

ORDINANCE NO. 2016-O-5

AN ORDINANCE GRANTING THE RIGHT, PRIVILEGE AND FRANCHISE TO JACKSON ELECTRIC COOPERATIVE, INC., AND ITS SUCCESSORS AND ASSIGNS, TO USE THE PUBLIC RIGHTS-OF-WAY OF THE CITY OF PALACIOS, TEXAS FOR THE DISTRIBUTION OF ELECTRIC POWER; PROVIDING FOR PERIOD OF GRANT; FOR METHOD OF ACCEPTANCE; FOR CONSIDERATION; FOR CONSTRUCTION AND RELOCATION OF SYSTEM FACILITIES; FOR ASSIGNMENT; FOR REPEAL OF CONFLICTING ORDINANCES; PROVIDING FOR PUBLICATION; AND ESTABLISHING AN EFFECTIVE DATE

WHEREAS, Texas Utilities Code § 41.005 provides that "An electric cooperative shall be an electric utility for purposes of Section 182.025, Tax Code, and Section 33.008."

WHEREAS, Texas Utilities Code § 33.008(a) provides that, "a municipality may impose on an electric utility, transmission and distribution utility . . . or electric cooperative that provides distribution service within the municipality a reasonable charge as specified in Subsection (b) for the use of a municipal street, alley, or public way to deliver electricity to a retail customer."; and

WHEREAS, Jackson Electric Cooperative, Inc. is a an "electric cooperative" as that term is defined in the Texas Utilities Code and wishes to use the City of Palacios streets, alleys, and public ways to deliver electricity to retail customers; and

WHEREAS, the City of Palacios wishes to grant Jackson Electric Cooperative, Inc. the right to use its streets, alleys, and public ways to deliver electricity to retail customers for a reasonable charge; and

WHEREAS, the City of Palacios finds that the charge provided in this Franchise Agreement is reasonable and comparable to fees charged to other providers; NOW THEREFORE

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

SECTION 1: GRANT OF FRANCHISE.

That the CITY of PALACIOS, Texas (hereinafter referred to as "CITY"), subject to the terms, conditions and provisions of this ordinance, does hereby grant to JACKSON ELECTRIC COOPERATIVE, INC. (hereinafter referred to as the "COMPANY"), its successors and assigns, the non-exclusive right, privilege and franchise to use the Public Rights-of-Way of the CITY as provided herein for the distribution of electric power. This Franchise grants no other rights or privileges to use the Public Rights-of-Way in the CITY except to distribute power in the CITY limits of the CITY and no other use of the Public Rights-of-Way by the COMPANY is granted or implied.

SECTION 2: DEFINITIONS.

"COMPANY" shall mean JACKSON ELECTRIC COOPERATIVE, INC., a Texas cooperative corporation, existing under and by virtue of the laws of the State of Texas, and authorized to transact and transacting business in the State of Texas, together with its legal representatives, successors, lessees and assigns, and shall not mean any of its affiliates and subsidiaries who shall have no right, privilege or franchise granted hereunder.

"FRANCHISE" shall mean this Ordinance and all rights and obligations established herein or as amended.

"ORDINANCE" shall mean this Ordinance No. O-2016-5.

"PUBLIC RIGHTS-OF-WAY" shall mean streets, avenues, easements (other than private easements obtained by the COMPANY), rights-of-ways, alleys and highways of the CITY and beneath the surface thereof as they may now or hereafter may exist and as defined herein, but

such does not include bridges or other CITY infrastructure such as water, sewer, electric, telecommunication and facilities and any conduit system owned, operated or controlled by CITY in

or on the Public Rights-of-Way.

"SYSTEM" shall mean all poles, pole lines, towers, distribution lines, wires, guys, cables, conduits and other desirable instrumentalities and appurtenances necessary for the operation of the COMPANY'S distribution business.

"CITY" shall mean the CITY of PALACIOS, Texas, as constituted on the effective date of this Ordinance or as may hereinafter be constituted.

