

ORDINANCE NO. 1268

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

Whereas, PacifiCorp, dba Pacific Power (“Franchisee”), is a regulated public utility that provides electric power and energy to the citizens of the City of Prineville (“City”) and other surrounding areas; and

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; and

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

Now, Therefore, the people of the City of Prineville ordain as follows:

Section 1. Definitions. Any term defined in the Prineville City Code and not in this Ordinance shall have the meaning provided by the Prineville City Code definition.

“Facilities” means Franchisee’s electrical transmission, distribution, and communication facilities, including lines, cables, conduit, poles, towers, wires, guys and anchors, vaults and boxes, transformers, fixtures, electric vehicle charging stations and other physical components of Franchisee’s electric power distribution system located within any Right-of-Way or Public Place within the City by virtue of the rights granted under this Ordinance or any predecessor franchise agreement.

“Gross Revenues” means any revenue received from sources within the City limits by the Franchisee; including revenue from the use, rental or lease of operating facilities of the Franchisee and from the provisions of services by the Franchisee.

“Right-of-Way” means property owned by the City, or dedicated to the public or the City, for transportation purposes, including public streets, roads, highways, lanes, courts, ways, alleys, boulevards, sidewalks, bicycle lanes, bridges, and places used or intended to be used by the general public for travel as the same now or may hereafter exist.

“Public Place” includes any City-owned property that is open to the public and that is not a Right-of-Way and includes public squares and parks. ~~Public Places do not include any public squares and parks owned by the City of Prineville.~~

Section 2. Grant of Authority. City grants to Franchisee the right to construct, install, maintain, repair, replace, upgrade and operate Facilities over, in, on, and under (i) the present and future Right-of-Way and (ii) existing Public Places currently in use by Franchisee, in each case, for the purpose of providing electric power utility service on the terms stated in this Ordinance. For the avoidance of doubt, except as may otherwise be agreed by Franchisee and

City, Franchisee may not place new Facilities in any Public Places that are not in use by Franchisee as of the effective date of this Franchise. This franchise is not exclusive, and City reserves the right to grant a similar franchise to any other person or entity. This Franchise is subject to prior rights, interests, agreements, City codes, permits, easements or licenses granted by the City, and to the City's and public's right to use and administer rights-of-way.

Section 3. Compliance with Laws, Rules, and Regulations. Franchisee shall comply with all City laws and regulations (including the Prineville City Code, other provisions or revisions of the Prineville City Code, and City ordinances, regulations, and standards and specifications and as directed by the City Engineer in accordance with the Prineville City Code) in constructing, installing, maintaining, repairing, replacing, upgrading, and operating its Facilities in the Right-of-Way and in Public Places for which Franchisee is granted permission to occupy under this Ordinance. Permits must be obtained prior to installation or construction of Facilities in Public Places. Where protection of the public health or safety or outage restoration requires emergency work to be performed, Franchisee may undertake work immediately to repair a break or restore service without a permit but must inform the City as soon as practical after the work is commenced, and, at the request of City, Franchisee shall submit documentation and/or a permit application in such form as is reasonably satisfactory to City describing the emergency work so performed. All Facilities shall be installed and at all times maintained by Franchisee in accordance with the National Electrical Safety Code, ANSI Standard C2 and any electric utility industry standards. The precise location of lines shall be determined through the permitting process.

Section 4. Franchisee Liability, Indemnification of City and Insurance.

A. Franchisee shall conduct its operations under this Franchise, including construction, installation, maintenance, repair, replacement, upgrade and operation of its Facilities, in a safe and workmanlike manner and all lawful governmental regulations.

B. Franchisee shall defend, indemnify and hold the City, its officers, agents, employees and volunteers harmless against all liability, claims, losses, demands, suits, fees and judgments (collectively known as "claims") that may be based on, or arise out of damage or injury (including death) to persons or property caused by or resulting from any wrongful or negligent act or omission of Franchisee, its agents or employees in exercising its rights and obligations under this Ordinance. This indemnification required shall not apply to claims to the extent caused by the negligence or willful misconduct of the City, its officers, agents, employees, and volunteers. Franchisee agrees that it is not an agent of the City and is not entitled to indemnification and defense under ORS 30.285 and ORS 30.287.

