

ORDINANCE NO. _____

AN ORDINANCE GRANTING TO BLUEBONNET ELECTRIC COOPERATIVE, INC., A FRANCHISE FOR CONSTRUCTING, MAINTAINING, OPERATING AND USING A TRANSMISSION AND DISTRIBUTION SYSTEM IN THE CITY OF AUSTIN TO PROVIDE ELECTRIC UTILITY SERVICE.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

PART 1. Findings.

- (A) On or about August 25, 2011, City granted Bluebonnet Electric Cooperative, Inc. (“Grantee”) a franchise under Ordinance No. 20110825-063, which expires August 30, 2026. City hereby agrees by this Ordinance to replace said previous ordinance, continuing Grantee’s franchise;
- (B) As a condition of receiving this franchise, the Grantee agrees to abide by all lawful and applicable ordinances and regulations as they may pertain to Grantee, including the City’s current and future policies, ordinances and regulations regarding infrastructure usage, street cuts and rights of way, provided no such ordinances or regulations unlawfully interfere with Grantee’s duty to provide electric service within its certificated electric service area; and
- (C) The City recognizes that Grantee is requesting this franchise to fulfill its obligations to provide electric utility service to its Members within Grantee’s certificated electric service area.

PART 2. Franchise Agreement. Bluebonnet Electric Cooperative, Inc. (“Grantee”) and the City of Austin (“City”) agree to the following:

SECTION 1. DEFINITIONS.

For the purpose of this franchise the following terms, phrases, words and their derivations shall have the meaning given herein. When not inconsistent with the context and whenever the sense of the text requires, words used in the present tense include the future, words in the plural number include the singular number and words in the singular number include the plural number. The words “shall” and “will” are mandatory and “may” is permissive.

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- (1) **Affiliate** means each person who falls into one or more of the following categories:
 - (a) each person having, directly or indirectly, a controlling interest in the Grantee;
 - (b) each person in which the Grantee has, directly or indirectly, a controlling interest;
 - (c) each officer, director, general partner, limited partner holding an interest of 25 percent (25%) or more, joint venturer or joint venture partner, of the Grantee; and
 - (d) each person, directly or indirectly, controlling, controlled by, or under common control with, the Grantee; provided that affiliate shall in no event mean any limited partner holding an interest of less than 25 percent (25%) of the Grantee, or any creditor of the Grantee solely by virtue of its status as a creditor and which is not otherwise an affiliate by reason of owning a controlling interest in, being owned by, or being under common ownership, common management, or common control with, the Grantee.
 - (2) **City** means the City of Austin, Texas, a home-rule municipality incorporated under the laws of Texas.
 - (3) **City Council** means the elected governing body of the City.
 - (4) **City Requirements** means laws, rules, regulations, policies and directives of general application of the City, in effect at present or to be adopted in the future by the City Council.
 - (5) **Consumer** means any Person receiving and using electric utility service from the Cooperative for the Person's equipment whether or not the service is billed directly to the Person or to another party. For example, in the case of a rental unit where the cost of utilities is part of the rent, the landlord is the Customer and the tenant is the Consumer.
 - (6) **Control** or **Controlling Interest** means actual working control in whatever manner exercised.
 - (7) **Cooperative** or **Grantee** means Bluebonnet Electric Cooperative, Inc., a rural electric cooperative organized under and by virtue of the laws of the State of Texas, and authorized to transact business in the State of Texas,

- 68 together with its legal representatives, lessees, successors and assigns.
- 69 (8) **Customer** means any Person billed for electric utility service whether
70 used by that Person or by others.
- 71 (9) **Days** means calendar days unless otherwise specified.
- 72 (10) **Director of Austin Financial Services** means the Director of Austin
73 Financial Services, or any successor department, or his or her designee.
- 74 (11) **Director of Public Works** means the Director of Austin Transportation
75 and Public Works Department, or any successor department, or his or her
76 designee.
- 77 (12) **Electric Utility Service** or **Electricity** means the sale, distribution,
78 conveyance, or other transmission of energy (kWh) and power (kW)
79 within the Franchise Area by the Cooperative.
- 80 (13) **Emergency Conditions** means those service conditions which are not
81 within the control of the Grantee. Those conditions which are not within
82 the control of Grantee include, but are not limited to, natural disasters,
83 civil disturbances, severe weather and testing required by the National
84 Electric Safety Code (“NESC”).
- 85 (14) **Franchise** means this contract between the City and the Grantee, as may
86 be amended.
- 87 (15) **Franchise Area** means all of the geographic area within which the City
88 owns or controls the public rights-of-way, at present or in the future,
89 located within the full-purpose annexed areas of the City.
- 90 (16) **Gross Revenue** means the total amount collected by the Cooperative and
91 Affiliates from Consumers for the sale of Electric Utility Service within
92 the Franchise Area.
- 93 (17) **Member** means any Person, Consumer, Customer or other entity that has
94 completed membership requirements with the Cooperative and has been
95 accepted by the Cooperative’s Board of Directors as a member.
- 96 (18) **“NESC”** means National Electric Safety Code.
- 97 (19) **Person** means a corporation, partnership, proprietorship, individual or
98 organization or a natural person, excluding any governmental entity.

