

ORDINANCE NO. 2018-02

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF BOERNE, TEXAS, GRANTING A TRANSMISSION AND DISTRIBUTION ELECTRIC UTILITY FRANCHISE TO PEDERNALES ELECTRIC COOPERATIVE, INC. FOR A TEN 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.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BOERNE, TEXAS:

Section 1. The City of Boerne, Texas (“City”), pursuant to this ordinance (“Ordinance”) does hereby grant unto Pedernales Electric Cooperative, Inc. and to any of the cooperative’s affiliates, successors 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 public Rights-of-Way owned or controlled, or hereafter owned or controlled, by the City for 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 electricity, energy, power, light, heat, and energy services and for communication signals or the capability and capacity for transport of communication signals of whatever kind and character in connection with or relating to Cooperative’s provision of electricity, energy, power, light, heat and/or energy services. For purposes of this Ordinance, ‘Rights-of-Way’ shall mean streets, avenues, easements (other than private easements obtained by the City), alleys and highways of the City and beneath the surface thereof as they may now or hereafter may exist.

Section 2. It is expressly understood and agreed that this Ordinance grants the Cooperative the rights and privileges contained in Section 1 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 monthly payment that does not include gross receipts for Cooperative customers within a newly annexed area until sixty (60) 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 sixty (60) 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 3.

(a) If the City, in order for the accommodation or new construction of its sewers, water lines, streets or other public works, shall require any structures, lines, guys, or other installations of the Cooperative located in Rights-of-Way to be shifted or relocated to a new position in the Rights-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 to a new position in the Rights-of-Way. For the avoidance of doubt, the City may not require the Cooperative to relocate its facilities underground in a public easement unless the Cooperative's facilities which the City seeks to have relocated are located underground before the City's request for relocation unless the City agrees to fund all differences between the overhead relocation versus the underground relocation. In the event that Cooperative is required by City to remove or relocate its facilities under this Section such relocation shall be completed within ninety (90) days, except in circumstances that would require additional time as reasonably determined by the City based on information provided by the Cooperative. Should additional time be needed, a schedule for the additional work contemplated shall be developed by the parties.

If the parties cannot agree to the schedule for additional time beyond the ninety (90) day period, the City Manager, or designated representative, after consultation with the Cooperative, shall establish a schedule which will be binding on the parties. The schedule shall provide for a minimum of fifteen (15) business days to exist between the time the schedule is furnished in writing to the Cooperative and the time that any specific work to be done by the Cooperative is to begin. In the event the relocation is not complete in the time allowed due to action or inaction by the Cooperative, the City has the authority to remove or relocate the Cooperative's facilities in accordance with any applicable regulations or standards. In the event the City must remove or relocate the Cooperative's facilities, the Cooperative shall reimburse the City for the costs incurred in the removal or relocation of the facilities. In the event the City is charged for any construction delay claims due to the Cooperative's failure to timely remove or relocate its facilities, the Cooperative shall defend, pay and reimburse the City such construction delay claims arising from the Cooperative's failure to timely remove or relocate its facilities.

(b) If the 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.

(c) 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.

Section 4.

(a) 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. Any such work performed by the Cooperative within the boundaries of the City shall comply with all current and future City ordinances that govern the placement, location and construction of facilities in the City; and City ordinances that assist in the management of facilities placed in, on or over the public Rights-of-Way to the extent such are necessary to protect the public health, safety or welfare, and are adopted pursuant to the City's police powers. City will notify the Cooperative fifteen (15) days before any future ordinances related to this Section 4 are passed. Otherwise, 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. The Cooperative will maintain or will endeavor to cause to maintain applicable NESC clearances if other utilities attach to their poles.

(b) The surface of any street, alley, or public way or place disturbed by the Cooperative shall be restored to substantially the same condition existing prior to the work by the Cooperative at 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.

