

MEMORANDUM

TO: Mayor and City Council

FROM: Richard Meyers, City Manager

SUBJECT: ORDINANCE NO. 3066 GRANTING AN ELECTRIC UTILITY
FRANCHISE AND GENERAL UTILITY EASEMENT TO
PACIFICORP AND REPEALING ORDINANCE NO. 2937

DATE: September 21, 2016

Background

Ordinance No. 3066 replaces an existing franchise agreement with PacifiCorp (Pacific Power) for electric utility services within specific portions of the City. The existing franchise expires October 6, 2016.


The Ordinance was presented at the last City Council meeting and is now before the City Council for the second vote and adoption.

Recommendation

That the City Council hold the second vote to adopt Ordinance No. 3066.

Cost

No Cost


Richard Meyers, City Manager

ORDINANCE NO. 3066

AN ORDINANCE GRANTING AN ELECTRIC UTILITY FRANCHISE AND GENERAL UTILITY EASEMENT TO PACIFICORP AND REPEALING ORDINANCE NO. 2937

WHEREAS, PacifiCorp , an Oregon corporation, d.b.a. Pacific Power "PacifiCorp"), is a regulated public utility that provide s electric power and energy to the citizens of the City of Cottage Grove, Oregon (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;

THE CITY OF COTTAGE GROVE ORDAINS 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, alleys, public ways and public places (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 ten (10) years commencing on the date of acceptance by the Company as set forth in Section 3 below.

Section 3. Acceptance by PacifiCorp. Within sixty (60) days after the passage of this ordinance by the City, 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 city owned and operated public facilities. The City may also make the Public Ways of the City available for use by other entities that provide services to City residences; provided, however, that such use shall not unreasonably interfere with 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. 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) unless in the City's judgment a conflict of interest exists between the City and PacifiCorp with respect to such claim, demand or lien, permit PacifiCorp to assume the defense of such claim, demand, or lien with counsel satisfactory to City. 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.

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 fifteen (15) working days after effective date of the 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 action approving the proposed annexation. The notice shall be mailed to:

PacifiCorp Customer Contact Center
P.O. Box 400
Portland, Oregon 97202-0400

With a copy to:
PacifiCorp
Attn: Office of the General Counsel 825 N E Multnomah
Portland, OR 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 date the notification is received by PacifiCorp. 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 Electric 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 necessary to assure compliance. Notwithstanding the foregoing, PacifiCorp shall not be obligated to obtain a permit to perform emergency repairs. PacifiCorp will provide information on emergency work performed within the City. Information shall include the date, time, address, cross street location along with what type of work was performed within five (5) business days after the emergency event.

8.3 All Electric Facilities shall be located so as to cause minimum interference with city owned and operated public facilities e.g. water, waste water, storm water and streets in 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. If, the City imposes material or design specifications that exceed the standard materials or design for Grantee's facilities, the additional, marginal increase in costs shall not be considered costs that are the Grantee's responsibility.

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 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 its fire alarms, police signal systems, or other communication lines used for governmental purposes; provided, however, any such uses shall be for activities owned, operated or used by the City for a public 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, or alter the manner in which PacifiCorp provides non-discriminatory access to other attaching entities on 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.

8.7 PacifiCorp shall have the right to excavate the Public 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 and shall allow the City, at its own expense, 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 Electric 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 overhead Electric Facilities within the Public Ways in the interest of public convenience, necessity, health, safety or welfare at no cost to the City. Within a reasonable period of time after written notice, PacifiCorp shall promptly commence the overhead 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. 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 860-22-0046, 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. If the removal or relocation of facilities is caused directly or otherwise by an identifiable development of private property in the area, or is made for the convenience of a customer, PacifiCorp may charge the expense of removal or relocation of 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 or caused by a private development. In such event, the City shall require the developer to pay PacifiCorp for such relocation costs as part of its approval procedures.

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: Right-of-Way Department
P.O. 248
Albany, OR 97321

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 construed to mean any revenue of PacifiCorp derived from the sale and use of retail electric power and energy within the municipal boundaries of the City after adjustment for the net write-off of uncollectible accounts and corrections of bills theretofore rendered. Gross Revenues do not include proceeds from the sale of bonds, mortgages or other evidence of indebtedness, securities or stocks, or sales at wholesale by Grantee to another utility when the utility purchasing such electricity and electric services is not the ultimate consumer. Gross revenues also do not include revenue from joint pole use. 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.

