



# AGENDA STAYTON CITY COUNCIL MEETING

Monday, February 5, 2018

Stayton Community Center  
400 W. Virginia Street  
Stayton, Oregon 97383

**CALL TO ORDER**

**7:00 PM**

**Mayor Porter**

**FLAG SALUTE**

**ROLL CALL/STAFF INTRODUCTIONS**

## **ANNOUNCEMENTS – PLEASE READ CAREFULLY**

*Items not on the agenda but relevant to City business may be discussed at this meeting. Citizens are encouraged to attend all meetings of the City Council to insure that they stay informed. Agenda items may be moved forward if a Public Hearing is scheduled.*

- a. Additions to the agenda
- b. Declaration of Ex Parte Contacts, Conflict of Interest, Bias, etc.

## **PRESENTATIONS/COMMENTS FROM THE PUBLIC**

Request for Recognition: If you wish to address the Council, please fill out a green “Request for Recognition” form. Forms are on the table at the back of the room. *Recommended time for presentation is 10 minutes. Recommended time for comments from the public is 3 minutes.*

- a. North Santiam School Board Update
- b. Stayton Public Library Electronic Reader Board – Janna Moser, Library Director

## **CONSENT AGENDA**

- a. January 16, 2018 City Council Minutes

### ***Purpose of the Consent Agenda:***

*In order to make more efficient use of meeting time, resolutions, minutes, bills, and other items which are routine in nature and for which no debate is anticipated, shall be placed on the Consent Agenda. Any item placed on the Consent Agenda may be removed at the request of any council member prior to the time a vote is taken. All remaining items of the Consent Agenda are then disposed of in a single motion to adopt the Consent Agenda. This motion is not debatable. The Recorder to the Council will then poll the council members individually by a roll call vote. If there are any dissenting votes, each item on the consent Agenda is then voted on individually by roll call vote. Copies of the Council packets include more detailed staff reports, letters, resolutions, and other supporting materials. A citizen wishing to review these materials may do so at Stayton City Hall, 362 N. Third Avenue, Stayton, or the Stayton Public Library, 515 N. First Avenue, Stayton.*

***The meeting location is accessible to persons with disabilities. A request for an interpreter for the hearing impaired or other accommodations for persons with disabilities should be made at least 48 hours prior to the meeting. If you require special accommodations contact Deputy City Recorder Alissa Angelo at (503) 769-3425.***

**BUSINESS FROM THE MAYOR**

- a. Committee and Commissions Appointments
  - Budget Committee – Paige Hook
  - Planning Commission – Paige Hook
- b. Committee and Commissions Reappointments
  - Public Safety Commission – Cari Sessums

**PUBLIC HEARING – None**

**UNFINISHED BUSINESS – None**

**NEW BUSINESS**

**PacifiCorp Franchise Hearing**

**Action**

- a. Staff Report – Wallace Lien
- b. Council Deliberation
- c. Council Decision

**STAFF/COMMISSION REPORTS – None**

**PRESENTATIONS/COMMENTS FROM THE PUBLIC**

*Recommended time for presentations is 10 minutes.*

*Recommended time for comments from the public is 3 minutes.*

**BUSINESS FROM THE CITY MANAGER**

- a. 2018/19 FY Draft Budget Calendar

**BUSINESS FROM THE COUNCIL**

**FUTURE AGENDA ITEMS – February 20, 2018**

- a. Transportation Master Plan
- b. Total Compensation Study

**ADJOURN**

# CALENDAR OF EVENTS

## FEBRUARY 2018

Monday	February 5	City Council	7:00 p.m.	Community Center (north end)
Tuesday	February 6	Parks & Recreation Board	6:30 p.m.	E.G. Siegmund Meeting Room
Friday	February 9	Community Leaders	7:30 a.m.	Covered Bridge Café
Tuesday	February 13	Commissioner's Breakfast	7:30 a.m.	Covered Bridge Café
Monday	February 19	<b>CITY OFFICES CLOSED IN OBSERVANCE OF PRESIDENTS DAY HOLIDAY</b>		
Tuesday	February 20	City Council	7:00 p.m.	Community Center (north end)
Wednesday	February 21	Library Board	6:00 p.m.	E.G. Siegmund Meeting Room
Thursday	February 22	Pick Your Park -Mill Creek Park	6:00 p.m.	Community Center
Monday	February 26	Planning Commission	7:00 p.m.	Community Center (north end)

## MARCH 2018

Monday	March 5	City Council	7:00 p.m.	Community Center (north end)
Tuesday	March 6	Parks & Recreation Board	6:30 p.m.	E.G. Siegmund Meeting Room
Friday	March 9	Community Leaders	7:30 a.m.	Covered Bridge Café
Tuesday	March 13	Commissioner's Breakfast	7:30 a.m.	Covered Bridge Café
Monday	March 19	City Council	7:00 p.m.	Community Center (north end)
Wednesday	March 21	Library Board	6:00 p.m.	E.G. Siegmund Meeting Room
Monday	March 26	Planning Commission	7:00 p.m.	Community Center (north end)

## APRIL 2018

Monday	April 2	City Council	7:00 p.m.	Community Center (north end)
Tuesday	April 3	Parks & Recreation Board	6:30 p.m.	E.G. Siegmund Meeting Room
Tuesday	April 10	Commissioner's Breakfast	7:30 a.m.	Covered Bridge Café
Friday	April 13	Community Leaders	7:30 a.m.	Covered Bridge Café
Monday	April 16	City Council	7:00 p.m.	Community Center (north end)
Wednesday	April 18	Library Board	6:00 p.m.	E.G. Siegmund Meeting Room
Monday	April 30	Planning Commission	7:00 p.m.	Community Center (north end)

## MAY 2018

Tuesday	May 1	Parks & Recreation Board	6:30 p.m.	E.G. Siegmund Meeting Room
Monday	May 7	Budget Committee	6:00 p.m.	Community Center (north end)
Monday	May 7	City Council	Upon Adjournment of Budget Committee	
Tuesday	May 8	Commissioner's Breakfast	7:30 a.m.	Covered Bridge Café
Friday	May 11	Community Leaders	7:30 a.m.	Covered Bridge Café
Monday	May 14	Budget Committee	6:00 p.m.	Community Center (north end)
Tuesday	May 15	Budget Committee	6:00 p.m.	Community Center (north end)
Wednesday	May 16	Budget Committee	6:00 p.m.	Community Center (north end)
Wednesday	May 16	Library Board	6:00 p.m.	E.G. Siegmund Meeting Room
Monday	May 21	City Council	7:00 p.m.	Community Center (north end)
Monday	May 31	<b>CITY OFFICES CLOSED IN OBSERVANCE OF MEMORIAL DAY HOLIDAY</b>		
Tuesday	May 29	Planning Commission	7:00 p.m.	Community Center (north end)

**City of Stayton  
City Council Meeting Action Minutes  
January 16, 2018**

**LOCATION:** STAYTON COMMUNITY CENTER, 400 W. VIRGINIA STREET, STAYTON

**Time Start:** 7:00 P.M.

**Time End:** 8:30 P.M.

**COUNCIL MEETING ATTENDANCE LOG**

COUNCIL	STAYTON STAFF
Mayor Henry Porter	Alissa Angelo, Deputy City Recorder
Councilor Priscilla Glidewell	Keith Campbell, City Manager
Councilor Mark Kronquist	Dan Fleishman, Director of Planning & Development
Councilor Christopher Molin	Lance Ludwick, Public Works Director
Councilor Brian Quigley	Janna Moser, Library Director
Councilor Joe Usselman	Rich Sebens, Chief of Police (excused)
	Charles Button, Lieutenant

AGENDA	ACTIONS
<b>OATH OF OFFICE</b> a. Oath Of Office For Councilor Christopher Molin	Councilor Molin was sworn in by Ms. Angelo.
<b>REGULAR MEETING</b>	
<b>Announcements</b> a. Additions to the Agenda b. Declaration of Ex Parte Contacts, Conflict of Interest, Bias, etc.	None. Councilor Kronquist stated he owns property in the area of the proposed Vertical Housing Development Zone. However, he did not feel this would cause a bias for his decision.
<b>Presentations / Comments from the Public</b> a. Dan Morgan  b. Julie Bochslar	Mr. Morgan spoke in favor of a teen center but expressed concerns about the location and proximity to a known drug house.  Ms. Bocshler spoke in support of establishing a Vertical Housing Development Zone.
<b>Consent Agenda</b> a. December 18, 2017 City Council Minutes b. Resolution No. 972, Extending City of Stayton's Workers Compensation Coverage to Volunteers of the City of Stayton	Motion from Councilor Kronquist, seconded by Councilor Quigley, to approve the Consent Agenda as presented. <b>Motion passed 5:0.</b>
<b>Public Hearing</b> <b>Ordinance No. 1015, Amending Land Use Code Regarding Standards for Awnings and the Color Palette for Buildings in the Downtown Zones</b> a. Commencement of Public Hearing	Mayor Porter opened the hearing at 7:19 p.m.

<p>b. Staff Report – Dan Fleishman</p> <p>c. Questions from the Council</p> <p>d. Proponents’ Testimony</p> <p>e. Opponents’ Testimony</p> <p>f. Governmental Agencies</p> <p>g. General Testimony</p> <p>h. Questions from the Public</p> <p>i. Questions from the Council</p> <p>j. Staff Summary</p> <p>k. Close of Hearing</p> <p>l. Council Deliberation</p> <p>m. Council Decision on Ordinance No. 1015</p>	<p>Councilor Glidewell stated she is a member of Friends of Old Town Stayton, but does not feel it will cause her any bias. Both Councilor Kronquist and Councilor Glidewell own property in the area. However, neither felt it would cause any bias in their decision.</p> <p>Mr. Fleishman reviewed the staff report.</p> <p>Council discussion with staff if these rules would apply to only new development in the downtown area. Mr. Fleishman explained the color palette applies to everyone in the downtown area seeking to paint their building. The other rules will apply on a case by case basis depending on changes proposed by the building owner.</p> <p>Further discussion of how many Friends of Old Town Stayton members own buildings in the downtown area.</p> <p><u>Steve Poisson, 1750 E. Pine Street</u>, spoke in support of the proposed ordinance.</p> <p><u>Alan Meyer, 2764 E. Pine Street</u>, spoke in support of the proposed ordinance.</p> <p>None.</p> <p>None.</p> <p>None.</p> <p><u>Julie Bochsler, 1660 Mt. Jefferson Drive</u>, inquired if replacing the fabric awning with no alteration to the frame would require meeting the new requirements. Mr. Fleishman stated no, only if the frame was replaced or altered.</p> <p>Mr. Fleishman provided a brief summary.</p> <p>Mayor Porter closed the hearing at 7:39 p.m.</p> <p>None.</p> <p>Motion from Councilor Kronquist, seconded by Councilor Usselman, to approve Ordinance No. 1015 as presented. <b>Motion passed 5:0.</b></p>
<p><b>Unfinished Business</b>  <b>Proposed Resolution Establishing Residential Rental Registration Fee</b></p> <p>a. Staff Report – Dan Fleishman</p>	<p>Mr. Fleishman reviewed his staff report.</p>

<p>b. Council Deliberation</p> <p>c. Council Decision</p>	<p>Council discussion on history of rental issues and how the discussion of a fee came about.</p> <p>Motion from Councilor Glidewell, seconded by Councilor Kronquist, to approve Resolution No. 969, as presented. <b>Motion passed 4:1 (Quigley).</b></p>
<p><b>New Business</b></p> <p><b>Appointment of Council President</b></p> <p>a. Staff Report – Alissa Angelo</p> <p>b. Council Discussion</p> <p>c. Council Decision</p> <p><b>Appointment of Council Liaisons to Boards and Committees</b></p> <p>a. Staff Report – Alissa Angelo</p> <p>b. Council Discussion</p> <p><b>Judicial Services Contract</b></p> <p>a. Staff Report – Alissa Angelo</p> <p>b. Council Discussion</p> <p>c. Council Decision</p>	<p>Ms. Angelo briefly reviewed the staff report.</p> <p>None.</p> <p>Motion from Councilor Glidewell, seconded by Councilor Usselman, to reappoint Councilor Quigley as the Council President. <b>Motion passed 5:0.</b></p> <p>Ms. Angelo reviewed the current list of Council Liaisons for Boards and Committees. Following discussion, Councilors agreed to serve as a Liaison as follows:</p> <ul style="list-style-type: none"> <li>• <i>Adaptive Management Group</i> – Councilor Glidewell</li> <li>• <i>North Santiam School District Board</i> – Councilor Kronquist</li> <li>• <i>Parks and Recreation Board</i> – Councilor Kronquist</li> <li>• <i>Regional Transportation Advisory Committee (SRAC)</i> – Mayor Porter</li> <li>• <i>Library Board</i> – Councilor Molin</li> <li>• <i>Santiam Communications Council</i> – Councilor Quigley</li> <li>• <i>Public Safety Commission</i> – Councilor Usselman</li> <li>• <i>Marion County Veterans Task Force</i> – Councilor Molin</li> </ul> <p>Ms. Angelo reviewed her staff report.</p> <p>None.</p> <p>Motion from Councilor Quigley, seconded by Councilor Glidewell, to approve the renewal and amendment of Municipal Court Judge Jonathan Clark’s contract as presented. <b>Motion passed 5:0.</b></p>

<p><b>Supporting Downtown Development through Establishment of a Vertical Housing Development Zone</b></p> <ul style="list-style-type: none"> <li>a. Staff Report – Dan Fleishman</li> <li>b. Council Discussion</li> <li>c. Council Decision</li> </ul>	<p>Mr. Fleishman reviewed his staff report.</p> <p>Council discussion of experience with vertical housing and the effect on an owner if a taxing agency opts out.</p> <p>The Council reached consensus to request staff begin the process of establishing a Vertical Housing Development Zone.</p>
<p><b>Staff / Commission Reports</b></p> <p><b>Finance Department Report – Cindy Chauran &amp; Elizabeth Baldwin</b></p> <ul style="list-style-type: none"> <li>a. December 2017 Monthly Finance Department Report</li> </ul> <p><b>Police Chief’s Report – Chief Rich Sebens</b></p> <ul style="list-style-type: none"> <li>a. December 2017 Statistical Report</li> </ul> <p><b>Public Works Director’s Report – Lance Ludwick</b></p> <ul style="list-style-type: none"> <li>a. December 2017 Operating Report</li> </ul> <p><b>Planning &amp; Development Director’s Report – Dan Fleishman</b></p> <ul style="list-style-type: none"> <li>a. December 2017 Activities Report</li> </ul> <p><b>Library Director’s Report – Janna Moser</b></p> <ul style="list-style-type: none"> <li>a. December 2017 Activities</li> </ul>	<p>No discussion.</p> <p>No discussion.</p> <p>Brief discussion of the recent announcement of the Army Corp of Engineers project at Detroit Lake.</p> <p>No discussion.</p> <p>Ms. Moser offered an invite to Brews, Bites, and Books at the Library on January 27<sup>th</sup>.</p>
<p><b>Presentations / Comments from the Public</b></p>	<p>None.</p>
<p><b>Business from the City Manager</b></p>	<p>None.</p>
<p><b>Business from the Mayor</b></p>	<p>None.</p>
<p><b>Business from the Council</b></p>	<p>None.</p>
<p><b>Future Agenda Items – Monday, February 5, 2018</b></p> <ul style="list-style-type: none"> <li>a. Library Reader Board Presentation</li> <li>b. North Santiam School Board Update</li> </ul>	

APPROVED BY THE STAYTON CITY COUNCIL THIS 5<sup>TH</sup> DAY OF FEBRUARY 2018, BY A \_\_\_\_ VOTE OF THE STAYTON CITY COUNCIL.

Date: \_\_\_\_\_

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

Henry A. Porter, Mayor

Date: \_\_\_\_\_

Attest: \_\_\_\_\_

Keith D. Campbell, City Manager

Date: \_\_\_\_\_

Transcribed by: \_\_\_\_\_

Alissa Angelo, Deputy City Recorder



# CITY OF STAYTON

## APPLICATION FOR COMMISSION/COMMITTEE

NAME OF COMMISSION/COMMITTEE:

\_\_\_\_\_

PLEASE CHECK ONE:

\_\_\_\_\_ New Applicant

\_\_\_\_\_ Application for reappointment

Years resided in Stayton: \_\_\_\_\_

PLEASE PRINT

Name \_\_\_\_\_

Address \_\_\_\_\_ Home Ph# \_\_\_\_\_

Email Address \_\_\_\_\_ Cell Ph# \_\_\_\_\_

Occupation \_\_\_\_\_

Place of Employment \_\_\_\_\_

Business Address \_\_\_\_\_

Phone \_\_\_\_\_ Email \_\_\_\_\_

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1. Please give a brief description of the experience or training that qualifies you for membership on this commission/committee. (If you wish, you may attach a resume or other pertinent material.)

2. Why do you want to become a member of the above-mentioned commission/committee and what specific contribution would you hope to make?

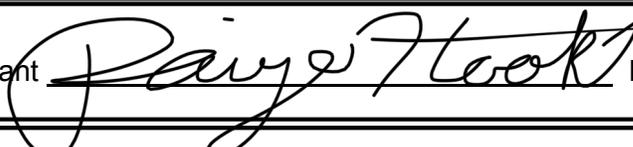
**PLEASE COMPLETE BOTH SIDES OF THIS APPLICATION**

3. Please list the community concerns related to this commission/committee that you would like to see addressed if you are appointed.
  
4. Briefly describe your present or past involvement in relevant community groups. (Having no previous involvement will not disqualify you for appointment.)
  
5. Are you currently serving on any Advisory Boards, Commissions or Committees? If so, which ones?
  
6. How did you learn about this vacancy?  
 Our Website     Word of mouth     Other
  
7. Are you employed by, have any business, contractual arrangements or family connections with programs having contractual agreements with the City that might be within the purview of the committee on which you are seeking appointment?

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Signature of Applicant  Date \_\_\_\_\_

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**PLEASE RETURN TO:**      City of Stayton  
    362 N. Third Avenue  
    Stayton, OR 97383

*It is the policy of the City to comply with all federal and state statutes on equal employment opportunity. This policy shall be applied without regard to any individual employee or job applicant's sex, race, color, religion, national origin, ancestry, age, marital status, political affiliation, genetic information, veteran status or any other legally protected status per state and federal law.*

**PLEASE COMPLETE BOTH SIDES OF THIS APPLICATION**



# CITY OF STAYTON

## APPLICATION FOR COMMISSION/COMMITTEE

**NAME OF COMMISSION/COMMITTEE:**

Planning commission

**PLEASE CHECK ONE:**

New Applicant  
 Application for reappointment

Years resided in Stayton: 5

PLEASE PRINT

Name Paige Hook

Address 2088 Quail Run Ave Home Ph# N/A

Email Address Mrs.paigehook@gmail.com Cell Ph# 503-507-4704

Occupation Executive Assistant

Place of Employment State of Oregon

Business Address 500 Summer St NE, Salem, OR

Phone 503-793-2533 Email Paige.k.hook@state.or.us

1. Please give a brief description of the experience or training that qualifies you for membership on this commission/committee. (If you wish, you may attach a resume or other pertinent material.)

I have a bachelors degree, experience in managing projects, and have training in crime analysis which takes a high level of analytical skill and cartography and GIS courses. I also have experience in keeping meetings moving forward.

2. Why do you want to become a member of the above-mentioned commission/committee and what specific contribution would you hope to make?

I want to become a member of this committee, because I care about our community, and want to be a part of the discussion and decisions on how we develop and grow. I want to help advocate for all citizens and make sure processes aren't rushed, yet topics are kept moving to respect each member's time. I want to take the time when needed to ask some or all of the following questions:

- Why are we doing this?
- Is it legal?
- Is it helpful?
- Does it support the small town, welcoming feel of our community?
- Is there a way to reduce the cost?
- Is it necessary or improve livability?
- Is it fair?
- How will it affect residents?
- How will it affect small businesses?
- How will it affect traffic?
- What other future implications of this decision might there be?
- What precedent might we be setting?
- What are two alternatives we could consider?

**PLEASE COMPLETE BOTH SIDES OF THIS APPLICATION**

3. Please list the community concerns related to this commission/committee that you would like to see addressed if you are appointed.

Community members including small and large business owners and our residents, deserve a wonderful place to work, play, learn, and live. Our governmental bodies and boards are entrusted with the planning, development, and growth of our city. This includes incorporating the voices of our citizens, improving livability, advocating for our vulnerable populations, and supporting our environment by making smart decisions in energy and design of our expanding city. I would like to be sure we are addressing the previous questions stated in #2 wherever possible to ensure we are planning for the current citizens and future generations in the best way we can.

4. Briefly describe your present or past involvement in relevant community groups. (Having no previous involvement will not disqualify you for appointment.)

I do not have any specific experience in city planning groups, but I am an active Rotarian, and am currently managing a nonpartisan campaign in a neighboring city.

5. Are you currently serving on any Advisory Boards, Commissions or Committees? If so, which ones?

I am not.

6. How did you learn about this vacancy?

Our Website  Word of mouth  Other

7. Are you employed by, have any business, contractual arrangements or family connections with programs having contractual agreements with the City that might be within the purview of the committee on which you are seeking appointment?

I do not believe so. I do work for the state of Oregon, but it is not in a section that deals with city planning. I work for the health authority.

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Signature of Applicant

*Raige Hook*

Date 1/23/2018

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City of Stayton  
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Stayton, OR 97383

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**PLEASE COMPLETE BOTH SIDES OF THIS APPLICATION**



# CITY OF STAYTON

## APPLICATION FOR COMMISSION/COMMITTEE

NAME OF COMMISSION/COMMITTEE:

Cari Fiske/Sessums

PLEASE CHECK ONE:

New Applicant

Application for reappointment

Years resided in Stayton: 35

PLEASE PRINT

Name Cari Fiske/Sessums

Address 1501 E Burnett Stayton, Or Home Ph# n/a

Email Address billyandcari@wbcable.net Cell Ph# 503-689-5015

Occupation Co Owner

Place of Employment Covered Bridge Cafe

Business Address 510 N 3rd Ave Stayton, Or

Phone 503-767-3945 Email Same as above

1. Please give a brief description of the experience or training that qualifies you for membership on this commission/committee. (If you wish, you may attach a resume or other pertinent material.)

