ORDINANCE NO. 20110825-063

AN ORDINANCE GRANTING TO BLUEBONNET ELECTRIC COOPERATIVE, INC., A FRANCHISE FOR CONSTRUCTING, MAINTAINING, OPERATING AND USING A TRANSMISSION AND DISTRIBUTION SYSTEM IN THE CITY OF AUSTIN TO PROVIDE ELECTRIC UTILITY SERVICE.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

PART 1. Findings.

(A) Bluebonnet Electric Cooperative, Inc. ("Grantee") has requested a franchise from the City to provide electric utility service;

(B) As a condition of receiving this franchise, the Grantee has agreed to abide by the City's current and future policies, ordinances and regulations regarding infrastructure usage, street-cuts and rights-of-ways; and

(C) The City recognizes that Grantee is requesting this franchise to fulfill its obligations to provide electric utility service to its Members within Grantee's certificated electric service area;

PART 2. Franchise Agreement. Bluebonnet Electric Cooperative, Inc. ("Grantee") and the City of Austin ("City") agree to the following:

SECTION 1. DEFINITIONS.

For the purpose of this franchise the following terms, phrases, words and their derivations shall have the meaning given herein. When not inconsistent with the context and whenever the sense of the text requires, words used in the present tense include the future, words in the plural number include the singular number and words in the singular number include the plural number. The words "shall" and "will" are mandatory and "may" is permissive.

(1) **Affiliate** means each person who falls into one or more of the following categories:

(a) each person having, directly or indirectly, a controlling interest in the Grantee;

(b) each person in which the Grantee has, directly or indirectly, a controlling interest;

(c) each officer, director, general partner, limited partner holding an interest of 25 percent (25%) or more, joint venturer or joint venture partner, of the Grantee; and

(d) each person, directly or indirectly, controlling, controlled by, or under common control with, the Grantee; provided that affiliate shall in no event mean any limited partner holding an interest of less than 25 percent (25%) of the Grantee, or any creditor of the Grantee solely by virtue of its status as a creditor and which is not otherwise an affiliate by reason of owning a controlling interest in, being owned by, or being under common ownership, common management, or common control with, the Grantee.

(2) **City** means the City of Austin, Texas, a home-rule municipality incorporated under the laws of Texas.

(3) **City Council** means the elected governing body of the City.

(4) **City Requirements** means laws, rules, regulations, policies and directives of general application of the City, in effect at present or to be adopted in the future by the City Council.

(5) **Consumer** means any person or organization receiving and using electric utility service from the Cooperative for the Consumer's equipment whether or not the service is billed directly to the Consumer or to another party. For example, in the case of a rental unit where the cost of utilities is part of the rent, the landlord is the Customer and the tenant is the Consumer.

(6) **Control** or **Controlling Interest** means actual working control in whatever manner exercised.

(7) **Cooperative** or **Grantee** means Bluebonnet Electric Cooperative, Inc., a rural electric cooperative organized under and by virtue of the laws of the State of Texas, and authorized to transact business in the State of Texas, together with its legal representatives, lessees, successors and assigns.

(8) **Customer** means any person or entity billed for electric utility service whether used by that person or organization, or by others.

(9) **Days** means calendar days unless otherwise specified.

(10) **Director** means the Director of Financial and Administrative Services Department of the City, or any successor department, or his or her designee.

(11) **Electric Utility Service** or **Electricity** means the sale, distribution, conveyance, or other transmission of energy (kWh) and power (kW) within the Franchise Area by the Cooperative.

(12) **Emergency Conditions** means those service conditions which are not within the control of the Grantee. Those conditions which are not within the control of Grantee include, but are not limited to, natural disasters, civil disturbances, severe weather and testing required by the National Electric Safety Code ("NESC").

(13) **Franchise** means this contract between the City and the Grantee, as may be amended.

(14) **Franchise Area** means all of the geographic area within which the City owns or controls the public rights-of-way, at present or in the future, located within the full-purpose annexed areas of the City.

(15) **Gross Revenue** means the total amount collected by the Cooperative and Affiliates from Consumers for the sale of Electric Utility Service within the Franchise Area.

(16) **Member** means any person, consumer, customer or other entity that has completed membership requirements with the Cooperative and has been accepted by the Cooperative's Board of Directors as a member.

(17) **"NESC"** means National Electric Safety Code.

(18) **Person** means a corporation, partnership, proprietorship, individual or organization or a natural person, excluding any governmental entity.