12.2 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.

12.3 No acceptance of any payment pursuant to this section shall be construed as an accord that the amount paid is, in fact, the correct amount, nor shall any acceptance of payments be construed as a release of any claim the City may have for further or additional sums payable. All amounts paid under this section shall be subject to an audit by the City; provided that only payments which occurred during a period of 36 months prior to the date the City notifies PacifiCorp of its intent to perform an audit shall be subject to such audit.

Section 13. Insurance. PacifiCorp shall obtain and maintain in full force and effect, for the entire Term, the following insurance, covering risks associated with PacifiCorp's ownership and use of PacifiCorp Facilities and the Public Right-of-Way and consistent with PacifiCorp's risk management practices:

(A) Commercial General Liability insurance covering all operations, subject to policy terms, conditions and exclusions, by or on behalf of PacifiCorp for Bodily Injury and Property Damage, including Completed Operations and Contractors Liability coverage, in an amount not less than Two Million Dollars (\$2,000,000.00) per occurrence and in the aggregate.

(B) Business Automobile Liability insurance to cover any vehicles used in connection with its activities under this Franchise, with a combined single limit not less than One Million Dollars (\$1,000,000.00) per accident.

(C) Workers' Compensation coverage as required by law and Employer's Liability Insurance with limits of One Million Dollars (\$1,000,000).

(D) The insurance shall be without prejudice to coverage otherwise existing and, with the exception of Workers' Compensation and Employers Liability, shall name as additional insureds the City, its elected and appointed officials, its officers, agents, and employees; provided, however, that such additional insured status shall only extend to the extent of PacifiCorp's contractually assumed indemnity obligation as outlined under Section 6 of this Franchise Agreement. Notwithstanding the naming of additional insureds, the insurance shall protect each insured in the same manner as though a separate policy had been issued to each, but nothing in this subsection shall operate to increase the insurer's liability as set forth elsewhere in the policy beyond the amount or amounts for which the insurer would have been liable if only one person or interest had been named as insured. The coverage must apply as to claims between insureds on the policy. The insurance shall provide that the insurance shall not be canceled without thirty (30) days' prior written notice first being given to the City. If the insurance is canceled or materially altered within the term of this Franchise, PacifiCorp shall provide a replacement policy with the same terms as required by this Franchise. PacifiCorp shall maintain continuous uninterrupted coverage, in the terms and amounts required, upon and after the effective date of this Franchise. PacifiCorp shall provide the City with a certificate of insurance evidencing such coverage as a condition of this Franchise and shall provide updated certificates upon request.

(E) In Lieu of Insurance. In lieu of the insurance policies required by this Section, PacifiCorp shall have the right to self-insure any and all of the coverage outlined hereunder. If PacifiCorp elects to self-insure, it shall do so in an amount at least equal to the coverage requirements of this Section in a form acceptable to the City and such coverage shall have the same protections for City and requirements of PacifiCorp as provided in this Section. PacifiCorp shall provide proof of self-insurance to the City before this Franchise takes effect and thereafter upon request by the City

Section 14. Renewal. At least 120 days prior to the expiration of this Franchise, PacifiCorp and the City shall agree to either 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.

Section 15. 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 16. Transfer of Franchise. PacifiCorp shall not transfer or assign any rights under this Franchise to another entity, except transfers and assignments by operation of law, unless the City shall first give its approval in writing, which approval shall not be unreasonably withheld; provided, however, inclusion of this Franchise as property subject to the lien of PacifiCorp's mortgage(s) shall not constitute a transfer or assignment.

Section 17. 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 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.

Section 18. 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 Vice President, 825 NE Multnomah, Portland, Oregon 97232, and such other office as PacifiCorp may advise the City of by written notice.

Section 19. 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 20. Upon the effective date hereof, but not otherwise, Ordinance No. 2937 of the City of Cottage Grove passed and approved October 9, 2006, is hereby repealed.

PASSED BY THE COUNCIL AND APPROVED BY THE MAYOR THIS 26TH DAY OF SEPTEMBER, 2016.

Thomas C. Munroe, Mayor

Dated: _____

ATTEST:

Richard Meyers, City Manager

Dated: _____