

CITY OF PAYNE SPRINGS, TEXAS

ORDINANCE NO. 2023-01

AN ORDINANCE OF THE CITY OF PAYNE SPRINGS, TEXAS, GRANTING TO TRINITY VALLEY ELECTRIC COOPERATIVE, INC., ITS SUCCESSORS AND ASSIGNS, THE NON-EXCLUSIVE RIGHT, PRIVILEGE, AND FRANCHISE FOR A TERM OF FIVE YEARS, SUBJECT TO EXTENSION, TO ERECT, MAINTAIN, AND OPERATE AN ELECTRIC POWER UTILITY SYSTEM IN THE CITY OF PAYNE SPRINGS, TEXAS; TO ERECT, MAINTAIN, AND OPERATE ITS FACILITIES IN, OVER, UNDER, ALONG, AND ACROSS THE PRESENT AND FUTURE PUBLIC RIGHTS-OF-WAY IN THE CITY; PRESCRIBING COMPENSATION FOR THE RIGHTS, PRIVILEGES, AND FRANCHISE CONFERRED HEREUNDER; PRESCRIBING THE CONDITIONS GOVERNING THE OPERATION OF THE BUSINESS INsofar AS IT AFFECTS THE USE OF PUBLIC PROPERTY FOR THE PURPOSE OF SUCH BUSINESS INSTALLATION, UPGRADE, MAINTENANCE, AND OPERATION OF SAID SYSTEM AND BUSINESS; CONTAINING OTHER PROVISIONS RELATING TO THE SUBJECT; PROVIDING FOR SEVERABILITY; AND PROVIDING AN EFFECTIVE DATE.

**WHEREAS**, the Texas statutes provide that the City of Payne Springs, Texas ("City") has exclusive dominion, control and jurisdiction over its public rights-of-way; and

**WHEREAS**, the City is authorized to enter into non-exclusive franchise agreements for utility services within the City limits and to require compensation to be paid to the City; and

**WHEREAS**, the City has annexed certain areas that have historically been served by Trinity Valley Electric Coop ("TVEC" or the "Company"); and

**WHEREAS**, TVEC has received certification from the Public Utility Commission of Texas to serve such area; and

**WHEREAS**, TVEC has requested that it be granted a franchise to operate within the City; and

**WHEREAS**, the City deems it appropriate and in the best interest of the City and its citizens that a franchise be granted to TVEC.

**NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF PAYNE SPRINGS, TEXAS, THAT:**

**Section 1.** The above recitals are found to be true and correct in all respects and are incorporated into the body of this Ordinance as if copied in their entirety.

**Section 2. Definitions.** For the purpose of this Ordinance, the following terms, phrases, words, and their derivations shall have the meaning given herein. When not inconsistent with the context, 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," "will," and "must" are always mandatory and not merely directory.

- (a) Affiliate. An entity that owns or controls, is owned or controlled by, or is under common ownership with, Grantee.
- (b) Anniversary Date. The month and day of the Effective Date of this Franchise, during each year of the term of the Franchise.
- (c) City. The City of Payne Springs, Texas.
- (d) Control. The actual working control of Grantee in whatever manner exercised.
- (e) Days. Calendar days unless otherwise specified.
- (f) Effective Date. The date of the final passage and approval of this Ordinance by the City.
- (g) Facilities. All the plant and equipment of Grantee, including all tangible personal property, without limitation, and any and all means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished or supplied for, by, or in connection with the business of, Grantee.
- (h) Franchise. The initial or renewed authorization granted hereunder to construct, operate, upgrade, rebuild and maintain an electric power utility system within the Public Rights-of-Way of the City. The term does not include any license or permit that is required by other applicable laws of the City for the privilege of transacting and carrying on a business within the City not included within the conditions of this Ordinance.
- (i) Franchise Area. The incorporated area of the City and such additional areas as are included in the corporate limits of the City during the term of this Franchise.
- (j) Grantee. Trinity Valley Electric Cooperative, Inc., a cooperative, or any Person who succeeds it, in accordance with the provisions of this Ordinance.
- (k) Gross Revenues. Any and all revenues derived by Grantee or any Affiliate of Grantee from the operations of the electric power utility system and the Services provided within the City limits. Gross Revenues shall not include revenues received from the sale of electric power and energy to another electric utility, as that term is defined in Texas Utilities Code §31.002, for purposes of resale.
- (l) Person. Any individual, firm, partnership, limited partnership, limited liability company, association, corporation, company, organization or entity of any kind.
- (m) Public Rights-of-Way. 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 and which, consistent with the purposes for which it was acquired or dedicated, may be used for the installation, construction, operation, upgrade, rebuild and maintenance of an electric power utility system. No reference in this Ordinance to a Public Right-of-Way shall be deemed to be a representation or guarantee by the