99 (20) **Public Rights-of-Way** means the surface, the air space above the
100 surface, and the area below the surface of any public street, highway,
101 lane, path, alley, sidewalk, boulevard, drive, bridge, tunnel, easement or
102 similar property in which the City holds any property interest or exercises
103 any rights of management or control (other than private easements or
104 right-of-ways obtained by the Cooperative) and which, consistent with
105 the purposes for which it was acquired or dedicated, may be used for the
106 installation and maintenance of a Transmission and Distribution System.

107 A reference in this franchise to a “public right-of-way” shall not be a
108 representation or guarantee by the City that its interests or other rights in
109 the property are sufficient to permit its use for the installation and
110 maintenance of a System and the Grantee shall receive only those rights
111 which the City has the right and power to give.

112 (21) **Service Regulations** means the service standards of the Cooperative.

113 (22) **Transmission and Distribution System** or **System** means all
114 interrelated lines, equipment, poles, installations, systems, fixtures and
115 other facilities or appurtenances including substation facilities used or
116 necessary for the transmission and distribution of Electric Utility
117 Service to Consumers in the Franchise Area by the Cooperative.

118 SECTION 2. GRANT OF FRANCHISE.

119 (A) The City grants, subject to the Grantee’s acceptance of the terms of this
120 franchise and the City’s receipt of monetary compensation, to the
121 Grantee, for the term as described in Subsection B of this section, unless
122 otherwise terminated as provided for in Section 16, the non-exclusive
123 right and privilege to have, acquire, construct, expand, reconstruct,
124 maintain, use and operate in the public rights-of-way, a transmission
125 and/or distribution system to provide electric utility service; in addition,
126 the Grantee is authorized to lease capacity on its transmission and/or
127 distribution system to other service providers, including affiliates.

128 (B) The term of this franchise shall commence on August 31, 2026, and shall
129 extend for a period of ten years until August 30, 2036. This franchise
130 shall be automatically extended for an additional five years until August
131 30, 2041, unless on or before February 28, 2036, the City notifies
132 Grantee of its intent not to extend this franchise.

133 (C) The Grantee may obtain the extension provided in Subsection 3 (B) only

134 if the Grantee is in substantial compliance with the material terms and
135 conditions of this franchise, including without limitation this section and
136 Section 8.

- 137 (D) The Grantee shall not allow the use of its system by another entity to
138 provide any service, unless the entity warrants that it has obtained all the
139 authorizations required by the City in order to provide the service. The
140 City shall assume all legal responsibility for enforcing its authority to
141 impose franchise, consent or other requirements on service providers
142 through this provision.
- 143 (E) The Grantee or affiliates shall not install or construct facilities within
144 public rights-of-way for services which are not authorized by this
145 franchise, by applicable law, or by another franchise.
- 146 (F) This franchise does not authorize either party to attach any part of its
147 system to the other party's electric utility infrastructure or to use any of
148 the other party's conduits or facilities until the parties have entered into a
149 separate agreement, supported by independent consideration, for the
150 rights of attachment or use.
- 151 (G) Nothing in this franchise shall be construed to require or authorize the
152 Cooperative to exceed its certification rights granted by the Public Utility
153 Commission of Texas, except as may be mutually agreed by the City and
154 the Cooperative.

155 **SECTION 3. CONSTRUCTION WORK REGULATION BY CITY**
156 **AND UNDERGROUND CONDUIT USE BY THE GRANTEE.**

- 157 (A) Work done by the Grantee in connection with the construction,
158 expansion, reconstruction, maintenance or repair of its facilities in the
159 public rights-of-way shall be subject to and governed by all City
160 requirements, and applicable federal and state rules and regulations. The
161 Grantee shall place certain facilities underground according to applicable
162 City requirements.
- 163 (B) Excavations and other construction in the public rights-of-way shall be
164 performed in accordance with applicable City requirements, including the
165 obligation to use trenchless technology whenever possible. Furthermore,
166 the Grantee shall construct and excavate in a manner which minimizes
167 interference with the use of public and private property and in accordance
168 with City directives under the police and regulatory powers of the City.

169 (C) The City may require the Grantee to attach portions of its facilities to
170 poles or duct trench space maintained by any other persons or entities
171 franchised by the City. The Grantee shall not be required to attach its
172 facilities to the poles or duct trench space of another person or entity
173 franchised by the City if it can be shown to the City's satisfaction that:

- 174 (1) the Grantee shall be subjected thereby to increased risks of
175 interruption to its service;
- 176 (2) to increased liability for accidents;
- 177 (3) unreasonably delay construction or availability of service;
- 178 (4) if the facilities of such other person or entity are not of the
179 character, design and construction required by the NESC;
- 180 (5) are not being maintained in accordance with current practice; or
- 181 (6) are not available to the Grantee on reasonable terms, including a
182 reasonable fee.

183 (D) In addition to the consideration set forth herein, the Cooperative shall
184 permit the City to use the Cooperative's existing facilities, without
185 charge, where the existing facilities are adequate for the City's own
186 purposes, said purposes being traffic, signal, police and fire alarm
187 systems ("Traffic Lights"). Traffic Lights shall not include revenue
188 producing or commercial access telecommunications systems,
189 including, but not limited to fiber optics and cable television systems.
190 The Cooperative shall provide space on existing facilities and those to
191 be constructed in the public rights-of-way for the City to attach Traffic
192 Lights.

