

ORDINANCE NO. 2010-08-

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MCKINNEY, TEXAS, GRANTING TO GRAYSON-COLLIN ELECTRIC COOPERATIVE, INC., A TEXAS ELECTRIC COOPERATIVE CORPORATION, ITS SUCCESSORS AND ASSIGNS, A NON-EXCLUSIVE FRANCHISE TO USE PUBLIC RIGHTS-OF-WAY OF THE CITY OF MCKINNEY, TEXAS FOR THE PURPOSES OF CONSTRUCTING AND OPERATING AN ELECTRIC DISTRIBUTION SYSTEM; SETTING FORTH TERMS AND CONDITIONS TO GOVERN THE FRANCHISE; PROVIDING A REPEALING CLAUSE, A SAVINGS CLAUSE AND AN EFFECTIVE DATE.

WHEREAS, on 21st day of August, 1990, by Ordinance No. 1877, the City of McKinney, Texas, granted a nonexclusive franchise to Grayson-Collin Electric Cooperative, Inc. and its successors and assigns to construct, erect, build, equip, own, maintain and operate in, along, under, over and across the streets, avenues, alleys, bridges, viaducts and public grounds of the City of McKinney, Texas for the purpose of transmitting, supplying, distributing and selling electricity; and,

WHEREAS, pursuant to Ordinance No. 1877, Grayson-Collin Electric Cooperative, a Texas Corporation ("the Cooperative"), is now and has been engaged in the electric utility business in the State of Texas and the City of McKinney and, in furtherance thereof, has erected and maintained portions of its physical plant in the City; and,

WHEREAS, the original franchise ordinance granted by the McKinney City Council expires on August 21, 2010; and,

WHEREAS, the City Council of the City of McKinney hereby finds that it is to the mutual advantage of both the City and the Cooperative to enter into a new franchise establishing the conditions under which the Cooperative will operate in the City; and,

WHEREAS, pursuant to Chapter 17 of the City's Charter, the City Council hereby determines that a grant of a franchise pursuant to this Ordinance is in the best interests and will inure to the benefit of the City and its citizens.

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

Section 1. Definitions.

For the purpose of this ordinance the following terms, phrases, words, abbreviations and their derivations shall have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future tense, words in the plural number include the singular number, and words in the singular number include the plural number.

- 1.1 **"City"** shall mean the City of McKinney, Texas, and includes the territory that currently is or may in the future be included within the boundaries of the City.
- 1.2 **"Cooperative"** shall mean Grayson-Collin Electric Cooperative, a Texas Electric Cooperative Corporation, its successors and permitted assigns.
- 1.3 **"Effective Date"** shall be as provided for in Section 17.
- 1.4 **"Electric Distribution System"** shall mean the Cooperative's system of cables, wires, lines, poles, towers, anchors, guy wires, insulators,

transformers, substations, conduits, ducts, and any associated equipment, or plant, or other facilities located within the City designed and constructed for the purpose of transmitting or distributing electricity to or from customers or locations within the City, as the same now exists and as may, from time to time, be placed, removed, constructed, reconstructed, extended and maintained.

