

ORDINANCE NO. 2645

AN ORDINANCE GRANTING TEXAS UTILITIES ELECTRIC COMPANY ITS SUCCESSORS AND ASSIGNS, THE RIGHT, PRIVILEGE AND FRANCHISE TO ERECT AND MAINTAIN ITS POLES, WIRES, ANCHORS, CABLES, MANHOLES, CONDUITS AND OTHER PLANT CONSTRUCTION AND APPURTENANCES ALONG, ACROSS, ON, OVER, THROUGH, ABOVE AND UNDER ALL PUBLIC STREETS, AVENUES, ALLEYS, HIGHWAYS, PUBLIC GROUNDS AND WAYS AND UTILITY EASEMENTS IN SAID CITY, UNDER REGULATIONS AND RESTRICTIONS, AND CITY SHALL RECEIVE AN ANNUAL PAYMENT AND THE RIGHT TO USE CERTAIN FACILITIES OF THE ELECTRIC COMPANY, ALL AS HEREIN PROVIDED; PRESCRIBING THE TERM AND EFFECTIVE DATE; PROVIDING THIS ORDINANCE BE CUMULATIVE; PROVIDING FOR SEVERABILITY; PROVIDING FOR GOVERNMENTAL IMMUNITY.

WHEREAS, Texas Utilities Electric Company, an electric utility, hereinafter referred to as the "Electric Company", is now and has been engaged in the electric generation, transmission, and distribution business in the State of Texas; and

WHEREAS, it is to the mutual advantage of both the City of Mesquite, Texas, hereinafter referred to as the "City", and the Electric Company that an agreement should be entered into between the Electric Company and the City establishing the conditions under which the Electric Company shall operate in the City; and

WHEREAS, it is to the mutual advantage of both the City and the Electric Company that an agreement should be entered into between the Electric Company and the City, pursuant to which the Electric Company will use the present and future streets, avenues, alleys, highways, public grounds and ways, and utility easements within the City in connection with the Electric Company's business;

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

Section 1. Construction and Maintenance of Electric Company Plant and Service

A. The City hereby grants to the Electric Company, its successors and assigns, the right, privilege, and franchise to use its present and future streets, avenues, alleys, highways, public grounds and ways and utility easements for the purpose of constructing and maintaining in the present and future streets, avenues, alleys, highways, public grounds and ways, and utility easements of the City, electric light and power lines

together with all necessary or desirable appurtenances (including underground conduits, poles, towers, wires, and transmission lines, and telephone and communication lines for its own use) for the purpose of supplying electricity to the City and the inhabitants thereof and persons, firms, and corporations beyond the City's corporate limits, for light, heat, power and other purposes.

B. The poles, wires, anchors, cables, manholes, conduits, and other plant construction and appurtenances used in or incident to the supplying of electric service, and to the maintenance of an electric generating, transmission, and distribution business and system by the Electric Company in the City, may remain as now constructed (usual repair, maintenance, and reconductoring excepted), subject to such changes as under the limitations and conditions herein prescribed may be considered necessary by the agreement of the City and the Electric Company; and the Electric Company shall continue to exercise its right to place, remove, construct and reconstruct, extend and maintain its said plant and appurtenances as the business and purposes for which it is or may be incorporated may from time to time require along, across, on, over, through, above and under all the public streets, rights-of-way, avenues, alleys, highways, public grounds and ways, and utility easements within the present limits of the City and within said limits as the same from time to time may be extended, subject to the regulation, limitations, and conditions herein prescribed.

Section 2. Utility Relocation

The placement of Electric Company's facilities in the streets, avenues, alleys, highways, public grounds and ways, and easements within the City shall interfere as little as reasonably practicable with the use of public streets, avenues, alleys, highways, drainage systems and public ways and shall comply with all pertinent requirements of the National Electric Safety Code. Whenever by reason of the widening or straightening of streets, it shall be deemed necessary by the governing body of the City or its designated representative to relocate the facilities of the Electric Company, the Electric Company shall, at no cost to the City, relocate such facilities as soon as reasonably practicable upon the City specifying the new location along said street. A reasonable time frame for the necessary relocation will be mutually agreed on by the City and Electric Company. If during the widening or straightening of the street or improvements to drainage systems, it becomes necessary to support any of the Electric Company's facilities due to the proximity of the construction, it shall be done at no cost to the City or its contractors. Should work of the City other than that addressed

by this Section require the relocation of the facilities of the Electric Company, the Electric Company shall relocate such facilities as soon as reasonably practicable upon the payment of the Electric Company's relocation costs.