(c) As to compliance with this Section, the City shall have access to the Cooperative's records relating to the use of the City's public Rights-of-Way under this Ordinance. The City shall also have access to and may request a copy of the declarations page of the Cooperative's general liability insurance policy. Access shall be given by the Cooperative to the City in accordance with Section 11 of this Ordinance.

Section 5. THE COOPERATIVE WILL INDEMNIFY, DEFEND AND HOLD HARMLESS THE CITY, ITS OFFICERS, AGENTS, SERVANTS, AND EMPLOYEES FROM AND AGAINST ANY AND ALL: (I) SUITS, LEGAL ACTIONS, LEGAL PROCEEDINGS, CLAIMS, DEMANDS, DAMAGES, INCLUDING PERSONAL OR BODILY INJURY, COSTS (INCLUDING COURT AND DEFENSE), EXPENSES (INCLUDING EXPERT FEES), 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; AND (II) DAMAGES, COSTS, LOSSES OR EXPENSES FOR THE REPAIR, REPLACEMENT, OR RESTORATION OF THE CITY'S PROPERTY, EQUIPMENT, MATERIALS, STRUCTURES, AND FACILITIES WHICH ARE DAMAGED, DESTROYED, OR FOUND TO BE DEFECTIVE AS A RESULT OF ANY WILLFUL OR NEGLIGENT ACT OR OMISSION OF THE COOPERATIVE, ITS OFFICERS, AGENTS, SERVANTS OR EMPLOYEES. 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. THIS SECTION IS SOLELY FOR THE BENEFIT OF THE COOPERATIVE AND THE CITY AND DOES NOT CREATE OR GRANT ANY RIGHTS, CONTRACTUAL OR OTHERWISE, TO ANY OTHER PERSON OR ENTITY.

Section 6. The Cooperative or the City shall promptly advise the other in writing of any known claim or demand against the Cooperative or the City related to or arising out of the Cooperative's activities in the public right of way.

Section 7. The provisions of this Ordinance are severable, and if any section, provision, or part thereof be declared invalid then it is hereby declared the intent of the parties that the remaining parts of this Ordinance would be adopted, notwithstanding such invalid part or parts, and the invalidity of any particular section, provision, or part shall not invalidate this Ordinance, unless such invalidation materially changes the rights or obligations of either party.

Section 8. This Ordinance shall be in force and effect for a period of ten (10) 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 9 of this Ordinance shall be effective for the Cooperative's gross receipts from its electric services provided within the City commencing on the first day of the month following the Effective Date. This Ordinance shall supersede and take precedence over inconsistent ordinances, resolutions, or regulations hereafter or previously passed by the City.

Section 9.

(a) In consideration of the rights granted to the Cooperative herein, the Cooperative, during the term of this Ordinance shall pay a fee of four and a half percent (4.5%) of the gross receipts received by the Cooperative from the Cooperative's sale of energy and power sold to customers residing within the city limits of the City during such previous month. 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 receipts" 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, ~~or~~ (3) revenue uncollectible from customers (i.e., bad debts) with billing addresses in the City that may have previously been included in gross receipts, 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 9 will reflect the Cooperative's gross receipts on a monthly basis and will be due to the City within thirty (30) days after the last day of each month.

(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.

(c) The City and the Cooperative recognize that the Cooperative may enter into other Franchise Ordinances after the effective date of this Franchise Ordinance with other municipalities. The City and the Cooperative recognize that other cities may require remittance by the Cooperative of franchise fee payments from its residents for the use of such municipality's public rights-of-way at an amount greater than the amount required under this Ordinance. In such an event the Cooperative shall notify the City that another municipality is requiring remittance from such residents of a higher franchise fee than the amount under this Ordinance. The City shall notify the Cooperative that the City wishes to increase its franchise fee payments from its

residents to the higher franchise fee that the Cooperative remits to the other municipality[ies]. The Cooperative shall then provide a schedule to the City upon which such increase will take effect subject to any statutory notices required to be given to the Cooperative's customers.

