

AN ORDINANCE GRANTING AN ELECTRIC LIGHT, HEAT AND POWER FRANCHISE TO BARTLETT ELECTRIC COOPERATIVE, INC.; PROVIDING FOR A FEE FOR THE USE OF THE PUBLIC RIGHTS-OF-WAYS; AND PROVIDING THAT SUCH FEE SHALL BE IN LIEU OF OTHER FEES AND CHARGES, EXCEPTING AD VALOREM TAXES

WHEREAS, Bartlett Electric Cooperative, Inc., a Texas non-profit electric cooperative corporation (“Grantee”), is in the business of supplying electricity for light, heat, power and other purposes, and has applied pursuant to Article XI of the City of Killeen’s Charter, Local Government Code Chapter 282, and Chapter 33 of the Texas Utilities Code for consent of the City of Killeen, Texas (“City”) to make use of its public ways for the purpose of providing such service within the City; and

WHEREAS, it is hereby found and determined by the City Council that it is in the best interests of the City that such consent be granted, subject to the terms and conditions provided herein; and

WHEREAS, the meeting at which this ordinance was passed was open to the public, and notice of the time, place and purpose of said meeting was given as required by law, all in strict accordance with the requirements of the Texas Open Meetings Act;

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

SECTION 1: *Findings.* The City Council officially finds and declares that the facts and recitations set forth in the preamble to this ordinance are true and correct.

SECTION 2: *Grant.* Subject to the provisions of the City’s Code of Ordinances, as such may be amended from time to time, Grantee is hereby granted the right, privilege and franchise to construct, maintain, and operate in the present and future streets, alleys and public ways (“Public Rights-of-Way”) of the City of Killeen, Texas (including, to the extent allowed by law, any area subsequently annexed into the City during the term of this franchise), electric, light and power lines, with all necessary or desirable appurtenances (including underground conduit poles, wires, transmission lines and other structures and telephone wires for its own use) (the “System”) for the purpose of supplying electricity to the said City, the inhabitants thereof, and persons and corporations beyond the limits thereof, for light, heat, power and other purposes. This franchise does not confer upon Grantee the right, privilege or authority to provide data delivery service, cable television service, or telephone service, or to engage in any other business within the City other than the transmission and distribution of electric power as herein provided.

SECTION 3: *Term.* This franchise shall become effective upon the later of its passage and publication pursuant to the City’s Charter, and Grantee’s written acceptance as provided below, and unless sooner terminated as herein provided shall expire on June 30, 2031; provided that, unless either the City or Grantee gives written notice not less than sixty (60) days before the expiration of the term, the franchise shall be automatically renewed for an additional period of three (3) months from such expiration date, and shall be automatically renewed thereafter for like periods until canceled by written notice given not less than sixty (60) days before the expiration of any such renewal period.

SECTION 4: *Non-Exclusivity.* This franchise is not exclusive, and nothing herein contained shall be construed so as to prevent the City from granting other like or similar rights and privileges to any other person, firm or corporation, provided that such grant does not unreasonably interfere with the rights granted herein.

