

H3
10/03/06

Ordinance 799

Granting a franchise to YAM Sunshine LLC for use of County roads in the East Sequim Bay Road area

Section 1. Section .010, Application for franchise, is created to read as follows:

An application for a waterline facilities franchise to allow the location of certain utilities within certain County properties has been signed by Renae White, representing YAM Sunshine LLC, dated August 11, 2006. The approved application is attached hereto as Exhibit A and is by this reference expressly incorporated herein.

Section 2. Section .020, Hearing on franchise, is created to read as follows:

The Board of Clallam County Commissioners (Board) conducted a public hearing in regard to the request for franchise. Notice was given by posting notices in three public places in Port Angeles, the county seat of Clallam County, at least 15-days before the date fixed for the hearing and by publishing a like notice two times in the official newspaper of the County not less than 5-days before the date fixed for the hearing. The notice stated the name(s) of the applicant; a description of the County property by reference to section, township, and range; and the time and place fixed for the hearing.

Section 3. Section .030, Grant of franchise, is created to read as follows:

The Board deems it to be in the public interest to transfer and grant the franchise as described in the attached Exhibit A.

Section 4. Section .040, Reservation of rights, is created to read as follows:

The franchise granted by this ordinance shall be subject to the power of eminent domain and the right of the Board or the people acting for themselves through the initiative or referendum to repeal, amend, or modify the franchise in the interest of the public.

Section 5. Section .050, Record of franchise, is created to read as follows:

This chapter shall be recorded with the County Auditor.

Section 6. Section .060, Severability, is created to read as follows:

If any section, subsection, paragraph, sentence, clause or phrase of the ordinance is for any reason held to be invalid or unconstitutional, such invalidity or unconstitutionality shall not affect the validity or constitutionality of the remaining portions of this chapter, it being hereby expressly declared that this chapter and each section, subsection, paragraph, sentence, clause, and phrase thereof would have been adopted irrespective of the fact that any one or more other sections, subsections, paragraphs, sentences, clauses, or phrases be declared invalid or unconstitutional.

Section 7. Section .070, Effective date, is created to read as follows:

This ordinance shall take effect ten (10) days after adoption.

EXHIBIT A

UTILITIES FRANCHISE

Granted by Clallam County Board of Commissioners
to
YAM Sunshine LLC Franchise

This non-exclusive franchise to construct, extend, connect, repair, maintain, operate and remove sewage and waterline facilities over, under, along, across, and upon East Sequim Bay Road (#57250) along the frontage of parcel 032901 120000 within Clallam County ("County") is granted to YAM Sunshine LLC ("Grantee"), a company organized under the laws of the State of Washington its successors and assigns,

subject to the terms and conditions of County Application to Perform Work on County Right of Way ("Right of Way") permits and upon the following express terms and conditions:

1. DEFINITIONS:

- A. "County road" or "road" as used herein shall include, but not be limited to, county roads, avenues, alleys, streets, boulevards, viaducts, bridges, public ways, and public rights of ways including but not limited to deeded land, easements, prescriptive rights, and dedications and shall include their appurtenances including, but not limited to , asphalt, turnouts, gutters, curbs, ditches, sidewalk, paths, trails, drain pipe, culverts, catch basins, manhole, utilities, hand and guard rails, retaining walls, bridges, trestles, wharves or landings, property corners, or fences and shall embrace the plural.
- B. "Construction" or "Construct" as used herein shall include, in addition to construction, extension, connection, repair, maintenance, operation, installation and removal.
- C. "Within the road" or "within a road" shall mean over, under along, across, or upon a county road.
- D. "Claims" shall include, but not be limited to, claims, demands, suits, actions, losses, costs, expenses, attorney fees, damage judgments, and decrees whether at law or in equity.

2. LOSS OF JURISDICTION:

Whenever any of the roads as designated in this franchise shall fall outside the County's authority by reason of change in political jurisdiction such as by subsequent incorporation or annexation, then all the rights and privileges herein granted shall terminate in respect to said roads; but this franchise shall continue in force and effect in respect to all roads not so removed from County authority. Requirements of state and federal law and other county permits may, however, continue in effect as to the roads removed.

3. POWERS:

The Grantee shall have the right and authority to enter over, under, along, across, and upon the above-mentioned roads for the purpose of construction of facilities as authorized herein in conformity with such county, state, and federal codes, regulations and standards, as now or later enacted or hereafter amended, governing such facilities. This franchise merely authorizes the Grantee to occupy and use the county roads above-mentioned and nothing contained herein shall be construed to grant or convey any right, title, or interest in or to such county roads to the Grantee. Such franchise shall in no way prevent or prohibit the County from using any of said roads or effect its jurisdiction over them or any part of them, and the County shall retain power to make all necessary changes, relocations, repairs, maintenance, establishment, improvement, dedication, or vacation of the same as the County may deem fit, including the dedication, establishment, maintenance, and improvement of all new rights-of-way, thoroughfares and other public properties of every type and description.

4. TERM:

The term of this franchise shall be for a period of five (5) years, beginning on the effective date of this franchise, unless terminated, revoked or modified under the provisions of this franchise. This franchise shall be automatically renewed for additional five (5) year terms up to a total of twenty (20) years from the effective date of this franchise, UNLESS, the County gives notice of its intention to renegotiate the terms or conditions of the franchise, in which case, the franchise shall not renew unless and until the County and the Grantee reach agreement on terms and conditions acceptable to both parties. If the County and the Grantee are unable to reach agreement on new terms and conditions, the franchise shall terminate and the Grantee shall remove its facilities from the County roads unless otherwise allowed under Section No. 17, Abandonment or Removal.

The County reserves for itself the right at any time upon forty-eight hours notice to the Grantee to change, amend, modify, or amplify any of the provisions or conditions herein enumerated to conform to any local, state or federal law or regulation or recognized engineering practice relating to the public welfare, health, environmental compliance, safety, or highway design as may hereinafter be adopted or recognized. Additionally, at any time after the initial five year period of this franchise, the County may direct the Grantee to meet and discuss in good faith amendments to this franchise or enter into separate agreements, provided that in the event that mutual agreement is not attained, the County may schedule before the Board of County Commissioners the consideration of such amendments and the Board may take such action as it deems appropriate. The authority of the County to consider mutually agreed amendments and, after the initial five (5) year period, to consider and take unilateral action on amendments in the event the parties do not reach mutual agreement, shall be in addition to, and shall in no way limit, the ability of the County to make amendments and changes to the franchise conditions, negotiate renewals or extensions of the franchise term, or take action pursuant to any other sections of this franchise.

