

CITY OF NEW BERLIN

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF NEW BERLIN, TEXAS, GRANTING AN ELECTRIC TRANSMISSION AND DISTRIBUTION, AND COMMUNICATIONS FRANCHISE TO THE GUADALUPE VALLEY ELECTRIC COOPERATIVE, INC. FOR THE USE OF CITY STREETS, ALLEYS, AND PUBLIC WAYS FOR A TEN YEAR TERM COMMENCING ON THE EFFECTIVE DATE; CONTAINING VARIOUS TERMS AND CONDITIONS WITH REGARD TO THE GRANT OF SUCH FRANCHISE; CONTAINING A SEVERABILITY CLAUSE; PROVIDING FOR THE SUPERSEDING OF ANY AND ALL KINDS OF ORDINANCES, REGULATIONS, RULES, OR POLICIES THAT ARE IN CONFLICT WITH THIS ORDINANCE; AND PROVIDING AN EFFECTIVE DATE.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF NEW BERLIN, TEXAS, that:

Section 1. The City of NEW BERLIN, Texas ("City"), pursuant to this ordinance ("Ordinance") does hereby grant unto the Guadalupe Valley Electric Cooperative, Inc. and to any of the Cooperative's affiliates, successors and permitted assigns ("Cooperative"), the right, privilege, and franchise to erect, construct, maintain, operate, use, extend, remove, replace, repair, and excavate within, under, on, over, across, and along any and all of the present and future public roadways, highways, streets, squares, parks, lanes, alleys, public sidewalks, public ways, waterways, streams, and bridges in which the City now or hereafter has an interest, a system of poles, pole lines, transmission and distribution lines, wires, guys, conduits, switches, transformers, fiber optic cables, transmitters, receivers, amplifiers, wireless radio signal antennas and other wireless transmission signal devices, and other desirable appurtenances and facilities necessary or useful for the purpose of delivering, carrying, conducting, conveying, supplying, and selling to the City and the inhabitants of the City or other person or persons, firms or corporations, whether within or outside the City boundaries, electricity for light, heat, power and for any other purpose for which electricity may be now or hereafter used, and communication signals or the capability and capacity for transport of communication signals of whatever kind and character, including telephone signals, internet communications and cable TV signals; to deliver, carry, conduct, supply, and distribute electricity and communication signals by means of said poles, pole lines, transmission and distribution lines, wires, guys, conduits, switches, transformers, fiber optic cables, transmitters, receivers, amplifiers, wireless radio antennas and other wireless transmission signal devices, or other facilities to sell and distribute same to the City, the inhabitants of said City, or any other persons, firms or corporations, whether within or outside the City boundaries.

Section 2. It is expressly understood and agreed that this Ordinance grants the Cooperative the rights and privileges contained in Section 1 above only as to property

located within the corporate limits of the City presently in or hereafter added to the Cooperative's service area and to property hereinafter annexed by the City which is presently or hereafter located within the Cooperative's service area. The City shall notify Cooperative in writing of the effective date of any annexation of property into the City limits that would require Cooperative to include such properties for purposes of calculations of any payments due under this Ordinance. Cooperative shall not be liable to City for any payments, penalties, or interest on gross receipts for Cooperative customers within a newly annexed area until ninety (90) days after written notice from the City to the Cooperative of the annexation. Thereafter the Cooperative shall assure that any and all retail customers located within such annexed territory be included and shown on its accounting system as being within the City boundaries. After such ninety (90) day written notice from the City to the Cooperative or after the effective date of the annexation (whichever occurs last), all customer accounts located within the annexed territory shall begin accrual for purposes of the payment provisions specified in Section 11 of this Ordinance.

Section 3. Cooperative's structures, lines, guys, and other installations shall be designed and constructed consistent with the National Electrical Safety Code and any other applicable state and national standards. The City will use its best efforts to support the Cooperative's need for easement conditions that do not unduly restrict the Cooperative's use of the easement, and City will exercise its regulatory power to manage the activities of Cooperative within a public way only to the extent that such regulations are reasonably necessary to protect the health, safety and welfare of the public. The City will maintain appropriate ordinances that limit the use of utility easements by fee property owners to uses that do not substantially interfere with safe and effective operation of the Cooperative's installed facilities. Upon written notification by the Cooperative to the City of an encroachment in a utility easement substantially interfering with the safe and effective operation of the Cooperative's installed facilities, the City will take prompt and reasonable action to resolve the encroachment.

