

## ORDINANCE NO. 1172

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### AN ORDINANCE GRANTING AN ELECTRIC UTILITY FRANCHISE AND GENERAL UTILITY EASEMENT TO PACIFICORP

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WHEREAS, PacifiCorp d.b.a. Pacific Power, is a regulated public utility that provides electric power and energy to the citizens of the City of Prineville (the "City") and other surrounding areas;

WHEREAS, providing electrical power and energy requires the installation, operation and maintenance of power poles and other related facilities to be located within the public ways of the City;

WHEREAS, the City desires to set forth the terms and conditions by which PacifiCorp shall use the public ways of the City;

NOW, THEREFORE, the people of the City of Prineville ordain as follows:

**SECTION 1. Grant of Franchise and General Utility Easement.** The City hereby grants to PacifiCorp the right, privilege and authority to construct, maintain, operate, upgrade, and relocate its electrical distribution and transmission lines and related appurtenances, including underground conduits and structures, poles, towers, wires, guy anchors, vaults, transformers, transmission lines, and communication lines (collectively referred to herein as "Electric Facilities") in, under, along, over and across the present and future streets and alleys (collectively referred to herein as "Public Ways") within the City, for the purpose of supplying and transmitting electric power and energy to the inhabitants of the City and persons and corporations beyond the limits thereof.

**SECTION 2. Term.** The term of this Franchise and General Utility Easement is for five years (5) years commencing on June 10, 2010, provided it is accepted by PacifiCorp on or before that date.

**SECTION 3. Acceptance by PacifiCorp.** Prior to June 1, 2010, PacifiCorp shall file an unqualified written acceptance thereof, with the City Recorder otherwise the ordinance and the rights granted herein shall be null and void.

**SECTION 4. Non-Exclusive Franchise.** The right to use and occupy the Public Ways of the City shall be nonexclusive and the City reserves the right to use the Public Ways for itself or any other entity that provides other utilities or services to City residences; provided, however, that such use shall not unreasonably interfere with PacifiCorp's Electric Facilities or PacifiCorp's rights granted herein.

**SECTION 5. City Regulatory Authority.** In addition to the provision herein contained, the City reserves the right to adopt such additional ordinances and regulations as may be deemed

necessary in the exercise of its police power for the protection of the health, safety and welfare of its citizens and their properties or exercise any other rights, powers, or duties required or authorized, under the Constitution of the State of Oregon, the laws of Oregon or City Ordinances.

## **SECTION 6. Indemnification and Insurance.**

6.1 **Indemnification.** The City shall in no way be liable or responsible for any loss or damage to property or any injury to, or death, of any person that may occur in the construction, operation or maintenance by PacifiCorp of its Electric Facilities. PacifiCorp shall indemnify, defend and hold the City harmless from and against claims, demands, liens and all liability or damage of whatsoever kind on account of PacifiCorp's use of the Public Ways within the City, and shall pay the costs of defense plus reasonable attorneys' fees for any claim, demand or lien brought thereunder. The City shall: (a) give prompt written notice to PacifiCorp of any claim, demand or lien with respect to which the City seeks indemnification hereunder; and (b) permit PacifiCorp to assume the defense of such claim, demand, or lien. If such defense is not assumed by PacifiCorp, PacifiCorp shall not be subject to liability for any settlement made without its consent. Notwithstanding any provision hereof to the contrary, PacifiCorp shall not be obligated to indemnify, defend or hold the City harmless to the extent any claim, demand or lien arises out of or in connection with any negligent or willful act or failure to act of the City or any of its officers or employees.

6.2 **Insurance.** PacifiCorp shall maintain automobile, comprehensive general liability and property damage insurance that protects PacifiCorp and the City, as well as the City's officers, agents, and employees, from the claims referred to in Section 6.1. The insurance shall provide coverage as follows: combined single limit of not less than \$1,000,000 for each occurrence and \$2,000,000 annual aggregate. The insurance shall be without prejudice to coverage otherwise existing and shall name as additional insureds the City and its officers, agents, and employees.