- 1.5 **“Franchise”** shall mean the non-exclusive permission granted to Cooperative to use the Public Rights-of-Way for its Electric Distribution System.
- 1.6 **“Franchise Fee”** shall mean the total franchise fees due from Cooperative as set forth in Section 8, herein.
- 1.7 **“Gross Revenues”** shall mean the gross operating revenue for all services provided by Cooperative to its customers within the corporate boundaries of the City as accrued on the Cooperative’s books pursuant to the accounting principles established by the rural Utilities Service of the U.S. Department of Agriculture, 7 CFR 1767, and, specifically, 1767.26, Accounts 440-456, as amended. The term “Gross Revenue” shall include franchise fees collected from the Cooperative’s customers located with the City and shall also include miscellaneous service fees and charges and pole attachment fees. The term “Gross Revenue” shall not include (i) local, state, or federal taxes collected by Cooperative that have been billed to its customers and separately stated on customers’ bills or (ii) contributions in aid of construction (CIAC).
- 1.8 **“Laws”** shall mean any and all applicable statutes, constitutions, ordinances, resolutions, regulations, judicial decisions, rules, tariffs, administrative orders, certificates, orders, or other requirements of the City or other governmental agency having jurisdiction of the parties to this Franchise Agreement, in effect during the term of the Franchise Agreement, including but not limited to Chapter 90, Article IV, Section 90-220 et seq. of the Code of Ordinances of the City and commonly known as the Right-of-Way Use and Management Ordinance for the City of McKinney, Texas”, and as amended .
- 1.9 **“Public Right-Of-Way”** means the area of land within the City that is acquired by, dedicated to, or claimed by the City in fee simple, by easement, or by prescriptive right and that is expressly or impliedly accepted or used in fact or by operation of law as a public roadway, highway, street, sidewalk, alley, or utility access easement. The term includes the area on, below, and above the surface of the Public Right-of-Way. The term applies regardless of whether the Public Right-of-Way is paved or unpaved. The term shall not include county, state, or federal rights of way or any property owned by any person or agency other than the City, except as provided by applicable Laws or pursuant to an agreement between the City and any such person or agency.
- 1.10 **"Public Utility Commission of Texas" or "PUC"** shall mean the Texas Public Utility Commission or its successor agency.
- 1.11 **“Right-of-Way Use and Management Ordinance”** shall mean Chapter 90, Article IV, Section 90-220 et. seq. of the Code of Ordinances, and as amended.

Section 2. **Grant of Authority.**

- 2.1 **Permission/Franchise Agreement.** Subject to the terms and conditions herein, City hereby grants Cooperative non-exclusive permission to erect, construct, install and maintain an Electric Distribution System in, over, under, along and across the Public Rights-of-Way. Cooperative shall not

use the Public Rights-of-Way for any use or purpose other than its use of Electric Distribution System, without obtaining, separate, written authorization from the City for the ancillary service. Within five business (5) days of City's request, Cooperative shall provide the City a list of each person, firm or corporation that has an existing contract with Cooperative to attach facilities on Cooperative's Electric Distribution System.

- 2.2 **Non-Exclusive Use.** This Franchise does not provide Cooperative with the exclusive use of the Public Rights-of-Way and the City reserves the right to grant at any time, like privileges, rights and franchises, as it deems appropriate to any other person, corporation or business entity.
- 2.3 **Area of the City Affected.** This Franchise shall extend to and include any and all territory that is within the corporate limits of the City that have been certificated to Cooperative by the PUC. Additionally, this franchise shall extend to any and all territory that is annexed by the City during the term of this Franchise and certificated to Cooperative by the PUC. In the event of disannexation, this Franchise shall be reduced to the territory that continues to be in the City. The City shall promptly furnish Cooperative with an Ordinance including maps of the affected franchise area in the event of an annexation or disannexation. Within thirty (30) days from the date such Ordinance including maps are furnished, Cooperative shall identify all customers located within such annexed or disannexed territory and adjust its accounting system accordingly. For the purposes of calculating Gross Revenues, customers, if any, included within an annexed or disannexed area shall be deemed to commence sixty (60) days from the date the City furnishes the applicable Ordinance(s) including maps to Cooperative.
- 2.4 **City's Rights in Public Rights-of-Way.** Cooperative acknowledges that by this Franchise it obtains no rights to, or further use, of the Public Rights-of-Way other than those expressly granted herein. Cooperative acknowledges and accepts at its own risk, provided that the City has the legal authority for the use, or uses in question, that the City may use Public Rights-of-Way in which Cooperative's Electric Distribution System is located in a manner inconsistent with Cooperative's use of such Public Rights-of-Way and, in that event, Cooperative shall not be entitled to compensation or reimbursement from City.
- 2.5 **Compliance with Law.** Cooperative, during the term of this Franchise, shall be subject to and comply with all applicable local, state and Federal laws, including the rules and regulations of any and all agencies thereof, whether presently in force or whether enacted or adopted at any time in the future in constructing and maintaining its Electric Distribution System. In constructing, maintaining and operating the Electric Distribution System, Cooperative shall act in a good and workmanlike manner, observing high standards of engineering and workmanship and using materials of good and durable quality. Cooperative shall comply in all respects with applicable codes and industry standards, including but not limited to the National Electrical Safety Code (latest edition) and the National Electric Code (latest edition). Nothing in this Franchise shall be construed to waive either party's right to challenge any statute, ordinance or regulation.
- 2.6 **Continued Obligations.** This Franchise does not relieve Cooperative of the obligation to comply with applicable municipal codes and ordinances, and specifically to comply with the Right-of-Way Use and Management Ordinance, and to obtain permits, licenses and other approvals from City or other units of government that are required for the construction, repair or maintenance of the Electric Distribution System, except in no instance shall Cooperative be required to pay permitting fees or bonds related to these City permits, licenses or other approval processes.

