

ORDINANCE NO. 2016-39

AN ORDINANCE REPEALING AND REPLACING ORDINANCE NO. 2006-39 CAPTIONED, "GRANTING THE RIGHT, PRIVILEGE AND FRANCHISE TO BANDERA ELECTRIC COOPERATIVE, INC., AND ITS SUCCESSORS AND ASSIGNS, TO USE THE PUBLIC RIGHTS-OF-WAY OF THE CITY OF BOERNE, TEXAS FOR THE DISTRIBUTION OF ELECTRIC POWER AND BROADBAND SERVICES; PROVIDING FOR PERIOD OF GRANT; FOR METHOD OF ACCEPTANCE; FOR CONSIDERATION; FOR CONSTRUCTION AND RELOCATION OF SYSTEM FACILITIES; FOR ASSIGNMENT; AND FOR REPEAL OF CONFLICTING ORDINANCES"

WHEREAS, Bandera Electric Cooperative Inc. wishes to use the City of Boerne's streets, alleys, and public ways to deliver electricity and broadband services to retail customers; and

WHEREAS, the City of Boerne wishes to grant Bandera Electric Cooperative, Inc. the right to use its streets, alleys, and public ways to deliver electricity and broadband services to retail customers for a reasonable charge; and

WHEREAS, the City of Boerne finds that the charge provided in this Franchise Agreement is reasonable and comparable to fees charged to other providers; Now Therefore

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

Section 1. GRANT OF FRANCHISE.

That the CITY of BOERNE, Texas, (hereinafter referred to as the "CITY"), subject to the terms, conditions and provisions of this ordinance, does hereby grant to Bandera Electric Cooperative, Inc. (hereinafter referred to as the "COMPANY"), its successors and assigns, the non-exclusive right, privilege and franchise to use the Public Rights-of-Way of the CITY as provided herein for the distribution of electric power and broadband services. This Franchise grants no other rights or privileges to use the Public Rights-of-Way in the CITY except to distribute power or information services in the CITY limits of the CITY and no other use of the Public Rights-of-Way by the COMPANY is granted or implied.

Section 2. DEFINITIONS.

2.1 "Broadband Service" shall mean the offering of broadband services, for a fee directly to the public, or to such classes of users as to be effectively available directly to the public or for the operational needs of the Bandera Electric Cooperative utility system. The broadband equipment for these services are limited to a fiber optic cable and the attachment hardware. Bandera Electric Cooperative understands that the attachment of antennas or like devices to the City of Boerne's utility pole infrastructure will not be permitted.

2.2 "CITY" shall mean the City of Boerne, Texas, as constituted on the effective date of this Ordinance or as may hereinafter be constituted.

2.3 "COMPANY" shall mean Bandera Electric Cooperative, Inc., a Texas Electric Cooperative Corporation, existing under and by virtue of the laws of the State of Texas, and authorized to transact and transacting business in the State of Texas, together with its legal representatives, successors, lessees and assigns, and shall not mean any of its affiliates and subsidiaries who shall have no right, privilege or franchise granted hereunder.

2.4 "Franchise" shall mean this Ordinance and all rights and obligations established herein or as amended.

2.5 "Ordinance" shall mean this Ordinance No. 2016-39.

2.6 "Public Rights-of-Way" shall mean streets, avenues, easements (other than private easements obtained by the COMPANY), rights-of-ways, alleys and highways of the CITY and beneath the surface thereof as they may now or hereafter may exist and as defined herein, but such does not include bridges or other CITY infrastructure such as water, sewer, electric, and ~~telecommunication~~ **broadband** facilities and any conduit system owned, operated or controlled by CITY in or on the Public Rights-of-Way.

2.7 "System" shall mean all poles, pole lines, towers, distribution lines, **fiber optic lines**, wires, guys, cables, conduits and other desirable instrumentalities and appurtenances necessary for the operation of the COMPANY'S **electrical** distribution business **and broadband services**.

2.8 "Gross receipts" shall mean the monthly receipts associated with the **Broadband Revenues**, Availability Charge, Energy Charge and Purchased Power Cost, as assessed by the COMPANY to each of its accounts within the CITY.

Section 3. TERM OF FRANCHISE

Upon the filing with the CITY by the COMPANY of the acceptance required hereunder, this Franchise shall be in full force and effect from the 1st day of September, 2016 and after the 31st day of August, 2026. At the expiration of this term, this agreement will continue in full force and effect until written notice of at least 120 days is given by either party that they wish to terminate the agreement.