6.3 The insurance policy shall provide the insurance shall not be cancelled or materially altered without 30 days prior written notice first being given to the City. If the insurance is cancelled or materially altered within the term of this Franchise, PacifiCorp shall provide a replacement policy with the same terms. PacifiCorp shall maintain continuous uninterrupted coverage, in the terms and amounts required, upon and after the effective date of this Franchise. PacifiCorp may satisfy the insurance requirements herein through a program of self-insurance. If PacifiCorp is self-insured, PacifiCorp shall provide City with proof of self-insurance or if PacifiCorp is not self-insured, PacifiCorp shall require PacifiCorp's insurance carrier to provide proof of such insurance to City.

## **SECTION 7. Annexation.**

7.1 **Extension of City Limits.** Upon the annexation of any territory to the City, the rights granted herein shall extend to the annexed territory to the extent the City has such authority. All Electrical Facilities owned, maintained, or operated by PacifiCorp located within any public ways of the annexed territory shall thereafter be subject to all of the terms hereof.

7.2 **Annexation.** When any territory is approved for annexation to the City, the City shall, not later than ten (10) working days after passage of an ordinance approving the proposed annexation, provide by certified mail to PacifiCorp: (a) each site address to be annexed as recorded on county assessment and tax rolls; (b) a legal description of the proposed boundary change; and (c) a copy of the City's ordinance approving the proposed annexation. The notice shall be mailed to:

PacifiCorp Customer Contact Center  
Attn: Annexations  
P.O. Box 400  
Portland, Oregon 97207-0400

With a copy to:

PacifiCorp  
Attn: Office of the General Counsel  
825 N.E. Multnomah, Suite 2000  
Portland, Oregon 97232

Additional or increased fees or taxes, other than ad valorem taxes, imposed on PacifiCorp as a result of an annexation of territory to the City shall become effective on the effective date of the annexation if notice is given to PacifiCorp by certified mail not later than ten (10) working days after the effective date of the annexation. However, if notification of the effective date of the annexation is provided to PacifiCorp later than the tenth (10<sup>th</sup>) working day after the effective date of the annexation, the additional or increased fees or taxes will become effective on the date of the notification. This provision shall be subject to any amendment of ORS 222.005.

## **SECTION 8. Planning, Design, Construction and Installation of Company Facilities.**

8.1 All Electrical Facilities installed or used under authority of this Franchise shall be used, constructed and maintained in accordance with applicable federal, state and city laws, codes and regulations.

8.2 Except in the case of an emergency, PacifiCorp shall, prior to commencing new construction or major reconstruction work in the public way or street or other public places, apply for a permit from the City which permit shall not be unreasonably withheld, conditioned, or delayed. PacifiCorp will abide by all applicable ordinances and all reasonable rules, regulations and requirements of the City, and the City may inspect the manner of such work and require remedies as may be reasonably necessary to assure compliance. Notwithstanding the foregoing, PacifiCorp shall not be obligated to obtain a permit to perform emergency repairs.

8.3 All Electric Facilities shall be located so as to cause minimum interference with the Public Ways of the City and shall be constructed, installed, maintained, cleared of vegetation, renovated or replaced in accordance with applicable rules, ordinances and regulations of the City.

8.4 If, during the course of work on its Electrical Facilities, PacifiCorp causes damage to or alters the Public Way or public property, PacifiCorp shall (at its own cost and expense and

in a manner reasonably approved by the City) replace and restore it to a condition comparable to that which existed before the work commenced.

8.5 In addition to the installation of underground electric distribution lines as provided by applicable state law and regulations, PacifiCorp shall, upon payment of all charges provided in its tariffs or their equivalent, place newly constructed electric distribution lines underground as may be required by City ordinance.

