

ORDINANCE NO. 836

AN ORDINANCE GRANTING TO PACIFICORP, AN OREGON CORPORATION DBA PACIFIC POWER, THE RIGHT, PRIVILEGE, AND AUTHORITY TO CONSTRUCT, INSTALL, OPERATE, UPGRADE AND RELOCATE ITS ELECTRICAL DISTRIBUTION AND TRANSMISSION LINES AND RELATED APPURTENANCES IN, UNDER, ALONG, OVER, AND ACROSS THE STREETS, ALLEYS, PUBLIC WAYS AND PUBLIC PLACES OF THE CITY OF MADRAS, JEFFERSON COUNTY, OREGON, FOR THE PURPOSE OF SUPPLYING AND TRANSMITTING ELECTRIC POWER AND ENERGY TO THE INHABITANTS OF THE CITY OF MADRAS AND OTHERS; PROVIDING FOR THE REPEAL OF ORDINANCE NO. 479 OF THE CITY OF MADRAS, PASSED AND APPROVED NOVEMBER 13, 1990, AND DECLARING AN EMERGENCY.

WHEREAS, PacifiCorp, currently transmits and distributes electric power and energy within the City of Madras, an Oregon municipal corporation, ("**the City**") in accordance with the terms and conditions of Ordinance No. 479;

WHEREAS, by passage of this Ordinance No. 836 (this "**Ordinance**"), the City will grant PacifiCorp the right, privilege, and authority to construct, install, operate, upgrade, and relocate electrical distribution and transmission lines and related appurtenances in, under, along, over, and across the streets, alleys, public ways, and public places of the City, subject to the terms and conditions contained in this Ordinance;

WHEREAS, by passage of this Ordinance, Ordinance No. 479 shall be repealed.

NOW, THEREFORE, the City of Madras ordains as follows:

SECTION 1. GRANT OF FRANCHISE AND GENERAL UTILITY EASEMENT.

Subject to the terms and conditions contained in this Ordinance, The City hereby grants to PacifiCorp the right, privilege and authority to construct, install, 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 Way(s)**") within the City owned and/or controlled excluding construction of new electric facilities or enlargement of existing facilities in parks, playgrounds, and trails unless otherwise authorized at the sole discretion of 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. The franchise granted by this Ordinance does not limit PacifiCorp's ability to provide other utility services, subject to entering into a separate franchise agreement with the City for those services.

SECTION 2. TERM.

The term of the franchise granted in this Ordinance is ten (10) years and several days, commencing December 14, 2010 and terminating on January 1, 2021, unless sooner terminated or extended as provided in this Ordinance, provided that PacifiCorp accepts this Ordinance pursuant to Section 3 below.

SECTION 3. ACCEPTANCE BY PACIFICORP.

Within thirty (30) days after the passage of this Ordinance by the City, PacifiCorp shall file an unqualified written acceptance thereof, with the City Recorder by signature of an authorized representative of PacifiCorp as provided for and incorporated here into this Ordinance, otherwise this Ordinance and the rights granted herein shall be null and void.

SECTION 4. NON-EXCLUSIVE FRANCHISE.

PacifiCorp acknowledges and agrees that the franchise created by this Ordinance is and will be construed as a non-exclusive franchise. The City expressly reserves the right to grant franchises, licenses, permits, and/or other similar rights to other persons or entities to use, place, erect, lay, or maintain equipment and/or other facilities, and to operate in, upon, over, and/or under the Public Ways for similar or different purposes allowed under this Ordinance provided such uses would not unreasonably interfere with PacifiCorp's rights hereunder.

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 the City Ordinances.

