

ORDINANCE NO. 20170928-xxx

1 **AN ORDINANCE GRANTING TO THE ONCOR ELECTRIC DELIVERY**
2 **COMPANY, LLC A FRANCHISE TO CONSTRUCT AND MAINTAIN IN THE**
3 **CITY OF AUSTIN, TEXAS; GRANTING A NONEXCLUSIVE ELECTRIC**
4 **POWER FRANCHISE TO USE THE PRESENT AND FUTURE STREETS,**
5 **ALLEYS, HIGHWAYS, PUBLIC UTILITY EASEMENTS, AND PUBLIC WAYS**
6 **OF AUSITIN, TEXAS; ESTABLISHING COMPENSATION; REPEALING ALL**
7 **PREVIOUSLY EXISTING FRANCHISE ORDINANCES TO ONCOR ELECTRIC**
8 **DELIVERY COMPANY LLC, ITS PREDECESSORS AND ASSIGNS AND**
9 **CONFLICTING ORDINANCES AND RESOLUTIONS; AND ESTABLISHING**
10 **AN EFFECTIVE DATE.**

11
12 **BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:**

13
14 **PART 1.** The Council finds that:

15 **SECTION 1. Definitions.**

- 16 1.1 For the purpose of this Ordinance, the following terms, phrases, words and
17 their derivations shall have the meanings given herein. When not
18 inconsistent with the context, words used in the present tense include the
19 future, words in the plural number include the singular number, and words in
20 the singular number include the plural number, and the use of any gender
21 shall be applicable to all genders whenever the sense requires. The words
22 "shall" and "will" are mandatory and the word "may" is permissive. Words
23 not defined shall be given their common and ordinary meaning.
24
25 1.2 "City" shall mean the city of Austin, Texas, a municipal corporation in the
26 state of Texas.
27
28 1.3 "Company" shall mean the Oncor Electric Distribution Company, LLC, a
29 Delaware limited liability company existing and authorized to do business
30 by the laws of the State of Texas, authorized to transact and actually
31 transacting business in the State of Texas, its legal representative,
32 successors, lessees and assigns.
33
34 1.4 "City Manager" shall mean the City Manager of the City or an authorized
35 designate of the City Manager.
36

- 1.5 “Consumer” shall mean any person or organization receiving and using electric utility service from the Company or equipment whether or not the electricity is billed directly to him or her, or to a second party. (For example, in the case of a rental unit where the cost of utilities are part of the rent, the landlord is a customer and the tenant is a Consumer.)
- 1.6 “Council” shall mean the governing body of the City of Austin.
- 1.7 “Customer” shall mean any person or organization being billed for electric service whether used by him or her, or by others.
- 1.8 “Director of Financial Services” shall mean the Director of the Financial Services Department of the City of Austin, or its successor Department.
- 1.9 “Director of Public Works and Transportation” shall mean the Director of the Public Works and Transportation Department of the City of Austin, or its successor Department.
- 1.10 “Distribution system” shall mean all interrelated lines, equipment, poles, and other appurtenances used or necessary for the transmission and distribution of electricity to consumers or customers in the City and its environs.
- 1.11 “Franchise” shall mean this Ordinance, and all rights and obligations established herein or as it may be amended.
- 1.12 “Electricity” shall mean energy (kWh) and power (kW) provided by Company.
- 1.13 “Pole Rental Agreement” means the standard agreement prescribed and used by the City Electric Department, approved by the City Council, between City and any person contacting city.
- 1.14 “Public Easement” shall mean those easements held, owned or controlled by the City, the terms, conditions or limitations upon which are not inconsistent with the construction or maintenance of an electric distribution system.
- 1.15 “Service line” shall mean lines directly connected to the Company's distribution system and used to convey electrical energy therefrom to the customer meter.
- 1.16 “Sidewalk” shall mean a paved area, within this street right-of-way or sidewalk easement, specifically designed for pedestrians and/or bicyclists.
- 1.17 “Street” or “alley” shall mean a publicly dedicated or maintained right-of-way, a portion of which is open to use by the public for vehicular travel.

SECTION 2. Granting of Franchise.

