

ORDINANCE NO. 19067

AN ORDINANCE introduced by City Manager Norton N. Bonaparte, Jr., granting to Kaw Valley Electric Cooperative, Inc., its successors and assigns, an electric energy franchise in the City of Topeka, Kansas, prescribing the terms thereof and relating thereto.

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF TOPEKA, KANSAS:

Section 1. Definitions.

For purposes of this Franchise, the following words and phrases shall have the meanings given herein:

City as the Grantor – shall mean the City of Topeka, Kansas.

Company as the Grantee – shall mean Kaw Valley Electric Cooperative, Inc., a Kansas Corporation.

Distributed or Distribution – shall mean all sales, distribution, or transportation to any consumer for use within the City by the Company or by others through the Facilities of the Company in the Right-of-Way.

Facilities – shall mean all electric distribution lines, substations, works, and plants together with all necessary appurtenances thereto.

Gross receipts – shall mean any and all compensation and other consideration derived directly by the Company from any Distribution of electric energy to a consumer for any use, including domestic, commercial and industrial purposes through charges as provided in tariffs filed and approved, and including without limitation interruptible sales and single sales; except that such term shall not include revenues from any operation or use of any or all of the Facilities in the Right-of-Way by others nor shall such term include revenue from certain miscellaneous charges and accounts, including but not limited to delayed or late payment charges, connection and disconnection fees, reconnection fees, customer

project contributions, returned check charges, and temporary service charges.

Public Improvement – shall mean any existing or contemplated public facility, building, or capital improvement project, financed by the City, including without limitation, streets, alleys, sidewalks, sewer, water, drainage, Right-of-Way improvement, and Public Projects.

Public Project – shall mean any project planned or undertaken and financed by the City or any governmental entity for construction, reconstruction, maintenance, or repair of public facilities or improvements, or any other purpose of a public nature paid for with public funds.

Public Project for Private Development – shall mean a Public Project, or that portion thereof, arising solely from a request or requirement of a third (3rd) party primarily for the benefit and use of a third (3rd) party.

Right-of-Way – shall mean present and future streets, alleys, rights-of-way, and public easements, including easements dedicated to the City in plats of the City for streets and alleys.

Street Right-of-Way – shall mean the entire width between property lines of land, property, or an interest therein of every way publicly maintained where any part thereof is open to the use of the public for purposes of vehicular traffic, including street, avenue, boulevard, highway, expressway, alley, or any other public way for vehicular travel by whatever name.

Section 2. Grant.

There is hereby granted to Company, the non-exclusive right, privilege, and franchise to construct, maintain, extend, and operate its Facilities in, through, and along the

Right-of-Way of the City for the purpose of supplying electric energy to the City and the inhabitants thereof for the full term of this Franchise; subject, however, to the terms and conditions herein set forth. Nothing in this grant shall be construed to franchise or authorize the use of the Company's Facilities or the Right-of-Way by the Company or others, for any purpose not related to the provision of electric energy. The Company may not allow a subsidiary, affiliate, or a third (3rd) party to acquire rights to occupy the Rights-of-Way under this Franchise; provided, that nothing in this section shall prevent Company from allowing the use of its Facilities by others when such use is compensated to the City under the provisions of a franchise granted by the City to any such third party.

Section 3. Term.

a. The term of this Franchise shall be twenty (20) years from the effective date of this Ordinance.

b. Upon sixty (60) days advance written notice by the City, the franchise fee percentage rate may be changed on the fifth, tenth or fifteenth anniversary of the effective date of this Ordinance.

c. Upon written request of either the City or the Company, the Franchise shall be reopened and renegotiated at any time upon any of the following events:

1. Change in federal, state, or local law, regulation, or order which materially affects any rights or obligations of either the City or the Company, including but not limited to the scope of the grant to the Company or the compensation to be received by the City; or

2. Change in the structure or operation of the electrical energy industry which materially affects any rights or obligations of either the City or the Company,

including but not limited to the scope of the grant to the Company or the compensation to be received by the City; or

3. Any other material and unintended change or shift in the economic benefit to the City or a change the Company did not anticipate upon accepting the grant of this Franchise.

d. Amendments under this section, if any, shall be made by ordinance as prescribed by statute. The Franchise shall remain in effect according to its terms pending completion of any review or renegotiation pursuant to subsection (c).