Section 4. ACCEPTANCE OF FRANCHISE.

The COMPANY shall have ten (10) days from and after the passage and approval of this Ordinance to file its written acceptance thereof with the CITY Secretary in the form of Exhibit "A" attached hereto.

Section 5. FRANCHISE FEE.

5.1 In consideration for the rights and privileges herein granted, the administration of this Franchise by the City, the temporary interference with the use of Public Rights-of-Way as rental for the use of the Public Rights-of-Way and for other costs and obligations undertaken by the CITY herein, the COMPANY agrees to pay to the CITY:

a franchise fee equal to four percent (4.00%) of gross receipts of the COMPANY within the CITY; and

5.2 Such franchise fee payments described in the above section 5.1 shall be calculated and paid to the CITY monthly on or before the 15th day of each month. Late payments shall accrue interest at six percent (6.00%), plus a late payment fee of \$50.00 per day, up to \$1,000.

5.3 After the end of five (5) years the franchise fee will be reviewed.

Section 6. AUDIT OF COMPANY'S RECORDS AND REPORTS.

6.1 Books of Account. The COMPANY shall keep complete and accurate books of accounts and records of its business and operations under and in connection with this Franchise. To the extent practicable, all such books of accounts and records shall be made available at the COMPANY'S local office.

6.2 Access by CITY. The CITY shall have access to all books of accounts and records of the COMPANY, during regular business hours and upon ten business days notice, to the extent said books of accounts and records relate to and will assist the CITY in ascertaining the correctness of any and all payments or reports to the CITY. As to compliance with the construction standards the CITY shall have access to the COMPANY'S records relating to use of the Public Rights-of-Way by its System within the CITY. The CITY shall also have access to and may request a copy of the declarations page of the COMPANY'S general liability insurance coverage. Access shall be given by the COMPANY to the CITY during regular business hours and upon ten business days notice.

6.3 Audits. The CITY may inspect the COMPANY'S books of accounts relative to the CITY at any time during regular business hours on ten (10) business days' prior written notice and may audit the books from time to time. All records reasonably necessary for such audit shall be made available by the COMPANY at the COMPANY'S local office. The COMPANY agrees to give its full cooperation in any audit and shall provide complete responses to inquiries within thirty (30) days of written request. If the results of any audit indicate that the COMPANY (i) paid the correct Franchise Fee, (ii) overpaid the Franchise Fee and is entitled to a refund or credit, or (iii) underpaid the franchise fee by three percent (3.00%) or less, then the CITY shall pay the costs of the audit. If the results of the audit indicate the COMPANY underpaid the Franchise Fee by more than three percent (3.00%), then the COMPANY shall pay the reasonable costs of the audit. The CITY agrees that any audit shall be performed in good faith. If the results of the audit indicate that the COMPANY underpaid the Franchise Fee by more than three percent (3.00%), and the COMPANY 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 COMPANY shall pay interest on the total amount of underpayment at an annualized interest rate of 8%, and interest shall be calculated from the time the original amount is 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 thirty (30) days from the date of the invoice will cause interest to be payable at an annualized interest rate of 8% on the entire amount from the date of invoice. Notwithstanding the above, if the COMPANY'S auditor disagrees with the CITY's determination that the additional amount due exceeds three percent (3.00%), the CITY's auditor and the COMPANY'S auditor shall choose a neutral auditor who shall make a determination which is final and binding on both parties as to whether the three percent (3.00%) amount was exceeded.

6.4 Confidentiality. The CITY agrees to hold in strict confidence any non-public information or information marked proprietary or confidential that it learns from the COMPANY to the extent permitted by law, including the Texas Public Information Act. The CITY shall not be liable to the COMPANY for the release of any information obtained as a result of an audit

where the CITY is required to release that information by law or applicable court or agency order.

Section 7. ANNEXATIONS BY THE CITY.

This Franchise shall extend to and include any and all territory which is annexed by the CITY during the term of this Franchise and is located within the COMPANY's service area. Within sixty (60) days from the effective date of any such annexation, the COMPANY 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 period, all customers accounts located within such annexed territory shall be subject to the payment provisions specified in Section 5 of this Franchise.

The CITY will notify the COMPANY within a reasonable time when the annexation of new territory has been approved.

Section 8. CONSTRUCTION.