(19) **Public Rights-of-Way** means the surface, the air space above the surface, and the area below the surface of any public street, highway, lane, path, alley, sidewalk, boulevard, drive, bridge, tunnel, easement or similar property in which the City holds any property interest or exercises any rights of management or control (other than private easements or right-of-ways obtained by the Cooperative) and which, consistent with the purposes for which it was acquired or dedicated, may be used for the installation and maintenance of a Transmission and Distribution System.

A reference in this franchise to a "public right-of-way" shall not be a representation or guarantee by the City that its interests or other rights in the property are sufficient to permit its use for the installation and maintenance of a System and the Grantee shall receive only those rights which the City has the right and power to give.

(20) **Service Regulations** means the service standards of the Cooperative.

(21) **Telecommunications & Regulatory Affairs** means the division of the City Financial Services Department, its designee, or any successor thereto, responsible for administration and enforcement of this Franchise.

(22) **Transmission and Distribution System** or **System** means all interrelated lines, equipment, poles, installations, systems, fixtures and other facilities or appurtenances including substation facilities used or necessary for the transmission and distribution of Electric Utility Service to Consumers in the Franchise Area by the Cooperative.

SECTION 2. GRANT OF FRANCHISE.

(A) The City grants, subject to the Grantee's acceptance of the terms of this franchise and the City's receipt of monetary compensation, to the Grantee, for the term as described in Subsection B of this section, unless otherwise terminated as provided for in Section 16, the non-exclusive right and privilege to have, acquire, construct, expand, reconstruct, maintain, use and operate in the public rights-of-way, a transmission and distribution system to provide electric utility service; in addition, the Grantee is authorized to lease capacity on its transmission and distribution system to other service providers, including affiliates.

(B) The term of this franchise shall commence on August 31, 2011 and shall extend for a period of ten years until August 30, 2021. This franchise shall be automatically extended for an additional five years until August 30, 2026 unless on or before February 28, 2021, the City notifies Grantee of its intent not to extend this franchise.

(C) The Grantee may obtain the extension provided in Subsection 3 (B) only if the Grantee is in substantial compliance with the material terms and conditions of this franchise, including without limitation this section and Section 8.

(D) The Grantee shall not allow the use of its system by another entity to provide any service, unless the entity warrants that it has obtained all the authorizations required by the City in order to provide the service. The City shall assume all legal responsibility for enforcing its authority to impose franchise, consent or other requirements on service providers through this provision.

(E) The Grantee or affiliates shall not install or construct facilities within public rights-of-way for services which are not authorized by this franchise, by applicable law, or by another franchise.

(F) This franchise does not authorize either party to attach any part of its system to the other party's electric utility infrastructure or to use any of the other party's conduits or facilities until the parties have entered into a separate agreement, supported by independent consideration, for the rights of attachment or use.

(G) Nothing in this franchise shall be construed to require or authorize the Cooperative to exceed its certification rights granted by the Public Utility Commission of Texas, except as may be mutually agreed by the City and the Cooperative.

SECTION 3. CONSTRUCTION WORK REGULATION BY CITY AND UNDERGROUND CONDUIT USE BY THE GRANTEE.

(A) Work done by the Grantee in connection with the construction, expansion, reconstruction, maintenance or repair of its facilities in the public rights-of-way shall be subject to and governed by all City requirements, and applicable federal and state rules and regulations. The Grantee shall place certain facilities underground according to applicable City requirements.

(B) Excavations and other construction in the public rights-of-way shall be performed in accordance with applicable City requirements, including the obligation to use trenchless technology whenever possible. Furthermore, the Grantee shall construct and excavate in a manner which minimizes interference with the use of public and private property and in accordance with City directives under the police and regulatory powers of the City.

(C) The City may require the Grantee to attach portions of its facilities to poles or duct trench space maintained by any other persons or entities franchised by the City. The Grantee shall not be required to attach its facilities to the poles or duct trench space of another person or entity franchised by the City if it can be shown to the City's satisfaction that:

(1) the Grantee shall be subjected thereby to increased risks of interruption to its service;

(2) to increased liability for accidents;

(3) unreasonably delay construction or availability of service;

(4) if the facilities of such other person or entity are not of the character, design and construction required by the NESC;

(5) are not being maintained in accordance with current practice; or

(6) are not available to the Grantee on reasonable terms, including a reasonable fee.

(D) In addition to the consideration set forth herein, the Cooperative shall permit the City to use the Cooperative's existing facilities, without charge, where the existing facilities are adequate for the City's own purposes, said purposes being traffic, signal, police and fire alarm systems, "Traffic Lights". Traffic Lights shall not include revenue producing or commercial access telecommunications systems, including, but not limited to fiber optics and cable television systems. The Cooperative shall provide space on existing facilities and those to be constructed in the public rights-of-way for the City to attach Traffic Lights.