8.6 The City shall have the right without cost to use all poles and suitable overhead structures owned by PacifiCorp within Public Ways for City wires used in connection with fire alarms, police signal systems, or other public safety communication lines used for governmental purposes; provided, however, any such uses shall be for activities owned, operated or used by the City or other governmental agencies for a public, non-commercial purpose and shall not include the provision of CATV, internet, or similar services to the public. Provided further, that PacifiCorp shall assume no liability nor shall it incur, directly or indirectly, any additional expense in connection therewith, and the use of said poles and structures by the City shall be in such a manner as to prevent safety hazards or interferences with PacifiCorp's use of same. Nothing herein shall be construed to require PacifiCorp to increase pole size, or alter the manner in which PacifiCorp attaches its equipment to poles, or alter the manner in which it operates and maintains its Electric Facilities. City attachments shall be installed and maintained in accordance with the reasonable requirements of PacifiCorp and the current edition of the National Electrical Safety Code pertaining to such construction. Further, City attachments shall be attached or installed only after written approval by PacifiCorp in conjunction with PacifiCorp's standard pole attachment application process. PacifiCorp shall have the right to inspect, at the City's expense, such attachments to ensure compliance with this Section 8.6 and to require the City to remedy any defective attachments.

8.7 PacifiCorp shall have the right to excavate the Public Rights of Ways subject to reasonable conditions and requirements of the City. Before installing new underground conduits or replacing existing underground conduits, PacifiCorp shall first notify the City of such work by written notice and shall allow the City, at its own expense (to include a pro rata share of the trenching costs), to share the trench of PacifiCorp to lay its own conduit therein, provided that such action by the City will not unreasonably interfere with PacifiCorp's Electrical Facilities or delay project completion.

8.8 Before commencing any street improvements or other work within a Public Way that may affect PacifiCorp's Electric Facilities, the City shall give written notice to PacifiCorp.

8.9 No structures, buildings or signs shall be erected below PacifiCorp's facilities or in a location that prevents PacifiCorp from accessing or maintaining its facilities.

## **SECTION 9. Relocation of Electric Facilities.**

9.1 The City reserves the right to require PacifiCorp to relocate its Electric Facilities within the Public Ways in the interest of public convenience, necessity, health, safety or welfare at no cost to the City. On or before the date designated by written notice from City to PacifiCorp,

which notice shall not be given less than 60 days before the date stated in the notice, PacifiCorp shall promptly commence and diligently pursue the relocation of its Electrical Facilities. Before requiring a relocation of Electric Facilities, the City shall, with the assistance and consent of PacifiCorp, identify a reasonable alignment for the relocated Electric Facilities within the Public Ways of the City. The City shall assign or otherwise transfer to Company all right it may have to recover the cost for the relocation work and shall support the efforts of PacifiCorp to obtain reimbursement. Notwithstanding anything to the contrary contained herein, in cases of capital improvement projects undertaken by the City, PacifiCorp shall convert existing overhead distribution facilities to underground, so long as PacifiCorp is allowed to collect the costs associated with conversion from overhead to underground distribution facilities consistent with OAR 860-022-0046, the Oregon Public Utility Commission rule on forced conversions.

9.2 PacifiCorp shall not be obligated to pay the cost of any relocation that is required or made a condition of a private development. However, if as a condition of a private development a street or alley needs to be improved to comply with City's transportation system plan (so long as the City's transportation system plan has been in effect for at least 30 days prior to the development application or permit), the removal or relocation of facilities is caused directly or otherwise by an identifiable development of property in the area, or is made for the convenience of a customer, PacifiCorp may charge the expense of removal or relocation to the developer or customer. For example, PacifiCorp shall not be required to pay relocation costs in connection with a road widening or realignment where the road project is made a condition of or caused by a private development except under the circumstances described in the second sentence of this Section 9.2. In the event a street or alley widening or relocation is made a condition of or caused by a private development and the street or alley does not need to be improved to comply with City's transportation system plan, the City shall require the developer to pay PacifiCorp for such relocation costs as part of its approval procedures.

