

ORDINANCE NO. 1973

AN ORDINANCE GRANTING PACIFICORP, INC., A WASHINGTON CORPORATION, ITS SUCCESSORS AND ASSIGNS, THE RIGHT, PRIVILEGE, AUTHORITY AND A NON-EXCLUSIVE FRANCHISE TO SET, ERECT, LAY, CONSTRUCT, EXTEND, SUPPORT, ATTACH, CONNECT, MAINTAIN, REPAIR, REPLACE, ENLARGE, OPERATE AND USE FACILITIES IN, UPON, OVER, UNDER, ALONG, ACROSS AND THROUGH THE CITY OF DAYTON'S PUBLIC RIGHT OF WAYS TO PROVIDE FOR THE TRANSMISSION, DISTRIBUTION AND SALE OF ELECTRIC ENERGY FOR POWER, HEAT AND LIGHT, AND ANY OTHER PURPOSES FOR WHICH ELECTRIC ENERGY MAY BE USED.

WHEREAS, RCW 35A.47.040 authorizes the City of Dayton, (referred herein as "City"), to grant, permit and regulate nonexclusive franchises for the use of public streets, bridges or other public right of ways, structures or places above or below the surface of the ground for facilities that provide public conveyances, through poles, conduits, tunnels, towers and structures, pipes, wires and appurtenances thereof for transmission and distribution of electric energy that provides public services;

WHEREAS, PacifiCorp, Inc., referred to herein as "PacifiCorp," provides electric energy to the citizens of the City and other surrounding areas;

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

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

WHEREAS, the Council find that the Franchise terms and conditions contained in this Ordinance is in the best interest of the public.

NOW, THEREFORE, the City Council of the city of Dayton, Washington, does hereby ordain as follows:

SECTION 1. Grant of Franchise and General Utility Easement. The City hereby grants to PacifiCorp the right, privilege, authority and a non-exclusive franchise to set, erect, lay, construct, extend, support, attach, connect, maintain, repair, replace, enlarge, operate and use facilities (collectively referred to herein as "Facilities") in, upon, over, under, along, across and through the City's public right of ways to provide for the transmission, distribution and sale of electric energy for power, heat and light, and any other purposes for which electric energy may be used 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. The services to be furnished hereunder by PacifiCorp shall be continuous and adequate for the requirements of the City and its inhabitants, and shall be furnished under such reasonable rules and regulations as PacifiCorp may make from time to time for the proper conduct of business.

Such service and all rates and charges therefore, and all rules and regulations pertaining thereto or to the making of necessary and proper extensions of services, shall be subject at all times to any rules, regulations, and orders lawfully prescribed. Upon PacifiCorp's acquisition of any facilities in the Public Way, or upon any addition or annexation to the City of any area in which PacifiCorp has facilities, such facilities shall immediately be subject to the terms of this Franchise without further action of the City or PacifiCorp.

SECTION 2. Term. The term of this Franchise and General Utility Easement is for ten (10) years commencing on the date of acceptance by PacifiCorp as set forth in 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 Clerk; 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 right of ways of the City shall be nonexclusive and PacifiCorp's use of the public right of ways shall not in any manner prevent the City from granting other franchises or uses in, along, over, through, under, below or across any public right of ways. The City reserves the right, at any time during the term of this franchise, to grant rights or franchises for such purpose to other persons or corporations, as well as the right in its own name as a municipality to use said public right of ways for such purposes, in the event that the City shall hereafter decide to engage in the business of supplying electricity and electric service for municipal or other uses. If, during the term hereof, the City shall decide to engage in such business, and shall elect to acquire by condemnation or otherwise the property used by PacifiCorp in furnishing electric service hereunder, no value or damages of any kind shall be claimed by or allowed by PacifiCorp for the unexpired term of the right and franchise hereby granted.

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 Washington, the laws of Washington or City Ordinances. This franchise does not confer on PacifiCorp any right, title, or interest in the public property, streets or right of way of the City, nor shall anything contained herein constitute a warranty of use or title. If and when appropriate, PacifiCorp may apply for a permit or permits to use portions of the City's right of way in accordance with the City's right of way ordinances, regulations and laws as they exist now and from time to time amended. As to any of PacifiCorp's facilities already located within the City's right of way, the locations and methods of installation and maintenance of said Facilities shall be subject at all times to reasonable regulations by the City. Facilities shall be constructed, repaired, and maintained as to interfere as little as reasonably possible with public right of ways or other traffic. Furthermore, PacifiCorp shall regularly consult with the City as to its operations and plans and coordinate in advance

with the City, the location and installation of new facilities and services within the public right of ways, as appropriate.