8.1 Compliance with CITY Ordinances. The COMPANY shall be bound by all current and future CITY ordinances that govern the placement, location and construction of facilities Systems in the CITY; including, but not limited to, CITY ordinances that assist in the management of Systems 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. The CITY will notify the COMPANY 15 days before any future ordinances related to this Section are passed.

8.2 Compliance with NESC. All construction performed by the COMPANY shall comply with NESC (National Electric Safety Code). The COMPANY will maintain NESC clearances if other utilities attach to their poles.

8.3 Relocation of Facilities. In the event relocation is required by the CITY of any of the COMPANY'S electric utility wire, cable, or other facility within Public Rights-of-Way such relocation shall be completed within ninety (90) days, except in circumstances that would require additional time as reasonably determined by the CITY based upon information provided by the COMPANY. If additional time is needed, schedules for the work contemplated shall be developed by designated representatives of the COMPANY and the CITY. If such representatives cannot agree on the schedule, the City Manager, after consultation with the COMPANY, shall establish a schedule. The schedule shall provide for a minimum of ten (10) days to exist between the time the schedule is furnished to the COMPANY and the time that any specific work to be done by the COMPANY is to begin. In the event relocation is not completed in the time allowed due to action or inaction by the COMPANY, the COMPANY shall defend, pay and reimburse the CITY for any construction delay claims that may be adjudicated against the CITY due to any delay arising from the failure to timely relocate the facilities. The relocation of facilities will be done at the cost of the COMPANY.

8.4 Temporary Removal of Wires. The COMPANY on the reasonable request of any person shall remove or raise or lower its wires within the CITY temporarily to permit the moving of houses or other bulky structures. The expense of such temporary removal, raising or lowering of wires shall be paid by the benefited party or parties, and the COMPANY may require such payment in advance. The COMPANY shall be given not less than seventy-two (72) hours advance notice to arrange for such temporary wire changes. The clearance of wires above ground or rails within the CITY and also underground work shall conform to the basic standards

of the National Electrical Safety Code, National Bureau of Standards, United States Department of Commerce, as promulgated at the time of erection thereof.

8.5 Tree Trimming. The right, license, privilege and permission is hereby granted to the COMPANY, its successors and assigns, to trim trees upon and overhanging the streets, alleys, sidewalks and public places of the CITY, so as to prevent the branches of such trees from coming in contact with the wires or cables of the COMPANY. The COMPANY shall be bound by all current and future CITY ordinances that govern the care and treatment during trimming of trees.

8.6 Additions or modifications to electric distribution and broadband systems. The COMPANY shall present each and every plan for additions to or modifications of the COMPANY's electric distribution and broadband system on any street, avenue, thoroughfare, alley, bridge, or public property within the corporate limits of the CITY for approval prior to commencing construction. The CITY shall review all plans submitted by the COMPANY to ensure compliance with all applicable regulations and policies of the CITY, and the CITY shall, within thirty (30) days, either approve each plan as submitted, or notify the COMPANY of any required modifications or changes to the COMPANY's plans which would be a prerequisite for approval by the CITY. The COMPANY shall not commence any addition to or modification of the COMPANY's electric distribution system on any street, avenue, thoroughfare, alley, without the approval of the CITY. The CITY shall have the right to fix and regulate the location of poles, towers, conductors, conduit and any other part of the COMPANY's electric distribution and broadband system located in, over, under or upon any street, avenue, thoroughfare, alley, bridge or public property.

Section 9. INDEMNITY.

9.1 The COMPANY shall indemnify and hold the CITY and its officers and employees harmless against (i) any and all claims, lawsuits, judgments, costs, liens, losses, expenses, fees (including reasonable attorney's fees and costs of defense), proceedings, actions, demands, causes of action, liability, and suits of any kind and nature, including personal or bodily injury (including death), property damage, or other harm for which recovery of damages is sought that arises out of a negligent act, error, or omission of the COMPANY, any agent, officer, director, representative, employee, affiliate, or subcontractor of the COMPANY, or their respective officers, agents, employees, directors, or representatives, relating to the installation, repair (or lack thereof), or maintenance of the facilities and/or Systems in the Public Rights-of-Way (ii) from and against all damages, costs, losses or expenses for the repair, replacement, or restoration of the CITY'S property, equipment, materials, structures, facilities and/or Systems which are damaged, destroyed, or found to be defective due to the COMPANY'S negligent act, error, or omission. The indemnity provided by this subsection does not apply to any liability resulting from the negligence of the CITY, its officers, employees, contractors, or subcontractors. If the COMPANY and the CITY are found jointly liable by a court of competent jurisdiction, liability shall be apportioned comparatively in accordance with the laws of Texas without, however, waiving any governmental immunity available to the municipality under state law and without waiving any defenses of the parties under state law. This section is solely for the benefit of the CITY and COMPANY and does not create or grant any rights, contractual or otherwise, to any other person or entity.

