

ORDINANCE NO. 5813

AN ORDINANCE RENEWING THE FRANCHISE OF THE BNSF RAILWAY COMPANY FOR THE PLACEMENT OF RAILWAY FACILITIES WITHIN THE CITY OF ALBANY, STATE OF OREGON, AND REPEALING AND SUPERCEDING ORDINANCE NO. 4420 AS CODIFIED IN ALBANY MUNICIPAL CODE 3.24.

WHEREAS, the City of Albany has determined it appropriate and in the best interests of the public to continue to allow The BNSF Railway Company, a Delaware corporation, and its successors, representatives, agents, officers, directors and shareholders, lessees and assigns ("BNSF"), including without limitation, Portland & Western Railroad, Inc., a New York corporation, and its successors, representatives, agents, officers, directors and shareholders ("PNWR"), in its capacity as the current lessee of BNSF, the right to operate a railroad within the Right of Way (as hereafter defined) on the terms and conditions set forth herein.

NOW, THEREFORE, THE PEOPLE OF THE CITY OF ALBANY DO ORDAIN AS FOLLOWS:

Section 1: Definition of Terms.

1.1 Terms. For the purpose of this franchise, the following terms, phrases, words, and abbreviations shall have the meanings ascribed to them below. When not inconsistent with the context, words used in the present tense include the future tense, words in the plural number include the singular number, and words in the singular number include the plural number;

- A. "City means the City of Albany, Oregon, or the lawful successor, transferee, or assignee thereof;
- B. "Grantee" means The BNSF Railway Company, or the lawful successor, transferee, lessee or assignee thereof,
- C. "Person" means an individual, partnership, association, joint stock company, trust, corporation, or other business or governmental entity.
- D. "Right of Way" shall include the Rail Facilities and the following land which the parties acknowledge is owned by City:

Beginning at the northeasterly boundary line of the City of Albany, the boundary line being the centerline of Cox Creek; thence running southwesterly to Water Avenue; thence westerly along Water Avenue to the west end thereof; thence in a southwesterly direction to the west boundary of the City of Albany, said west boundary being the east line of Umatilla Street extended northerly, and being sufficient in width to allow the Grantee to erect, maintain, equip and operate a railroad and related structures, including without limitation, the operation of locomotives, passenger, freight, mail, baggage, and express cars along, upon and between the herein described boundaries;

- E. "Rail Facility or Rail Facilities" means all railroad track and associated structures located in the Right of Way, owned or controlled by Grantee and for use by Grantee or its assigns in providing rail services, including but not limited to, standard gauge railway tracks, either single or double, including the rails, the space between the rails and the spaces running parallel with and adjacent to the outside flange of each rail, as well as sidings, switches, turnouts, curves, wyes, frogs, crossovers and connections, extending to the outside edge of the rail ties or concrete panels.

Section 2: Grant of Franchise.

- 2.1 Grant. Subject to the limitations set forth in Section 2.5 below, the City hereby grants to the Grantee a franchise, right and privilege to erect, maintain, equip and operate a railroad with Rail Facilities and related structures, including without limitation, to run and operate locomotives, passenger, freight, mail, baggage, and express cars along and upon the Right of Way (the "Franchise"). Subject to the other provisions in the Franchise and applicable law, this grant shall be non exclusive and shall not preclude use by the City of that portion of the Right of Way within Water Avenue for public streets, utility, and transportation purposes, except that the City shall not grant any other rail common carrier operating rights within the Right of Way during the term of this Agreement and shall not grant or use any portion of the Right of Way for rail services, including, without limitation, light rail or commuter rail, without first providing reasonable written notice to and obtaining express written agreement from the Grantee. The public's right, if any, to cross the Right of Way and Rail Facilities at any crossing currently in existence or as necessary to provide access to property located generally to the North of the Right of Way shall be subject to the rules and regulations of the Oregon Department of Transportation – Rail Division and other applicable laws, rules, statutes and regulations.
- 2.2 Communication and power lines and systems. Grantee may construct, operate, equip, and maintain telegraph, telephone, power lines, and other communications systems, under the streets designed in the Right of Way for the purpose of transmitting messages or power over the lines and systems. For the purposes and for the practical enjoyment of the Franchise, Grantee is hereby authorized to erect poles and string wires or conductors upon poles or other fixtures above the ground in that portion of the Franchise not located within a public street and within all portions of the right-of-way to the extent required by applicable laws or regulations or said wires and communications systems may be laid underground in pipes, conduits, or otherwise protected.
- 2.3 Excavations and General Maintenance. It is lawful for Grantee to make all needful and convenient excavations in any Right of Way under the conditions hereinafter named for the purpose of establishing and maintaining railway, telegraph, telephone, power lines, and underground communication systems; provided, that if the excavation disturbs any of the streets, adjacent to the Rail Facilities the same shall be restored to good order and condition as soon as practicable and without unnecessary delay. Grantee shall, during the term of this Franchise, maintain any street portion of the Rail Facilities in good condition such that railroad use does not damage the adjacent street. During the term of this Franchise, Grantee shall be obligated to maintain its Rail Facilities to the following standards:
- Track Standards:
- The track that is located within the Rail Facilities shall meet the then current track standards for the Class of track as established by the then relevant federal authority.
- 2.4 Other Ordinance. The Grantee agrees to comply with the terms of any lawfully adopted generally applicable local ordinance, to the extent that the provisions of the ordinance are not preempted by federal and/or state law and do not have the effect of limiting the benefits or expanding the obligations of the Grantee that are granted by this Franchise. Except for the City's right to enforce the terms of this Franchise or to seek damages for its breach, nothing in this Franchise shall be deemed a submission by Grantee to the jurisdiction of any state or local body or a waiver of the preemptive effect of any state or federal law. Neither the City nor the Grantee may unilaterally alter the material rights and obligations set forth in this Franchise.