SECTION 6. Use Fee. Except for PacifiCorp's obligation to pay utility tax equal to six percent (6%) of the total gross operating revenues derived from operating its Facilities under this Franchise, as set forth in Dayton Municipal Code § 3-3.12, no franchise or use fee is imposed for this Franchise.

SECTION 7. 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 Facilities. PacifiCorp shall indemnify, defend and hold the City, its elected officials, officers, employees, agents and representatives harmless from and against claims, demands, liens and all liability or damage of whatsoever kind, including claims by PacifiCorp's own employees to which PacifiCorp might otherwise be immune under Title 51 RCW, on account of PacifiCorp's exercise of the rights granted herein, or by virtue of the City's permitting the PacifiCorp's use of the public right of ways within the City, and shall pay the costs of defense plus reasonable attorneys' fees for any claim, demand or lien brought thereunder including costs and fees incurred upon appeal. 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 which shall not be unreasonably withheld or delayed. 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. Should both parties be found at fault and/or negligent, the parties agree to be responsible for their share of damages, expenses, costs, and judgment in proportion to their respective fault.

It is specifically and expressly understood that the indemnification provided herein constitutes PacifiCorp's waiver of immunity under Title 51 RCW, solely for the purposes of this indemnification. This waiver has been mutually negotiated by the City and PacifiCorp.

The provisions of this indemnification clause shall survive the termination of this lease agreement.

SECTION 8. Annexation.

8.1 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 Facilities owned, maintained, or operated by PacifiCorp located within any Public Right of Ways of the annexed territory shall thereafter be subject to all of the terms hereof.

8.2 Annexation. When any territory is approved for annexation to the City, the City shall, not later than fifteen (15) 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, OR 97207 – 0400

With a Copy to:

PacifiCorp, Attn: Office of General Counsel
825 NE 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 effective date of the annexation if notice is given to PacifiCorp by certified mail not later than fifteen (15) 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 fifteenth (15th) 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.

SECTION 9. Planning, Design, Construction, and Installation of Company Facilities.

9.1 All Facilities installed or used under authority of this Franchise shall be used, installed, constructed, reconstructed, repaired, replaced and maintained in accordance with applicable federal, state and city laws, codes, regulations, standards or procedures as they presently exist or as may be hereafter enacted, promulgated or amended. PacifiCorp shall comply with all federal, state, and local hazardous substance and environmental protection laws, rules, recommendations, and regulations as they presently exist or as may be hereafter enacted, promulgated or amended. Should any conflict arise between the privileges expressed in this Franchise and applicable federal, state and city laws, codes, and regulations, the applicable federal, state and city laws, codes and regulations shall control. PacifiCorp shall, at all times, employ ordinary care in the installation, abandonment, relocation, construction, maintenance, and/or repair, utilizing methods and devices commonly accepted in its industry of operation to prevent failures and accidents that are likely to cause damage, injury or nuisance to persons or property. All of PacifiCorp's facilities in the Public Way shall be constructed and maintained in a reasonably safe and operational condition. PacifiCorp shall follow all safety codes and other applicable regulations in the installation, operation, and maintenance of the facilities.

9.2 All Facilities shall be located, constructed, and maintained so they do not unreasonably interfere with the free passage of traffic, both vehicular and pedestrian, or the existing municipal infrastructure and facilities, including the City's sewer and water utility infrastructure. The owners of all utilities, public or private, installed in or on the public right of ways prior to the installation of the PacifiCorp's facilities shall, as determined by the City, have preference as to the positioning and location of such utilities so installed with respect to the PacifiCorp unless such facility has been abandoned or unused for a continuous period of one (1) year. Such preference shall continue regardless of realignment or change to the grade of any public right of way. This subsection does not grant any third-party rights to persons or entities occupying the public rights of ways.

9.3 If, during the course of work on its Facilities, PacifiCorp causes damage to or alters the public right of 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.

9.4 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.

9.5 The City shall have the right, without cost, to use all poles and suitable overhead structures owned by PacifiCorp within the public right of ways for City wires used in connection with its traffic controls, 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, alter the manner in which PacifiCorp attaches its equipment to poles or alter the manner in which it operates and maintains its 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 such attachments to ensure compliance with this Section 9.5 and to require the City to remedy any defective attachments.

9.6 PacifiCorp shall allow the City, at City's 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 Facilities or delay project completion.

9.7 City shall not erect structures, buildings, or signs directly below any Facilities or in a location that prevents PacifiCorp from accessing or maintaining its facilities.

9.8 PacifiCorp shall maintain its facilities in a manner so as to provide reliable service and prevent injury to public property or property belonging to any person within the City. PacifiCorp, solely at its own expense shall repair, renew, change, and improve said facilities from time to time as may be necessary to maintain that same in good condition.