Section 4. Compensation to the City.

In consideration of and as compensation for the Franchise hereby granted to the Company by the City, the Company shall make an accounting to the City of all electric energy that has been distributed on a monthly basis. The Company shall pay the City:

A sum equal to five percent (5%) of the Gross Receipts received from the Distribution of electric energy; and

The above sum shall be adjusted for uncollectible receivables and for uncollectible receivables which are later collected.

Payment of compensation above shall be effective on the first day of the first month after final passage and approval by the City and acceptance by the Company. Prior to that date, payments shall continue to be calculated and be paid in the manner previously provided in Ordinance 16602. Such payments shall be made to the City under procedures, which are mutually agreed to by the Company and the City within thirty (30) days of the last day of the month to which such accounting shall apply.

In the event the accounting rendered to the City by the Company is found to be

incorrect, then payment shall be made on the corrected amount, it being agreed that the City may accept any amount offered by the Company, but the acceptance thereof by the City shall not be deemed a settlement of such item if the amount is in dispute or later found to be incorrect. The Company agrees that all of its books, records, documents, contracts and agreements as may be reasonably necessary for an effective compliance review of this Franchise shall at all reasonable times be opened to the inspection and examination of the officers of the City and its duly authorized agents, auditor, and employees for the purpose of verifying said accounting. Notwithstanding the obligation herein, the Company shall have the right to request the reasonable protection of proprietary information of the Company.

For each and every month, or any part thereof, that the compensation provided for by this Franchise remains unpaid after the same becomes due and payable by the City, there shall be added to such payment, as a late charge, a sum equivalent to the statutory rate for interest on the unpaid amount. Such late charge shall be applicable to sums that are delinquent as well as any sums due the City as the result of an audit of the Company's records.

Section 5. Payment and Charges.

The payments and compensation herein provided shall be in lieu of all other licenses, taxes, charges, and fees, except that the usual general property taxes and special ad valorem property assessments, sales and excise taxes, or charges made for privileges which are not connected with the electric energy business, will be imposed on the Company and are not covered by the payments herein.

Section 6. Use of Right-of-Way.

The use of the Right-of-Way under this Franchise by the Company shall be subject to all rules, regulations, policies, resolutions, and ordinances now or hereafter adopted or promulgated by the City in the reasonable exercise of its police power relating to use, placement, location, or management of utilities located in the City's Right-of-way. In addition, the Company shall be subject to all laws, rules, regulations, policies, resolutions, and ordinances now or hereafter adopted or promulgated by the City in the reasonable exercise of its police power relating to permits, fees, sidewalk and pavement cuts, utility location, construction coordination, screening, and other requirements on the use of the Right-of-Way; provided, however, that nothing contained herein shall constitute a waiver of or be construed as waiving the right of the Company to oppose, challenge, or seek judicial review of, in such manner as is now or may hereafter be provided by law, any such rules, regulation, policy, resolution, or ordinance proposed, adopted, or promulgated by the City. Further, the Company shall comply with the following:

a. The Company's use of the Right-of-Way shall in all matters be subordinate to the City's use of the Right-of-Way for any public purpose. The Company shall coordinate the installation of its Facilities in the Right-of-Way in a manner which minimizes adverse impact on Public Improvements, as reasonably determined by the City. Where installation is not otherwise regulated, the Facilities shall be placed with adequate clearance from such Public Improvements so as not to conflict with such Public Improvement.