9.3 Whenever it becomes necessary to temporarily rearrange, remove, lower, or raise PacifiCorp's aerial Electric Facilities to permit the passage of a building, machinery, or other object, PacifiCorp shall perform the rearrangement upon receipt of written notice from the persons desiring to move the building, machinery, or object. The costs incurred by PacifiCorp in making the rearrangements to its aerial Electric Facilities shall be born by the persons requesting the rearrangement, unless the aerial Electric Facilities are placed or maintained in violation of the applicable PUC rules and regulations and thereby interfere with the movement.

9.4 If PacifiCorp fails to relocate, remove, or alter any Electric Facilities as requested by the City by the date established by the City in the notice described in Section 9.1 and such failure was not caused by delays due to acts of God or conditions beyond PacifiCorp's control, the City may cause the Electric Facilities to be removed by qualified contractors at PacifiCorp's sole expense. Upon receipt of demand for payment from the City, PacifiCorp shall promptly reimburse the City for the actual and reasonable costs the City incurred.

**SECTION 10. Subdivision Plat Notification.** Before the City approves any new subdivision and before recordation of the plat, the City shall mail notification of such approval and a copy of the plat to PacifiCorp:

PacifiCorp  
Attn: Property Management / Right-of-Way Department  
825 N.E. Multnomah, Suite 1700  
Portland, Oregon 97232

**SECTION 11. Vegetation Management.** PacifiCorp or its contractor may prune all trees and vegetation which overhang the Public Ways, whether such trees or vegetation originate within or outside the Public Ways, to prevent the branches or limbs or other part of such trees or vegetation from interfering with PacifiCorp's Electrical Facilities. Such pruning shall comply with the *American National Standard for Tree Care Operation (ANSI A300)* and be conducted under the direction of an arborist certified with the International Society of Arboriculture. A growth inhibitor treatment may be used for trees and vegetation species that are fast-growing and problematic. Nothing contained in this Section shall prevent PacifiCorp, when necessary and with the approval of the owner of the property on which they may be located, from cutting down and removing any trees which overhang streets.

**SECTION 12. Compensation.**

12.1 In consideration of the rights, privileges, and franchise hereby granted, PacifiCorp shall pay to the City from and after the effective date of the acceptance of this franchise, five percent (5%) of its gross revenues derived from within the corporate limits of City. The term "gross revenue" as used herein shall be defined as set forth in Oregon Administrative Rule 860-022-0040.

12.2 If City implements direct access in accordance with state law and regulations adopted by the PUC, and if the City so directs, instead of calculating the franchise fee in accordance with Section 12.1, PacifiCorp shall calculate the franchise fee using volume-based methodologies in accordance with PUC regulations.

12.3 The compensation required by this Section shall be due and payable monthly, and shall be paid to the City by the 20<sup>th</sup> day following the end of each month of each calendar year. Within 60 days after the termination of this, Franchise compensation shall be paid for the period elapsing since the close of the last quarter for which compensation has been paid.

12.4 PacifiCorp shall furnish to the City with each payment of compensation required by this Section, a statement showing the amount of gross revenue for the period covered by the payment. The compensation for the period covered by this statement shall be computed on the basis of the reported gross revenue. If PacifiCorp fails to pay the entire amount of compensation due the City through error or otherwise, the difference due the City shall be paid by PacifiCorp within 15 days from discovery of the error or determination of the correct amount. Any over payment to the City through error or otherwise shall be offset against the next payment due from PacifiCorp.

12.5 Acceptance by the City of any payment due under this Section shall not be deemed as an accord, that the amount paid is the correct amount, nor shall any acceptance of payment be construed as a release of any claim the City may have for additional funds or as a waiver by the City of any breach of this Franchise.