SECTION 5: *Rights Reserved.*

- A. The City reserves the right to lay, and permit to be laid, storm, sewer, gas, water, wastewater, voice, video, data and other pipelines, cable, and conduits or other improvements, and to do and permit to be done any underground or overhead work that may be necessary or proper in, across, along, over, through or under Public Rights-of-Way occupied by Grantee. The City also reserves the right to change in any manner any curb, sidewalk, highway, alley, public way, street, utility lines, water or wastewater pipes, gas lines, storm sewers, drainage basins, drainage ditches, and the like. Upon request by City, Grantee shall relocate its facilities at Grantee's expense, to the extent provided by Section 37.101(c) of the Texas Utilities Code, or successor or similar legislation, as amended. When Grantee is required by City to remove or relocate its poles, towers, conduits, cables and other facilities to accommodate public right-of-way improvements, and Grantee is eligible under Federal, State, County, City or other local agencies or programs for reimbursement of costs and expenses incurred by Grantee as a result of such removal or relocation and such reimbursement is required to be handled through City, Grantee's costs and expenses shall be included in any application by City for reimbursement, if Grantee submits its cost and expense documentation to City prior to the filing of the application. City shall provide reasonable notice to Grantee of the deadline for Grantee to submit documentation of the costs and expenses of such relocation to City. In the event of a conflict between this Franchise and an ordinance of the City addressing Public Rights-of-Way management, this Franchise shall control.
- B. If Grantee has spare ducts in its underground conduits or space on any of its poles not then necessary in the conduct of its business, it may permit the City to use one such duct in each conduit or reasonable communications space on poles, or both, for the City's police and fire alarm wires, traffic control wire or cable, fiber optic lines connecting City facilities or other similar, appropriate non-commercial, governmental use, and the City shall execute an attachment agreement with Grantee and pay Grantee a fair rental therefore. Upon notice by Grantee that such facilities have or will become necessary in the conduct of its business, the City shall cease its use of such facilities within ninety (90) days of such notice.
- C. If City abandons any public rights-of-way in which Grantee has facilities, such abandonment shall be conditioned on Grantee's right to maintain its use of the former public rights-of-way and on the obligation of the party to whom the public rights-of-way are abandoned to reimburse Grantee for all removal or relocation expenses if Grantee agrees to the removal or relocation of its facilities following abandonment of the public rights-of-way. If the party to whom the public rights-of-way are abandoned requests the Grantee to remove or relocate its facilities and Grantee agrees to such removal or relocation, such removal or relocation shall be done within a reasonable time at the expense of the party requesting the removal or relocation. If relocation cannot practically be made to another public right-of-way, the expense of any right-of-way acquisition shall be considered a relocation expense to be reimbursed by the party requesting the relocation.
- D. If the City requires the Grantee to adapt or conform its facilities, or in any manner to alter, relocate or change its property to enable any entity other than the City to use, or use with greater convenience, said public rights-of-way, the Grantee shall not be bound to make such changes until such other entity shall have undertaken, with good and sufficient bond, to reimburse the Grantee for any costs, loss or expense which will be caused by, or arises out of such change, alteration or relocation of Grantee's property or facilities.

- E. Grantee retains all of its lawful authority and rights under the Public Utility Regulatory Act (“PURA”) and any other applicable laws, rules and regulations.

SECTION 6: *Service Standard.* Service furnished hereunder to the City and its inhabitants shall be first class in all respects considering all circumstances, and shall be subject to such reasonable rules and regulations as the City may make from time to time. Grantee shall at all times comply with all applicable laws and regulations, and shall at its sole expense maintain all licenses, permits and certifications necessary or appropriate for the exercise of its rights hereunder. However, this Franchise shall in no way affect or impair the rights, obligations or remedies of the parties under PURA, or other state and federal law, rules or regulations. Nothing herein shall be deemed a waiver, release or relinquishment of either party’s right to contest, appeal or file suit with respect to any action or decision of the other party, including ordinances adopted by the City that Grantee believes are contrary to any federal, state or local law, rules or regulations.

SECTION 7: *Installation and Maintenance.* All of Grantee’s poles, conduits, structures and other appurtenances shall be erected and maintained in good order and condition, and so as not to unreasonably interfere with traffic over Public Rights-of-Way, or present a danger to life or property. Grantee shall promptly restore any Public Rights-of-Way to at least the same condition as existed prior to any damage caused by the exercise of Grantee’s rights hereunder. Grantee shall obtain a permit from the City Manager or designee in compliance with the City’s Streets, Sidewalks and Miscellaneous Public Places Ordinance Sec. 25-52 prior to installation of any new facilities. If a permit is not issued by the City to Grantee within one (1) week of Grantee’s application for such permit, then the permit shall be deemed granted. The location of all poles, conduits, and other structures shall be subject to approval of the City’s Public Works Director, but not so as to unreasonably interfere with the proper operation of said lines. An approval by such Director, or any other agent of the City, of any part of Grantee’s performance shall not be construed to waive compliance with this franchise or to establish a standard of performance other than required by this franchise or by law. Pursuant to the City’s Streets, Sidewalks and Miscellaneous Public Places Ordinance Sec. 25-52, Grantee shall provide the Public Works Director once each calendar month electronic “as-built” files depicting new infrastructure installed in the City limits or its extraterritorial jurisdiction, and a report giving the location of each utility pole which Grantee has set in the right-of-way of any and all streets and alleys in the City during the preceding calendar month. In addition, each January Grantee shall provide the Public Works Director updated electronic files reflecting Grantee’s current infrastructure location maps. All electronic files shall be in PDF or other format reasonably acceptable to the City.