(1) The Cooperative agrees to provide for and accommodate Traffic Lights when the Cooperative constructs any new facilities, or when the Cooperative upgrades existing facilities during scheduled maintenance activities.

(2) If existing Cooperative facilities are inadequate, and the City requests space on Cooperative facilities to accommodate Traffic Lights, the Cooperative shall upgrade its facilities at the City's expense. The City shall reimburse the Cooperative for the difference between the cost of the upgraded facilities required to accommodate the Traffic Lights and the cost of replacing the existing facilities.

SECTION 4. WORK BY OTHERS, CONSTRUCTION BY ABUTTING OWNERS, ALTERATION TO CONFORM WITH PUBLIC IMPROVEMENT.

(A) The City reserves the right to lay and permit to be laid, sewer, gas, water, and other pipe lines or cables and conduits, and to do and permit to be done, any underground and overhead work, and any attachment, restructuring or changes in aerial facilities that the City Manager requires in, across, along, over or under any public street, alley or right-of-way occupied by the Grantee, and to change any curb or sidewalk or the grade of any street. In permitting work to be done, the City shall not be liable to the Grantee for any damages not directly caused by the willful misconduct or negligence of the City; provided, however, nothing herein shall relieve any other person or entity, including any contractor, subcontractor, or agent from liability for damage to the Grantee's system.

(B) In the event that during the term of this franchise, the City authorizes abutting landowners to occupy space under the surface of any public street, alley, or right-of-way, such grant to an abutting landowner shall be subject

to the rights herein granted to the Grantee. In the event that the City closes or abandons a segment of the public rights-of-way that contains a portion of the Grantee's system, the conveyance of land contained in the closed or abandoned public right-of-way shall be subject to the rights herein granted.

(C) During the term of this franchise, the Grantee shall be liable for the acts or omissions of an entity used by the Grantee including an affiliate, if the entity is involved directly or indirectly in the construction and installation of the Grantee's system to the same extent as if the acts or omissions of such entity were the acts or omissions of the Grantee.

(D) Relocation or Removal of Facilities: Within 90 days following written notice from the City, the Grantee shall, at its own expense, temporarily or permanently remove, relocate, change or alter the position of any of its system or other of its facilities that are within the public rights-of-way if the City determines that the removal, relocation, change or alteration is reasonably necessary for:

(1) The construction, repair, maintenance or installation of any City or other public improvement in or on the public rights-of-way.

(2) The operations of the City or other governmental entity in or upon the public rights-of-way.

SECTION 5. COMPLIANCE WITH CITY CHARTER OR ORDINANCES.

The Grantee recognizes, accepts and agrees that the terms, conditions and provisions of this franchise are subject to the applicable provisions of the Austin City Charter or ordinances. The City Attorney shall review a request by the Grantee for a modification of this franchise for compliance with the applicable provisions of the City Charter or ordinances.

SECTION 6. CONSTRUCTION, MAINTENANCE, EXPANSION, RECONSTRUCTION, AND EXCAVATION.

(A) In furtherance of the public interest in safety, health and public welfare and to facilitate the safe management of public rights-of-way, the construction, expansion, reconstruction, excavation, use, maintenance and operation of the Grantee's system and property is subject to all generally applicable City requirements as determined by the City Manager, or designee. In addition to any other City requirements, the Grantee shall provide the Public Works Director, or such other officials as the City may designate, construction plans and maps showing the routing of any new construction and construction plans, 45 days prior to the commencement of construction which involves an alteration to the surface or beneath the surface of the

public rights-of-way, to the extent generally required. The Grantee shall not begin construction until the plans and drawings have been approved in writing by the Public Works Director; this approval shall not be unreasonably delayed. The Grantee shall participate in the Austin Area Utility Coordination Council ("AAUCC") meetings and coordinate new construction with the AAUCC. The Grantee's facilities shall bear the identification marks established by the AAUCC if the facilities are installed after the AAUCC establishes identification marks.

(B) On written request by the City, the Grantee shall remove and abate a facility, when the Director of Public Works declares an emergency. The Grantee and the City shall cooperate to the extent possible to assure continuity of service. If the Grantee, after notice, fails or refuses to act, the City may remove or abate the facility, at the sole cost and expense of the Grantee, without compensation or liability for damages to the Grantee.

(C) On completion of initial or any subsequent construction work, the Grantee shall promptly restore the public rights-of-way in accordance with applicable City requirements. The Grantee may excavate only for the construction, installation, expansion, repair, removal, and maintenance of its facilities.