C. Franchisee shall purchase and maintain at Franchisee's expense, Commercial General Liability and Commercial Automobile insurance covering bodily injury and property damage in an amount of \$5 million per occurrence and \$10 million in the aggregate. The insurance policy obtained by Franchisee shall be primary and non-contributory. Franchisee shall remain fully responsible for any claims resulting from negligence or intentional misconduct of Franchisee or its subcontractors and their officials, agents and employees in performance of this Ordinance,

even if not covered by, or in excess insurance limits. This insurance requirement may be met in part by self-insurance.

D. Franchisee shall obtain and maintain Workers' Compensation insurance required by ORS chapter 656. Franchisee shall ensure that each of its contractors obtains and maintains workers' compensation insurance and obtains proof of the coverage before performing work.

E. Coverages provided by Franchisee must be underwritten by an insurance company authorized to do business in the state of Oregon and with a Best's rating of A-VII or higher.

F. As evidence of the insurance coverage required by this Franchise, Franchisee shall provide proof of coverage required by acceptable Certificate of Insurance and Endorsement from the carrier(s). The Certificate and Endorsement shall provide that there will be no cancellation, termination, or reduction in limits of the insurance coverage without a minimum 30-day written notice to the City, except if such cancellation is due to failure to pay premiums in which case 10 days' prior written notice of cancellation is given to City. The Certificate and Endorsement shall also state the deductible or self-insured retention level. This Ordinance shall not be in effect until the required certificates and signed endorsements have been received and approved by City. Renewal certificates and endorsements will be sent to City prior to coverage expiration. The City may terminate the Franchise for failure to maintain the required insurance.

G. Franchisee grants Waiver of Subrogation to the City, its officers, agents, employees and volunteers for any claims arising out of Franchisee's work or service. Further, Franchisee agrees that in the event of loss due to any of the risks for which it has agreed to provide insurance recovery shall be solely with its insurance carrier, and also grants to City on behalf of any insurer providing coverage to either Franchisee or City with respect to the work or services of Franchisee a waiver of any right to subrogation which any insurer or subcontractor may acquire against City by virtue of the payment of any loss under the insurance coverage.

Section 5. Construction and Conditions on Right-of-Way Occupancy

A. Use. Except in the case of emergency work described in Section 3 above, all work involving street or sidewalk cuts or protracted lane closures in the City Right-of-Way will require a permit prior to any work being started, which permit may not be unreasonably withheld, conditioned, or delayed, and will require a traffic plan that is fully compliant with the City of Prineville Design Standards and Specifications.

B. Reserved.

C. Restoration. In case of any disturbance of pavement, sidewalk, driveway or other surfacing by Franchisee, Franchisee shall, at its own cost and expense and in compliance with the City's pavement restoration policy and standards and specifications, promptly replace and restore the disturbed paving, sidewalk, driveway, landscaping or surface of any street or alley, as applicable, the condition it was in prior to the disturbance. Franchisee warrants all restoration work for a period of one-year from completion of the work. If Franchisee fails to make restoration as required by this section or if the restoration fails within the one-year warranty

period, City may, if Franchisee fails to make necessary repairs within a reasonable timeframe following written notice from City to Franchisee, cause the repairs to be made at the expense of Franchisee. If Franchisee fails to reimburse the City for any costs incurred under this section within 45 days of demand for reimbursement and such failure is not a result of a good faith dispute between City and Franchisee, City may refuse to issue additional permits.

D. Notification. Franchisee shall comply with the requirements of Oregon Utility Notification Law and implementing rules and regulations.

E. Relocation. City may require Franchisee to relocate its Facilities as follows:

1. If the removal or relocation of Facilities is caused directly by development of private property or any project sponsored or funded by a third party (including but not limited to any governmental agency or instrumentality other than the City) and the removal or relocation of Facilities occurs within the area to be developed or is made for the benefit or convenience of a third-party, Franchisee may charge the expense of removal or relocation of Facilities to the developer or other third-party, including the cost of acquiring private rights, permits, and other associated costs that result from the relocation. Franchisee shall be solely responsible for enforcing collection from the developer or other third-party, but Franchisee shall not be required to remove or relocate Facilities for the benefit of third-parties until it receives payment for the removal or relocation. For the purpose of this paragraph, the removal or relocation of Facilities shall be considered “caused directly” by a private development or third party project if, for example, the removal or relocation is necessary to enable the developer or third party to make any improvements or otherwise satisfy any conditions required under any permit, rule, regulation, or other requirement applicable to the project.