I have been on this board for two years, I also hold a position on the Marion County Sheriffs office Advisory board as well as an appointment by our County Commissioners on the Local Drug and Alcohol planning commission. I am currently on the budgeting board for St Josephs in Mt. Angel. I have completed the Citizens Academy in Marion County. As wells as spent years working with Methbusters and No Meth in my neighborhood.

*Marion County Health Mental Advisory Board*

2. Why do you want to become a member of the above-mentioned commission/committee and what specific contribution would you hope to make?

I enjoy having a voice for our citizens to the leaders in our community sharing Knowledge as well as information to help people feel that they are a part of our Police dept.

PLEASE COMPLETE BOTH SIDES OF THIS APPLICATION

3. Please list the community concerns related to this commission/committee that you would like to see addressed if you are appointed.  
No Concerns on my behalf, but however I do share concerns with other board members as well as the police dept that people may bring my way.

4. Briefly describe your present or past involvement in relevant community groups. (Having no previous involvement will not disqualify you for appointment.)  
See #1.

5. Are you currently serving on any Advisory Boards, Commissions or Committees? If so, which ones?  
See #1

6. How did you learn about this vacancy?  
\_\_\_\_\_ Our Website \_\_\_\_\_ Word of mouth  Other

7. Are you employed by, have any business, contractual arrangements or family connections with programs having contractual agreements with the City that might be within the purview of the committee on which you are seeking appointment?  
No

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Signature of Applicant Carl Jessung Date 12/2/13

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Stayton, OR 97383

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**PLEASE COMPLETE BOTH SIDES OF THIS APPLICATION**



**CITY OF STAYTON**  
**M E M O R A N D U M**

**TO: Mayor Henry A. Porter and the Stayton City Council**  
**FROM: Wallace W. Lien, Special Counsel**  
**DATE: January 31, 2018**  
**SUBJECT: PacifiCorp Franchise Hearing**

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This matter comes before the Council pursuant to the terms of the Franchise Agreement with PacifiCorp for the use of city rights of way for the provision of electric power to the citizens of Stayton. The Franchise Agreement is attached hereto as Exhibit A. Staff has alleged PacifiCorp has violated and breached the Franchise Agreement by failing to move certain power poles to accommodate the city's stormwater drainage project and street widening project on Kindle Way, and PacifiCorp has denied it has violated or breached the Franchise. The purpose of this hearing is for the Council to resolve the issue.

**1. Background Facts**

The City has been planning and implementing its new storm water detention facility and street widening project north of Kindle Way for the last year. The project involves the purchase, rezoning and annexation of land by the City for the purpose of creating a new regional storm water detention facility and adjoining public park. Included in this project are certain street improvements necessary, and construction of storm water piping and ditching to feed the new detention facility. Improvements to Kindle Way to collector status are mandated by the Transportation Systems Plan, and are being paid for from City Transportation SDC funds.

Early on in the project, staff and designers identified that certain PacifiCorp power poles would need to be moved in order to accommodate the new City project. Those poles that need to be moved are identified in the attached drawing marked as Exhibit B. A total of 10 power poles are involved at this time beginning at the intersection of Shaff Road and Kindle Way (Pole #1), and running north along Kindle Way to its intersection with Junco Street. (Poles #2-10).

Pole #1 is a high voltage transmission pole that has to have special treatment in the move. Poles #2-10 are normal power poles and require nothing extra in order to move. The current project planning requires Pole #1 to be moved to the northeast to the edge of the new Shaff Road right of way. It will remain an above ground pole. Poles #2-10 will be moved and placed underground along the eastern edge of the Kindle Way right of way. The City has the responsibility for the trenching, and laying the vaults and conduit in order to get the power lines underground, but it is the responsibility of PacifiCorp to remove the poles, run the wire inside

the conduit and make the electrical connections. The City's underground obligation is a part of the project budget, and will be paid for with City Transportation SDC funds.

Section 4.12.030(3)(a)(iv) of the Franchise Agreement provides that in cases of capital improvement projects undertaken by the City, PacifiCorp shall at its expense convert existing overhead distribution facilities to underground. The detention and street project involved here are a capital improvement project of the City. PacifiCorp in this situation is allowed to be reimbursed for the costs of conversion from ratepayers pursuant to OAR 860-22-0046.

Section 4.12.040(2) of the Franchise Agreement regarding relocation of facilities provides that PacifiCorp shall, at its expense, relocate any of its equipment or facilities that are required to promote the public interest of the City by reason of traffic conditions, public safety, street construction, installation of storm sewer lines, or any other type of structures or public improvements by City.

On June 8, 2017, the City sent an official written demand to have PacifiCorp move the poles. On June 26, 2017, PacifiCorp, through Eddie Steiner advised the City that PacifiCorp refused to move pole #1 because it was, or had been, in a private easement. At this point Mr. Steiner had no issue with the moving of poles #2-10. Upon being advised that the City did not agree with that assessment, and continued its demand to have the affected poles moved, the attorney for PacifiCorp, sent an email to the Acting City Attorney on October 23, 2017 affirming that the position of PacifiCorp was that the franchise obligation to move the poles did not apply where PacifiCorp had a prior private easement. Thereafter on November 1, 2017, Mr. Steiner advised the City that PacifiCorp had discovered that poles #2-10 were, or had been, in a private easement, therefore PacifiCorp was refusing to move those poles as well.

Staff originally advised all utility providers that utilities from the intersection of Shaff Road and Kindle Way would have to move their facilities by December 31, 2017. Northwest Natural Gas, Stayton Telephone and Wave Cable have all agreed to move their facilities at their own expense, and Staff anticipates that all those moves will be fully accomplished by June 1, 2018.

Annexation of the subject property has now been accomplished, and the stormwater detention project needs to proceed as soon as practical. Staff believes it is necessary to have the affected power poles moved by June 1, 2018 in order to keep the detention/street project on schedule for completion before the end of 2018.

## **2. The Hearing Process**

Section 4.12.070(8)(b) of the Franchise Agreement provides for a public hearing to be held to resolve this matter. That section reads as follows:

*PacifiCorp shall be afforded due process and provided with an opportunity to be heard at a public hearing before the City Council prior to the termination of the franchise. The City Council shall hear any persons interested therein, and shall determine, in its discretion, whether or not any failure, refusal, or neglect by PacifiCorp has occurred.*

This form of public hearing allows the presentation of evidence and argument by the parties in order to fully inform the Council prior to making its final determination.

The order of presentation of the hearing will be as follows:

Staff Report  
Questions of Staff by Council  
Presentation by PacifiCorp  
Questions of PacifiCorp by Council  
Rebuttal by Staff  
Deliberations by Council

This hearing is not a land use hearing, and the formalities of a land use hearing do not apply. Any relevant evidence and argument should be received and considered. There are no automatic rules for continuance of the hearing, although Council always has the right to continue a hearing on its own Motion.

Upon making a decision, staff will draft an Order manifesting the Council decision, including findings of fact, and will bring the Order to Council at the next Council meeting for final adoption.

### **3. Breach of Franchise Agreement**

PacifiCorp's refusal to comply with the Franchise Agreement in moving the affected power poles for a City project amounts to a breach thereof as hereinafter explained.

PacifiCorp's sole reason for refusing to comply with the mandates of the Franchise Agreement is that the poles are, or had been previously authorized by a private easement extended to PacifiCorp by local property owners.

However, there is no language in the Franchise Agreement that gives PacifiCorp an exemption to compliance because the affected poles were under a prior private easement. There is one exception (for service drops) to that rule, but it does not apply in this case.

Without specific language in the Franchise Agreement that would give PacifiCorp the right to be exempt from the moving requirements for a City project, no such right exists. This Franchise Agreement is specific, and the rights and obligations of the parties are stated fully and completely therein. For rights to exist, they must be negotiated, agreed to and written into the Franchise Agreement. None of that has happened for a private easement exemption.

Staff interprets the Franchise Agreement to provide for no such exception. The Franchise Agreement actually requires PacifiCorp to follow the mandates of the Franchise Agreement even when an easement is involved. Section 4.12.010(3)(h) of the Agreement defines an Easement as a public right-of-way, private utility easement on private or public property, or public utility easement on public or private property but not including a private utility easement for a customer's service drop. There is nothing in this language that exempts PacifiCorp performance for anything other than a service drop, which is not the situation here.

Section 4.12.040(1)(a) Use of Public Ways (Excavation and Restoration) of the Franchise Agreement provides that PacifiCorp shall comply with all applicable ordinances, municipal codes, rules or regulations that may pertain to its activities within easements, public places and public rights-of-way of the City. This language supports the Staff's interpretation that PacifiCorp is obligated to move the affected poles even when those poles were at some prior time located within a private easement.

Further support for the staff's position is provided by Section 4.12.040(1)(b) of the Franchise Agreement which provides that all structures, lines, and equipment erected by PacifiCorp within the City shall be located so as to cause minimum interference, with the proper use of city streets. There is no limitation or exception here for prior private easements. This provision is clear that if PacifiCorp has equipment within the City, and that equipment is located in such a manner as to cause interference with the proper use of a street within the City, PacifiCorp falls out of compliance with the Franchise Agreement.

Section 4.12.040(2) of the Franchise Agreement regarding relocation of facilities provides that PacifiCorp shall, at its expense, relocate any of its equipment or facilities that are required to promote the public interest of the City by reason of traffic conditions, public safety, street construction, installation of storm sewer lines, or any other type of structures or public improvements by City. This provision also contains no exemption for prior private easements, and is clear language that PacifiCorp has the obligation to relocate its poles when such is needed due to traffic conditions, new street construction and installation of storm sewer facilities.

Subsection 4.12.040(2)(d) goes on to state that if PacifiCorp fails to comply with any requirement of the City pursuant to this section, the City may remove or relocate the facilities at PacifiCorp's expense, unless said removal or relocation would be in violation of any portions of ORS 757.800 and ORS 757.805. These ORS citations are to high voltage power lines and apply only to Pole #1, which will be further discussed below as to remedies.

Section (2)(b) of 4.12.040 of the Franchise Agreement requires the City to give PacifiCorp a written request to relocate the poles. That request was made on June 8, 2018. PacifiCorp was given until January 31, 2018 to enter into a formal agreement for it to move the affected poles. No such agreement has been forthcoming.

It is the Staff's position that PacifiCorp is in material breach of the Franchise Agreement by its repeated refusal to move the affected power poles.

#### **4. Fiscal Impact**

The approximate cost of moving Pole #1 is between \$75,000 and \$100,000 because it is a high voltage transmission line pole. This pole would remain an above ground pole, and has to be moved by PacifiCorp.

The approximate cost of moving Poles #2-10 is \$165,000. The City is responsible for placing the moved lines underground, regardless of who is responsible for moving the poles. The City's cost for trenching, vaults and conduit for Poles #2-10 is approximately \$55,000.

The total cost for moving all 10 poles involved in this case is between \$240,000 and \$265,000, of which the City is responsible for approximately \$55,000, leaving the amount remaining for moving the poles at between \$185,000 and 210,000, which is the responsibility of PacifiCorp.

If the decision is that PacifiCorp must move the poles, there is no fiscal impact to the City, as the cost of the move will be borne by PacifiCorp, except for the cost of under-grounding which the City is responsible for in either event. If the decision is that there is an implied exemption in the Franchise Agreement to exempt compliance when the poles were located in a prior easement, then the fiscal impact to the City would be a cost of \$240,000-\$265,000 additional for the detention/street project.

## **5. Remedies**

According to Section 4.12.070(6) the City has all the remedies available to it under the Franchise Agreement, as well as all remedies available at law or in equity.

Upon a finding of a violation of a material provision of the Franchise Agreement, the City has the following remedies available to it under that Agreement:

- A. Revoke and terminate the Franchise Agreement. Section 4.12.070(7); or
- B. In lieu of revocation, the City may assess a penalty of \$240 per day for breach without just cause. The penalty would begin on January 1, 2018, as that is the date given by Staff for the work to be completed. Since it was not completed, the penalty would run for every day from January 1, 2018 until the work is completed. Section 4.12.070(9)(a); and/or
- C. The City may mandate PacifiCorp move Pole #1, and underground Poles #2-10 at its expense no later than June 1, 2018. Section 4.12.040(2)(a); or
- D. The City may elect to undertake the move of Poles #2-10, and assess the costs thereof back against PacifiCorp, and mandate that PacifiCorp move Pole #1 (because it is a high voltage transmission line, according to the ORS 757.800 and 757.805, because of the liability associated with high voltage lines, only PacifiCorp should be the one to move it). Section 4.12.040(2)(d).

## **6. Staff Recommendation**

It is Staff's position that the Franchise Agreement provides the rules and regulations that govern the provision of electrical power in the City. There is nothing in the Franchise Agreement that even remotely suggests that the provisions of the Franchise Agreement do not apply when there is a prior easement for the location of a power facility unless that easement is for a service drop. Staff believes that if the Franchise Agreement were intended to allow such an exemption, it would have been specifically written into the Agreement and not left up to interpretation.

Easements are between PacifiCorp and private property owners, and have nothing to do with the City. That an easement once existed for the location of a power pole means nothing when the adjacent right of way is expanded by the City to upgrade a street, leaving the easement location of the pole in the middle of the street. The entire relocation of pole provisions in the Franchise Agreement are intended to prevent that situation from happening. Where the pole movement is caused by private development, PacifiCorp can recoup its costs from the private developer. However when the pole movement is caused by a city initiated and funded capital improvement project, the obligation to move the poles lies with PacifiCorp. That cost is either assumed as a cost of the franchise, or may be passed on to the ratepayers consistent with OAR 860-22-0046.

It is assumed that many, if not most, established power poles were originally placed pursuant to an easement granted by a private property owner. Should the Franchise Agreement be interpreted in such a way as to exempt poles placed under a private easement, the portion of the Franchise Agreement governing relocation would essentially be meaningless. The precedent to be set here has an enormous long term impact on the City as it grows and undertakes new capital improvement street projects.

Staff is not advocating for a revocation of the Franchise Agreement, only compliance with the terms of that Agreement. Staff further believes that the private easement argument proffered by PacifiCorp is without just cause given the clear language of the Franchise Agreement. PacifiCorp's repeated failure from June 2017 through the current period to agree to move the poles at its expense constitutes a material breach of the Franchise Agreement.

Staff recommends that In lieu of revocation, the City assess a penalty of \$240 per day, beginning January 1, 2018 and continuing until such time as an agreement is reached for PacifiCorp to move Poles #1-10, and in addition, to mandate that PacifiCorp move Pole #1, and underground Poles #2-10 at its expense no later than June 1, 2018.

### **Options Available to the Council**

1. I move that the City find PacifiCorp in breach/violation of its Franchise Agreement (Ordinance 939) for its repeated refusal, without just cause, to move Poles #1-10 at its expenses to allow for the City's capital improvement project to construct a new storm water detention facility and to bring Kindle Way up to collector standards as required by the Transportation Systems Plan. A penalty of \$240 per day, beginning January 1, 2018 and continuing until such time as an agreement is reached for PacifiCorp to move Poles #1-10 shall be assessed. In addition, PacifiCorp is mandated to move Pole #1, and underground Poles #2-10 at its expense (less the City's obligation for under-grounding) with said work being completed no later than June 1, 2018. Staff shall prepare an Order with findings of fact commensurate with this decision and bring it to the next Council meeting for adoption.
2. I move that the City interpret its Franchise Agreement (Ordinance 939) to include therein an exemption to the relocation requirements for each situation in which a pole was originally located within a private easement. For those circumstances, PacifiCorp would not be responsible for any cost of moving poles, even where the need for the move is

caused by a City initiated capital improvement project. With this interpretation, PacifiCorp is not in violation of the Franchise Agreement, and has no financial obligation to move Poles #1-10. Staff shall prepare an Order with findings of fact commensurate with this decision and bring it to the next Council meeting for adoption.

**ORDINANCE NO. 939**

**AN ORDINANCE GRANTING A NONEXCLUSIVE ELECTRIC UTILITY FRANCHISE TO PACIFICORP, AN OREGON CORPORATION, DOING BUSINESS AS PACIFIC POWER & LIGHT COMPANY, AND FIXING TERMS, CONDITIONS, AND COMPENSATION OF SUCH FRANCHISE.**

WHEREAS, The City of Stayton, through Ordinance No. 835, granted a twenty year non-exclusive franchise to Pacific Power & Light Company to operate an electric power utility system within the City of Stayton;

WHEREAS, subsequent to the granting of said franchise, Pacific Power & Light Company became an assumed business name of PacifiCorp;

WHEREAS, Pacific Power & Light Company and/or PacifiCorp have continuously operated said franchise throughout the term granted by the franchise;

WHEREAS, PacifiCorp desires to continue the operation of its electric power utility system within the City of Stayton through a renewed franchise agreement; and,

WHEREAS, the City of Stayton deems it appropriate that a successor franchise be granted to PacifiCorp, an Oregon Corporation also known as Pacific Power & Light Co, which reflects the current state of the electric power industry.

NOW, THEREFORE, the Stayton City Council does ordain as follows:

4.12.010 INTRODUCTION

1. Statement of Intent and Purpose. The City of Stayton intends, by the granting of this franchise, to authorize the continued development and operation of an electric utility system to serve the citizens of Stayton. Such development can contribute significantly to meeting the electrical needs and desires of many individuals, associations, and institutions in the City.
2. Short Title. This Ordinance shall be known as the PacifiCorp (Pacific Power & Light Co.) Franchise Ordinance. Within this document, it shall also be referred to as "this franchise" or "the franchise".
3. Definitions. For the purpose of the ordinance, the following terms shall have the meaning given herein.
  - a. Administrator: The City Administrator of the City of Stayton, or such person as may be designated by the City Administrator for the administration of this franchise.

- b. Bridge: Includes a structure erected within the City to facilitate the crossing of a river, stream, ditch, ravine, or other place.
- c. Conduit: An electrical raceway for the enclosure of electrical conductors and may consist of rigid conduit of electrical metallic tubing or plastic tubing.
- d. City: The City of Stayton, Oregon, and the area within its boundaries including its boundaries as extended in the future and all property owned by the City, outside City limits. It means all officers, employees, and representatives of the City of Stayton.
- e. City Council: The legislative body of the City.
- f. Customer Base: The total number of individual customers in any given year within the City.
- g. Distribution Facilities: Electric facilities of up to 35,000 kilovolts used for the delivery of electric power and energy to customers.
- h. Easement: Public right-of-way, private utility easement on private or public property, or public utility easement on public or private property but not including a private utility easement for a customer's service drop.
- i. Franchise Territory: The area within the legal boundaries of City, and all property owned by City outside its boundaries and includes areas annexed during the term of franchise.
- j. Gross Revenue: Revenues derived from the sale of electricity or from the use, rental or lease of PacifiCorp's operating facilities other than residential-type space and water heating equipment within City allowed by law to be included within the term "Gross Revenue", after deducting therefrom any amounts paid by PacifiCorp to the United States or to the State of Oregon as excise, occupation, or business taxes upon the sale or distribution of electric service in City and after deducting net uncollectibles. Gross Revenues shall not include proceeds from the sale of bonds, mortgage or other evidence of indebtedness, securities or stocks, sales at wholesale by one utility to another when the utility purchasing the service is not the ultimate customer, or revenue from joint pole use.
- k. May: Is permissive.
- l. PacifiCorp: PacifiCorp, an Oregon corporation doing business as Pacific Power & Light Company, its successors, transferees, legal representatives, employees, contractors, subcontractors, agents, or assigns.

- m. **Person:** Includes an individual, corporation, statutory entity (LLC, intergovernmental agency, etc.), firm, partnership, and joint stock company.
- n. **Public Place:** Includes any City owned or leased park, place, facility, or grounds within the City that is open to the public, but does not include a street or bridge.
- o. **Public Rights-of-Way:** Includes, but is not limited to streets, roads, highways, bridges, alleys, sidewalks, trails, paths, parking strips, public easement on private property, and all other public ways or areas, including subsurface and air space over these areas.
- p. **Shall:** Is mandatory.
- q. **State:** The State of Oregon
- r. **Street:** includes the surface, the air space about the surface, and the area below the surface of any public street, alley, avenue, road, boulevard, thoroughfare, or public highway, and other public rights-of-way, including public utility easements, but does not include a bridge or public place.
- s. **Technical Facilities or Facilities:** All real property, equipment, and fixtures used by PacifiCorp in the distribution of its services through its system.
- t. **Volumetric:** A method of computing franchise fees based on the volume of electricity sold or transmitted through PacifiCorp facilities within the City.

#### 4.12.020 GRANT OF AUTHORITY AND GENERAL PROVISIONS

- 1. Grant of Authority. Subject to the conditions and reservations contained in this ordinance, City hereby grants to PacifiCorp, the right, privilege and franchise to:
  - a. Own, construct, expand, upgrade, maintain, and operate an electric utility system within the City.
  - b. Install, maintain, and operate on, over, or under the streets, bridges, and public places approved by City, facilities for the transmission and distribution of electricity to be distributed to City and to its inhabitants and to other customers and territory beyond the limits of City. This franchise does not limit PacifiCorp's ability to provide other utility services such as telecommunications and cable television, but does not allow PacifiCorp to provide these services under this franchise. PacifiCorp shall be required to enter into separate franchise agreements for these services at the sole discretion of City.

2. Duration, Renewal, and Renegotiation. This franchise ordinance and the rights and privileges granted herein shall take effect on or before thirty (30) days after the date this ordinance is passed by the City and remain in effect until October 6, 2021 unless reopened sooner under the provisions of Section 4.12.060.1.e or .f, or terminated sooner under the provisions of Section 4.12.070.7. Notwithstanding the foregoing, City and PacifiCorp shall retain the right, upon sixty (60) days advance written notice to the other party, to reopen and renegotiate any provision of this franchise at any time during or after the fifth year of the term of the franchise. All terms of the franchise must be unconditionally accepted by PacifiCorp in writing, signed by an authorized officer of the corporation, within thirty (30) days after the date this ordinance is passed by City; and if PacifiCorp fails to do so, this ordinance shall be void.
3. Franchise Nonexclusive. This franchise is not exclusive and shall not be construed as a limitation on the City in:
  - a. Granting rights, privileges, and authority to other persons similar to, or different from, those granted by this ordinance.
  - b. Constructing, installing, maintaining or operating any City owned public utility, including but not limited to an electric power and light utility system.

