

STATE OF TEXAS

ORDINANCE NO. \_\_\_\_\_

CITY OF KYLE

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF KYLE TEXAS, GRANTING A TRANSMISSION AND DISTRIBUTION ELECTRIC UTILITY FRANCHISE TO PEDERNALES ELECTRIC COOPERATIVE, INC. FOR A FIVE YEAR TERM COMMENCING ON THE EFFECTIVE DATE; CONTAINING VARIOUS TERMS AND CONDITIONS WITH REGARD TO THE GRANT OF SUCH FRANCHISE; CONTAINING A SEVERABILITY CLAUSE; PROVIDING FOR THE REPEAL OF ANY PRIOR ORDINANCES GRANTING A FRANCHISE TO PEDERNALES ELECTRIC COOPERATIVE, INC. FOR SUCH PURPOSES; AND PROVIDING AN EFFECTIVE DATE.**

**BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF KYLE, TEXAS, that:**

Section 1. Grant. Subject to article XI of its Home Rule Charter, the City of Kyle, 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 streets, alleys, lanes, and public utility easements owned or controlled, or hereafter owned or controlled by the City and over and across any stream or streams, bridge, or bridges, now or hereafter owned or controlled by the City, a system of poles, pole lines, transmission and distribution lines, wires, guys, conduits, conductor, transformers, enclosures, concrete pads, ground rods, cable risers, and fiber optic cables and other desirable instrumentalities and appurtenances necessary or proper for the purpose of transmitting, distributing, carrying, conducting, conveying, supplying, furnishing and selling to the City and the inhabitants of the City or other person or persons, firms or corporations, whether within or without the City, electricity, energy, power, light, heat, energy services, and for any other purpose for which electricity or energy services may be now or hereafter used.

Section 2. City Property; Annexation. 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 quarterly payment that does not include gross revenues for Cooperative customers within a newly annexed area until ninety (90) days after written notice from the City to the Cooperative of any such annexation. Thereafter the Cooperative shall assure that any and all customers located within such annexed territory be included and shown on its accounting system as being within the City. After such ninety (90) day written notice from the City to the Cooperative, all customers’ accounts located within such annexed territory shall begin accrual for purposes of the payment provisions specified in this Ordinance.

Section 3. Relocation; Electric Facilities; Pole Attachments.

(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 a street or other City right-of-way to be shifted or relocated to a new position in a street or other available right-of-way, such structures, lines, guys, or other installations shall be so shifted or relocated by the Cooperative at the Cooperative's expense; provided, however, the City shall work with Cooperative in good faith to determine the most cost effective method of relocation or shifting of Cooperative's facilities and the City may not require the Cooperative to relocate its facilities underground in a public easement unless the City elects to pay for such placement underground. City shall give the Cooperative reasonable prior written notice of its projects requiring relocation of the Cooperative's facilities. In the event that Cooperative is required by City to remove or relocate its facilities under this Section and City is eligible under federal, state county, local or other programs for reimbursement of costs and expense incurred by Cooperative as a result of such removal or relocation, and such reimbursement is required to be handled through the City, City and Cooperative will coordinate to include Cooperative costs and expenses in any application by City for reimbursement and City shall attempt to provide notice to Cooperative of the deadline for submission of its costs and expenses to the City. If reimbursement is available for relocation of Cooperative facilities, the Cooperative shall receive its portion of reimbursement payments attributable to its facilities.

(b) If a third party desires or the City requires Cooperative to adapt or conform any of Cooperative's facilities, or in any way alter, relocate or change Cooperative's property to enable any third party 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 losses, cost or expense occasioned thereby to be paid by the third party.

Section 4. Operations and Maintenance.

(a) Subject to the primacy of City's uses of its streets, alleys and rights-of-way, 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 will be coordinated with the City in advance of any such work unless such work is precipitated by an emergency or the immediate need to repair Cooperative facilities in order to maintain the health and safety of the public. The design, construction and maintenance of the Cooperative facilities shall be in accordance with Cooperative standards. Structures, lines, guys, and other installations shall be erected consistent with the National Electrical Safety Code and any other applicable state and national standards.

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

Section 5. Indemnification - Cooperative. THE COOPERATIVE WILL INDEMNIFY, DEFEND AND HOLD HARMLESS THE CITY, ITS OFFICERS, AGENTS, SERVANTS, AND EMPLOYEES FROM AND AGAINST ANY AND ALL SUITS, LEGAL ACTIONS, LEGAL PROCEEDINGS, CLAIMS, DEMANDS, DAMAGES, COSTS, EXPENSES, AND ATTORNEYS' FEES INCIDENT TO ANY WORK DONE IN THE PERFORMANCE OF THIS ORDINANCE ARISING OUT OF A WILLFUL OR NEGLIGENT ACT OR OMISSION OF THE COOPERATIVE, ITS OFFICERS, AGENTS, SERVANTS OR EMPLOYEES, PROVIDED, HOWEVER, THAT THE COOPERATIVE SHALL NOT BE LIABLE FOR ANY SUIT, ACTIONS, LEGAL PROCEEDINGS, CLAIMS, DEMANDS, DAMAGES, COSTS, EXPENSES, AND ATTORNEYS' FEES ARISING OUT OF A WILLFUL ACT OR NEGLIGENT ACT OR OMISSION OF THE CITY, ITS OFFICERS, AGENTS, SERVANTS OR EMPLOYEES.