Section 4. If the City, in order for the accommodation or new construction of its sewers, water lines, streets or other public works, shall require any structures, lines, guys, or other installations and facilities of the Cooperative located in a street or other City right-of-way to be shifted or relocated to a new position in a street or other available right-of-way, such structures, lines, guys, or other installations shall be so shifted or relocated by the Cooperative at the Cooperative's expense; provided, however, the City shall work with Cooperative in good faith to minimize the economic impact on Cooperative and the number of Cooperative facilities that may need to be relocated or shifted. City shall give the Cooperative reasonable prior written notice of its projects requiring relocation of the Cooperative's facilities, and shall provide a suitable alternate public easement for the facilities to be relocated. In the event that Cooperative is required by City to remove or relocate its facilities under this Section 4 and City is eligible under federal, state county, local or other programs for reimbursement of costs and expense incurred by Cooperative as a result of such removal and/or relocation, and such reimbursement is required to be handled through City, City shall apply for such reimbursement and include Cooperative's removal and/or relocation costs and expenses in the application by City for

reimbursement, and remit such reimbursement to Cooperative when received. City shall provide reasonable written notice to Cooperative of the deadline for Cooperative to submit documentation to City for reimbursement of the costs and expenses of such removal and/or relocation. For the avoidance of doubt, the City may not require the Cooperative to relocate any facilities underground in a public right-of-way, and a location underground in a public easement will not constitute a "suitable alternate public easement" for purposes of relocating Cooperative facilities under this Section.

If a third-party desires or the City requires Cooperative to adapt or conform any of Cooperative's facilities, or in any way alter, relocate, or change Cooperative's property to enable any third party (whether public or private), other than the City, to use the public ways, Cooperative shall have the right, as a precondition to making any such alteration, change or relocation, to require payment to Cooperative for any and all loss, cost or expense occasioned thereby to be paid by the third party. The City shall, as part of any franchise agreement, or renewal thereof, with any future third party, include the requirement of payment by the third party to Cooperative for any and all loss, cost or expense incurred by Cooperative that is occasioned by the third party request for any alteration, change or relocation of Cooperative property.

Cooperative shall permit private or public entities desiring to provide communication services to the City to use existing Cooperative poles, provided that such attachment and use is feasible, does not interfere with Cooperative's ability to utilize its facilities for its purposes, and is not in conflict with safety procedures or requirements of Cooperative. Such use shall be subject to the entity's execution of Cooperative's form of contract for pole attachment and payment of the Cooperative fees applicable to such service.

Section 5. The Cooperative may open-cut streets, curbs and sidewalks, and may bore, or utilize any other methods it deems reasonably necessary (including, but not limited to tree trimming) to construct, operate and maintain the Cooperative facilities within the City.

The surface of any street, alley, or public way or place disturbed by the Cooperative shall be restored by the Cooperative within a reasonable time after the completion of the work to the same or similar condition as existed prior to the Cooperative's work. No street, alley, or public way or place shall be encumbered by the Cooperative for a longer period than shall be reasonably necessary to execute the work. The Cooperative shall have no responsibility for any injuries to landscaping or improvements located over, under, or around Cooperative facilities, but shall use reasonable care to avoid such injuries.

Section 6. **COOPERATIVE SHALL INDEMNIFY AND HOLD THE CITY AND ITS OFFICERS AND EMPLOYEES HARMLESS AGAINST ANY AND ALL CLAIMS, LAWSUITS, JUDGMENTS, COSTS, LIENS, LOSSES, EXPENSES, FEES (INCLUDING REASONABLE ATTORNEY'S FEES AND COSTS OF DEFENSE), PROCEEDINGS, ACTIONS, DEMANDS, CAUSES OF ACTION, LIABILITY, AND SUITS OF ANY KIND AND NATURE, INCLUDING PERSONAL OR BODILY INJURY (INCLUDING DEATH), PROPERTY DAMAGE, OR OTHER HARM FOR WHICH RECOVERY OF DAMAGES**