#### 4.12.030 SERVICE STANDARDS

1. Continuous Service. PacifiCorp shall maintain and operate an electric power utility system in the City that conforms to the standards of the National Electric Safety Code. PacifiCorp shall use due diligence to maintain continuous and uninterrupted service which shall conform at least to the standards adopted by the State and Federal authorities, and to standards of City which are not in conflict with those adopted by the State and Federal authorities. Under no circumstances is PacifiCorp liable to City for an interruption or failure of service caused by acts of God, unavoidable accident, or other circumstances beyond the control of PacifiCorp through no fault of its own.
2. Emergency Repair Service. PacifiCorp shall maintain emergency repair service available to City customers on a twenty-four (24) hours per day, seven (7) days per week basis. Such emergency service shall be easily reached by phone during normal business hours and through an answering service at all other times. PacifiCorp shall at all times during the course of this franchise meet or exceed the customer commitment and performance standards as established by PacifiCorp and City and by this reference are incorporated herein. PacifiCorp shall designate these emergency repair facilities as a priority and provide all necessary information and assistance to resolve the emergency as soon as possible.
3. Provision of Service Standards. PacifiCorp will at all times maintain the following service standards.
  - a. Underground Extension of System.

i. In cases of new construction or where utilities are to be placed underground, or service to newly created lots, which shall be underground in accordance with standards of the Stayton Municipal Code, the developer or property owner shall give PacifiCorp reasonable notice of such construction or development, including a copy of any final plat, and of the particular date on which open trenching will be available for PacifiCorp's installation of conduit, pedestals and/or vaults, and laterals to be provided at PacifiCorp's expense, in accordance with PUC OR No. 34, Rule 13. PacifiCorp shall also provide to City specifications as needed for trenching.

ii. Costs of trenching and easements required to bring service to the development shall be borne by the developer or property owner as provided in PacifiCorp's Tariff Rule 13 as approved by the Oregon Public Utility Commission. Written notice must be given to PacifiCorp five (5) working days before trenches are available.

iii. It shall be the policy of City to encourage all utilities, including PacifiCorp, to place overhead distribution facilities underground. PacifiCorp has a right to collect costs of undergrounding in a manner consistent with its tariffs, Oregon statutes, and Oregon Public Utility Commission regulations. It is also the policy of City to encourage co-location of utilities in common underground facilities. PacifiCorp shall make its best effort to satisfy City's policy.

iv. In cases of capital improvement projects undertaken by City, PacifiCorp shall convert existing overhead distribution facilities to underground, so long as PacifiCorp is allowed to collect the incremental costs associated with the conversion from overhead to underground distribution facilities consistent with OAR 860-22-0046, the Oregon Public Utility Commission rule on forced conversion.

v. PacifiCorp shall remove idle overhead facilities within a reasonable time.

- b. In the event a utility or person vacates or abandons a pole or facility, the utility or person shall provide written notification at least thirty (30) business days prior to vacation or abandonment of such pole or facility to City and all other utilities or persons sharing the pole through a joint use agreement. Affected utilities shall be provided a grace period of thirty (30) business days following the date of pole vacation or abandonment in which to remove their facilities. If facilities have not been removed within the thirty (30) day grace period, City may have the facilities removed at the expense of the owner of the facilities.

- c. PacifiCorp shall operate its electric utility system authorized by this ordinance twenty-four (24) hours per day, seven (7) days per week.
- d. PacifiCorp shall repair and maintain all existing and future street lights within the City at no cost to City in accordance with the established service standards and policies of PacifiCorp and City. Additionally, PacifiCorp shall provide the necessary materials and service to add additional street lighting as deemed necessary by City. City shall pay power costs for all street lights.
- e. PacifiCorp shall provide, at no cost to City, based on applicable tariff rate plan selected by City, the repair and maintenance of street lights within the franchise jurisdiction and in accordance with the most current Street Light Master Plan jointly developed by PacifiCorp and City. Repair and maintenance shall include, but not be limited to, all labor and materials necessary to repair and maintain all street lights in good working order.
- f. PacifiCorp shall perform periodic inspection and maintenance to street lights to ensure proper and consistent operation of street lights. In addition, City may request PacifiCorp to inspect and repair any street lights not in good working order. PacifiCorp shall respond to City's request for repair within seventy-two (72) hours (three working days), of receipt of such request and make repairs necessary to street lights within ten (10) days (ten-working days) upon request. In the event PacifiCorp fails to meet either request and/or repair time, City shall deduct monthly a pro-rated portion of cost of street lights from PacifiCorp invoice based on quantity of street lights reported and not repaired.

4. Safety Standards and Work Specifications.

- a. PacifiCorp shall at all times keep and maintain all of its poles, fixtures, conduits, wires, and its entire system in a good state of repair and shall at all times conduct its operations under this franchise, including installation, construction or maintenance of its facilities, in a safe and well-maintained manner so as not to present a danger to the public or City.
- b. The location, construction, extension, installation, maintenance, removal, and relocation of the facilities of PacifiCorp shall conform to:
  - i. The requirements of the State and Federal statutes and regulations in force at the time of such work.
  - ii. Such reasonable specifications in force at the time of such work, as City may from time to time adopt.
  - iii. All installations, rearrangements, removals, lowering or raising of aerial electric utilities, wiring, or other apparatus shall be done in

conformance with the requirements of the National Electric Safety Code, the laws of the State of Oregon, all Oregon Public Utility Commission rules and all ordinances and municipal codes of City.

iv. For the purpose of carrying out Section 4.12.030.4, City may provide such specification relating thereto as may be necessary or convenient for public safety or the orderly development of City. City may reasonably amend and add to such specifications from time to time.

v. PacifiCorp shall remove graffiti pursuant Stayton Municipal Code title 8.04.300 on electrical facilities upon notification from City.

5. Maintenance Personnel. Maintenance personnel shall at a minimum be on duty eight (8) hours a day, during regular Monday through Friday working days, and shall be on-call at all times to respond to system outages in a prompt and expedient manner.

#### 4.12.040 USE OF PUBLIC WAYS

1. Excavation and Restoration.

- a. PacifiCorp shall comply with all applicable ordinances, municipal codes, rules or regulations that may pertain to its activities within easements, public places and public rights-of-way of City.
- b. All structures, lines, and equipment erected by PacifiCorp within the City shall be located so as to cause minimum interference, with the proper use of streets, alleys, and other public rights-of-ways and places, and to cause minimum interference with the rights or reasonable convenience of property owners who adjoin any of the streets, alleys, or other public rights-of-ways or places.
- c. Pursuant to Stayton Municipal Code Section 12.04.092, no newly overlaid street or newly constructed street shall be excavated by PacifiCorp for a period of five (5) years from the time of completion of the street overlay or the street construction unless specifically authorized by City, or in cases of an emergency declared by authorized City, state or federal officials. Such authorization shall not be unreasonably withheld.
- d. All installations by PacifiCorp in new residential subdivisions shall be, wherever and whenever practical, placed in conjunction with all other utility installations in compliance with existing regulations.
- e. Except as provided in Section 4.12.040.1, when any excavation is made by PacifiCorp, PacifiCorp shall, within seven (7) calendar days, restore the affected portion of the street, bridge, easement area, private property or public place to as reasonably good a condition as it was prior to the excavation. The restoration

shall be done in compliance with City specifications, requirements, and regulations in effect at the time of such restoration and shall be guaranteed for a period of one year following inspection and acceptance of the restoration by City. If PacifiCorp fails to restore, within seven (7) calendar days, the affected portion of the street, bridge, easement area, private property, or public place to as reasonably good a condition in which it was prior to the excavation, City may make the restoration, and the reasonable costs of making the restoration, including the cost of inspection, supervision, and administration shall be paid by PacifiCorp. City may grant an extension to the seven (7) calendar day requirement of this section.

- f. City may require that any excavation made by PacifiCorp in any street, bridge, or public place be filled and the surface replaced by City, and that the reasonable cost thereof, including the cost of inspection, supervision, and the administration shall be paid by PacifiCorp.
- g. The reasonable costs of excavation and restoration incurred by City pursuant to Section 4.12.040.1.e and 4.12.040.1.f of this franchise, including the cost of inspection, supervision, and administration shall be paid by PacifiCorp to City in accordance with the standard billing policy of City in effect at the time the excavation or restoration occurred.

2. Relocation of Facilities.

- a. PacifiCorp shall, at its expense, protect, support, temporarily disconnect, or relocate any of its equipment or facilities that are required to promote the public interest by City by reason of traffic conditions, public safety, street vacation, freeway and street construction, change or establishment of street grade, installation of sanitary or storm sewer lines, water pipes, power lines, signal lines, or tracks, or any other type of structures or public improvements by City or its agents. Relocation of facilities, required by City shall be completed within a time limit mutually agreed to by City and PacifiCorp.
- b. A written request for facility relocation may be initiated directly by City or by a private developer or contractor installing or modifying public infrastructure under the approval of City; provided PacifiCorp may charge the expense of removal or relocation to the developer or contractor that makes a request, directly or indirectly, if the removal or relocation is caused by an identifiable development of property in the area, or is made for the convenience of a developer or contractor. PacifiCorp shall not be reimbursed for removal or relocation requested by, and for the sole convenience of City.
- c. All facilities placed in the public rights-of-way shall be placed in coordination with City and other affected utilities.

- d. If PacifiCorp fails to comply with any requirement of City pursuant to this section, City may remove or relocate the facilities at PacifiCorp's expense, unless said removal or relocation would be in violation of any portions of ORS 757.800 and ORS 757.805.
- e. 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 customer, PacifiCorp may charge the expense of removal or relocation to the developer or customer.

3. Tree Pruning.

- a. Subject to the provisions of this ordinance, PacifiCorp may prune trees, when necessary in easements, for the operation of the utility lines, wires or other appurtenances, provided such pruning shall be performed by or supervised by a certified arborist, in accordance with applicable City ordinances, and it shall be done without cost or expense to City.
- b. PacifiCorp shall provide a written notice to the City Public Works Department and property owner and resident at least ten (10) business days prior to any pruning to be done on the property. City recognizes that a ten (10) day notice may not be possible in emergency situations, however, City does encourage PacifiCorp to provide as much advance notice to property owners and residents as is reasonably possible under such emergency circumstances.

4. Use of Facilities by City.

- a. As additional consideration for the franchise and privileges granted to PacifiCorp by this ordinance, City shall have the free right and privilege to install, or affix and maintain street lights, wires, seasonal decorations and equipment for municipal purposes upon the structures and installations, excluding underground facilities, owned and/or maintained by PacifiCorp. For the purpose of this section, the term "municipal purposes" means all municipal purposes except the distribution or sale of electric power to the public and includes, but is not limited to, the use of structures and installations for:
  - i. Municipal fire, police, water, wastewater, and storm water utility service wires and equipment.
  - ii. Municipal interdepartmental computers and communications.
  - iii. Municipal fire alarm and police and traffic signals, signs, and equipment.

- iv. Seasonal decorations and special event banners and attachments authorized by the City.
- b. City shall install, affix, maintain and operate its wires and equipment at its own expense and in accordance with the requirements of State and Federal law, and regulations adopted pursuant thereto, and in accordance with good engineering practice and safety standards. The wires and equipment of City shall be subject to interference by PacifiCorp only when necessary for the maintenance, operation or repair of the facilities of PacifiCorp. PacifiCorp's actions shall not unduly interfere with City's safe and convenient use of its installations.
- c. City shall install, affix, maintain and operate its wires and equipment in such a manner as not to impose any undue additional expense upon PacifiCorp, or unduly interfere with the safe and convenient use and maintenance by PacifiCorp of its structures and installations.
  - i. If there is not sufficient space available thereon for said purposes, PacifiCorp shall change, alter or re-arrange its structures at City's expense so as to provide proper clearance for such wires or appurtenant facilities.
  - ii. Such facilities shall be subject to interference by PacifiCorp only when and to the extent necessary for the proper construction, maintenance, operation or repair of PacifiCorp's facilities.
- d. City shall indemnify, protect, and save PacifiCorp, its officers, employees and agents, harmless against and from any and all damages, claims, loss, liability, cost or expense resulting from damage to property or injury or death to any third person to the extent caused by or arising out of the installation, maintenance, existence, or use of the installations for municipal purposes as described in Section 4.12.040.4.

5. Use of Bridges and Public Places by PacifiCorp.

- a. Before PacifiCorp may use or occupy any bridge or public place, PacifiCorp shall first obtain permission from City to do so and comply with any special conditions City desires to impose on such use or occupation.
- b. The compensation paid by PacifiCorp for this franchise includes compensation for the use of bridges and public places located within the City, as authorized. However, this subsection shall not be construed to prevent City from requiring PacifiCorp to pay the compensation or charges as provided in Section 4.12.060.1.

6. Emergency Removal and Alternate Routing of Facilities.

- a. If at any time, in case of fire or disaster in the franchise territory, it shall become necessary in the reasonable judgment of City to cut or move any of the wires, equipment or other appurtenances to the system of PacifiCorp, such cutting or moving may be done and any repairs rendered necessary thereby shall be made by PacifiCorp, at its sole expense, provided that such repairs are not necessitated by a negligent act of City, in which case costs for repairs shall be borne by City.
- b. City shall indemnify, protect and hold PacifiCorp, its officers, employees and agents harmless against and from all damages, claims, loss, liability, cost or expense resulting from damage to property or injury or death to any third person caused by such cutting or moving any of the wires, equipment or other appurtenances.
- c. In the event continued use of a street or easement is denied to PacifiCorp by City for any reason, PacifiCorp shall provide service to affected customers over such alternate routes as shall be determined by PacifiCorp within a reasonable period of time. City shall provide or attempt to provide an alternate route if continued use of a street or easement is denied to PacifiCorp.

#### 4.12.050 CONSTRUCTION

1. Public Works and Improvements Not Affected by Franchise. City reserves the right to:
  - a. Construct, install, maintain, and operate any public improvement, work, or facility.
  - b. Do any work that City may find desirable on, or over, or under any street, bridge or public right-of-way.
  - c. Vacate, alter, or close any street, bridge or public right-of-way.
  - d. Whenever City shall excavate or perform any work in any of the present and future streets, alleys, and public rights-of-way of City, or shall contract or issue permits to others for such excavation or work, where such excavation or work may disturb PacifiCorp's underground electric utility, pipes, conduits, and appurtenances, the City may, in writing, notify PacifiCorp sufficiently in advance of such contemplated excavation or work to enable PacifiCorp to take such measures as may be deemed necessary to protect such underground electric utility, pipes, conduits, and appurtenances from damage and possible inconvenience to the public. In any such case, PacifiCorp, upon receiving such notice, shall furnish maps or drawings to City or contractor, as the case may be, showing the approximate location of all its structures in the area involved in such proposed excavation or other work.

- e. Whenever City shall vacate any street or public place for the convenience or benefit of any person or governmental agency or instrumentality other than City, PacifiCorp's rights shall be preserved as to any of its facilities then existing in such street or public place.
2. Control of Construction. PacifiCorp shall file with City, maps that meet City specifications, showing the location of any construction, extension, or relocation of any of its electric lines, conduits or facilities and must first obtain City's approval of the location and plans prior to the commencement of the work. PacifiCorp shall be required to obtain a permit from City before commencing the construction, extension, or relocation of any of its electric utility transmission or distribution facilities within an easement.
  3. Maps. Upon request from the City, PacifiCorp shall provide the City with a system "as built" map in mutually acceptable format showing the location of PacifiCorp's electric facilities within the public right of ways of the City.
  4. Rearrangement of Facilities to Permit Moving of Buildings and Other Objects.
    - a. Upon reasonable advance notice in writing from any person desiring to move a building or other object, PacifiCorp shall temporarily raise, lower, or remove its facilities upon any street, bridge, or public place within the City, when necessary, to permit the person to move the building or other object across or along such street, bridge or public place. The raising, lowering, or removal of the facilities of PacifiCorp shall be in accordance with all applicable ordinances and regulations of City.
    - b. The notice required by Section 4.12.050.4.a of this section shall bear the approval of the Administrator, shall detail the route of movement of the building or other objects, and shall provide the actual expense incurred by PacifiCorp in making the temporary rearrangement of its facilities, including the cost to PacifiCorp of any interruption of service to its customers caused thereby, will be borne by the person giving the notice. It shall further provide that the person giving said notice will indemnify and save PacifiCorp harmless from any and all damages or claims whatsoever caused directly or indirectly from such temporary rearrangement of PacifiCorp's facilities.
    - c. PacifiCorp, before making the temporary rearrangement of its facilities, may require the person desiring the temporary rearrangement to deposit cash or other adequate security reasonably acceptable to PacifiCorp, to secure payment of the costs of rearrangement as estimated by PacifiCorp.
    - d. Upon advance notice by City of its own intent to move a building or other object, either in its governmental or proprietary capacity and for the sole benefit

of City, the temporary rearrangement of PacifiCorp's facilities shall be accomplished by PacifiCorp at no cost to City; provided, however, that the indemnification provisions of Section 4.12.050.4.b shall still apply to City.

4.12.060 FINANCIAL

1. Compensation.

- a. In consideration of the rights, privileges, and franchise hereby granted, PacifiCorp shall pay to City from and after the effective date of the acceptance of this franchise, five percent (5.0%) of its gross revenues derived from within the corporate limits of City. Notwithstanding any provision to the contrary, at any time during the term of this franchise, City may elect to increase the franchise fee to any greater amount as may then be allowed by state law. City shall provide PacifiCorp prior written notice of such increase following adoption of the change in percentage by City. The increase shall be effective sixty (60) days after City has provided PacifiCorp with such written notice.
- b. The compensation required by this section shall be due on or before the 25<sup>th</sup> day of each and every month for the month preceding. Within thirty (30) days after the termination of this franchise, compensation shall be paid for the period elapsing since the end of the last month for which compensation has been paid.
- c. PacifiCorp shall furnish to City with each payment of compensation required by this section a statement, showing the amount of gross revenue of PacifiCorp within the City for the period covered by the payment and including an explanation of the basis upon which the amount of compensation is calculated. If PacifiCorp fails to pay the entire amount of compensation due to City through error or otherwise within the times allotted for payment in Section 4.12.060.1.b above, the amount of the compensation due for that month and not timely paid shall be subject to a late penalty of an additional ten (10) percent plus interest of two (2%) percent per month on the amount of compensation due and unpaid from the date due until it is paid together with the late penalty.
- d. Nothing contained in this franchise shall give PacifiCorp any credit against any ad valorem property tax now or hereafter levied against real or personal property within the City, or against any local improvement assessment or any business tax imposed on PacifiCorp, or against any charges imposed upon PacifiCorp as provided in Section 4.12.060.4 of this franchise, or reimbursement or indemnity paid to City.
- e. In the event PacifiCorp is prohibited by State or Federal law from paying a fee or compensation based on gross revenues, or City is prohibited by State or Federal law from collecting such a fee or compensation, either City or PacifiCorp shall have the right to re-open the franchise agreement to renegotiate

the compensation section. Additionally, if at any time a volumetric approach to the calculation of fees or compensation is deemed by City as advantageous, PacifiCorp shall cooperate in the renegotiation of the compensation section to ensure that City shall remain "revenue neutral" in respect to the total amount of fees or compensation collected from PacifiCorp.

- f. In the event Oregon law is changed to provide for a franchise fee or privilege tax in an amount greater than the amount established in Section 4.12.060.1.a, or PacifiCorp agrees to pay any other city in the State of Oregon a higher amount pursuant thereto, City shall have the right to re-open the franchise agreement for the purpose of establishing the franchise fee or privilege tax in an amount equal to that being paid to such other city.

2. Insurance.

- a. PacifiCorp shall indemnify, protect and save City, its officers, employees and agents, harmless against and from any and all damage claims, and any and all loss, liability, cost or expense, occasioned by any negligent act or omission of PacifiCorp in the construction, maintenance, operation, or repair of PacifiCorp's property or any use thereof, and PacifiCorp shall at all times comply with any lawful present or future charter provisions, ordinances, rules or regulations of City relating to the manner of occupation or use, or to the repair or improvement of all public rights-of-way.
- b. PacifiCorp shall, for the purposes of carrying out the provisions of this franchise, prior to commencing construction of any kind, have in full force and effect, and file evidence thereto with the City Administrator, good and sufficient insurance policies covering Employer's Liability insurance with a minimum limit of \$500,000; Commercial General Liability insurance, to include contractual liability, with a minimum single limit of \$1,000,000 to protect against and from all loss by reason of injury to persons or damage to property based upon and arising out of the work performed under this franchise; Business Automobile Liability insurance with a minimum single limit of \$1,000,000 for bodily injury and property damage with respect to vehicles whether owned, hired or non-owned, assigned to or used by any contractor in the performance of the work. PacifiCorp may self-insure for any or all of the above coverage and shall furnish City with documentation, acceptable to City, certifying evidence of self-insurance.
- c. The City of Stayton, its officers, agents, and employees, shall be named insureds in any policy or self-insurance covering losses caused in whole or in part by reason of the exercise of the rights and privileges herein granted, but only such losses for which PacifiCorp has agreed to indemnify City per the terms of this franchise. PacifiCorp shall pay all expenses incurred by City in defending itself with regard to all damages and penalties mentioned in Section 4.12.060.2.a

above. These expenses shall include all out-of-pocket expenses, including consultants' or attorneys' fees.

3. Damages. Damages and penalties shall include, but shall not be limited to, damages arising out of personal injury, property damage, copyright infringement, defamation, antitrust, errors and omissions, theft, fire, and all other damages arising out of PacifiCorp's exercise of this franchise, whether or not any act or omission complained of is authorized, allowed, or prohibited by this franchise.
4. Permits. Nothing in this ordinance shall be construed to limit the right of City to require PacifiCorp to obtain any necessary permits required by the Stayton Municipal Code.
5. Reflecting Expenditures on Billing Statements. If the franchise fee or compensation paid to City is itemized on the customer billing statement, it shall only be the amount over 3.5% of PacifiCorp's gross revenues in accordance with the applicable Oregon Administrative Rules.

