

ORDINANCE NO. 2020-001

AN ORDINANCE GRANTING TO ONCOR ELECTRIC DELIVERY COMPANY LLC, ITS SUCCESSORS AND ASSIGNS, A NONEXCLUSIVE ELECTRIC POWER FRANCHISE TO USE THE PRESENT AND FUTURE STREETS, ALLEYS, HIGHWAYS, PUBLIC UTILITY EASEMENTS, PUBLIC WAYS AND PUBLIC PROPERTY OF THE CITY OF WATAUGA, TEXAS, PROVIDING FOR COMPENSATION THEREFOR, PROVIDING FOR A TERM OF TWENTY (20) YEARS FROM THE EFFECTIVE DATE OF THIS ORDINANCE, PROVIDING FOR WRITTEN ACCEPTANCE OF THIS FRANCHISE, PROVIDING FOR THE REPEAL OF ALL EXISTING FRANCHISE ORDINANCES TO ONCOR ELECTRIC DELIVERY COMPANY LLC, ITS PREDECESSORS AND ASSIGNS, AND FINDING THAT THE MEETING AT WHICH THIS ORDINANCE IS PASSED IS OPEN TO THE PUBLIC.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF WATAUGA, TEXAS:

SECTION 1. GRANT OF AUTHORITY: That the City of Watauga, Texas (the "City") hereby grants to Oncor Electric Delivery Company LLC, its successors and assigns (herein called "Company"), the non-exclusive right, privilege and franchise to construct, install, extend, maintain, use and operate in, along, under and across the present and future streets, alleys, highways, public utility easements, public ways and other public property ("Public Rights-of-Way") of the City electric power lines, with all necessary or desirable appurtenances (including underground conduits, poles, towers, wires, transmission lines, telephone and communication lines, and other structures for Company's own use), (herein called "Facilities") for the purpose of delivering electricity to the City, the inhabitants thereof, and persons, firms and corporations beyond the corporate limits thereof, for the term set out in Section 8

SECTION 2. The provisions set forth in this ordinance represent the terms and conditions under which Company shall construct, operate, and maintain the Facilities within the Public Rights-of-Way of the City. In granting this Franchise, 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, or any of its rights and powers under or by virtue of present or future ordinances of the City, as may be amended from time to time, except as may be set out herein. Company also retains all of its lawful authority and rights under the Public Utility Regulatory Act ("PURA") and any other applicable laws, rules, and regulations. Not included in this Franchise are any facilities (including any equipment attached in any way to Company's facilities, whether owned by Company or not) that provide data delivery, cable service, telephone service, and/or any other service or product not required by Company for, or in support of, the transmittal and delivery of electricity.

Poles, towers and other structures shall be erected so as not to unreasonably interfere with traffic over Public Rights-of-Way.

SECTION 3.

- A. Use of the Public Rights-of-Way by Oncor shall be governed by applicable local, state and federal laws, rules and regulations, including any amendments thereto. Nothing in this agreement shall prohibit Oncor from asserting a claim before the Watauga City Council, or a regulatory agency or court having jurisdiction to contest any requirements of the City that Oncor believes is unconstitutional, conflicts with this Franchise agreement, or conflicts with any other local, state and federal laws, rules, and regulations.
- B. The City shall endeavor to provide Company with reasonable notice and opportunity to review and comment upon any new or revised City laws, rules, or regulations that impact Company's use of the Public Rights-of-Way, but the failure to do so shall not affect the applicability of such laws, rules, or regulations to Company. This Franchise shall in no way affect or impair the rights, obligations, or remedies of the parties under PURA, or other state or federal law, rules, or regulations. Nothing herein shall be deemed a waiver, release or relinquishment of either party's right to contest, appeal, or file suit with respect to any action or decision of the other party, including ordinances adopted by the City that Company may believe are contrary to any federal, state, or local law, rules, or regulations.
- C. The City reserves the right for any reason whatsoever to use, to change the grade of, to lay, and permit to be laid, construct, install, repair, alter, maintain, close, reduce or widen (collectively "to change") any storm, sewer, gas, water, wastewater and other pipe lines, cables, and conduits, telephone, electric or other lines, 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, including those occupied by Company. 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 the like. City shall provide Company with at least thirty (30) days' notice when requesting Company to relocate facilities and shall specify a new location for such facilities along the Public Rights-of-Way. Company shall, except in cases of emergency conditions or work incidental in nature, obtain a permit, if required by City ordinance, prior to performing work in the Public Rights-of-Way, except in no instance shall Company be required to pay fees or bonds related to its use of the Public Rights-of-Way, despite the