- 2.1 There is hereby granted to Company a non-exclusive franchise to maintain, construct, equip, extend, replace, alter and otherwise establish in the City as constituted as of the effective date of this ordinance or as may hereafter be constituted, works, systems, plants, distribution lines and all related facilities (including those now in service) necessary or appropriate to sell, distribute, convey or otherwise conduct, serve, supply and furnish the inhabitants of City and others, and to the City, whenever the City may desire to contract therefor, electric power and/or energy and said Company is hereby granted passage and right-of-way in, under, along and across, any and all streets, avenues, easements, rights-of-way, alleys, highways , and grounds of the City and beneath the surface of the same, and the right to occupy and use in any lawful way during the life of this franchise said streets, avenues, easements, rights-of-way, alleys, highways, sidewalks, bridges and other structures and places and public grounds of the City, as they now or hereafter may exist, for every and any such service, use, effect, and lawful purpose as herein mentioned; provided that nothing herein shall be construed to require or authorize Company to exceed its certification rights granted by the Public Utility Commission of Texas; and provided further, that the Company shall, except in the case of a bona fide emergency, provide notice to the Director of Transportation before commencing any excavation in the paved portion of any street and, in the case of a bona fide emergency, provide notice to the Director of Transportation of any such excavation as soon as reasonably practicable.
- 2.2 The Company shall, prior to constructing any facilities after the effective date of this franchise within city parks or on land hereafter designated as a City park, comply with all applicable State laws, including Chapter 26 of the Texas Parks and Wildlife Code, and with all applicable valid and enforceable regulations of the City.
- 2.3 The Company's operations subject to this franchise and the construction, maintenance, and operation of the Company's system and property subject to this franchise shall be subject, where applicable, to all laws of the United States, the State of Texas, the City Charter, and City Ordinances, subject to the Company's rights of appeal or to otherwise contest the validity, applicability or enforceability of same as may be provided by law. The venue for all causes of action arising under this Ordinance shall be in the District Court of Travis County, Texas.

1 2.4 The initial term of this franchise shall be for a period of fifteen (15) years,
2 from the effective date of this Ordinance; provided, that at the end of the
3 initial term, the term shall be automatically renewed for a (5) year period,
4 unless written notice is given to the Company by the City or to the City by
5 the Company 120 days before the initial term or extension expiration date to
6 reconsider or terminate this franchise, in which event this franchise shall
7 either be renegotiated or terminated at the end of the initial term or five (5)
8 year extension before which notice is given. The City requests that the
9 Company give a twelve (12) month written notice to the City of the
10 expiration of the initial term as well as the five (5) year extension term.
11 Company's failure to provide the City with such twelve (12) months written
12 notice will not constitute a breach of the franchise or affect the continuation
13 of the franchise, the intent herein being a fifteen (15) year initial term
14 followed by one five year renewal.

15 2.5 The company shall not transfer this franchise or any rights and privileges
16 granted herein, except to an affiliate of Oncor, without the written approval
17 of the City Council expressed by Ordinance. Such approval shall not be
18 unreasonably withheld. Oncor shall provide written notice of any transfer of
19 its franchise to any affiliate of Oncor within thirty days of such transfer.
20

21 **SECTION 3. Acceptance by Company.**

22
23 3.1 This franchise shall not become effective until accepted by the Company in
24 writing, which acceptance shall be filed with the City within sixty (60) days
25 following the final adoption of this ordinance by the Council, and when so
26 accepted this Ordinance shall be a contract, duly executed by and between
27 the City and Company.
28

29 **SECTION 4. Service.**

30 4.1 Service shall be provided by means of transmission and distribution lines,
31 and equipment, and appurtenances in the streets, alleys, easements, and other
32 public rights-of-way. All future locations of transmission and distribution
33 lines, equipment, and appurtenances shall be located so that they will not
34 unreasonably interfere with the flow of water in any gutter or drain, with the
35 operations of any City-owned utility, with any existing electric, water, sewer
36 or telephone facilities, traffic control signals, street lights, fire lines or
37 communications lines, and so that same will not unduly interfere with
38 ordinary travel on the streets or sidewalks. The surface of any public street,
39 avenue, highway, alley or public place disturbed by the Company in the

1 construction or maintenance of its electrical system shall be restored within a
2 reasonable time after the completion of the work to as good a condition as
3 before the commencement of the work. Should the City reasonably
4 determine, within one year from the date of such restoration, that such
5 surface requires additional restoration work to place it in as good a condition
6 as before the commencement of the work, the Company shall perform such
7 additional restoration work to the reasonable satisfaction of the City. No
8 public street, avenue, highway, alley or public place shall be encumbered for
9 a longer period than shall be reasonably necessary to execute all work.