#### 4.12.070 CITY ADMINISTRATION OF FRANCHISE.

1. Ongoing Communication. PacifiCorp shall keep City informed of all new developments, issues or concerns affecting the utility system. PacifiCorp shall notify the Administrator in advance of any public announcement that is to be made on such subjects. City shall endeavor to notify PacifiCorp of any developments or issues concerning the franchise in advance of any public announcement on such subjects.
2. PacifiCorp's Rules. PacifiCorp shall have authority to promulgate such reasonable rules and regulations governing the conduct of its business as shall be reasonably necessary to enable PacifiCorp to exercise its rights and performance obligations under this franchise, and to assure uninterrupted service to its customers. PacifiCorp's rules and regulations shall be subject to provisions of this ordinance and any other governmental regulations. Copies of such rules and regulations, and any updates, shall be furnished to City or be made available through PacifiCorp's electronic web site.
3. Right to Inspect Records. PacifiCorp shall keep current, accurate records of account at any office within a reasonable days commute of City for the purpose of determining the amounts due City under Sections 4.12.060.1.a and 4.12.060.1.c of this ordinance. City may inspect and audit the records of account, upon written request. The City Council may request periodic reports from PacifiCorp relating to its revenue within the City.
4. Reports and Records.
  - a. Within thirty (30) days following any written request by City, PacifiCorp shall furnish to City a report which will accurately identify the total number of PacifiCorp's customers, according to customer class, within the City limits.
  - b. The cost of preparing and furnishing to City the records and reports required by

this franchise shall be borne by PacifiCorp.

5. Assignment or Sale of Franchise or Facilities. PacifiCorp shall not transfer or assign any rights under this franchise to another person or entity, except transfers and assignments by operation of law including mergers and similar transactions, unless City shall first give its approval in writing, which approval shall not be unreasonably withheld or delayed; provided, however, inclusion of this franchise as property subject to the lien of PacifiCorp's mortgage(s) shall not constitute a transfer or assignment.
6. Remedies Not Exclusive: When Requirement Waived. All remedies and penalties under this ordinance, including termination of the franchise, are cumulative, and the recovery or enforcement of one is not a bar to the recovery or enforcement of any other such remedy or penalty. The remedies and penalties contained in this ordinance, including termination of the franchise, are not exclusive, and City reserves the right to enforce the penal provisions of any ordinance or resolution and to avail itself of any and all remedies available at law or in equity. Failure to enforce shall not be construed as a waiver of a breach of any term, condition, or obligation imposed upon PacifiCorp by, or pursuant to, this ordinance. A specific waiver of a particular breach of any term, condition, or obligation imposed upon PacifiCorp by, or pursuant to, this ordinance or acceptance of any payment due shall not be a waiver of any other or subsequent or future breach of the same or any other term, condition, or obligation itself.
7. City's Right to Revoke. In addition to all other rights which City has pursuant to law or equity, City reserves the right to revoke, terminate, or cancel this franchise, and all rights and privileges pertaining thereto, in the event that:
  - a. PacifiCorp repeatedly violates any material provision of this franchise.
    - i. The following provisions are deemed to be material to the performance of the franchise:
      - Continuous Service (Section 4.12.030.1)
      - Emergency Repair Service (Section 4.12.030.2)
      - Excavation and Restoration (Section 4.12.040.1)
      - Relocation and Facilities (Section 4.12.040.2)
      - Compensation (Section 4.12.060.1)
      - Insurance (Section 4.12.060.2)
      - Damages (Section 4.12.060.3)
      - Assignment of Sale of Franchise (Section 4.12.070.5)
  - b. PacifiCorp practices any fraud upon City or any customer.
  - c. PacifiCorp becomes insolvent, unable or unwilling to pay its debts, or is adjudged bankrupt.
  - d. PacifiCorp misrepresents a material fact in the application for or negotiation of, or renegotiation of, or renewal of, the franchise.

- e. PacifiCorp deliberately fails to operate the system without prior approval of City or without just cause.

8. Revocation Procedures;

- a. City shall provide PacifiCorp with a written notice of the cause of termination and its intention to terminate or revoke the franchise and shall allow PacifiCorp a minimum of ninety (90) days after service of the notice in which to correct the violation. If at the end of the ninety (90) day period, PacifiCorp has not corrected the matter which provides grounds for termination, the franchise may, at the option of City, become null and void and PacifiCorp shall thereafter be entitled to none of the privileges or rights herein extended to them and said PacifiCorp shall thereupon cease and desist from any activity within the City limits of City; provided, however, that City may at its option pursue any other and different or additional remedy provided to it by law or in equity.
- b. PacifiCorp shall be afforded due process and provided with an opportunity to be heard at a public hearing before the City Council prior to the termination of the franchise. The City Council shall hear any persons interested therein, and shall determine, in its discretion, whether or not any failure, refusal, or neglect by PacifiCorp has occurred.
- c. Any revocation of this franchise shall be by formal action of the City Council, by ordinance.

9. Penalties. Subject to requirement of prior notice as set forth in Section 4.12.070.10.a below, for violations of this ordinance occurring without just cause, City may, at its discretion and in addition to any other remedies provided herein, assess penalties against PacifiCorp as follows:

- a. For failure to adhere to material provisions of this franchise, as defined in Section 4.12.070.7.a.i, and in lieu of revocation as described in Sections 4.12.070.7 and 4.12.070.8, Two Hundred Forty Dollars (\$240.00) per day for each provision not fulfilled.
- b. For failure to comply with any provision of this franchise, for which a penalty is not otherwise specifically provided, the penalty shall be One Hundred Twenty Dollars (\$120.00) per day, per each occurrence.

10. Procedure for Imposition of Penalties.

- a. Whenever City finds that PacifiCorp has violated one (1) or more terms, conditions or provisions of this franchise, a written notice, or a verbal notice followed by a written notice, shall be given to PacifiCorp informing it of such violation or liability. If the violation concerns requirements mandated by City

permits, a verbal notice followed by a written notice will be given. The written notice shall describe in reasonable detail the specific violation so as to afford PacifiCorp an opportunity to remedy the violation. PacifiCorp shall have twenty (20) working days subsequent to receipt of the notice in which to correct the violation. PacifiCorp may, within ten (10) days of receipt of notice, notify City that there is a dispute as to whether a violation or failure has, in fact, occurred. Such notice by PacifiCorp to City shall specify with particularity the matters disputed by PacifiCorp.

- b. The City Council shall hear PacifiCorp's dispute at its next regularly or specially scheduled meeting. The City Council shall supplement its decision with written findings of fact.
- c. If after hearing the dispute the claim is upheld by the City Council, PacifiCorp shall have twenty (20) working days from such a determination to remedy the violation or failure.
- d. PacifiCorp shall be liable for full payment of all penalties imposed under this section.

#### 4.12.080 POST FRANCHISE

##### 1. City Right in Franchise.

- a. Notwithstanding City's rights as outlined in Section 4.12.040.4, City use of PacifiCorp's facilities shall at all times comply with the rules and regulations of PacifiCorp and shall not compete or interfere with PacifiCorp's use. City shall hold PacifiCorp harmless from any claims arising out of City's use of said facilities hereafter.
- b. City shall have the right to observe and inspect all construction or installation of PacifiCorp's facilities subject to the provisions of this ordinance and to make such inspections as it shall find necessary to insure compliance with governing laws, rules, and regulations. No construction shall be commenced prior to approval by City. PacifiCorp is responsible for all work performed by or for PacifiCorp or its agents.
- c. Upon any termination of this franchise, whether before the expiration of the franchise or upon expiration, or by any abandonment of the franchise by PacifiCorp (except for an unapproved assignment provided in Section 4.12.070.5), all equipment installed or used by PacifiCorp shall be removed by PacifiCorp at PacifiCorp's expense and the property upon which said equipment was used restored by PacifiCorp to the original or better than original condition it was in before installation or use by PacifiCorp.

##### 2. Foreclosure, Receivership and Abandonment.

- a. Upon the foreclosure or other judicial sale of the system, PacifiCorp shall notify City of such fact and such notification shall be treated as a notification that a change in control of PacifiCorp has taken place, and the provisions of this franchise governing the consent to transfer or change ownership shall apply without regard to how such transfer or change in ownership occurred.
  - b. City shall have the right to cancel or terminate this franchise subject to any applicable provisions of Oregon or Federal law, including the Bankruptcy Act, one hundred and twenty (120) days after the appointment of a debtor-in-possession, receiver or trustee to take over and conduct the business of PacifiCorp, whether in receivership, reorganization, bankruptcy, or other action or proceeding, unless such receivership or trusteeship shall have been vacated prior to the expiration of said one hundred and twenty (120) days, or unless:
    - i. Within one hundred and twenty (120) days after election or appointment, such receiver or trustee shall have fully complied with all the provisions of this franchise and remedied all defaults there under; and
    - ii. Such receiver or trustee, within said one hundred and twenty (120) days, shall have executed an agreement, duly approved by the court having jurisdiction in the premises, whereby such receiver or trustee assumes and agrees to be bound by each and every provision of this franchise.
3. Continuity of Service Mandatory. Upon expiration or the termination of this franchise, City may require PacifiCorp to continue to operate the system for an extended period of time, not to exceed twelve (12) months. PacifiCorp shall, as trustee for its successor in interest, continue to operate the system under the terms and conditions of this franchise. In the event PacifiCorp does not so operate the system, City may take such steps as it, in its sole discretion, deems necessary to assure continued service to subscribers, at PacifiCorp's cost and expense.

#### 4.12.090 MISCELLANEOUS

1. Compliance with Laws, Rules, and Regulations. At all times during the term of this franchise, PacifiCorp shall comply with all applicable laws, ordinances, municipal codes, rules, and regulations of the United States of America, the State of Oregon, Marion County and the City of Stayton including all agencies and subdivisions thereof. PacifiCorp shall be subject to the lawful exercise of the police power of City and to such reasonable regulations as City may from time to time hereafter by resolution or ordinance provide. No provision of this franchise shall be construed as a waiver of local, State, or Federal law, or as a limit of liability.
  - a. If at any time during the term of this franchise, City implements a generic "Right

of Way Management Ordinance” or similarly title document which may apply to all of City’s utility franchises, PacifiCorp agrees to abide by such ordinance; provided that any specific conflicts between such an ordinance and this franchise ordinance shall be mutually reviewed and resolved by City and PacifiCorp.

2. Discriminatory Practices Prohibited. PacifiCorp shall make its services available without discrimination and shall not give any person any preference or advantage not available to all persons similarly situated. Notwithstanding the above, the City Council may, by resolution, approve any program or service offered by PacifiCorp that the City Council believes to be in the best interest of the City. PacifiCorp shall comply at all times with all other applicable, Federal, State, and local laws, and all executive and administrative orders relating to non-discrimination.
3. Rules of Construction. This ordinance shall be construed liberally in order to effectuate its purposes. Unless otherwise specifically prescribed in this ordinance, the following provisions shall govern its interpretation and construction:
  - a. When not inconsistent with the context, words used in the present tense include the future, words in the plural number include singular number, and words in the singular number include the plural number.
  - b. Time is of the essence of this ordinance. PacifiCorp shall not be relieved of its obligation to comply promptly with any provision of this ordinance by any failure of City to enforce prompt compliance with any of its provisions.
  - c. Unless otherwise specified in this ordinance, any action authorized or required to be taken by City may be taken by the City Council or by an official or agent designated by the City Council.
  - d. Every duty and every act to be performed by either party imposes an obligation of good faith on the party to perform such.
4. Severability and Constitutionality. If any section, subsection, sentence, clause, or phrase of this ordinance is for any reason held illegal, invalid, or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining positions hereof.
  - a. The City Council hereby declares that it would have passed this ordinance and each section, subsection, sentence, clause, and phrase hereof irrespective of the fact that any one or more sections, subsections, sentences, clauses, or phrases be declared illegal, invalid, or unconstitutional. The invalidity of any portion of this ordinance shall not abate, reduce, or otherwise affect any other consideration or obligation required of PacifiCorp by any franchise granted hereafter. If, for any reason, the franchise fee or compensation is invalidated or amended by the act of any court or authorized governmental agency, then the highest reasonable



deemed to have waived its option to arbitrate said dispute if such party files a general appearance in the litigation prior to providing written notice to the plaintiff or claimant of the filing of a claim in arbitration in the manner specified above; and,

ii. The plaintiff or petitioner in such litigation shall be deemed to have waived its right to arbitrate said dispute if such party fails to file a claim for arbitration in the manner specified above within sixty days after a general appearance in the litigation has been filed by the party who is the defendant or respondent in the litigation. This provision is intended to allow either party to commence litigation and seek an order of default without waiving the right to arbitrate in the event the default is not attainable.

iii. If either party exercises its option to arbitrate, arbitration of such dispute shall be mandatory and any pending litigation shall be stayed.

iv. There will be no right to appeal an order or decision made by the Arbitrator or decision maker after arbitration or trial.

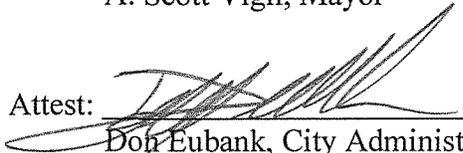
v. The prevailing party in the arbitration may be awarded reasonable attorneys' fees and costs.

6. Non-enforcement by City. PacifiCorp shall not be relieved of its obligation to comply with any of the provisions of this franchise by reason of any failure of City to enforce prompt compliance.
7. Captions. The paragraph captions and headings in this franchise are for the convenience and reference purposes only and shall not affect in any way the meaning of interpretation of this franchise.
8. Calculation of Time. Where the performance of doing of any act, duty, matter, payment, or thing is required hereunder and the period of time or duration for the performance or doing thereof is prescribed and fixed herein, the time shall be computed so as to exclude the first and include the last day of the prescribed or fixed period or duration of time unless stipulated otherwise in this agreement. When the last day of the period falls on Saturday, Sunday, or a legal holiday, that day shall be omitted from the computation.

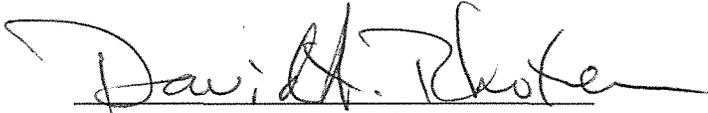
Adopted by the Stayton City Council this 6th day of September 2011.

CITY OF STAYTON

By:  Date: 9-7-11  
A. Scott Vigil, Mayor

Attest:  Date: 9/7/11  
Don Eubank, City Administrator

APPROVED AS TO FORM

  
DAVID A. RHOTEN, City Attorney

ATTACHMENT A

ACCEPTANCE OF ORDINANCE NO. 939  
City of Stayton, Oregon

TO THE MAYOR AND COUNCIL OF THE CITY OF STAYTON:

WHEREAS, on the 6th day of September, 2011, the Stayton City Council of the City of Stayton, Oregon, enacted Ordinance No. 939, which is:

**AN ORDINANCE GRANTING A NONEXCLUSIVE ELECTRIC UTILITY FRANCHISE TO PACIFICORP, AN OREGON CORPORATION, DOING BUSINESS AS PACIFIC POWER AND LIGHT COMPANY, AND FIXING TERMS, CONDITIONS, AND COMPENSATION OF SUCH FRANCHISE**

WHEREAS, the ordinance was granted upon the condition that the Grantee, PacifiCorp dba Pacific Power and Light Company, shall, within thirty (30) days of the passage and approval of the ordinance, file with the City Administrator or the City of Stayton, its written acceptance of all terms and conditions of the ordinance:

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that PacifiCorp dba Pacific Power and Light Company does hereby accept Stayton City Ordinance No. 939 and all the terms and conditions of said ordinance.

IN WITNESS WHEREOF, Pacific Power and Light Company, Inc. has caused this acceptance to be duly executed this 29th day of SEP., 2011.

PACIFICORP DBA PACIFIC POWER AND  
LIGHT COMPANY

By: Pat Egan

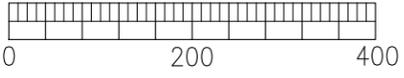
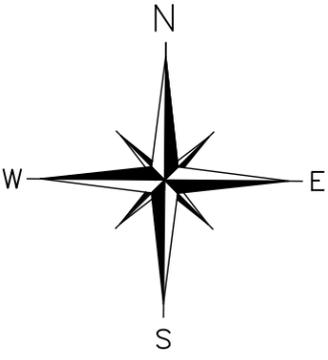
PAT EGAN, VP, CUSTOMER & COMMUNITY AFFAIRS

Date: 9/29/11

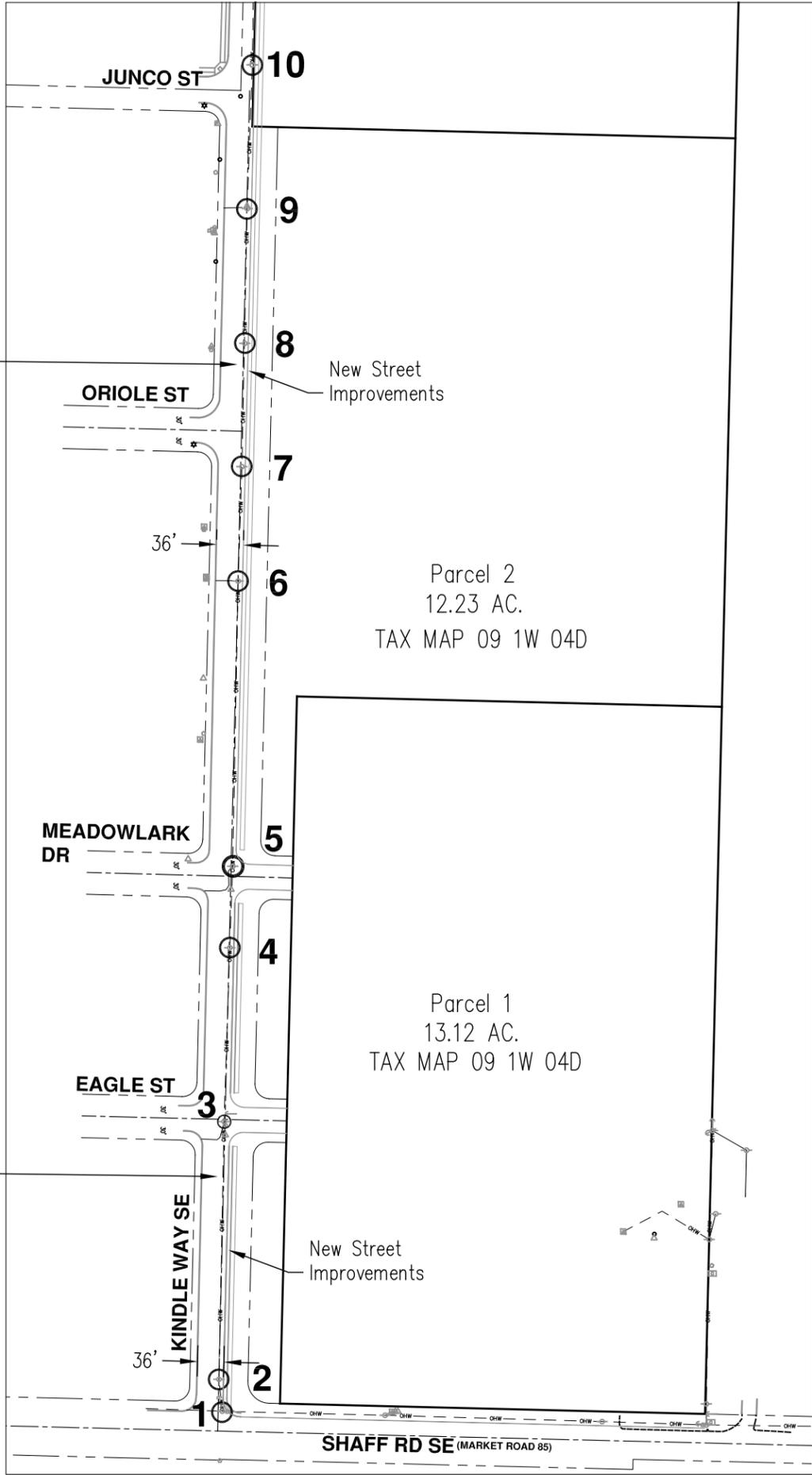
Received by the City of Stayton:

By: [Signature], City Administrator

Date: 9/30/2011

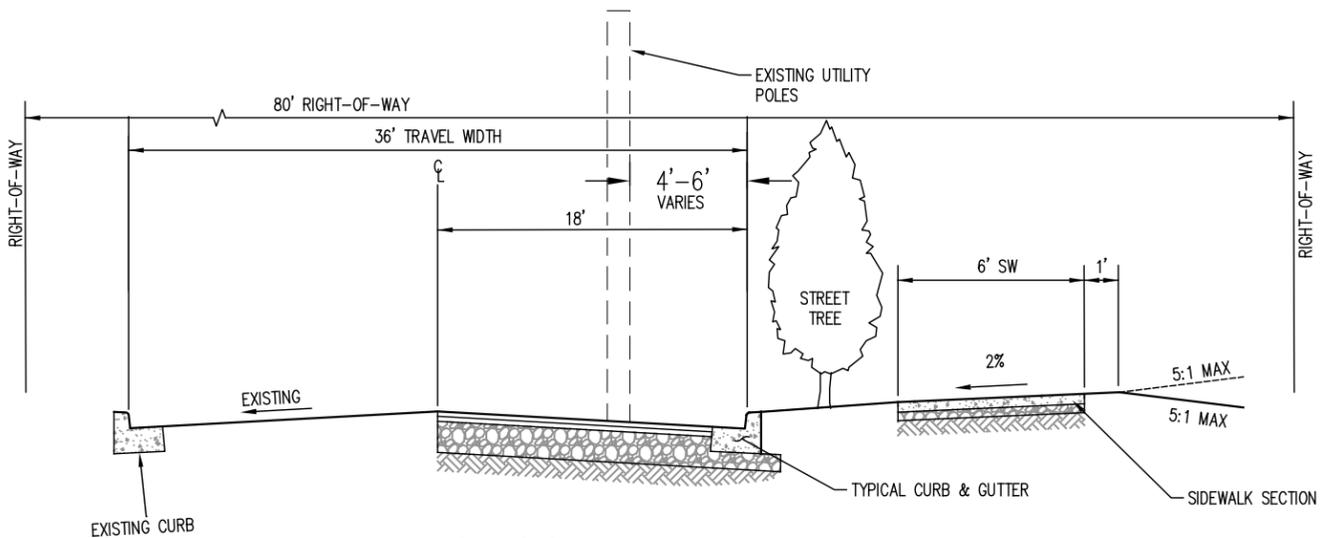


SCALE: 1"=200'  
Existing Edge of Pavement



**UTILITY POLES TO BE RELOCATED**

MAP I.D. NO.	UTILITY POLE TAG NO.
1	TAG NO. 04806
2	TAG NO. 048001
3	TAG NO. 048000
4	TAG NO. 048101
5	TAG NO. 048100
6	TAG NO. 048201
7	TAG NO. 048200
8	TAG NO. 048301
9	TAG NO. 048300
10	TAG NO. 048401



**PROPOSED KINDLE WAY**

TYPICAL SECTION  
N.T.S.