2. If Section 5.E.1 does not apply, and subject to Section 5.G below, if the removal or relocation of Facilities is required by City for a City-funded project that serves a public purpose (e.g., a street widening project undertaken independently of a project described in Section 5.E.1), Franchisee will remove or relocate its facilities at Franchisee’s expense within a reasonable time after notification by City and delivery of the City’s 100% complete design plan; provided that if the City requires the subsequent relocation of the same Facilities within five (5) years of the date of the last relocation, City shall bear the expense of the subsequent relocation; and provided further the removal and/or relocation of Facilities that are used to serve City as a customer of Franchisee shall be subject to terms of Franchisee’s tariffs and not this Section 5.E.2. City will make a reasonable effort to provide Franchisee with an alternate location for its Facilities within the Right-of-Way or Public Places. The City will make every effort to coordinate with the Franchisee during project development to reduce or eliminate conflicts with existing facilities, including coordinating and communication with Franchisee and interested parties regarding the relocation project.

F. Right-of-Way Vacation; Transfer of Property in Right-of-Way or Public Place; Relocations into Right-of-Way.

1. City shall retain public utility easements or otherwise require the petitioner of the vacation to grant an easement or obtain an easement in such form and in a location acceptable to

Franchisee if City vacates any public Right-of-Way or Public Place where Franchisee has facilities. If Franchisee's Facilities must be relocated from a vacated public right-of-way, the petitioner of the vacation will bear the expense of moving the Facilities and obtaining alternate rights, permits or easements.

2. In the event City conveys, assigns or transfers title to any property within any Right-of-Way or Public Place in which Franchisee has Facilities, as part of said conveyance, City shall either (i) secure from such transferee an easement or other rights allowing for such Facilities to remain in place in a form acceptable to Franchisee or, (ii) if such Facilities are to be relocated, (x) City shall obtain an easement or other rights in such form and in such location as are acceptable to Franchisee, and (y) the expense of relocating the Facilities and obtaining such easement or other rights shall be borne by City.

3. In the event Franchisee has Facilities located on any private property that is condemned or otherwise acquired by City for the purpose of expanding any existing Right of Way or Public Place or creating any new Right of Way or Public Place, expenses related to relocation, including the expense of relocating the Facilities and acquiring a new easement or other rights in such form and location as is acceptable to Franchisee, shall be borne by City. In addition, in the event said Facilities remain in place or are relocated within the existing or expanded Right of Way or Public Place, notwithstanding the terms of Section 5.E.2, City shall be responsible for all related relocation costs, including expense of relocating the Facilities and acquiring a new easement or other rights in such form and location as is acceptable to Franchisee for each subsequent City requested relocation of said Facilities.

G. Underground Conversions. Franchisee shall remove and replace overhead Facilities with underground Facilities at the request of the City. Cost responsibility shall be allocated in accordance with all applicable Oregon Administrative Rules and a schedule agreed upon by the City and Franchisee. The City shall require that each customer served from the existing overhead Facilities shall make all facility changes to the customer's premises in accordance with Franchisee's policies and standards necessary to receive service from the underground facilities as soon as they become available.

H. Vegetation Management. Franchisee or its assignee 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 Franchisee'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 Franchisee, when necessary and with the approval of the owner of the property on which they be located, from cutting down and removing any trees which overhang streets.

Section 6. Transfer of Franchise. Franchisee shall not sell, assign, dispose of, lease, or transfer in any manner whatsoever any interest in this Ordinance, without written consent of City, which consent shall not be unreasonably withheld, conditioned or delayed. In the event the

City provides such consent, the City may impose reasonable conditions, including but not limited to the requirement that the transferee acknowledge in writing and agree to be bound by the terms of this Ordinance. City shall have the right to collect from Franchisee City's actual administrative costs associated with processing a transfer request, including the cost of ascertaining the financial responsibility of the proposed transferee. Franchisee may mortgage this Ordinance, together with its Facilities and properties within the City, in order to secure any legal bond issue or other indebtedness of Franchisee, with no requirement for City's consent or that the trustees acknowledge in writing and agree to be bound by the terms of this Ordinance.

Section 7. City Rights and Obligations in Franchise.

A. City Supervision and Inspection. City shall have the right to inspect all construction and installation of Franchisee's Facilities to insure compliance with governing laws, ordinances, rules and regulations as they relate to the City approved permit.

B. Termination or Abandonment of Franchise. Upon any termination of this Franchise, if City and Franchisee are not engaged in efforts to renew or renegotiate this Franchise, (i) all above ground Facilities installed or used by Franchisee shall be removed by Franchisee at Franchisee's expense or de-energized and abandoned in place with approval of the City and the property on which the Facilities were used or restored by Franchisee to the condition it was in before installation; (ii) all underground Facilities installed or used by Franchisee shall be de-energized and abandoned in place.

