining the City's consent by ordinance, so long as Grantee remains solely responsible for locating, servicing, repairing, relocating or removing such portion of its System. A lessee of any portion of Grantee's System shall not obtain any rights under this Franchise.

12.4 Sales.

(A) Notwithstanding Section 12.1, Grantee may sell portions of its System in the ordinary course of its business, without otherwise obtaining the City's consent by ordinance, so long as Grantee complies with the following conditions:

(1) The sale is to the holder of a current existing, valid franchise, license, permit, or other similar right granted by the City;

(2) Within fourteen (14) days of the sale being executed and becoming final, Grantee shall provide written notice to the City, describing the portions of the System sold by the Grantee, identifying the purchaser of the Facilities, the location of the Facilities (in accordance with the requirements of Section 6.1(B)(2)) and providing an executed counterpart or certified copy of the sales documents;

(3) Grantee remains solely responsible for locating, servicing, repairing, relocating or removing its remaining System; and,

(4) Within fourteen (14) days of the sale being executed and becoming final, the purchaser of such Facilities shall file written notice to the City that it has assumed sole responsibility for locating, servicing, repairing, relocating or removing the purchased Facilities under the purchaser's current, existing valid franchise, license, permit or other similar right granted by the City. The purchaser shall not obtain any of the Grantee's rights under this Franchise.

Section 13. FRANCHISE VIOLATIONS AND REMEDIES.

13.1 Remedies for Franchise Violations.

(A) In addition to any other rights set out elsewhere in this Franchise, the City reserves the right at its discretion to apply any of the following remedies, alone or in combination, in the event Grantee violates any material provision of this Franchise, including but not limited to compensation and maintenance of insurance or performance bonds.

(1) Impose liquidated damages as provided in Section 13.1(C);

(2) Recover specific damages from all or any part of the security provided pursuant to this Franchise, including without limitation any performance bond, letter of credit or other security, provided, however, the assessment shall be for such amount as the City reasonably determines is necessary to remedy the violation;

(3) Commence litigation seeking recovery of monetary damages or specific performance of this Franchise, as such remedy may be available;

(4) Suspend the Grantee's Franchise rights related to the violation, until the Grantee corrects or otherwise remedies the violation;

(5) Reduce the duration of the term of this Franchise on such basis as is reasonable provided that in no event shall the amount of the term remaining after the reduction be less than three (3) years; or

(6) Revoke this Franchise.

(B) (1) Grantee shall not be relieved of its obligations to comply promptly with this Franchise by reason of any failure of the City to enforce prompt compliance. The City's failure to enforce shall not constitute a waiver of any term, condition, or obligation imposed upon the Grantee under this Franchise; nor a waiver of rights by the City or acquiescence in Grantee's conduct. A specific waiver of a particular term, condition, or obligation imposed upon Grantee under this Franchiseshall not be a waiver of any other or subsequent or future breach of the same

or of any other term, condition or obligation. The acts or omissions of affiliates are not beyond the Grantee's control, and the knowledge of affiliates shall be imputed to Grantee.

(2) Subject to applicable law, the remedies provided for in this Franchise are cumulative and not exclusive; the exercise of one remedy shall not prevent the exercise of another remedy, or the exercise of any available rights of the City at law or equity.

(C) Liquidated Damages.

(1) The City and Grantee recognize that delays, expense and unique difficulties may be involved in establishing actual losses suffered by the City and the public as a result of the Grantee's violation of material provisions of this Franchise. In circumstances where proof of specific, actual damages would not be feasible, the City and Grantee agree that Grantee shall pay liquidated damages in the following amounts to the City for violating material provisions of this Franchise. The parties agree that such amounts are a reasonable estimate by the parties of the actual damage (including increased costs of administration and other damages difficult to measure) the City and the public would suffer in the event of Grantee's breach of such provisions of this Franchise.

(2) Subject to Grantee's right to notice and the opportunity to cure as provided in Section 13.2, if the City determines that Grantee has violated any material provision of this Franchise, the City may assess liquidated damages of \$1,000. Liquidated damages will be assessed by the City on a per day or per violation basis or other reasonable measure based on the magnitude and duration of the breach.

(3) The liquidated damage amounts are stated in 2011 dollars and shall be adjusted each year for any increase in the amount of change in the Consumer Price Index for urban age earners and clerical workers for the Portland, Oregon metropolitan region for the prior year, unadjusted for seasonal variations, as determined by the Bureau of Labor Statistics of the Department of Labor and as published in such Bureau of Labor Statistics' Detailed Report (CPI). The adjustment will be calculated by multiplying the base liquidated damages amount by the ratio of 1) the average CPI for January through June of the current Year, to 2) the average CPI for January through June of the prior Year.