- 2.5 Term. The Franchise granted hereunder shall be for an initial term of thirty (30) years commencing April 1, 2013, and expiring on March 31, 2043, subject to the provisions of applicable law, unless otherwise extended by written agreement of the parties.

Section 3: Standards of Service.

3.1 Preservation of Right of Way.

- A. If during the course of the Grantee's construction, operation, or maintenance of the Rail Facilities there occurs damage to infrastructure outside the Rail Facilities, where such damage is proximately caused by the willful misconduct or negligence of the Grantee or Grantees failure to comply with the construction and maintenance obligations set forth in subparagraph B, below, Grantee shall repair such damage and restore to a condition reasonably comparable to the condition existing immediately prior to such damage. In the event Grantee fails to restore the damaged infrastructure to a condition reasonably comparable to the condition existing immediately prior to such damage, the City may repair and restore or cause to repair and restore such damage at the expense of Grantee; provided, that the City provides Grantee with reasonable notice to restore, and Grantee fails to restore such damage within the time period given by the City.

If during the course of construction, operation, or maintenance by the City of the area outside of the Rail Facilities there occurs damage to the Rail Facilities, where such damage is proximately caused by the willful misconduct or negligence of the City, the Grantee may repair and restore or cause to repair and restore such damage at the expense of the City.

- B. Grantee shall construct and maintain the Rail Facilities such that railroad use does not damage the adjacent street and such that said facilities are laid even with the current grade of streets and immediately adjacent thereto to the extent it is reasonably practicable and in such manner as to not materially interfere with the public use thereof.

Section 4: Crossings and Speed Limit

4.1 Crossing Protective Devices.

Should the Oregon Department of Transportation - Rail Division (hereinafter "ODOT Rail") issue an order requiring upgrading to gates and related flashing devices at any of four (4) identified crossings (Madison, Washington, Broadalbin and Thurston) by reason of development on or near those particular street crossings ("Required Upgrading"), the Parties hereto agree as follows:

- a. The Parties will cooperate to seek State and/or Federal funds to cover the entire cost of any Required Upgrading.
- b. If State and/or Federal funds are available for a Required Upgrading at any of the four (4) identified crossings, but the funds are insufficient to cover the entire cost of that Required Upgrading, then the operating railroad shall pay up to \$250,000 of the cost for that Required Upgrading. The City shall bear any and all unfunded cost of the Required Upgrading that exceeds \$250,000 and in no event shall the operating railroad be obligated to pay more than \$250,000 at any of the four (4) identified crossings.

- c. If City elects not to accept the conditions imposed in exchange for the use of State and/or Federal funds, or if there are no State and/or Federal funds available, for a Required Upgrading of any of the four (4) identified crossings, then the operating railroad shall pay 50% of the cost for that Required Upgrading, not to exceed \$125,000. The City shall pay any remaining cost of Required Upgrading and in no event shall the operating railroad be obligated to pay more than \$125,000 at any of the four (4) identified crossings.
- d. Grantee's obligations under this Section shall be limited to the four (4) identified crossings and those obligations will terminate upon termination of the Franchise for any reason.

4.2 Speed Limit. The rate of speed on all cars shall not exceed the maximum speed established by the Federal Railway Administration for the class of the track in the Right of Way.

Section 5: Enforcement and Termination of Franchise.