9.2 The COMPANY or CITY shall promptly advise the other in writing of any known claim or demand against the COMPANY or the CITY related to or arising out of the COMPANY's activities in the Public Rights-of-Way.

Section 10. TRANSFERS AND ASSIGNMENT.

10.1 No transfer of this Franchise shall be effective unless it be in writing signed by the transferor and by the transferee filed with the CITY Secretary, the transferee pays a franchise transfer fee of Five Hundred Dollars (\$500.00) to the CITY and it is approved by the CITY's City Council as provided herein. Such City Council approval shall not be unreasonably withheld. The fees for subsequent years shall be payable by the transferee under the same conditions as they had been for the transferor. Additionally, the transferee shall be responsible for all terms and conditions contained within this Franchise as if they were the original signatory thereto.

10.2 No assignment in law or otherwise shall be effective until the transferee has filed with the CITY Manager an instrument, duly executed, reciting the fact of such assignment, accepting the terms of this Franchise, and agreeing to comply with all of the provisions of this Franchise substantial in the form of Exhibit "A". A mortgage or other pledge of assets in a bona fide lending transaction shall not be considered an assignment or a transfer for the purposes of this section.

Section 11. FORFEITURE AND TERMINATION.

11.1 In addition to all other rights and powers retained by the CITY under this Franchise or otherwise, the CITY reserves the right to forfeit and terminate this Franchise and all of the COMPANY'S rights and privileges hereunder in the event of a material breach of terms and conditions hereof, subject to reasonable notice and opportunity to cure as provided in Section 11.2 below.

11.2 If the COMPANY is in violation of this Franchise and such violation is of a curable nature, the CITY Manager or designee shall notify the COMPANY in writing, setting forth the nature of such violation. Within twenty-one (21) days of receipt of such notice, the COMPANY shall (i) respond in writing that the violation has been cured, (ii) provide a written cure plan, subject to review and approval by the CITY Manager, or (iii) provide a written explanation with documentation to support that the alleged violation did not occur.

11.3 Notwithstanding Section 10.2, the COMPANY shall be allowed ~~thirty (30)~~ twenty-one (21) days after the CITY's delivery of the written notice described in Section 10.2 to cure a curable violation. If the nature of such violation is such that it cannot be fully cured within twenty-one (21) days due to circumstances not under the COMPANY'S control, the period of time in which the COMPANY must cure the violation may be extended by the CITY Manager in writing for such additional time reasonably necessary to complete the cure, provided that (i) the COMPANY has begun promptly to cure, and (ii) the COMPANY is diligently pursuing its efforts to cure in the CITY Manager's reasonable judgment.

11.4 At the COMPANY'S request, the CITY shall afford the COMPANY an opportunity to show that a violation has not occurred, through a hearing before the CITY's City Council. Such hearing shall take place on or before the next City Council meeting scheduled within twenty-one (21) days after the CITY's receipt of the COMPANY'S request. After the conclusion of the hearing either party may seek any and all remedies to which it may be entitled at law or in equity.

11.5 Material breaches of this Franchise specifically include, but are not limited to, failing to comply with the requirements set forth in Sections 4, 5, 6, 7, 8 and 9.

11.6 ~~Failing to comply with the requirements set forth in Sections 5, 6, 8, and 9 shall not constitute a material breach if the violation occurs without the fault of the COMPANY or occurs as a result of circumstances beyond its control.~~ The COMPANY shall not be excused from performance of any of its obligations under this Franchise by mere economic hardship, nor misfeasance or malfeasance of its directors, managers, officers or employees.

11.7 A termination shall be declared only by a written decision of the City Council after a public hearing before the City Council, which shall afford the COMPANY full opportunity to be heard and to respond to any notice of grounds of termination. The foregoing sentence, however, shall not be construed as requiring any additional hearing after the COMPANY has had such proceeding pursuant to Section 10.4 and after the COMPANY'S failure to timely cure any default within a time period which may have been granted by the City Council at the hearing held pursuant to Section 10.4 above. All of the CITY's notice requirements shall be met by providing written notice to the COMPANY at least twenty-one (21) days before a public hearing concerning the proposed termination of this Franchise. Such notice shall state the CITY'S alleged grounds for termination with specificity.