- 193 (1) The Cooperative agrees to provide for and accommodate Traffic
194 Lights when the Cooperative constructs any new facilities, or when
195 the Cooperative upgrades existing facilities during scheduled
196 maintenance activities.
- 197 (2) If existing Cooperative facilities are inadequate, and the City
198 requests space on Cooperative facilities to accommodate Traffic
199 Lights, the Cooperative shall upgrade its facilities at the City's
200 expense. The City shall reimburse the Cooperative for the
201 difference between the cost of the upgraded facilities required to
202 accommodate the Traffic Lights and the cost of replacing the

existing facilities.

**SECTION 4. WORK BY OTHERS, CONSTRUCTION BY
ABUTTING OWNERS, ALTERATION TO CONFORM WITH
PUBLIC IMPROVEMENT.**

(A) The City reserves the right to lay and permit to be laid, sewer, gas, water, and other pipe lines or cables and conduits, and to do and permit to be done, any underground and overhead work, and any attachment, restructuring or changes in aerial facilities that the City Manager requires in, across, along, over or under any public street, alley or right-of-way occupied by the Grantee, and to change any curb or sidewalk or the grade of any street. In permitting work to be done, the City shall not be liable to the Grantee for any damages not directly caused by the willful misconduct or negligence of the City; provided, however, nothing herein shall relieve any other person or entity, including any contractor, subcontractor, or agent from liability for damage to the Grantee's system.

(B) In the event that during the term of this franchise, the City authorizes abutting landowners to occupy space under the surface of any public street, alley, or right-of-way, such grant to an abutting landowner shall be subject to the rights herein granted to the Grantee. In the event that the City closes or abandons a segment of the public rights-of-way that contains a portion of the Grantee's system, the conveyance of land contained in the closed or abandoned public right-of-way shall be subject to the rights herein granted.

(C) During the term of this franchise, the Grantee shall be liable for the acts or omissions of an entity used by the Grantee including an affiliate, if the entity is involved directly or indirectly in the construction and installation of the Grantee's system to the same extent as if the acts or omissions of such entity were the acts or omissions of the Grantee.

(D) Relocation or Removal of Facilities: Within 90 days following written notice from the City, the Grantee shall, at its own expense, temporarily or permanently remove, relocate, change or alter the position of any of its system or other of its facilities that are within the public rights-of-way if the City determines that the removal, relocation, change or alteration is reasonably necessary for:

(1) The construction, repair, maintenance or installation of any City or other public improvement in or on the public rights-of-way.

- 239 (2) The operations of the City or other governmental entity in or
240 upon the public rights-of-way.

241 **SECTION 5. COMPLIANCE WITH CITY CHARTER OR**
242 **ORDINANCES.**

243 The Grantee recognizes, accepts and agrees that the terms, conditions and
244 provisions of this franchise are subject to the applicable provisions of the
245 Austin City Charter or ordinances. The City Attorney shall review a request
246 by the Grantee for a modification of this franchise for compliance with the
247 applicable provisions of the City Charter or ordinances.

248 **SECTION 6. CONSTRUCTION, MAINTENANCE, EXPANSION,**
249 **RECONSTRUCTION, AND EXCAVATION.**

250 (A) In furtherance of the public interest in safety, health and public welfare
251 and to facilitate the safe management of public rights-of-way, the
252 construction, expansion, reconstruction, excavation, use, maintenance
253 and operation of the Grantee's system and property is subject to all
254 generally applicable City requirements as determined by the City
255 Manager, or designee. In addition to any other City requirements, the
256 Grantee shall provide the Director of Public Works, or such other
257 officials as the City may designate, construction plans and maps showing
258 the routing of any new construction and construction plans, 45 days prior
259 to the commencement of construction which involves an alteration to the
260 surface or beneath the surface of the public rights-of-way, to the extent
261 generally required. The Grantee shall not begin construction until the
262 plans and drawings have been approved in writing by the Director of
263 Public Works; this approval shall not be unreasonably delayed. The
264 Grantee shall participate in the Austin Utility Location and Coordination
265 Committee ("AULCC") meetings and coordinate new construction with
266 the AULCC. The Grantee's facilities shall bear the identification marks
267 established by the AULCC if the facilities are installed after the AULCC
268 establishes identification marks.

269 (B) On lawful written request by the City, the Grantee shall remove and abate
270 a facility, when the Director of Public Works declares an emergency. The
271 Grantee and the City shall cooperate to the extent possible to assure
272 continuity of service. If the Grantee, after lawful notice, fails or refuses to
273 act, the City may remove or abate the facility, at the sole cost and
274 expense of the Grantee, without compensation or liability for damages to
275 the Grantee.

