

ORDINANCE NO. 2018-001-23-002

AN ORDINANCE OF THE CITY OF KEMPNER, TEXAS, GRANTING A TRANSMISSION AND DISTRIBUTION ELECTRIC UTILITY FRANCHISE TO PEDERNALES ELECTRIC COOPERATIVE, INC. FOR A FIVE YEAR TERM COMMENCING ON THE EFFECTIVE DATE; CONTAINING VARIOUS TERMS AND CONDITIONS WITH REGARD TO THE GRANT OF SUCH FRANCHISE; CONTAINING A SEVERABILITY CLAUSE; PROVIDING FOR THE REPEAL OF ANY AND ALL KINDS OF ORDINANCES, REGULATIONS, RULES, OR POLICIES THAT ARE IN CONFLICT WITH THIS ORDINANCE; AND PROVIDING AN EFFECTIVE DATE.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF KEMPNER, TEXAS, THAT:

Section I. Grant. The City of Kempner, Texas ("City"), pursuant to Ordinance No. 2018-001-23-002 ("Ordinance") does hereby grant unto Pedernales Electric Cooperative, Inc. and to any of the cooperative's affiliates and permitted assigns ("Cooperative"), the right, privilege, and franchise to erect, construct, maintain, operate, use, extend, remove, replace, and repair in, under, upon, over, and across, and along any and all of the present and future streets, squares, parks, lanes, alleys, and public utility easements owned or controlled, or hereafter owned or controlled by the City and over and across any stream or streams, bridge, or bridges, now or hereafter owned or controlled by the City, a system of poles, pole lines, transmission and distribution lines, wires, guys, conduits, conductor, transformers, enclosures, concrete pads, ground rods, cable risers, and fiber optic cables and other desirable instrumentalities and appurtenances necessary or proper for the purpose of transmitting, distributing, carrying, conducting, conveying, supplying, furnishing and selling to the City and the inhabitants of the City or other person or persons, firms or corporations, whether within or without the City, electricity, energy, power, light, heat, energy services, and for any other purpose for which electricity or energy services may be now or hereafter used and for communication signals or the capability and capacity for transport of communication signals of whatever kind and character; to carry and transport communication signals by means of said poles, transmission and distribution lines, wires, guys, conduits, conductor or other instrumentalities to sell and distribute same to the City, the inhabitants of said City, and any other persons, firms or corporations whether within or without the City.

Section II. City Property; Annexation. It is expressly understood and agreed that this Ordinance grants the Cooperative the rights and privileges contained in Section I above only as to property located within the corporate limits of the City presently in the Cooperative's service area and to property hereinafter annexed by the City which is located within the Cooperative's service area. The City shall notify Cooperative in writing of the effective date of any annexation of property into the City limits that would require Cooperative to include such properties for purposes of calculations of any amounts due under this Ordinance. Cooperative shall not be liable for any late payments, penalties or interest on the portion of a quarterly payment that does not include

gross revenues for Cooperative customers within a newly annexed area until ninety (90) days after written notice from the City to the Cooperative of any such annexation. Thereafter the Cooperative shall assure that any and all customers located within such annexed territory be included and shown on its accounting system as being within the City. After such ninety (90) day written notice from the City to the Cooperative, all customers' accounts located within such annexed territory shall begin accrual for purposes of the payment provisions specified in this Ordinance.

Section III. Relocation; Electric Facilities; Pole Attachments.

(a) If the City, in order for the accommodation or new construction of its streets or other public works, shall require any structures, lines, guys, or other installations of the Cooperative located in a street or other City right-of-way to be shifted or relocated to a new position in a street or other available right-of-way, such structures, lines, guys, or other installations shall be so shifted or relocated by the Cooperative at the Cooperative's expense; provided, however, the City shall work with Cooperative in good faith to determine the most cost effective method of relocation or shifting of Cooperative's facilities. City shall give the Cooperative reasonable prior written notice of its projects requiring relocation of the Cooperative's facilities, and shall provide an alternate public easement for relocation. In the event that Cooperative is required by City to remove or relocate its facilities under this Section and City is eligible under federal, state county, local or other programs for reimbursement of costs and expense incurred by Cooperative as a result of such removal or relocation, and such reimbursement is required to be handled through the City, Cooperative costs and expenses shall be included in any application by City for reimbursement. City shall provide reasonable notice to Cooperative of the deadline for Cooperative to submit documentation of the costs and expense of such relocation to City. If reimbursement is available for relocation, the Cooperative shall receive its portion of reimbursement payments attributable to its facilities. For the avoidance of doubt, the City may not require the Cooperative to relocate its facilities underground in a public easement, and a location underground in a public easement will not constitute an "alternate public easement" for purposes of this Section, unless the Cooperative's facilities which the City seeks to have relocated are located underground before the City's request for relocation.