10 4.2 The Company shall, as specified in its "Service Regulations", as are now, or
11 as shall in the future be approved by the City Council or other regulatory
12 authority having jurisdiction, furnish service without unreasonable
13 discrimination to all areas of the City for which the Company holds a valid
14 Certificate of Convenience and Necessity issued by the Public Utility
15 Commission of Texas. The Company shall not deny service, or otherwise
16 discriminate against applicants for service, customers, or consumers on the
17 basis of race, color, religion, national origin, sex, or sexual orientation.

18 4.3 The Company shall maintain its property and equipment in good order and
19 condition, consistent with the needs of the service to be rendered therefrom.
20 It is recognized that the Company shall retain full title in and right to its
21 personal property whether or not same is incorporated in real estate.

22 4.4 The City, at any time, may make reasonable inquiries pertaining to this
23 Ordinance and the Company shall respond to such inquiries on a timely
24 basis. The city may require an examination and/or audit of the Company's
25 books, accounts, and operations to the extent permitted by State law. To the
26 extent required by State law, the Company shall reimburse the City for the
27 reasonable cost of such examination or audit.

28 4.5 The Company shall keep the City informed concerning the Company's
29 conservation programs and, upon request, shall deliver to the City a copy of
30 the energy efficiency plan required to be filed with the Public Utility
31 Commission of Texas.

32 **SECTION 5. Use of streets and Easements.**

33
34 5.1 The Company is hereby authorized, licensed and empowered to do any and
35 all things necessary and proper to be done and performed in executing the
36 powers and utilizing the privileges herein mentioned and granted by this

franchise, provided the same do not conflict with existing water pipes, sewers, electric power lines, telephone lines, cable television lines and other authorized installations, and provided that all work done in said streets, avenues, easements, rights-of-way, alleys, highways, sidewalks, bridges and other structures and places and public grounds by the Company shall be done with reasonable diligence and without unnecessary inconvenience to the public or individuals. Provided, it is not the intention of either city or Company to create any liability, right, or claim for the benefit of third parties and this franchise ordinance is intended and shall be construed for the sole benefit of City and Company.

SECTION 6. Work by the City and Others.

6.1 City reserves the right to lay, and permit to be laid, sewer, cable television, water, telephone, electric and other lines, cables and conduits, 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 any street, alley, highway, easement or public place occupied by the Company. The City shall be liable to the Company only for any damage to the Company's lines, equipment or appurtenances of the Company, the producing cause of which is the negligence of the City or its employees. Damage caused to Company as a result of work done by persons other than the City shall be corrected through payment to the Company by the responsible person. Removal and relocation expenses incurred by the Company shall be reimbursed by the person for whom the removal or relocation is made, except as provided in Sec. 7.1.

SECTION 7. Changes for Governmental Purposes.

7.1 If, during the period of this franchise, the City shall elect to widen or straighten any street within the corporate limits, so as to conflict with the transmission or distribution lines, equipment and appurtenances of the Company, the Company shall remove or relocate, as necessary, all of its transmission or distribution lines, equipment, and appurtenances at its own expense provided that the City furnishes Company another right-of-way along said street or streets. Schedules for this work shall be developed by designated representatives of the Company and the City. If representatives cannot agree on the schedule, the City Manager, after consultation with the Company, shall establish a schedule. This schedule shall provide for a minimum of thirty (30) days to exist between the time the schedule is furnished to the Company and the time that any specific work to be done by the Company covered in the schedule is to begin. Whenever any such project

1 is funded, in whole or in part, with federal or state highway monies, if the
2 federal government or state provides compensation for utility adjustments,
3 the City shall request that compensation be provided to the company by the
4 funding authority. If the City receives such requested utility adjustment
5 compensation, it shall deliver same to the Company.
6

7 **SECTION 8. Captions and Severability.**

8 8.1 The use of captions or headings for the various sections of this Ordinance
9 are for the convenience of the parties only and do not reflect the intent of the
10 parties. This Ordinance shall be construed and deemed to have been drafted
11 by the combined efforts of the City and the Company.