SECTION 3. TERM OF FRANCHISE.

That upon the filing with the CITY by the COMPANY of the acceptance required hereunder, this Franchise shall be in full force and effect beginning March 1, 2016 for a term ending December 31, 2026.

SECTION 4. ACCEPTANCE OF FRANCHISE.

The COMPANY shall have ten (10) days from and after the passage and approval of this Ordinance to file its written acceptance thereof with the City Secretary in the form of Exhibit "A" attached hereto.

SECTION 5. FRANCHISE FEE.

5.1 In consideration for (i) the rights and privileges herein granted, (ii) the administration of this Franchise by the CITY, (iii) the temporary interference with the use of Public Rights-of-Way, (iv) rental for the use of the Public Rights-of-Way to distribute electric power and (v) for other costs and obligations undertaken by the CITY herein, the COMPANY agrees to pay to the CITY:

(a) before the Company implements customer choice, a franchise fee equal to \$0.0032 per kWh for each kilowatt hour of electricity delivered to retail customers within the CITY; and

(b) after the COMPANY implements customer choice, a franchise fee equal to the greater of \$0.0032 per kWh for each kilowatt hour of electricity delivered to retail customers within the CITY, or the maximum amount allowed by Section 33.008 of the Utilities Code, its successor law, if any, and as allowed by any other applicable law.

5.2 Such franchise fee payments described in section 5.1 begin accruing March 1, 2016 and shall be calculated and paid to the CITY quarterly on or before the 15th day of January, April, July and October, of each year of this Franchise. Nonetheless, no payments are due before thirty (30) days from COMPANY's acceptance of this Franchise, but will be calculated as beginning March 1, 2016. Late payments shall accrue interest at six percent (6.00%) per annum.

SECTION 6. AUDIT OF COMPANY'S RECORDS AND REPORTS.

6.1 Books of Account. The COMPANY shall keep complete and accurate books of accounts and records of its business and operations under and in connection with this Franchise. To the extent practicable, all such books of accounts and records shall be made available at the COMPANY'S local office or within sixty miles of the City.

6.2 Access by CITY. The CITY'S representative shall have access to all books of accounts and records of the COMPANY to the extent said books of accounts and records relate to and will assist the CITY in ascertaining the correctness of any and all payments or reports to the CITY. As to compliance with the construction standards, the CITY'S representative shall have access to the COMPANY'S records relating to use of the Public Rights-of-Way by its System within the CITY, and may examine its representatives with respect thereto. Access shall be given by COMPANY to the CITY'S representative at any time during regular business hours on ten (10) business days' prior written notice.

6.3 Annual Report by COMPANY. The COMPANY shall file an annual report with CITY evidencing the kilowatt hours delivered within the CITY to retail customers for the period beginning January 1 and ending December 31 of each calendar year this Agreement is in place on or before March 1st of each year.

6.4 Audits. The CITY's representative may inspect COMPANY'S books of accounts relative to the CITY at any time during regular business hours on ten (10) business days' prior written notice and may audit the books from time to time. All records reasonably necessary for such audit shall be made available by COMPANY at the COMPANY'S local office or within sixty miles from the City. COMPANY agrees to give its full cooperation in any audit and shall provide complete responses to inquiries within thirty (30) days of a written request. If the results of any audit indicate that COMPANY (i) paid the correct Franchise Fee, (ii) overpaid the Franchise Fee and is entitled to a refund or credit, or (iii) underpaid the franchise fee by three percent (3.00%) or less, then the CITY shall pay the costs of the audit. If the results of the audit indicate the COMPANY underpaid the Franchise Fee by more than three percent (3.00%), then COMPANY shall pay the reasonable costs of the audit. CITY agrees that any audit shall be performed in good faith, and shall not be requested more frequently than once every two years except an audit may be requested upon annexation of new areas in the City. If the results of the audit indicate that COMPANY underpaid the Franchise Fee by more than three percent (3.00%), and in CITY's reasonable judgment, which shall be exercised in good faith, determines that COMPANY is unable to produce contrary evidence to satisfactorily demonstrate to CITY that the results of the audit are not accurate, then COMPANY shall pay interest on the total amount of underpayment at an annualized interest rate of 8%, and interest shall be calculated from the time the original amount is due. Any additional amount due to CITY hereunder shall be paid within thirty (30) days from the date of invoice. Any amount not paid within thirty (30) days from the date of the invoice will cause interest to be payable at an annualized interest rate of 12% on the entire amount from the date of invoice. Notwithstanding the above, if COMPANY'S auditor disagrees with the CITY's determination that the additional amount due exceeds three percent (3.00%), the CITY's auditor and the COMPANY'S auditor shall choose a neutral auditor who shall make a determination which is final and binding on both parties as to whether the three percent (3.00%) amount was exceeded.