(4) The assessment and recovery of liquidated damages will not constitute a waiver by the City of any other right or remedy it may have under the Franchise or applicable law, including its right to recover from Grantee any additional damages, losses, costs and expenses that are incurred by City by reason of the breach of this Franchise. The assessment and recovery of liquidated damages for a particular violation will substitute for the recovery of actual damages for the period of the assessment.

(5) Each violation of any material provision of this Franchise shall be considered a separate violation for which separate liquidated damages may be imposed. Enumeration of material Franchise provisions set forth in Section 13.1 is not exhaustive and shall not be invoked under any guideline for contract interpretation to narrow the scope of other material terms, violation of which would be a material breach of this Franchise. Any liquidated damages for a specific franchise violation may be imposed upon Grantee. Thereafter, if Grantee has not cured

or commenced to cure the alleged breach to the satisfaction of the City, the City may pursue any other remedies available under this Franchise or applicable law.

(6) The City may determine that the actual and potential damages are capable of being ascertained, taking into account the nature and extent of the violation, the associated costs administrative enforcement by staff, and the harm to the public. In those circumstances, the City may seek the recovery of the ascertained, determinable damages arising from the violation.

(D) In determining which of the remedies available under this Franchise is appropriate, the City may consider, among other things: (1) the nature and extent of the violation; (2) whether Grantee has had a history of similar violations; (3) the Person burdened by the violation and the cost of remedying the violation; (4) the nature of the remedy required in order to prevent further such violations; and (5) such other factors as the City may deem appropriate.

(E) The City may shorten the term of this Franchise or revoke this Franchise in the manner described in Sections 13.1(A)(5) and (6) upon the occurrence of any of the following acts or events:

(1) Any failure to comply with the requirements of Section 4 of this Franchise, including but not limited to, any failure to provide uninterrupted insurance or performance bonds;

(2) Grantee is found by a court of competent jurisdiction to have practiced any fraud or deceit upon the City; or

(3) Grantee fails to obtain and maintain any permit required by any federal or state regulatory body in order to own and operate the System.

(F) In addition to its other rights and remedies as set forth in this Franchise, the City shall have the right to revoke this Franchise after the appointment of a receiver or trustee to take over and conduct the Grantee's business, or the initiation of receivership, reorganization, insolvency or other similar action or proceeding, unless Grantee, its receiver or trustee timely and fully perform all obligations, until such time as this Franchise is either rejected or assumed by Grantee, its receiver or trustee.

12.2 Notice and Opportunity to Cure.

(A) The City shall give Grantee thirty (30) days prior written notice of its intent to exercise any of its rights under Section 13.1, identifying the reasons for such action.

(B) If Grantee removes or otherwise cures to the satisfaction of the City the asserted violation constituting the stated reason within the thirty (30) day notice period, or if cure is not reasonably possible within the thirty (30) day period and the Grantee initiates good faith efforts satisfactory to the City within the thirty (30) day period to cure the asserted violation constituting the stated reason and the efforts continue in good faith, the City shall not exercise its rights under Section 13.1.

(C) If Grantee fails to remove or otherwise cure the asserted violation constituting the stated reason within the thirty (30) day notice period, or if the Grantee does not undertake and continue efforts satisfactory to the City to remedy the stated reason, then the City may exercise any or all of the remedies available under Section 13.1 or such other rights as the City may possess.

13.3 Removal of Facilities. If the City has revoked this Franchise as provided in Section 13.1, or if this Franchise has expired without being renewed or extended, or in the event of the City's lawful purchase, lease-purchase, condemnation, acquisition, taking over or holding of plant and equipment, all of Grantee's rights under this Franchise shall immediately cease and be divested. Thereafter, the Grantee shall at its own expense remove its Facilities from the Streets and restore the Streets to the standards provided in applicable regulations of the City, except as otherwise:

(A) provided in this Section;

(B) provided by ordinance; or,

(C) in the event of a sale of the Facilities or System to another party who has or obtains a franchise.

In the event of a failure by the Grantee to properly perform such work, then the City may perform the work and collect the cost thereof from the Grantee. The cost thereof shall be a lien upon the system of the Grantee and a set-off against any sums owed Grantee by City.

Section 14. RENEGOTIATION. In the event that any provision of this Franchise becomes invalid or unenforceable and the City Council or the Grantee expressly finds that such provision constituted a consideration material to entering into this Franchise, the City and the Grantee may mutually agree to renegotiate the terms of this Franchise. The party seeking renegotiation shall serve on the other party written notice of an offer to renegotiate. In the event the other party accepts the offer to renegotiate, the parties shall have 90 days to conduct and complete the renegotiation. If both parties agree to renegotiations under this Section, the parties shall proceed in good faith and in a manner that is reasonable under the circumstances.