City that its interests or other rights in such property are sufficient to permit its use for the installation and maintenance of an electric power utility system and Grantee shall be deemed to gain only those rights which the City has the right and power to give.

- (n) PUC. The Public Utility Commission of Texas, as presently constituted by the laws of the State of Texas, or its successor agency.
- (o) Services. All acts done, rendered or performed and any and all things furnished or supplied and any and all facilities used, furnished or supplied by Grantee to the consumer and any other Person in the performance of the rights granted pursuant to this Franchise. For purposes of this definition, the term "Services" shall be construed in its broadest and most inclusive sense.

**Section 3. Grant of Non-Exclusive Authority.** The City hereby grants to Grantee the non-exclusive franchise, right, authority and privilege to construct, erect, operate and maintain an electric power utility system in, upon, along, across, above, over and under the Public Rights-of-Way now laid out or dedicated, and all extensions thereof and additions thereto, in the Franchise Area. Grantee or its Affiliates shall not install or construct facilities within the Public Rights-of-Way to be used for services which are not authorized by this Franchise.

**Section 4. Purpose.** The provisions set forth in this Ordinance represent the terms and conditions under which Grantee shall construct, operate, and maintain the electric power utility system within the Public Rights-of-Way. In granting this Franchise, the City does not in any manner surrender, waive, release or relinquish 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, except as may be set out herein. Grantee 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 Grantee's facilities, whether owned by Grantee or not) that provide data delivery, cable service, telephone service, and/or any other service or product not required by Grantee for, or in support of, the transmittal and delivery of electricity.

**Section 5. Use of Existing Pole Line Facilities.**

- (a) There is hereby granted the further right, privilege, and authority to Grantee to lease, rent, or in any other manner obtain the use of poles, underground conduits and other facilities from the City and any and all holders of public licenses and franchises within the limits of the Franchise Area, and to use such poles, underground conduits and other facilities, subject to all existing and future ordinances and regulations of the City. The poles used for Grantee's distributions system shall be those currently used and maintained by Grantee or erected and maintained by the City or the public utilities serving the City; provided that mutually satisfactory rental agreements or other arrangements can be entered into by Grantee with the City or said companies.
- (b) In areas or locations where underground conduit is in use, is required by City ordinance (including but not limited to the City's Subdivision Ordinance) to be used, or shall at some future date be required by City ordinance to be used by public

utility companies serving the City, Grantee, by negotiation with said companies, will join in the use of underground facilities, provided mutually satisfactory agreements or other arrangements can be entered into with said companies; otherwise, Grantee shall install its own underground conduits and facilities in accordance with applicable regulations of the City and applicable provisions of this Franchise.

