

ORDINANCE NO. 2010-08-____

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MCKINNEY, TEXAS, GRANTING TO DENTON COUNTY ELECTRIC COOPERATIVE, INC., D/B/A COSERV ELECTRIC, ITS SUCCESSORS AND ASSIGNS, THE NON-EXCLUSIVE RIGHT TO USE AND OCCUPY RIGHTS-OF-WAY WITHIN THE CITY OF MCKINNEY FOR THE CONSTRUCTION AND OPERATION OF AN ELECTRIC TRANSMISSION AND DISTRIBUTION SYSTEM; PRESCRIBING CONDITIONS GOVERNING THE USE OF THE PUBLIC RIGHTS-OF-WAY; PROVIDING FOR COMPENSATION THEREFOR, PROVIDING FOR AN EFFECTIVE DATE AND A TERM OF SAID FRANCHISE, PROVIDING FOR WRITTEN ACCEPTANCE OF THIS FRANCHISE; FINDING THAT THE MEETING AT WHICH THIS ORDINANCE IS PASSED IS OPEN TO THE PUBLIC; AND PROVIDING FOR SEVERABILITY.

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. **“City”** shall mean the home rule municipal corporation designated as the City of McKinney and includes the territory that currently is or may in the future be included within the boundaries of the City of McKinney.
2. **“Cooperative”** shall mean Denton County Electric Cooperative, Inc., d/b/a CoServ Electric, a Texas electric cooperative corporation, its successors and assigns.
3. **“Effective Date”** shall be the date specified in Section 22 of this Ordinance.
4. **“Electric Distribution System” or “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 designed and constructed for the purpose of producing, transmitting or distributing electricity to or from customers or locations within the City, as the same now exists and may from time to time be placed, removed, constructed, reconstructed, extended and maintained.
5. **“Governmental or Regulatory Authority”** means any court, tribunal, arbitrator, authority, agency, commission, official or other instrumentality of the United States, or any state, county, city or other political subdivision.
6. **“Gross Revenues”** shall mean all revenue derived or received, directly or indirectly, by the Cooperative from or in connection with the operation of the Electric Distribution System within the corporate limits of City, and including, without limitation:
 - (a) all revenues received by the Cooperative from the sale of electricity to all classes of customers within the City;

- (b) all revenues derived from the Cooperative's Service Fees as set forth in Section 204 of the Cooperative's Tariff, including, but not limited to, the following:
 - (i) charges to connect, disconnect, or reconnect service within the City;
 - (ii) charges to handle returned checks from consumers within the City; and
 - (iii) such other service charges and charges as may, from time to time, be authorized in the rates and charges on file with the City;
- (c) all revenues derived from contributions in aid of construction ("CIAC"), including but not limited to System Benefit Charges and Facilities Charges, as defined in Cooperative's Tariff;
- (d) revenues billed but not ultimately collected or received by the Cooperative;
- (e) gross receipts fees and state receipts fees; and
- (g) revenues from the lease, license, or use of Cooperative's facilities in the Public Rights-of-Way as set forth in Section 2.D. of this Ordinance.

"Gross Revenues" shall not include:

- (a) the revenue of any person including, without limitation, an affiliate, to the extent that such revenue is also included in Gross Revenues of the Cooperative;
 - (b) sales taxes;
 - (c) any interest income earned by Cooperative;
 - (d) all monies received from the lease or sale of real or personal property, provided, however, that this exclusion does not apply to the lease of facilities within the Public Rights-of-Way.
7. **"Laws"** shall mean any and all federal, state and local statutes, constitutions, ordinances, resolutions, regulations, judicial decisions, rules, tariffs, administrative orders, certificates, orders, or other requirements of the City or other governmental agency having joint or several jurisdiction over the parties to the Franchise granted herein, in effect either as of the Effective Date or at any time during the term of the Franchise granted herein.
 8. **"Public Right-of-Way"** shall mean all present and future public streets, public thoroughfares, highways and alleys owned by City, and all present and future public utility easements that allow the use of Cooperative's facilities. This 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.
 9. **"Public Utility Commission of Texas" or "PUC"** shall mean that agency as presently constituted by the laws of the State of Texas or any successor agency.
 10. **"Tariff"** shall mean the Tariff for Electric Service for Cooperative, effective as of May 1, 2010, and as subsequently revised or amended. If

Cooperative revises or amends its Tariff during the term of this Franchise, such revisions or amendments shall not operate to remove revenues from the definition of Gross Revenues herein, unless specifically brought to City's attention by Cooperative and City agrees in writing to such removal.