Section 10. 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 11.

(a) The Cooperative shall keep complete and accurate books of accounts and records of its business and operations in the City under and in connection with this Ordinance. Upon forty-five (45) days' notice, the City shall have access to all books of accounts and the records of the Cooperative that relate to this Ordinance that will assist the City in ascertaining the correctness of any and all payments and reports made to the City.

(b) The City may inspect and/or audit the Cooperative's books of accounts that relate to the City at any time during regular business hours with forty-five (45) days' notice. The Cooperative agrees to give the City its full cooperation in any audit and shall provide complete responses to any inquiries within forty-five (45) days of a written request.

(c) If the results of any audit indicate that the Cooperative paid (i) the correct fees under this Ordinance, (ii) overpaid the fees under this Ordinance and is entitled to a refund, or (iii) under paid the fees due under this Ordinance by three percent (3%) or less, then the City shall pay the cost of the audit. If the results of the audit indicate the Cooperative under paid the fees due under this Ordinance by more than three percent (3%), then the Cooperative shall pay the reasonable cost of the audit. The City agrees that any audit shall be performed in good faith. If the results of the audit indicate that the Cooperative under paid the fees due under this Ordinance by more than three percent (3%), and the Cooperative is unable to produce contrary evidence that in the City's reasonable judgment is satisfactory to demonstrate to the City that the results of the audit are not accurate, then the Cooperative shall pay interest on the total amount at an annualized interest rate of eight percent (8%), and interest shall be calculated from the time the original amount was due. Any additional amount due to the City hereunder shall be paid within thirty (30) days from the date of invoice. Any amount not paid within such time frame will cause interest to be payable at an annualized interest rate of eight percent (8%) on the entire amount from the date of the invoice. Notwithstanding the above, if the Cooperative's auditor disagrees with the City's determination that the additional amount due exceeds three percent (3%), then the City's auditor and the Cooperative's auditor shall choose a neutral auditor who shall make a determination as to whether the three percent (3%) amount was exceeded. Such determination shall be final and binding on both parties.

Section 12. This Ordinance may be assigned by the Cooperative to any entity with the consent of the City, which consent shall not be unreasonably withheld. The fees for subsequent years shall be paid by the assignee under the same terms and conditions as they had been for the Cooperative. No assignment in law or otherwise shall be effective until the assignee has filed with the City manager an instrument, duly executed, reciting the fact of such assignment, accepting the terms of this Ordinance, and agreeing to comply with all of the provisions of this Ordinance. A mortgage or other pledge of assets and a bona fide lending transaction shall not be considered an assignment for the purpose of the Section.

Section 13. This Ordinance supersedes for all purposes the franchise previously granted under Ordinance No. 2006-08 by the City to the Cooperative on February 28, 2006 and any other written agreements, including that Letter Agreement dated December 3, 2012, with respect to the franchise prior to the acceptance of this Ordinance.

Section 143. 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 154. 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 Boerne
402 E. Blanco Road
Boerne, TX 78006

To the Cooperative:

Pedernales Electric Cooperative, Inc.
PO Box 1
Johnson City, Texas 78636-0001

Notice shall be effective upon the earlier to occur of actual receipt or the expiration of three (3) business days from the date of deposit in an official depository of the United States Postal Service.

Section 165. 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. The City shall not be liable to the Cooperative for release of information obtained where the City is required to release such information by order of any court or regulatory agency.

Section 176.

(a) The City manager or designee shall have the right to enforce all legal rights and obligations under this Ordinance without further authorization. In accordance with Section 11, the Cooperative shall provide the City Manager or his/her designee documents and records that the City Manager deems reasonably necessary to determine the Cooperative's compliance with this Ordinance, with the exception of those documents that may privileged and or confidential by federal or state law, regulation, or the Texas Rules of Civil Procedure.