5. PERMITS:

5.1 No construction within a road shall commence until a Right of Way Permit has been submitted to and approved by the County for a site-specific location or installation, including but not limited to, relocations. Before any work is done by the Grantee under this franchise, it shall first file with the Clallam County Engineer (hereinafter the "Engineer") an application for a permit to do such work, accompanied by design drawings in triplicate showing the position, location, and type of facilities sought to be constructed, extended, connected, repaired, maintained, operated or removed, showing the relative positions to existing roads and property lines. Prints shall be submitted on 11 by 17 inch or smaller paper (but not smaller than 8-1/2"x11"). Drawings shall be drawn in a professional manner and to a scale of 1 inch = 50 feet (unless otherwise approved). Drawings shall give an accurate graphic representation of local improvements including, but not limited to, sidewalks, roadways, driveways, property lines, turnouts, parking strips, paths, trails, telephone lines, electric lines, other utilities, conduits, culverts, ditches, drainage facilities, sewer lines, and water lines, as may exist over, under, along, across, and upon the roads sought to be occupied and immediately adjacent thereto. Said locations shall be drawn in such a manner that identification in the field is possible. Drawings shall indicate the nature of the materials being installed (e.g., concrete, PVC, HDPE, asbestos cement, copper, steel, treated wood, etc.). Drawings shall also show the location by cross sections of the utility to be installed by the Grantee. Drawings shall show all critical and sensitive areas within 300 feet of the work area. If Grantee desires to attach a facility to a bridge or other structure of the County, drawings shall include details of the proposed method of attachment and, if requested by the County, shall be supplemented with structural calculations as requested.

5.2 The Engineer shall apply the following considerations and other relevant considerations in reviewing proposed utility routes and in the issuance, conditioning, or denial of a Right of Way Permit:

- A. the capacity of the roads to accommodate the Grantee's proposed facilities;
- B. the capacity of the roads to accommodate additional utility, cable, telecommunications, or other public facilities if the Right of Way Permit is granted;
- C. the damage or disruption, if any, to public or private facilities, improvements, service, travel, or landscaping if the Right of Way Permit is granted;
- D. the impact upon sensitive areas, species, or their habitats;
- E. the public interest in minimizing the cost and disruption of construction within the roads, including but not limited to, coordination with future utility installation or county improvement projects and use of common conduits and structures;
- F. recent construction and/or improvements to the road and/or proposed construction and/or improvements to the road which is proposed for location of facilities;
- G. the availability and County's preference of alternate routes, locations, and/or methods of construction for the proposed facilities, including, but not limited to, boring or directional drilling instead of open cuts;

- H. whether the Grantee has received all requisite licenses, certificates, and authorizations from applicable federal, state, and local agencies with jurisdiction over the activities proposed by the Grantee;
- I. whether the Grantee is in compliance with the terms of this franchise;
- J. if a facility is proposed to be attached to a bridge or other structure, consideration will be given to its affect on the load rating, strength, serviceability, aesthetics, maintenance access and other impacts.

The Engineer will approve and issue the permit, approve subject to conditions, or reject the application. If the application is rejected, the Engineer will provide the Grantee an explanation of the reasons that the application was rejected.

5.3 In the event any of the Grantee's facilities located in, above or under any road, breaks, becomes damaged, or becomes endangered, and such break, damage, or endangerment threatens the property, life, health or safety of any individual, the Grantee shall immediately take such measures as are necessary to repair its facilities, to cure or remedy the dangerous conditions for the protection of property, life, health or safety of individuals without first applying for and obtaining a permit. However, this shall not relieve the Grantee from the requirement of obtaining any permits necessary for this purpose, and the Grantee shall apply for all such permits and mitigation not later than the next business day. Moreover, it will not relieve the Grantee from the requirement of performing such work in a professional manner with appropriate materials and compaction and for traffic control and safety. Mitigation measures shall be performed by the Grantee as specified in the conditions of the permits or other authorizations. Any such emergency repairs may be directed to be removed or replaced by the Engineer and the Grantee shall comply forthwith.

6. COMPLIANCE WITH LAW AND STANDARDS:

6.1 Grantee shall comply with all federal, state, and local laws, rules, standards and regulations applicable to any work, facility or operation of the Grantee during the period of this franchise. All work performed by the Grantee and all of Grantee's facilities within the roads shall comply with the comprehensive plan, zoning code and development regulations of the County. Grantee's facilities may require additional project permits and approvals under County land use codes and development regulations. All work shall be performed by the Grantee in a manner to avoid or minimize impacts on critical areas contained within, adjacent to, or downstream from the County road. Prior to commencing any work in a critical area, the Grantee shall obtain any and all necessary permits and approvals required. The granting of this franchise shall in no way relieve the Grantee from its responsibility for avoiding "take of any threatened or endangered species" as defined by the Endangered Species Act of 1973, 16 US §1531, et seq., as amended, in the performance of any work authorized by this franchise and any right of way permits. All construction, maintenance and repair activities performed within the limits of the County roads shall be performed in strict compliance with the Endangered Species Act.

6.2 For all construction which may fall within or affect county roads, the Grantee shall as a minimum and under the direct control of a qualified responsible individual (1) make a determination whether the work area involves a sensitive area as identified for ESA listed species; and if so (2) determine what Best Management Practices (BMP's) are required to protect said sensitive areas; (3) insure that these BMP's are implemented, effective and maintained for the duration of said work activity; (4) perform all monitoring and reporting subsequently required and (5) remove, if applicable, the BMP's after completion. For all work activities not clearly covered by Clallam County Standard Operating Procedures (SOP's) within areas designated sensitive to ESA listed species, the Grantee shall apply directly to the National Marine Fisheries Service (NMFS) and/or the U.S. Fish and Wildlife Service to obtain all additional required permits and authorizations prior to commencement of work. A responsible individual shall be designated by the Grantee who shall subsequently insure that all work performed within sensitive areas is performed in a manner consistent with all aspects of the Clallam County SOP's and/or the individual permit or authorization issued for said specific project.