(D) Except in an emergency, the Grantee may not excavate pavement in a public alley or street or significant amounts of an unpaved public right-of-way without first complying with applicable City requirements.

(E) Within 120 days of completion of each segment of the Grantee's facilities, the Grantee shall supply the City with a set of "as built" drawings for the segment in a format prescribed by the Public Works Director. The Grantee shall provide every year a set of "as-built" drawings incorporating changes to the Grantee's facilities in the public right-of-way, in a format prescribed by the Public Works Director. The Grantee must obtain the City's approval before relocating facilities in the public right-of-way. Approval shall not be unreasonably withheld.

SECTION 7. COMPENSATION TO THE CITY.

(A) **General Compensation.** The City Council finds that the public rights-of-way to be used by the Grantee in the provision of services within the boundaries of the franchise area is valuable public property, acquired and maintained by the City at great expense to its taxpayers, and the grant to the Grantee of the use of said public right-of-way is a valuable property right without which the Grantee would be required to invest substantial capital in right-of-way costs and acquisitions. The Grantee agrees to pay to the City as general compensation during each year of this franchise, a franchise fee

consisting of three percent of the Grantee's gross revenue derived within the franchise area. The City shall provide notice to Grantee of all changes, annexations or disannexations, affecting the franchise area. Grantee shall have sixty (60) days from such notice to begin collecting and paying the franchise fee for any revenues received from the Grantee's customers and/or consumers residing in the newly annexed territories

(B) **Calculation and Payment on a Quarterly Basis of Annual Franchise Fee.** The Grantee shall pay to the City for each quarter this franchise remains in effect an amount equal to three percent of gross revenue, referred to as the "Quarterly Payment." The Grantee shall make this payment to the office designated by the director by 12:0l P.M. on the 45th day following the close of the calendar quarter for which the quarterly payment is calculated. Any necessary prorations shall be made.

(C) To the extent consistent with federal law, the compensation set forth in this section is exclusive of and in addition to all special assessments and taxes, including, but not limited to, ad valorem taxes, street cut permits, inspection fees and assessments for recovery of costs incurred by the City.

(D) In the event any quarterly payment is made after noon on the date due, the Grantee shall pay a late payment charge of the greater of:

(1) $100

(2) Simple interest at 10% annual percentage rate of the total amount past due.

(E) Payment of money under this section shall not in any way limit or impair the privileges or rights of the City, whether under this franchise or otherwise. No acceptance of any payment shall be construed as an agreement that the amount paid is the correct amount, nor shall acceptance be construed as a release of any claim which the City may have for additional sums payable under the provisions of this section.

(F) The Grantee shall file annually with the director no later than 120 days after the end of the Grantee's fiscal year, a statement of gross revenue for that year within the franchise area pursuant to this franchise. This statement shall present a detailed classification of gross revenue and uncollectible accounts for the year in a form prescribed by the director after consultation with the Grantee.

(G) A transaction or arrangement which has the effect of circumventing payment of required franchise fees or evasion of payment of franchise fees by non-collection, non-reporting of gross revenue, collection of revenues by

affiliates, bartering, or any other means which evade the actual collection of revenues by the Grantee for services delivered over the system or businesses the Grantee pursues derived from the operation of the system is prohibited.

SECTION 8. CITY'S RIGHT TO PURCHASE GRANTEE'S SYSTEM.

(A) Subject to the requirements herein, the City has the right to purchase the Grantee's facilities in the public right-of-way (hereinafter referred to as "facilities") at any time within the five year period preceding the expiration of this franchise at 1.5 times (1.5x) the fair market value, with the fair market value to be determined in accordance with Subsection 8(B). For purposes of the calculations of this section only, the term of this franchise shall be considered 15 years. Notwithstanding the provisions of this section, the Grantee shall have the right to operate its system and receive all revenue therefrom for the term of this franchise as set forth in Section 3. The City may not sell the purchased facilities in the public right-of-way within three years of its purchase from the Grantee.

(B) If the City exercises its right to purchase the Grantee's facilities in the public right-of-way, the City shall notify the Grantee in writing at least 90 days before the effective date of such purchase. Upon such written notification, the Grantee and City shall each designate an appraiser experienced and knowledgeable in the valuation of similar facilities. Each appraiser shall conduct an independent appraisal of the fair market value of the Grantee's facilities as a going concern as of the effective date of the purchase by the City. Each party shall be responsible for the appraisal fees of its own appraisers. If the two independent appraisals result in fair market value determinations that are within five percent of each other, the fair market value for determining the purchase price to be paid by the City shall be the average of the two appraisals. In conducting the appraisals, the appraisers shall consider, among other factors:

(1) the value of the assets constituting the Grantee's facilities;

(2) the age and condition of the physical plant and equipment; and

(3) the discounted future revenue stream considering the customer base, discounted in accord with general appraisal practice, for the remaining useful life of the assets constituting the Grantee's facilities.