- 2.7 **Right of Condemnation Reserved.** Nothing in this Franchise Agreement shall limit any right the City may have to acquire property by eminent domain.
- 2.8 **Fees.** Subject to Section 8.6 of this Franchise Agreement, nothing in this Franchise shall be construed to limit the authority of the City to impose a tax, fee, or other assessment of any kind on any person. Subject to Section 8.6 of this Franchise Agreement, Cooperative shall pay all fees necessary to obtain all applicable local, state, and Federal licenses, permits, and authorizations required for the construction, installation, maintenance, or operation of its Electric Distribution System.
- 2.9 **Use of Poles and Ducts.** Nothing contained in this Franchise shall be construed to require or permit any pole attachments for electric light or power wires or electrical facilities or systems not provided by Cooperative to be attached to Cooperative's poles or other physical plant by the City, or for the City, nor to require or permit any electric light or power wires or electrical facilities or systems not provided by Cooperative to be placed in any duct in Cooperative's conduit by the City or for the City. Nothing contained in this Franchise Agreement shall be construed as a City requirement that Cooperative shall share its duct space with City or with any other entity. Cooperative shall maintain sole business discretion and authority regarding sharing of duct space. Nothing herein shall prohibit the Cooperative from requiring reasonable, non-discriminatory terms and from charging just compensation pursuant to a joint use agreement however, any joint use agreement with any third party shall not be enforceable by City. If the City desires pole attachments for electric light or power wires or electrical facilities or systems not provided by Cooperative, or if the City desires to place electric light or power wires or communications facilities or systems not provided by Cooperative in any Cooperative duct, then a further separate non-contingent agreement shall be prerequisite to such attachments or such use of any duct by the City. Agreements existing prior to this Franchise Agreement remain in effect according to the terms defined in such agreements.
- 2.10 **Use of City Owned Facilities, Structures, and Physical Plant.** Nothing contained in this Franchise shall be construed to require or permit any attachments to City owned facilities, structures or physical plant by Cooperative for any purpose. If Cooperative desires attachments to any City owned facility, structure, or physical plant for any equipment related to operating the Electric Distribution System or delivering any service other than electricity through Cooperative's Electric Distribution System, then a further separate non-contingent, agreement shall be a prerequisite to such attachments or such use of any facility by Cooperative. Agreements existing prior to this Franchise Agreement remain in effect according to the terms defined in such agreements.
- 2.11 **Relocation of Electric Facilities.** The City shall compensate GCEC in accordance with applicable State law; however subject to any limitations contained in the Texas Utilities Code Section 37.101.

Section 3. **Terms of Franchise.**

This Ordinance shall become effective on August 22, 2010, after its final passage on three (3) readings, provided that Cooperative has filed with the City Secretary its written acceptance of this Ordinance prior to the Effective Date, and shall terminate on August 21, 2015, unless earlier terminated by either party in accordance with the provisions herein. Upon mutual agreement of the parties, the term of this Franchise Agreement may be renewed for one (1) additional term of five (5) years on the same terms and conditions as set forth herein or as agreed to by the parties.

Section 4. **Public Right of Way and Construction.**

Cooperative's use of Public Rights-of-Way shall be subject to its compliance with the Right-of-Way Use and Management Ordinance, as amended.

Section 5. **Compliance with Public Utility Commission Rules and Regulations.**

Cooperative shall comply with all customer service rules and regulations set by the Public Utility Commission of Texas that are applicable to electric cooperatives.

Section 6. **Liability Insurance.**

Cooperative shall obtain, maintain, and provide insurance in the amounts, types and coverages in accordance with the City's Right-of-Way Management Ordinance, as amended.