6.3 With the application, Grantee shall file proof of all environmental approvals and permits required accompanied by the procedures to be utilized in accomplishing its work. In addition to the terms and conditions of this franchise, all work shall be performed in accordance with the current County standards, the approved plans and specifications, and the terms and conditions of the Right of Way Permit and other permits and approvals necessary to accomplish the work or otherwise applicable. The Grantee shall remain solely responsible for compliance with all applicable laws, regulations, codes, and standard plans and specifications in the design and construction of Grantee's facilities.

6.4 The Grantee shall construct its facilities at its own risk. The Engineer may inspect said work to determine whether it materially or adversely impacts the county road. Approval by the County of the Grantee's work shall not be construed as an approval of the nature, extent, quality, or workmanship of the work and shall be construed to mean nothing other than that the Grantee's work is not found to materially adversely impact the physical characteristics of the county road. The location of all the Grantee's facilities, their depth below or height above the surface of the ground or grade of any road, and their lateral location in relation to the road centerline shall be in compliance with all county, state, and federal permits, codes, regulations, and standards, including, but not limited to, WAC 136-40. All underground facilities except electrical power lines and copper telephone lines which can be otherwise traced shall be installed with a locate wire of 10-gauge stranded copper wire with 600 volt insulation; Essex, or approved equal. Where the locate wire extends to the surface for tapping it shall be adequately protected. Where conflicts occur between the aforesaid codes, regulations, and standards and the terms of this franchise, the stricter of the two shall apply. The Grantee shall at all times insure that its construction, extension, connection, repair, maintenance, operation, and removal of its facilities does not diminish the safety of the public using, or in proximity to, county roads and their clear zones.

6.5 During any period of construction all work performed by the Grantee or its contractors shall be accomplished in a safe and workmanlike manner, so as to minimize interference with the free passage of traffic and the free use of adjoining property, whether public or private. The Grantee shall at all times post and maintain proper signs, cones, and barricades and comply with all applicable safety regulations during such period of construction as required by county, state or federal codes, regulations, standards or laws, including but not limited to, RCW 39.04.180 for the construction of trench safety systems and the Manual on Uniform Traffic Control Devices (MUTCD).

7. RECORDS:

7.1. The Grantee shall maintain adequate records to document obligations performed under this franchise. The County shall have the right to review the Grantee's records, at reasonable times, with regard to the subject matter of this franchise, upon reasonable notice. The right to review records shall last for six (6) years from the termination date of this franchise, including any extensions or renewals. In addition to the maps and records of facility location under this Section, the Grantee shall provide the County, upon the County's request, with copies of records of construction inspections, or regulatory compliance for all facilities subject to this franchise as deemed necessary by the County to manage the county roads, or to protect the public health, safety, and welfare. Nothing in this Section shall be construed to require Grantee to violate state or federal law concerning subscriber privacy, nor shall this Section be construed to require Grantee to disclose proprietary or confidential information without adequate safeguards for its confidential or proprietary nature subject to RCW 42.17 et seq as now or hereafter amended.

7.2. Grantee shall at all times keep at its principal place of business full and complete plans, maps, and records showing the as-built location and details of all franchise facilities located over, under, along, across, or upon the roads. Grantee shall make copies of the maps, plans, and records available, free of charge, to County at any time upon request. Such maps and plans shall be drawn in the same manner as design drawings as set forth in Section 5 of this franchise, showing the location of all franchise facilities installed over, under, along, across, or upon the roads within the limits of Clallam County. One complete set of said maps, plans, and records shall be provided on reproduction quality Mylar or, alternatively, may be provided on paper, with the number of copies as requested by the County. Maps, plans, and records may be provided in electronic form, instead of Mylar or paper, if approved by the County.

7.3. In addition to the above described plans, maps, and records the Grantee shall maintain a paper or Mylar map at a scale of 1 inch = 2000 feet (or other scale approved by the County) showing all county roads within the bounds of this franchise and showing where Grantee's facilities are located in respect to said roads. An up to date copy of this map shall be provided, free of charge, to the County upon completion of construction and after any alterations.

8. RESTORATIONS AND MAINTENANCE:

8.1 The Grantee shall leave all roads in as good and safe condition in all respects as they were before the commencement of construction by the Grantee, its officers, agents, contractors, or employees, or in such condition as meets with the approval of the Engineer. The Grantee shall comply with all restoration conditions of applicable permits or approvals.

The Engineer shall have final approval to determine that the condition of roads after restoration meets these requirements. The Grantee agrees to promptly complete all restoration work and to promptly repair all damage caused by the work to the roads and to other affected areas at its sole cost and expense.

8.2 The Grantee shall maintain its facilities in accordance with accepted standards of practice. The grantee shall trim brush, grass, trees, and all other vegetative matter from within the county road within a 10-foot radius of all aboveground appurtenances so as to aid in visual location of the utilities by county personnel. Trimming shall be performed as necessary to keep vegetative growth shorter than the appurtenance. Herbicides and other chemical agents shall not be used. The cost and the repair of damage caused by the County, its officers, agents, and employees to a facility that is not accordingly made readily visible shall be the responsibility of the Grantee.

8.3 In case of any damage to said roads or to the property of third parties, resulting from any work performed or failed to be performed by the Grantee, the Grantee agrees to immediately repair said damage at its own cost and expense to the satisfaction of the Engineer. Clallam County may at any time, do, order, and have done any and all work considered necessary to restore to a good and safe condition any such roads left by the Grantee, its officers, agents, contractors, or employees in a condition different from that which existed prior to the work and the Grantee, upon demand, shall pay to the County all costs of such construction or repair and of doing such work; provided, that Clallam County shall have first made written demand upon the Grantee to perform the work necessary to return the road to the condition which they existed prior to the work by the Grantee, and the Grantee shall have failed, for a period of forty-eight (48) hours after receipt of such written demand, to commence the work necessary to return the road to its pre-existing condition. Provided further, that in the event it is reasonably determined by Clallam County that an emergency exists, which requires immediate restoration, then the County may perform such work and the Grantee shall pay all reasonable costs thereof. In addition, the Grantee shall reimburse the County for any and all documented costs the County reasonably incurs in response to an emergency involving the Grantees' facilities.