- 276 (C) On completion of initial or any subsequent construction work, the
277 Grantee shall promptly restore the public rights-of-way in accordance
278 with applicable City requirements. The Grantee may excavate only for
279 the construction, installation, expansion, repair, removal, and
280 maintenance of its facilities.
- 281 (D) Except in an emergency, the Grantee may not excavate pavement in a
282 public alley or street or significant amounts of an unpaved public right-
283 of-way without first complying with applicable City requirements.
- 284 (E) Within 120 days of completion of each segment of the Grantee's
285 facilities within public rights-of-way, the Grantee shall supply the City
286 with a set of "as built" drawings for the segment in a format prescribed
287 by the Director of Public Works Director. The Grantee shall provide
288 every year a set of "as-built" drawings incorporating changes to the
289 Grantee's facilities in the public right-of-way, in a format prescribed by
290 the Director of Public Works Director. The Grantee must obtain the
291 City's approval before relocating facilities in the public right-of-way.
292 Approval shall not be unreasonably withheld.

293 **SECTION 7. COMPENSATION TO THE CITY.**

- 294 (A) **General Compensation.** The City Council finds that the public rights-
295 of-way to be used by the Grantee in the provision of services within the
296 boundaries of the franchise area is valuable public property, acquired and
297 maintained by the City at great expense to its taxpayers, and the grant to
298 the Grantee of the use of said public right-of-way is a valuable property
299 right without which the Grantee would be required to invest substantial
300 capital in right-of-way costs and acquisitions. The Grantee agrees to pay
301 to the City as general compensation during each year of this franchise, a
302 franchise fee consisting of three (3)% of the Grantee's gross revenue
303 derived within the franchise area. The City shall provide notice to
304 Grantee of all changes, annexations or disannexations, affecting the
305 franchise area. Grantee shall have sixty (60) days from such notice to
306 begin collecting and paying the franchise fee for any revenues received
307 from the Grantee's customers and/or consumers residing in the newly
308 annexed territories.
- 309 (1) The City and Grantee recognize that Grantee may enter into
310 franchise agreements after the effective date of this franchise with
311 other municipalities. The City and Grantee further recognize that
312 Grantee may agree to pay for the use of said municipality's public

313 rights-of-way an amount, however characterized, greater than 3%
314 of Grantee's gross revenue in said municipality. In such an event
315 Grantee's payments under this section shall be increased to an
316 amount equal to that proportionately higher rate of Grantee's said
317 gross revenue within the City. Grantee's payments shall be
318 increased pursuant to this section in those instance in which
319 Grantee enters into such agreement or renews or extends a
320 franchise agreement adopted by any municipality on or after the
321 effective date of this Ordinance.

322 (2) The increased payments to the City provided by this section shall
323 be subject to the same method or terms of collecting such fee from
324 Grantee's customers. Grantee shall notify the City of such increase
325 within thirty days of the other payment's effective date.
326 Collections of the franchise fee and payments to the City will be
327 based on such higher rate from the first date of the first month next
328 following the date the City accepts and authorizes the increase.
329 The City's acceptance and authorization shall be on the same terms
330 as those in effect for the other municipality. The collection of the
331 franchise fee and the increase payment shall continue until
332 expiration of term of this franchise.

333 (3) Nothing in this section shall alter or affect the dates upon which
334 the payments specified in this franchise are payable or the period
335 to which each of said payments are referable as provided in
336 Subsection (B).

337 (B) **Calculation and Payment on a Quarterly Basis of Annual Franchise**
338 **Fee.** The franchise fee specified in Subsection (A) above shall be payable
339 quarterly to the City. The Grantee shall make this payment to the office
340 designated by the Director of Austin Financial Services by 12:01 P.M. on
341 the 45th day following the close of the calendar quarter for which the
342 quarterly payment is calculated. Any necessary prorations shall be made.

343 (C) To the extent consistent with federal law, the compensation set forth in
344 this section is exclusive of and in addition to all special assessments and
345 taxes, including, but not limited to, ad valorem taxes, street cut permits,
346 inspection fees and assessments for recovery of costs incurred by the
347 City.

348 (D) In the event any quarterly payment is made after noon on the date due,
349 the Grantee shall pay a late payment charge of the greater of:

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- (1) \$100
- (2) Simple interest at 10% annual percentage rate of the total amount past due.
- (E) Payment of money under this section shall not in any way limit or impair the privileges or rights of the City, whether under this franchise or otherwise. No acceptance of any payment shall be construed as an agreement that the amount paid is the correct amount, nor shall acceptance be construed as a release of any claim which the City may have for additional sums payable under the provisions of this section.
- (F) The Grantee shall file annually with the Director of Austin Financial Services no later than 120 days after the end of the Grantee's fiscal year, a statement of gross revenue for that year within the franchise area pursuant to this franchise. This statement shall present a detailed classification of gross revenue and uncollectible accounts for the year in a form prescribed by the Director of Austin Financial Services after consultation with the Grantee.
- (G) A transaction or arrangement which has the effect of circumventing payment of required franchise fees or evasion of payment of franchise fees by non-collection, non-reporting of gross revenue, collection of revenues by affiliates, bartering, or any other means which evade the actual collection of revenues by the Grantee for services delivered over the system or businesses the Grantee pursues derived from the operation of the system is prohibited.

SECTION 8. CITY'S RIGHT TO PURCHASE GRANTEE'S SYSTEM.