SECTION 8: *Tree Pruning.* Grantee shall have the right and privilege, insofar as the City is able to grant the same, in accordance with National Arborist Association standards, of the pruning of all trees which overhang the Public Rights-of-Way, in such a manner and to such extent as will prevent the branches or limbs or other parts of such trees from touching or interfering with its wires, poles and other fixtures and equipment.

SECTION 9: *Books and Records.* During the term of this franchise and for a minimum of two years thereafter, Grantee shall keep and maintain comprehensive records, accounts, and financial and operating reports in a manner that will allow the City to verify Grantee’s compliance with the terms of this franchise. The Finance Director shall, upon 15 days’ advance notice, have the right to inspect such records. In the event such Director determines that Grantee has not complied with any term or condition of this franchise, the Director shall have the right to use those records in any manner necessary to resolve Grantee’s noncompliance. If Grantee provides confidential or proprietary information to the City under this or any other provision of this franchise, Grantee shall be solely responsible for identifying such information with markings calculated to bring the City’s attention to the proprietary or confidential nature of the

information. The City agrees to maintain the confidentiality of any non-public information obtained from Grantee so designated to the extent allowed by law. City shall not be liable to Grantee for the release of any information the City is required to release by law, or that the City, after consultation with legal counsel, in good faith believes it is required by law to release. City shall endeavor to: (i) provide notice to Grantee of any request for release of information marked by Grantee as proprietary or confidential prior to releasing the information so as to allow Grantee adequate time to pursue available remedies for protection; and (ii) provide Grantee with a copy of any request the City submits to the Texas Attorney General seeking an opinion on the disclosure of such information.

SECTION 10: *Franchise Fees.* In consideration of the privilege and license granted by the City, Grantee agrees to pay and City agrees to accept franchise fees paid on an annual basis. Franchise fees shall be calculated as four percent (4%) of the gross receipts from the sale of electricity within the City limits for the calendar year January to December, in lieu of any and all occupation taxes, assessments, municipal charges, fees, easement taxes, franchise taxes, license, permit and inspection fees or charges, street taxes, bonds, street or alley rentals, and all other taxes, charges, levies, fees and rentals of whatsoever kind and character which the City may impose or hereafter be authorized or empowered to levy and collect, excepting only the usual general and special ad valorem taxes which the City is authorized to levy and impose upon real and personal property, sales and use taxes, and special assessments for public improvements. The franchise fees hereunder shall be payable on or before the thirty first (31st) day of January following the year for which payment is made, beginning with the first such date following the Effective Date of this Franchise. However, the first such payment shall be prorated as necessary to reflect only those gross receipts received by the Grantee after the Effective Date of this Franchise. If any payment due date required herein falls on a weekend or bank holiday, payment shall be made on or before the close of business of the first working day after the payment due date. At the time such payment is delivered, Grantee shall file with the City a sworn report containing a detailed accounting of the calculated fee, together with such additional information as the City may reasonably require.

SECTION 11: *Late Fees; Audit Fees.* Grantee shall pay a late penalty calculated in accordance with the interest rate for customer deposits established by the Public Utility Commission of Texas (“PUC”) in accordance with Texas Utilities Code Section 183.003 as amended, for the time period involved on franchise fee payments (or portions thereof) that are not timely received by the City. In addition, if the results of any audit indicate Grantee underpaid the franchise fee by more than five percent (5%), then Grantee shall pay the reasonable costs of the audit.

SECTION 12: *No Waiver.* No acceptance of payment shall be construed as a release or as an accord and satisfaction of any claim the City may have for further or additional sums payable under this franchise or for the performance of any other obligation hereunder. Any overpayment to the City through error or otherwise will, at the sole option of the City, either be refunded or offset against the next payment due from Grantee. Waiver of the City’s rights hereunder may only be effected by a written instrument approved by the City Council. The provisions of this Section will survive termination or expiration of this franchise.