8.4. The Grantee shall promptly reimburse the County, upon submittal by the County of an itemized billing, for the Grantee's proportionate share of all actual, identified costs and expenses incurred by the County in repairing or altering any County or Grantee facility, if at the Grantee's request or as the result of the presence of the Grantee's facilities in the right of way. Such costs and expenses shall include, but not be limited to, the Grantee's proportionate share of the costs of County personnel assigned to oversee or engage in any work in the road

or outside the road if damage to a critical resource or site requires repair as a result of the Grantee's activities or presence in the road. Such costs and expenses shall also include the Grantee's proportionate share of County time spent reviewing construction plans in order to either accomplish the relocation of the Grantee's facilities or the routing or rerouting of any utilities so as not to interfere with the Grantee's facilities. Any and all costs will be billed on an actual cost basis, including overhead and indirect costs. The County will provide the Grantee with the County's itemization of costs for information purposes.

9. RELOCATION OF FACILITIES

9.1 The Grantee agrees and covenants at its sole cost and expense, to protect, support, temporarily disconnect, relocate, or remove from any road any of its facilities when so required by the County by reason of traffic conditions, public safety, acquisition of new rights-of-way and the establishment and improvement thereof, widening and improvement of existing roads, right of way vacations, change or establishment of road grade, or the construction of any public improvement or structure by any governmental agency acting in a governmental capacity; PROVIDED, that upon approval by the Engineer, Grantee shall generally have the privilege to temporarily bypass, in the authorized portion of the same road or any facilities required to be temporarily disconnected or removed. This section applies to all of Grantee's facilities wheresoever situated within the road, regardless of whether the Grantee's facilities were previously located therein through an easement or other property interest prior to the property becoming County road.

9.2 Upon the request of the County and in order to facilitate County road improvements, the Grantee agrees at its sole cost and expense, to locate, and, if reasonably determined necessary by the County, to excavate and expose portions of its facilities for inspection so that the location of the facilities may be taken into account in the improvement design; PROVIDED, that Grantee shall not be required to excavate and expose its facilities for inspection if the Grantee's as-built plans and maps of its facilities submitted pursuant to Section 7 of this franchise are reasonably determined by the Engineer to be adequate for purposes of evaluating improvements. The decision to relocate Grantee's facilities in order to accommodate road improvements shall be made by the Engineer upon review of the location and construction of the Grantee's facilities. Where additional costs accrue to the County during maintenance, operation, or improvement of public facilities related to avoidance of damage or accommodation of the Grantee's facilities, Grantee agrees to pay the County the full amount of additional costs, if any, as identified by the County.

9.3 If, at any time, County, deems it advisable to improve any of its roads by, including, but not limited to, grading, regrading, paving, altering, repairing, realigning, widening, or draining, the Grantee, upon advance notice by County, shall, at its own expense, except as detailed below, promptly raise, lower, or move its facilities to allow County to complete its road improvements and to conform to such improved roads and the County shall in no way be held liable for any damages to Grantee that may occur by reason of the County's improvements or by the exercise of any rights so reserved in this Section or grant, except as a

result of negligence or fault on the part of the County. Said advance notice shall indicate the date by which the Grantee is required to raise, lower, or move its facilities and said notice will be given to the Grantee in advance of said date by a length of time consistent with the urgency of the situation (less time for emergencies and more time for scheduled projects). County will strive for as much advance notice as is practical so as to allow time for designing, bidding, and completing the work.

9.4 Any condition or requirement imposed by the County upon any person or entity (including, without limitation, any condition or requirement imposed pursuant to any contract or in conjunction with approvals for permits for zoning, land use, construction or development) which reasonably necessitates the relocation of the Grantee's facilities within the franchise area shall be required relocation for purposes of subsections 9.1, 9.2 and 9.3 above.

9.5 The Grantee may, after receipt of written notice requesting a relocation of its facilities, submit to the County written alternatives to such relocation. The County may evaluate such alternatives and advise the Grantee in writing if one or more of the alternatives are suitable to accommodate the work, which would otherwise necessitate relocation of the facilities. If requested by the County, the Grantee shall submit additional information to assist the County in making such evaluation. In the event the County ultimately determines that there is no other reasonable or feasible alternative, the Grantee shall relocate its facilities as otherwise provided in this Section.

9.6 The provisions of this Section shall in no manner preclude or restrict the Grantee from making any arrangements it may deem appropriate when responding to a request for relocation of its facilities by any person or entity other than the County, where the facilities to be constructed by said person or entity are not or will not become County-owned, operated or maintained facilities, provided that such arrangements do not unduly delay any County construction projects and are otherwise in full conformance with this franchise.

9.7 Grantee shall be responsible for timely relocation of its facilities and coordination of relocation with the County or the Contractor for the project. The Grantee shall be fully responsible for the costs of any delays to County projects resulting from relocations of the Grantee's facilities. In the event the Grantee fails or refuses to relocate its facilities in a timely manner, the County may do, order, or have done, any and all work required to perform the facilities relocation and the Grantee, upon demand, shall pay to the County all costs of such work including all damages and additional costs incurred by the County as a result of Grantee's failure or refusal. Grantee shall hold harmless, indemnify and defend the County against all claims, lawsuits, or damages caused in whole or in part by location or relocation of Grantee's facilities, as more fully set forth in Section 11 of this franchise ordinance. Failure of the Grantee to raise, lower or move its facilities by the date set forth in the written notice shall entitle Clallam County to liquidated damages in the amount of Two Hundred and Fifty

Dollars (\$250.00) per day (to be adjusted for inflation per Section 19, INFLATION ADJUSTMENTS) for each day of non-compliance.

10. UNDERGROUNDING OF FACILITIES.

10.1 In any area of the County in which there are no aerial facilities, in any area in which telephone, electric power wires or other cables have been placed underground, or in any area where the Board of Commissioners requires conversion of aerial to underground facilities, the Grantee will not be permitted to erect poles or to run or suspend wires, cables or other facilities thereon, but shall lay such wires, cables or other facilities underground in the manner required by the County at no cost to the County. The Grantee acknowledges and agrees that, even if the County does not require the undergrounding of its facilities at the time of right of way use permit application, the County may, at any time in the future, require the conversion of the Grantee's aerial facilities to underground installation at the Grantee's expense. Whenever the County may require the undergrounding of the aerial facilities in any area of the County, the Grantee shall underground its aerial facilities in the manner specified by the County.