12.6 Notwithstanding any provision to the contrary, at any time during the term of this Franchise, the City may elect to increase the franchise fee amount as may then be allowed by state law. The City shall provide PacifiCorp with prior written notice of such increase following adoption of the change in percentage by the City. The increase shall be effective sixty (60) days after City has provided such written notice to PacifiCorp.

12.7 The franchise fee shall not be in addition to any other license, occupation, franchise or excise taxes or charges which might otherwise be levied or collected by the City from PacifiCorp with respect to PacifiCorp's electric business or the exercise of this franchise within the corporate limits of the City and the amount due to the City under any such other license, occupation, franchise or excise taxes or other charges for corresponding periods shall be reduced by deducting there from the amount of said franchise fee paid hereunder.

**SECTION 13. Books of Accounts and Reports.** PacifiCorp shall keep accurate books of account at an office in Oregon for the purpose of determining the amounts due to the City under Section 12 of this Ordinance. The City may inspect the books of account upon no less than sixty (60) days prior notice during business hours and may audit the books from time to time; provided that only payments which occurred during a period of thirty-six (36) months prior to the date the City notifies PacifiCorp of its intent to conduct a review shall be subject to such review. The City may also require PacifiCorp to provide an audit report prepared at PacifiCorp's expense or an audit report prepared by an independent accounting firm prepared at the City's expense, but not more than once per calendar year.

**SECTION 14. Service and Safety Standards.**

14.1 PacifiCorp shall maintain and operate an adequate and safe system for the distribution of electric energy in the City. PacifiCorp shall use due diligence to maintain continuous and uninterrupted 24-hour a day service, which shall at all times conform at least to the standards common in the business and to the standards adopted by state authorities. Under no circumstances shall PacifiCorp be liable for an interruption or failure of service caused by acts of God, unavoidable accident, or other circumstances beyond the control of PacifiCorp or through no fault of its own.

14.2 PacifiCorp shall comply with those rules lawfully prescribed by the Oregon Public Utility Commission with respect to rates to be charged and the conditions, quality, character, and standards of the service furnished.

14.3 PacifiCorp's Electric Facilities shall be constructed and maintained in good order and condition, in a safe manner, and in accordance with standard engineering practice and all lawful governmental regulations.

**SECTION 15. Termination of Franchise for Cause.** The City may terminate this Franchise as provided in this Section, subject to PacifiCorp's right to a court review of the reasonableness of such action, upon the willful failure of PacifiCorp to perform promptly and completely each and every material term, condition, or obligation imposed upon it under or pursuant to this Ordinance. The City shall provide PacifiCorp written notice of any such failure and PacifiCorp shall have sixty (60) days from receipt of notice to cure the failure, or if the failure cannot

reasonably be cured within sixty (60) days, to commence and diligently pursue curing the failure. If PacifiCorp does not cure the failure within the sixty (60) day period, or does not commence in diligently pursue curing the failure to the City's satisfaction within the sixty (60) day period, then the City Council may declare the Franchise terminated.

**SECTION 16. Renewal.** At least 120 days prior to the expiration of this Franchise, PacifiCorp and the City either shall agree to extend the term of this Franchise for a mutually acceptable period of time or the parties shall use best faith efforts to renegotiate a replacement Franchise. PacifiCorp shall have the continued right to use the Public Ways of the City as set forth herein in the event an extension or replacement Franchise is not entered into upon expiration of this Franchise provided the City and PacifiCorp are in the process of negotiating an extension or replacement Franchise.

**SECTION 17. No Waiver.** Neither the City nor PacifiCorp shall be excused from complying with any of the terms and conditions of this Franchise by any failure of the other, or any of its officers, employees, or agents, upon any one or more occasions to insist upon or to seek compliance with any such terms and conditions.