Section 2. **Grant of Authority.**

- A. There is hereby granted to Cooperative and its successors and assigns, the right, privilege and franchise to construct, re-construct, extend, maintain, repair, remove and operate in, along, under and across the Public Rights-of-Way of City an Electric Distribution System consisting of electric power lines, with all necessary or desirable appurtenances and communications cables, equipment, devices and other equipment (including underground conduits, poles, towers, wires, transmission lines and other structures, and telephone and communication lines for its own internal and non-commercial use), for the purposes of supplying, operating, managing, controlling, optimizing, and maintaining electric service to the City, the inhabitants thereof, and persons, firms and corporations beyond the corporate limits thereof, and operating, managing, controlling, and maintaining local and regional distribution and/or transmission systems, for the term set out in Section 13 ("Franchise"). The Franchise granted herein does not grant to the Cooperative the right, privilege, or authority to engage in any other business within the City requiring the grant of a right, privilege or authority by the City, other than the provision of electric utility service.
- B. The Franchise granted herein does not establish any priority for the use of the Public Rights-of-Way by Cooperative or by any present or future recipients of franchise agreements, franchisees, or other permit holders. In the event of any dispute as to the priority of use of the Public Rights-of-Way, the first priority shall be to the public generally, the second priority to the City, the third priority to the State of Texas and its political subdivisions in the performance of their various functions, and thereafter, as between recipients of franchise agreements, Cooperative and other permit holders, as reasonably determined by the City in the lawful exercise of its powers, including the police power and other powers reserved to and conferred on it by the State of Texas.
- C. Cooperative acknowledges that by this Ordinance it obtains only the right to use the Public Rights-of-Way that is expressly granted herein. Cooperative acknowledges and accepts at its own risk that City may make use of the Public Rights-of-Way in a manner that is inconsistent with Cooperative's placement and use of its Electric Distribution System located in the Public Rights-of-Way, and in that event Cooperative shall not be entitled to compensation from City except to the extent City is obligated to compensate Cooperative under applicable Laws.
- D. Cooperative shall have the right to lease, license or otherwise grant to a party other than Cooperative the use of its facilities within the City's Public Rights-of-Way, provided that: (i) Cooperative shall first notify the City of the name of the lessee, licensee, or user, the type of service(s) intended to be provided through the facilities, and the name and telephone number of a contact person associated with such lessee, licensee, or user; (ii) Cooperative makes the Franchise Fee payment due on the revenues from such lease or license pursuant to Section 9 of this Franchise; and (iii) Cooperative receives compensation and/or revenue for such license or lease for which Cooperative pays a Franchise Fee to the City. This authority to lease facilities within the Public Rights-of-Way shall not affect any such lessee, licensee, or user's obligation, if any, to pay Franchise Fees.

Section 3. **Purpose.**

The provisions set forth in this Ordinance represent the terms and conditions under which Cooperative shall construct, re-construct, extend, repair, remove, operate and maintain the System within the Public Rights-of-Way of the City. In the Franchise granted herein, the City does not in any manner surrender or waive its regulatory or

other rights and powers under and by virtue of the Constitution and statutes of the State of Texas as the same may be amended, nor any of its rights and powers under or by virtue of present or future ordinances of the City, except as may be set out herein. Not included in the Franchise granted herein are any facilities (including any equipment attached in any way to Cooperative's facilities, whether owned by the Cooperative or not) that provide data delivery, cable service, telephone service, and/or any other service or product unrelated to the Cooperative's transmittal and delivery of electricity.

Section 4. Operation, Construction and Maintenance of Electric Distribution System.

- A. Cooperative's System shall be initially constructed so as not to unreasonably interfere with any existing publicly-owned or publicly-franchised water and wastewater lines, gas lines, storm sewer lines, open drainage areas, cable, fiber optic cable, roadways, sidewalks, alleys, traffic control devices, public signs, or any other publicly-owned or publicly-franchised facility. The City shall have the right at any time to order and require Cooperative to remove and abate any part of its Electric Distribution System that is unnecessarily dangerous to life or property, and in case Cooperative, after notice, fails or refuses to act within a reasonable time, the City shall have the power to remove or abate the same at the expense of Cooperative, all without compensation or liability for damages to Cooperative.
- B. The Cooperative shall construct, re-construct, extend, repair, remove, maintain, operate and replace its facilities in accordance with its Tariff and any applicable City ordinances. Cooperative's facilities shall interfere as little as reasonably possible with private property and with vehicular and pedestrian use of such Rights-of-Way. The placement of new facilities in the Public Rights-of-Way shall be subject to the approval of the City Manager or designee. In determining the location of the Cooperative's new facilities within the City, the Cooperative shall minimize interferences with then-existing or documented planned underground structures of the City or with the existing facilities of other users of the Public Rights-of-Way. In determining the location of the facilities of the City and other utility franchisees and other users of the Public Rights-of-Way within the City, the City shall take reasonable steps to minimize the interference with existing facilities of the Cooperative and shall require other utility franchisees or users of the Public Rights-of-Way to minimize interference with existing facilities of the Cooperative.
- C. Cooperative's property and operations within the Public Rights-of-Way of the City shall be subject to such reasonable and lawful rules and regulations of the City or other Governmental or Regulatory Authority as may be authorized by applicable law from time to time for the protection of the public health, safety and welfare. general public. This Ordinance shall in no way affect or impair the rights, obligations or remedies of the parties under the Texas Public Utility Regulatory Act, or other state or federal law. 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 Cooperative believes are contrary to applicable Laws.
- D. Cooperative shall construct its facilities in conformance with the applicable provisions of the National Electric Safety Code or such comparable standards as may be adopted by the Cooperative, provided such comparable standards are not in conflict with the National Electric Safety Code. Cooperative shall comply with applicable federal, state, and local environmental laws and standards.
- E. Cooperative shall cooperate with the City by providing complete information regarding the location of current and future facilities, including the underground electric primary lines and conduits, and manholes to access such underground conduit located within Public Rights-of-Way within the City. Reproducible copies of maps showing the location of all Cooperative facilities within the Public Rights-

of-Way shall be furnished to the City upon request. The maps shall be provided in electronic digital format, if available.