IS SOUGHT THAT IS FOUND BY A COURT OF COMPETENT JURISDICTION TO BE CAUSED SOLELY BY THE NEGLIGENT ACT, ERROR, OR OMISSION OF THE COOPERATIVE, ANY AGENT, OFFICER, DIRECTOR, REPRESENTATIVE, EMPLOYEE, AFFILIATE, OR SUBCONTRACTOR OF THE COOPERATIVE, OR THEIR RESPECTIVE OFFICERS, AGENTS, EMPLOYEES, DIRECTORS, OR REPRESENTATIVES, WHILE INSTALLING, REPAIRING, OR MAINTAINING COOPERATIVE ELECTRIC AND COMMUNICATION FACILITIES IN A PUBLIC RIGHT-OF-WAY. THE INDEMNITY PROVIDED BY THIS SUBSECTION DOES NOT APPLY TO ANY LIABILITY RESULTING FROM THE NEGLIGENCE OF THE CITY, ITS OFFICERS, EMPLOYEES, CONTRACTORS, OR SUBCONTRACTORS. IF COOPERATIVE AND THE CITY ARE FOUND JOINTLY LIABLE BY A COURT OF COMPETENT JURISDICTION, LIABILITY SHALL BE APPORTIONED COMPARATIVELY IN ACCORDANCE WITH THE LAWS OF THIS STATE WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO THE CITY UNDER STATE LAW AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER STATE LAW. THIS SECTION IS SOLELY FOR THE BENEFIT OF THE CITY AND COOPERATIVE AND DOES NOT CREATE OR GRANT ANY RIGHTS, CONTRACTUAL OR OTHERWISE, TO ANY OTHER PERSON OR ENTITY.

Section 7. TO THE EXTENT ALLOWED BY LAW, CITY SHALL INDEMNIFY AND HOLD COOPERATIVE AND ITS OFFICERS AND EMPLOYEES HARMLESS AGAINST ANY AND ALL CLAIMS, LAWSUITS, JUDGMENTS, COSTS, LIENS, LOSSES, EXPENSES, FEES (INCLUDING REASONABLE ATTORNEY'S FEES AND COSTS OF DEFENSE), PROCEEDINGS, ACTIONS, DEMANDS, CAUSES OF ACTION, LIABILITY, AND SUITS OF ANY KIND AND NATURE, INCLUDING PERSONAL OR BODILY INJURY (INCLUDING DEATH), PROPERTY DAMAGE, OR OTHER HARM FOR WHICH RECOVERY OF DAMAGES IS SOUGHT THAT IS FOUND BY A COURT OF COMPETENT JURISDICTION TO BE CAUSED SOLELY BY THE NEGLIGENT ACT, ERROR, OR OMISSION OF THE CITY, ANY AGENT, OFFICER, DIRECTOR, REPRESENTATIVE, EMPLOYEE, AFFILIATE, OR SUBCONTRACTOR OF THE CITY, OR THEIR RESPECTIVE OFFICERS, AGENTS, EMPLOYEES, DIRECTORS, OR REPRESENTATIVES, WHILE INSTALLING, REPAIRING, OR MAINTAINING FACILITIES IN A PUBLIC RIGHT-OF-WAY. THE INDEMNITY PROVIDED BY THIS SUBSECTION DOES NOT APPLY TO ANY LIABILITY RESULTING FROM THE NEGLIGENCE OF THE COOPERATIVE, ITS OFFICERS, EMPLOYEES, CONTRACTORS, OR SUBCONTRACTORS. IF COOPERATIVE AND CITY ARE FOUND JOINTLY LIABLE BY A COURT OF COMPETENT JURISDICTION, LIABILITY SHALL BE APPORTIONED COMPARATIVELY IN ACCORDANCE WITH THE LAWS OF THIS STATE WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO THE CITY UNDER STATE LAW AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER STATE LAW. THIS SECTION IS SOLELY FOR THE BENEFIT OF THE COOPERATIVE AND CITY AND DOES NOT CREATE OR GRANT ANY RIGHTS, CONTRACTUAL OR OTHERWISE, TO ANY OTHER PERSON OR ENTITY.

Section 8. Nothing herein contained shall be construed as conferring upon the Cooperative any exclusive rights or privileges of any nature whatsoever; provided, however, that the rights granted to Cooperative hereunder shall not be infringed upon or diminished by rights or privileges granted to a third party by City.

Section 9. The provisions of this Ordinance are severable, and if any section, provision, or part thereof be declared invalid then it is hereby declared the intent of the parties that the remaining parts of this Ordinance would be adopted, notwithstanding such invalid part or parts, and the invalidity of any particular section, provision, or part shall not invalidate this Ordinance, unless such invalidation materially changes the rights or obligations of either party.

Section 10. This Ordinance shall be in force and effect for a period of ten (10) years from and after the date on which the City adopts it in the form authorized by the Cooperative (the "Effective Date") and shall be automatically extended for an additional ten (10) years. The Cooperative's payment obligation provided for in Section 11 of this Ordinance shall become effective on the first day of the month following the Effective Date. This Ordinance shall supersede and take precedence over inconsistent ordinances, resolutions, or regulations hereafter or previously passed by the City, including ordinances requiring an application, permit, or fee to use or construct facilities within City streets, alleys, or any other public ways.