(b) If a third-party desires or the City requires Cooperative to adapt or conform any of Cooperative's facilities, or in any way alter, relocate or change Cooperative's property to enable any third party (whether public or private), other than the City, to use the rights-of-way, Cooperative shall have the right, as a condition of any such alteration, change or relocation, to require payment to Cooperative for any and all loss, cost or expense occasioned thereby to be paid by the third party. The City shall, as part of any franchise agreement with any third party entered into after the date of this Ordinance, attempt to include the requirement of payment to Cooperative for any and all loss, cost or expense occasioned by any necessary alteration, change or relocation.

(c) The Cooperative shall permit private or public entities desiring to provide communication services to the City to use existing Cooperative poles, provided that such attachment and use is feasible, does not interfere with Cooperative's ability to utilize its facilities for its purposes, and is not in conflict with the National Electric Safety Code, other safety procedures or requirements of Cooperative, and such entity obtains any necessary right-of-way or easement or permits or licenses for its use. Such use shall be subject to the entity's execution of Cooperative's form of contract for pole attachment and payment of the Cooperative applicable fees.

Section IV. Operations and Maintenance.

(a) Upon notification to and approval of the City, the Cooperative may open-cut streets, curbs and sidewalks, and may bore, or utilize any other methods (including, but not limited to tree trimming) it deems reasonably necessary to construct, operate and maintain the Cooperative facilities within the City and remove obstructions to the Cooperative's facilities that endanger or interfere with the efficiency of the Cooperative's facilities. The design, construction and maintenance of the Cooperative facilities shall be in accordance with Cooperative standards. Structures, lines, guys, and other installations shall be erected consistent with the National Electrical Safety Code and any other applicable state and national standards.

(b) The surface of any street, alley, or public way or place disturbed by the Cooperative shall be restored to the same condition existing prior to the work by the Cooperative within a reasonable time after the completion of the work. No street, alley, or public way or place shall be encumbered by the Cooperative for a longer period than shall be reasonably necessary to execute the work.

Section V. Indemnification: Cooperative. THE COOPERATIVE WILL INDEMNIFY, DEFEND AND HOLD HARMLESS THE CITY, ITS OFFICERS, AGENTS, SERVANTS, AND EMPLOYEES FROM AND AGAINST ANY AND ALL SUITS, LEGAL ACTIONS, LEGAL PROCEEDINGS, CLAIMS, DEMANDS, DAMAGES, COSTS, EXPENSES, AND ATTORNEYS' FEES INCIDENT TO ANY WORK DONE IN THE PERFORMANCE OF THIS ORDINANCE ARISING OUT OF A WILLFUL OR NEGLIGENT ACT OR OMISSION OF THE COOPERATIVE, ITS OFFICERS, AGENTS, SERVANTS OR EMPLOYEES, PROVIDED, HOWEVER, THAT THE COOPERATIVE SHALL NOT BE LIABLE FOR ANY SUIT, ACTIONS, LEGAL PROCEEDINGS, CLAIMS, DEMANDS, DAMAGES, COSTS, EXPENSES, AND ATTORNEYS' FEES ARISING OUT OF A WILLFUL ACT OR NEGLIGENT ACT OR OMISSION OF THE CITY, ITS OFFICERS, AGENTS, SERVANTS OR EMPLOYEES.

Section VI. Indemnification: City. TO THE EXTENT ALLOWED BY LAW, THE CITY WILL INDEMNIFY, DEFEND AND HOLD HARMLESS THE COOPERATIVE, ITS OFFICERS, AGENTS, SERVANTS, AND EMPLOYEES FROM AND AGAINST ANY AND ALL SUITS, LEGAL ACTIONS, LEGAL PROCEEDINGS, CLAIMS, DEMANDS, DAMAGES, COSTS, EXPENSES, AND ATTORNEYS' FEES INCIDENT TO ANY WORK DONE IN THE PERFORMANCE OF THIS ORDINANCE ARISING OUT OF A WILLFUL OR NEGLIGENT ACT OR OMISSION OF THE CITY, ITS OFFICERS, AGENTS, SERVANTS OR EMPLOYEES, PROVIDED, HOWEVER, THAT THE CITY SHALL NOT BE LIABLE FOR ANY SUIT, ACTIONS, LEGAL PROCEEDINGS, CLAIMS, DEMANDS, DAMAGES, COSTS, EXPENSES, AND ATTORNEYS' FEES ARISING OUT OF A WILLFUL ACT OR NEGLIGENT ACT OR OMISSION OF THE COOPERATIVE, ITS OFFICERS, AGENTS, SERVANTS OR EMPLOYEES.

Section VII. Term. This Ordinance shall be in force and effect for a period of five (5) years from and after the date on which the City adopts it in the form authorized by the Cooperative (the "Effective Date"). The payments provided for in Section VIII of this Ordinance shall be effective for the Cooperative's gross revenues from its sale of energy and power sold within the City commencing on the first day of the month following the thirty (30) day notice period that the Cooperative is required to provide to the Cooperative's customers.

Section VIII. Franchise Fee.