SECTION 10. Relocation of Facilities.

10.1 Whenever the City causes a public right of way improvement to be undertaken within the corporate limits of the City, and such public right of way improvement requires the relocation of PacifiCorp's then existing Facilities within the City's corporate limits (for purposes other than those described in paragraph 10.4 below), the City shall:

10.1.1. Provide PacifiCorp, within a reasonable time prior to the commencement of such public right of way improvement, written notice requesting such relocation; and

10.1.2 Provide PacifiCorp with reasonable plans and specifications for such public right of way improvement.

After receipt of such notice and such plans and specifications, PacifiCorp shall relocate such Facilities at no charge to the City. If the City requires the subsequent relocation of any Facilities within five (5) years from the date of relocation of such facilities pursuant to this Section 10.1, the City shall bear the entire cost of such subsequent relocation. As used herein,

the term "public right of way improvement" is a City-funded capital improvement to the public right of way identified in the City's six-year transportation improvement program or City of Dayton's Growth Management Comprehensive Plan.

10.2 Whenever (i) any public or private development within the City's corporate limits, other than a public right of way improvement, requires the relocation of PacifiCorp 's Facilities to accommodate such development; or (ii) the City requires the relocation of PacifiCorp's Facilities for the benefit of any person or entity other than the City (e.g., as a condition to private development, etc.), then in such event, PacifiCorp shall have the right as a condition of such relocation, to require such developer, person or entity to make payment to PacifiCorp, at a time and upon terms acceptable to PacifiCorp, for any and all costs and expenses incurred by PacifiCorp in the relocation of PacifiCorp 's Facilities.

10.3 Any condition or requirement imposed by the City upon any person or entity, other than PacifiCorp, that requires the relocation of PacifiCorp Facilities shall be a required relocation for purposes of paragraph 10.2 above (including, without limitation, any condition or requirement imposed pursuant to any contract or in conjunction with approvals or permits for zoning, land use, construction or development).

10.4 Nothing in this Section 10 "Relocation of Facilities " shall require PacifiCorp to bear any cost or expense in connection with the location or relocation of any Facilities then existing pursuant to easement or such other rights not derived from this Franchise.

SECTION 11. Abandonment of PacifiCorp's Facilities. Within one (1) year of the termination of this Franchise or PacifiCorp's permanent cessation of the use of the PacifiCorp's Facilities, or any portion thereof, the PacifiCorp shall remove the affected Facilities or upon consent of the City, abandon the electric Facilities in place. For below-ground Facilities, the conduit may be abandoned in place, provided: (1) the City agrees in writing to abandonment in place for the particular Facility; and (2) PacifiCorp delivers plans to the City that depict the location of the abandoned conduit. The City and PacifiCorp agree that this Section 11 shall survive the expiration, revocation, or termination of this Franchise.

SECTION 12. Vacation. The City reserves the right to vacate any City street or public right-of-way which is subject to rights granted by this Franchise because the street or public right-of-way so vacated is no longer needed for public purposes. If PacifiCorp has facilities in such street or public right-of-way the City shall reserve an easement for PacifiCorp.

SECTION 13. Insurance. PacifiCorp shall procure and maintain for the duration of the Franchise, insurance against claims for injuries to persons or damages to property which may arise from or in connection with the exercise of the rights, privileges and authority granted hereunder to PacifiCorp, its agents, representatives or employees. PacifiCorp shall provide a copy of such insurance certificate to the City for its inspection prior to the adoption of this Franchise, and such insurance shall evidence:

- (a) Comprehensive general liability insurance, written on an occurrence basis, with limits not less than: (i) Five million dollars for bodily injury or death to each person; (ii) Five million dollars for property damage resulting from any one accident; and (iii) Five million dollars for all other types of liability;
- (b) Automobile liability for owned, non-owned and hired vehicles with a limit of three million dollars for each person and three million dollars for each accident;
- (c) Worker's compensation within statutory limits and employer's liability insurance with limits of not less than one million dollars; and
- (d) Comprehensive form premises-operations, explosions and collapse hazard, underground hazard and products completed hazard with limits of not less than three million dollars.

The insurance obtained by PacifiCorp shall name the City, its officers, employees as additional insured's with regard to activities performed by or on behalf of PacifiCorp. PacifiCorp's insurance shall be the primary insurance as respects the City, its officers, officials, employees, except to the extent City, its officers, officials, or employees are negligent. Any insurance maintained by the City, its officers, officials, or employees shall be in excess of PacifiCorp's insurance and shall not contribute to it. The insurance certificate required by this clause shall be endorsed to state that coverage shall not be suspended, voided, canceled by either party, or reduced in coverage or in limits except after sixty (60) days prior written notice, by U.S. mail, has been given to the City. Any failure to comply with the reporting provisions of the policies required herein shall not affect coverage provided to the City, its officers, officials, or employees. PacifiCorp may satisfy the obligations herein through a program of self-insurance.