6.5 Confidentiality. The CITY agrees to hold in strict confidence any non-public information or information marked proprietary or confidential that it learns from the COMPANY to the extent permitted by law. CITY shall not be liable to the COMPANY for the release of any information obtained as a result of an audit where the CITY is required to release that information by law or court order.

SECTION 7: ANNEXATIONS BY THE CITY.

This Franchise shall extend to and include any and all territory which is annexed by the CITY during the term of this Franchise. Within sixty (60) days from the effective date of any such annexation, the COMPANY shall assure that any and all customers located within such annexed territory be included and shown on its accounting system as being within the CITY. After such sixty (60) day period, all customers accounts located within such annexed territory shall be subject to the payment provisions specified in Section 5 of this Franchise.

SECTION 8. CONSTRUCTION.

8.1 Compliance with CITY Ordinances. The COMPANY shall be bound by all current and future CITY ordinances that govern the placement, location and construction of facilities in the CITY, and CITY ordinances that assist in the management of facilities placed in, on or over the Public Rights-of-Way to the extent such are necessary to protect the public health, safety, or welfare, and are adopted pursuant to the CITY'S police powers.

8.2 Relocation of Facilities. In the event relocation is required by CITY of any of the COMPANY'S electric utility wire, cable, or other facility within Public Rights-of-Way for any CITY construction project as determined by the City's representative such relocation shall be completed at the COMPANY's sole cost within 120 days, except in circumstances that require additional time as reasonably determined by the CITY based upon information provided by the COMPANY. In the event relocation is not completed in the time allowed due to action or inaction by the COMPANY, the COMPANY shall defend the CITY against construction delay

claims that may be asserted against the CITY due to any delay arising from COMPANY's failure to timely relocate the facilities and pay or reimburse the CITY for amounts reasonably paid pursuant to such claims.

8.3 CITY Inspection. The CITY retains the right to make reasonable visual, non-invasive inspections of the System and on request of the CITY's representative from time to time, to require the COMPANY to provide available records or data to demonstrate its current compliance with the terms of this Franchise. Said inspections shall be made during the COMPANY'S normal business hours and shall not cause the COMPANY'S employees to work any hours that will cause the COMPANY to pay overtime wages or salaries to employees necessary to fulfill the CITY's right to said inspection.

8.4 Temporary Removal of Wires. COMPANY on the reasonable request of any person shall remove or raise or lower its wires within the CITY temporarily to permit the moving of houses or other bulky structures. The expense of such temporary removal, raising or lowering of wires shall be paid by the benefitted party or parties, and COMPANY may require such payment in advance. COMPANY shall be given not less than seventy-two (72) hours advance notice to arrange for such temporary wire changes. The clearance of wires above ground or rails within the CITY and also underground work shall conform to the basic standards of the National Electrical Safety Code, National Bureau of Standards, United States Department of Commerce, as promulgated at the time of erection thereof.