11. HOLD HARMLESS:

11.1 The Grantee shall assume the risk of, be liable for, and pay all damage, loss, cost and expense of any party arising out of the Grantee's use of the road, to the extent of their negligent actions, errors, omissions, or breach of any obligations. The Grantee hereby releases, covenants not to bring suit, and agrees to indemnify, defend and hold harmless the County, its elected and appointed officials, officers, employees, agents and representatives from any and all claims, including claims by the Grantee's own employees for which the Grantee might otherwise be immune under Title 51 RCW, for injury or death of any person or damage to property caused by or arising out of the negligent acts or omissions of the Grantee, its agents, servants, officers or employees in the performance of this franchise, and any rights granted hereunder. This indemnification provision constitutes the Grantee's waiver of immunity under Title 51 RCW and has been mutually negotiated by the parties.

11.2 The Grantee shall hold harmless from, defend, and indemnify the County, its elected and appointed officials, officers, employees, and volunteers, against all claims by reason of damage to any property or business or environmentally critical species or habitat, and/or any death, injury or disability to or of any person or party of any nature arising out of or suffered, directly or indirectly, in whole or in part, from the actions, errors, omissions, or breach of any common law, statutory, regulatory or contractual obligations in connection with the activities of the Grantee, its sub-contractors, assigns, agents, contractors, or employees, under this franchise, any permit, or in connection with the use of the right of way; PROVIDED, that nothing herein shall require the Grantee to hold harmless from, defend, and indemnify the County, its elected and appointed officials, officers, employees, and volunteers, against claims based solely upon the negligence of the County, its elected and appointed officials, officers, employees, and volunteers; and PROVIDED FURTHER, that if the claims are caused by or

result from the concurrent negligence of (a) the County, its elected and appointed officials, officers, employees, and volunteers and (b) the Grantee, its sub-contractors, assigns, agents, contractors, or employees, and involve those actions covered by RCW 4.24.115, this indemnity provision, with respect to liability for damages arising out of bodily injury to persons or damage to property based upon such concurrent negligence, shall be valid and enforceable only to the extent of the Grantee's negligence or the negligence of their sub-contractors, assigns, agents, contractors, or employees, except as limited below. This indemnification provision constitutes the Grantee's waiver of immunity under Title 51 RCW and has been mutually negotiated by the parties.

11.3 The Grantee further agrees to process and defend at its own expense all claims arising in whole or in part from the actions, errors, omissions, or breach of any obligations of the Grantee, its sub-contractors, assigns, agents, contractors, or employees, arising out of or in connection with any activities related to this franchise or the Grantee's use of the road. The Grantee's duty to assume the defense and to pay all expenses thereof shall apply to all claims where any duty to provide indemnification in whole or in part potentially applies, whether or not the injuries or damages are ultimately found to be due to the negligence of the Grantee arising out of the franchise or any use of the road.

11.4 In the event that the Grantee refuses the tender of defense in any claim, said tender having been made pursuant to the indemnification provision contained herein, and said refusal is subsequently determined by the Superior Court or other court, tribunal, or agency having competent jurisdiction, to have been a wrongful refusal on the part of the Grantee, then the Grantee shall pay all of the County's costs for defense of the action, including all expert witness fees, costs, and reasonable attorney's fees, including costs and fees incurred in recovering under this indemnification provision.

11.5 The County shall notify Grantee, in writing, as soon as practicable after the presentation of any claims made or accrued against the County on account of any fault on the part of Grantee. Failure by the County to notify Grantee properly in accordance with the foregoing of any such claims against the County shall not release Grantee from its obligation to defend or indemnify the County unless Grantee can establish that it has been materially prejudiced by such failure. Inspection, approval or acceptance by the County of any work performed by the Grantee shall not be grounds for avoidance by the Grantee of any of its obligations under this Section.

11.6 The Grantee agrees that it will not cause nor permit in any manner, including negligent or intentional acts or omissions, release of any hazardous substance, waste, or pollutant or contaminant into or upon any county road contrary to any state or federal law or local regulation with respect thereto. Grantee shall notify the Washington State Department of Ecology, and other necessary agencies, and County in writing immediately upon any such release. Grantee shall indemnify, hold harmless, defend and covenant not to sue the County, from and against any and all claims, actions or suits in equity or at law and any judgements, damages, awards, penalties or fines, including reasonable attorneys' fees and costs incurred in

the defense thereof, arising out of the release or spill of any such hazardous materials, dangerous waste, or pollutant or contaminant within the County right of way or on private property. Grantee shall be responsible for completely cleaning up and remediating, as required by any government agency, any and all hazardous substance, waste or pollutants or contaminants released or spilled into or upon the County road or private property. The County shall be entitled to indemnification by Grantee for all costs incurred by it as the result of any release or spill of such materials by Grantee, its agents, officials, officers, and employees.

Upon any release or spill of any such materials mentioned herein, the County may give notice of intent to immediately terminate this franchise and, where it deems necessary to protect the public health, safety and welfare, the County may immediately take whatever steps it deems necessary and advisable to contain, clean up or remediate the release or spill. The County shall be entitled to repayment from the Grantee of any costs or expenses incurred in responding to such a release or spill.

12. CONCURRENT POWERS:

The construction of the Grantee's facilities shall not preclude Clallam County, its officers, agents, contractors, or employees from blasting, grading, or doing other necessary road work contiguous to the Grantee's facilities, provided that the Grantee shall have advance notice of said blasting, grading or other necessary road work in order that the Grantee may protect its facilities.

13. DANGEROUS CONDITIONS, AUTHORITY FOR COUNTY TO ABATE

13.1 Whenever the Grantee's construction, relocation, or abandonment of facilities authorized by this franchise has caused or contributed to a condition that substantially impairs, in the opinion of the Engineer, the lateral support of the adjoining road, or endangers the public, an adjoining public place, an environmentally critical area, road facilities or County property, the Engineer may direct the Grantee, at the Grantee's own expense, to take actions to protect the public, adjacent public places, County property or road facilities, and such action may include compliance within a prescribed time.