**SECTION 18. Transfer of Franchise.** PacifiCorp shall not transfer or assign any rights under this Franchise to another entity, except transfers and assignments to affiliates, parents or subsidiaries of PacifiCorp which assume all of PacifiCorp's obligations hereunder, unless the City shall first give its approval in writing, which approval shall not be unreasonably withheld, conditioned or delayed; provided, however PacifiCorp may assign, mortgage, pledge, hypothecate or otherwise transfer without consent its interest in this Franchise to any financing entity, or agent on behalf of any financing entity to whom PacifiCorp (1) has obligations for borrowed money or in respect of guaranties thereof, (ii) has obligations evidenced by bonds, debentures, notes or similar instruments, or (iii) has obligations under or with respect to letters of credit, bankers acceptances and similar facilities or in respect of guaranties thereof.

**SECTION 19. Amendment.** At any time during the term of this Franchise, the City, through its City Council, or PacifiCorp may propose amendments to this Franchise by giving thirty (30) days written notice to the other party of the proposed amendment(s) desired, and both parties thereafter, through their designated representatives, will, within a reasonable time, negotiate in good faith in an effort to agree upon mutually satisfactory amendment(s). No amendment or amendments to this Franchise shall be effective until mutually agreed upon by the City and PacifiCorp and formally adopted as an ordinance amendment, which is accepted in writing by PacifiCorp.

**SECTION 20. Non-Contestability--Breach of Contract.**

20.1 Neither the City nor PacifiCorp will take any action for the purpose of securing modification of this Franchise before either the Oregon Public Utility Commission or any Court of competent jurisdiction; provided, however, that neither shall be precluded from taking any action it deems necessary to resolve difference in interpretation of the Franchise nor shall PacifiCorp be precluded from seeking relief from the Courts in the event Oregon Public Utility



Commission orders, rules or regulations conflict with or make performance under the Franchise illegal.

20.2 In the event PacifiCorp or the City fails to fulfill any of their respective obligations under this Franchise, the City, or PacifiCorp, whichever the case may be, will have a breach of contract claim and remedy against the other in addition to any other remedy provided by law, provided that no remedy which would have the effect of amending the specific provisions of this Franchise shall become effective without such action which would be necessary to formally amend the Franchise.

**SECTION 21. Notices.** Unless otherwise specified herein, all notices from PacifiCorp to the City pursuant to or concerning this Franchise shall be delivered to the City Recorder's Office. Unless otherwise specified herein, all notices from the City to PacifiCorp pursuant to or concerning this Franchise shall be delivered to the Customer and Community Affairs Vice President, Pacific Power, 825 NE Multnomah, Lloyd Center Tower Suite 2000, Portland, Oregon 97232, and such other office as PacifiCorp may advise the City of by written notice.

**SECTION 22. Severability.** If any section, sentence, paragraph, term or provision hereof is for any reason determined to be illegal, invalid, or superseded by other lawful authority including any state or federal regulatory authority having jurisdiction thereof or unconstitutional, illegal or invalid by any court of common jurisdiction, such portion shall be deemed a separate, distinct, and independent provision and such determination shall have no effect on the validity of any other section, sentence, paragraph, term or provision hereof, all of which will remain in full force and effect for the term of the Franchise or any renewal or renewals thereof.

**SECTION 23. Emergency.** The prior Franchise Agreement with PacifiCorp expires June 1, 2010. In order to have a Franchise Agreement with PacifiCorp in place on June 1, 2010, an emergency is hereby declared and this Ordinance shall be become effective June 1, 2010.

PASSED by City Council this 11 day of May, 2010.

SIGNED by the Mayor this 14 day of May, 2010.

City of Prineville

  
Mike Wendel, Mayor

ATTEST:

  
Steve Forrester, City Manager/Recorder

Accepted and agreed to by PacifiCorp this \_\_\_\_\_ day of May, 2010, by \_\_\_\_\_,  
its \_\_\_\_\_.

ATTEST:

By: \_\_\_\_\_  
\_\_\_\_\_

This acceptance was received by the City of Prineville on May \_\_\_\_, 2010.

\_\_\_\_\_