b. All earth, materials, sidewalks, paving, crossings, utilities, Public Improvements, or improvements of any kind located within the Right-of-Way damaged or removed by the Company in its activities under this Franchise shall be fully repaired or replaced promptly by the Company without cost to the City, however, when such activity is

a joint project of utilities or franchise holders, the expenses thereof shall be prorated among the participants, and to the reasonable satisfaction of the City in accordance with the ordinances and regulations of the City pertaining thereto.

c. Except in the event of an emergency, as reasonably determined by the Company, the Company shall comply with all laws, rules, regulations, policies, resolutions, or ordinances now or hereinafter adopted or promulgated by the City relating to any construction, reconstruction, repair, or relocation of Facilities which would require any street closure which reduces traffic flow. Notwithstanding the foregoing exception all work, including emergency work performed in the Right-of-Way or which in any way impacts vehicular or pedestrian traffic shall be properly signed, barricaded, and otherwise protected.

d. The Company shall cooperate promptly and fully with the City and take all reasonable measures necessary to provide accurate and complete information regarding the location of its Facilities located within the Right-of-Way when requested by the City or its authorized agents for a Public Project. Such location and identification shall be promptly communicated in writing to the City without cost to the City, its employees, agents, or authorized contractors. The Company shall designate and maintain an agent, familiar with the Facilities, who is responsible for providing timely information needed by the City for the design and replacement of Facilities in the Right-of-Way during and for the design of Public Improvements. At the request of the Company, the City may include design for Facilities in the design of Public Projects. Also at the request of the Company, the City and/or its contractor(s) or agent(s) shall provide accurate and timely field locations of proposed Public Projects in the event the Company is required to install new and/or relocate its Facilities.

e. The Company shall promptly locate, remove, relocate, or adjust any Facilities

located in the Right-of-Way, City's easements, or platted utility easements which contain City utilities or facilities if reasonably necessary and requested by the City for a Public Project. Such location removal, relocation, or adjustment for a particular Public Project shall be performed by the Company without expense to the City, its employees, agents, or authorized contractors, and shall be specifically subject to rules and regulations of the City pertaining to such. If additional location, removal, relocation, or adjustment is the result of the inaccurate or mistaken information of the Company, the Company shall be responsible for costs associated with such without expense to the City. Likewise, if additional location, removal, relocations or adjustment is the result of inaccurate or mistaken information of the City, the City shall reimburse the Company for any additional expense necessarily incurred by the Company directly due to such inaccurate or mistaken information. The Company shall only be responsible for removal, relocation, or adjustment of Facilities located in the Right-of-Way, City's easements, or platted utility easements which contain City utilities or facilities at the Company's sole cost once each five (5) years for that particular facility. The City shall reimburse the Company for the removal, relocation, or adjustment of the Company's Facilities located in the Right-of-Way, City's easements, or platted utility easements which contain City utilities or facilities if required before the expiration of five (5) years from the date of the last relocation, removal, or adjustment of that particular facility.

The Company shall not be responsible for the expenses of relocation to accommodate any new Public Project for Private Development initiated after the effective date of this Franchise. The expenses attributable to such a project shall be the responsibility of the third (3rd) party upon the request and appropriate documentation of the Company. Before such expenses may be billed to the third (3rd) party, the Company shall

191 be required to coordinate with the third (3rd) party and the City on the design and
192 construction to ensure that the work required is necessary and done in a cost effective
193 manner. The Company may require payment in advance of estimated costs or relocation
194 prior to undertaking any work required to accommodate any new Public Project for Private
195 Development initiated after the effective date of this Franchise.

196 The City may continue to provide a location in the Right-of-Way for the Company's
197 Facilities as part of a Public Project, provided that the Company has cooperated promptly
198 and fully with the City in the design of its Facilities as part of the Public Project.