Section 7. **Indemnification and Liability for Damages.**

- 7.1 Cooperative shall release, defend, indemnify and hold harmless the City, its officers, agents and employees from and against all damages, injuries (including death), claims, property damages (including loss of use), losses, demands, suits, judgments and costs, including attorney's fees and expenses, in any way arising out of, related to, or resulting from Cooperative's use of the Public Right-of-Way or caused by the act or omission of Cooperative, its officers, agents, employees, subcontractors, licensees, invitees or any other third parties for whom Cooperative is legally responsible, except to the extent that such loss, injury, demand, suit, judgment, cost, fee, claim, damage, liability or expense is finally determined by a court of competent jurisdiction to have resulted solely from an indemnified party's negligence, willful misconduct or gross negligence. Pending judicial determination, Cooperative shall continue to defend and indemnify City. Cooperative shall promptly reimburse City for any costs or expenses incurred, including attorneys fees, in any action involving Cooperative for which discovery or witnesses are sought from City as a non-party.
- 7.2 City shall have the right to approve the defense counsel retained by Cooperative for the City in fulfilling its obligation hereunder, unless such right is expressly waived by City in writing. City reserves the right to provide a portion or all of its defense; however, City is under no obligation to do so. Any such action by City is not to be construed as a waiver of Cooperative's obligation to defend and/or indemnify the City. Cooperative shall retain approved defense counsel for the City within seven (7) business days after receipt of written notice that the City is invoking its right to indemnification under this Franchise. In the event Cooperative fails to timely retain Counsel the City shall have the right to retain counsel at Cooperative's costs.

Section 8. **Compensation to the City.**

- 8.1 **Franchise Fee.** In consideration of the grant of this Franchise by the City, and as full payment for the right, privilege and franchise of using and occupying the said Public Rights-of-Way for Cooperative's Electric Distribution System and in lieu of any and all occupation taxes; assessments; municipal charges; fees; easement taxes; franchise taxes; license; permit and inspection fees or charges associated with activities within the public right-of-way; street taxes; street or alley rentals; bonds; 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 or 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, Cooperative shall pay to the City throughout the term of this Franchise the following:

- A. The franchise fee due from Cooperative shall be a sum equal to four percent (4%) of Cooperative’s Gross Revenues, which shall be payable quarterly with payment due on or before the 30th day of the following month following the end of the calendar quarter. Cooperative shall pay franchise fees on a quarterly basis as provided below:

<u>Quarterly Period</u>	<u>Franchise Payment Due Date</u>
First (January 1-March 31)	April 30
Second (April 1-June 30)	July 31
Third (July 1-September 30)	October 31
Fourth (October 1-December 31)	January 31

- 8.2 Cooperative shall furnish to the City with each payment of compensation required by this Section a quarterly statement, executed by an authorized officer of Cooperative or designee, the amount of Gross Revenues received for the period covered by the payment and the computation of the payment amount.
- 8.3 If either party discovers that Cooperative has failed to pay the entire or correct amount of compensation due, the correct amount shall be determined and the City shall be paid by Cooperative within thirty (30) days of such discovery. Any overpayment to the City through error or otherwise shall, at the option of the City, be refunded or offset against future payments due from Cooperative. Acceptance by the City of any payment due under this Franchise shall not be deemed to be a waiver by the City of any breach of this Franchise occurring prior thereto, nor shall the acceptance by the City of any such payments preclude the City from later establishing that a different amount is due or from collecting any balance due to the City.
- 8.4 Interest on late or delinquent payments shall be calculated in accordance with the interest rate for customer deposits established by the PUC in accordance with Texas Utilities Code Section 183.003 as amended for the time period involved.
- 8.5 No taxes, fees, or other payments by Cooperative to the City, including, but not limited to, ad valorem taxes, shall reduce the Franchise Fees payable to City hereunder. Nothing in this Franchise shall be construed to prohibit the City from levying the usual general or special ad valorem taxes which the City is authorized to levy and impose upon real and personal property, general sales and use tax, assessments for public improvements, and sums to which the City may be entitled under the Texas Utility Code (the Texas Public Utility Regulatory Act), and no reduction of the Franchise Fee will occur pursuant to the Texas Public Utility Regulatory Act.
- 8.6 Cooperative is hereby authorized to surcharge to customers within the City all or any portion of the Gross Revenues assessment. All bills for services rendered within the City shall be adjusted so as to recover the Gross Revenues assessment specified herein, less any percentage that is recovered by Cooperative through base rates or other charges.