12 8.2 Notwithstanding anything contained in this Ordinance to the contrary, in the
13 event that this Ordinance or any part hereof is declared unenforceable, void,
14 unlawful or otherwise inapplicable, in whole or in part, by any court at law,
15 the remainder of the provisions of this Ordinance shall remain in full force
16 and effect and shall in no way be affected, impaired or invalidated. In such
17 event, the level of compensation to be provided to the City shall continue to
18 be comparable to that set forth in this Ordinance.

19 **SECTION 9. Fees.**

20
21 9.1 In consideration of the grant of said right, privilege and franchise by the City
22 and as full payment for the right, privilege and franchise of using and
23 occupying the said Public Rights-of-Way, and in lieu of any and all
24 occupation taxes, assessments, municipal charges, fees, easement taxes,
25 franchise taxes, license, permit and inspection fees or charges, street taxes,
26 bonds, street or alley rentals, and all other taxes, charges, levies, fees and
27 rentals of whatsoever kind and character which the City may impose or
28 hereafter be authorized or empowered to levy and collect, excepting only the
29 usual general or special ad valorem taxes which the City is authorized to
30 levy and impose upon real and personal property, sales and use taxes, and
31 special assessments for public improvements, Company shall pay to the City
32 the following:

33 9.1.1 A final quarterly payment will be made on or before August 15, 2017
34 for the privilege period of April 1, 2017 through June 30, 2017 in
35 accordance with the provisions in the previous franchise.
36

9.1.2 As authorized by Section 33.008(b) of PURA, the original franchise fee factor calculated for the City in 2002 was 0.001886 (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 0.001980 (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 quarterly basis.

9.1.3 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 0.001886 and all future payments, irrespective of the time period that is covered by the payment, will be made using the Base Factor.

9.1.4 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>
November 15	Jul. 1 – Sept. 30	Jul. 1 – Sept. 30
February 15	Oct. 1 – Dec. 31	Oct. 1 – Dec. 31
May 15	Jan. 1 – Mar. 31	Jan. 1 – Mar. 31
August 15	Apr. 1 – Jun. 30	Apr. 1 – Jun. 30

The first quarterly payment hereunder shall be due and payable on or before November 15, 2017, and will cover the basis and privilege period of July 1, 2017 through September 30, 2017. If this Franchise is not effective prior to the first quarterly payment date, Company will pay any payments due within 30 days of the effective date of this agreement. The final payment under this Franchise is due on or before November 15, 2026 and covers the basis and privilege period of July 1, 2026 through September 30, 2026.

9.1.5 On a prospective basis, a sum equal to four percent (4%) of gross revenues received by Company from services identified as DD1

1 through DD24 in Section 6.1.2 “Discretionary Service Charges,” in
2 Oncor’s Tariff for Retail Delivery Service (Tariff), effective 1/1/2002,
3 that are for the account and benefit of an end-use retail electric
4 consumer. Company will, upon request by City, provide a cross
5 reference to Discretionary Service Charge numbering changes that are
6 contained in Company’s current approved Tariff.

7 9.1.5.1 The franchise fee amounts based on “Discretionary Service
8 Charges” shall be calculated on an annual calendar year basis,
9 i.e. from January through December 31 of each calendar year.

10
11 9.1.5.2 The franchise fee amounts that are due based on
12 “Discretionary Service Charges” shall be paid at least once
13 annually on or before April 30 each year based on the total
14 “Discretionary Service Charges”, as set out in Section 6C,
15 received during the preceding calendar year. The initial
16 Discretionary Service Charge franchise fee amount will be
17 paid on or before April, 30 2018 and will be based on the
18 calendar year January 1 through December 31, 2017. The
19 final Discretionary Service Charge franchise fee amount will
20 be paid on or before April 30, 2027 and will be based on the
21 calendar months of January 1 through September 30, 2026.