(b) Nothing contained in this Ordinance shall ever be construed as conferring upon the Cooperative an exclusive right or privilege of any nature whatsoever.

(c) This Ordinance contains all of the agreements of the parties with respect to any matter covered or mentioned in this Ordinance and no prior or contemporaneous agreement or understanding pertain to any such matter shall be effective for any purpose.

(d) Failure of the City or Cooperative to declare, or delay in taking any action in connection with, any breach or default immediately upon the occurrence thereof shall not waive such default but the City or Cooperative shall have the right to declare any such breach or default at any time. Failure of the City or Cooperative to declare a breach or default does not act as a waiver of the City's or the Cooperative's right to declare another breach or default.

(e) This Ordinance shall be governed by and construed in accordance with the laws of the State of Texas. The venue and jurisdiction over any dispute related to this Ordinance shall lie with the District Court in Kendall County Texas.

Section 187.

(a) In addition to all other rights and powers retained by the City under this Ordinance or under applicable law, the City reserves the right to forfeit and terminate this Ordinance and all of the Cooperative's rights and privileges hereunder in the event of a material breach of the terms and conditions herein, subject to reasonable notice and opportunity to cure as provided in this Section.

(b) If the Cooperative is in violation of this Ordinance, then the City Manager or his/her designee shall notify the Cooperative in writing, setting forth the nature of such violation. Within thirty (30) days of receipt of such notice, the Cooperative shall respond in writing (i) that the violation has been cured or provide a written cure plan, subject to review and approval by the City Manager, or (ii) provide a written explanation, with documentation, to support that the alleged violation did not occur.

(c) Notwithstanding Section 17(b), the Cooperative shall be allowed thirty (30) days after the City's delivery of the written notice described above to cure such violation. If the nature of the violation is such that it cannot be fully cured within thirty (30) days due to circumstances not under the Cooperative's control, the period of time in which the Cooperative can cure the violation may be extended by the City Manager for such additional time reasonably necessary to complete the cure, provided that the Cooperative has begun efforts to cure and is diligently pursuing such efforts.

(d) If the City Manager determines that a violation of this Ordinance has occurred by the Cooperative and has not been cured after the applicable cure period set out in Sections 17(b) and (c), then, at the Cooperative's request, the City shall provide the Cooperative an opportunity to show that a violation has not occurred (or has been cured, as applicable) through a hearing before the City Council. Such hearing shall take place on or before the next City Council meeting scheduled thirty (30) days after the City's receipt of the Cooperative's written request. At the conclusion of the hearing, either party may seek any and all remedies to which it may be entitled to in law or equity.

(e) A termination shall be declared only by written decision of the City Council after a public hearing before the City Council at which the Cooperative was provided a full opportunity to be heard and to respond to any grounds of termination. Neither the Cooperative's acceptance of this Ordinance, the Cooperative's appearance before the City Council at any public hearing concerning the proposed termination of this Ordinance nor any action taken by the City Council as a result of such public hearing, including a declaration of

termination or a finding of grounds to terminate, shall be construed to waive or otherwise affect the Cooperative's right to seek judicial determination of the rights and responsibilities of the parties under this Ordinance.

PASSED and APPROVED on first reading this the 9th day of January, 2018.

PASSED, APPROVED and ADOPTED on seconded reading this ____ day of January, 2018.

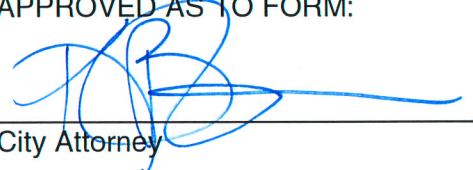
CITY OF BOERNE

Mayor

ATTEST:

City Secretary

APPROVED AS TO FORM:



City Attorney

ACKNOWLEDGED, ACCEPTED, AND AGREED TO:

PEDERNALES ELECTRIC COOPERATIVE, INC.

BY: _____

NAME: _____

DATE: _____