C. City's Work in Right-of-Way. Whenever City shall perform or cause or permit to be performed any work in any Right-of-Way or Public Place where Franchisee's Facilities are located, City shall, or shall require its permittees, to notify, in writing, Franchisee sufficiently in advance of the contemplated work to enable Franchisee to take coordinate with the City or permittees, as applicable. No structures, buildings or signs shall be erected below Franchisee's Facilities or in a location that prevents Franchisee from accessing or maintaining its Facilities.

Section 8. Franchise Fee.

A. Franchisee shall pay monthly to City five (5) percent of Franchisee's Gross Revenues received from customers within the City limits of the City excluding amounts charged and received for separately billed governmental taxes and governmental fees.

B. The fee required by this section shall be due and payable within 30 days after the end of each month. With respect to any amount or portion thereof due hereunder that is not disputed in good faith by Franchisee, City shall have the right to charge interest at the rate of 5% per annum.

C. With each payment, Franchisee shall furnish City with a written statement verifying the amount of gross revenues of Franchisee within City for the monthly period covered by payment.

D. City's acceptance of any payments due under this section shall not be considered a waiver by City of any breach of this Ordinance.

E. City will provide notice of any annexation of territory, including a map of the annexed territory, a legal description of the boundary change, each site address to be annexed as recorded on county assessment and tax rolls and a copy of the annexation ordinance within ten (10) days of the annexation. Franchisee's obligation to pay franchise fees on revenue generated by service to the annexed property shall begin ten (10) days after notice is actually provided.

F. 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 9. Franchise Records and Reports. Franchisee shall keep accurate books of financial accounts at an office within the State of Oregon throughout the term of this franchise and for six years after the expiration or termination of this Ordinance. Franchisee shall produce all books and records directly concerning its gross revenues and other financial information necessary for calculation of the franchise fee for inspection by City, upon ten (10) days' written notice, during normal working hours provided that only records that support payments which occurred during a period of three (3) years prior to the date the City notifies Franchisee of its intent to conduct an inspection shall be subject to review. City may require periodic reports from Franchisee relating to its operations within the City. City shall have the right during the term of this agreement or within 180 days after expiration or termination of the Ordinance to audit Franchisee's records for the period of three (3) years prior to the audit. If the audit reveals underpayment of five percent (5%) or more, the City may expand the audit to cover up to six (6) years. The audits shall be undertaken by a qualified person or entity selected by City. The costs of the audit shall be borne by City, unless the results of the audit reveal an underpayment of more than five percent (5%) or more, the full cost of the audit shall be paid by Franchisee. Franchisee shall promptly pay the portion of the underpayment as determined by the audit not subject of a good faith dispute to City together with nine percent (9%) annual interest from the date the payment should have been made to the date the payment is actually made. Any audit information obtained by City under these provisions shall be kept confidential to the maximum extent allowed by Oregon law, except that this obligation shall not prevent the City from introducing audit results in any forum where enforcement of the provisions of this Ordinance is at issue. Franchisee's obligations under this Section shall be subject to the requirements of applicable laws.

Section 10. Reserved.

Section 11. Subdivision Plat Notification. City shall provide written notice of tentative subdivision approval, including a copy of the tentative plan, to Franchisee at least twenty (20) days prior to approving the tentative plan to provide Franchisee an opportunity to comment on the portion(s) of the plan which impact Franchisee's facilities and/or easement rights. Further, City agrees that any public utility easements included on each final plat will be at least ten feet in width. City also will include a restrictive covenant or easement as part of the final plat limiting development on individual lots within Franchisee's easement corridors upon a timely request

from Franchisee that is consistent with the restrictions set forth in the applicable easements held by Franchisee and that indicates that consent to install any fences, structures, buildings or other permanent facilities such as swales, ponds or other hardscaping features within the easement must be obtained from Franchisee. With respect to new public utility easement areas, the City will include a restrictive covenant or easement as part of the final plat prescribing that no fences, structures, buildings or other permanent facilities such as swales, ponds, or other hardscaping features may be installed or maintained in the public utility easement area.