(a) In consideration of the rights granted to the Cooperative herein, the Cooperative, during the term of this Ordinance shall pay a fee of two and one-half percent (2.5%) of the gross revenues received by the Cooperative from the Cooperative's sale of energy and power sold to customers within the city limits of the City during such previous year or previous quarter. It is agreed that such payment is in addition to any ad valorem tax now or hereafter to be assessed and collected under the authority of the City's charter or under the laws of the State of Texas. Other than with respect to such ad valorem taxes, the payment so provided for in this Section is in lieu of all other fees or charges of any nature, and the City shall not impose or collect, nor attempt to impose or collect, any other charge or fee in connection with the construction, operation, and maintenance of the Cooperative facilities within the City. The term "gross revenues" shall not include (1) local, state, or federal taxes collected by Cooperative that have been billed to its customers and separately stated on customers' bills, (2) the franchise fee paid under this Ordinance, (3) revenue uncollectible from customers (i.e., bad debts) with billing addresses in the City that may have previously been included in gross revenues, or (4) revenue from the Cooperative's pole attachment agreements. Cooperative shall be entitled to list the franchise fee as a separate line item on monthly bills of Cooperative members who have meters within the City limits. The payment provided for in this Section 8 will reflect the Cooperative's gross revenues on a quarterly basis and will be due the City within forty-five (45) days after the close of each quarter in the Cooperative's fiscal year.

(b) If Cooperative elects to provide customer choice pursuant to the terms of the Public Utility Regulatory Act ("PURA"), the fee due under this Ordinance shall be as provided in the Texas Utilities Code Section 33.008 for a transmission and distribution utility.

Section IX. Reports. Upon City's request, at reasonable intervals not to exceed once per fiscal year, the Cooperative will provide to City reports setting out matters concerning energy and power sold by reason of the operation of the Cooperative within the City.

Section X. Assignment. This Ordinance may be assigned by the Cooperative to any entity with the consent of the City, which consent shall not be unreasonably withheld. For the avoidance of doubt, a transfer of this Ordinance by virtue of a sale by the Cooperative of all or substantially all of its assets in the City shall not require consent of the City, but Cooperative shall provide City written notice within thirty (30) days of such transfer.

Section XI. Superseding Effect. This Ordinance supersedes for all purposes any other written agreements with respect to the franchise prior to the acceptance of this Ordinance. This Ordinance shall supersede and take precedence over inconsistent ordinances, resolutions, or regulations hereafter or previously passed by the City.

Section XII. Severability. The provisions of this Ordinance are severable, and if any court of competent jurisdiction enters a final order which holds that any section, subsection, sentence, clause, phrase, or other portion of this Ordinance is invalid, illegal, or otherwise unenforceable, then any such portion shall be deemed a separate, distinct and independent provision, and any such ruling shall not affect any other provision of this Ordinance which are not specifically designated as being illegal, invalid or unenforceable.

Section XIII. Notices. Notice to the parties under this Ordinance shall be in writing and shall be by certified mail, return receipt requested, or by private delivery service such as Federal Express or U.P.S. addressed as follows:

To the City:

City of Kempner, Texas
12288 E. Hwy. 190
P.O. Box 660
Kempner, Texas 76539

To the Cooperative:

Pedernales Electric Cooperative, Inc.
Attn: Finance Department
PO Box 1
Johnson City, Texas 78636-0001

With a copy to:

Pedernales Electric Cooperative, Inc.
Attn: General Counsel
PO Box 1
Johnson City, Texas 78636-0001

Notice shall be effective upon the earlier to occur of actual receipt or the expiration of five (5) business days from the date of deposit in an official depository of the United States Postal Service.

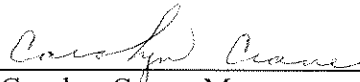
Section XIV. Confidential Information. To the extent allowed by law, including the Texas Public Information Act, the City agrees to hold in strict confidence any non-public information, information marked proprietary or confidential that it receives from the Cooperative or such information that by its nature or under the particular circumstances of disclosure should be understood by City, exercising its reasonable judgment, to be the confidential information of the Cooperative.

Section XV. Effective Date. This ordinance shall take effect immediately from and after its passage and adoption in accordance with the provisions of Chapter 52 of the Texas Local Government Code; provided, however, the payment of the franchise fee will be as described in Section VII.

Section XVI. Open Meetings. It is hereby officially found and determined that the meeting at which this ordinance is passed was open to the public as required and that public notice of the time, place, and purpose of said meeting was given as required by the Open Meetings Act, Chapter 551 of the Texas Government Code.

PASSED AND ADOPTED THIS THE 23rd DAY OF January 2018.

CITY OF KEMPNER



Carolyn Crane, Mayor

ATTEST:



Lisa Campanella, City Secretary

ACKNOWLEDGED, ACCEPTED, AND AGREED TO:

PEDERNALES ELECTRIC COOPERATIVE, INC.

BY:

Julie Parsley

NAME:

Julie Parsley, CEO

DATE:

2-6-18