13.2 In the event that the Grantee fails or refuses to promptly take the actions directed by the County, or fails to fully comply with such directions, or if emergency conditions exist which require immediate action, the County may enter upon the property and take such actions as are necessary to protect the above interests, and the Grantee shall be liable to the County for the costs thereof.

14. FRANCHISE NOT EXCLUSIVE:

This grant or privilege shall not be deemed or held to be an exclusive franchise. It shall in no manner prohibit Clallam County from granting other franchises of a like nature or of an un-

like nature for public or private purposes over, under, along, upon, or across any of the county roads and shall in no way prevent or prohibit Clallam County from using any of said roads or affect its jurisdiction over them or any part of them, with full power to make all necessary changes, relocation, repairs, maintenance, etc., as it deems fit.

15. ASSIGNMENT:

Except for assignment or hypothecation for security purposes, Grantee shall not have the right to assign the franchise or otherwise transfer it in any manner whatsoever, or sell, lease, license, or permit others to use or transfer in any manner whatsoever any interest in all or any part of its facilities that are installed or operated hereunder, except on prior written approval of the Board of Clallam County Commissioners, which consent shall not be unreasonably withheld.

16. FORFEITURE:

The franchise may be forfeited, at the option of the County, upon failure or violation by Grantee to observe the material terms and conditions set forth herein. Forfeiture may be exercised only following written notice to Grantee of failure to observe the terms and conditions hereof, detailing the breach of this franchise with specificity, followed by Grantee's failure or refusal to eliminate or correct such failure or to commence correction of such within the amount of time specified by the County. In the event of any failure or violation, the County may bring suit in the manner provided by law for the forfeiture of the franchise without the necessity of resorting to procedures in quo warranto, and the exercise of such remedy of forfeiture shall not preclude exercise of any other right or remedy given to the County by law, whether exercised concurrently or subsequently.

17. ABANDONMENT OR REMOVAL:

17.1 No facilities located within the road by the Grantee or Grantee's agents may be abandoned in place without a written plan and the express agreement and written consent of the County. Any plan for removal must be first approved by the County, and all necessary permits must be obtained prior to such work and all roads occupied by Grantee's facilities must be restored to the condition specified by the County.

17.2 Except as otherwise provided herein, within one hundred eighty (180) days after the use of any facilities has been permanently discontinued or this franchise expires or is otherwise terminated, Grantee shall forthwith remove its facilities from the roads and shall restore roads to that condition specified by the Engineer; provided that such property shall not be removed if the Engineer shall reasonably determine that such removal will cause unreasonable damage to such roads or the environment. The Engineer may, at his discretion, permit or require facilities to be abandoned in place. If utilities are to be abandoned in place the Grantee shall at Grantees cost:

- 1) provide the Engineer with a detailed description of the facilities being abandoned (type of material, condition, size, extent, etc.);
- 2) provide a detailed as-built map of the utility to be abandoned showing the precise location with measurements to reliable landmarks;
- 3) purge its facilities of any hazardous product or other additive substances and render them safe in accordance with applicable law or standards deemed appropriate by the County;
- 4) submit to the Engineer an instrument transferring to the County ownership of such facilities.

Said instrument shall certify that the utilities being abandoned are disconnected from service and are inactive. Facilities may not be abandoned in place if the Engineer considers them hazardous, problematic, or otherwise undesirable.

Abandoning facilities in place shall not relieve the Grantee of the obligation and costs to remove or alter such facilities in the event the County later determines and requests Grantee to remove or alter such facilities as is necessary for the installation, operation, upgrade, or maintenance of any County road or utilities or facilities, including, but not limited to, drainage facilities, or for the health and safety of the public, in which cases the Grantee shall perform such work in a timely manner at no cost to the County.

Grantee shall be responsible for any environmental review required for the abandonment or removal of any facility and payment of any costs of such environmental review.

In the event Grantee does not perform above work within a reasonable time following notice from the County, the County may do, order, or have done, any and all work on such abandoned facilities, and the Grantee, upon demand, shall pay to the County all costs of such work.

18. MONUMENT REFERENCE:

Before any work is performed under this franchise, the Grantee shall have referenced all monuments and markers of every nature relating to subdivision plats, roadways, and all other surveys that might be affected by such work. The reference points shall be so located that they will not be disturbed during the Grantee's operations under this franchise nor by other reasonable maintenance or construction activities. All such monuments or markers disturbed during the Grantee's operation shall be replaced as expeditiously as conditions permit. The cost of replacement of monuments shall be borne by the Grantee. Said reference and replacement of monuments shall be performed by a surveyor licensed by the State of Washington.

19. INFLATION ADJUSTMENTS:

The dollar amounts fixed under this franchise in Section No. 9, Relocation of Facilities, and Section No. 30, Compensation shall be increased annually on the anniversary date of this

franchise by Three and One-Half percent (3.5%) of the then current amount. The inflation adjustment for Section No. 21, Insurance and Section No. 23, Surety Bond shall be reviewed and modified at each five-year anniversary (see Section No. 4, Term).

20. LIMITATION OF COUNTY LIABILITY.

Administration of this franchise shall not be construed to create the basis for any liability on the part of the County, its elected and appointed officials, officers, employees, and agents, for any injury or damage from the failure of the Grantee to comply with the provisions of this franchise; by reason of any plan, schedule or specification review, inspection, notice and order, permission, or other approval or consent by the County; for any action or inaction thereof authorized or done in connection with the implementation or enforcement of this franchise by the County; or for the accuracy of plans submitted to the County.

21. INSURANCE.

21.1 The Grantee shall procure and maintain for the duration of the franchise, insurance against claims for injuries to persons or damages to property which may arise from or in connection with the exercise of the rights, privileges and authority granted by this franchise and Right of Way Permits to the Grantee, its agents, representatives or employees. The Grantee shall provide a certificate of insurance to the County for its inspection prior to performance of any permitted work within the County rights of way, and such insurance shall include:

- A. Automobile Liability insurance with limits no less than \$1,000,000 Combined Single Limit per occurrence for bodily injury and property damage; and
- B. Commercial General Liability insurance, written on an occurrence basis with limits no less than \$1,000,000 combined single limit per occurrence and \$2,000,000 aggregate for personal injury, bodily injury including death, and property damage.