Section 12. Enforcement and Termination of Franchise for Violation

A. Default. City may terminate this franchise, as provided in Section 12.B below subject to Franchisee's right to a court review of the reasonableness of such action upon the failure of Franchisee to perform promptly and completely any material term, condition, or obligation imposed upon it under this franchise; provided that City shall first provide Franchisee written notice of any such failure and Franchisee shall have sixty (60) days from receipt of such 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 Franchisee does not cure the failure within the sixty (60) day period, or does not commence and diligently pursue curing the failure within the sixty (60) day period, then the City Council may declare the franchise terminated.

B. Termination for Defaults Not Cured. The City may terminate this Franchise for defaults that are not cured within the time allowed by Section 12.A by providing notice of termination to Franchisee following the declaration of termination by the City Council. Franchisee may challenge the notice of termination by providing a written protest to the City Manager within ten (10) business days of the date of the notice of termination. The City Manager, on receipt of the protest, shall refer the protest to the City Council for a decision. The termination will not become final until after the decision by the City Council. Because of the potential public health and safety risks that could arise as a result of cessation of power distribution within the City, if the City decides to terminate the franchise, it shall set a termination date that allows for implementation of a plan to assure continued electrical power delivery service.

Section 13. Remedies not Exclusive; Waiver. All remedies granted the City under this Ordinance are cumulative, and recovery or enforcement of one is not a bar to the recovery or enforcement of any other remedy. Failure to enforce any provision of this Ordinance shall not be construed as a waiver of a breach of any other term, condition or obligation of this Ordinance.

Section 14. Franchise Term; Acceptance; Effective Date. This Franchise is granted for a term of five (5) years beginning on April 1, 2021. The Franchisee shall, within sixty (60) days from the date this ordinance takes effect, file with the City its written unconditional acceptance of this franchise, and if the Franchisee fails to do so, this ordinance shall be void. This Franchise shall be effective the later of thirty (30) days after passage by the City Council and Franchisee's acceptance. In the event of any conflict between the terms of this Franchise and future City ordinance setting forth terms and conditions of general applicability to franchises, the terms and conditions of this Franchise shall govern; provided that City and Franchisee may amend this

Franchise by any written agreement that is adopted by City and accepted in writing by Franchisee.

Section 15. Renewal. At least 120 days prior to the expiration of the Franchise, Franchisee and City shall agree to either extend the term of this Franchisee for a mutually acceptable period of time or the parties shall use good faith efforts to renegotiate a replacement Franchise. Notwithstanding the forgoing, so long as the parties are in good faith negotiations to replace this Franchise, this Franchise shall continue to remain in effect unless otherwise terminated as provided herein.

Section 16. Severability. If any section, subsection, sentence, clause or portion of this Ordinance is for any reason held invalid or rendered unconstitutional by any Court of competent jurisdiction, that portion shall be deemed a separate, distinct, independent and severable provision and the holding shall not affect the validity or constitutionality of the remaining portion of this Ordinance. If for any reason, the franchise fee is invalidated by any court or governmental agency, the then-highest permissible franchisee fee allowed shall be the franchise fee.

Section 17. Notices. Any notice required or permitted under this Ordinance shall be in writing and delivered in person, by overnight courier or by registered or certified United States mail, addressed as follows:

To City:
City of Prineville
ATTN: City Manager
387 NE Third Street
Prineville, OR 97754

To Franchisee:
Pacific Power
ATTN: Customer and Community Affairs Vice President
825 NE Multnomah
Lloyd Center Tower, Suite 2000
Portland, OR 97232

or other address specified by either party in writing in a notice conforming with these requirements. Notices shall be deemed effective when received or, if (i) sent via overnight courier, the next business day, and (ii) if deposited with postage prepaid in the United States Mail as registered or certified mail, three (3) business days following the date of deposit.

Section 18. Waiver of Jury Trial. To the fullest extent permitted by law, each of City and Franchisee waives any right it may have to a trial by jury in respect of litigation directly or indirectly arising out of, under or in connection with this franchise. Each party further waives any right to consolidate any action in which a jury trial has been waived with any other action in which a jury trial cannot be or has not been waived.

Section 19. Interpretation/Jurisdiction. Interpretation of the Franchise shall be governed by the laws of the State of Oregon and any legal action relating to this Franchise shall be brought in Crook County Circuit Court.

Ordinance 1267 is hereby vacated and superseded by this Ordinance 1268.

Presented and enacted at a regular meeting of the City Council held on August ____, 2021 by unanimous approval.

Rodney J. Beebe
Mayor

ATTEST:

Lisa Morgan, City Recorder

Accepted by PacifiCorp, dba Pacific Power

By: _____

Name: _____

Title: _____

Date: _____