SCALE	DESIGN
DRAWING NAME	DWG. NAME
SHEET	1
	OF 1

**KINDLE WAY**  
**UTILITY POLE EXHIBIT**

**EXHIBIT "B"**

DESIGN	DESIGN	DATE
DRAFTED	DRAFTED	
CHECKED	CHECKED	

Parcel 1  
13.12 AC.  
TAX MAP 09 1W 04D

**CITY OF STAYTON**  
362 N. THIRD AVENUE  
STAYTON, OREGON 97383  
PHONE: 503-769-2919

REFERENCE INFORMATION:

REV.	DESCRIPTION	APPR.	DATE

REV.	DESCRIPTION	APPR.	DATE

**Kimberley Hanks McGair**  
Attorney  
Admitted in Oregon and Washington

kmcgair@fwwlaw.com

121 SW Morrison Street, Suite 600  
Portland, Oregon 97204

tel 503.228.6044  
fax 503.228.1741

www.fwwlaw.com

January 5, 2018

**VIA EMAIL AND CERTIFIED MAIL**

City of Stayton  
Attn: City Administrator  
362 North Third Avenue  
Stayton, OR 97383  
[KCampbell@ci.stayton.or.us](mailto:KCampbell@ci.stayton.or.us)

Re: *City of Stayton/PacifiCorp*

Dear Mr. Campbell:

This firm represents PacifiCorp in connection with your letter dated December 18, 2017, which PacifiCorp received on December 26, 2017. Pursuant to Section 4.12.070(10)(a) of the Franchise Agreement, this letter shall serve as PacifiCorp's notification to the City of Stayton ("City") that PacifiCorp disputes that it has violated the Franchise Agreement. The factual and legal basis of PacifiCorp's dispute are set forth below. PacifiCorp also reserves the right to provide a further written response in advance of any meeting of the City Council regarding this matter.

Because the City's letter contains an incomplete recitation of the relevant facts, I will begin with a discussion of the factual background relevant to this dispute.

**Relevant Easements.** In 1965 PacifiCorp purchased a Right of Way Easement ("PacifiCorp Shaff ROW Easement") from Lindsay and Lola Lambert, which was promptly recorded in the real property records (Exhibit 1). This easement is 22 feet in width and located immediately north of Shaff Road. PacifiCorp installed the poles at issue within the PacifiCorp Shaff ROW Easement area. In 1998, more than 30 years later, the City obtained a Permanent Road Easement over the 15 feet immediately to the north of Schaff Road from the then owner, Stayton Elementary School District 77CJ ("City ROW Easement") (Exhibit 2). Thus, both the PacifiCorp Shaff ROW Easement and the City ROW Easement occupy the same 15 feet immediately north of Shaff Road. Because the owner of the servient estate had already granted PacifiCorp the PacifiCorp Shaff ROW Easement, and that easement had been recorded in the real property records, when the City obtained the City ROW Easement, the City's rights in that property are subordinate to PacifiCorp's rights. *See* ORS 93.640. In other words, the City could

City of Stayton  
January 5, 2018  
Page 2

only obtain whatever rights the owner still held in the property at the time of the conveyance of the City ROW Easement to the City. While the PacifiCorp Shaff ROW Easement allows the servient estate to use the easement area for roads, that use cannot be inconsistent with PacifiCorp's use. Because PacifiCorp's poles have been installed and in use for more than 50 years, the construction of a road in the precise location of PacifiCorp's poles would be inconsistent with PacifiCorp's use, and therefore prohibited.

In 1965, William Rauscher granted PacifiCorp a Right of Way Easement approximately 30 feet in width adjacent to Kindle Way ("PacifiCorp Kindle ROW Easement") (Exhibit 3). The City received a roadway easement for this same property in 1992 as a result of a plat of the Clarambeau Addition subdivision (Exhibit 4). Again, the City obtained its roadway easement rights subject to all rights of PacifiCorp. Nothing in the PacifiCorp Kindle ROW Easement permits the construction of a road within its easement area. Neither the servient estate, nor any subsequent easement holder, may use the servient estate in any manner which unreasonably interferes with PacifiCorp's rights. *Knight v. Nyara*, 240 Or App 586, 595, 248 P3d 36 (2011), *citing D'Abbracci v. Shaw-Bastian*, 201 Or App 108, 121, 117 P3d 1032 (2005). Consequently, as with the PacifiCorp Shaff ROW Easement, the City cannot construct a road within the PacifiCorp Kindle ROW Easement easement area because doing so will unreasonably interfere with PacifiCorp's prior rights.

**City's Request for Relocation.** We understand that the City is in the process of widening Kindle Way, and is also apparently constructing a stormwater diversion system. In connection with these two projects, the City has requested that PacifiCorp move ten of its utility poles that lie within the PacifiCorp Shaff ROW Easement area and the PacifiCorp Kindle ROW Easement area (collectively "PacifiCorp Easement Area"). On June 8, 2017, the City sent PacifiCorp a letter stating that it was in the process of widening Kindle Way and that PacifiCorp "currently has equipment along Kindle Way and will need to be relocated in order to accommodate the road widening." The letter did not identify the specific facilities the City was asking PacifiCorp to relocate, nor any authority for its request.

PacifiCorp informed the City via email on June 26<sup>th</sup> that the pole on the corner of Kindle and Shaff is in a private easement held by PacifiCorp and that the City must the cost of its requested relocation. On June 27<sup>th</sup>, the City disputed PacifiCorp's contention that the identified pole is in a private easement. On June 30<sup>th</sup>, PacifiCorp provided the City with an estimate for the cost of relocating the nine poles near Kindle Way, and also provided the City with an alternative option to upgrade to an underground conversion. At this time, PacifiCorp mistakenly believed that the nine poles near Kindle Way were placed within the public right of way pursuant to the rights granted by the Franchise Agreement. As for the pole at the corner of Kindle and Shaff, PacifiCorp reiterated that the City would have to pay the relocation cost for that pole because it

FARLEIGH WADA WITT

City of Stayton  
January 5, 2018  
Page 3

was located within PacifiCorp's private easement rights, i.e. not by grant through the Franchise Agreement.

On July 18, 2017, the City responded that it wanted to proceed with the underground conversion and relocation of the lines near Kindle Way and requested a design as soon as possible. It did not address relocation of the Kindle and Shaff pole.

Between July and October, based on conversations with the City's engineer and consultant, PacifiCorp understood that the Kindle Way project had lost some of its urgency or otherwise had been delayed or stalled, and it stopped work on the requested design plans. In October, as the project regained momentum, PacifiCorp re-commenced work on the design plans. At this time, PacifiCorp's estimator discovered the PacifiCorp Kindle ROW Easement, under which PacifiCorp's nine distribution poles along Kindle Way (which the City had requested PacifiCorp relocate) were placed. Because these poles were placed by private right of easement, and not pursuant to the Franchise Agreement, PacifiCorp concluded that it was not required to relocate those lines at PacifiCorp's expense.

On October 16, 2017, acting City Attorney Wallace Lien sent PacifiCorp's in-house counsel, Cynthia Hansen Mifsud, a letter regarding the City's request for relocation of the pole at Kindle and Schaff, as well as a pedestal stand (which appears to be a facility belonging to another utility). Ms. Mifsud responded via email on October 23, 2017. On November 1, 2017, PacifiCorp informed the City that PacifiCorp's nine poles on Kindle Way were installed pursuant to the PacifiCorp Kindle ROW Easement and thus are not subject to the relocation provisions of the Franchise Agreement.

PacifiCorp heard nothing further from the City until it received your letter on December 26, 2017.

The above facts demonstrate that the contention in your letter that PacifiCorp has failed to take action "over the past six months" is incorrect. Indeed, PacifiCorp has provided timely responses to each and every request from the City. PacifiCorp's refusal to relocate its facilities at its own expense is not a failure to perform its obligations under the Franchise Agreement, but is rather based on its contention that it is not required to do so because its easement rights are senior in priority to the City's rights, and the Franchise Agreement does not apply to the facilities at issue. Moreover, PacifiCorp's in-house counsel provided a timely response to Mr. Lien's October letter and invited further discussion. The City failed to respond to Ms. Mifsud's email, and then waited two more months before sending your December 18, 2017 letter. PacifiCorp has provided, and will continue to, provide timely responses to the City's requests and other communication, and will continue to work with the City to try and resolve this matter.

City of Stayton  
January 5, 2018  
Page 4

**Legal Analysis.** The City’s contention that PacifiCorp must relocate the poles in PacifiCorp’s Easement Area, and that it must do so at its own cost pursuant to the Franchise Agreement, is incorrect. The Franchise Agreement governs PacifiCorp’s installation of facilities within the public rights-of-way. Pursuant to Section 4.12.020 of the Franchise Agreement, the City granted PacifiCorp the right to install and maintain electrical transmission and distribution facilities “on, over or under the streets, bridges and public places” of the City. PacifiCorp’s facilities at issue in this matter (the nine distribution poles adjacent to Kindle Way and the one transmission pole adjacent to the intersection of Kindle and Shaff) (collectively, the “Facilities”) were not installed “on, over or under the streets” of the City. Rather, they were installed on private property pursuant to express easement rights for which PacifiCorp paid consideration. The Franchise Agreement, by its plain language, does not apply to facilities installed on land that was not owned by the City at the time of installation, and where the installation was not made pursuant to a grant under the Franchise Agreement.

Section 4.12.040 further supports this conclusion. That section, entitled “Use of Public Ways,” relates solely to the use of the public-right-of-way granted by the Franchise Agreement. Section 4.12.040(2), pertaining to relocation, applies only to those facilities installed within the public-right-of-way pursuant to the Franchise Agreement.

The construction suggested by the City – that the relocation obligation applies to all facilities within the City regardless of whether the facilities were installed by Franchise Agreement grant – is unreasonable. PacifiCorp would have had no reason to abrogate its long-standing private property rights with third parties, to whom it paid consideration, in connection with obtaining a separate and independent property right from the City, and it did not intend to do so. If one takes the City’s argument to its logical conclusion, the City could force PacifiCorp to relocate any equipment or facilities, regardless of where those facilities were located, including facilities like buildings and substations located wholly on property that PacifiCorp owned in fee simple. Clearly, that was not the intent of the Franchise Agreement.

In this case, the City’s rights to the land upon which the Facilities are located were obtained decades after PacifiCorp obtained its easements and installed its Facilities under private rights. When PacifiCorp installed its Facilities, the land was not a public right of way. Thus, the City’s rights to that land are subordinate to PacifiCorp’s. The City obtained its easement rights subject to PacifiCorp’s pre-existing and perpetual right to leave its poles in their present location. As a matter of property law, the City has no right to construct a road that interferes with PacifiCorp’s existing property rights on the land encumbered by PacifiCorp’s easements. If the City wishes to acquire PacifiCorp’s easement rights, then it may do so by condemnation and with just compensation (which is likely equal to the cost of relocation and the grant of a replacement easement). It cannot simply take PacifiCorp’s easement rights via administrative fiat without compensation. The Franchise Agreement does not change this result

FARLEIGH WADA WITT

City of Stayton  
January 5, 2018  
Page 5

because it only governs facilities placed in the public-right-of way pursuant to the grant of permission contained therein. Moreover, PacifiCorp could not have waived or modified, and certainly did not intend to waive or modify, its pre-existing property rights simply by entering into the Franchise Agreement. In short, PacifiCorp acquired and paid consideration for private property rights for the poles in question that pre-date the Franchise Agreement. Its ratepayers cannot be made to repay for these rights.

Your December 17<sup>th</sup> letter argues that there is no “exemption” in the franchise agreement for rights granted by prior easement. This argument misunderstands both the legal and factual basis of PacifiCorp’s position. PacifiCorp does not claim that there is an exemption in the Franchise Agreement. Rather, as explained above, the Franchise Agreement simply does not apply to poles installed prior to the Franchise Agreement’s enactment, on private property pursuant to a private right of easement, and not pursuant to the grant of rights contained within the Franchise Agreement. Similarly, the City’s reliance on Section 4.12.040(1)(a) of the Franchise Agreement is misplaced. That section clearly applies only to “excavation and restoration.” This dispute involves neither activity.

Finally, I want to take this opportunity to address a few specific points in the letter. First, the letter refers to 12 utility poles that require relocation and refers to Exhibit A. Exhibit A appears to be a condensed version of a survey or map. It is illegible. PacifiCorp is aware of only ten poles that have been identified by the City for relocation, as noted above. Second, your letter indicates that the City may move PacifiCorp’s poles if PacifiCorp fails to accede to the City’s demands. The City is not authorized nor qualified to move PacifiCorp’s poles. Doing so would constitute a public safety hazard due to the energized lines attached to those poles. Additionally, the poles belong to PacifiCorp and are properly placed within the PacifiCorp Easement Area. Any attempt by the City to move PacifiCorp’s poles would constitute a trespass, and interference with PacifiCorp’s easement rights, for which PacifiCorp could recover both damages and attorneys fees (pursuant to ORS 20.080).

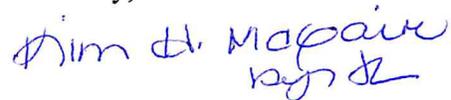
Section 4.12.070(10) of the Franchise Agreement provides that the City Council will hear PacifiCorp’s dispute at its next regularly or specially scheduled meeting. We believe that it would be beneficial to both parties to have this matter considered at the City Council’s February or March meeting, rather than its January meeting, to allow additional time for PacifiCorp and the City to discuss the matter, and for both parties to be sufficiently prepared to address each other’s positions and consider applicable law. Please let us know as soon as possible if the City will agree to have this matter considered at its February or March meeting.

FARLEIGH WADA WITT

City of Stayton  
January 5, 2018  
Page 6

I have called Mr. Lien to discuss the issues and timing with him, but have not yet received a return call. We look forward to hearing from the City.

Sincerely,

Handwritten signature in blue ink that reads "Kim H. McGair" with a stylized flourish below the name.

Kimberley Hanks McGair

KHM/jl

Enclosures

cc: PacifiCorp

Wallace Lien

P:\DOCS\PACICOM\47738\DOC\3R02557.DOC

RIGHT OF WAY EASEMENT

For value received the undersigned Grantors, J. Lindsay Lambert and Lola R. Lambert, husband and wife do hereby grant to PACIFIC POWER & LIGHT COMPANY, a corporation, the Grantee, its successors and assigns, an easement or right of way 22 feet in width as shown on the attached map marked "EXHIBIT A", for an electric transmission and distribution line of one or more wires and all necessary or desirable appurtenances, including telephone and telegraph wires, towers, poles, props, guys and other supports and the right to place all or any part of such line in underground conduits and the right to clear and cut away all trees within said right of way and also such trees outside of said right of way which might endanger said transmission line, at or near the location and along the general course now located and staked out by the Grantee over, across and upon the following described real property in Marion County, State of Oregon, to wit:

A portion of Section 4, Township 9 South, Range 1 West, W.M., as described in deed recorded in Book 564, Page 429 and Book 564, Page 307, Deed Records of Marion County, Oregon

Together with the right of ingress and egress over the adjacent lands of the Grantor for the purpose of constructing, reconstructing, stringing new wires on, maintaining and removing such line and appurtenances, and exercising other rights hereby granted.

The Grantee shall pay to the Grantor reasonable compensation for any damage caused by Grantee, or its agents, to any property or crops (growing or to be grown) on the above described real property, arising out of the construction, reconstruction, operation and maintenance of said transmission and distribution line.

At no time shall any building or anything flammable be erected or placed within the boundaries of said right of way, nor shall any equipment or material of any kind or nature that exceeds 20 feet in height be placed or used thereon by Grantor or their successors or assigns.

SUBJECT to the foregoing limitations said right of way may be used by the Grantor for roads, agricultural crops, or any purpose not inconsistent with said easement.

All such rights hereunder shall cease if and when such line shall have been abandoned.

Dated this 27<sup>th</sup> day of August, 1965

\_\_\_\_\_  
(SEAL) J. Lindsay Lambert (SEAL)  
\_\_\_\_\_  
(SEAL) Lola R. Lambert (SEAL)  
Lola R. Lambert

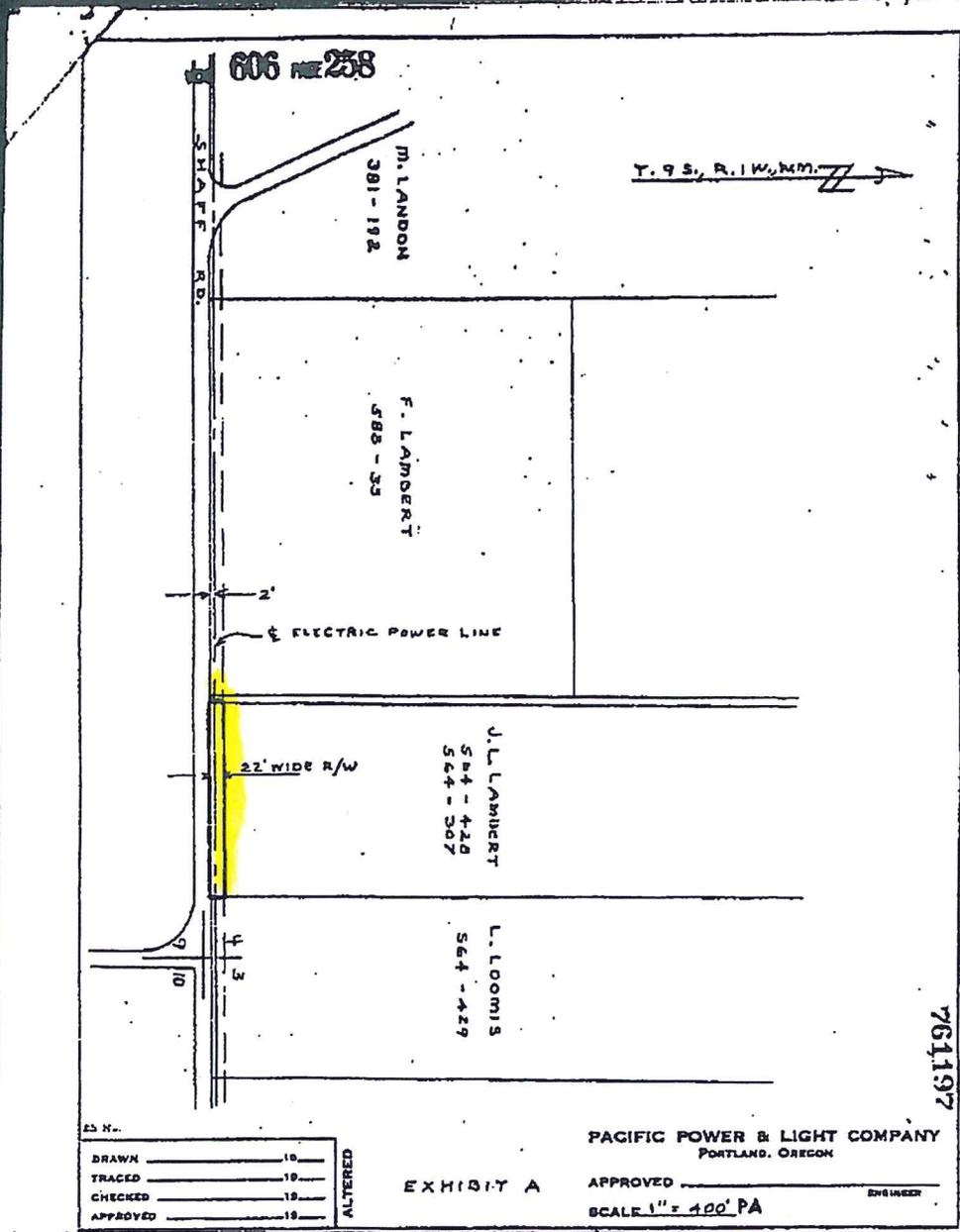
STATE OF Oregon }  
COUNTY OF Marion } ss

On this 27<sup>th</sup> day of August, 1965, personally appeared before me a notary public in and for said State, the within named J. Lindsay Lambert & Lola R. Lambert to me known to be the identical persons described therein and who executed the foregoing instrument, and acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal the day and year above written.

Edmond Howard  
Notary Public for Oregon  
residing at \_\_\_\_\_ there in.  
My commission expires: Sept. 15, 1968

761197



T. 9 S., R. 1 W., M.M. 7

761197

AS N.	
DRAWN	10
TRACED	10
CHECKED	10
APPROVED	10

ALTERED

EXHIBIT A

PACIFIC POWER & LIGHT COMPANY  
 PORTLAND, OREGON  
 APPROVED \_\_\_\_\_  
 SCALE 1" = 100' PA

761197  
 EASEMENT  
 100

J. Lindsay Lambert  
 To  
 PACIFIC POWER & LIGHT COMPANY

606  
 259  
 SEP 7 - 1965  
 9:48  
 380

When Recorded return to  
 P. C. F. L. & L. COMPANY  
 P. C. F. L. DEPARTMENT  
 Public Service Bldg., Portland 4, Oregon



RECORDING COVER SHEET

THIS COVER SHEET HAS BEEN PREPARED BY THE PERSON PRESENTING THE ATTACHED INSTRUMENT FOR RECORDING (ORS 205.234). ANY ERRORS IN THIS COVER SHEET DO NOT AFFECT THE TRANSACTIONS CONTAINED WITHIN THE DOCUMENT.