Section 15. EXPIRATION. Upon the expiration of this Franchise, the City shall have the right, at its election, to: (1) renew or extend Grantee's Franchise; (2) invite additional proposals and award the Franchise to another Person; (3) allow the Franchise to expire without further action; or (4) take such further action as the City deems appropriate. Until such time as the City exercises its rights under Section 15, the Grantee's rights and responsibilities within the City shall be controlled by the terms of this Franchise.

Section 16. MISCELLANEOUS PROVISIONS.

16.1 Compliance with Laws.

(A) Both Grantee and the City shall comply with all applicable federal and state laws.

(B) Grantee shall comply with all applicable City ordinances, resolutions, rules and regulations adopted or established pursuant to the City's lawful authority.

16.2 Severability. If any Section, provision or clause of this Franchise is held by a court of competent jurisdiction to be invalid or unenforceable, or is preempted by federal or state laws or published regulations, the remainder of this Franchise shall not be affected, unless the City Council determines such section, provision, or clause was material to the City's agreement to issue a Franchise to the Grantee. All provisions concerning indemnity shall survive the termination of this Franchise for any cause. Expiration or termination of this Franchise shall not extinguish, prejudice or limit either party's right to enforce this Franchise with respect to any default or defect in performance that has not been corrected.

16.3 Regulation and Nonenforcement by the City. The City Council shall be vested with the power and authority to reasonably regulate the exercise of the privileges permitted by this Franchise in the public interest. Grantee shall not be relieved of its obligations to comply with any of the provisions of this Franchise by reason of any failure of the City to enforce prompt compliance, nor does the City waive or limit any of its rights under this Franchise by reason of such failure or neglect. Services furnished by Grantee under this Franchise shall be rendered using the best practicable commercial methods and practices, insuring the least danger to life and property compatible with good engineering practice.

16.4 Force Majeure.

(A) For purposes of this Section 16.4, the term "Force Majeure" shall mean acts of God, landslides, earthquakes, lightning, fires, hurricanes, volcanic activity, storms, floods, washouts, droughts, civil disturbances, acts or terrorism or of the public enemy, partial or entire failure of utilities, strikes, explosions, lockouts or other industrial disturbances, insurrections, public riots, or other similar events which are not reasonably within the control of the parties hereto.

(B) If the Grantee is wholly or partially unable to carry out its obligations under this Franchise as a result of Force Majeure, the Grantee shall give the City prompt notice of such Force Majeure, describing the same in reasonable detail, and Grantee's obligations under this Franchise, other than for the payment of monies due, shall not be deemed in violation or default for the duration of the Force Majeure. Grantee agrees to use its best efforts to remedy as soon as possible, under the circumstances, Grantee's inability, by reason of Force Majeure, to carry out its responsibility and duties under this Franchise.

16.5 Choice of Forum. Any litigation between the City and the Grantee arising under or regarding this Franchise shall occur, if in the state courts, in the Multnomah County Court having jurisdiction thereof, and if in the federal courts, in the United States District Court for the District of Oregon.

16.6 Choice of Law. This contract shall be governed by and construed in accordance with the laws of the State of Oregon, even if Oregon's choice of law rules would otherwise require application of the laws of a different state.

16.7 Notice. Any notice provided for under this Franchise shall be sufficient if in writing and (1) delivered personally to the following addressee or deposited in the United States mail, postage prepaid, certified mail, return receipt requested, (2) sent by overnight or commercial air courier (such as Federal Express), or (3) sent by electronic mail addressed as follows, or to such other address as the receiving party hereafter shall specify in writing:

(A) If to the City: Office for Community Technology/Revenue Bureau
City of Portland, Oregon
111 SW Columbia, Suite 600
Portland, Oregon 97201
FAX (503) 823-5370
Email: cffranchiseinfo@portlandoregon.gov

With a copy to: City Attorney's Office
City of Portland
Room 430, City Hall
1221 SW 4th Avenue
Portland, Oregon 97204
FAX (503) 823-3089

(B) If to the Grantee: Gregg Semler President and CEO
Lucid Energy, Inc
108 NW 9th Avenue, Suite 201
Portland, OR 97209
FAX (503) 341-0004

(C) Any such notice, communication or delivery shall be deemed effective and delivered upon the earliest to occur of actual delivery, three (3) business days after depositing in the United States mail as aforesaid, one (1) business day after shipment by commercial air courier as aforesaid or the same day as electronic mail transmission (or the first business day thereafter if sent by electronic mail on a Saturday, Sunday or legal holiday) but, in the case of electronic mail, only if followed by transmittal by national overnight courier or hand for delivery on the next Business Day.