Section 11. In consideration of the rights granted to the Cooperative herein, the Cooperative, during the term of this Ordinance shall pay quarterly to City (payable on or before the forty-fifth day after the end of each quarter) a franchise fee of three percent (3%) of the gross receipts received by Cooperative from the Cooperative's sale of electricity, and three percent (3%) of the gross receipts received by Cooperative from Cooperative's sale of fiber optic home internet services, but only to the extent such services, whether for electricity or for fiber optic home internet services, are provided through Cooperative facilities located in, on, or under City public ways for which Cooperative does not pay the City a rental fee or other consideration for such use outside this Ordinance, to each retail customer of Cooperative whose consuming facility's point-of-delivery is located within the City's boundaries during such previous quarter. The term "gross receipts" shall not include (1) local, state, or federal taxes and regulatory fees of any kind collected by Cooperative that have been billed to its customers and that are separately stated on customer bills, (2) the franchise fees paid under this Ordinance, (3) receivables or revenue uncollectible from customers (i.e., bad debts) with billing addresses in the City that may have previously been included in gross receipts, or (4) revenue from the Cooperative's pole attachment agreements. It is agreed that such franchise fee payment is in addition to any ad valorem tax now or hereafter to be assessed on and collected from Cooperative under the laws of the State of Texas. Other than with respect to such ad valorem taxes, the payments so provided for in this section are in lieu of all other fees or charges, and the City shall not impose or collect, nor attempt to impose or collect, any other charge or fee in connection with the construction, operation, and maintenance of Cooperative's facilities or Cooperatives use of City public ways. In the

event Cooperative's customer bills contain charges for services or fees other than electric and/or communication service, customer payment shall be allocated between services on a pro rata basis for purposes of calculating the franchise fee.

If the Cooperative elects to provide customer choice pursuant to the terms of the Public Utility Regulatory Act ("PURA"), the electric franchise fee due under this Ordinance shall be as provided in the Texas Utilities Code Section 33.008 for an electric cooperative.

Section 12. Upon the City's written request, at reasonable intervals not to exceed once per fiscal year, the Cooperative will provide to City reports setting out matters concerning rates charged for services provided and revenues received by reason of the operation of the Cooperative within the City for payments made within two (2) years prior to the commencement of the reports, as such services and revenues relate to the calculation of the franchise fee herein. Such reports shall not include personally identifiable information, the content of communications, or other privately stored data.

Section 13. This Ordinance may be assigned by the Cooperative to any entity with the written consent of the City, which consent shall not be unreasonably withheld, delayed, or conditioned.

Section 14. To the extent allowed by law, including the Texas Public Information Act, the City agrees to hold in strict confidence and to not disclose any financial and trade secret information, or other information marked proprietary or confidential that it receives from the Cooperative or such information that by its nature or under the particular circumstances of disclosure should be understood by City, exercising its reasonable judgment, to be the confidential or proprietary information of the Cooperative. City shall promptly notify Cooperative in the event any such information received from Cooperative is requested by any third party.

Section 15. As part of the consideration for the Cooperative's use of the City's streets and public ways under this Ordinance, the Cooperative agrees to provide street lighting service within the areas of the City covered by this Ordinance, as provided for in this section. The design and construction of the street light units shall be in accordance with reasonable industry standards.

a. Street light units shall be installed and maintained by the Cooperative at various locations on City property in the City, as mutually agreed by the parties, but not including locations on farm-to-market roads, State or Interstate highways, or toll roads. Such lights shall be located primarily on street corners, within the bounds of the City streets, or at other locations on City property. Such lights shall be located for the benefit of the public and in areas which are open to and frequented by the general public. Following initial placements of lights, reasonable additional street light installations may be requested by the City Mayor (or his designee) in writing, specifying the location of such light or lights to be installed under the terms of this Ordinance; the Cooperative shall reasonably comply with such requests, in its sole discretion.

b. The Cooperative shall not be obliged to provide street lights on private property. Existing lights installed under private contracts with various persons or with the City may be absorbed into the street lighting system to be furnished hereunder, at the Cooperative's sole discretion, and the persons contracting for such lighting shall be excused from their obligations under such contract, provided that such lights meet the requirements of this Ordinance.

c. Street lights in new subdivisions within the City limits and the annexed areas of the City shall be installed from time to time pursuant to this Ordinance. Reasonable design standards shall be used in determining locations. The Cooperative shall not install a street light in any block or area in which there is not at least one permanent residence or business, nor shall it erect street lights in areas along highways, roads or streets unless there is at least one residence or business within a normal city block or 500 feet of such light.