SECTION 6. INDEMNIFICATION / 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 will defend, indemnify, and hold the City, and each present and future employee, director, officer, agent, and representative of the City (collectively, the "City Indemnified Parties"), harmless, from, and against any and all claims, actions, proceedings, damages, liabilities, losses, and expenses, including, without limitation, reasonable attorney fees and costs of suit or defenses, arising out of, resulting from, PacifiCorp's: (a) use of the Public Ways within the City; and/or PacifiCorp's breach or failure to perform any PacifiCorp representation, warranty, covenant, and/or obligation under this Ordinance. PacifiCorp will defend the City at the City's request against

any such claims, actions, proceedings, damages, liabilities, and expenses. The City will notify PacifiCorp promptly of any written claims or demands against the City of which PacifiCorp is responsible hereunder. 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 Indemnified Parties.

6.2 Insurance. PacifiCorp, at its cost and expense, shall secure and keep in full force and effect during the term of this Ordinance and shall provide evidence thereof to the City, the following insurance coverage and their respective minimum limits: (a) workers' compensation insurance within statutory limits and employer's liability insurance with limits of not less than \$1,000,000 per occurrence; (b) commercial general liability insurance with limits of not less than \$3,000,000 combined single limit for bodily injury or death and property damage resulting from each occurrence with an annual aggregate of not less than \$3,000,000 (c) automobile liability insurance for all owned, non-owned, and hired vehicles that are, or may be used, by PacifiCorp and its employees in connection with this Ordinance with a limit of not less than \$3,000,000 combined single limit for bodily injury and property damage for each accident. The above minimum levels of insurance may be provided by a combination of primary and excess policies at PacifiCorp's election. Each insurance certificate provided by or on behalf of PacifiCorp pursuant to the provisions of this Section 6.2 will name the City as an additional insured and will provide that no cancellation, expiration, modification, or reduction in amount or scope of insurance coverage is permitted without providing the City thirty (30) days prior written notice. All insurance that PacifiCorp is required to maintain under this Section 6.2 will be issued only by insurance companies licensed in Oregon. Prior to the City's execution and acceptance of this Ordinance, and at any other time thereafter with thirty (30) days after the City's written request, PacifiCorp will provide the City with certificates of insurance to evidence PacifiCorp's compliance with this Section 6.2. Notwithstanding the above, PacifiCorp may maintain self-insurance that meets the requirements of this Section 6.2, and the additional insured requirements shall apply to the limit of liability insured by an insurance policy.

SECTION 7. ANNEXATION.

7.1 Extension of the 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 Electric 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 an ordinance approving the proposed annexation becomes effective, 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 this 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 (10th) 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 Electric Facilities. 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.

8.2 Construction Notification, Submitting Plans, Approval, Process and Emergencies. 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 unreasonable 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.

8.3 Restoration of Property. If PacifiCorp or its contractor or subcontractor damages any Public Way, PacifiCorp will, at PacifiCorp's cost and expense, promptly replace or restore the Public Way to the same condition to which the Public Way existed prior to the damage. If PacifiCorp fails to timely replace or restore any Public Way to the same condition to which the Public Way existed prior to the disruption, and fails to do so within a reasonable time following receipt of written notice by the City, the City may cause the replacement or restoration to be made at the expense of PacifiCorp. PacifiCorp will pay the City any and all costs and expenses incurred by the City to replace or restore the Public Way immediately on the City's demand.

8.4 Co-Location. The City shall have the right without cost to use all poles and suitable overhead structures owned by PacifiCorp within Public Ways for the City wires used in connection with its 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 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. The 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, the 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 8.5 and to require the City to remedy any defective attachments.

8.5 Notice of Improvements. 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.

8.6 Access. No structures, buildings or signs shall be erected in a location that prevents PacifiCorp from accessing or maintaining the Electric Facilities.

SECTION 9. RELOCATION OF ELECTRIC FACILITIES.