A. Names of the Transactions described in the attached instrument:

**Permanent Road Easement**

B. Names of First Parties: **Stayton Elementary School District  
1021 Shaff Road  
Stayton, Oregon 97383**

Names of Second Parties: **Marion County, a political  
subdivision of the State of Oregon**

C. Consideration Paid: (if applicable): **\$none**

D. Lien or Satisfaction Amount: (if applicable): **N/A**

E. Until a change is requested, all tax statements shall be sent to the following address:

**Exempt, Public Property  
(Roadway Purposes)**

F. Name and address of person authorized to receive the instrument after recording:

**Ron Sharbono, Right of Way Agent  
Marion County Department of Public Works  
5155 Silverton Road NE  
Salem, Oregon 97305**

**PERMANENT ROAD EASEMENT**

KNOW ALL PERSONS BY THESE PRESENTS, That Stayton Elementary School District 77CJ, hereinafter called the grantor, hereby grants, bargains, sells and conveys unto Marion County, a political subdivision of the State of Oregon, hereinafter called the grantee, its successors and assigns, a Permanent Road Easement, which runs with the land, for public road and right-of-way purposes in, upon, and across real property located in Marion County, State of Oregon, and more particularly described as follows:

See Exhibit "A" attached to and made a part hereof.

THIS INSTRUMENT WILL NOT ALLOW USE OF THE PROPERTY DESCRIBED IN THIS INSTRUMENT IN VIOLATION OF APPLICABLE LAND USE LAWS AND REGULATIONS. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING RIGHTS TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY APPROVED USES AND TO DETERMINE ANY LIMITS ON LAWSUITS AGAINST FARMING OR FOREST PRACTICES AS DEFINED IN ORS 30.930.

The true and actual consideration paid for this conveyance is None.

Dated the last day signed below.

Stayton Elementary School District 77CJ

By B.J. Hollensteiner  
B.J. Hollensteiner, Superintendent

APPROVED AND ACCEPTED  
MARION COUNTY BOARD OF COMMISSIONERS

Paula Frank  
COMMISSIONER  
[Signature]  
COMMISSIONER  
10-14-98  
DATE

STATE OF OREGON )  
                                  )ss.  
County of Marion )

This instrument was acknowledged before me on June 29, 1998,  
by **B. J. Hollensteiner**, as Superintendent of Stayton Elementary School District 77CJ.



Kimberly A Knox  
Notary Public for Oregon  
My Commission Expires: 1-23-2000

**Exhibit "A"**

Grantor: Stayton Elementary School District 77CJ  
Grantee: Marion County  
Tax Account No. 60404-000

A strip of land fifteen feet wide, the Southerly line of which is coincident with the Northerly line of Shaff Road, County Road No. 86, and being the most Southerly fifteen feet of that parcel described in Volume 729, Page 374, Marion County Deed Records, and more particularly described as follows:

Beginning at the Southeast corner of said parcel described in Volume 729, Page 374, Marion County Deed Records; thence South  $89^{\circ}45'$  West along the northerly line of said Shaff Road 654.58 feet to the Southwest corner of said tract; thence North  $0^{\circ}45'$  West along the westerly line of said parcel 15 feet; thence North  $89^{\circ}45'$  East parallel with the north line of said Shaff Road 654.58 feet to the east line of said parcel; thence South  $0^{\circ}45'$  East along said east line 15 feet to the place of beginning and containing 0.225 acres, more or less.

**REEL:1534      PAGE: 324**

**October 22, 1998 , 10:42A**

CONTROL #:      1534324

State of Oregon  
County of Marion

I hereby certify that the attached  
instrument was received and duly  
recorded by me in Marion County  
records:

FEE: \$25.00

ALAN H DAVIDSON  
COUNTY CLERK



RECORDING COVER SHEET

THIS COVER SHEET HAS BEEN PREPARED BY THE PERSON PRESENTING THE ATTACHED INSTRUMENT FOR RECORDING (ORS 205.234). ANY ERRORS IN THIS COVER SHEET DO NOT AFFECT THE TRANSACTIONS CONTAINED WITHIN THE DOCUMENT.

- A. Names of the Transactions described in the attached instrument:

**Permanent Road Easement**

- B. Names of First Parties: **Roy Lambert, et al**  
**1600 Partridge Court**  
**Stayton, Oregon 97383**

Names of Second Parties: **Marion County, a political**  
**subdivision of the State of Oregon**

- C. Consideration Paid: (if applicable): **\$none**

- D. Lien or Satisfaction Amount: (if applicable): **N/A**

- E. Until a change is requested, all tax statements shall be sent to the following address:

**Exempt, Public Property**  
(Roadway Purposes)

- F. Name and address of person authorized to receive the instrument after recording:

**Ron Sharbono, Right of Way Agent**  
**Marion County Department of Public Works**  
**5155 Silverton Road NE**  
**Salem, Oregon 97305**

**PERMANENT ROAD EASEMENT**

KNOW ALL PERSONS BY THESE PRESENTS, That Roy Lambert, Joyce M. Lambert, Rebecca Mable McLellan and William Rodney Lambert, hereinafter called the grantor, hereby grants, bargains, sells and conveys unto Marion County, a political subdivision of the State of Oregon, hereinafter called the grantee, its successors and assigns, a Permanent Road Easement, which runs with the land, for public road and right-of-way purposes in, upon, and across real property located in Marion County, State of Oregon, and more particularly described as follows:

See Exhibit "A" attached to and made a part hereof.

THIS INSTRUMENT WILL NOT ALLOW USE OF THE PROPERTY DESCRIBED IN THIS INSTRUMENT IN VIOLATION OF APPLICABLE LAND USE LAWS AND REGULATIONS. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING RIGHTS TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY APPROVED USES AND TO DETERMINE ANY LIMITS ON LAWSUITS AGAINST FARMING OR FOREST PRACTICES AS DEFINED IN ORS 30.930.

The true and actual consideration paid for this conveyance is None.

Dated the last day signed below.

Roy Lambert  
Roy Lambert  
*mabel*  
Rebecca m. McLellan  
Rebecca Mable McLellan

Joyce M. Lambert  
Joyce M. Lambert  
William Rodney Lambert  
William Rodney Lambert

STATE OF OREGON )  
                                  )ss.  
County of Marion )

This instrument was acknowledged before me on 9/25/98, 1998,  
by Roy Lambert.

Kathryn L. Vargas  
Notary Public for Oregon  
My Commission Expires: 5/18/2000



STATE OF Oregon )  
 )ss.  
County of Marion )

This instrument was acknowledged before me on 9/25/98, 1998,  
by **Joyce M. Lambert.**



Kathryn L. Vargas  
Notary Public for State of Oregon  
My Commission Expires: 5/18/2000

STATE OF Oregon )  
 )ss.  
County of Marion )

This instrument was acknowledged before me on 9/25, 1998,  
by **Rebecca Mable McLellan.**



Kathryn L. Vargas  
Notary Public for State of Oregon  
My Commission Expires: 5/18/2000

STATE OF Oregon )  
 )ss.  
County of Marion )

This instrument was acknowledged before me on 9/25, 1998,  
by **William Rodney Lambert.**



Kathryn L. Vargas  
Notary Public for State of Oregon  
My Commission Expires: 5/18/2000

APPROVED AND ACCEPTED  
MARION COUNTY BOARD OF COMMISSIONERS

CHAIRMAN

Sandra Franke  
COMMISSIONER

[Signature]  
COMMISSIONER

10-14-98

DATE

Lambert easement - Page 2 of 3

## Exhibit "A"

Grantor: Roy Lambert, Joyce M. Lambert, Rebecca Mable McLellan and William Rodney Lambert  
Grantee: Marion County  
Tax Account No. 60405-001

A strip of land fifteen feet wide, the Southerly line of which is coincident with the Northerly line of Shaff Road, County Road No. 86, and being the most Southerly fifteen feet of that parcel described in Reel 897, Page 206, Marion County Deed Records, and more particularly described as follows:

Beginning at the Southeast corner of said parcel described in Reel 897, Page 206, Marion County Deed Records; thence South  $89^{\circ}45'$  West along the northerly line of said Shaff Road 665.42 feet to the Southwest corner of said tract; thence North  $0^{\circ}45'$  West along the westerly line of said parcel 15 feet; thence North  $89^{\circ}45'$  East parallel with the north line of said Shaff Road 665.42 feet to the east line of said parcel; thence South  $0^{\circ}45'$  East along said east line 15 feet to the place of beginning and containing 0.229 acres, more or less.

**REEL:1534**

**PAGE: 323**

**October 22, 1998 , 10:42A**

CONTROL #: 1534323

State of Oregon  
County of Marion

I hereby certify that the attached  
instrument was received and duly  
recorded by me in Marion County  
records:

FEE: \$30.00

ALAN H DAVIDSON  
COUNTY CLERK





**SURVEYOR'S CERTIFICATE:**

I, William F. Ringnald, Oregon Registered Professional Land Surveyor No. 815, do hereby certify that I have personally marked with proper monuments the land represented on the attached subdivision map, the exterior boundary being described as follows:

Beginning at the initial corner of this subdivision, which is 5/8 inch diameter by 30 inch long iron rod with a yellow plastic cap imprinted "R. P. GORMAN L50 1195" at the southwest corner of Parcel 2 of Marion County Partition Plat No. 90-48 in Section 4 of Township 9 South, Range 1 West of the Willamette Meridian in the City of Stayton in Marion County, Oregon and running thence North 89° 45' 00" East, along the South line of said Parcel 2, 679.14 feet to the southeast corner of said Parcel 2; thence South 0° 20' 27" East, 15.09 feet to the North line of said Parcel 2; thence North 89° 45' 00" East, along said right-of-way line 29.70 feet, to the West line of L. S. Lambert's land as described in Volume 61, Page 453 of the Marion County Deed Records; thence North 0° 20' 27" West, along the West line of said L. S. Lambert's land, 589.53 feet; thence South 89° 45' 00" West, 29.70 feet to the Northwest corner of Parcel 2 of said Partition Plat; thence South 89° 45' 00" West, along the North line of said Parcel 2, 679.14 feet to the Northwest corner thereof; thence South 0° 20' 27" East, along the West line of said Parcel 2, 574.53 feet to the point of beginning and encompassing 9,359 gross acres.

REGISTERED PROFESSIONAL LAND SURVEYOR  
W.F. RINGNALDA  
No. 815

**ABOUT THE SURVEY:**

This survey was performed to satisfy part of the conditions of approval granting the subdivision of this property. We found existing monumentation defining the boundaries of Marion County Partition Plat No. 90-48 (5/8 inch iron rods with yellow plastic caps imprinted "R. P. GORMAN L50 1195") as shown hereon which conformed to the Plat. We used these monuments for control and used the old bearings for our basis of bearings. Additional kindle property, shown on the Partitioning Plat as resurveyed and is therefore included in the subdivision. The monuments we set are 5/8 inch diameter by 30 inch long iron rods with yellow plastic caps imprinted "LS 915".

Taxes and assessments on the above property have been paid in full to June 30, 1992  
by K. A. Rasmussen  
Marion County Tax Collector

**DECLARATION:**

Know all persons by these presents that we, Craig A. Clarambeau and Linda A. Clarambeau, being the owners of the land described in the Surveyor's Certificate hereon and desiring to dispose of same in lots, have caused the same to be surveyed and platted, the name to be known as CLARAMBEAU ADDITION TO THE CITY OF STAYTON.

We hereby dedicate to the public use the streets and easements as shown hereon and we hereby grant to the City of Stayton the one foot reserve stripes as shown on the plat. We additionally dedicate the five feet of each lot as shown as a public utility easement. We also state that all taxes and assessments levied against said land have been paid in full.

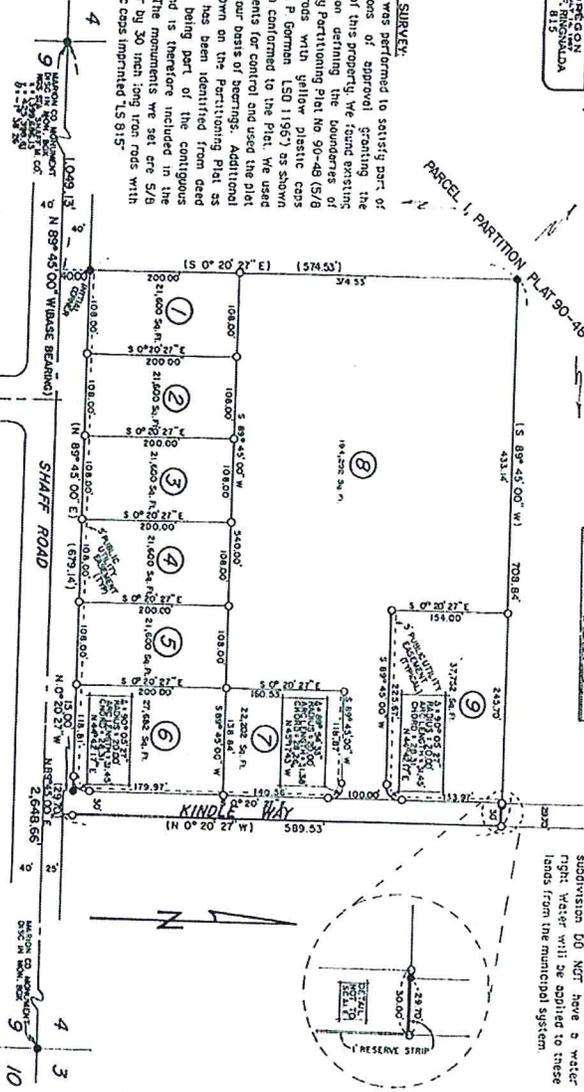
In witness whereof we set our hands and seals this 28th day of January, 1992.

Craig A. Clarambeau  
Craig A. Clarambeau  
Spouse of Linda A. Clarambeau

Linda A. Clarambeau  
Linda A. Clarambeau  
Spouse of Craig A. Clarambeau

STATE OF OREGON  
COUNTY OF MARION  
Signed and sworn to before me on this 28th day of January, 1992 by Craig A. Clarambeau and Linda A. Clarambeau.

**STATEMENT OF WATER RIGHTS:**  
The parcels identified within this subdivision DO NOT have a water right. Water will be applied to these lands from the municipal system.



**WM. F. RINGNALDA**  
CONSULTING ENGINEER & LAND SURVEYOR  
810 COTTAGE ST. NE, SALEM, OREGON 97301 • (503) 571-3131  
Registered Professional Land Surveyor • Oregon, Alaska & Idaho  
Registered Professional Engineer • Oregon, Washington & Idaho

SCALE: 1" = 100'  
DATE: 1-3-92  
JOB NO.: 91-026  
DRAWN BY: W. F. R.

**CLARAMBEAU ADDITION TO THE CITY OF STAYTON**  
A SUBDIVISION  
OF PARCEL 2 OF MARION COUNTY PARTITIONING PLAT NO. 90-48  
LOCATED IN THE HENRY FOSTER D. L. C. NO. 45  
IN THE SE 1/4 OF SECTION 4 OF T. 9 S., R. 1 W., W.M.  
IN THE CITY OF STAYTON, MARION COUNTY, OREGON

**APPROVALS:**

<u>William F. Ringnald</u> Surveyor	Date: <u>2-6-92</u>
<u>David W. Koenig</u> Stayton City Administrator	Date: <u>2-02-92</u>
<u>W. F. Ringnald</u> Marion County Surveyor	Date: <u>2-05-92</u>
<u>Mary Rowland</u> County Commissioner	Date: <u>2-13-92</u>
<u>Richard F. ...</u> County Commissioner	Date: <u>2-13-92</u>
<u>Alan Davidson</u> County Commissioner	Date: <u>2-13-92</u>
<u>Alan Davidson</u> County Clerk	Date: <u>2-13-92</u>

State of Oregon  
County of Marion  
I, Surveyor, do hereby certify that the within Plat was received for the record on the 28th day of January, 1992, at 4:15 o'clock P.M. and recorded as Volume 470 Page 3 of the Marion County Book of Town Plats.

Additionally, affidavits consenting to the declarations and dedications contained hereon are recorded in the Marion County Deed Records at Vol. 923, P. 418

Alan Davidson, Marion County Clerk  
Deputy County Clerk

**LEGEND:**

- = Monument, Set, 5/8" x 30" Iron Rod with yellow plastic cap imprinted "LS 915" unless otherwise noted.
- = Monument, Found, 5/8" Iron Rod with yellow plastic cap imprinted "R. P. GORMAN L50 1195" unless otherwise indicated.
- = Measured Bearing and/or Distance
- XXXXXX = Bearing and/or distance of record, from Partition Plat No. 90-48, equal to that measured.

V410 P 3

**Kimberley Hanks McGair**  
Attorney  
Admitted in Oregon and Washington

kmcgair@fwwlaw.com

121 SW Morrison Street, Suite 600  
Portland, Oregon 97204

tel 503.228.6044  
fax 503.228.1741

www.fwwlaw.com

January 30, 2018

**VIA EMAIL AND REGULAR MAIL**

Mayor Henry A. Porter and the Stayton City Council  
c/o Wallace Lien, Special Counsel  
Wallace W Lien PC  
PO Box 5730  
Salem, OR 97304  
[wallace.lien@lienlaw.com](mailto:wallace.lien@lienlaw.com)

Re: *City of Stayton/PacifiCorp*

Dear Mayor Porter and Councilors Glidewell, Kronquist, Quigly and Usselman:

I represent PacifiCorp in connection with the issue of relocation of PacifiCorp's facilities along Kindle Way. On January 5, 2018, PacifiCorp sent a detailed letter ("Initial Response") to the City Administrator of the City of Stayton ("City") explaining why PacifiCorp does not believe it is required to pay the cost of relocating its electric transmission facilities (which are located within a private easement that pre-dates the City's right-of-way by approximately 30 years) in connection with the Kindle Way road-widening project. I understand from the City's Special Counsel, Wallace Lien, that PacifiCorp's Initial Response has been provided to you. As anticipated in PacifiCorp's Initial Response, this letter provides additional legal authority for PacifiCorp's position that the costs of relocating PacifiCorp's facilities are the City's responsibility, and also responds to the January 31, 2018 Staff Report ("Staff Report") submitted by Wallace Lien, Special Counsel.

**Legal Memorandum Regarding Responsibility for Relocation Costs.**

The interplay between utility franchise rights and the improvement and expansion of public roads has a long legal history in the United States. In 1905, the United States Supreme Court recognized that when a city permitted a public utility to use its streets for pipes, lines and other facilities, that right was not absolute and the city could subsequently require that the gas company move its pipes at its expense to accommodate future projects in the public interest. *New Orleans Gaslight Co. v. Drainage Comm'n of New Orleans*, 197 U.S. 453, 458 (1905). This principle of law has been recognized for over a hundred years and is summarized as follows:

City of Stayton  
January 30, 2018  
Page 2

When a state or municipal corporation grants to a utility the right to install facilities such as telephone poles, lines, conduits and cables on the right of way of a public highway or street, there is an implied condition that the facilities shall not interfere with public use, either at the time they are placed in position or thereafter. If the highway or street is improved by widening or change of grade, the utility must relocate its facilities at its own expense.

*City of Grand Prairie v. American Tel. & Tel. Co.*, 405 F.2d 1144 (5<sup>th</sup> Cir. 1969), *citing* Nichols', THE LAW OF EMINENT DOMAIN, (3d ed. 1963), §§ 5.85, 12.22.

Importantly, the corollary is also true, and has also been recognized for decades. That is,

Where, however, the utility facilities were installed pursuant to private granted easements prior to the existence of the street, the [utility] cannot be charged with the cost of relocating its pre-existing facilities. Indeed, for such interference, it may also recover the damages to its easement.

*Id.*, *citing* Nichols', THE LAW OF EMINENT DOMAIN, §15.22 (Supp. 1968 at 258). Put simply, if utility facilities were placed in the public right of way pursuant to a grant from the public body, the utility must pay the cost of relocating. If the facilities were placed pursuant to a grant from a private easement before the public body had any rights to the land, the public body must pay the cost of relocation.

Courts both in Oregon and across the country have uniformly followed this rule, holding that a utility cannot be forced, at its own cost, to relocate facilities that it originally placed by private easement right, not pursuant to a public franchise right. The preeminent case establishing this principle is *State of Tennessee v. United States*, 256 F.2d 244 (6<sup>th</sup> Cir. 1958), which addressed a road widening project near the Great Smoky Mountains National Park. The court in that case considered a telephone company's relocation obligations with respect to its facilities, some of which were located within the public right of way, and some of which were located in its own private easement. The court held that where the telephone lines were originally installed within the public right of way by permissive grant of the state, the company must move those lines at its own expense. However, for those lines which were located pursuant to a private easement acquired by the telephone company, the state was required to pay the costs of relocation. *Id.*

City of Stayton  
January 30, 2018  
Page 3

Following the *Tennessee* case, courts have consistently applied this distinction, requiring municipalities to pay the costs of relocation of facilities which were installed within private easements acquired by the utility prior to the public body acquiring rights in the land. *Grand Prairie* has facts almost identical to this dispute. In that case, the telephone companies acquired easements in 1929 and installed their facilities at the same time. *Grand Prairie*, 405 F.2d at 1145. Approximately thirty years later, the city acquired right of way across the same property in order to construct a road. As in this case, the city's ordinance required a utility to relocate its facilities from the public right of way at its own expense upon request by the city. *Id.* The city demanded that the telephone companies relocate their facilities and the telephone companies refused to comply, claiming that the companies' rights to the land were superior to the city's by virtue of their private easements. The court agreed with the companies, holding that, because the telephone companies "did not locate their facilities on the right of way of a public street by permission of the municipal corporation," but by private easement acquired long before the city even had any rights to the property, the city was required to pay the costs of relocation. *Id.* at 1146-48.