(C) If upon exercise of this option at the end of the original term, and the payment of the above sum by the City and its service of official notice of the action upon the Grantee, the Grantee shall immediately transfer to the City title to all facilities in the public right-of-way and property, real and

personal, of the Grantee's facilities in the public right-of-way, free from any and all liens and encumbrances not agreed to be assumed by the City in lieu of some portion of the purchase price, subject to the Grantee's right to continue to operate and maintain its facilities in the public right-of-way within the City for the duration of the term provided in Subsection 8(A) above; and the Grantee shall execute and deliver such warranty deeds or other instruments of conveyance to City as shall be necessary for this purpose.

(D) The Grantee recognizes that the provisions of the City Charter require inclusion of this section in the franchise. Specifically, Article XI, Section 2 of the Austin City Charter conditions the grant of a franchise on the City's right to purchase the property of the franchise holder. The Cooperative's acquiescence in this section and provision of the franchise is conditional, subject to the following: (1) the Cooperative's right to challenge this Charter provision, this section of the franchise, or any application thereof on any basis, including as a violation of the Constitution and laws of the United States and/or the State of Texas, (2) the satisfaction of all conditions for the sale of such property contained herein and in the Cooperative's Master Indenture of Trust, or successor document, applicable to such property, and (3) the granting to the City by the Public Utility Commission of Texas of a certificate of convenience and necessity, as identified in Chapter 37 of the Texas Utilities Code, that includes the area in which the facilities are located.

SECTION 9. ACCOUNTS, RECORDS, REPORTS AND INVESTIGATIONS.

(A) Upon request and not later than 10 days, the Grantee shall provide the City information as to all matters in connection with or affecting the construction, reconstruction, removal, maintenance, operation and repair of the Grantee's system and any other facilities in the public rights-of-way. The City shall extend the time for provision of such information upon a reasonable showing by the Grantee.

(B) The Grantee shall keep complete and accurate books of accounts and records of its business and operations pursuant to this franchise in accordance with generally accepted accounting principles. After consultation with the Grantee, the director may require the keeping of additional records or accounts which are reasonably necessary for purposes of identifying, accounting for, and reporting gross revenue and uncollectibles for purposes of Section 7. To the extent practicable, the Grantee shall keep its books of

accounts and records in a manner that identifies revenues by type within the franchise area.

(C) In order to determine the gross revenue received by the Grantee which is subject to franchise fee in accordance with Section 7, the Grantee agrees that on the same date that payment is made, it will file with the City Clerk a sworn copy of a report that itemizes revenues which comprise gross revenue. Without limitation on the discretion of the director to require additional information, this report shall incorporate a statement reflecting the market value of all "trade" revenue (revenues from exchanges or barter which do not involve monetary compensation).

(D) The City may have the books and records of the Grantee examined by a City representative to verify the correctness of the reports filed in accordance with this section.

(E) The director may require the Grantee to report to the City other information relating to this franchise. The Grantee shall comply with the City's requests of forms for reports, the time for reports, the frequency with which reports are to be made, and whether reports are to be made under oath.

(F) On the director's 12 day written request, the Grantee shall make available to the City, during regular business hours, its books and records. The director may examine, audit, review or obtain copies of the papers, books, accounts, documents, maps, plans and other records of the Grantee pertaining to gross revenue derived by the Grantee and affiliates from the operation of the transmission and distribution system to verify the accuracy of payments under Section 7. The Grantee shall fully cooperate in making available its records and otherwise assisting in these activities. The City shall extend the time for the provision of such information after a reasonable showing by the Grantee that such extension is justified.

(G) The director may, at any time, make inquiries pertaining to the Grantee's performance of the terms and conditions of this franchise. The Grantee shall respond to such inquiries within 21 days.

(H) The City will maintain confidentiality of information provided by the Grantee to the extent permitted by law if the Grantee has notified the City of the confidential nature of the information. The City will provide the Grantee copies of requests under the Texas Open Records Act which pertains to such information and the related referral to the Attorney General.

(I) The City's right to inspect or audit Grantee's records is limited to three full calendar years prior to the date of the request for such inspection or audit.

SECTION 10. ASSIGNMENT OF FRANCHISE.