SECTION 13: *Insurance.* Upon acceptance of this franchise by Grantee and before Grantee shall have any rights hereunder, Grantee shall file with the City a certificate of insurance evidencing General Liability Insurance which covers claims for bodily injury, property damage and death. Such insurance shall have minimum limits of \$1,000,000 per occurrence and be written by insurance companies authorized to do business in Texas and having a minimum A.M. Best rating of “A” Class “VII.” All insurance contracts and certificates of insurance will: (i) name the City as an “additional named insured;” (ii) state that coverage shall not be canceled, nonrenewed or materially changed except after 30 days written notice by certified mail to the City; (iii) waive subrogation against the City, its officers, employees

and elected representatives; and (iv) provide that such insurance is primary insurance with respect to the City, its officers, employees and elected representatives. Grantee shall continuously and without interruption maintain in force the insurance coverage and limits required by this Section.

SECTION 14: *Release and Indemnity.* The rights granted by this franchise shall not create any additional liability to the City. **GRANTEE HEREBY RELEASES AND DISCHARGES THE CITY FROM AND FURTHER COVENANTS AND WARRANTS THAT IT WILL PROTECT, DEFEND, INDEMNIFY AND HOLD HARMLESS THE CITY, ITS AGENTS, OFFICERS, OFFICIALS, LEGAL REPRESENTATIVES, EMPLOYEES, INSURERS AND ASSIGNS (COLLECTIVELY REFERRED TO IN THIS SECTION AS “THE CITY”) FROM ANY AND ALL FINES, DEMANDS, DAMAGES, INJURIES OR CLAIMS AND CAUSES OF ACTION ARISING BY REASON OF OR IN CONNECTION WITH: (i) THE ACTUAL OR ALLEGED ERRORS, INTENTIONAL ACTS, OMISSIONS OR NEGLIGENT ACTS OF GRANTEE (INCLUDING ITS OFFICERS, AGENTS, BONDING COMPANIES, EMPLOYEES AND ANY OTHER PARTY EMPLOYED OR CONTRACTED BY GRANTEE TO PERFORM UNDER THIS FRANCHISE) RELATING TO THIS FRANCHISE; AND (ii) ANY ACTION OR FAILURE TO ACT BY GRANTEE (INCLUDING ITS OFFICERS, AGENTS, BONDING COMPANIES, EMPLOYEES AND ANY OTHER PARTY EMPLOYED OR CONTRACTED BY GRANTEE) TO PERFORM UNDER THIS FRANCHISE IN CONNECTION WITH THE SYSTEM OR THIS FRANCHISE. IN THE EVENT OF JOINT AND CONCURRENT NEGLIGENCE OR FAULT OF BOTH THE CITY AND GRANTEE, RESPONSIBILITY AND INDEMNITY, IF ANY, SHALL BE APPORTIONED COMPARATIVELY IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO THE CITY UNDER TEXAS LAW AND WITHOUT WAIVING ANY OF THE DEFENSES OF THE PARTIES UNDER TEXAS LAW. FURTHER, IN THE EVENT OF JOINT AND CONCURRENT NEGLIGENCE OR FAULT OF BOTH THE GRANTEE AND THE CITY, RESPONSIBILITY FOR ALL COSTS OF DEFENSE SHALL BE APPORTIONED BETWEEN THE CITY AND GRANTEE BASED UPON THE COMPARATIVE FAULT OF EACH.** This indemnity clause shall apply to Grantee whether Grantee is immune from liability or not. As to any matters arising under this indemnity provision for which Grantee has agreed to indemnify the City, Grantee shall have the right to select defense counsel, subject to City’s approval, which will not be unreasonably withheld. If Grantee fails to retain counsel within seven (7) business days of City’s written notice that City is invoking its right to indemnification under this franchise, City shall have the right to retain defense counsel on its own behalf, and Grantee shall be liable for all reasonable defense costs incurred by City, except as provided above as to joint and concurrent negligence or fault. Grantee’s liability under this indemnity clause is separate from its duties under the insurance provisions of this franchise. This section is solely for the benefit of the City and does not create or grant any rights, contractual or otherwise, to any other person or entity. The City and Grantee shall promptly advise each other in writing of any known claim or demand against Grantee or City related to or arising out of the Grantee’s activities in the Public Rights-of-Way. The obligations of this Section will survive the expiration or termination of this franchise.