- F. Any and all excavations and obstructions in and upon the Public Rights-of-Way and other public places in the City caused by the Cooperative's operations under the Franchise granted herein shall be repaired and removed as quickly as is reasonably possible, under the circumstances. All excavations shall be repaired in a good and workmanlike manner and restored to at least the condition that existed prior to the excavation. All utilities, irrigation equipment, utility equipment, and any other improvements located in the Public Rights-of-Way and disturbed by the Cooperative's operations under the Franchise granted herein shall likewise be restored within a reasonable time to as good a condition as existed before the commencement of the work to the satisfaction of the City. Replacement of sod is to be of like kind, smoothed, shaped, rolled and compacted for proper landscape maintenance. Cooperative warrants that any such restoration work performed in the Public Rights-of-Way shall be in satisfactory condition for a period of two (2) years after completion of restoration, to the extent that such restoration work has not been disturbed by others. In the event that the Cooperative fails to repair or restore an excavation site within fourteen (14) calendar days after receipt of written notice from the City of a deficiency, the City may, at its option, perform the needed repair or restoration and the Cooperative shall promptly reimburse the City for the cost of such repair or restoration.
- G. City shall have the right to inspect all reconstruction or installation work and to make such tests as it deems necessary to ensure compliance with the terms of this Ordinance, or other applicable City ordinances or pertinent provisions of law.
- H. The public shall be protected by barriers and lights placed, erected, marked and maintained by the Cooperative in accordance with standards set forth in the current Texas Manual on Uniform Traffic Control Devices as well as any other applicable local, state and federal requirements. Except for repairs, day-to-day maintenance, or in cases of emergency conditions, work conducted within the Public Rights-of-Way shall require an approved permit issued by the City prior to commencement of work. In no instance shall Cooperative be required to pay fees or post bonds related to its use of the Public Rights-of-Way.
- I. Cooperative shall have the authority to trim trees upon or overhanging its System in order to prevent the branches of such trees from coming in contact with the System. The Cooperative shall ensure compliance with the North American Reliability Corporation's Transmission Vegetation Management Program, reliability standard FAC-003-1, the safety requirements for pruning, repairing, maintaining, and removing trees endorsed by the American National Standards Institute (specifically the ANSI A300, titled "Best Management Practices, Utility Pruning of Trees"); NESC Section 218; and state law. Except during an emergency or the recovery after an emergency, Cooperative shall notify the City and its residents at least three (3) days prior to entering onto property to perform any tree trimming activities. Within one year after acceptance of the Franchise granted herein, and on a yearly basis thereafter, the Cooperative will engage in a campaign to educate its customers within the City through bill inserts or other reasonable methods regarding prudent tree selection and planting around power lines.
- J. Upon the written request of any person holding a building moving permit issued by the City, Cooperative shall remove, raise or lower its wires temporarily to permit the moving of a house, building or other bulky structure. The reasonable expense of such temporary removal, raising, or lowering shall be paid by the benefited person or persons and Cooperative may require such payment in advance. Cooperative shall be given not less than forty-eight (48) hours advance notice in writing to arrange for such temporary removal.

- K. Nothing contained in this Ordinance shall be construed to require any pole attachments for electric light or power wires or electrical facilities or systems not provided by Cooperative, or any non-electric wires, facilities or systems, to be attached to Cooperative's poles or other physical plant. If the City or any other person or entity desires pole attachments for electric light or power wires or electrical facilities or systems not provided by Cooperative, then a further separate, non-contingent agreement shall be prerequisite to such attachments or such use of any duct. Nothing herein shall prohibit Cooperative from requiring reasonable, non-discriminatory terms and from charging just compensation pursuant to a pole attachment or joint use agreement; however, any pole attachment or joint use agreement with a third party shall not be enforceable by the City.
- L. In areas of the City where the City finds that the Public Rights-of-Way will not readily accommodate further facilities, the City may require Cooperative to share trench space for cables or ducts with the City or any other person authorized to use such Public Rights-of-Way for the placement of its cables or ducts. Ducts, cables, or wires not owned by Cooperative shall be placed in trenches in compliance with applicable safety and construction standards in a manner that does not interfere with Cooperative's ducts, conduit, cables or wires. Nothing herein shall prohibit Cooperative from requiring reasonable, non-discriminatory terms and from charging just compensation for the use of its facilities, trench space or duct space; however, any such agreement with a third party shall not be enforceable by the City.
- M. In addition to the consideration set forth herein, the Cooperative shall hold itself ready to furnish, subject to the use of the City, such wire space as may be required from time to time by the City upon the poles now owned or hereafter erected by the Cooperative in the City for the use of the City's police, fire alarm, communications, and traffic signal systems (for purposes of this Section hereafter referred to as "City Systems"); provided that the required wire space shall not exceed the wire capacity of any one pole. The location on the poles of the City Systems shall be determined on specific applications for space, at the time the applications are received from the City, and will be allotted in accordance with the considerations for electrical construction of the United States Department of Commerce, Bureau of Standards. In its wire construction on Cooperative's poles, the City will follow the suggestions and requirements laid down for wire construction in the Rules and Regulations of the Bureau of Standards of the United States Department of Commerce.
- N. Where conduits are laid or are constructed by the Cooperative, the Cooperative shall hold itself ready to furnish sufficient duct space not to exceed capacity of one duct for use by the City Systems. All such wires, whether on poles or in conduits, shall be constructed, maintained and operated in such manner as not to interfere with nor create undue hazard in the operation of the electric power utility system of Cooperative. It is further agreed that the Cooperative shall not be responsible to any party or parties whatsoever for any claims, demands, losses, suits, judgments for damages or injuries to persons or property by reason of the construction, maintenance, inspection or use of the systems and/or facilities belonging to the City.
- O. City shall not sell, lease or otherwise make available any rights granted by Cooperative to City to use Cooperative's facilities to any third party. Such rights are provided solely for the non-commercial, governmental use by the City.