(A) Neither this franchise, the assets held by the Grantee for use under this franchise which are in the public rights-of-way, any rights or privileges of the Grantee under this franchise, either separately or collectively, shall be sold, resold, assigned, transferred or conveyed by the Grantee to any other person, firm, affiliate or entity, without the prior written consent of the City by ordinance. Should the Grantee sell, assign, transfer, convey or otherwise dispose of its rights or interests under this franchise, including the Grantee's system or capacity on its system, or attempt to do so, without the City's prior consent, the City may revoke this franchise. On revocation all rights and interest of the Grantee shall cease. A transfer in violation of this section shall be null and void and unenforceable.

(B) A change of control of the Grantee is a transfer under this section. There shall be a rebuttable presumption of a change of control of the Grantee upon a change of 25% or greater in the ownership of the Grantee. A mortgage or other pledge of assets to a bank or lending institution in a bona fide lending transaction shall not be considered an assignment.

SECTION 11. VIOLATIONS.

(A) If the Grantee is in violation of this franchise, the director or designee shall notify the Grantee in writing of the violation setting forth the nature of such violation. Within 21 days of receipt of such notice, or such longer period specified by the director, the Grantee shall respond in writing that the violation has been cured or provide a cure plan or schedule that satisfies the director or provide an explanation with documentation to support that an alleged violation did not occur.

(B) Notwithstanding Subsection 11 (A), the Grantee shall be allowed 30 days to cure violations after written notice is received from the City, by taking appropriate steps to comply with the terms of this franchise and any lawful regulations. If the nature of the violation is such that it cannot be fully cured within 30 days due to circumstances not under the Grantee's control, the period of time in which the Grantee must cure the violation may be extended by the director in writing for such additional time reasonably necessary to complete the cure, provided that (i) the Grantee has promptly began to cure, and (ii) the Grantee is diligently pursuing its efforts to cure in the director's reasonable judgment.

(C) If a violation has not been cured within the time allowed under Subsection 11 (B) the Grantee shall be liable for liquidated damages for the following violations:

(1) failure to promptly provide data, documents, reports or information to the City, in accordance with Section 9: $250 per day, for each day such failure continues.

(2) failure to comply with City requirements concerning construction in the public rights-of-way: $200 per day for each day such failure continues.

(D) The Grantee agrees that each of the failures in Subsection 11 (C) shall result in injuries to the City and its citizens and institutions, the compensation for which would be difficult to ascertain and to prove. Accordingly the Grantee agrees that the foregoing amounts are liquidated damages, not a penalty or forfeiture.

(E) At the Grantee's request, the City shall afford the Grantee an opportunity to show that a violation has not occurred, through an administrative hearing on thirty 30 days' notice before an impartial hearing examiner jointly designated by the City Attorney and the Grantee within 30 days of the Grantee's request.

If as a result of the administrative hearing, the hearing examiner determines that a violation has not occurred, the City shall pay all of the expenses related to the administrative hearing. If a violation has occurred, the Grantee shall pay the expenses. After the conclusion of the administrative hearing either party may seek any and all remedies which it may have at law or under the terms of this franchise.

(F) Upon evidence being received by the City that violations of this franchise, City Charter provisions or the ordinances regulating the Grantee in the construction and operation of its system have occurred, or continue to occur after the 30 day period, and any additional time necessary to cure, as allowed under Subsection 10 (B), the City may make an investigation. If the City finds that such a violation continues to exist or has occurred, then the City or the Grantee may take an action authorized by law, subject to Section 19, including forfeiture of this franchise and a suit in court to compel compliance. In any such proceeding the non-prevailing party shall be required to pay the reasonable expenses incurred by the prevailing party in such suit and all damages and costs (including attorney fees), but the Grantee may be allowed, either by the court in the judgment of forfeiture or by order of the City Council, a reasonable time thereafter, as fixed by such judgment or order, to correct the default and pay such expenses, damages and costs as it may be adjudged to pay, and if the Grantee does so correct and so pay within a reasonable time, forfeiture shall not become effective nor be enforced.

(G) Failure by the City or the Grantee to enforce rights under this franchise does not constitute a waiver of the rights.

SECTION 12. INDEMNITY.

(A) The Grantee shall defend, indemnify and hold City harmless from and against all damages, cost, loss or expense for the repair, replacement, or restoration of City's property, equipment, materials, structures and facilities which are damaged, destroyed or found to be defective as a result of the Grantee's negligence or willful misconduct.