Section 3. Supervision By City of Location of Poles And Conduits

All Electric Company facilities to be placed or relocated in the future in the City's streets, avenues, alleys, highways, public grounds and ways shall be set so that they shall not interfere with the flow of water in any gutter, drain or other drainage facility, and so that the same shall not interfere with ordinary travel on the streets, and so that the same shall interfere as little as practical with ordinary travel on sidewalks and bikeways, and so that they shall not compromise public safety, especially at public street intersections. The Electric Company must notify the City prior to any major construction work within the paved portion of any City streets, avenues, alleys, highways, public grounds and ways. The City herein reserves the right to require the Electric Company to install or relocate above-ground facilities as far from the vehicular travel lanes as reasonably possible to alleviate unnecessarily hazardous conditions to life or property. The City expressly reserves the right to require by ordinance that utilities be placed underground in the new developments provided that the Electric Company is paid the actual cost of such underground facilities if they replace existing overhead facilities or, in the case of new facilities, the actual difference in cost of constructing the facilities underground and constructing them overhead, all in accordance with the Electric Company's approved tariff.

Section 4. Streets To Be Restored To Good Condition

The surfaces of any street, alley, highway or public place disturbed by the Electric Company in building, constructing, renewing or maintaining its electric plant and system shall be restored within a reasonable time after the completion of the work to as good condition as before the commencement of work to the reasonable satisfaction of the City. No street, alley, highway or public place shall be encumbered for a longer period than shall be reasonably necessary to execute the work. The Electric Company shall install traffic control devices in accordance with lawful City or State standards, when such activity requires the full or partial closure of any vehicular travel way.

Section 5. Operation And Maintenance Of Electric Plant

The Electric Company shall maintain its system in reasonable operating condition at all times during the continuance of this agreement. An exception to this condition is automatically in

effect when service furnished by the Electric Company is interrupted, impaired or prevented by fires, strikes, riots or other occurrences beyond the reasonable control of the Electric Company, or by storms, floods or other casualties, in any of which events the Electric Company shall do all things, reasonable within its power to restore normal service. Nothing contained in this Section 5 or elsewhere herein shall be construed to create any liability for the benefit of third parties, it being the intent of the parties that this agreement is solely for the benefit of the parties hereto.

Section 6. Temporary Removal of Wires

The Electric Company on the request, and with reasonable advance notice, of any person shall remove or raise or lower its wires 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 the Electric Company may require such payment in advance.

Section 7. Tree Trimming

The right, license, privilege and permission is hereby granted to the Electric Company to trim trees upon and overhanging the streets, alleys, sidewalks and public places of the City, so as to prevent the branches of such trees from coming in contact with, and to prevent possible damage to, the wires or cables of the Electric Company.

Section 8. Compensation To The City

A. In consideration of the grant of said right, privilege, and franchise by City and as full payment for the right, privilege and franchise of using and occupying the said streets, avenues, alleys, highways, public grounds and ways, and utility easements and in lieu of any and all occupation taxes, municipal charges, fees, easement taxes, franchises taxes, license and inspection fees or charges, street taxes, street or alley rentals and all other taxes, charges, levies, fees, and rentals of whatsoever kind and character which City may impose or hereafter be authorized or empowered to levy and collect excepting only the usual general or special ad valorem taxes which City is authorized to levy and impose upon real and personal property, sales taxes on grantee's sales within the City to the extent authorized by state law and assessments for public improvements, the Electric Company shall pay to the City quarterly, on or before the 10th day of January, April, July, and October of each year during the term hereof, beginning on January 10, 1990, a sum equal to three percent (3%) of its gross receipts from the retail sale

of electric energy within the corporate limits of the City during the three-month period ending on the last day of October, January, April, or July next preceding the date such payment is due. Each such quarterly payment shall be based upon the Electric Company's gross receipts during the specified three-month period and shall be payment for the rights and privileges granted hereunder for the three-month period ending on the date each such payment is due. On or before each payment due date a report shall be filed by the Electric Company with the City showing its gross receipts as aforesaid for the applicable three-month period and the payment made hereunder shall be based upon said report. The payment due dates, gross receipts for each payment period and three-month period of use and occupancy covered by each payment are shown below:

<u>Payment Due Date</u>	<u>Gross Receipts for Three Months Ending On Prior</u>	<u>Use and Occupancy For Three Months Ending</u>
January 10	October 31	January 10
April 10	January 31	April 10
July 10	April 30	July 10
October 10	July 31	October 10

B. If Electric Company shall accept (other than through the acquisition by merger or otherwise of another utility) a franchise ordinance adopted by any municipality on or after September 1, 1988, (other than a short-term extension of a preexisting franchise pending negotiation of a new franchise) which franchise ordinance provides for payment to the municipality of a percentage of Electric Company's gross receipts at a rate higher than three percent (3%), then Electric Company's payments under Section 8.A. of this ordinance shall be at the rate in excess of three percent (3%) specified in the ordinance of such other municipality accepted by Electric Company. Payments to City will be based on such higher rate from the first day of the first month next following the date Electric Company accepts the franchise ordinance of such other municipality and shall continue until expiration of the term of the franchise ordinance of such other municipality or until expiration of the term of this franchise, whichever is earlier, provided that, if all or part of such higher rate is to be surcharged to the citizens of such other municipality, then the payments to City will be based on such higher rate effective

beginning on the date that City approves a tariff for Electric Company permitting Electric Company to implement on its electric service bills to all of its customers within the City's corporate limits a surcharge by which Electric Company is able to fully recover the full amount of such higher rate on terms similar to those in effect in such other municipality and terminating upon the expiration of the term of the franchise ordinance of such other municipality or until expiration of the term of this franchise, whichever is earlier. Provided that nothing herein shall alter or affect the dates upon which the payments specified in this franchise are payable or the period to which each of said payments is referable.

Section 9. Facilities To Be Furnished To City As Additional Consideration

In addition to the consideration set forth in Section 8, the Electric Company shall, to the extent that it has spare space on its above-ground facilities not needed for future anticipated load growth or emergencies, furnish such space as may be required from time to time by the City upon the poles now owned or hereafter erected by the Electric Company in the City for the use of the City's police and fire alarm, street light, traffic signal and communications systems (for purposes of this Section hereafter referred to as "systems"), provided that the City pays a fair rental therefor. The location on the poles of the systems shall be determined on specific applications for space, at the time the applications are received from the City, and will be subject to the requirements of the National Electric Safety Code. Where underground conduits are laid or are constructed by the Electric Company, the Electric Company shall, to the extent that it has spare space on its facilities not needed for future anticipated load growth or emergencies, furnish sufficient duct space not to exceed the capacity of one (1) duct for use by the City in carrying its systems, provided that the City pays a fair rental therefor. All such wires, whether on poles or in conduits, shall be constructed, maintained, and operated in such manner as not to interfere with nor create undue hazard in the operation of the electric system of the Electric Company. It is further agreed that the Electric Company shall not be responsible to any party or parties whatsoever for any claims, demands, losses, suits, judgments for damages or injuries to persons or property by reason of the construction, maintenance, inspection or use of the systems' wires belonging to the City, and the City shall insure, indemnify and hold the Electric Company harmless against all such claims, losses, demands, suits and judgments, except as to the liability of the Electric Company for its own negligence.

Section 10. Term of This Ordinance

This ordinance and the agreements contained herein shall be in full force and effect for a period beginning with the date of passage of this ordinance and ending thirty (30) years after such date.