City's enactment of any ordinance providing the contrary. Company shall work with City to complete the requested relocations in a timely manner. City-requested relocations of Company facilities in the Public Rights-of-Way shall be at the Company's expense; provided however, if the City is the end use Retail Customer (customer who purchases electric power or energy and ultimately consumes it) requesting the removal or relocation of Company Facilities for its own benefit, or the project requiring the relocation is solely aesthetic/beautification in nature, it will be at the total expense of the City. Provided further, if the relocation request includes, or is for, the Company to relocate above-ground facilities to an underground location, City shall be fully responsible for the additional cost of placing the facilities underground. Upon reasonable request by the City, Company shall provide information to the City regarding the status of a relocation request.

- D. If any other corporation or person (other than City) requests Company to relocate Company facilities located in City Rights-of-Ways, the Company shall not be bound to make such changes until such other corporation or person shall have undertaken, with good and sufficient bond, to obtain all necessary and applicable permits, reimburse the Company for any costs, loss, or expense which will be caused by, or arises out of such change, alteration, or relocation of Company's Facilities. City may not request the Company to pay for any relocation which has already been requested, and paid for, by any entity other than City.
- E. If City abandons any Public Rights-of-Way in which Company has facilities, such abandonment shall be conditioned on Company's right to maintain its use of the former Public Rights-of-Way and on the obligation of the party to whom the Public Rights-of-Way is abandoned to reimburse Company for all removal or relocation expenses if Company agrees to the removal or relocation of its facilities following abandonment of the Public Rights-of-Way. If the party to whom the Public Rights-of-Way is abandoned requests the Company to remove or relocate its facilities and Company agrees to such removal or relocation, such removal or relocation shall be done within a reasonable time at the expense of the party requesting the removal or relocation. If relocation cannot practically be made to another Public Rights-of-Way, the expense of any right-of-way acquisition shall be considered a relocation expense to be reimbursed by the party requesting the relocation.

- F The location of Company's facilities in the Public Rights-of-Way shall be subject to approval by the City Council or the City Manager if so designated by the City Council prior to construction; provided however, said approval shall not be unreasonably withheld. This approval will also be obtained through the City's permitting process (if required by City Ordinance). In the event of a conflict between the location of the proposed facilities of Company and the locations of the facilities of City or other Public Rights-of-Way users which exist or have been authorized by the City, the City Council or City Manager shall resolve the conflict and determine the location of the respective facilities within the City's Public Rights-of-Way, subject to Company's right to request review of the matter by any court or regulatory agency having jurisdiction. To avoid a facilities location conflict, the City Council or City Manager will designate a reasonable alternate location within the City's Public Rights-of-Way for Company's facilities if a reasonable alternate location exists.
- G City and Company agree that any lawsuit between the City and Company concerning this Ordinance will be filed in the State of Texas. Nothing in the Ordinance shall prohibit the City from filing an action related to this Ordinance in Tarrant County.

SECTION 4.

- A. In consideration of the granting of this Franchise, Company shall, at its sole cost and expense, defend, indemnify and hold the City, and its past and present officers, agents and employees harmless against any and all liability arising from suits, actions or claims regarding injury or death to any person or persons, or damages to any property arising out of or occasioned by the intentional and/or negligent acts or omissions of Company or any of its officers, agents, or employees in connection with Company's construction, maintenance and operation of Company's system in the City Public Rights-of-Way, including any court costs, reasonable expenses and reasonable 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 Company or its officers, agents or employees, and does not apply to the extent such loss, damage or injury is attributable to the negligence or wrongful act or omission of the City or the City's officers, agents, 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 Company and the City.

- C. In the event of joint and concurrent negligence or fault of both Company and the City, responsibility to defend and indemnify, if any, shall be apportioned comparatively between the City and Company in accordance with the laws of the state of Texas without, however, waiving any governmental immunity available to the City under Texas law and without waiving any of the defenses of the parties under Texas law. Further, in the event of joint and concurrent negligence or fault of both Company and the City, responsibility for all costs of defense shall be apportioned between the City and Company based upon the comparative fault of each.
- D. In fulfilling its obligation to defend and indemnify City, Company shall have the right to select defense counsel, subject to City's approval, which will not be unreasonably withheld. Company shall retain defense counsel within seven (7) business days of City's written notice that City is invoking its right to a defense and indemnification under this franchise. If Company fails to retain counsel within such time period, City shall have the right to retain defense counsel on its own behalf, and Company shall be liable to reimburse City for all reasonable defense costs incurred by City, except as otherwise provided in section 4.B and 4.C.