- (A) Subject to the requirements herein, the City has the right to purchase the Grantee's facilities in the public right-of-way (hereinafter referred to as "Facilities") at any time within the five year period preceding the expiration of this franchise at 1.5 times (1.5x) the fair market value, with the fair market value to be determined in accordance with Subsection 8(B). For purposes of the calculations of this section only, the term of this franchise shall be considered 15 years. Notwithstanding the provisions of this section, the Grantee shall have the right to operate its system and receive all revenue therefrom for the term of this franchise as set forth in Section 3. The City may not sell the purchased Facilities in the public right-of-way within three years of its purchase from the Grantee.

386 (B) If the City exercises its right to purchase the Grantee's Facilities in the
387 public right-of-way, the City shall notify the Grantee in writing at least
388 90 days before the effective date of such purchase. Upon such written
389 notification, the Grantee and City shall each designate an appraiser
390 experienced and knowledgeable in the valuation of similar facilities.
391 The two appraisers shall designate a third appraiser. Each
392 appraiser shall conduct an independent appraisal of the fair market
393 value of the Grantee's Facilities as a going concern as of the effective
394 date of the purchase by the City. Each party shall be responsible for the
395 appraisal fees of its own appraisers and pay an equal share of the
396 appraisal fee of the third appraiser. In conducting the appraisals, the
397 appraisers shall consider, among other factors:

- 398 (1) the book value of the assets constituting the Grantee's Facilities;
399 (2) the age and condition of the physical plant and equipment; and
400 (3) the discounted future revenue stream considering the customer
401 base, discounted in accord with general appraisal practice, for the
402 remaining useful life of the assets constituting the Grantee's
403 Facilities.

404 The appraisers may not consider value of the unexpired term or the
405 potential renewal of the license itself. The purchase price to be paid by
406 the City shall be the price agreed to by at least two of the three appraisers
407 and in the event none of the appraisal values are the same, then the price
408 will be the average of the two closest values established by the three
409 appraisers.

410 (C) If upon exercise of this option at the end of the original term, and the
411 payment of the above sum by the City and its service of official notice
412 of the action upon the Grantee, the Grantee shall immediately transfer
413 to the City title to all facilities in the public right-of-way and property,
414 real and personal, of the Grantee's facilities in the public right-of-way,
415 free from any and all liens and encumbrances not agreed to be assumed
416 by the City in lieu of some portion of the purchase price, subject to the
417 Grantee's right to continue to operate and maintain its facilities in the
418 public right-of-way within the City for the duration of the term provided
419 in Subsection 8(A) above; and the Grantee shall execute and deliver
420 such warranty deeds or other instruments of conveyance to City as shall
421 be necessary for this purpose.

422 (D) The Grantee recognizes that the provisions of the City Charter require
423 inclusion of this section in the franchise. Specifically, Article XI,
424 Section 2 of the Austin City Charter conditions the grant of a franchise
425 on the City's right to purchase the property of the franchise holder.
426 The Cooperative's acquiescence in this section and provision of the
427 franchise is conditional, subject to the following: (1) the Cooperative's
428 right to challenge this Charter provision, this section of the franchise,
429 or any application thereof on any basis, including as a violation of the
430 Constitution and laws of the United States and/or the State of Texas,
431 (2) the satisfaction of all conditions for the sale of such property
432 contained herein and in the Cooperative's Master Indenture of Trust, or
433 successor document, applicable to such property, and (3) the granting to
434 the City by the Public Utility Commission of Texas of a certificate of
435 convenience and necessity, as identified in Chapter 37 of the Texas
436 Utilities Code, that includes the area in which the Facilities are located.

437 **SECTION 9. ACCOUNTS, RECORDS, REPORTS AND**
438 **INVESTIGATIONS.**

- 439 (A) Upon request and not later than 10 days, the Grantee shall provide the
440 City information as to all matters in connection with or affecting the
441 construction, reconstruction, removal, maintenance, operation and
442 repair of the Grantee's system and any other facilities in the public
443 rights-of-way. The City shall extend the time for provision of such
444 information upon a reasonable showing by the Grantee.
- 445 (B) The Grantee shall keep complete and accurate books of accounts and
446 records of its business and operations pursuant to this franchise in
447 accordance with generally accepted accounting principles. After
448 consultation with the Grantee, the Director of Austin Financial Services
449 may require the keeping of additional records or accounts which are
450 reasonably necessary for purposes of identifying, accounting for, and
451 reporting gross revenue and uncollectibles for purposes of Section 7. To
452 the extent practicable, the Grantee shall keep its books of accounts and
453 records in a manner that identifies revenues by type within the franchise
454 area.
- 455 (C) In order to determine the gross revenue received by the Grantee which is
456 subject to franchise fee in accordance with Section 7, the Grantee agrees
457 that on the same date that payment is made, it will file with the City
458 Clerk a sworn copy of a report that itemizes revenues which comprise

459 gross revenue. Without limitation on the discretion of the Director of
460 Austin Financial Services to require additional information, this report
461 shall incorporate a statement reflecting the market value of all “trade”
462 revenue (revenues from exchanges or barter which do not involve
463 monetary compensation).