Section 5. Relocation of Facilities.

- A. The City reserves the right to lay, and permit to be laid, storm, sewer, gas, water, wastewater and other pipe lines, 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, or under Public Rights-of-Way occupied by Cooperative.

- B. The City also reserves the right to change in any manner any curb, sidewalk, highway, alley, public way, street, utility lines, storm sewers, drainage basins, drainage ditches, and other public improvements. Upon request by City, Cooperative shall relocate, remove, or alter its facilities at its expense whenever such relocation, removal, or alteration is made necessary by Public Right-of-Way or other public improvements, provided that the City shall provide Cooperative with at least thirty (30) days prior written notice and shall specify and provide a new location for such facilities within the Public Rights-of-Way. If Cooperative believes that the requirements impose a financial hardship on Cooperative, Cooperative shall have the opportunity to present alternative proposals for the City's consideration. City may request that Cooperative relocate existing overhead facilities into underground conduit when street excavations are anticipated where overhead facilities are located, provided that the City or property developer shall bear the cost differential between overhead and underground construction and facilities.
- C. When Cooperative is required by City to remove or relocate its poles, towers, conduits, cables, and other facilities to accommodate Public Right-of-Way improvements, and Cooperative is eligible under Federal, State, County, City or other local agencies or programs for reimbursement of costs and expenses incurred by Cooperative as a result of such removal or relocation and such reimbursement is required to be handled through City, the Cooperative's costs and expenses shall be included in any application by City for reimbursement, if Cooperative submits its cost and expense documentation to City prior to the filing of the application. City shall provide reasonable notice to Cooperative of the deadline for Cooperative to submit documentation of the costs and expenses of such relocation to City.
- D. If a Public Right-of-Way in which Cooperative has facilities is proposed to be vacated, eliminated, discontinued, or closed, Cooperative shall be notified of same at least sixty (60) days prior to such event, and all rights of Cooperative under this Ordinance to use same shall terminate, provided that a reasonable alternate route within the Public Right-of-Way is available for relocation of such facilities. Cooperative shall, as soon as reasonably possible, remove the Electric Distribution System from such Public Right-of-Way unless Cooperative obtains any necessary easements from the affected property owner to use the former Public Right-of-Way, or a court orders the provision of such easements. Where reasonably possible and to the extent consistent with the treatment of other utility facilities in the former Public Right-of-Way, City shall reserve easements for Cooperative to continue to use the former Public Right-of-Way. Cooperative shall bear the cost of any removal or relocation of the Electric Distribution System unless the vacation, elimination, discontinuance or closure is primarily for the benefit of a private party, in which case the private party shall bear such costs.
- E. If the City requires the Cooperative to adapt or conform its facilities, or in any manner to alter, relocate, or change its property to enable any other entity to use, or use with greater convenience, said Public Rights-of-Way, the Cooperative shall not be bound to make such changes until such other entity shall have undertaken, with good and sufficient bond, to reimburse the Cooperative for any costs, loss, or expense which will be caused by, or arises out of such change, alteration, or relocation of Cooperative's property or facilities.

Section 6. **Indemnity.**

- A. In consideration of the Franchise granted herein, Cooperative shall, at its sole cost and expense, indemnify and hold the City, and its past and present officers, agents, and employees (the "Indemnitees") harmless against any and all liability arising from any claim, lawsuit, judgments, or action brought or made for or on account of any death, injuries to, or damages received or sustained by any person or persons or for damage to or loss of property arising out of, or occasioned by Cooperative's or any of its officers, agents, or employees,

intentional and/or negligent acts or omissions in connection with Cooperative's construction, maintenance and operation of Cooperative's System in the Public Rights-of-Way, including any court costs, expenses and defenses thereof.