21.2 The insurance policies obtained by the Grantee shall name the County, its elected and appointed officers, officials, employees, agents, and volunteers as additional insureds with regard to activities performed by or on behalf of the Grantee. The coverage shall contain no special limitations on the scope of protection afforded to the County, its elected and appointed officers, officials, employees, agents, or volunteers. In addition, the insurance policy shall contain a clause stating that coverage 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. The Grantee's insurance shall be primary insurance as respects the County, its elected and appointed officers, officials, employees, agents and volunteers. Any insurance maintained by the County, its elected and appointed officials, officers, employees, agents or volunteers shall be excess of the Grantee's insurance and shall not contribute with it. The insurance policy or policies required by this clause shall be endorsed to state that coverage shall not be suspended, voided, canceled by either party, reduced in coverage or in limits except after thirty (30) days prior written notice by certified mail, return receipt requested, has been given to the County.

Any failure to comply with the reporting provisions of the policies required herein shall not affect coverage provided to the County, its elected and appointed officials, officers, employees, agents or volunteers. If Grantee's insurance policy is suspended, voided, cancelled, or otherwise becomes ineffective or reduced or limited, the Grantee shall immediately obtain replacement insurance so as to be in conformance with these franchise requirements.

21.3 The complete policy with all endorsements shall be provided to the County at any time upon request. Any deductibles or self-insured retentions must be declared to and approved by the County. Payment of deductible or self-insured retention shall be the sole responsibility of the Grantee. Proof of all insurance shall be in a form acceptable to the County. The Grantee's insurance provider shall be authorized to do business in Washington. If the Grantee is self-insured, Grantee shall provide such information as required by the County sufficient to demonstrate its ability to meet the requirements of this Section; the determination as to its sufficiency is within the sole judgment of the County. All insurance documentation shall be submitted to and reviewed by the County prior to final execution of the franchise. The County may from time to time review the amount of insurance and require additional amounts based upon Grantee's facilities and the Grantee's performance of the covenants, terms, conditions and obligations under this franchise and any right of way use permits or approvals.

21.4 Failure to provide a certificate of insurance to the County or to maintain insurance as required herein shall constitute failure of consideration and this franchise shall be void and a nullity provided that the County shall have first given written notice to Grantee of its failure to provide certificate of insurance, and Grantee shall not, within ten working days of the receipt of such notice, have corrected the deficiency.

22. VACATION.

Whenever a county road or portion thereof is vacated the County may include in the resolution authorizing the vacation a provision that the County retain an easement in respect to the vacated land for the construction of public utilities, and services which at the time the resolution is adopted are authorized or are physically located on a portion of the land being vacated. The County shall not convey such easement to any public utility or other entity or person but may convey a permit or franchise to a public utility. The term "public utility" as used in this section shall include utilities owned, operated, or maintained by every gas company, electrical company, telephone company, telegraph company, communication company, and water company whether or not such company is privately owned or owned by a government entity.

Where the County determines to abandon or vacate any right of way or other permitted area, it is the Grantee's responsibility to resolve any question of Grantee's continued occupancy or use of such areas directly with the owner of such areas, and the County has no obligation with respect thereto.

23. SURETY BOND:

Before undertaking any construction authorized by this franchise and the separate Right of Way Permits under Section 5, Permits, the Grantee shall, prior to performance of any permitted work within the County roads, furnish a bond executed by the Grantee and a corporate surety authorized to do a surety business in the State of Washington, in the amount of Five Thousand Dollars(\$5,000.00) to ensure performance of the Grantee's obligations under this franchise generally and under any specific Right of Way Permits or approvals. The bond shall remain in effect for the life of the franchise and shall be retained by the County. The bond shall be conditioned so that the Grantee shall observe all the covenants, terms and conditions and faithfully perform all of the obligations of this franchise and any right-of-use permits or approvals, and to correct or replace any defective work or materials discovered in the replacement of the County's roads within a period of two (2) years from the date of the replacement and acceptance of such repaired roads or property by the County. The County may from time to time review the amount of surety and require an additional amount based upon Grantee's facilities and the Grantee's performance of the covenants, terms, conditions and obligations under this franchise and any Right of Way Permits or approvals. The bond shall be provided to Clallam County before the franchise may enter into effect.

The Grantee or any entity actions on behalf of the Grantee shall be licensed and bonded in the State of Washington prior to performing work in the road. The bond shall be for an amount not less than 150% of the value of the work undertaken. Said license shall be in addition to the above mentioned surety bond.

24. SEVERABILITY:

If any article, section, sentence, clause, or phrase of this franchise or its application to any person or entity is for any reason held illegal, invalid, or unconstitutional, such invalidity or unconstitutionality shall not affect the validity or constitutionality of any other article, section, sentence, clause or phrase of this franchise nor its application to any other person or entity. The invalidity of any portion of this franchise shall not abate, reduce, or otherwise affect any consideration or other obligation required of Grantee. All of the provisions, conditions and requirements of Sections 5, Permits; 7, Records; 8, Restorations and Maintenance; 9, Relocation of Facilities; 10, Undergrounding of Facilities; 11, Hold Harmless; 13, Dangerous Conditions, Authority for County to Abate; 17, Abandonment or Removal; and 25, Governing Law and Stipulation of Venue, of this franchise shall be in addition to any and all other obligations and liabilities the Grantee may have to the County at common law, by statute, or by contract, and shall survive the expiration, revocation, termination, or forfeiture of the County's franchise to the Grantee and any renewals or extensions thereof. All of the provisions, conditions, regulations and requirements contained in this franchise shall further be binding upon the successors and assigns of the Grantee and all privileges, as well as all obligations and liabilities of the Grantee shall inure to its successors and assigns equally as if they were specifically mentioned wherever the Grantee is named herein.

25. GOVERNING LAW AND STIPULATION OF VENUE.

This franchise and use of roads shall be governed by the laws of the State of Washington, unless preempted by federal law. The Grantee agrees to be bound by the laws of the State of Washington and subjected to the jurisdiction of the Courts of the State of Washington. Any action relating to this franchise must be brought in the Superior Court of Washington for Clallam County, or in the case of a federal action, the United States District Court for the Western District of Washington at Seattle, unless an administrative agency has primary jurisdiction.