SECTION 5. This franchise is not exclusive, and nothing herein contained shall be construed so as to prevent the City from granting other like or similar rights, privileges and franchises to any other person, firm, or corporation. Any Franchise granted by the City to any other person, firm, or corporation shall not unreasonably interfere with this Franchise.

SECTION 6. 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, and 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, Company shall pay to the City the following.

- A. A final annual payment will be made on or before March 15, 2020 for the basis period of January 1, 2019 through December 31, 2019 and the privilege period of January 1, 2020 through December 31, 2020 in accordance with the provisions in the previous franchise.
- B. As authorized by Section 33.008(b) of PURA, the original franchise fee factor calculated for the City in 2002 was 0.002968 (the "Base Factor"), multiplied by each kilowatt hour of electricity delivered by Company to each retail customer whose consuming facility's point of delivery is located within the City's municipal boundaries for determining franchise payments going forward.

Due to a 2006 agreement between Company and City the franchise fee factor was increased to a franchise fee factor of 0.003116 (the "Current Factor"), multiplied by each kilowatt hour of electricity delivered by Company to each retail customer whose consuming facility's point of delivery is located within the City's municipal boundaries on an annual basis.

However, consistent with the 2006 agreement, should the Public Utility Commission of Texas at any time disallow Company's recovery through rates of the higher franchise payments made under the Current Factor as compared to the Base Factor, then the franchise fee factor shall immediately revert to the Base Factor of 0.002968 and all future payments, irrespective of the time period that is covered by the payment, will be made using the Base Factor.

1. Payments to the City shall be made per the quarterly schedule as follows:

<u>Payment Due Date</u>	<u>Basis Period</u>	<u>Privilege Period</u> <u>(Following Year)</u>
June 15	Jan. 1 – Mar. 31	Jan. 1 – Mar 31
September 15	Apr. 1 – June. 30	Apr. 1 – June. 30
December 15	July 1 – Sept. 30	July 1 – Sept. 30
March 15	Oct. 1 – Dec. 31	Oct. 1 – Dec. 31

The first quarterly payment hereunder shall be due and payable on or before June 15, 2020, and will cover the basis January 1, 2020 through March 31, 2020 and the privilege period of January 1, 2021 through March 31, 2021. If this Franchise is not effective prior to the first quarterly payment date, Company will pay any payments due within thirty (30) days of the effective date of this Ordinance. The final payment under this Franchise Ordinance is due on or before March 15, 2040, and covers the basis October 1, 2039 through December 31, 2039 and the privilege period of October 1, 2040 through December 31, 2040.

2. After the final payment date of March 15, 2040, Company may continue to make additional annual payments in accordance with the above schedule. City acknowledges that such continued payments will correspond to privilege periods that extend beyond the term of this Franchise and that such continued payments will be recognized in any subsequent franchise as full payment for the relevant annual periods.

C. A sum equal to four percent (4%) of gross revenues received by Company from services identified as DD1 through DD24 in Section 6.1.2 "Discretionary Service Charges," in Oncor's Tariff for Retail Delivery Service (Tariff), effective 1/1/2002, that are for the account and benefit of an end-use retail electric consumer. Company will, upon request by City, provide a cross reference to Discretionary Service Charge numbering changes that are contained in Company's current approved Tariff.

1. The franchise fee amounts based on "Discretionary Service Charges" shall be calculated on an annual calendar year basis, i.e. from January 1 through December 31 of each calendar year.
2. The franchise fee amounts that are due based on "Discretionary Service Charges" shall be paid at least once annually on or before April 30 each year based on the total "Discretionary Service Charges", as set out in Section 6C, received during the preceding calendar year. The initial Discretionary Service Charge franchise fee amount will be paid on or before April 30, 2020 and will be based on the calendar year January 1 through December 31, 2019. The final Discretionary Service Charge franchise fee amount will be paid on or before April 30, 2041 and will be based on the

calendar year of January 1, 2040 through December 31, 2040.

3. Company may file a tariff or tariff amendment(s) to provide for the recovery of the franchise fee on Discretionary Service Charges.
4. City agrees (i) to the extent the City acts as regulatory authority, to adopt and approve that portion of any tariff which provides for 100% recovery of the franchise fee on Discretionary Service Charges; (ii) in the event the City intervenes in any regulatory proceeding before a federal or state agency in which the recovery of the franchise fees on such Discretionary Service Charges is an issue, the City will take an affirmative position supporting the 100% recovery of such franchise fees by Company and; (iii) in the event of an appeal of any such regulatory proceeding in which the City has intervened, the City will take an affirmative position in any such appeals in support of the 100% recovery of such franchise fees by Company.
5. City agrees that it will take no action, nor cause any other person or entity to take any action, to prohibit the recovery of such franchise fees by Company.
6. In the event of a regulatory disallowance of the recovery of the franchise fees on the Discretionary Service Charges, Company will not be required to continue payment of such franchise fees.
7. The collection of the franchise fee shall continue until expiration of the term of this franchise.