- B. This indemnity shall only apply to the extent that the loss, damage or injury is attributable to the negligence or wrongful act or omission of the Cooperative, its officer, agents or employees, and does not apply the extent such loss, damage or injury is attributable to the negligence or wrongful act or omission of the City, or the City's agents, representatives or employees or any other person or entity. This provision is not intended to create a cause of action or liability for the benefit of third parties but is solely for the benefit of the Cooperative and the City.
- C. In the event of joint and concurrent negligence or fault of both the Cooperative and the City, responsibility and indemnity, if any, shall be apportioned comparatively in accordance with the laws of the State of Texas without, however, waving 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 Cooperative and the City, responsibility for all costs of defense shall be apportioned between the City and Cooperative based upon the comparative fault of each.
- D. In fulfilling its obligations to defend and indemnify City, Cooperative shall have the right to select defense counsel, subject to City's approval, which will not be unreasonably withheld. Cooperative shall retain defense counsel within seven (7) business days of City's written notice that City is invoking its right to indemnification under this Contract. If Cooperative fails to retain counsel within such time period, City shall have the right to retain defense counsel on its own behalf, and Cooperative shall be liable for all reasonable defense costs incurred by City.

Section 7. Liability Insurance.

Cooperative shall, at its sole cost and expense, obtain, maintain, or cause to be maintained, and provide, throughout the term of the Franchise granted herein, insurance in the amounts, types and coverages in accordance with the following City requirements. Such insurance may be in the form of self-insurance to the extent not precluded by applicable law or by obtaining insurance, as follows:

- 1. Commercial general or excess liability on an occurrence or claims made form with minimum limits of five million dollars (\$5,000,000) per occurrence and ten million dollars (\$10,000,000) aggregate. To the extent that coverage is maintained on a claims made form, the minimum limits are ten million dollars (\$10,000,000) per occurrence and twenty million dollars (\$20,000,000) aggregate. This coverage shall include the following:
 - (a) Products/completed operations to be maintained for the warranty period specified in the Right-of-Way Use and Management Ordinance, Chapter 90, Article IV, Section 90-246 (z) "Two-Year Maintenance Period", of the City Code of Ordinances, and as amended.
 - (b) Personal and advertising injury.
 - (c) Contractual liability.
 - (d) Explosion, collapse, or underground (XCU) hazards.
- 2. Automobile liability coverage with a minimum policy limit of one million dollars (\$1,000,000) combined single limit each accident. This coverage shall include all owned, hired and non-owned automobiles.

3. Statutory workers' compensation benefits in accordance with the statutes and regulations of the State of Texas. Cooperative must provide the City with a waiver of subrogation for workers compensation claims.
4. Cooperative must name the City, which includes all authorities, commissions, divisions, and departments, as well as elected and appointed officials, agents, and volunteers, as additional insureds under the coverage required herein, except workers' compensation coverage. The certificate of insurance must state that the City is an additional insured.
5. Cooperative will require its contractors and subcontractors performing work within the Public Rights-of-Way to maintain, at their sole cost and expense, insurance in the same amounts and under the same conditions as specified herein for Cooperative. Cooperative will maintain at all times, and will provide to City upon request, proof of its contractors' and subcontractors' compliance with this requirement.
6. The Cooperative will provide proof of insurance in accordance with this Ordinance within 30 days of the effective date hereof and annually thereafter. Cooperative will not be required to furnish separate proof when applying for permits.
7. All policies shall be endorsed to read: "THIS POLICY WILL NOT BE CANCELLED OR NON-RENEWED WITHOUT 30 DAYS ADVANCE WRITTEN NOTICE TO THE CITY EXCEPT WHEN THIS POLICY IS BEING CANCELLED FOR NONPAYMENT OF PREMIUM, IN WHICH CASE TEN (10) DAYS ADVANCE WRITTEN NOTICE IS REQUIRED."

Section 8. Non-Exclusive Franchise.

The Franchise granted herein is not exclusive, and nothing herein contained shall be construed so as to prevent the City from granting other like or similar rights, privileges and franchises to any other person, firm, or corporation.

Section 9. Compensation to the City.

- A. In consideration of the grant of said right, privilege and franchise by the City and as full payment for the right, privilege and franchise of using and occupying the said Public Rights-of-Way, Cooperative shall pay to the City a franchise fee as set forth herein ("Franchise Fee").
 1. The Franchise Fee shall be 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 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.
 2. The Franchise Fee shall be paid quarterly, within forty-five (45) days after the end of each calendar quarter (*i.e.*, by May 15, August 15, November 15, and February 15 of each year of this Franchise term).
 3. Payments shall be equal to five percent (5%) of Cooperative's Gross Revenues for the previous calendar quarter.
 4. Payments shall continue in like manner for any extension of the Franchise granted herein as provided in Section 13 hereof.