9.1 Relocation by the City. 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, including without limitation, relocations necessary to ensure compliance with requirements of the Americans with Disabilities Act ("ADA"). Within a reasonable period of time after written notice, PacifiCorp shall promptly commence the overhead relocation of its Electric 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 860-022-0046, the Oregon Public Utility Commission rule on forced conversions. Prior to relocation of existing Electric Facilities, PacifiCorp and the City shall discuss reasonable least cost alternative options consistent with Public Works Standards and Specifications for ADA requirements and shall agree upon one such least cost alternative for relocation. If the City elects a higher cost relocation alternative, PacifiCorp shall not be responsible for any amount in excess of the least cost alternative agreed upon by PacifiCorp and the City.

9.2 Relocation by Private Developer. 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 property in the area, or is made for the convenience of a private developer or 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.

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

SECTION 11. COMPENSATION.

11.1 Franchise Fee. In consideration of the rights, privileges, and franchise granted by the City to PacifiCorp under this Ordinance, PacifiCorp will pay the City seven percent (7%) of the Gross Revenues (as defined below) (the "**Franchise Fee**"). PacifiCorp will pay the Franchise Fee in monthly installments, which monthly installments will be due on or before the twentieth 20th day of each calendar month. The first monthly payment of the Franchise Fee is due on or before January 20, 2011. Contemporaneously with each monthly payment, PacifiCorp will file with the City a statement describing the total Gross Revenues PacifiCorp has received during the immediately preceding month (the "**Accounting Statement**"). The City's acceptance of any payments under this Section 11.1 will not constitute a waiver by the City of any PacifiCorp breach under this Ordinance. For purposes of this Section 11.1, the term "**Gross Revenues**" means any and all revenues received directly or indirectly from PacifiCorp's operations in The City's corporate limits, less net uncollectibles, including, without limitation, revenues resulting from the use, rental, and/or lease of Electric Facilities; provided, however, the term "**Gross Revenues**" does not include proceeds from the sale of bonds, mortgages, securities, or stocks, sales at wholesale to another utility when the utility purchasing the service is not the ultimate consumer, revenue from joint pole use, revenue paid by the United States of America (or any of its agencies), or revenue paid by The City.

Notice by the City to Grantee to implement the volumetric methodology for purposes of calculating the payments to the city shall only be effective if provided by the City to the Grantee in writing not later than September 1 of any year for implementation beginning January 1 of the following year. Upon such notice, Grantee shall make all payments on a volumetric basis for the entire year (based on January 1 to December 31/electricity consumption by Grantee customers within the Franchise territory). The City shall provide the same manner of notice to Grantee if the city thereafter elects to return to the Gross Revenues methodology.

11.2 Inspection of Books and Records. On ten (10) days' advance written notice to PacifiCorp, the City may review such PacifiCorp books, records, documentation, and/or information the City reasonably determines necessary or appropriate to audit an Accounting Statement and/or ascertain PacifiCorp's compliance with this Ordinance. PacifiCorp will cooperate with the City in conducting any inspection and/or audit and will correct any discrepancies affecting the City's interest in a prompt and efficient manner. The City will bear the cost of any audit provided that no irregularities are found (if the City discovers any material irregularities, PacifiCorp will bear the cost of the City's audit). Notwithstanding anything to the

contrary contained herein 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. PacifiCorp agrees to provide the City with an annual address list for services within the City limits of Madras.

11.3 Change in Franchise Fee Amount. Notwithstanding any provision to the contrary, at any time during the term of this Ordinance, 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 the City has provided such written notice to PacifiCorp.

11.4 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 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 12. MISCELLANEOUS.

12.1 No Waiver. Neither the City nor PacifiCorp shall be excused from complying with any of the terms and conditions of this Ordinance 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.

12.2 Assignment or Transfer. PacifiCorp shall not transfer or assign any rights under this Ordinance to another entity, except transfers and assignments by operation of law, or 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 rights under this Ordinance to any financing entity, or agent on behalf of any financing entity to whom PacifiCorp (a) has obligations for borrowed money or in respect of guaranties thereof, (b) has obligations evidenced by bonds, debentures, notes or similar instruments, or (c) has obligations under or with respect to letters of credit, bankers acceptances and similar facilities or in respect of guaranties thereof.