8.5 Tree Trimming. The right, license, privilege and permission is hereby granted to COMPANY, its successors and assigns, to trim trees upon and overhanging the streets, alleys, sidewalks and public places of the CITY, as needed and at the COMPANY'S discretion so as to prevent the branches of such trees from coming in contact with the wires or cables of COMPANY, and when so ordered by the CITY, said trimming shall be done under the supervision and direction of the City official to whom said duties have been or may be delegated.

SECTION 9. INDEMNITY.

9.1 COMPANY shall indemnify and save harmless CITY and its officers, agents, and employees (i) from and against all damages, costs, losses or expenses 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 COMPANY's acts or omissions, and (ii) from all suits, actions, losses, damages, claims, or liability of any character, type, or description, including without limiting the generality of the foregoing all expenses of litigation, court costs, and attorney's fees for injury or death to any person, or injury to any property, received or sustained by any person or persons or property, arising out of, or occasioned by, the negligent acts of COMPANY or its agents or employees, in the execution or performance of this Franchise. COMPANY further agrees to defend, at its own expense, and on behalf of CITY, any claim or litigation brought in connection with any such injury, death or damage. COMPANY shall have the right to control the defense and settlement of any such claim. This indemnity provision shall not apply to any liability resulting from the negligence of CITY, its officers, employees, agents, contractors, or subcontractors, as provided in subsection 9.3 below.

9.2 Upon commencement of any actions, losses, damages, claims, or liability, proceeding at law or in equity against the CITY relating to or covering any matter covered by this indemnity, to indemnify and hold the CITY harmless, or to pay said final judgment and costs, as the case may be, the CITY shall give the COMPANY reasonable notice of such actions, losses, damages, claims, or liability. ~~The COMPANY shall promptly provide~~ a defense to any such actions, losses, damages, claims, or liability, including any appellate proceedings brought in connection therewith, and pay as aforesaid, any final judgment or judgments that may be rendered against the CITY by reason of such damage suit. Upon failure of the COMPANY to comply with the provisions of this Ordinance, after reasonable notice to the COMPANY, CITY shall have the right to defend the same and in addition to being reimbursed for any such judgment that may be rendered against CITY, together with all court costs incurred therein, the COMPANY shall promptly reimburse CITY for attorney's fees, including those employed by CITY in such case or cases, as well as all expenses incurred by CITY by reason of undertaking the defense of such suit or suits, whether such suit or suits are successfully defended, settled, compromised, or fully

adjudicated against CITY.

9.3 The indemnity provided for in this section shall not apply to any liability determined by a court of competent jurisdiction to have resulted from the negligence or intentional acts or omissions of the CITY, its officers, agents and employees. In the event of joint and concurrent negligence or fault of both the COMPANY 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 under Texas law and without waiving any of the defenses of the parties under Texas law. Further, in the event of joint and concurrent negligence or fault of both the COMPANY and the CITY, responsibility for all costs of defense shall be apportioned between the CITY and COMPANY based upon the comparative fault of each.

9.4 The provisions of this indemnity are solely for the benefit of CITY and are not intended to create or grant any rights, contractual or otherwise, to any other person or entity.

SECTION 10. TRANSFERS AND ASSIGNMENT.

10.1 No transfer of this Franchise shall be effective unless it is in writing, in duplicate, signed by the transferor and by the transferee filed with the City Secretary, the transferee pays a franchise transfer fee of Five Hundred Dollars (\$500.00) to the CITY and it is approved by the City Council. Such approval shall not be unreasonably withheld. The fees for subsequent years shall be payable by the transferee under the same conditions as they had been for the transferor. Approval by the City Council of such transfer will extinguish COMPANY's rights and obligations pursuant to this Franchise and delegate them to the transferee.

10.2 No assignment in law or otherwise shall be effective until the assignee has filed with the CITY an instrument, duly executed, reciting the fact of such assignment, accepting the terms of this Franchise, and agreeing to comply with all of the provisions of this Franchise substantially in the form of Exhibit "A". A mortgage or other pledge of assets in a bona fide lending transaction shall not be considered an assignment for the purposes of this section.