Section 9. **Accounting Matters.**

- 9.1 **Maintenance of Records.** Cooperative shall keep accurate books of account at its principal office, which is currently located in Van Alstyne, Texas, for the purpose of determining the amount due to the City under

this Franchise.

- 9.2 **Audit.** The City, or City's designee, may inspect Cooperative's books of accounts relative to the City at any time during regular business hours and on ten (10) business days' prior written notice and may audit the books from time to time but not more often than annually. All records reasonably necessary for such audit shall be made available by Cooperative at Cooperative's principal offices. Cooperative agrees to give its full cooperation in any audit and shall provide complete responses to inquiries within fifteen (15) business days of a written request. The City or City's designee may also request the identity of the service provider and the type of service delivered for any service in addition to electricity delivered directly to retail customers through Cooperative's Electric Distribution System that are located in the City's Public Right-of-Way and for which Cooperative receives compensation.
- 9.3 **Access to Records.** All records reasonably deemed by City or City's designee to be reasonably necessary for such audit shall be made available by Cooperative in a format reasonably deemed appropriate by the City and at the Cooperative's principal offices, or Cooperative shall pay the City's expenses in traveling to any other location necessary to conduct the audit. Cooperative agrees to give its full cooperation in any audit and shall attempt in good faith to provide complete responses to inquiries within twenty (20) calendar days of a written request, unless a different schedule is agreed to by the City and Cooperative.
- A. If as the result of any City audit, Cooperative is refunded/credited for an overpayment, or pays the City for an underpayment, of the Franchise Fee, such refund/credit or payment shall be made pursuant to the terms established in Sections 8.3 and 8.4.
- B. If as a result of a subsequent audit, which resulted in Cooperative making a payment to the City due to an underpayment of the Franchise Fee of more than 5%, Cooperative makes another payment to the City due to an underpayment of the Franchise Fee of more than 5%, the City may immediately treat this underpayment as an Event of Default and, if uncured as provided in Section 11.2, exercise the remedies provided for in Section 12.1.A-D.
- 9.4 **Allocation for Bundled and/or Discounted Services.** If Cooperative bundles, ties, or combines electric services (which are subject to the franchise fee under this Franchise) with non-electric services (which are not subject to the franchise fee under this Franchise) and assesses a customer only one fee, the total revenue there from shall be allocated to the electric services to the full extent that would have been charged by Cooperative if the customer had received only electric services. The rebuttable presumption shall be that the discount offered is not attributable to a discount in electric services but is in fact attributable to a discount in the non-electric services provided by Cooperative. In the event that Cooperative receives from a customer an amount less than the mandatory tariff rate amount that it would be entitled to receive for electric services due to bundling, then Section 9.4(b) shall apply.

For example, assume that Cooperative offers a price of \$100 to customers for bundling electric services, cable services and local telephone services. Based on mandatory tariff rates, the Cooperative should have received \$80 for electric services, \$30 for cable service and \$10 for local telephone service for a total of \$120. The rebuttable presumption shall be that the \$20 discount offered is not attributable to a discount in electric services but is in fact attributable to a discount in the cable and/or telephone services provided by Cooperative. Therefore, Cooperative's franchise fees would be based on the full \$80 that is attributable to the electric

services unless Cooperative proves to City pursuant to the provisions of Section 9.4(b) below that electric services were actually discounted in addition to the discounted non-electric services.

- A. Notwithstanding any interpretation to the contrary, this Franchise does not authorize Cooperative to vary or alter any payments or amounts of compensation to the City that may be dictated by another franchise, ordinance, agreement or by applicable law and are related to the use of the Public Rights-of-Way in the provision of non-electric services in the City.
- B. If Cooperative offers its customers any kind of discount for receipt of both electric services (which are subject to the Franchise Fee under this Franchise) and non-electric services (which are not subject to the Franchise Fee under this Franchise), the discount shall be applied proportionately to electric services and non-electric services upon notification to the City of such discount methodology. Such notification shall include the amount of the discount being applied to each service and documentation demonstrating the promotion and billing of such discount. This Section shall also apply to any and all price increases related to bundled services.