- B. With each payment of compensation required by Section 9.A, Cooperative shall furnish to the City a statement, executed by an authorized officer of Cooperative or designee, in sufficient detail to show how the Gross Revenues amount was arrived at and how the amount paid to the City was determined for the pertinent quarter.
- C. If either party discovers that Cooperative has failed to pay the entire or correct amount of compensation due, the correct amount shall be determined by mutual agreement between the City and Cooperative and the City shall be paid by Cooperative within thirty (30) calendar days of such determination or such additional time as mutually agreed to by the City and Cooperative. 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 Cooperative. Acceptance by the City of any payment due under this Section shall not be deemed to be a waiver by the City of any breach of this Ordinance, nor shall the acceptance by the City of any such payments preclude the City from later establishing that a larger amount was actually due or from collecting any balance due to the City.
- D. Interest on late payments and underpayments shall be calculated in accordance with the interest rate for customer deposits established by the Public Utility Commission of Texas in accordance with Texas Utilities Code § 183.003, as amended, for the time period involved.
- E. 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 the City hereunder, except as agreed to by the City in Section 9.
- F. Within thirty (30) days after the effective date of this Ordinance, the City shall provide Cooperative (at the notice address specified in Section 18) with maps clearly showing the location of the boundaries of the City. Within thirty (30) days after City annexes property into, or de-annexes property from, the territory of City, City shall provide Cooperative (at the notice address specified in Section 18) with maps clearly showing the location of the boundaries of such annexed or de-annexed property. Within sixty (60) days, or such additional time as mutually agreed to by the City and Cooperative, after Cooperative's receipt by certified mail of (i) written notice from the City that the City has annexed territory into the City and (ii) maps showing clearly the areas annexed, the Cooperative shall revise its accounting records to include the annexed territory, and Cooperative's customers therein, within the City. After such time period, all Gross Revenues received from customers located within such annexed area shall be subject to the payment provisions specified herein.
- G. If Cooperative shall at any time after the effective date of this Franchise agree to a new municipal franchise ordinance, or renew an existing municipal franchise ordinance, with another municipality, which municipal franchise ordinance determines the franchise fee owed to that municipality for the use of its public rights-of-way in a manner that, if applied to the City, would result in a franchise fee greater than the amount otherwise due City under this Franchise, then the Franchise Fee to be paid by Cooperative to the City pursuant to this Franchise shall be increased so that the amount due and to be paid is equal to the amount that would be due and payable to City were the franchise fee provisions of that other franchise ordinance applied to City. The provisions of this Section 9.G. apply to the amount of the Franchise Fee to be paid and the revenue sources to be included in the calculation of the Franchise Fee, but do not apply to other franchise fee payment provisions, including without limitation the timing of such payments.

Section 10. Accounting Matters.

- A. Cooperative shall keep accurate books of account at its principal office for the purpose of determining the Franchise Fee amount due to the City under this

Ordinance. Cooperative shall retain such books, records, and documents and other evidence pertaining to the Franchise granted herein and Franchise Fee payments due hereunder for a period of five (5) years, except if an audit is in progress or audit findings are yet unresolved, in which case records shall be kept until all audit tasks are completed and resolved. Each of the terms “books,” “records,” “documents,” and “other evidence” as used herein shall be construed to include drafts and electronic files, even if such drafts or electronic files are subsequently used to generate or prepare a final printed document.

- B. The City may conduct an audit or other inquiry in relation to a Franchise Fee payment made by Cooperative. The City may, if it sees fit, upon reasonable notice to the Cooperative, have the books and records of the Cooperative examined by representatives of the City to ascertain the correctness of the reports agreed to be filed herein. Cooperative shall make available all requested books, records, documents and other evidence within ten (10) business days of City’s written request for same.
- C. If the results of any audit indicate that Cooperative (i) paid the correct Franchise Fee, (ii) overpaid the Franchise Fee and is entitled to a refund or credit, or (iii) underpaid the Franchise Fee by one percent (1%) or less, then the City shall pay the costs of the audit. If the results of the audit indicate the Cooperative underpaid the Franchise Fee by more than one percent (1%), then the Cooperative shall pay the reasonable costs of the audit.
- D. Upon the reasonable request of the City, the Cooperative shall use commercially reasonable efforts to make available to the auditor at the Cooperative’s offices where such records are maintained and such personnel are located, during the Cooperative’s regular business hours and upon reasonable notice, such personnel and records as the Cooperative, in its reasonable discretion, determines are necessary or appropriate to the City’s request in order to complete such audit, and shall make no charge to the City therefor; provided, however, any copy expenses or other out-of-pocket expenses incurred by the Cooperative as a result of requests by the City or its auditor, shall be the responsibility of the City and the City shall promptly pay the reasonable cost thereof to the Cooperative.
 - 1. 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 9.C. and 9.D.
 - 2. If as a result of a subsequent audit, initiated within two years of an audit which resulted in Cooperative making a payment to the City due to an underpayment of the franchise fee of more than one percent (1%), Cooperative makes another payment to the City due to an underpayment of the franchise fee of more than one percent (1%), the City may immediately treat this underpayment as an Uncured Event of Default and exercise the remedies provided for in Section 14.C.
 - 3. If the results of the audit indicate that the Cooperative underpaid the Franchise Fee by more than one percent (1%), and the Cooperative is unable to produce contrary evidence that demonstrates to the reasonable satisfaction of the City that the results of the audit are not accurate, then the Cooperative shall pay to the City a penalty equal to twenty percent (20%) of the total amount underpaid in addition to the total amount underpaid. No penalty shall be assessed for uncollected Franchise Fees by Cooperative; however, the Cooperative shall provide evidence of the actual amount of uncollected Franchise Fees. Interest on the total amount of underpayment shall be paid at the prime interest rate in effect on the date the original payment was due plus two percent (2%), and interest shall be calculated from the time the original amount was due. Any additional amount due to City hereunder shall be paid within thirty (30)

days from the date of invoice. Any amount not paid within thirty (30) days from the date of the invoice will cause interest to be payable at the prime interest rate in effect on the date of the invoice plus two percent (2%) on the entire amount from the date of invoice.