SECTION 11. FORFEITURE AND TERMINATION.

11.1 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 of the COMPANY'S rights and privileges hereunder in the event of a material breach of terms and conditions hereof, subject to reasonable notice and opportunity to cure as provided in Section 11.2 below.

11.2 If the COMPANY is in violation of this Franchise and such violation is of a curable nature, the CITY's representative shall notify the COMPANY in writing, setting forth the nature of such violation. Within twenty-one (21) days of receipt of such notice, the COMPANY shall (i) respond in writing that the violation has been cured, (ii) provide a written cure plan, subject to review and approval by the CITY's representative, or (iii) provide a written explanation with documentation to support that the alleged violation did not occur.

11.3 Notwithstanding Section 11.2, the COMPANY shall be allowed thirty (30) days after the CITY's delivery of the written notice described in Section 11.2 to cure a curable violation. If the nature of such violation is such that it cannot be fully cured within thirty (30) days due to circumstances not under the COMPANY'S control, the period of time in which the COMPANY must cure the violation may be extended by the CITY's representative in writing for such additional time reasonably necessary to complete the cure, provided that (i) the COMPANY has begun promptly to cure, and (ii) the COMPANY is diligently pursuing its efforts to cure in the CITY's representative's reasonable judgment.

11.4 At the COMPANY'S request, the CITY shall afford the COMPANY an opportunity to show that a violation has not occurred, through a hearing before the City Council. Such hearing shall take place on or before the next City Council meeting scheduled within thirty (30) days after the CITY's receipt of the COMPANY request. If the City Council determines that a violation has occurred, the COMPANY shall pay all of the CITY's reasonable expenses

associated with the hearing. After the conclusion of the hearing either party may seek any and all remedies to which it may be entitled at law or in equity.

11.5 Material breaches of this Franchise specifically include, but are not limited to, failing to comply with the requirements set forth in Sections 5, 6, 8 and 9.

11.6 The preceding conditions provided in subsection 11.5 shall not constitute a material breach if the violation occurs without the fault of the COMPANY or occurs as a result of circumstances beyond its control. The COMPANY 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, managers, officers or employees.

11.7 A termination shall be declared only by a written decision of the City Council after a public hearing before the City Council, which shall afford the COMPANY full opportunity to be heard and to respond to any notice of grounds of termination. The foregoing sentence, however, shall not be construed as requiring any additional hearing after the COMPANY has had such proceeding pursuant to Section 11.4 and after the COMPANY'S failure to timely cure any default within a time period which may have been granted by the City Council at the hearing held pursuant to Section 11.4 above. All of the CITY'S notice requirements shall be met by providing written notice to the COMPANY at least thirty (30) days before a public hearing concerning the proposed termination of this Franchise. Such notice shall specifically state the CITY'S alleged grounds for termination.

11.8 The City Council, after public hearing, and upon finding the existence of grounds to terminate, may either declare this Franchise terminated, excuse the breach upon a showing by the COMPANY of mitigating circumstances or good cause for the existence of such grounds, or grant additional time for the COMPANY to cure its default.

11.9 Neither the COMPANY'S acceptance of this Franchise, the COMPANY'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 COMPANY'S right to seek judicial determination of the rights and responsibilities of the parties under this Franchise.

SECTION 12: FORECLOSURE, RECEIVERSHIP, AND BANKRUPTCY.

The COMPANY shall notify the CITY within thirty (30) days after the appointment of a receiver or trustee to take over and conduct the business of the COMPANY, 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.

SECTION 13: ENFORCEMENT

The City Attorney or his/her designee shall have the right to enforce all legal rights and obligations under this Ordinance without further authorization. The COMPANY shall provide to the City Attorney or his/her designee documents and records reasonably necessary to determine the COMPANY'S compliance with this Franchise, with the exception of those documents that are privileged or confidential by federal or state law or regulation or any documents that would be privileged under the Texas Rules of Civil Procedure.