For example, assume that a customer's monthly charge for electric services alone would be \$40; for local telephone service alone, \$30; and for cable service alone, \$30, for a total of \$100. If Cooperative offers a single rate to the customer for taking all three services from Cooperative that, in effect, amounts to a 20% discount from the rates that would apply to the services if purchased individually, the aggregate discount in this example is \$20. For computation of the Franchise Fee, the \$20 discount would be applied pro rata so that Gross Revenue hereunder would be deemed to be \$32 (a 20% discount from the \$40 fee for electric services). The result would be the same if Cooperative offers a specific dollar discount for any services provided, such as, for example, a \$20 discount for local telephone services offered on the condition that the subscriber also take electric services at the standard \$40 rate

- 9.5 The City agrees to maintain the confidentiality of any non-public information obtained from Cooperative to the extent allowed by law. City shall not be liable to Cooperative for the release of any information that the City is required to release by law. City shall provide notice to Cooperative of any request for release of non-public information prior to releasing the information so as to allow Cooperative adequate time to pursue available remedies for protection.

If the City receives a request under the Texas Public Information Act that includes Cooperative's proprietary information, City will notify the Texas Attorney General of the proprietary nature of the document(s). The City also will provide Cooperative with a copy of this notification, and thereafter Cooperative is responsible for establishing that an exception under the Act allows the City to withhold the information.

- 9.6 The omission by the City to exercise its rights to an audit shall not constitute waiver of such right.

Section 10. Right of Renegotiation.

Should either party hereto determine that it is in its best interest to renegotiate all or some of the provisions of this Franchise, the other party agrees to enter into good faith negotiations. Said negotiations shall involve reasonable, diligent, and timely discussions about the pertinent issues and a resolute attempt to settle

those issues. The obligation to engage in such negotiations does not obligate either party to agree to an amendment of the Franchise as a result of such negotiations. If, as a result of renegotiation, the City and Cooperative agree to a change in a provision of this Ordinance, the change shall become effective upon passage of an Ordinance by the City in accordance with the City Charter and acceptance of the amendment by Cooperative. Cooperative agrees to provide the City any and all requested information related to any changes in conditions, practices, or services provided by Cooperative through the use of the Public Rights-of-Way. If Cooperative enters into any franchise with any other City that includes a provision which is more favorable to such other City than the correlative provision of this Ordinance (the "alternative provision"), such provision shall be automatically effective for the duration of this Ordinance; such alternative provision shall be enforceable in this Ordinance retroactive to the date on which it became effective in the other City regardless of when the City of McKinney has knowledge of such alternative provision.

Section 11. Defaults.

11.1 Events of Default. The occurrence, at any time during the term of the Franchise, of any one or more of the following events, shall constitute an Event of Default by Cooperative under this Franchise:

- A. The failure of Cooperative to pay the Franchise Fee on or before the due dates specified herein.
- B. Cooperative's breach or violation of any of the material terms contained herein.

11.2 Uncured Events of Default.

- A. Upon the occurrence of an Event of Default which can be cured by the immediate payment of money to the City or a third party, Cooperative shall have thirty (30) calendar days after written notice from City of an occurrence of such Event of Default to cure same before City may exercise any of its rights or remedies provided in Section 12.
- B. Upon the occurrence of an Event of Default by Cooperative which cannot be cured by the immediate payment of money to City or a third party, Cooperative shall have ninety (90) calendar days (or such additional time as agreed to by the City) after written notice from City of an occurrence of such Event of Default to cure same before City may exercise any of its rights or remedies provided for in Section 12.
- C. If any Event of Default is not cured within the time period allowed for curing the Event of Default as provided for herein, such Event of Default shall, without additional notice, become an Uncured Event of Default, which shall entitle City to exercise the remedies provided for in Section 12

Section 12. Remedies.

12.1 Remedies. Upon the occurrence of any Uncured Event of Default as described in Section 11.2, City shall be entitled to exercise any and all of the following cumulative remedies:

- A. The commencement of an action against Cooperative for monetary damages.
- B. The commencement of an action in equity seeking injunctive relief or the specific performance of any of the provisions that, as a

matter of equity, is specifically enforceable.