11.8 The City Council, after public hearing, and upon finding the existence of grounds to terminate, may either declare this Franchise terminated, excuse the breach upon a showing by the COMPANY of mitigating circumstances or good cause for the existence of such grounds, or grant additional time for the COMPANY to cure its default.

11.9 Neither the COMPANY'S acceptance of this Franchise, the COMPANY'S appearance before the City Council at any public hearing concerning proposed termination of this Franchise 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 COMPANY'S right to seek judicial determination of the rights and responsibilities of the parties under this Franchise.

Section 12. FORECLOSURE, RECEIVERSHIP, AND BANKRUPTCY.

The COMPANY shall notify the CITY within thirty (30) days after the appointment of a receiver or trustee to take over and conduct the business of the COMPANY, whether in receivership, reorganization, bankruptcy, or other action or proceeding, whether voluntary or involuntary, such notice to include where applicable the cause number and court involved.

Section 13. ENFORCEMENT.

The CITY Manager or his/her designee shall have the right to enforce all legal rights and obligations under this Ordinance without further authorization. The COMPANY shall provide to the CITY Manager or his/her designee documents and records that the CITY Manager or his/her designee deems reasonably necessary to determine the COMPANY'S compliance with this Ordinance, with the exception of those documents made privileged and/or confidential by federal or state law or regulation or any documents that would be privileged under the Texas Rules of Civil Procedure.

Section 14. NONEXCLUSIVE FRANCHISE.

Nothing contained in this Franchise shall ever be construed as conferring upon the COMPANY any exclusive rights or privileges of any nature whatsoever.

Section 15. ENTIRE AGREEMENT.

This Franchise contains all of the agreements of the parties with respect to any matter covered or mentioned in this Franchise and no prior or contemporaneous agreements or understandings pertaining to any such matters shall be effective for any purpose.

Section 16. SEVERABILITY.

If any section, subsection, sentence, clause, phrase, or portion of this Franchise is for any reason held invalid or unconstitutional by any court or administrative agency of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision and such holding shall not affect the validity of the remaining portions thereof.

Section 17. NON-WAIVER.

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

Section 18. GOVERNING LAW; VENUE.

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 Franchise shall be with the Texas State District Court in Kendall County, Texas.

PASSED AND APPROVED on first reading this the ____ day of October, 2016.

PASSED, APPROVED AND ADOPTED on second reading this the ____ day of November, 2016.

APPROVED:

Mayor

ATTEST:

City Secretary

APPROVED AS TO FORM:



City Attorney

EXHIBIT "A"

Acceptance

(In accordance with Section 4 or Section 10 on Transfers)

TO THE HONORABLE MAYOR AND CITY COUNCIL OF THE CITY OF BOERNE:

Bandera Electric Cooperative, Inc. [, on behalf of itself, its successors and assigns] hereby fully accepts CITY of BOERNE Ordinance No 2016-39 and expressly agrees to be bound by all of its terms and provisions, and to fully observe and fully perform all limitations and obligations contained in such Ordinance. The COMPANY further certifies to the CITY that all of the COMPANY'S information filed with the CITY in connection with the issuance of such Ordinance is true, correct and complete.'

Bandera Electric Cooperative, Inc.

ATTEST:

Secretary

BY: _____
William Hetherington CEO

Dated the ____ day of _____, A.D., 2016.

THE STATE OF TEXAS

COUNTY OF _____

This instrument was acknowledged before me on _____, 20____, by _____, the _____ of _____, a _____ corporation, on behalf of said corporation.

NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

My Commission expires:

Printed Name: _____

THE STATE OF TEXAS

COUNTY OF KENDALL

I, _____, the duly appointed, qualified acting CITY Secretary of the CITY of BOERNE, Texas, hereby certify that the above and foregoing Acceptance was received and filed in the office of the CITY Secretary of the CITY of BOERNE on the ____ day of _____, 20____.

Executed under my hand and the official seal of the CITY of BOERNE, Texas, at said CITY, this ____ day of _____, A.D., 20____.

LORI A. CARROLL
CITY SECRETARY
CITY OF BOERNE, TEXAS