Section 11. Indemnity

The Electric Company agrees to and shall indemnify and hold harmless the City, its officers, agents, contractors and employees 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 occasioned by the construction, maintenance, operation or repair of the Electric Company's generation, transmission or distribution system, or by the conduct of the Electric Company's business in the City. Electric Company further agrees to handle and defend at its own expense, on behalf of City and in City's name, any claim or litigation in connection with any such injury, death or damage herein indemnified. 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.

Section 12. No Exclusive Privileges Conferred By This Ordinance

Nothing herein contained shall be construed as giving to the Electric Company any exclusive privilege.

Section 13. Successors and Assigns

The rights, powers, limitation, duties, and restrictions herein provided for shall inure to and be binding upon the parties hereto and upon their respective successors and assigns.

Section 14. Electric Company Subject to Other Regulations

The Electric Company's property and operations shall be subject to all lawful rules and regulations that have been or will be promulgated by the City which are not inconsistent with this ordinance or State or Federal law.

Section 15. Independent Contractor

When performing under this agreement, the Electric Company's status shall be that of an Independent Contractor and not an agent, servant, employee or representative of the City in the performance of this agreement. No term or provision of, or act of the Electric Company or City under this agreement shall be construed as changing that status.

When performing under this agreement, the City's status shall be that of an Independent Contractor and not an agent, servant, employee or representative of the Electric Company in the performance of this agreement. No term or provision of, or act of, the City or Electric Company under this agreement shall be construed as changing that status.

Section 16. Ordinance Cumulative

This ordinance shall be and is hereby declared to be cumulative of all other ordinances of the City and this ordinance shall not operate to repeal or affect any of such other ordinances except insofar as the provisions thereof might be inconsistent or in conflict with the provisions of this ordinance, in which event such conflicting provisions, if any, in such other ordinance or ordinances are hereby repealed.

Section 17. Effect of Invalidity

If any provision, section, subsection, sentence, clause or phrase of this ordinance is for any reasons held to be unconstitutional, void or invalid (or for any reason unenforceable), the validity of the remaining portions of this ordinance shall not be affected thereby, it being the intent of the City in adopting this ordinance that no portion hereof or provision hereof shall become inoperative or fail by reason of any unconstitutionality or invalidity of any other portion, provision, or regulation, and to this end, all provisions of this ordinance are declared to be severable.

Section 18. Governmental Immunity

All of the regulations provided in this ordinance are hereby declared to be governmental and for the health, safety and welfare of the general public. Any member of the City Council or any City official or employee charged with the enforcement of this ordinance, acting for the City in the discharge of his duties, shall not thereby render himself personally liable; and he is hereby relieved from all personal liability for any damage that might accrue to persons or property as a result of any act required or permitted in the discharge of his said duties.

Section 19. Rights Reserved

Neither party to this agreement waives its respective rights to seek all appropriate legal and equitable remedies as allowed by law upon violation of the terms of this agreement, including seeking injunctive relief in a court of competent jurisdiction.

Section 20. Meeting Open to the Public

It is hereby officially found and determined that the meeting or meetings at which this ordinance is passed is open to the public, as required by law, and that public notice of the time, place and purpose thereof was posted, as required by law.

Section 21. Effective Date

This ordinance shall become effective from and after its passage as provided by law and acceptance by the Electric Company. If the Electric Company does not deliver a written acceptance hereof to the City within sixty (60) days of the date of passage, this ordinance shall be null and void.

PASSED on 1st reading this 6th day of November, 1989.

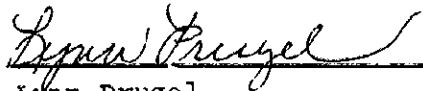
PASSED on 2nd reading this 20th day of November, 1989.

PASSED AND APPROVED on 3rd and final reading this 4th day of December, 1989, at a regular meeting of the City Council of the City of Mesquite, Texas.



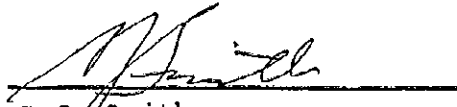
George A. Venner, Sr.
Mayor

ATTEST:



Lynn Prugel
City Secretary

APPROVED AS TO FORM:



B.J. Smith
City Attorney

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