22
23 9.1.5.3 Company may file a tariff or tariff amendment(s) to provide
24 for the recovery of the franchise fee on Discretionary Service
25 Charges.

26
27 9.1.5.4 City agrees (i) to the extent the City acts as regulatory authority, to
28 adopt and approve that portion of any tariff which provides for
29 100% recovery of the franchise fee on Discretionary Service
30 Charges; (ii) in the event the City intervenes in any regulatory
31 proceeding before a federal or state agency in which the
32 recovery of the franchise fees on such Discretionary Service
33 Charges is an issue, the City will take an affirmative position
34 supporting the 100% recovery of such franchise fees by
35 Company and; (iii) in the event of an appeal of any such
36 regulatory proceeding in which the City has intervened, the
37 City will take an affirmative position in any such appeals in
38 support of the 100% recovery of such franchise fees by
39 Company.
40

1 9.1.5.5 City agrees that it will take no action, nor cause any other
2 person or entity to take any action, to prohibit the recovery of
3 such franchise fees by Company.
4

5 9.1.5.6 In the event of a regulatory disallowance of the recovery of
6 the franchise fees on the Discretionary Service Charges,
7 Company will not be required to continue payment of such
8 franchise fees.
9

10 9.1.6 The collection of the franchise fee shall continue until
11 expiration of the term of this franchise. The audit provisions
12 of this franchise shall extend to any and all records of
13 payments between other municipalities and the Company.
14

15 9.2 Except for rentals paid for the use of City's poles under the City's Pole
16 Rental Agreement, said franchise fee shall be in lieu of any and all other
17 rentals or compensation or franchise, license, privilege, instrument,
18 occupation, excise or revenue taxes or fees and all other exactions or charges
19 (except ad valorem property taxes, special assessments for local
20 improvements, City sales tax, and such other charges for utility services
21 imposed uniformly upon persons, firms or corporations then engaged in
22 business within the City) or permits upon or relating to the business,
23 revenue, franchise, transmission and distribution lines, installations and
24 systems, fixtures, and other facilities of the Company and all other property
25 of the Company and its activities, or any part thereof, in the City which
26 relate to the operations of the Company's electric utility system; provided,
27 that this shall not be construed to prevent the Company from being required
28 to reimburse the City for reasonable expenses incurred in employing
29 consultants in rate proceedings to the extent required by State Law.

30 9.3 Should City not have the legal power to agree that payment of the foregoing
31 sums of money shall be in lieu of taxes, licenses, fees, street or alley rentals
32 or charges, easement or franchise taxes or charges aforesaid, then City
33 agrees that it will apply so much of said sums of money paid as may be
34 necessary to satisfy Company's obligations, if any, to pay any such taxes,
35 licenses, charges, fees, rentals, easement or franchise taxes or charges.

36 **SECTION 10. Indemnity.**

37 10.1 The Company agrees to indemnify, defend, and save harmless the City, its
38 agents, officers and employees, against and from any and all claims by or on

1 behalf of any person, firm corporation or other entity, arising from the
2 Company's construction, operation or management of its transmission or
3 distribution system, or arising from any act of negligence of the company, or
4 any of its agents, contractors, servants, employees or licensees, and from and
5 against all costs, counsel fees, expenses and liabilities incurred in or about
6 any such claim or proceeding brought thereon, and from any and all claims
7 arising from any breach or default on the part of the Company in the
8 performance of any covenant or agreement on the part of the Company to be
9 performed pursuant to the terms of this agreement. The City shall promptly
10 notify the Company of any claim or cause of action which may be asserted
11 against the City relating to or covering any matter against which the
12 Company has agreed, as set forth above, to indemnify, defend and save
13 harmless the City. The Company reserves the right, but not the obligation, to
14 employ such attorneys, expert witnesses and consultants as it deems
15 necessary to defend against the claim or cause of action. It is understood that
16 it is not the intention of either the City or the Company to create any liability,
17 right, or claim for the benefit of third parties and this franchise ordinance is
18 intended and shall be construed for the sole benefit of the City and the
19 Company.
20