16.8. Public Records. All information and records submitted to the City are subject to disclosure under the Oregon Public Records Law, ORS 192.410 to 192.505. If Grantee reasonably believes that any information or records it submits to the City may be exempt from disclosure under the Oregon Public Records Law, Grantee must identify such information with particularity and include the following statement:

“This data is exempt from disclosure under the Oregon Public Records Law pursuant to ORS 192, and is not to be disclosed except in accordance with the Oregon Public Records Law, ORS 192.410 through 192.505.”

If Grantee fails to identify with particularity the portions of such information that Grantee believes are exempt from disclosure, and the basis for its conclusion that the identified


information is exempt from disclosure, Grantee is deemed to waive any future claim regarding non-disclosure of that information.

16.9. Franchise Amendment. The City has negotiated this Franchise in good faith, in reliance upon the information provided by the Grantee regarding the scope of its authority to offer services associated with its System. In the event that Grantee offers or receives authority to offer services outside the scope of this Franchise that utilize Grantee's Facilities in the Streets, Grantee shall immediately notify the City. Within ninety (90) days of receiving such notice, the City may elect, without limitation, to enter into negotiations with Grantee to revise or amend this Franchise, or to extend separate authority to Grantee for such services to reflect such changed circumstances, or may proceed with early termination of this Franchise. The parties will negotiate in good faith to reach mutual agreement on the lawful means to provide the necessary authority for Grantee to provide such services using Streets.

16.10. Written Acceptance. On or before the thirtieth day after this Ordinance becomes effective, Grantee shall file in the Office of the Auditor of the City of Portland a written acceptance of this ordinance, executed by the Grantee, meeting the approval of the City Attorney. Any failure on the part of Grantee to file such written acceptance within such time shall be deemed an abandonment and rejection of the rights and privileges conferred hereby and this ordinance shall thereupon be null and void. Such acceptance shall be unqualified and shall be construed to be an acceptance of all the terms, conditions and restrictions contained in this ordinance.

16.11 Other Authority Superseded. . Upon effectiveness of this Franchise, any and all authority to operate previously granted to Grantee by the City shall be superseded by this Franchise.

Passed by Council, **MAR 27 2013**
 Mayor Charlie Hales
 Prepared by MHenry/JLi/BWalters
 Date: November 20, 2012

LaVonne Griffin-Valade
 Auditor of the City of Portland
 By 
 Deputy

Agenda No. **185951**
ORDINANCE NO.
Title

Grant a franchise to Lucid Energy, Inc. for a renewal energy project in conjunction with the Water Bureau for a period of 20 years. (Ordinance)

INTRODUCED BY Commissioner/Auditor: Mayor Charlie Hales	CLERK USE: DATE FILED <u>JAN 17 2013</u>
COMMISSIONER APPROVAL Mayor—Finance and Administration - Hales	LaVonne Griffin-Valade Auditor of the City of Portland By: <u>[Signature]</u> Deputy
Position 1/Utilities - Fritz	
Position 2/Works - Fish	
Position 3/Affairs - Saltzman	
Position 4/Safety - Novick	
BUREAU APPROVAL CAO: Jack D. Graham <u>JDG</u> Bureau: Revenue Bureau Head: Thomas W. Lannom <u>Thomas</u>	ACTION TAKEN: JAN 23 2013 REFERRED TO COMMISSIONER OF FINANCE AND ADMINISTRATION
Prepared by: MBH/JL Date Prepared: December 18, 2012	FEB 20 2013 PASSED TO SECOND READING MAR 27 2013 2 P.M.
Financial Impact & Public Involvement Statement Completed <input checked="" type="checkbox"/> Amends Budget <input type="checkbox"/>	
Portland Policy Document If "Yes" requires City Policy paragraph stated in document. Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>	
Council Meeting Date January 23, 2013	
City Attorney Approval: required for contract, code, easement, franchise, or other plan, charter <u>[Signature]</u>	

AGENDA
TIME CERTAIN <input type="checkbox"/> Start time: _____
Total amount of time needed: _____ (for presentation, testimony and discussion)
CONSENT <input checked="" type="checkbox"/> <u>Pulled</u>
REGULAR <input type="checkbox"/> Total amount of time needed: _____ (for presentation, testimony and discussion)

FOUR-FIFTHS AGENDA	COMMISSIONERS VOTED AS FOLLOWS:	
	YEAS	NAYS
1. Fritz	1. Fritz <input checked="" type="checkbox"/>	
2. Fish	2. Fish <input checked="" type="checkbox"/>	
3. Saltzman	3. Saltzman <input checked="" type="checkbox"/>	
4. Novick	4. Novick <input checked="" type="checkbox"/>	
Hales	Hales <input checked="" type="checkbox"/>	