- 464 (D) The City may have the books and records of the Grantee examined by a
465 City representative to verify the correctness of the reports filed in
466 accordance with this section.
- 467 (E) The Director of Austin Financial Services may require the Grantee to
468 report to the City other information relating to this franchise. The Grantee
469 shall comply with the City’s requests of forms for reports, the time for
470 reports, the frequency with which reports are to be made, and whether
471 reports are to be made under oath.
- 472 (F) On the Director of Austin Financial Services’ 12 day written request, the
473 Grantee shall make available to the City, during regular business hours,
474 its books and records. The Director of Austin Financial Services may
475 examine, audit, review or obtain copies of the papers, books, accounts,
476 documents, maps, plans and other records of the Grantee pertaining to
477 gross revenue derived by the Grantee and affiliates from the operation of
478 the transmission and distribution system to verify the accuracy of
479 payments under Section 7. The Grantee shall fully cooperate in making
480 available its records and otherwise assisting in these activities. The City
481 shall extend the time for the provision of such information after a
482 reasonable showing by the Grantee that such extension is justified.
- 483 (G) The Director of Austin Financial Services may, at any time, make
484 inquiries pertaining to the Grantee’s performance of the terms and
485 conditions of this franchise. The Grantee shall respond to such inquiries
486 within 21 days.
- 487 (H) The City will maintain confidentiality of information provided by the
488 Grantee to the extent permitted by law if the Grantee has notified the City
489 of the confidential nature of the information. The City will provide the
490 Grantee copies of requests under the Texas Open Records Act which
491 pertains to such information and the related referral to the Attorney
492 General.
- 493 (I) The City’s right to inspect or audit Grantee’s records is limited to four
494 full calendar years prior to the date of the request for such inspection or

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audit.

SECTION 10. ASSIGNMENT OF FRANCHISE.

- (A) Neither this franchise, the assets held by the Grantee for use under this franchise which are in the public rights-of-way, any rights or privileges of the Grantee under this franchise, either separately or collectively, shall be sold, resold, assigned, transferred or conveyed by the Grantee to any other person, firm, affiliate or entity, without the prior written consent of the City by ordinance. Should the Grantee sell, assign, transfer, convey or otherwise dispose of its rights or interests under this franchise, including the Grantee's system or capacity on its system, or attempt to do so, without the City's prior consent, the City may revoke this franchise. On revocation all rights and interest of the Grantee shall cease. A transfer in violation of this section shall be null and void and unenforceable.

- (B) A change of control of the Grantee is a transfer under this section. There shall be a rebuttable presumption of a change of control of the Grantee upon a change of 25% or greater in the ownership of the Grantee. A mortgage or other pledge of assets to a bank or lending institution in a bona fide lending transaction shall not be considered an assignment.

SECTION 11. VIOLATIONS.

- (A) If the Grantee is in violation of this franchise, the Director of Austin Financial Services shall notify the Grantee in writing of the violation setting forth the nature of such violation. Within 21 days of receipt of such notice, or such longer period specified by the Director of Austin Financial Services, the Grantee shall respond in writing that the violation has been cured or provide a cure plan or schedule that satisfies the Director of Austin Financial Services or provide an explanation with documentation to support that an alleged violation did not occur.

- (B) Notwithstanding Subsection 11(A), the Grantee shall be allowed 30 days to cure violations after written notice is received from the City, by taking appropriate steps to comply with the terms of this franchise and any lawful regulations. If the nature of the violation is such that it cannot be fully cured within 30 days due to circumstances not under the Grantee's control, the period of time in which the Grantee must cure the violation may be extended by the Director of Austin Financial Services in

531 writing for such additional time reasonably necessary to complete the
532 cure, provided that (i) the Grantee has promptly began to cure, and (ii)
533 the Grantee is diligently pursuing its efforts to cure in the Director of
534 Austin Financial Services' reasonable judgment.

535 (C) If a violation has not been cured within the time allowed under
536 Subsection 11(B) the Grantee shall be liable for liquidated damages for
537 the following violations:

538 (1) failure to promptly provide data, documents, reports or information
539 to the City, in accordance with Section 9: \$250 per day, for each
540 day such failure continues.

541 (2) failure to comply with City requirements concerning construction
542 in the public rights-of-way: \$200 per day for each day such
543 failure continues.

544 (D) The Grantee agrees that each of the failures in Subsection 11(C) shall
545 result in injuries to the City and its citizens and institutions, the
546 compensation for which would be difficult to ascertain and to prove.
547 Accordingly, the Grantee agrees that the foregoing amounts are
548 liquidated damages, not a penalty or forfeiture.

549 (E) At the Grantee's request, the City shall afford the Grantee an opportunity
550 to show that a violation has not occurred, through an administrative
551 hearing on thirty 30 days' notice before an impartial hearing examiner
552 jointly designated by the City Attorney and the Grantee within 30 days of
553 the Grantee's request.

554 If as a result of the administrative hearing, the hearing examiner
555 determines that a violation has not occurred, the City shall pay all of the
556 expenses related to the administrative hearing. If a violation has occurred,
557 the Grantee shall pay the expenses. After the conclusion of the
558 administrative hearing either party may seek any and all remedies which
559 it may have at law or under the terms of this franchise.