12.3 Amendment. At any time during the term of this Ordinance, the City, through its the City Council, or PacifiCorp may propose amendments to this Ordinance by giving thirty (30) days' written notice to the other party of the proposed amendment(s), 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 Ordinance 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.

12.4 Notices. Except as otherwise provided in this Ordinance, all notices or other communications required or permitted by this Ordinance must be in writing, must be delivered

to the parties at the addresses set forth below, or any other address that a party may designate by notice to the other party, and are considered delivered upon actual receipt if delivered personally, by fax, or by a nationally recognized overnight delivery service, or at the end of the third business day after the date of deposit if deposited in the United States mail, postage pre-paid, certified, return receipt requested.

To the City:

The City of Madras
Attn: City Recorder
71 SE D Street
Madras, Oregon 97741

To PacifiCorp:

PacifiCorp
Attn: Customer and Community Affairs Vice President
Lloyd Center Tower, Suite 2000
825 NE Multnomah Street
Portland, Oregon 97232

12.5 Governing Law. This Ordinance is subject to any and all applicable federal, state, and local laws, rules, regulations, codes, and ordinances, including, without limitation, any city ordinances and regulations, all as heretofore or hereafter adopted or established (collectively, the “**Legal Regulations**”).

12.6 Compliance with Laws. PacifiCorp will comply with any and all applicable Legal Regulations. The rights and privileges granted by the City to PacifiCorp under this Ordinance extend only to the extent of the City’s right or authority to grant a franchise to occupy and use the Public Ways for Electric Facilities.

12.7 Action by the Parties. In any action mandated or permitted by the City or PacifiCorp under this Ordinance, such party will act in a reasonable, expeditious, and timely manner. Whenever the approval or consent of either the City or PacifiCorp is required under this Ordinance, such consent will not be unreasonably withheld, conditioned, or delayed.

12.8 Attorney Fees. With respect to any dispute relating to this Ordinance, or if a suit, action, arbitration, or other proceeding of any nature whatsoever is instituted to interpret or enforce the provisions of this Ordinance, the prevailing party will be entitled to recover from the losing party its reasonable attorney fees, paralegal fees, expert fees, and all other fees, costs, and expenses incurred in connection therewith, as determined by the judge or arbitrator at trial, arbitration, or other proceeding, or on any appeal or review, in addition to all other amounts provided by law.

12.9 Entire Agreement. This Ordinance contains the entire agreement and understanding between the parties with respect to the subject matter of this Ordinance and contains all of the terms and conditions of the parties’ agreement and supersedes any other oral or written negotiations, discussions, representations, or agreements. PacifiCorp has not relied on any promises, statements, representations, or warranties except as set forth expressly in this Ordinance.

12.10 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 Ordinance or any renewal or renewals thereof.

12.11 Interpretation. All pronouns contained herein and any variations thereof will be deemed to refer to the masculine, feminine, or neutral, singular or plural, as the identity of the parties may require. The singular includes the plural and the plural the singular. The words "include," "includes," and "including" are not limiting. A reference to any federal, state, or local law, regulation, or ordinance includes any amendment or modification to such federal, state or local law, regulation, or ordinance. Reference to "days" means calendar days, with any deadline falling on a day other than a business day being extended to the next business day.

12.12 Corrections. This ordinance may be corrected by order of the City Council to cure editorial and clerical errors.

12.13 Repeal. Ordinance No. 479, which contains the current franchise agreement with PacifiCorp, is hereby repealed effective December 14, 2010.

12.14 Emergency Clause. It is hereby determined and declared that existing conditions are such that it is necessary for the immediate preservation of the peace, health, general welfare and safety of the citizens of the City of Madras that an emergency be declared to exist and this ordinance shall be in full force and effect immediately upon and after its passage by the Council and approval by the Mayor of the City of Madras, Oregon.

ADOPTED by the City Council of the City of Madras and signed by the Mayor on this 14th day of December, 2010.