(B) The Grantee, for itself and its agents, employees, subcontractors, and the agents and employees of any subcontractors, shall defend, indemnify, and hold the City, its Successors, assigns, officers, employees and elected officials harmless from and against any and all claims, demands, suits, causes of action, and judgments for: (i) Damage to or loss of the property of any person (including, but not limited to the Grantee, its agents, officers, employees and subcontractors, City's agents, officers and employees, and third parties); and/or (ii) death, bodily injury, illness, disease, worker's compensation, loss of services, or loss of income or wages to any person (including but not limited to the agents, officers and employees of the Grantee, the Grantee's subcontractors and City, and third parties), arising out of, incident to, concerning or resulting from the negligence or willful misconduct of the Grantee, its agents, employees, or subcontractors, in the performance of all activities and services under this franchise, no matter how, or to whom, the loss may occur.

(C) The Parties shall give each other prompt written notice of any claims or suits. The Parties shall have the right to investigate, defend and compromise same to the extent of their own interests.

SECTION 13. NOTICES.

Notices from the Grantee to the City under this franchise shall be directed to the City Attorney and the director, individually, at P.O. Box 1088, Austin, Texas 78767, or to the officer as designated by the City Council. Notice shall be deemed received on the date shown on the confirmation receipt when given by certified mail, return receipt requested, or the date of confirmation of transmission when by electronic transmission. The Parties shall also provide a telephone number operational during normal business hours for the conduct of matters related to this franchise. Any change in address or telephone number shall be furnished to the other party 10 days prior to the change.

SECTION 14. FORFEITURE AND TERMINATION.

(A) In addition to all other rights and powers retained by the City under this franchise or otherwise, the City reserves the right to forfeit and terminate this franchise and all rights and privileges of the Grantee hereunder in the event of a material breach of its terms and conditions, subject to reasonable notice and opportunity to cure, as provided in Section 11 as well as the provisions of Section 20.

(B) Material breaches of this franchise specifically include, but are not limited to the violations set forth in Sections 3, 4, 5, 7, and the provision of services not authorized by this franchise.

(C) The preceding shall not constitute a material breach if the violation occurs without the fault of the Grantee or occurs as a result of circumstances beyond its control. The Grantee shall not be excused from performance of any of its obligations under this franchise by mere economic hardship, nor misfeasance or malfeasance of its directors, officers or employees.

(D) A termination shall be declared only by a written decision of the City Council after an appropriate public proceeding before the City Council, which shall accord the Grantee due process and full opportunity to be heard and to respond to any notice of grounds of termination. All notice requirements shall be met by providing written notice to the Grantee at least 15 days prior written notice of a public hearing concerning the proposed termination of this franchise. Such notice shall state the grounds for termination alleged by the City.

(E) The City Council, after public hearing, and upon finding the existence of grounds to terminate, may either declare this franchise terminated or excuse the breach upon a showing by the Grantee of mitigating circumstances or good cause for the existence of such grounds.

(F) Neither the Grantee's acceptance of this franchise, the Grantee's appearance before the City Council at any public hearing concerning proposed termination of this franchise nor any action taken by the City Council as a result of such public hearing, including a declaration of termination or a finding of grounds to terminate, shall be construed to waive or otherwise affect the Grantee's right to seek judicial determination of the rights and responsibilities of the parties under this franchise.

SECTION 15. GOVERNING LAW.

This franchise is subject to the provisions of the Constitution and laws of the United States of America and the State of Texas and the Charter and ordinances of the City of Austin.

SECTION 16. FORCE MAJEURE.

The time within which the Grantee shall be required to perform any act under the franchise shall be extended by a period of time equal to the number of days performance is delayed due to a force majeure, nor shall the Grantee be subject to any penalty hereunder because of acts or failure to act due to force majeure. The term "force majeure" shall mean delays due to acts of God, civil disturbances, fire, unavoidable casualty, construction delays due to weather, failure of suppliers, or for other similar causes beyond the control of Grantee.

SECTION 17. SEVERABILITY AND PREEMPTION.

(A) Except as provided in Subsection (B) of this section, if any section, subsection, sentence, clause, phrase, term, provision, condition, covenant or portion of this franchise is for any reason held invalid or unenforceable by any court of competent jurisdiction, or superseded by state or federal legislation, rules, regulations or decision, the remainder of this franchise shall not be affected, but shall be a separate, distinct and independent provision, and such holding shall not affect the validity of the remaining portions, and each remaining section, subsection sentence, clause, phrase, provision, condition, covenant and portion of this franchise shall be valid and enforceable to the fullest extent permitted by law.