- E. The Cooperative shall assist the City in its review by responding to all requests for information no later than thirty (30) days after receipt of a request unless a different schedule is agreed to by the City and Cooperative.
- F. If the Cooperative bundles, ties, or combines electric services (which are subject to the Franchise Fee) with non-electric services (which are not subject to the Franchise Fee), the provisions of this subsection shall apply.
 - 1. If the Cooperative bundles such services and assesses a customer only one fee, the total revenue therefrom 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 any 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 the Cooperative.

(For example, assume that the Cooperative offers a price of \$100 to customers for bundling electric services, cable television services, and local telephone services. Based on mandatory tariff rates, the Cooperative should have received \$80 for electric services, \$30 for cable television services, and \$10 for local telephone service, for a total of \$120. Thus, the Cooperative's Franchise Fee calculation would be based on the full \$80 that is presumed to be attributable to electric services, unless the Cooperative demonstrates to the city that electric services were actually discounted in addition to the discounted non-electric services.)

- 2. If the Cooperative offers its customers any kind of discount for receipt of both electric services and non-electric services, 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 subsection 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 television service alone, \$30; for a total of \$100. If the 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 (*i.e.*, a 20% discount from the \$40 fee for electric services). The result would be the same if the 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.

- 3. In the event that the 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 subsection 10.F.2. shall apply. However, City shall not require Cooperative to remit Franchise

Fees based on an amount that is more than Cooperative actually receives for the bundled services or more than would be due from Cooperative as a Franchise Fee based on the actual tariffed rate for electric services.

Section 11. Right of Renegotiation.

- A. Should either Cooperative or the City have cause to believe that a change in circumstances relating to the terms of the Franchise granted herein may exist, it may request that the other party provide it with a reasonable amount of information to assist in determining whether a change in circumstances has taken place. If the Cooperative elects to participate in customer choice (i.e., retail competition), it shall notify the City within thirty (30) days of the Cooperative's election to so participate.
- B. Should either party hereto determine that based on a change in circumstances, it is in such party's best interest to renegotiate all or some of the provisions of this Ordinance, then 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 this Ordinance as a result of such negotiations. A failure to agree does not show a lack of good faith. If, as a result of renegotiation, the City and Cooperative agree to a change in a provision of the Ordinance, the change shall become effective upon passage of an ordinance by the City in accordance with the City Charter and acceptance of the ordinance by Cooperative.

Section 12. Transfer and Assignment.

The Franchise granted herein shall not be assigned or transferred without the written consent of the City, which consent shall not be unreasonably withheld, provided, however, that Cooperative may assign its rights under this Ordinance 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. Cooperative shall give the City sixty (60) days prior written notice of any assignment to a parent, subsidiary, affiliate or successor entity. Any required consent shall be expressed by an ordinance that fully recites the terms and conditions, if any, upon which such consent is given. Any assignment or transfer effected prior to the City's approval thereof, if required, shall authorize the City to treat such assignment or transfer as an Uncured Event of Default and immediately implement the provisions of Section 14, including the right to terminate the Franchise granted herein.

Section 13. Term.

This Ordinance shall become effective upon Cooperative's written acceptance hereof, said written acceptance to be filed by Cooperative with the City within sixty (60) days after City provides written notice to Cooperative of the final passage and approval hereof. The Franchise granted hereby shall expire on December 31, 2014; provided that, unless written notice of non-renewal is given by either party hereto to the other not less than six (6) months before the expiration of the Franchise granted herein, it shall be automatically renewed for an additional period of one (1) year from such expiration date and shall be automatically renewed thereafter for like periods until canceled by written notice given not less than six (6) months before the expiration of any such renewal period.

Section 14. Default, Remedies and Termination.

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

1. The failure of Cooperative to pay the Franchise Fee on or before the due dates specified herein.
2. Cooperative's breach or violation of any of terms, covenants, representations or warranties contained herein or Cooperative's failure to perform any material obligation contained herein.

B. Uncured Events of Default.

1. Upon the occurrence of an Event of Default which can be cured by the immediate payment of money to City or a third party, Cooperative shall have thirty (30) calendar days after receipt of written notice from City of an occurrence of such Event of Default (or such longer time as the City may specify in such notice) to cure same before City may exercise any of its rights or remedies pursuant to Section 14.C.
2. 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 sixty (60) calendar days (or such additional time as may be agreed to by the City) after receipt of 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 pursuant to Section 14.C.
3. If the 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 pursuant to Section 14.C.

C. Remedies. Upon receipt of a notice of an alleged Uncured Event of Default as described in Section 14.B, which notice shall specify the alleged failure with reasonable particularity, the Cooperative shall, within the time periods specified in Section 14.B or such longer period of time as the City may specify in such notice, either cure such alleged failure or in a written response to the City either present facts and arguments in refuting or defending such alleged failure or state that such alleged failure will be cured and set forth the method and time schedule for accomplishing such cure. In the event that such cure is not forthcoming or the City determines that an unexcused Uncured Event of Default has occurred, City shall be entitled to exercise any and all of the following cumulative remedies:

1. The commencement of an action against Cooperative at law for monetary damages.
2. The commencement of an action in equity seeking injunctive relief or the specific performance of any of the provisions, which as a matter of equity, are specifically enforceable.
3. The termination of the Franchise granted herein.