26. ADDITIONAL POWERS:

This franchise shall be subject to the power of eminent domain and the right of the Board of Clallam County Commissioners or the people acting for themselves through the initiative or referendum to repeal, amend, or modify the franchise in the interests of the public. In any proceeding under eminent domain, the franchise itself shall have no value.

27. REMEDIES TO ENFORCE COMPLIANCE.

The County may elect, in lieu of forfeiture and without any prejudice to any of its other legal rights and remedies, to obtain an order from the Superior Court or other court, tribunal, or agency having competent jurisdiction compelling the Grantee to comply with the provisions of this franchise and to recover damages and costs incurred by the County by reason of the Grantee's failure to comply. In the event that Clallam County seeks judicial enforcement of any term of this agreement, the Grantee shall reimburse Clallam County for all disbursements and costs incurred, including, if Clallam County prevails, reasonable attorney fees and expert witness fees. In addition to any other remedy provided herein, the County reserves the right to pursue any remedy to compel or force the Grantee and/or its successors and assigns to comply with the terms hereof, and the pursuit of any right or remedy by the County shall not prevent the County from thereafter declaring a forfeiture for breach of the conditions herein.

28. NONWAIVER OF RIGHTS OR REMEDIES.

Failure of the County to exercise any rights or remedies under this franchise shall not be a waiver of any obligation by the County and shall not prevent the County from pursuing that right at any future time.

29. COUNTY ORDINANCES AND REGULATIONS – RESERVATION OF POLICE POWER.

Nothing in this franchise shall be deemed to restrict the County's ability to adopt and enforce all necessary and appropriate ordinances regulating the performance of the conditions of this franchise, including, but not limited to, any valid ordinance made in the exercise of its police

powers in the interest of public safety and for the welfare of the public. The County shall have the authority at all times to control by appropriate regulations, including design standards, and utility accommodation policies, the location, elevation, manner of construction, and maintenance of any facilities of the Grantee within the road or affecting the road, and the Grantee shall promptly conform with all such regulations, unless compliance would cause the Grantee to violate other requirements of law. In the event of a conflict between the regulatory provisions of this franchise and any other ordinance(s) enacted under the County's police power authority, the County will determine which shall take precedence.

30 COMPENSATION:

30.1 Advance Deposit. In consideration for the granting of this franchise, Grantee shall pay Clallam County for the actual costs including overhead and indirect costs incurred by the County in the processing and administration of this franchise. An advance deposit of \$1,000.00 shall be paid with submittal of the franchise application. Said \$1,000.00 deposit will be placed in a non-interest bearing Treasurer's suspense fund to be dispersed to County or partially refunded to Grantee after the Grantee's facilities are installed and approved by the County. Payment to cover costs over \$1,000.00 shall be paid by Grantee within 30 days of billing by Clallam County. If \$1,000.00 has not been expended, the difference between the actual costs and \$1,000.00 shall be refunded to Grantee.

30.2 Annual Fee. As additional consideration for the granting of this franchise the Grantee shall pay Clallam County the sum of One Hundred Fifty Dollars(\$150.00) per year (to be adjusted for inflation) each and every year that this franchise is in effect. The first Annual Fee shall be paid within 30 days after the franchise is passed and adopted by the Board of Clallam County Commissioners and annually within 30 days of each anniversary date thereof. Said dollar amount shall increase in accordance with Section 19, INFLATION ADJUSTMENTS.

30.4 Revisit Fee. In the event the County finds it necessary to revisit this franchise and/or the ordinance granting it for any reason and the County's costs to revisit exceed Two Hundred and Fifty Dollars (\$250.00) the Grantee agrees to reimburse the County for the County's costs. Such revisits may be due to considerations of Section No. 4, Term, such as renewals, amendments, or changes to conform to new laws, regulations, or practices, or for other reasons. In the event the Grantee initiates an action that necessitates a revisit of this franchise and/or the ordinance granting it, such as for reassignment to new owners, for expansion of services, or for other reasons, the Grantee shall reimburse the County for the County's costs. An advance deposit may be required by the County prior to considering changes.

31 CONTACTS/NOTICES: Any notices required to be given under this franchise shall be given by certified mail, return receipt requested, to the designated contact and shall be deemed complete on the third day following mailing. The following identified persons shall be the designated contact persons for administration of this franchise:

in Section 21, Insurance and Section 23, Performance Bond of this franchise; and (3) the Grantee pays all applicable fees set forth in Section 30, Compensation above. However, should Grantee fail to satisfy all conditions within one year of the date of adoption of this franchise, the rights and privileges herein granted, shall absolutely cease and terminate, unless the time period is extended by ordinance duly passed for that purpose.

34. APPLICATION: The undersigned hereby applies for this franchise, subject to all the terms, conditions, stipulations, and obligations contained herein.

COMPANY NAME	<u>YAM Sunshine LLC</u>	
BY (SIGNATURE)	<u>Renae White</u>	<u>8-11-06</u>
(PRINT)	<u>Renae White</u>	(Date)
TITLE	<u>Managing Member</u>	

Seal or Stamp:



For a Company

State of Washington
County of Clallam

I certify that I know or have satisfactory evidence that

Rena White is the person who appeared before me, and said person acknowledged that (he/she) signed this instrument, on oath stated that (he/she) was authorized to execute the instrument and acknowledged it as the managing member of (type authority, e.g. officer, president, trustee, etc.) YAM Sunshine LLC to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

Dated: 8-11-06.

Signature: [Signature]

Title: manager.

Residing at: Seattle, WA

My appointment ends: Feb 10th, 2008

Seal or Stamp:

ADOPTED this third day of October

BOARD OF CLALLAM COUNTY COMMISSIONERS

[Signature]

Howard V. Doherty, Jr., Chair

[Signature]

Stephen P. Tharinger

[Signature]

Michael C. Chapman

ATTEST

Trish Holden
Trish Holden, CMC
Clerk of the Board

Approved as to Form:

[Signature]

Deputy Prosecuting Attorney
Clallam County