Numerous other courts have issued identical decisions. In *St. Charles County v. Laclede Gas Co.*, 456 S.W.3d 137 (Mo. 2011), a gas company installed its gas lines in utility easements established by subdivision plats. Some years later, the county wanted to widen the adjacent roads and demanded that the gas company relocate its lines at its expense. The gas company refused, citing its private easement rights. The court agreed with the gas company, holding that "the general rule is that when a utility's right to construct and maintain its utility equipment is premised upon an easement, the utility is not responsible for the cost of relocating its equipment." *Id.* at 140; citing *Panhandle Eastern Pipe Line Co. v. State Highway Commission of Kansas*, 294 U.S. 613 (1935). "[T]he utility could not be divested of its easement without just compensation." *Id.*

Similarly, in *Sussex Rural Electric Cooperative v. Township of Wantage*, 217 N.J. Super. 481, 526 A.2d 259 (App. Div. 1987), the electric utility held a private easement granted in the early 1950's for construction and maintenance of electrical transmission lines, which were constructed adjacent to dirt roads. The roads were then conveyed to the city, including the land upon which the utility had its easement. The city demanded that the utility move its lines at its expense in connection with the widening and paving of the roads, and the utility refused in reliance on its private easement rights. The court ruled in favor of the utility, recognizing the uniformly-accepted rule that "where utility lines originally placed on private property are required to be relocated to accommodate a subsequently created public right of way, the utility is entitled to be compensated for its relocation costs." *Id.* at 486-87 (collecting numerous cases from across the country with the same holding); see also *State ex rel Herman v. Electric Dist. No. 2*, 106 Ariz. 242, 474 P.2d 833 (1970) (holding that the utility cannot be required to pay

City of Stayton  
January 30, 2018  
Page 4

relocation costs “where the line was there before the dedication of the street or the acquisition of the road by the public body”).

The ruling in the one Oregon case to consider the issue is consistent with these authorities. In *Multnomah County v. Rockwood Water Dist.*, 219 Or 356, 347 P2d 110 (1959), the water district had placed pipes on land in Multnomah County when the adjacent streets were privately owned. The streets were then dedicated to the county and it sought to improve them, requiring relocation of the water lines. The court held that the water district was not responsible for the costs to relocate the water pipes for three independent reasons, one of which was “the water district had rights to use the street prior to dedication.” *Id.* at 365. In other words, the water district’s private rights were superior to the county’s rights with respect to the subsequently-created public right of way. In a subsequent case, the Oregon Supreme Court cited to *Rockwood* and to *Contra Costa County v. Central Contra Costa Sanitary Dist.*, 182 Cal. App. 2d 176 (Ct. App. 1960), as cases where the cost of relocation was to be borne by the government because “the facility was originally laid in private property and later acquired for a government purpose...” *State Highway Commission v. Clackamas Water Dist.*, 247 Or 216, 222, 428 P2d 395 (1967).

These authorities strongly support PacifiCorp’s position. As detailed in PacifiCorp’s Initial Response, PacifiCorp acquired, and still holds, private easement rights for the poles at issue that pre-date the City’s public right of way rights by 30 years. Thus, the City’s rights to the land are, in the words of the cases discussed above, “a subsequently created public right of way.” PacifiCorp’s easement is a privately-held property right. Just as with privately owned property held in fee simple, the City cannot simply take PacifiCorp’s easement rights without just compensation. This result can be contrasted with the situation where a utility has placed its facilities within the public right of way by grant of rights pursuant to a franchise agreement or ordinance. In that case, the utility has no pre-existing rights and is required to move its facilities at its expense as its right to remain in the public right of way is entirely dependent on the terms of the franchise agreement or ordinance.

This principle is also reflected in the policies and procedures of the State of Oregon’s Department of Transportation (“ODOT”). Specifically, ODOT allows public utilities to locate their facilities in a state road right of way in much the same way that the City (and virtually every city and county in Oregon) does. If the utility places its facilities in the public right of way by virtue of this grant, and ODOT later needs the utility to move its facilities to accommodate a road project, the utility must move its facilities at the utility’s expense. *See* Utility Relocation Guide, published by ODOT (excerpt enclosed). Importantly, however, ODOT recognizes that if the utilities’ facilities were placed pursuant to a private easement, and not pursuant to the public franchise or ODOT permit, then ODOT must pay the cost of relocation. In addition to paying the cost of relocation, if the utility must relocate outside the boundaries of its

City of Stayton  
January 30, 2018  
Page 5

private easement, ODOT will also grant the utility an X permit. An X permit allows the utility to recoup relocation costs in the future if ODOT requires further relocation. *Id.* By issuing an X permit, ODOT recognizes that the utilities' pre-existing private easement right is superior to its later-acquired public right of way rights, and that it cannot force utilities to relocate their facilities at their own expense, or at all, without just compensation, which includes protection against future relocation. ODOT's approach demonstrates that PacifiCorp's position is consistent with long-standing and well-recognized legal principles related to franchises, utilities, private easements and public road projects.

In sum, the applicable legal authorities support PacifiCorp's position in this matter. It is worth noting that the Staff Report does not contain any legal authority that supports the position advocated in the Staff Report or that otherwise rebuts the legal authority provided above. Consequently, PacifiCorp respectfully requests that, in taking any action with respect to this matter, the Council comply with decades of legal precedent in finding that PacifiCorp is not required to relocate its privately-placed facilities at its own cost.

### **Response to Staff Report**

In the face of the legal precedent cited above, the analysis in the Staff Report is not persuasive.<sup>1</sup> That analysis relies solely on a strained interpretation of the Franchise Agreement which, if allowed, would result in a taking of PacifiCorp's private property interest without just compensation. The Franchise Agreement simply contains no provisions by which PacifiCorp waives or agrees to subordinate its easement rights or otherwise allows the process and compensation available in eminent domain to be circumvented.

While it is true that the Franchise Agreement requires PacifiCorp to relocate facilities it placed within the public right of way pursuant to the grant of rights in the Franchise Agreement, the contention in the Staff Report that this extends to facilities placed 30 years prior to the City acquiring right of way rights in the property is not well taken. As noted on pages 4 and 5 of PacifiCorp's Initial Response, the Franchise Agreement governs facilities installed "on, over or under the streets, bridges and public places" of the City by the grant of authority in the agreement. *See* Section 4.12.020. PacifiCorp's facilities at issue are not installed "on, over or under the streets" of the City; they are installed on private property pursuant to express easement rights for which PacifiCorp paid consideration, 30 years before the City had any interest in the property. In fact, just the opposite is true: the public right of way for Kindle Way was obtained "on, over and under" PacifiCorp's facilities. Section 4.12.040 of the Franchise Agreement further supports this conclusion. That section, entitled "Use of Public Ways," relates solely to the use of

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<sup>1</sup> The Staff Report makes no mention of the Initial Response nor refutes any of the arguments or analysis set forth therein.

City of Stayton  
January 30, 2018  
Page 6

the public right of way granted by the Franchise Agreement. PacifiCorp did not place its poles in question within public right of way, and is not using the public right of way. Rather, the City<sup>2</sup> acquired public right of way rights 30 years after, and *subject to*, PacifiCorp's private easement rights.

Moreover, PacifiCorp notes that certain factual recitations in the Staff Report are inaccurate or incomplete, and PacifiCorp refers the Council to the pages 1-3 of its Initial Response for a more complete and accurate factual statement. Other inaccuracies in the Staff Report include the following items:

1. The Staff Report erroneously refers to the PacifiCorp's easement rights in the past tense instead of the present tense.<sup>3</sup> PacifiCorp's easement rights have never been extinguished and remain valid, current and existing rights of PacifiCorp across the property upon which the City wishes to construct the widened Kindle Way.

Under Oregon law, in order to terminate or convey its easement rights, PacifiCorp must execute a document, before a notary public, identifying its easements by legal description and agreeing to terminate its easements, or to convey them to a third party. *See, e.g.* ORS 93.010, ORS 93.410, and ORS 93.600 (establishing requirements for conveyance of property interests in Oregon). It has never done so, and the Staff Report does not contend that it has. Importantly, the Franchise Agreement contains no express provision terminating PacifiCorp's easement rights, nor any release or waiver of those rights. Thus, as a matter of black letter property law, PacifiCorp's easement rights remain in place as a current encumbrance on the property which are senior to the City's rights, and, as with any other ownership interest in property, the City cannot involuntarily terminate those rights except by exercise of eminent domain. It is simply not accurate to refer to those rights in the past tense, or to state that "an easement once existed." *See* Staff Report, p. 6.

PacifiCorp's easements remain of record in the county property records and they are and will remain current and valid unless and until PacifiCorp executes a document that complies with Oregon law releasing, conveying or terminating its easement rights. Importantly, this is true even if PacifiCorp were required as a matter of law to relocate its facilities under the Franchise Agreement (which PacifiCorp denies). That relocation would not terminate PacifiCorp's properly-recorded senior easement rights. As with any other privately-held

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<sup>2</sup> The right of way was actually acquired by Marion County in 1998.

<sup>3</sup> Staff Report, p. 2 ("poles #2-10 were, or had been, in a private easement"); p 3 ("the poles are, or had been previously authorized by a private easement"); p. 3 ("because the affected poles were under a prior private easement"); p. 6 ("that an easement once existed for the location of a power pole...").

City of Stayton  
January 30, 2018  
Page 7

property to be occupied by a widened road, the City must acquire PacifiCorp's ownership of its easement before it can take action which interferes with those rights.

As discussed in this memorandum, PacifiCorp remains willing to convey its easement rights to the City without separate consideration, so long as the City pays for the cost of relocation and provides replacement rights.

2. The Staff Report states that PacifiCorp is claiming an exemption or exception under the Franchise Agreement for facilities placed in a private easement. As noted on page 5 of the Initial Response, that construction of PacifiCorp's argument is incorrect. PacifiCorp does not contend that there is an exception or exemption for its facilities placed pursuant to its privately-held rights, but that the Franchise Agreement, by its terms and under applicable law, applies only to those facilities that PacifiCorp installed pursuant to the grant of authority in Section 4.12.020 of the Franchise Agreement. It does not and cannot apply to facilities that were placed pursuant to private easements obtained 30 years before the City had right of way rights over the subject property. Put another way, because the Franchise Agreement applies only to facilities placed by the City's grant of permission in the agreement, there is no need for the exemption or exception mentioned in the Staff Report for facilities placed pursuant to a different grant of authority, such as a private easement. The Franchise Agreement simply does not, and has never, applied to those facilities.

3. The Staff Report's reliance on Section 4.12.010(3)(h) is misplaced. That section defines the word "easement" as it is used in the Franchise Agreement. However, the section of the Franchise Agreement which relates to relocation (Section 4.12.040(2)) does not use the word "easement" at all. The word "easement" is used only in Section 4.12.040(1)(a), which generally requires PacifiCorp to comply with applicable ordinances in all of the areas that it operates within the City, including "easements, public places and public rights-of-way." There is no allegation that PacifiCorp has violated other applicable ordinances. Thus, this provision, and the definition of easement, are not relevant to the question of relocation of facilities.

4. The Staff Report states that "it is assumed that many, if not most, established power poles were originally placed pursuant to an easement granted by a private property owner," but offers no factual support for this assumption. *See* Staff Report, p. 6. It goes on to contend that "the precedent to be set here has an enormous long term impact on the City..." Again, the Staff Report offers no factual support for this contention. More importantly, monetary considerations are not a sufficient basis for the City to simply abrogate private property rights which were lawfully acquired for consideration decades before the City had any similar rights. Jurisdictions across Oregon, including both ODOT and other cities and counties, regularly recognize that utility facilities placed pursuant to private easement rights, and not by virtue of publicly-granted franchise rights, can only be relocated at the governmental entity's

City of Stayton  
January 30, 2018  
Page 8

expense, and upon provision of adequate replacement rights. PacifiCorp's position is in line with long-recognized legal principles followed by numerous jurisdictions, and there is no reason to believe, based on information provided in the Staff Report, that reimbursing PacifiCorp to relocate facilities placed under a private easement will lead to significant negative consequences for the City.

### **Options Available to the Council**

The Staff Report identifies two "Options Available to the Council." PacifiCorp respectfully disagrees that these are the only two options available to the Council, and further disagrees that the Council not finding a breach of the Franchise Agreement is accurately described in Option 2. PacifiCorp proposes the following revised version Option 2, and also offers an additional option, or Option 3:

**Option 2: (Revised):** I move that the City conclude, based on consideration of applicable law, precedent and evidence submitted at this hearing, that the Franchise Agreement does not govern facilities which PacifiCorp installed on private property pursuant to easement rights which it required before the property became a public right of way. For that reason, the relocation requirement in Section 4.12.040(2)(a) of the Franchise Agreement does not apply to such facilities, and PacifiCorp is not in breach of the Franchise Agreement. The City acknowledges and agrees that PacifiCorp is willing to relocate those facilities which it installed pursuant to its private easement rights upon the City's agreement to pay the costs of the relocation and upon the City's grant to PacifiCorp of a private easement or similar right as to the new location.

**Option 3:** I move that the City delay consideration of whether PacifiCorp has breached the Franchise Agreement until [insert date] in order to allow the City Council and City staff to further consider the matter and the applicable legal authorities.

### **Conclusion**

PacifiCorp values its relationship with the City. Contrary to the statements in the Staff Report, PacifiCorp has never refused to relocate its facilities to accommodate the road-widening project. PacifiCorp remains willing to promptly relocate its poles upon the City's agreement to pay the costs of relocation and to provide a replacement easement or grant rights akin to the rights granted by ODOT under the X permit. PacifiCorp's request that the City pay PacifiCorp's relocation costs and grant such protection against future relocation requests is consistent with well-recognized and undisputed legal principles and practices both within Oregon and across the country, and with the Franchise Agreement. The Franchise Agreement applies the same general rules that are outlined in the legal analysis above, *i.e.* that the obligation

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City of Stayton  
January 30, 2018  
Page 9

of the utility to relocate at its own cost applies to facilities placed pursuant to the Franchise Agreement. As a result, PacifiCorp's position is not, as the City staff contends, a breach of the Franchise Agreement, nor does it justify the imposition of penalties. PacifiCorp has an obligation to its ratepayers to recoup relocation costs when it is permitted to do so, and, as the authority set forth in this letter and in PacifiCorp's Initial Response demonstrate, it is permitted to do so in this instance.

Please let me know if there is any further information that PacifiCorp can provide the City in connection with its consideration of this matter. PacifiCorp looks forward to further discussing this matter with you at the February 5, 2018 City Council Meeting.

Sincerely,



Kimberley Hanks McGair

KHM/af  
Enclosure  
cc: PacifiCorp (via email)  
P:\DOCS\PACICO\47738\LTR\3RS9576.DOC

# Utility Relocation Guide

## Table of Contents

Introduction – General guidelines and information on the usage of this Guide.

Chapter 1 – Processes contains ideas/suggestions/discussions on the resources and methods to perform the required tasks of relocating utility facilities due to conflicts with ODOT Construction projects.

Chapter 2 – Checklists contains task oriented lists of the steps a RUS/Utility Coordinator will need to make during the various phases of identifying and relocating a utility facility.

Chapter 3 – Forms and Templates used by the RUS/Utility Coordinator in the utility relocation process. The RUS/Utility Coordinator is expected to check the [Utility Form Website](#) for the most current version of the documents.

Chapter 4 – Examples of forms and documents used by the RUS/Utility Coordinator for reference.

## INTRODUCTION

This guide is written for the Region Utility Specialists (RUS), Out-sourced Project Utility Coordinators (UC) and Local Agency Utility Coordinators (UC) to assist in their execution of the Oregon Department of Transportation (ODOT) Utility Relocation Program.

The Federal and State of Oregon laws, rules, regulations, and guidelines for the Utility Relocation Program are listed and discussed in [Chapter 10 – Utility Manual](#) of the ODOT Right of Way Manual.

**A thorough reading and understanding of the Utility Manual should be done prior to using this Guide.**

The following table shows the flow of work by project assignment from the project Region Utility Specialist /Utility Coordinator to the State Utility Liaison.

Project Assignment	Utility Coordination (from)	Report Flow (to)
In-house projects	Region Utility Specialist (RUS)	State Utility Liaison (SUL)
Out-sourced projects	Consultant Utility Coordinator (UC)	Project Manager(PM) to SUL
Local Agency projects	Local Agency Utility Coordinator (UC)	Local Agency Liaison (LAL) to SUL

Electronic files and hard-copy (paper) files are all part of project documentation. To ease in the archiving and recovery of documents, a file naming convention has been developed. The critical component of naming a file is to always include the project key number at the beginning. Avoid the use of spaces within a file name; if you wish to have separation, use the underbar ( \_ ) or hyphen ( - )

- **File Names:** KeyNumber\_DocumentType\_UtilityOwner  
Example: 10942\_ConflictLetter1\_Pacific Power.doc
- **Correspondence:** Subject Header  
Subject: Conflict Letter  
Project Name: Some Project  
Highway: Some Highway  
County: Some County  
Key No.: 10942
- **Email:** Subject Line: KeyNumber-Description of Discussion  
Example: 10942-Potholing request
- **SharePoint File Repository**  
Some Project Leaders (PL) will choose to use SharePoint as a file organization and communication tool. A project directory is created at the PL request and should be used by the project team if set up. NOTE: This is not an ARCHIVE directory, but is for communication purposes only. The RUS should keep copies of any documents that may be needed for future reference, as the SharePoint files may be deleted at the conclusion of the Preliminary Engineering (PE) phase of a project.

Example 4-1 is a screen print of the Project Document Folder>Shared Documents>Utilities. The example shows the deliverable documents have been completed for this project and the documents are available in final status for the project leader to incorporate into the package to be submitted for PS&E.

- **ProjectWise**

ProjectWise is an integrated suite of collaboration servers that enable engineering design and construction project teams, their information, and their tools to work together.

Bentley ProjectWise provides managed access to engineering and geospatial content within the workgroup, across a distributed organization, or among collaborating organizations throughout ODOT. By working within the Bentley ProjectWise managed environment, users can streamline their project work and improve the efficiency.

Utility Relocation Workflow

Utility Relocation Work Flow



# Chapter 1

# Process

## INDEX

- 1.1 Utility Reports
- 1.2 Mapping
- 1.3 Establish Eligibility for Reimbursement
- 1.4 Conflict Letter and Project Notification Letter
- 1.5 Reimbursable Process
- 1.6 Non-Reimbursable Process
- 1.7 Funding Opportunities
- 1.8 Utility Attachments on Structures
- 1.9 Adding Work to ODOT Contract
- 1.10 Coordinating Utility and ODOT Facility Installations
- 1.11 Timing Letter
- 1.12 Specifications
- 1.13 Certification
- 1.14 Permits
- 1.15 Construction

### 1.1 Utility Reports

Utility Reports are developed during the Environmental Impact Statement or Scoping phase of a project. The report is to be used by the project team when evaluating the proposed alternatives and making the choice for the alternative that is moved forward toward construction. The report consists of three major sections:

- 1 – Utility facility owner and contact information.
- 2 – General statement of impacts to each utility facility based on alternatives being considered.
- 3 – Estimated cost impacts to each utility for each alternative and any estimated reimbursable costs.

The reimbursable cost estimates developed for the Utility Report are a rough estimate of costs that can be used as the initial Utility Reimbursement (UR) budget for the project.

There is rarely any surveyed mapping of the project at the scoping phase. The RUS/Utility Coordinator will probably have to depend on aerial maps with alignments roughly estimated, mapping collected from utility facility owners, and visits to the project site. Once impacts have been identified, the RUS/Utility Coordinator can work with the utility owners to prepare general estimates for relocation costs.

While it is the responsibility of the utility owner to establish reimbursable relocation rights, the RUS/Utility Coordinator will need to anticipate those rights when preparing the utility reports. Section 1.3 lists resources available to make the initial assessment of eligibility.

Sample reports are provided in Chapter 4 – Examples 4.2 – 4.4

### 1.2 Mapping

#### OUNC One Call –

The Survey Crew files a locate request with the Oregon Utility Notification Center (OUNC) 10 business days prior to beginning their survey for the project base map. When they file the request, a Locate Ticket is created. The survey crew should provide the ticket number and/or a copy of the ticket to the RUS/Utility Coordinator. A sample of a Locate Ticket is provided in Chapter 4, Example 4.5

The OUNC notifies the utility companies listed on the bottom of the ticket. The utility companies are responsible to mark their facilities, and notify the requestor of “non-locatable facilities” or “no facilities” within the requested area.

OUNC *only* notifies those utility companies that have maintained and submitted their facility mapping. It is possible that some utilities will not be located and further research and contacts must be made. An example would be ODOT or City electrical facilities serving illumination, traffic signals or traffic monitoring devices.

If a notified utility owner fails to mark their facility within the 10 business days, as directed in Oregon Administrative Rule (OAR) 952-01-80, the survey crew should contact the utility owner directly. All contact should be documented in the event that there is a need to file a Request for Administrative Action (RAA) for failure on the part of the utility owner to mark their facilities.

The Oregon Utility Coordinating Council (OUCC) has developed a comprehensive Standards Manual which includes the laws, statutes, and procedures pertaining to utility facility identification. The website at: [www.oucc.net](http://www.oucc.net) is an excellent resource for up to date facts and information.

#### **Review Design Base Map**

Once the survey crew has gathered all the existing features of the project area, a base map is generated and transmitted to the designer. The data collection and method is described in the ODOT Geometrics Survey Field Note Standards and Base Map Standards. The surveyor or designer may provide a copy to the RUS/Utility Coordinator. The RUS/Utility Coordinator reviews the utility locate information and works with the utility owners to verify completeness and accuracy. Depending on the density of utility facilities on a project site, any or all of the following actions may be necessary to verify the utility data on the base map:

- 1- Complete a project on-site visit with map to confirm ownership of mapped above ground and underground utility facilities. Above ground confirmation includes noting ownership and joint use on poles and direction of aerial lines. Underground confirmation includes ownership and continuity of underground facilities.
- 2- Meet with utility facility owners to compare base map to their facility maps.
- 3- Additional horizontal and vertical data may be required through potholing.