560 (F) Upon evidence being received by the City that violations of this
561 franchise, City Charter provisions or the ordinances regulating the
562 Grantee in the construction and operation of its system have occurred, or
563 continue to occur after the 30-day period, and any additional time
564 necessary to cure, as allowed under Subsection 10(B), the City may make
565 an investigation. If the City finds that such a violation continues to exist

566 or has occurred, then the City or the Grantee may take an action
567 authorized by law, subject to Section 19, including forfeiture of this
568 franchise and a suit in court to compel compliance. In any such
569 proceeding the non-prevailing party shall be required to pay the
570 reasonable expenses incurred by the prevailing party in such suit and all
571 damages and costs (including attorney fees), but the Grantee may be
572 allowed, either by the court in the judgment of forfeiture or by order of
573 the City Council, a reasonable time thereafter, as fixed by such judgment
574 or order, to correct the default and pay such expenses, damages and costs
575 as it may be adjudged to pay, and if the Grantee does so correct and so
576 pay within a reasonable time, forfeiture shall not become effective nor be
577 enforced.

- 578 (G) Failure by the City or the Grantee to enforce rights under this franchise
579 does not constitute a waiver of the rights.

580 **SECTION 12. INDEMNITY.**

- 581 (A) The Grantee shall defend, indemnify and hold City harmless from and
582 against all damages, cost, loss or expense for the repair, replacement, or
583 restoration of City's property, equipment, materials, structures and
584 facilities which are damaged, destroyed or found to be defective as a
585 result of the Grantee's negligence or willful misconduct.
- 586 (B) The Grantee, for itself and its agents, employees, subcontractors, and the
587 agents and employees of any subcontractors, shall defend, indemnify, and
588 hold the City, its Successors, assigns, officers, employees and elected
589 officials harmless from and against any and all claims, demands, suits,
590 causes of action, and judgments for: (i) Damage to or loss of the property
591 of any person (including, but not limited to the Grantee, its agents,
592 officers, employees and subcontractors, City's agents, officers and
593 employees, and third parties); and/or (ii) death, bodily injury, illness,
594 disease, worker's compensation, loss of services, or loss of income or
595 wages to any person (including but not limited to the agents, officers and
596 employees of the Grantee, the Grantee's subcontractors and City, and
597 third parties), resulting from the negligence or willful misconduct of the
598 Grantee, its agents, employees, or subcontractors, in the performance of
599 all activities and services under this franchise.
- 600 (C) The Parties shall give each other prompt written notice of any claims or
601 suits. The Parties shall have the right to investigate, defend and
602 compromise same to the extent of their own interests.

603 **SECTION 13. NOTICES.**

604 Notices from the Grantee to the City under this franchise shall be directed to
605 the City Attorney and the Director of Austin Financial Services, individually,
606 at P.O. Box 2920, Austin, Texas 78768, or to the officer as designated by the
607 City Council. Notice shall be deemed received on the date shown on the
608 confirmation receipt when given by certified mail, return receipt requested, or
609 the date of confirmation of transmission when by electronic transmission. The
610 Parties shall also provide a telephone number operational during normal
611 business hours for the conduct of matters related to this franchise. Any change
612 in address or telephone number shall be furnished to the other party 10 days
613 prior to the change.

614 **SECTION 14. FORFEITURE AND TERMINATION.**

- 615 (A) In addition to all other rights and powers retained by the City under this
616 franchise or otherwise, the City reserves the right to forfeit and terminate
617 this franchise and all rights and privileges of the Grantee hereunder in the
618 event of a material breach of its terms and conditions, subject to
619 reasonable notice and opportunity to cure, as provided in Section 11 as
620 well as the provisions of Section 18.
- 621 (B) Material breaches of this franchise specifically include, but are not
622 limited to the violations set forth in Sections 3, 4, 5, 7, and the provision
623 of services not authorized by this franchise.
- 624 (C) The preceding shall not constitute a material breach if the violation
625 occurs without the fault of the Grantee or occurs as a result of
626 circumstances beyond its control. The Grantee shall not be excused from
627 performance of any of its obligations under this franchise by mere
628 economic hardship, nor misfeasance or malfeasance of its directors,
629 officers or employees.
- 630 (D) A termination shall be declared only by a written decision of the City
631 Council after an appropriate public proceeding before the City Council,
632 which shall accord the Grantee due process and full opportunity to be
633 heard and to respond to any notice of grounds of termination. All notice
634 requirements shall be met by providing written notice to the Grantee at
635 least 15 days prior written notice of a public hearing concerning the
636 proposed termination of this franchise. Such notice shall state the
637 grounds for termination alleged by the City.

638 (E) The City Council, after public hearing, and upon finding the existence of
639 grounds to terminate, may either declare this franchise terminated or
640 excuse the breach upon a showing by the Grantee of mitigating
641 circumstances or good cause for the existence of such grounds.

642 (F) Neither the Grantee's acceptance of this franchise, the Grantee's
643 appearance before the City Council at any public hearing concerning
644 proposed termination of this franchise nor any action taken by the City
645 Council as a result of such public hearing, including a declaration of
646 termination or a finding of grounds to terminate, shall be construed to
647 waive or otherwise affect the Grantee's right to seek judicial
648 determination of the rights and responsibilities of the parties under this
649 franchise.

650 **SECTION 15. GOVERNING LAW.**

651 This franchise is subject to the provisions of the Constitution and laws of the
652 United States of America and the State of Texas and the Charter and lawful
653 ordinances of the City of Austin.