- 5.1 Violation Creating an Imminent Hazard. Should the Grantee violate any term of this Franchise which violation creates an immediate risk of personal injury or substantial property damage, City may take such steps as are reasonably necessary to remedy the emergency condition so as to minimize the risk of personal injury or property damage. Such emergency action shall be accompanied by reasonable notice to Grantee and corrective action shall be undertaken in a manner reasonably intended to minimize adverse impact to the Grantee, and in accordance with applicable safety laws related to work done in or around railroad tracks. The reasonable cost of emergency corrective action necessary as a result of a breach of this Franchise shall be reimbursed to City by Grantee.
- 5.2 Notice of Non Emergency Violation. In the event City believes that Grantee has not complied with the terms of the Franchise, and an emergency circumstance as described above does not exist, the City shall informally discuss the matter with Grantee. If these discussions do not lead to resolution of the problem, the City shall notify the Grantee in writing of the exact nature of the alleged noncompliance.
- 5.3 The Grantee's Right to Cure or Respond in a Non Emergency Circumstance. The Grantee shall have 30 days from the receipt of the notice described in section 5.2 above: (A) To respond to the City contesting the assertion of noncompliance; or (B) To cure such default; or (C) In the event that, by the nature of the default, such default cannot be cured within the 30 day period, initiate reasonable steps to remedy such default as soon as reasonably possible and notify the City of the steps being taken and the date by which they will be completed.
- 5.4 Enforcement. In the event that Grantee fails to cure the default as set forth above, the City may seek judicial enforcement of the terms of this Franchise by specific performance or damages. Jurisdiction and venue shall rest with the Circuit Court in the State of Oregon for Linn County.
- 5.5 Force Majeure. The Grantee shall not be held in default under, or in noncompliance with, the provisions of the Franchise, nor suffer any enforcement or penalty relating to noncompliance or default, where such noncompliance or alleged defaults occurred or were caused by circumstances reasonably beyond the ability to the Grantee to anticipate and control.

Section 6: Miscellaneous Provision.

- 6.1 Actions of Parties. In any action by the City or the Grantee that is mandated or permitted under the terms hereof, such party shall act in a reasonable, expeditious, and timely manner. Furthermore, in any instances where approval or consent is required under the terms hereof, such approval or consent shall not be unreasonably withheld.
- 6.2 In the event the City determines that public necessity requires it install or maintain any sewer pipe, water pipe, or other public utility service ("Utilities") along or across the Rail Facilities, the City agrees to provide reasonable notice to the Grantee in advance of such planned work and to cooperate with the Grantee in completing any such work. City is authorized to undertake any action reasonably necessary to abate an emergency without providing advance notice to Grantee, provided that City shall provide notice and cooperate with Grantee as soon as practicable. Grantee shall be permitted to oversee any installations and maintenance of Utilities, and all installations and maintenance shall comply with applicable law and Grantee's engineering specifications, if any, so long as such specification are provided to the City in a timely fashion so as not to unreasonably delay construction. Grantee shall reimburse the City for the actual, reasonable incremental costs paid to third parties, if any or incurred by the City for such work, but only to the extent such actual, reasonable incremental costs were directly caused by the need to avoid interference with the Rail Facilities or to comply with requirements applicable only because of the presence of the rail facilities. The City shall provide invoices and other documentation reasonably acceptable to Grantee supporting such actual, reasonable incremental costs, which documentation must clearly show that such costs were a direct result of the need to avoid interference with the Rail Facilities. Any expense incurred by Grantee in the maintenance and operation of its Rail Facility during City's installation or maintenance of Utilities shall be at the expense of the Grantee.
- 6.3 Entire Agreement. This Franchise constitutes the entire agreement between the Grantee and the City. Amendments to this Franchise will not be effective unless mutually agreed to in writing by the parties.
- 6.4 Notice. Unless expressly otherwise agreed between the parties, every notice or response required by this Franchise to be served upon the City or the Grantee shall be in writing, and shall be deemed to have been duly given to the required party when placed in a properly sealed correctly addressed envelope: a) upon receipt when hand delivered with receipt/acknowledgment, b) upon receipt when sent certified mail, or c) within five (5) business days after having been posted in the regular mail.

The notices or responses to the Grantee shall be addressed as follows:

City of Albany
Attn: Mayor
333 Broadalbin Street SW
Albany, OR 97321

The notices or responses to the Grantee shall be addressed as follows:

The BNSF Railway Company
2500 Lou Menk Dr. A0B3
Fort Worth, TX 76137
Attention: Manager, Acquisitions & Development

Portland & Western Railroad, Inc.
Attn: President

200 Hawthorne Ave SE Suite C-320
Salem, OR 97301

The City and the Grantee may designate such other address or addresses from time to time by giving notice to the other in the manner provided for in this Section 6.4.

6.5 Descriptive Headings. The captions to sections contained herein are intended solely to facilitate the reading thereof. Such captions shall not affect the meaning or interpretations of the text herein.

6.6 Severability. If any section, sentence, paragraph, term, or provision hereof is determined to be illegal, invalid, or unconstitutional, by any court of competent jurisdiction or by any state or federal regulatory authority having jurisdiction thereof, such determination shall have no effect on the validity of any other section, sentence, paragraph, term or provision hereof, all of which remain in full force and effect for the term of Franchise.

Passed by the Council: June 26, 2013

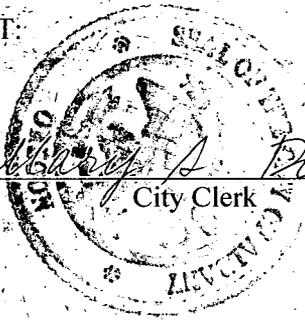
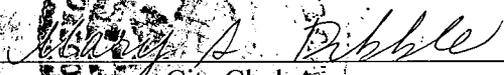
Approved by the Mayor: June 26, 2013

Effective Date: June 26, 2013



Mayor

ATTEST:

City Clerk