- (c) Nothing in this Franchise shall authorize either party to attach any part of its facilities to any conduits or poles owned by the other party or third parties until the requesting party has entered into a separate agreement or other arrangement with the owner of such conduits or poles supported by independent consideration for such rights of attachment or use.
- (d) Grantee shall cooperate with the City by providing complete, non-confidential, non-security-related information regarding the location of current and future overhead and underground wires, conduits, and poles within the Public Rights-of-Way. Reproducible copies of available maps showing the location of all overhead and underground wires and poles within the Public Rights-of-Way shall be furnished to the City Engineer upon request. The maps shall be provided in electronic digital format, if available.

**Section 6. Duration.** Upon the filing with the City by Grantee of a written acceptance required herein, this Franchise shall continue in full force and effect for a period of five (5) years, commencing on the Effective Date. At the expiration of the first five-year period, this Franchise will be extended for one additional five-year term unless either the City or Grantee notifies the other party of non-renewal in writing no more than six months and no fewer than three months prior to the expiration of the initial term.

**Section 7. Performance.** The service furnished hereunder to the City and its inhabitants shall be first class in all respects considering all circumstances, and shall be subject to such reasonable rules and regulations as Grantee may make from time to time. Grantee may require reasonable security for payment of its bills.

**Section 8. Indemnification.**

- (a) In consideration of the granting of this Franchise, Grantee shall, at its sole cost and expense, defend, indemnify and save whole and harmless the City and all its past and present officers, agents and employees, against any and all claims, causes of action, lawsuits, judgments, costs and expenses for personal injury (including death), property damage or other harm for which recovery of damages is sought suffered by any person or persons that may be occasioned by, or arise out of Grantee's breach of any of the terms or provisions of this Franchise, or by any intentional, negligent or strictly liable act or omission by Grantee, its officers, agents, employees, subcontractors, affiliates and subsidiaries in the construction, maintenance, operation, or repair of the distribution and/or transmission facilities, to this Franchise, except that the indemnity provided for in this paragraph shall not apply to any separate contractors, and in the event of joint and concurrent negligence or fault of both Grantee and the City, responsibility and indemnity, if any, shall be apportioned comparatively in accordance with the laws of the State of Texas without, however, waiving any governmental immunity available to the

City or any of the defenses of the parties under Texas law. It is understood that it is not the intention of the parties hereto to create liability for the benefit of third parties, but that this agreement shall be solely for the benefit of the parties hereto and shall not create or grant any rights, contractual or otherwise, to any person or entity. The provisions of this paragraph shall survive the termination of this Franchise.

- (b) In fulfilling its obligations to defend and indemnify the City, Grantee shall have the right to select defense counsel, subject to the City's approval, which will not be unreasonably withheld. Grantee shall retain defense counsel within seven (7) days of the City's written notice that the City is invoking its right to indemnification under this Contract. If Grantee fails to retain counsel within such time period, the City shall have the right to retain defense counsel on its own behalf, and Grantee shall be liable for all reasonable defense costs incurred by the City, except as may otherwise be provided in this Section.

**Section 9. Liability Insurance.** Grantee will, at its sole cost and expense, insure against the risks undertaken pursuant to the Franchise, including indemnification under Section 8 hereof. Such insurance may be in the form of self-insurance to the extent permitted by applicable law, including a PUC-approved formal plan of self-insurance maintained in accordance with sound accounting practices. Otherwise, Grantee shall maintain reasonably adequate insurance covering its obligations of indemnity under Section 8 hereof, duly issued by a company authorized to do business in the State of Texas, which at no time will be less than One Million Dollars (\$1,000,000) in any one accident and Two Million Dollars (\$2,000,000) aggregate on liability due to physical damage to property in any single policy year; and One Million Dollars (\$1,000,000) as to any one person and One Million Dollars (\$1,000,000) in any one accident for bodily injury and death. Grantee shall provide proof of Certificate of Insurance to the City within thirty (30) days of the Effective Date and annually thereafter.

**Section 10. Maintenance of Street Lights.** Grantee shall erect and maintain street lights, poles, and appurtenances, consistent with applicable codes and ordinances, along the streets where Grantee is authorized to provide service within the City. Title to the facilities erected on City-owned property shall be in the City, and the City shall pay for the electricity used by such street lights, and the installation costs thereof, erected on City-owned property in accordance with applicable tariffs.