21 **SECTION 11. Forfeiture and Termination.**

22
23 11.1 In addition to all other rights and powers retained by the City under this
24 franchise or otherwise, the City reserves the right to declare this franchise
25 forfeited and to terminate the franchise and all rights and privileges of the
26 Company hereunder in the event of a material breach of its terms and
27 conditions. A material breach by Company shall include, but shall not be
28 limited to, the following:
29

30 11.1.1 Failure to pay the fee prescribed by Section 9 hereof.

31 11.1.2 Material misrepresentation of fact in the application for or
32 negotiation of the franchise.

33
34 11.1.3 Conviction of any director, officer, employee, or agent of the
35 company of the offense of bribery or fraud connected with or
36 resulting from the awarding of this franchise to the Company.

37
38 11.2 The foregoing shall not constitute a major breach if violation occurs without
39 fault of the Company or of its employees or occurs as a result of

circumstances beyond its control. Company shall not be excused by mere economic hardship nor by misfeasance or malfeasance of its directors, officers, or employees.

11.3 In order for the City to declare a forfeiture, City shall make a written demand that the Company comply with any such provision, rule, order, or determination under or pursuant to this franchise. If the violation by the Company continues for a period of thirty (30) days following the Company's receipt of such written demand without written proof that the corrective action has been taken or is being actively and expeditiously pursued, the council may take under consideration the issue of termination of the franchise. The city shall cause to be served upon Company, at least twenty (20) days prior to the date of such a Council meeting, a written notice of intent to request such termination and the time and place of the meeting. Public notice shall be given of the meeting and issue which the Council is to consider.

11.4 The Council shall hear and consider the issue, shall hear any person interested therein, and shall determine, in its discretion, whether or not any violation by the company has occurred.

11.5 If the Council shall determine that the violation by the Company was the fault of Company and within its control, the council may declare the franchise of the Company forfeited and terminated, or the Council may grant to company a period of time for compliance.

SECTION 12. Foreclosure, Receivership and Bankruptcy.

12.1 The Company shall notify the City within thirty (30) days after any foreclosure or other judicial sale of all or substantial part of its assets or of the appointment of a receiver or trustee to take over and conduct the Company's business, whether in receivership, reorganization, bankruptcy or other action or proceeding, whether voluntary or involuntary, such notice to include, where applicable, the cause number and court involved.

PART 2. In compliance with the provisions of the Charter of the City of Austin, this Ordinance, upon being introduced at regular meeting of the City Council, shall be read at three (3) separate regular meetings of the City Council and shall not be passed finally until thirty (30) days after the first reading. Within five (5) days following each of its three (3) readings the full text of this Ordinance shall be published one (1) time in a daily newspaper published in the City of Austin. This Ordinance shall take effect sixty (60) days after its final passage, if it is accepted in writing by Company, by Company filing its

1 acceptance with the City Clerk of the city of Austin within sixty (60) days following the
2 final adoption of this ordinance by the Council.

3 **PART 3.** The City Clerk is hereby authorized and directed to make appropriate
4 endorsements over his official hand and the seal of the City of Austin, on a form provided
5 at the conclusion of this Ordinance, of the dates upon which this Ordinance shall have
6 been read at three (3) separate regular meetings of the City Council and the date of final
7 passage of this Ordinance; and the date upon which this Ordinance shall take effect,
8 being sixty (60) days after the date of final passage, if the Company shall have accepted
9 this franchise, and the dates upon which the full text of this Ordinance shall have been
10 published and the name and address of the daily newspaper in which such publications
11 were had in the City of Austin.

12 **PART 4.** This ordinance takes effect on _____, 2017.

13
14 **PASSED AND APPROVED**

15
16
17 §
18 §
19 _____, 2017 § _____
20 Steve Adler
21 Mayor

22
23
24 **APPROVED:** _____ **ATTEST:** _____
25 Anne L. Morgan Jannette S. Goodall
26 City Attorney City Clerk