SECTION 14: NONEXCLUSIVE FRANCHISE

Nothing contained in this Franchise shall be construed as conferring upon the COMPANY any exclusive rights or privileges of any nature whatsoever.

SECTION 15: ENTIRE AGREEMENT.

This Franchise contains all of the agreements of the parties with respect to any matter covered or mentioned in this Franchise and no prior or contemporaneous agreements or understandings pertaining to any such matters shall be effective for any purpose.

SECTION 16: SEVERABILITY.

If any section, subsection, sentence, clause, phrase, or portion of this Franchise is for any reason held invalid or unconstitutional by any court or administrative agency of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision and such holding shall not affect the validity of the remaining portions thereof.

SECTION 17: NON-WAIVER.

Failure of the CITY to declare, or delay in taking any action in connection with, any breach or default immediately upon the occurrence thereof shall not waive such breach or default, but the CITY shall have the right to declare any such breach or default at any time. Failure of the CITY to declare one breach or default does not act as a waiver of the CITY's rights to declare another breach or default.

SECTION 18: GOVERNING LAW; VENUE.

This Ordinance shall be governed by and construed in accordance with the laws of the State of Texas. The venue and jurisdiction over any dispute related to this Franchise shall be with the Texas State District Court in Matagorda County, Texas.

SECTION 19: PUBLICATION.

After the first reading and before its final passage, this ordinance shall be published once each week for two (2) consecutive weeks in a local newspaper, the cost of which shall be paid by the COMPANY.

SECTION 20: EFFECTIVE DATE.

This Ordinance shall become effective thirty days after its approval and adoption upon second and final reading.

PASSED AND APPROVED on first reading this 10th day of May, 2016.

PASSED, APPROVED AND ADOPTED on second and final reading this 14 day of June, 2016.

CITY OF PALACIOS, TEXAS

Glen Smith
ATTEST:

Glen Smith, Mayor

Angela Flores
ANGELA FLORES, City Secretary



APPROVED AS TO FORM:

RANDALL B. STRONG, City Attorney

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EXHIBIT "A"
Acceptance
(In accordance with Section 4 or Section 10 on Transfers)

TO THE HONORABLE MAYOR AND CITY COUNCIL OF THE CITY OF PALACIOS:

THE STATE OF TEXAS

COUNTY OF MATAGORDA

I, Angela Flores, the duly appointed, qualified City Secretary of the CITY of PALACIOS, Texas, hereby certify that the above and foregoing Acceptance was received and filed in the office of the City Secretary of the CITY of PALACIOS on the 14 day of June, 2016.

Executed under my hand and the official seal of the CITY of PALACIOS, Texas, at said CITY, this 14 day of June, A.D., 2016.


CITY SECRETARY
CITY OF PALACIOS, TEXAS

'[Name of Company or transferee] [, on behalf of itself, its successors and assigns] hereby fully accepts CITY of PALACIOS Ordinance No. - and expressly agrees to be bound by all of its terms and provisions, and to fully observe and fully perform all limitations and obligations contained in such Ordinance. COMPANY further certifies to the CITY that all of the COMPANY's information filed with the CITY in connection with the issuance of such Ordinance is true, correct and complete.'

Jackson Electric Cooperative, Inc.

Hertf Cornelius
[NAME OF COMPANY OR TRANSFEREE]

BY: President
[Title]

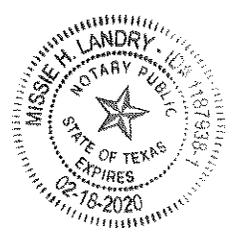
ATTEST:

Michael Jacobs
Secretary
Michael Jacobs

Dated the 23 day of August, A.D., 2016.

THE STATE OF TEXAS
COUNTY OF Jackson

This instrument was acknowledged before me on August 23, 2016, by Hertf Cornelius, the President of Jackson Electric Cooperative, Inc a Texas corporation, on behalf of said corporation.



Missie H. Landry
NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

My Commission expires:

Printed Name: _____