d. If the installation of different types of street light units other than those that are in accordance with reasonable industry standards should be requested by the City, such units will be installed and maintained by the Cooperative upon a cost-sharing basis. The City shall be billed for the balance of the cost of such light at such location.

e. For lights requested by the City and installed by the Cooperative that are different than reasonable industry standards, the City shall reimburse the Cooperative monthly for its delivered cost of power consumed by such lights in excess of that applicable to the standard size light unit.

f. In the event any area in which street lighting has been placed should no longer be used, either as business property or residential, to such extent that street lighting would not be appropriate under the terms of this Ordinance, then the street lights in such area may be removed by the Cooperative at its discretion.

g. All installations made hereunder shall remain the property of the Cooperative. Upon the termination of this Ordinance, Cooperative may at its election remove street lights installed hereunder.

h. It is understood that the street lighting being furnished under the terms of this Ordinance is being requested by the City and furnished by the Cooperative as a service to the City in the manner agreed upon herein. **CITY AGREES TO AND SHALL INDEMNIFY AND HOLD HARMLESS COOPERATIVE FROM AND AGAINST ANY AND ALL CLAIMS, LOSSES, DAMAGES, CAUSES OF ACTION, SUITS, AND LIABILITY OF EVERY KIND, INCLUDING ALL EXPENSES OF LITIGATION, COURT COSTS, AND ATTORNEY'S FEES, FOR INJURY TO OR DEATH OF ANY PERSON, OR FOR DAMAGE TO ANY PROPERTY, ARISING OUT OF OR IN CONNECTION WITH THE LOCATION (UNLESS THE CITY HAS PREVIOUSLY REQUESTED A LOCATION CHANGE IN WRITING) AND/OR OPERATION OF ANY LIGHT INSTALLED BY COOPERATIVE AS PROVIDED FOR UNDER THIS SECTION; PROVIDED THAT THIS INDEMNITY SHALL NOT EXTEND TO ANY INJURIES,**

DEATH, OR DAMAGES THAT ARE CAUSED BY COOPERATIVE'S NEGLIGENCE IN THE INSTALLATION OR MAINTENANCE OF SUCH LIGHT.

i. Notwithstanding anything herein to the contrary, the Cooperative's obligation to provide street lighting under this section shall apply only to areas of the City served electricity by the Cooperative. The Cooperative reserves the right to terminate its obligation under this section if its non-wholesale power revenues are materially reduced as the result of another entity performing a power delivery function (i.e. distribution, transformation, metering, billing, etc.) in any section of the City served by the Cooperative. If this Ordinance is terminated at any time or for any reason, all street lighting provided thereafter at the written request of the City shall be billed to and paid for by the City at the then-existing appropriate tariff or as otherwise agreed by the Cooperative and the City.

Section 16. City agrees to include Cooperative in the planning process for developments of land located within the Cooperative's service area, and the City Mayor or his/her designee shall forward a copy of such proposed plats or subdivision master plans to the Cooperative for review and recommendation. Cooperative shall provide a written recommendation to the City Mayor or his/her designee with respect to the acceptability of the proposed plat or subdivision master plan and the provision of Cooperative utility services provided hereunder.

Section 17. Regarding the Cooperative's sale of fiber optic home internet services provided through Cooperative facilities located in, on, or under City public ways to retail customers of Cooperative whose consuming facility's point-of-delivery are located within the City's boundaries, Cooperative agrees to provide City a map of Cooperative's fiber optic plans; provided, however, Cooperative may in its sole discretion and from time to time change, modify, amend, or repeal the plans or routes or adopt new plans and routes, and such plans shall be provided to the City. City agrees to treat Cooperative's plans as confidential and proprietary commercial information of Cooperative, and to notify Cooperative in accordance with the requirements of the Texas Public Information Act if an open records request for the Cooperative's plans is received by City.

PASSED AND ADOPTED THIS THE 15 DAY OF July, 2019.

CITY OF NEW BERLIN, TEXAS

Walt Williams
Walt Williams, Mayor

ATTEST:

Marjorie Snell
City Secretary, City of New Berlin, Texas
Marjorie Snell

*After Recording
Please return to:*

THE CITY OF NEW BERLIN
NEW BERLIN, TEXAS
275 FM 2538
SEGUIN, TX 78155

ACKNOWLEDGED, ACCEPTED, AND AGREED TO:

GUADALUPE VALLEY ELECTRIC COOPERATIVE, INC.

BY: *Darren Schauer*

NAME: Darren Schauer

DATE: July 30, 2019