The information gathered and displayed on the base map is dependant upon the type and complexity of the project. The RUS/Utility Coordinator should discuss what information they will require for their conflict analysis with the Survey Team prior to the survey if at all possible. A completed base map should include the following:

1. Proposed center line
2. Slope lines
3. Existing roadbed
4. Right of Way lines, existing and proposed
5. All utilities shown in relationship to highway center line
6. Lowest elevation of utility wire crossings
7. Depth of underground structures
8. Easement and permit data
9. All proposed utility adjustments on existing or proposed highway right of way, or where proposed utility right of way is adjacent to the highway

#### **Utility Facility Maps**

When preparing Utility Reports for an Environmental Impact Study (EIS) or Project Scoping trip there will probably be no survey data for utility facilities. In order to determine what facilities are within the project area it will be necessary to request facility maps from the utility owners. These maps can vary from aerial photos with line drawings of the general size and position of facilities to line drawings with annotations of utility facilities. It is best to request the utility facility maps in writing to have documentation in the project records.

Some utility owners will refuse to provide mapping based on proprietary or homeland security restrictions. For those utility owners it will be necessary to provide the ODOT mapping available and ask them to verify their general facility information.

**Railroad Facilities**

Utility facilities lying within the railroad right of way are under easement or franchise agreement with the railroad. All coordination with the railroad owner and those utility owners is to be through the ODOT State Railroad Liaison. The railroad will require the Township, Range, and Section of the area of the conflict.

**1.3 Establish Eligibility for Reimbursement**

Typically, if the utility has a compensable property interest in its present location, it would be entitled to reimbursement. If the utility is located on public right of way by permit or franchise agreement, the relocation would generally be non-reimbursable, although the permit or franchise agreement should explicitly define the parameters.

When preparing a Utility Report or determining which Conflict Letter to send to a utility owner, the potential for reimbursement eligibility must be established. A [Utility Reimbursement Matrix](#) was developed to assist with the initial evaluation and is found in the Utility Forms Library.

The first step when determining reimbursement eligibility is to search the ODOT permit database. Utility facilities located on State Highway right of way by permit are considered non-reimbursable unless there is an X-Permit with special provisions declaring conditions for future reimbursement for relocation.

If the project falls within city limits, it will be necessary to obtain and evaluate city franchise agreements for any relocation rights and conditions the city has made with the utility company.

If no permit is found, then there are a number of references and documents available to use to help determine potential reimbursable eligibility:

**Easement Discovery by Survey and Right of Way**

The Right of Way Section and Survey Unit obtain copies of the deeds of properties lying adjacent to the road right of way during the development of the base map. Contained within those deeds are descriptions of utility and/or access easements that accompany the ownership of the land. Those deeds containing utility easement information should be provided by the ROW Agents or surveyors to the RUS/Utility Coordinator.

**Highway History Documents**

Documents providing background and history of the development of the State Highway system are scattered throughout the Right of Way Section. The following documents have been placed in the [Utility Forms Library](#):

[Overview of Ownership Rights](#): This document was generated by ODOT as a summary of the designation and establishment of State Highways and rights of way. In addition to the summary of the process there are also references for finding the original documents.

[Road Establishment File Index](#): A listing of the documents describing state highways based on highway number, county in which the roadway is located and the Right of Way file number.

[History of State Highways in Oregon](#): A document compiled and maintained by the ODOT Geometrics Unit which includes information to assist in locating the

documents pertaining to the creation, relocation, jurisdictional exchange and abandonment of State Highways.

Designation of Secondary Highways: A listing by county of sections of county and market roads adopted as secondary highways in 1933.

Highway Designation Through Cities: Descriptions of the beginning, routing, and ending of primary and secondary highways routed through incorporated cities as adopted in 1935. This document provides important information on which city streets became part of the State Highway.

#### **State Highways across Federal Public Lands**

##### **Unreserved Lands - Roadway Easements on Forest Service Lands**

In order to provide uniformity on the right of way easement through National Forests a Memorandum of Understanding (MOU) was established and agreed to between ODOT and the US Forest Service.

Utility facilities placed after the State Highway easement was established should be found under the ODOT permits. Those permits have been reviewed and agreed upon by the US Forest Service as a condition of the MOU. Relocation of the utility facility under ODOT permit is non-reimbursable.

Utility facilities may have been placed prior to the State Highway easement and will have a separate easement agreement with the US Forest Service. It will be necessary to obtain a copy of the easement to determine if there is any reimbursement eligibility.

##### **Reserved Lands - Roadway Easements on Indian Lands**

Tribal lands are part of the Federal Reserved Lands. Roadways through these lands are there by easement. Utility facilities crossing these lands are also under easement and may be there under ODOT permit or direct easement with the tribe. The Bureau of Indian Affairs should be contacted to assist in obtaining the utility easement information for reimbursement eligibility.

##### **Irrigation Districts – Federal Land Act and rights prior to State Highway**

Most irrigation districts in the State of Oregon were established under the Desert Lands Act of 1891 and right of ways under the Carey Act of 1894 and adopted by Oregon in 1901 which is prior to the establishment of state highways. Agreements between the irrigation district and ODOT should have been made at the time the roadway right of way was established. Copies of these agreements most often require research by the Right of Way Unit in Salem.

Under the same general policy as other utilities, the adjustment and/or relocation of irrigation and drainage canals and ditches which conflict with highway construction are reimbursable. However, there are many types of organizations which own irrigation facilities. There may be Water Improvement Districts, Water Control Districts or Corporations, Bureau of Reclamation Projects and Water Districts that

are all organized under different statutes and have different rights and responsibilities.

The RUS/Utility Coordinator must determine:

1. The statute under which a particular district or company was organized.
2. The type of ditch right of way – whether it exists by easement, fee, right by prescription or estoppel, or reserved for irrigation purposes by the federal government.
3. The date the particular ditch or canal was constructed. This date compared with the date the right of way was acquired will establish the irrigation company's rights. The rights must be certified in the same manner as any other utility company property rights. (See Section 1.5 Reimbursement Certification)

**Irrigation Relocation Agreements:**

Before adjusting the irrigation facilities which are in conflict with highway construction, Federal regulations and State law require that the irrigation district or company and State agree on their separate financial, construction, and maintenance responsibilities. (Example 4.18 – Irrigation Agreement)

1. The work may be done by the irrigation districts' forces on a contract let by the district or included in the State's contract.
2. A written agreement must be executed. In cases where the adjustment is simple, the agreement may consist of an exchange of correspondence. In more complicated instances a formal agreement is required. (Example 4.17 ) The SUL executes the agreement with input from the RUS/Utility Coordinator.

**Existing Utility Services**

Existing utility services to adjacent properties are normally accommodated during the acquisition of new right of way for a project. The RUS/Utility Coordinator needs to work with the Right of Way Agent to determine how the existing service will be maintained.

**Restoration:**

Where highway construction disrupts a utility service to a residence or business located outside the area acquired for new right of way, the restoration of that service is eligible for reimbursement.

Where highway construction disrupts a utility service to a residence or business located wholly or partially within the area acquired for new right of way, the cost of relocating the service is included in the property settlement and the utility is not eligible for reimbursement.

**Removal:**

The removal of utility facilities which are located on and serve property purchased for new right of way are reimbursable **only** if the utility company has a valid property right in the existing location.

When the utility company does not have a valid property right, the landowner has the option of requiring the utility to remove their facilities at the utility's cost when the landowner no longer requires the service. The State purchases that landowner's right when they purchase the property for right of way purposes.

#### 1.4 Conflict Letter or Project Notification Letter

OAR 734-055-0045 requires a Conflict Letter or a Project Notification letter for each utility affected by the project or located within the project limits. Templates for the letters are provided in the [Utility Forms Library](#). There are two conflict letter templates available for use based on whether the relocation is eligible or ineligible for reimbursement. For reimbursable relocations, see Section 1.5. For non-reimbursable relocations, see Section 1.6.

The Conflict Letter submittal to the utility facility owner is a package that begins with the letter and a set of preliminary or advanced plan sheets. Other documents such as a conflict list, Utility Relocation Information Sheet and Reimbursement Information Form may be added based on the needs of the project. An example of the package is included in Chapter 4, Examples 4.7 through 4.10.

The Project Notification Letter submittal to the utility facility owner is a package that begins with the letter and a set of preliminary or advanced plan sheets. An example of the package is included in Chapter 4, Examples 4.7

##### Conflict Letter Templates

The [Reimbursable Conflict Letter](#) or [Non-reimbursable Conflict Letter](#) templates provide the necessary legal language to meet the criteria of OAR 734-055-0045 with selectable paragraphs to include for various situations. The non-reimbursable conflict letter contains language to the utility owner for submitting documentation if they feel their facility is eligible for relocation reimbursement.

##### Project Notification Letter Template

The [Project Notification Letter](#) template provides the necessary legal language to meet the criteria of OAR 734-055-0045 with selectable paragraphs to include for various situations.

##### Utility Relocation Information Sheet

The [Utility Relocation Information Sheet](#) is provided to the Utility Owner with explicit information requested. A date is also included at the top of the sheet as a reminder as to when the information needs to be returned. While not a legal requirement, this sheet has proven invaluable to both RUS/Utility Coordinator and Utility Owner.

##### Conflict List

The [Conflict List](#) is a spreadsheet that should be provided to the project designers to be filled in as soon as the project design begins. It is the responsibility of the designer to prepare the initial conflict list as the horizontal and vertical alignment and roadway templates are developed and utility conflicts become apparent. The preliminary list is then transmitted to the RUS/Utility Coordinator for evaluation, summary, and transmittal to the utility owner. The project designer and RUS/Utility Coordinator should review the list together and determine if additional information is needed from the utility owner especially vertical depth by potholing.

The project designer will make a running list of conflicts by station and offset as they come across them. The RUS/Utility Coordinator will have to sort the list by utility owner and prepare separate spreadsheets for each company. The RUS/Utility Coordinator will have to revise the list and add plan sheet numbers and notes to clearly define the areas of conflict to coordinate with the plan set being submitted to the utility.

#### **Plan Sheet Markup**

Plan Sheet markup occurs when a complete set of plans, including *all* elements of design such as staging, roadway, drainage, signals and illumination, and any other elements that impact overhead and underground utility facilities, has been compiled for the project. A set of plans is made for each of the utility owners. Using the conflict list, each conflict is marked on the plan sheet and the corresponding construction note highlighted. A sample of a marked up plan sheet and the corresponding utility owner relocation is in Chapter 4, Example 4.11 and 4.12.

#### **1.5 Reimbursable Process**

It is required that the State and utility agree in writing on their separate responsibilities in doing financing and relocation. The form of the agreement is not prescribed, but is documented by an exchange of correspondence. A utility conflict letter, prepared by the RUS, sets out the separate financial responsibilities and outlines the area of conflict. That agreement "offer" consists of an estimate, plan, and a letter of transmittal from the utility which details the work to be done, who is to do the work, and the financial responsibility of the utility and State. The State letter, issued by the SUL, authorizes the utility to proceed with the work (occasionally with written stipulations) and becomes the "acceptance" of the agreement. There are other variations of this procedure where perhaps several letters will be written by the utility and the State before there is a written agreement.

#### **Transmittal Request Form**

The Transmittal Request Form is located in the [Utility Forms Library](#) under the Forms, Reimbursable section. The form is a cover letter that accompanies all of the submittals for reimbursable relocation information and serves as a request for action from the State Utility Liaison (SUL).

There are five areas on the form:

- 1 - Request Approval Checkboxes – Utility Let Contracts, Work by Utility Forces, Work Added to Contract
- 2 – Funding Allocation with request for programming if needed
- 3 – Description of Request – brief one paragraph explanation
- 4 – Transmit Approvals to Contact Person and addresses
- 5 – Checklist for the attached documentation.

#### **Reimbursement Information Form**

The reimbursement process begins with the Reimbursement Information Form (RIF). This document is provided to the Utility Owner from the RUS/Utility Coordinator. It can be transmitted as a separate document or attached to the Conflict Letter package along with the list of conflicts and plan set. The utility owner will fill out and return the form to the RUS/Utility Coordinator who forwards it to the SUL with the Transmittal Request Form.

The information provided by the utility owner on this form provides the information on budget needs and who will be performing the engineering and construction.

#### **Utility Relocation (UR) Budget**

An estimated utility relocation (UR) budget is established during the scoping and project prospectus stage. The RUS/Utility Coordinator should be involved in the development of that budget but it is not always true. The RUS/Utility Coordinator should be confirming with the Project Leader that a budget is set up for a UR expenditure account when eligible reimbursable utility facilities are found or suspected to be within the project limits. Adding a UR phase to a project after the initial budget is established requires a STIP amendment.

It is the responsibility of the utility to prepare an estimate of cost for the proposed reimbursable work. The utility should itemize the work in sufficient detail to provide the State a reasonable basis for analysis. The itemization should include estimated costs of labor, overhead rates, materials, supplies, handling charges, transportation and equipment, and preliminary and construction engineering. The estimate should also include an itemization of appropriate credit for salvage, betterments and accrued depreciation.

The RUS/Utility Coordinator needs to compare the utility owner's estimated reimbursable costs against the amount allocated in the project budget. A Notice to Proceed with preliminary engineering and/or construction cannot be issued unless there is sufficient project budget assigned to the UR. The SUL will work with the Project Leader to increase the budget if there are insufficient funds assigned to the UR budget.

#### **Establish Cost Split**

There are times when only a portion of the relocation costs may be reimbursable. The RUS/Utility Coordinator works with the utility owner to establish what relocations or portions of the relocations are eligible for reimbursement. Payment for the reimbursable portions can be based on a percentage of the overall work or under separate work orders.

Split costs can occur when:

1 – The utility facility to be relocated lies inside and outside areas considered reimbursable. These situations can often be defined as a direct percentage when the overall work is uniform in nature for the entire length of the facility. An example of a percentage based reimbursement would be if a utility facility relocation of 25 poles

includes 23 on private property and 2 on public right of way. The percentage would be 23/25 or 93.46% of the relocation would be eligible. Underground linear relocations such as waterlines, communications, and gas can be calculated on total length. An example would be 2300' of gas line to relocate. If 1800' is on private property, then there is a reimbursable percentage of 1800'/2300' or 78.26%. An example of the research and cost split determination is found in Chapter 4, Example 4.6.

2 – The utility owner decides to upgrade their facility while performing the relocation. Upgrades or Betterments are usually in the form of larger capacity materials to accommodate future needs. The difference in materials and possibly construction methods needs to be estimated and a cost differential agreed upon. The utility owner makes the declaration of intent to make an upgrade or betterment when they submit the Reimbursement Information Form. The actual costs and differentials will be presented when the utility owner submits the detailed cost estimate.

#### **Reimbursement Certification**

The utility owner is responsible for providing proof of their property rights that make them eligible for relocation reimbursement. Proof can be provided in the following forms:

**X-Permit:** An X-Permit is granted to a utility owner when the utility had facilities on land where it has/had compensable interest and the land was acquired by the State of Oregon for roadway right of way. The X-Permit guarantees reimbursement to the utility owner for costs incurred in removing and relocating their facilities at any future time when required by an Oregon Transportation Commission project. X-Permits should be on file with the District Permit Office.

**Easement:** An easement is the right to use the real property of another without possessing it. The utility owner must provide the documentation showing that the utility facility is allowed on a property in a specific location as described in a deed or other recorded legal document.

When there is no written documentation of easement for the utility, the utility will have to provide certification that they have prior rights on the property by either prescription or estoppel. Forms for the utility owner are available in the Utility Form Library and are provided by the RUS/Utility Coordinator.

**Prior Rights:** City or County owned and operated utility facilities may or may not be eligible for relocation reimbursement based on their location and the property rights at the time of placement of the facility. The documents listed in Section 1.3 can help verify eligibility claimed by the facility owner.

#### **Reimbursement Certification Form**

The RUS/Utility Coordinator submits a Reimbursement Certification Form once all the reimbursement eligibility documentation has been received, reviewed, and confirmed. The Reimbursement Certification Form along with all of the

documentation is transmitted to the SUL with the Transmittal Request Form as a cover sheet.

#### **Utility Preliminary Engineering**

Preliminary Engineering (PE) for the utility facility relocation can be performed by the utility staff, a consultant under contract with the utility owner, or a consultant hired specifically for the design of the relocation work. The utility owner provides the method of performing the PE on the Reimbursement Information Form. The RUS/Utility Coordinator collects the documentation and transmits it to the SUL using the Transmittal Request Form. The SUL must issue a Notice to Proceed before any preliminary engineering work can begin. Any work prior to the Notice to Proceed will not be reimbursed.

##### **PE by Utility staff:**

The utility owner submits a cost estimate for approval prior to starting PE.

##### **PE by Continuing Consultant Agreement:**

The utility owner submits a copy of their contract with the Consultant which also includes salary rates, overhead, and profits. An estimate of the total PE costs should be submitted on the RIF. The SUL reviews the information and issues a Notice to Proceed.

##### **PE by New Consultant Contract:**

The utility owner submits the Consultant Agreement. Documentation includes an estimate cost of services with salary, overhead, profit, and incidental expenses, an agreed upon 'not to exceed amount', basis of payment to the consultant, and an agreement for retention of records for auditing purposes. For contracts expected to exceed \$10,000 a detailed Scope of Work is also required. The SUL reviews the contract to confirm a competitive bidding process was used as well as reasonable rates are being contracted and issues a Notice to Proceed.

#### **Relocation Plan Review and Approval**

The relocation plan is best submitted on marked up ODOT plan sheets if possible. If the utility owner submits their own plan sheets, then the drawings should include sufficient roadway, right of way, and ODOT project information to compare the relocated facility positioning against the ODOT proposal. The RUS/Utility Coordinator, along with the project designer, PM, district representative, and other technical staff as needed, review the proposed relocation and approve or request revision. This step may require the utility to stake the proposal on the project site and the ODOT survey crew record the staking and map it to the ODOT construction file before a final approval can be made.

#### **Utility Plans, Specifications, and Estimate (PS&E)**

Utility Name: \_\_\_\_\_

Project Name: \_\_\_\_\_

Highway: \_\_\_\_\_

County: \_\_\_\_\_

Key #: \_\_\_\_\_

**Disposition of Utility Property When the  
Utility Will be Located on Acquired State Right of Way**

A Utility has several choices regarding the future relocation, reimbursement and property disposition of its facilities where it has a compensable interest. This form can be used as a guide to help understand the different circumstances when a Utility facility currently occupies a portion of the future right of way **to be acquired by the State** for construction of an Oregon Transportation Commission project. Early in the project development phase, utility conflicts are not fully known, and Utilities will fill out this form in case either scenario (or both) occurs. Utilities will check the most applicable box that declares their intent.

**SCENARIO 1 -- Facilities Are Not in Conflict**

**SCENARIO 2 -- Facilities Are In Conflict**

Apply for an X-Permit. An X-Permit is issued by ODOT and guarantees the reimbursement to the applicant for costs incurred in removing and relocating their facilities at any future time required by a future Oregon Transportation Commission project.

Relocate onto ODOT R/W at some designated location and apply for an X-Permit. The Utility will be reimbursed by ODOT for its relocation costs. An X-Permit is issued by ODOT and guarantees reimbursement to the applicant for costs incurred in removing and relocating their facilities at any future time required by an Oregon Transportation Commission project.

Convey to ODOT at an appraised fair market value its current property right. The utility can remain in place and will be issued by ODOT a standard occupancy permit. The issuance of a standard permit means the utility must move at their own expense if a future Oregon Transportation Commission project results in their required relocation.

Convey to ODOT at an appraised fair market value its current property right. The Utility can then relocate onto ODOT R/W at some designated location with ODOT reimbursing the Utility for its cost of relocation. The Utility would be issued a standard occupancy permit from ODOT since the previous Utility property right will be extinguished. The Utility would not be entitled to future relocation costs.

Relocate to a location other than the right of way to be acquired by the State. **ODOT will not reimburse the Utility for any costs associated with this relocation.**

Relocate from the Utility's current location to another location on private property. The Utility with its own forces will obtain another easement. ODOT will reimburse the Utility for its relocation costs, including the cost of the new easement.

Relocate from the Utility's current location to another location on private property and rely on ODOT to acquire another easement for the utility. ORS 366.333, "Acquisition of Utility Real Property; Exchange of Land for Right of Way" allows the State to do so. The Utility will be reimbursed by ODOT for its relocation costs.

Other; Please describe below:

Other; Please describe below:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_



# Annual Budget Calendar Fiscal Year 2018-19

**DRAFT**

Prepared date: January 19, 2018

Description	Parties	Dates
Initiate Budget development - distribute draft calendar	City Manager and management team	January 19
Budget calendar - distribute draft	Mayor, Council, City Administrator	February 5
Desired positions, position changes provided to finance	Management team	March 2
Complete 5-year template information request form including Updated Capital Improvement Plan (CIP)	Management team	week of Mar 12
Estimate current year-end revenue and expenditures	Management team	March 16
Preliminary revenue forecasts, review goal setting issues and budget priorities.	City Manager and management team	March 16
Update salary schedule and total compensation costs, distribute to management for review and approval	Finance	March 16
Work session - review mid-year financials, forecasts and discuss significant budget issues	Budget Committee	week of Mar 19
Departments provide the following to finance: Review personnel costs and provide amounts for materials and services and capital outlay for requested budget	Management team	March 30
Department meetings with City Manager and finance	Management team	week of April 9
Finance review of year-end revenue and expenditure estimates - resolve items with management team/City Manager	Management team	week of April 16
Provide and publish "Notice of Budget Committee Meeting" (ORS 294.426)	Finance	week of April 16
Budget narratives completed and submitted to finance	Management team	April 18
Aggregate budget document	Finance	week of April 23
First Budget Committee meeting - Read budget message and release budget (ORS 294.408 and 294.426)	Budget Committee	May 7
Additional Budget Committee meetings (ORS 294.428)	Budget Committee	week of May 14
Budget Committee approves budget (ORS 294.428)	Budget Committee	week of May 14
Public hearing; adopt budget; levy taxes (ORS 294.456)	City Council	June 4

## Color Guide

Council
Budget Committee
Management team
City Administrator or Finance