D. Remedies Not Exclusive. The rights and remedies of City and Cooperative set forth in this Ordinance 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 failure to cure. However, notwithstanding this Section or any other provision of this Ordinance, City shall not recover both liquidated damages and actual damages for the same violation, breach, or noncompliance, either under this Section or under any other provision of this Ordinance.

E. Termination. The Franchise granted herein may be terminated only in accordance with the provisions of Section 14.C. City shall notify Cooperative in

writing at least thirty (30) business days in advance of the City Council meeting at which the questions of 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 granted herein, the effective date of such termination shall be either when such appeal is withdrawn or a court order upholding the termination becomes final and unappealable. If no appeal is filed, the effective date of such termination shall be the thirtieth (30th) day following the date of the final termination decision of the City Council. Until the termination becomes effective the provisions of the Franchise granted herein shall remain in effect for all purposes.

- F. The failure of the City to insist in any one or more instances upon the strict performance of any one or more of the terms or provisions of this Ordinance shall not be construed as a waiver or relinquishment for the future of any such term or provision, and the same shall continue in full force and effect. No waiver or relinquishment shall be deemed to have been made by the City unless said waiver or relinquishment is in writing and signed by the City.

Section 15. Public Information.

If the Cooperative provides confidential or proprietary information to the City, the Cooperative 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—provided it is expressly understood and agreed that all information concerning Gross Revenues and audit information furnished by or on behalf of the Cooperative to the City or its auditors or consultants shall be deemed strictly confidential and subject to the City's agreement in the next sentence. The City agrees to maintain the confidentiality of any information obtained from Cooperative so designated to the fullest extent allowed by law—and if the City is not permitted by applicable law to maintain such confidentiality, the City shall notify the Cooperative of such fact at the time the City requests any such information from the Cooperative or, in all other events, prior to receiving such information from the Cooperative. City shall not be liable to Cooperative for the release of any information the City is required to release by law. City shall provide notice to Cooperative of any request for release of information designated as confidential or proprietary 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 information designated by Cooperative as proprietary or confidential, City will notify the Texas Attorney General of the asserted proprietary or confidential nature of the document(s). The City also will provide Cooperative with a copy of such notification to the Texas Attorney General, and thereafter Cooperative is responsible for establishing that an exception under the Texas Public Information Act allows the City to withhold the information.

Section 16. Public Purpose.

All of the provisions contained in this Ordinance are hereby declared to be for a public purpose, and are in the interests of the health, safety, and welfare of the general public.

Section 17. Severability; Ordinance Controlling.

If any provision, section, subsection, sentence, clause or phrase of the Ordinance is for any reason held to be unconstitutional, void or invalid (or for any reason unenforceable), the validity of the remaining portions of this Ordinance shall not be affected thereby, it being the intent of the parties in adopting this Ordinance that no provision hereof shall be inoperative or fail by reason of any unconstitutionality or invalidity of any other portion, provision, or regulation, and to that end, all provisions of this Ordinance are declared to be severable.

Section 18. **Notice.**

Any notices required or desired to be given from one party to the other party to this Ordinance shall be in writing and shall be given and shall be deemed to have been served and received if: (i) delivered in person to the address set forth below; (ii) deposited in an official depository under the regular care and custody of the United States Postal Service located within the confines of the United States of America and sent by certified mail, return receipt requested, and addressed to such party at the address hereinafter specified; or (iii) delivered to such party by courier receipted delivery. Either party may designate another address within the confines of the continental United States of America for notice, but until written notice of such change is deemed served and received by the other party as provided above, the last address of such party designated for notice shall remain such party's address for notice.

CITY

COOPERATIVE

City of McKinney
Attn: City Manager's Office
222 N Tennessee
McKinney, TX 75070

Section 19. **Acceptance.**

In order to accept the Franchise granted herein, Cooperative must file with the City Secretary its written acceptance of this Ordinance within sixty (60) days after the City provides written notice to Cooperative of this Ordinance's final passage and approval by City. Cooperative shall pay all publication expense regarding notification of the accepted Franchise.

Section 20. **Future Amendments.**

This Ordinance may be amended only by an Ordinance adopted by the City and accepted by the Cooperative in writing.

Section 21. **Ordinance Passed At Public Meeting.**

It is hereby officially found that the meeting at which this Ordinance is passed is open to the public and that due notice of this meeting was posted, all as required by law.

Section 22. **Effective Date.**

If Cooperative accepts the Franchise granted herein, by the filing of its written acceptance, this ordinance shall be effective as of _____, 2010.

Section 23. **Repeal.**

This Ordinance shall supersede any and all other franchises granted by the City to Cooperative, its predecessors and assigns.

DULY PASSED AND APPROVED ON THE FIRST READING BY THE CITY COUNCIL OF THE CITY OF MCKINNEY, TEXAS, ON THIS THE ____ DAY OF _____, 2010.

DULY PASSED AND APPROVED ON THE SECOND READING BY THE CITY COUNCIL OF THE CITY OF MCKINNEY, TEXAS, ON THIS THE ____ DAY OF _____, 2010.

DULY PASSED AND APPROVED ON THE THIRD READING BY THE CITY COUNCIL OF THE CITY OF MCKINNEY, TEXAS, ON THIS THE ____ DAY OF _____, 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