Section 6. Term. This Ordinance shall be in force and effect for a period of five (5) years from and after (the Effective Date (as defined in Section 14 herein. The payments provided for in Section 7 of this Ordinance shall be effective for the Cooperative's gross revenues from its sale of energy and power sold within the City commencing on the first day of the month following the thirty (30) day notice period that the Cooperative is required to provide to the Cooperative's customers

Section 7. Franchise Fee.

(a) In consideration of the rights granted to the Cooperative herein, the Cooperative, during the term of this Ordinance shall pay a fee of four and one-half percent (4.5%) of the gross revenues received by the Cooperative from the Cooperative's sale of energy and power sold to customers within the city limits of the City during such previous quarter. It is agreed that such payment is in addition to any ad valorem tax now or hereafter to be assessed and collected under the authority of the City's charter or under the laws of the State of Texas. Other than with respect to such ad valorem taxes, the payment so provided for in this Section is in lieu of all other fees or charges of any nature, and the City shall not impose or collect, nor attempt to impose or collect, any other charge or fee in connection with the construction, operation, and maintenance of the Cooperative facilities within the City under this Ordinance, except as provided under section 11.07 of the Home Rule Charter of the City of Kyle, Texas. The term "gross revenues" shall not include (1) local, state, or federal taxes collected by Cooperative that have been billed to its customers and separately stated on customers' bills, (2) the franchise fee paid under this Ordinance, (3) revenue uncollectible from customers (i.e., bad debts) with billing addresses in the City that may have previously been included in gross revenues, or (4) revenue from the Cooperative's pole attachment agreements. Cooperative shall be entitled to list the franchise fee as a separate line item on monthly bills of Cooperative members who have meters within the City limits. The payments provided for in this Section 7 will reflect the Cooperative's gross revenues on a quarterly basis and will be due to the City within forty-five (45) days after the close of each quarter following the implementation of the franchise fee by the Cooperative, irrespective of the Cooperative's fiscal year. The franchise fee is due and payable to the City without further notice, demand, or invoice.

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

Section 8. Reports and Audits.

(a) 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.

(b) Cooperative shall permit City or its agents to inspect, audit during regular business hours, the books, papers and records kept by Cooperative in the ordinary course of business necessary to verify the franchise fee payment provided for in Section 7 hereof such as plats and utility maps identifying locations in the City.

(c) For the purpose of performing an audit of this Ordinance, the City Manager or designee and the City’s auditor shall have the right, at its expense, at reasonable times, to inspect to examine, audit, and obtain copies of the papers, books, accounts, documents, and other business records of Cooperative kept by Cooperative in the ordinary course of business necessary to verify the franchise fee payment..

Section 9. Assignment. This Ordinance may be assigned by the Cooperative to any entity with the consent of the City, which consent shall not be unreasonably withheld.

Section 10. Superseding Effect. This Ordinance supersedes for all purposes any other written agreements with respect to the franchise prior to the acceptance of this Ordinance.

Section 11. Severability. The provisions of this Ordinance are severable, and if any court of competent jurisdiction enters a final order which holds that any section, subsection, sentence, clause, phrase, or other portion of this Ordinance is invalid, illegal, or otherwise unenforceable, then any such portion shall be deemed a separate, distinct and independent provision, and any such ruling shall not affect any other provision of this Ordinance which are not specifically designated as being illegal, invalid or unenforceable.

Section 12. Notices. Notice to the parties under this Ordinance shall be in writing and shall be by certified mail, return receipt requested, or by private delivery service such as Federal Express or U.P.S. addressed as follows:

To the City:

City of Kyle, Texas  
Attn: City Manager  
100 W. Center Street  
Kyle, TX 78640

With a copy to:

City of Kyle, Texas  
Attn: Director of Finance  
100 W. Center Street  
Kyle, TX 78640

To the Cooperative:

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

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

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

Section 13. Confidential Information. To the extent allowed by law, including the Texas Public Information Act, the City agrees to hold in strict confidence any non-public information, information marked proprietary or confidential that it receives from the Cooperative or such information that by its nature or under the particular circumstances of disclosure should be understood by City, exercising its reasonable judgment, to be the confidential information of the Cooperative.

Section 14. Effective Date. This Ordinance shall take effect immediately from and after its passage and adoption in accordance with applicable provisions of Section 11.02 of the Home Rule Charter of the City of Kyle, Texas, and Chapter 52 of the Texas Local Government Code (the “Effective Date”); provided, however, the payment of the franchise fee will be as described in Section 6.

Section 15. Open Meetings. It is hereby officially found and determined that the meeting at which this ordinance is passed was open to the public as required and that public notice of the time, place, and purpose of said meeting was given as required by the Open Meetings Act, Chapter 551 of the Texas Government Code.

**PASSED AND ADOPTED THIS THE \_\_\_\_\_ DAY OF \_\_\_\_\_, 2017.**

CITY OF KYLE

\_\_\_\_\_  
Mayor

ATTEST:

\_\_\_\_\_  
City Secretary

**ACKNOWLEDGED, ACCEPTED, AND AGREED TO:**

**PEDERNALES ELECTRIC COOPERATIVE, INC.**

BY: \_\_\_\_\_

NAME: \_\_\_\_\_

DATE: \_\_\_\_\_