

ORDINANCE NO. _____

**AN ORDINANCE OF THE CITY OF PFLUGERVILLE, TEXAS,
GRANTING TO THE CITY OF AUSTIN A FRANCHISE TO
CONSTRUCT, MAINTAIN, OPERATE, AND USE A
TRANSMISSION AND DISTRIBUTION SYSTEM IN THE CITY OF
PFLUGERVILLE TO PROVIDE ELECTRIC UTILITY SERVICE.**

WHEREAS, the City of Austin owns and operates the municipally owned electric utility, Austin Energy (“AE”); and

WHEREAS, AE is the exclusive electric service provider to customers within the municipal limits of the City of Pflugerville (“City”); and

WHEREAS, the Pflugerville City Council finds it in the best interest of the City to enter into a franchise agreement with AE on the terms and conditions set forth in this ordinance;

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF PFLUGERVILLE, TEXAS:

Section 1. Grant of Franchise

The City of Austin, acting by and through its municipally owned electric utility, AE, is granted a franchise for the transmission, distribution, and sale of electricity within the City of Pflugerville. AE may construct, operate and maintain in, upon, over, under, and across the present and future streets, alleys and public ways and places within the City all the facilities AE deems reasonably necessary for the provision of safe, reliable, and economical electric service (AE Facilities).

This Franchise shall not be construed to restrict or materially affect or alter any power or authority granted to AE by state or federal law, nor does it grant to the City any right or regulatory authority over AE’s rates or operations not otherwise expressly given the City by state or federal law.

Section 2. Franchise Fee

During the term of the franchise granted herein, AE shall pay a Franchise Fee to the City of street rental in the amount of 3% of AE’s Gross Receipts from the sale of electricity to customers within the City beginning from the date of approval of a franchise agreement between AE and the City. “Gross Receipts” shall consist only of monies actually received and shall exclude uncollectibles and taxes. In the event a customer bill contains charges for services or fees other than for electric service, customer payments shall be allocated between services on a pro-rata basis.

The payment for street rental shall be based upon AE’s Gross Receipts on a quarterly basis and will be due and payable to the City within forty-five days after the close of each quarter in AE’s fiscal year.

The Franchise Fee is in lieu of all other fees and charges and the City shall not impose upon or collect from AE any other charge or fee in connection with the construction, operation, and maintenance of AE facilities within the City.

Section 3. Construction and Operation of Facilities

AE may open and cut streets, curbs, and sidewalks; bore; or use any other methods it deems reasonably necessary to construct, maintain, and operate AE facilities within the City. The design and construction of AE Facilities and AE's access to and restoration of paved surfaces shall be in accordance with AE's design standards and criteria, as amended by AE from time to time.

Prior to starting work, AE shall give ten days written notice to the City of the scope and duration of the work. Prior notice may be reduced or waived by the City Manager. In the event AE deems there is an emergency, the work is necessary to restore interrupted service, or AE otherwise deems that the notice requirement will hamper its ability to maintain safety or reliability, AE may act without prior notice.

The surface of any street, alley, or public way or place disturbed by AE shall be restored by AE within a reasonable time after completion of the work. Restoration shall be made to standards at least equal to those used by AE within the city limits of Austin.

All construction by AE in the public rights-of-way shall be in compliance with applicable City Ordinances, except where there is an express conflict in this franchise.

Section 4. Civic Improvements

The City shall give AE reasonable prior notice of street widening or straightening projects and water line or wastewater line replacement projects. AE shall, at its expense, relocate AE facilities in City-owned rights-of-way as is reasonably necessary to accommodate such street widening or straightening and water or wastewater line replacement.

Section 5. Use of Pole Space

AE shall permit the City to use existing AE poles for the City's communications fiber to be used for governmental purposes to the extent AE determines space is available. Such use shall be subjected to the City's execution of AE's form contract for pole attachments and payment of the AE fees applicable to such service. The City may not lease or resell excess fiber capacity on AE poles for non-governmental use without AE's written consent.

Section 6. Uniform Franchise Fees

If at any time during the term of this Agreement, AE enters into a franchise agreement with another municipality that provides for payment of a franchise fee at a greater percentage than that stated in Section 2, AE shall provide written notice of such event to the City. Within sixty days after the City's receipt of notice from AE, the City may opt to amend the percentage stated in Section 2 to reflect the percentage given to such other municipality. Such amendment shall take effect on the same date shown in the franchise with such other municipality.

Section 7. Indemnification and Hold Harmless

To the extent allowed by law, AE 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 cost 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 AE, any agent, officer, director, representative, employee, affiliate or subcontractor of AE, 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 City, its officers, employees, contractors, or subcontractors. If AE 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 defenses of the parties. This section is solely for the benefits of the City and AE and does not create or grant any rights, contractual or otherwise, to any other person or entity.

AE or the City shall promptly advise the other in writing of any known claim or demand against AE or the City related to or arising out of AE's activities in a public right-of-way.

Section 8. Effective Date

This Agreement shall become effective thirty days after adoption by the City Council of Pflugerville or upon adoption by the City Council of Austin, whichever is sooner.

Section 9. Governing Law

This Agreement is performable in Travis County, Texas, shall be governed by the Laws of the State of Texas. Other than AE's obligation to pay the Franchise Fee stated in Section 2, in the event of a conflict between this Agreement and an existing or later-adopted ordinance of the City Council of Austin, the latter shall control.

Section 10. Accounts, Records, Reports and Investigations

AE will provide the records necessary to verify that all payments to the City are accurate. AE will provide all necessary and reasonable records within 30 days of written request.

Section 11. Termination

Either party may terminate this agreement by giving notice to the other party not less than 180 days prior to the beginning of the next fiscal year. Such termination shall become effective as of the last day of the then current fiscal year.

Section 12. Notices

Any notices required under this Agreement shall be effective when delivered to the City Manager of Pflugerville, when notice to the City is required, or to the General Manager of Austin Energy, when notice to AE is required.

Section 13. Severability

Should any of the clauses, sentences, paragraphs, sections or parts of this Ordinance be deemed invalid, unconstitutional, or unenforceable by a court of law or administrative agency with jurisdiction over the matter, such action shall not be construed to affect any other valid portion of this Ordinance.

Section 14. Proper Notice and Meeting

It is hereby officially found and determined that the meeting at which this Ordinance was passed was open to the public, and that public notice of the time, place and purpose of said meeting was given as required by the Open Meetings Act, Texas Government Code, Chapter 551. Notice was also provided as required by Chapter 52 of the Texas Local Government Code.

PASSED AND APPROVED THIS _____ day of _____, 2011

CITY OF PFLUGERVILLE, TEXAS

By: _____
Jeff Coleman, Mayor

ATTEST:

Karen Thompson, City Secretary

APPROVED AS TO FORM:

Floyd Akers, City Attorney