**Section 11. Franchise Fee.**

- (a) During the term of this Franchise and Grantee's operation of its electric power utility system under the terms of this Franchise, Grantee shall pay to the City a fee equal to three percent (2%) of the Gross Revenues. The franchise fee shall be paid annually, in arrears, by March 1, and shall be computed on the basis of Gross Revenues received by the Grantee during the immediately preceding calendar year. The fee payable to the City hereunder shall be exclusive of and in addition to generally applicable ad valorem taxes, special assessments, fees for municipal improvements, and other lawful obligations of Grantee to the City.
- (b) Upon written request, the City shall have the right, during normal business hours, to inspect Grantee's records showing the Gross Revenues from which payments to the City are computed, and to audit and re-compute any and all amounts paid under this Franchise. Any such inspection or audit shall take place within twenty-

four (24) months following the end of the calendar period in question.

**Section 12. Transfers and Change of Control.** All of the rights and privileges and all of the obligations, duties and liabilities created by the Franchise shall pass to and be binding upon the successors of the City and the successors and assigns of Grantee; however, any or all of such rights and privileges shall not be assigned or transferred without the written approval of the City, which approval shall not be unreasonably withheld or delayed. Such written approval shall be required in all instances where any of the current operations of Grantee are assigned and/or transferred to affiliated or non-affiliated entities pursuant to changes in regulation by the PUC or State law concerning regulatory authority over electric power system operations.

**Section 13. Notice.** Any notices or notifications required or desired to be given from one party to the other party to this Ordinance shall be in writing and shall be given and shall be deemed to have been served and received if: (a) delivered in person to the address set forth below; (b) deposited in an official depository under the regular care and custody of the United States Postal Service located within the confines of the United States of America and sent by certified mail, return receipt requested, and addressed to such party at the address hereinafter specified; or (c) delivered to such party by courier-receipted delivery. Either party may designate another address within the confines of the continental United States of America for notice, but until written notice of such change is actually received by the other party, the last address of such party designated for notice shall remain such party's address for notice.

CITY

COMPANY

City Secretary  
City of Payne Springs  
19601 CR 2529  
Payne Springs, Texas 75763

Trinity Valley Electric Cooperative, Inc.  
1800 Hwy. 243 East  
Kaufman, Texas 75142

**Section 14. Severability.** If any section, sentence, clause or phrase of this Ordinance is for any reason determined to be illegal, invalid, or unconstitutional, such invalidity shall not affect the validity of this Franchise. It is the intent of the City in adopting this Franchise that no portion or provision thereof shall become inoperative or fail by reason of any invalidity or unconstitutionality of any other portion or provision, and to this end all provisions of this Franchise ordinance are declared to be severable.

**Section 15. Acceptance of Franchise.** In order to accept the Franchise granted herein, Grantee must file with the City Secretary its written acceptance of this Ordinance and Franchise within sixty (60) days after the City provides written notice to Grantee of this Ordinance's final passage and approval by the City ("City Adoption Notice"). Grantee shall pay all publication expense regarding notification of the accepted Franchise. Upon Grantee's written acceptance of the terms of this Ordinance, all claims of the City and Grantee under any prior franchise ordinance or other agreement between the parties that were or could have been made by either party shall be forever waived and extinguished.

**Section 16. Non-Exclusive Right.** 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 and privileges to any other person, firm or corporation.

**DULY PASSED, APPROVED AND ADOPTED** by the City Council of the City of Payne Springs, Texas on this 17<sup>th</sup> day of January, ~~2022~~  
2023

  
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**Andrea Miller, Mayor**  
**City of Payne Springs**

**ATTEST:**

  
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**Beth Billings, City Secretary**

**APPROVED AS TO FORM:**