SECTION 14. 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:

Pacific Power, Attn: Estimating
650 E. Douglas Ave.
Walla Walla, WA 99362

SECTION 15. Vegetation Management. PacifiCorp or its contractor may prune all trees and vegetation which overhang the public right of ways, whether such trees or vegetation originate within or outside the public right of ways, to prevent the branches or limbs or other part of such trees or vegetation from interfering with PacifiCorp's 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 16. Performance Guarantee. The City reserves the right to adopt additional ordinances and regulations that may require PacifiCorp to provide a financial performance guarantee. Such a financial guarantee shall not be construed to limit the PacifiCorp's liability to the guarantee amount, or otherwise limit the City's recourse to any remedy to which the City is otherwise entitled at law or in equity.

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 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 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. Default. If PacifiCorp shall fail to comply with the terms of this Franchise, the City may serve upon PacifiCorp a written notice specifying the non-compliance. Within thirty (30) days from the date such notice is received by PacifiCorp, the non-compliance shall be cured. If any failure to comply with this Franchise by PacifiCorp cannot be reasonably corrected within said thirty (30) day period (PacifiCorp's obligation to comply and to proceed with due diligence being subject to unavoidable delays and events beyond its control), then the time within which

PacifiCorp may so comply may be extended by the City, in the City's sole discretion, for such time as may be reasonably necessary so long as PacifiCorp commences to promptly and diligently effect such compliance. If the breach is not cured within the specified time, or the PacifiCorp does not comply with the specified conditions, the City may, at its sole discretion, terminate the Franchise. Within ten (10) days of receipt of notice of termination, PacifiCorp may seek appeal of the matter set forth in the notice of termination to the City Council. During the period of appeal, the notice of termination shall be stayed with this Franchise continuing in full force and effect. The City Council shall render a written decision. The City may take any action that it believes necessary for the immediate protection of public health and safety without notice and opportunity to cure, or with such limited notice and opportunity to cure as it determines appropriate. Nothing herein is intended to waive a party's rights under this Franchise, including the right to seek judicial relief.

SECTION 21. Choice of Law. This Franchise shall be governed by and construed under Washington State laws. Any litigation between the City and PacifiCorp arising under or regarding this Franchise shall occur, if in the state courts, in the Walla Walla County Superior Court, and if in the federal courts, in the United States District Court for the Eastern District of Washington.

SECTION 22. Entire Agreement and Effect. This Franchise constitutes the entire understanding and agreement between the parties as to the subject matter herein and no other agreements or understandings, written or otherwise, related to this subject-matter shall be binding upon the parties upon execution and acceptance hereof.

This Franchise supersedes, affirms, and governs previous rights or claims of PacifiCorp to occupy the right-of-way. If any term of this Franchise shall directly conflict with the code, ordinances, resolutions, rules, permits, licenses, policies or standards of the City, the terms of this Franchise shall control and govern.

SECTION 23. Notices. Unless otherwise specified herein, all notices from PacifiCorp to the City pursuant to or concerning this Franchise shall be delivered to the City Clerk's office. Unless otherwise specified herein, all notices from the City to PacifiCorp pursuant to or concerning this Franchise shall be delivered to:

PacifiCorp, Attn: Office of General Counsel
825 NE Multnomah
Portland, OR 97232

and such other office as PacifiCorp may advise the City of Dayton by written notice.

SECTION 24. 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 25. Effective Date. This ordinance shall be in full force and effect five (5) days after publication of the ordinance or a summary thereof occurs in the official newspaper of the City of Dayton as provided by law.

PASSED by the City Council of the City of Dayton Washington this 11 day of January, 2021.

MAYOR


Zac Weatherford

ATTEST:



Trina Cole
City Administrator

APPROVED AS TO FORM:



Quinn Plant
City Attorney

ORDINANCE SUMMARY BY TITLE ONLY FOR PUBLICATION PURPOSES

ORDINANCE NUMBER 1973

AN ORDINANCE OF THE CITY OF DAYTON, WASHINGTON AMENDING

The full text of Ordinance 1973, adopted the 13th day of January 2021, is available for examination at Dayton City Hall, 111 S. 1st St., Dayton, WA during normal business hours, 7:00 a.m. to 4:00 p.m., Monday – Friday.

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By: /s/ Zac Weatherford, Mayor

Attest: /s/ Trina Cole, City Administrator

Approved as to form: /s/ Quinn Plant, City Attorney

Published: Jan. 22, 21

The Waitsburg Times