(B) If Section 8 of this franchise is held invalid or unenforceable by any court of competent jurisdiction, or superseded by state or federal law, rules, regulations or decision so that the intent of these provisions is frustrated, the parties agree to immediately negotiate a replacement provision to fulfill the purpose and intent of the superseded provisions consistent with applicable law.

(C) If federal or state laws, rules or regulations preempt a provision or limit the enforceability of a provision of this franchise, then the provision shall be read to be preempted to the extent and for the time required by law. In the event such federal or state law, rule or regulation is subsequently repealed, rescinded, amended or otherwise changed so that the provision that had been preempted is no longer preempted, such provision shall return to full force and effect, and shall thereafter be binding on the parties, without the requirement of further action on the part of the City, and any amendments to

this franchise negotiated pursuant to Subsection (B) of this section as a result of such provision being preempted shall no longer be of any force or effect.

SECTION 18. DISPUTE RESOLUTION.

(A) If a dispute arises out of or related to this franchise, or the breach thereof, the parties agree to negotiate prior to prosecuting a suit for damages. However, this section does not prohibit the filing of a lawsuit to toll the running of a statute of limitations or to seek injunctive relief. Either party may make a written request for a meeting between representatives of each party within fourteen (14) calendar days after receipt of the request or such later period as agreed by the parties. Each party shall include, at a minimum, one (1) senior level individual with decision–making authority regarding the dispute. The purpose of this and any subsequent meeting is to attempt, in good faith, to negotiate resolution of the dispute. If within thirty (30) calendar days after such meeting, the parties have not succeeded in negotiating a resolution of the dispute, they will proceed directly to mediation as described below. Negotiation may be waived by a written agreement signed by both parties, in which event the parties may proceed directly to mediation as described below.

(B) If the efforts to resolve the dispute through negotiation fail, or the parties waive the negotiation process, the parties may select, within thirty (30) calendar days, a mediator trained in mediation skills to assist with resolution of the dispute. Should they choose this option, the City and the Grantee agree to act in good faith in the selection of the mediator and to give consideration to qualified individuals nominated to act as mediator. Nothing in the Franchise prevents the parties from relying on the skills of a person who is trained in the subject matter of the dispute or a contract interpretation expert. If the parties fail to agree on a mediator within thirty (30) calendar days of initiation of the mediation process, the mediator shall be selected by the Travis County Dispute Resolution Center (DRC).

(C) The parties agree to participate in mediation in good faith for up to thirty (30) calendar days from the date of the first mediation session. The City and the Grantee will share costs of the mediator selected to mediate the dispute, equally.

PART 3. In compliance with Article XI (Franchises and Public Utilities), Section 3 (Ordinance Granting Franchise) of the City Charter, Grantee shall bear the expense of publishing the full text of this ordinance in a newspaper of general circulation in the City within five days after each of the three readings of this ordinance.

PART 4. If any of the terms of this ordinance conflict with the City Charter, the terms of the Charter prevail.

PART 5. The Grantee shall, within 60 days after passage and approval of this Ordinance, file in the office of the City Clerk a written instrument accepting this Ordinance and its franchise and all terms and conditions, signed and acknowledged by its proper officers in a form acceptable to the City.

PART 6. Upon Grantee's acceptance in compliance with Part 5 of this Ordinance, the franchise will take effect 60 days following the date of final passage and approval of this Ordinance by the City Council.

PASSED AND APPROVED

§
§
August 25, 2011 §

Lee Leffingwell
Mayor

APPROVED:

Karen M. Kennard
City Attorney

ATTEST:

Shirley A. Gentry
City Clerk

ACCEPTANCE OF FRANCHISE FROM
THE CITY OF AUSTIN, TEXAS, TO
BLUEBONNET ELECTRIC COOPERATIVE, INC.

WHEREAS, the City Council of the City of Austin, Texas, has approved a franchise to Bluebonnet Electric Cooperative, Inc. to operate within the City and use City right-of-way, and prescribing certain obligations and duties as set forth in the City of Austin, Texas, Ordinance No. 20110825-063 (the "Agreement").

NOW, THEREFORE, Bluebonnet Electric Cooperative, Inc. executes this written acceptance of the Agreement and files this Acceptance with the City Clerk of the City of Austin, Texas.

BLUEBONNET ELECTRIC COOPERATIVE, INC.

By: _____
Mark Rose, General Manager/CEO

Date: Sept. 19, 2011

ATTEST:

Gina Medack

This ACCEPTANCE filed in the office of the City Clerk of the City of Austin, Texas, on the 3rd day of October, 2011.

CITY OF AUSTIN, TEXAS

By: Shirley A Gentry
City Clerk