SECTION 7.

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

B. The City may conduct an audit or other inquiry in relation to a payment made by Company less than two (2) years before the commencement of such audit or inquiry. The City may, if it sees fit, and upon reasonable notice to the Company, have the books and records of the Company examined by a representative of the City to ascertain the correctness of the reports agreed to be filed herein.

C. The Company shall make available to the auditor during the Company's regular business hours and upon reasonable notice, such personnel and records as the City may, in its

reasonable discretion, request in order to complete such audit, and shall make no charge to the City therefore.

D. The Company 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.

E. The City agrees to maintain the confidentiality of any non-public information obtained from Company to the extent allowed by law if Company identifies the information as non-public prior to providing the information to City. City shall not be liable to Company for the release of any information the City is required by law to release. City shall provide notice to Company of any request for release of non-public information prior to releasing the information so as to allow Company adequate time to pursue available remedies for protection. If the City receives a request under the Texas Public Information Act that includes information Company has identified as Company's confidential information, City will notify the Texas Attorney General of the confidential nature of the document(s). The City also will provide Company with a copy of this notification, and thereafter Company is responsible for establishing that an exception under the Act allows the City to withhold the information.

F. If either party discovers that the Company has failed to pay the entire or correct amount of compensation due the City, the correct amount shall be paid by the Company within thirty (30) calendar days of such mutual determination pursuant to the payment terms in Section 6. Any overpayment to the City by Company through error or otherwise, will, at the option of the City, either be refunded by City to Company within thirty (30) days of the determination or be offset against the next payment due from Company. Such underpayments or overpayments shall include interest calculated in accordance with the interest rate for customer deposits established by the PUC in accordance with Texas Utilities Code Section 183.003. If the parties cannot agree on either the underpayment due the City or an overpayment due the Company, both the City and Company may seek any other rights and remedies provided by law or in equity. Acceptance by the City or Company of any payment due under this Section shall not be deemed to be a waiver by the City or Company of any breach of this Franchise, nor shall the acceptance by the City or Company of any such payments preclude the City or Company from later establishing that a larger amount was actually due or from collecting any balance due.

SECTION 8. This Ordinance shall become effective sixty (60) days after its final passage and approval by the City Council. The right, privilege and franchise granted hereby shall expire on December 31, 2040; provided that, unless written notice of cancelation is given by either party hereto to the other not less than sixty (60) days before the expiration of this franchise agreement, it shall continue on a month-to-month basis until a new franchise ordinance is negotiated.

SECTION 9. This Ordinance shall supersede any and all other franchises granted by the City to Company, its predecessors and assigns.

SECTION 10. The sections, paragraphs, sentences, clauses and phrases of this Ordinance are severable. If any portion of this Ordinance is declared illegal or unconstitutional by the valid final non-appealable judgment or decree of any court of competent jurisdiction, such illegality or unconstitutionality shall not affect the legality and enforceability of any of the remaining portions of this Ordinance.

SECTION 11. City shall ensure, that in compliance with the provisions of the Charter of the City of Watauga, this Ordinance, upon being introduced at a regular meeting of the City Council, shall be read at two (2) separate regular meetings of the City Council and shall not be passed finally until thirty (30) days after the first reading. The full text of this Ordinance shall be published once each week for four (4) consecutive weeks in the official newspaper published in the City and the expense of such publication shall be borne by the proponent of the franchise.

SECTION 12. In order to accept this franchise, Company must file with the City Secretary its written acceptance of this franchise ordinance within sixty (60) days after its final passage and approval by City.

SECTION 13. 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 by City, all as required by law.

PASSED AND APPROVED on the first reading at a regular meeting of the City Council of Watauga, Texas, on this the 9TH day of DECEMBER, 2019.

PASSED AND APPROVED on the 2nd and final reading at a regular meeting of the City Council of Watauga, Texas, on this the 10TH day of FEBRUARY, 2020.

Arthur L. Miner
Mayor
The City of Watauga

ATTEST:

Andrea Gaulder
City Secretary



Approved as to form and legality.

George E. Hyde
George E. Hyde
Russell Rodriguez Hyde Bullock, LLP
City Attorney

STATE OF TEXAS §
COUNTY OF TARRANT §
CITY OF WATAUGA §