- C. The commencement of proceedings to seek revocation of Cooperative's certificate of convenience and necessity to serve any or all of Cooperative's service area located within the City of McKinney.
- D. The termination of this Franchise in accordance with the provisions of Section 13.

12.2 Remedies Not Exclusive. The rights and remedies of City and Cooperative set forth in this Franchise shall be in addition to, and not in limitation of, any other rights and remedies provided by law or in equity. City and Cooperative understand and intend that such remedies shall be cumulative to the maximum extent permitted by law and the exercise by City of any one or more of such remedies shall not preclude the exercise by City, at the same or different times, of any other such remedies for the same Uncured Event of Default. However, notwithstanding this Section or any other provision of this Franchise, City shall not recover both liquidated damages and actual damages for the same Uncured Event of Default, either under this Section or under any other provision of this Franchise.

Section 13. **Termination.**

In accordance with the provisions of Section 12.1D, this Franchise Agreement may be terminated upon thirty business day's prior written notice to Cooperative. City shall notify Cooperative in writing at least fifteen (15) business days in advance of the City Council meeting at which the question of forfeiture or termination shall be considered, and Cooperative shall have the right to appear before the City Council in person or by counsel and raise any objections or defenses Cooperative may have that are relevant to the proposed forfeiture or termination. The final decision of the City Council may be appealed to any court or regulatory authority having jurisdiction. Upon timely appeal by Cooperative of the City Council's decision terminating the franchise, the effective date of such termination shall be either when such appeal is withdrawn or a court order upholding the termination becomes final and non-appealable. Until the termination becomes effective the provisions of this franchise shall remain in effect for all purposes. The City recognizes Cooperative's right and obligation to provide service in accordance with the Certificate of Convenience and Necessity authorized by the Public Utility Commission in accordance with the Texas Utilities Code.

Section 14. **Assignment.**

The rights granted by this Franchise Agreement inure to the benefit of Cooperative and any parent, subsidiary, affiliate or successor entity now or hereafter existing. The rights shall not be assignable without the express written consent of the City Council of the City, which consent shall not be unreasonably withheld, except Cooperative may assign its rights under this Franchise Agreement to a parent, subsidiary, affiliate or successor entity without such consent, so long as (i) such parent, subsidiary, affiliate or successor assumes all obligations of Cooperative hereunder, and (ii) is bound to the same extent as Cooperative hereunder. Any required consent is to be evidenced by an ordinance of the City Council of the City that fully recites the terms and conditions, if any, upon which consent is given. Cooperative shall give the City sixty (60) days prior written notice of any such assignment to a parent, subsidiary, affiliate or successor entity. Any attempted assignment in violation of this Section shall be void and shall be grounds for termination by City.

Section 15. **Notices.**

15.1 All notices required by this Franchise Agreement shall be in writing and

delivered personally or transmitted (a) through the United States mail, by registered or certified mail, postage prepaid; (b) by means of prepaid overnight delivery service; or (c) by facsimile or email transmission, if a hard copy of the same is followed by delivery through the U.S. mail or by overnight delivery service as just described, addressed as follows:

If to the City:

City of McKinney

Attn: City Manager's Office

222 N Tennessee

McKinney, TX 75070

With a Copy to:

City of McKinney

Attn: City Attorney's Office

222 N Tennessee

McKinney, TX 75070

If to the Cooperative:

Grayson-Collin Electric

Attn: Chief Executive Officer

P. O. Box 548

Van Alstyne, TX 75495-0548

- 15.2 **Date of Notices; Changing Notice Address.** Notices shall be deemed given: (a) upon receipt in the case of personal delivery; (b) three (3) days after deposit in the mail; or (c) the next day in the case of facsimile or overnight delivery. From time to time, either party may designate another address for this purpose by written notice to the other party delivered in the manner set forth above.