654 **SECTION 16. FORCE MAJEURE.**

655 The time within which the Grantee shall be required to perform any act under
656 the franchise shall be extended by a period of time equal to the number of
657 days performance is delayed due to a force majeure, nor shall the Grantee be
658 subject to any penalty hereunder because of acts or failure to act due to force
659 majeure. The term "force majeure" shall mean delays due to acts of God,
660 civil disturbances, fire, unavoidable casualty, construction delays due to
661 weather, failure of suppliers, or for other similar causes beyond the control of
662 Grantee.

663 **SECTION 17. SEVERABILITY AND PREEMPTION.**

664 (A) Except as provided in Subsection (B) of this section, if any section,
665 subsection, sentence, clause, phrase, term, provision, condition, covenant
666 or portion of this franchise is for any reason held invalid or unenforceable
667 by any court of competent jurisdiction, or superseded by state or federal
668 legislation, rules, regulations or decision, the remainder of this franchise
669 shall not be affected, but shall be a separate, distinct and independent
670 provision, and such holding shall not affect the validity of the remaining
671 portions, and each remaining section, subsection sentence, clause, phrase,
672 provision, condition, covenant and portion of this franchise shall be valid

673 and enforceable to the fullest extent permitted by law.

674 (B) If Section 8 of this franchise is held invalid or unenforceable by any court
675 of competent jurisdiction, or superseded by state or federal law, rules,
676 regulations or decision so that the intent of these provisions is frustrated,
677 the parties agree to immediately negotiate a replacement provision to
678 fulfill the purpose and intent of the superseded provisions consistent with
679 applicable law.

680 (C) If federal or state laws, rules or regulations preempt a provision or limit
681 the enforceability of a provision of this franchise, then the provision shall
682 be read to be preempted to the extent and for the time required by law. In
683 the event such federal or state law, rule or regulation is subsequently
684 repealed, rescinded, amended or otherwise changed so that the provision
685 that had been preempted is no longer preempted, such provision shall
686 return to full force and effect, and shall thereafter be binding on the
687 parties, without the requirement of further action on the part of the City,
688 and any amendments to this franchise negotiated pursuant to Subsection
689 (B) of this section as a result of such provision being preempted shall
690 no longer be of any force or effect.

691 **SECTION 18. DISPUTE RESOLUTION.**

692 (A) If a dispute arises out of or related to this franchise, or the breach
693 thereof, the parties agree to negotiate prior to prosecuting a suit for
694 damages. However, this section does not prohibit the filing of a lawsuit
695 to toll the running of a statute of limitations or to seek injunctive relief.
696 Either party may make a written request for a meeting between
697 representatives of each party within fourteen (14) calendar days after
698 receipt of the request or such later period as agreed by the parties. Each
699 party shall include, at a minimum, one (1) senior level individual with
700 decision-making authority regarding the dispute. The purpose of this and
701 any subsequent meeting is to attempt, in good faith, to negotiate
702 resolution of the dispute. If within thirty (30) calendar days after such
703 meeting, the parties have not succeeded in negotiating a resolution of the
704 dispute, they will proceed directly to mediation as described below.
705 Negotiation may be waived by a written agreement signed by both
706 parties, in which event the parties may proceed directly to mediation as
707 described below.

708 (B) If the efforts to resolve the dispute through negotiation fail, or the parties
709 waive the negotiation process, the parties may select, within thirty (30)

710 calendar days, a mediator trained in mediation skills to assist with
711 resolution of the dispute. Should they choose this option, the City and the
712 Grantee agree to act in good faith in the selection of the mediator and to
713 give consideration to qualified individuals nominated to act as mediator.
714 Nothing in the Franchise prevents the parties from relying on the skills of
715 a person who is trained in the subject matter of the dispute or a contract
716 interpretation expert. If the parties fail to agree on a mediator within
717 thirty (30) calendar days of initiation of the mediation process, the
718 mediator shall be selected by the Travis County Dispute Resolution
719 Center (DRC).

- 720 (C) The parties agree to participate in mediation in good faith for up to thirty
721 (30) calendar days from the date of the first mediation session. The City
722 and the Grantee will share costs of the mediator selected to mediate the
723 dispute, equally.

724 **PART 3.** In compliance with state law and Article XI (Franchises and Public Utilities),
725 Section 3 (Ordinance Granting Franchise) of the City Charter, Grantee shall bear the
726 expense of publishing this ordinance in a newspaper of general circulation in the City
727 within five days after each of the three readings of this ordinance.

728 **PART 4.** If any of the terms of this ordinance conflict with the City Charter, the terms
729 of the Charter prevail.

730 **PART 5.** The Grantee shall, within 60 days after passage and approval of this
731 Ordinance, file in the office of the City Clerk a written instrument accepting this
732 Ordinance and its franchise and all terms and conditions, signed and acknowledged by
733 its proper officers in a form acceptable to the City.

734 **PART 6.** The Grantee shall, within 60 days after passage and approval of this
735 Ordinance, file in the office of the City Clerk a written instrument accepting this
736 Ordinance and its franchise and all terms and conditions, signed and acknowledged by
737 its proper officers in a form acceptable to the City.

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