SECTION 15: *Default and Remedies.* The City will give Grantee not less than 30 days’ written notice of any alleged default hereunder, provided that if the nature of the alleged default is such that the giving of such notice is impractical due to a threat of harm to life or property then the City shall give such notice as may be reasonable under the circumstances. If Grantee remains in default beyond any period provided for cure thereof, the City may terminate this franchise unless Grantee has commenced a cure and is diligently pursuing such cure. Termination is final upon the effective date of City Council adoption of an ordinance ratifying the termination. Upon any termination of this franchise, all amounts owed by Grantee to the City shall immediately become due and payable and Grantee’s obligation to pay such sums shall survive the termination of this franchise. Alternatively, the City, at its sole option

and discretion and without waiving such uncured default, may determine to: (i) maintain this franchise in full force and effect and file suit against Grantee for damages, specific performance, injunctive relief, or some combination thereof; (ii) or pursue such other remedies as may be available to the City at law or in equity, or both. The City's rights and remedies herein shall be in addition to, and not in limitation of, any other rights or remedies provided by law, in equity, or by administrative proceeding before the PUC, Federal Energy Regulatory Commission, or respective successor or similar governmental agencies.

SECTION 16: *Force Majeure.* Except as may be expressly provided otherwise, Grantee shall not be liable to the City for any failure of performance hereunder due to causes beyond Grantee's control, including but not limited to: (a) acts of God, fire, explosion, vandalism, storm, or other similar occurrences; (b) national emergencies, insurrections, riots, acts of terrorism, or wars; or (c) strikes, lockouts, work stoppage, or other labor difficulties. To the extent practicable, the Grantee shall be prompt in restoring normal conditions, establishing new schedules and resuming operations as soon as the force majeure event causing the failure or delay has ceased. Grantee shall promptly notify the City of any delay in performance under this Section and such failure's effect on performance required under this franchise.

SECTION 17: *Successors and Assigns.* The rights granted by this franchise inure to the benefit of Grantee and any entity controlling, controlled by, or under common control with Grantee. Upon any assignment such related entity assumes all obligations of Grantee hereunder and is bound to the same extent as Grantee hereunder. Grantee shall give City written notice within sixty (60) days of any such assignment. However, this provision is subject to, and nothing contained herein shall be interpreted to prevail over the rights of any lender to Grantee, including, but not limited to, the United States of America, acting through the Rural Utilities Service and/or the National Rural Utilities Cooperative Finance Corporation or their successors, by virtue of 7 U.S.C. §907, or any successor thereto, as amended from time to time.

SECTION 18: *Entire Franchise; Amendment.* This ordinance sets forth the entirety of the franchise granted hereby, and no other understandings or agreements exist with regard to such matters. This ordinance supersedes all prior franchises granted to Grantee or its predecessors. This franchise may be amended only by an ordinance duly adopted by the City Council and accepted by Grantee.

SECTION 19: *Acceptance.* In order to accept this franchise, Grantee shall file its written acceptance within sixty (60) days after its passage and approval, and if it fails to do so this franchise shall automatically expire without necessity for any further action by the City Council.

PASSED AND APPROVED on this the _____ day of _____, 2017.

ATTEST:

Dianna Barker, City Secretary

Jose L. Segarra, Mayor

Kathryn H. Davis, City Attorney

Acceptance of Franchise

To the Honorable Mayor and City Council of the City of Killeen, Texas:

Bartlett Electric Cooperative, Inc., acting by and through the undersigned authorized officer, hereby accepts Ordinance No. _____ granting an electric light, heat and power franchise.

Bartlett Electric Cooperative, Inc.

By: _____

Bryan Lightfoot,
General Manager / CEO

Date: _____

ATTEST:

Secretary