Section 16. **Miscellaneous.**

- 16.1 **Amendment of Franchise Agreement.** This Franchise Agreement may not be amended except pursuant to an Ordinance adopted by the City and agreed to by Cooperative.
- 16.2 **Governing Law.** The laws of the State of Texas shall govern the interpretation validity, performance and enforcement of this Franchise Agreement. The parties agree that this Agreement is performable in Collin County, Texas and that exclusive venue shall lie in Collin County, Texas.
- 16.3 **Force Majeure.** In the event that the performance by either party of any of its obligations or undertakings hereunder shall be interrupted or delayed by an act of God or the result of war, riot, civil commotion, then such party shall be excused from performance for a period of time as is reasonably necessary after such occurrence to remedy the effects thereof, and each party shall bear the cost of any expense it may incur due to the occurrence.
- 16.4 **Attorneys' Fees.** Should any dispute arising out of this Franchise lead to litigation, the prevailing party shall be entitled to recover its costs of suit, including reasonable attorneys' fees.
- 16.5 **Exhibits.** All exhibits referred to in this Franchise and any addenda, attachments, and schedules which may from time to time be referred to in any duly executed amendment to this Franchise are by such reference incorporated in this Franchise and shall be deemed a part of this Franchise.
- 16.6 **Successors and Assigns.** This Franchise is binding upon the successors and permitted assigns of the parties.

- 16.7 **Consent Criteria.** In any case where the approval or consent of one party hereto is required, requested or otherwise to be given under this Franchise, such party shall not unreasonably delay or withhold consent.
- 16.8 **Waiver of Breach.** The waiver by either party of any breach or violation of any provision of this Franchise shall not be deemed to be a waiver or a continuing waiver of any subsequent breach or violation of the same or any other provision of this Franchise.
- 16.9 All ordinances of the City of McKinney, Texas, in conflict with the provisions of this ordinance be, and the same are hereby, repealed; provided, however that all other provisions of said ordinances not in conflict with the provisions of this ordinance shall remain in full force and effect. The City does not waive any sovereign immunity defense to any action by Cooperative under this Ordinance.
- 16.10 Should any word, sentence, paragraph, subdivision, clause, phrase or section of this ordinance, as amended hereby, be adjudged or held to be void or unconstitutional, the same shall not affect the validity of the remaining portions of said ordinance, which shall remain in full force and effect.
- 16.11 An offense committed before the effective date of this ordinance is governed by prior law and the Code of Ordinances of the City of McKinney, as previously amended, in effect when the offense was committed and the former law is continued in effect for this purpose.
- 16.12 In addition to any contractual remedies contained herein, any person, firm or corporation violating any of the provisions or terms of this ordinance or of the Code of Ordinances, as amended hereby, shall be subject to the same penalty as provided for in the Code of Ordinances of the City of McKinney, as previously amended, and upon conviction shall be punished by a fine not to exceed the sum of Two Thousand Dollars (\$2,000) for each offense.
- 16.13 **Limitations.** Should Cooperative desire to pursue any claim or cause of action against the City relating to this franchise, notwithstanding any provisions of any law, the Cooperative must do so in a form with appropriate jurisdiction within four years of the date that such claim or cause of action first arose or said claim or cause of action shall be forever barred.

Section 17.

This Ordinance shall become effective after its final passage on three (3) readings, provided that Cooperative has filed with the City Secretary its written acceptance of this Ordinance prior to the Effective Date. Prior to the first and third reading by the City Council, Cooperative shall provide written notification to the City indicating acceptance of this Ordinance contingent upon no amendments or changes to the document as submitted.

DULY PASSED AND APPROVED ON THE FIRST READING BY THE CITY COUNCIL OF THE CITY OF MCKINNEY, TEXAS, ON THIS THE 20th DAY OF JULY, 2010.

DULY PASSED AND APPROVED ON THE SECOND READING BY THE CITY COUNCIL OF THE CITY OF MCKINNEY, TEXAS, ON THIS THE 26TH DAY OF JULY, 2010.

DULY PASSED AND APPROVED ON THE THIRD READING BY THE CITY COUNCIL OF THE CITY OF MCKINNEY, TEXAS, ON THIS THE 23rd DAY OF AUGUST, 2010.

CITY OF MCKINNEY, TEXAS

BRIAN LOUGHMILLER
Mayor

CORRECTLY ENROLLED:

SANDY HART, TRMC, MMC
City Secretary

DATE: _____

APPROVED AS TO FORM:

MARK S. HOUSER
City Attorney