199 f. It shall be the responsibility of the Company to take adequate measures to
200 protect and defend its Facilities in the Right-of-Way from harm or damage. If the Company
201 fails to accurately locate Facilities when requested, it shall have no claim for costs or
202 damages against the City. The Company shall be responsible to the City and its agents,
203 representatives, and authorized contractors for all damages including, but not limited to,
204 delay damages, repair costs, down time, construction delays, penalties or other expenses
205 of any kind arising out of the failure of the Company to perform any of its obligations under
206 this Franchise. The above general provisions notwithstanding, the City and its authorized
207 contractors shall take reasonable precautionary measures including calling for utility
208 locations through Kansas One Call and exercising due caution when working near the
209 Company's Facilities.

210 g. All technical standards governing construction, reconstruction, installation,
211 operation, testing, use, maintenance, and dismantling of the Facilities in the Right-of-Way
212 shall be in accordance with applicable present and future federal, state, and City laws and
213 regulations, including but not limited to the most recent standards of the Kansas

Corporation Commission and U.S. Department of Transportation, and further, to the extent they are not inconsistent with federal or state laws, the City of Topeka standard technical specifications as may be amended from time to time, or such substantive equivalents as may hereafter be adopted or promulgated. It is understood that the standards established in this paragraph are minimum standards and the requirements established or referenced in this Franchise may be additional to or stricter than such minimum standards.

h. The City encourages the conservation of the Right-of-Way by the sharing of space by all utilities. Notwithstanding provisions of this Franchise prohibiting third (3rd) party use, to the extent required by federal or state law, the Company will permit any other franchised entity by an appropriate grant, or a contract, or agreement negotiated by the parties, to use any and all Facilities constructed or erected by the Company.

Section 7. Indemnity and Hold Harmless.

The Company shall indemnify and hold and save the City, its officers, employees, agents, and authorized contractors, harmless from and against all claims, damages, expense, liability, and costs including reasonable attorney fees, to the extent occasioned in any manner by the Company's occupancy of the Right-of-Way. In the event a claim shall be made or an action shall be instituted against the City growing out of such occupancy of the Right-of-Way by Facilities of the Company, then upon notice by the City to the Company, the Company shall assume responsibility for the defense of such actions at the cost of the Company, subject to the option of the City to appear and defend.

Section 8. Right of Assignment.

This Franchise shall be assignable only in accordance with the laws of the State of Kansas, as the same may exist at the time when any assignment is made.

237 Section 9. Termination of Franchise for Breach.

238 The parties agree that in the event of a breach of this Franchise by either party, the
239 non breaching party has the right to terminate the Franchise as set forth herein. Prior to
240 terminating the Franchise, the non breaching party shall first serve a written notice upon the
241 breaching party, setting forth in detail the nature of the breach, and the breaching party
242 shall have thirty (30) days thereafter in which to cure the breach. If at the end of such thirty
243 (30) day period the non breaching party deems that the breach has not been cured, the non
244 breaching party may take action to terminate this Franchise.

245 Nothing herein shall serve to bar either party from pursuing any legal or equitable
246 remedy available in a court of competent jurisdiction.

247 Section 10. Rights and Duties of Company Upon Termination of Franchise.

248 Upon termination of this Franchise, whether by lapse of time, by agreement between
249 the Company and the City, or by forfeiture thereof, the Company shall have the right to
250 remove any and all of its facilities and equipment used in its business within a reasonable
251 time after such expiration, but in such event, it shall be the duty of the Company,
252 immediately upon and during such removal; (a) to cooperate with the City and its agents to
253 permit the installation of all necessary facilities and other equipment necessary or
254 convenient for the provision of electric energy to residents of the City; and (b) to restore the
255 streets, avenues, alleys, parks, and other public ways and grounds from which said
256 facilities, and other equipment have been removed, to the equivalent condition as the same
257 were before said removal was effected.

258 Section 11. Acceptance of Franchise.

259 This Franchise is made under and in conformity with the laws of the State of Kansas.

This Franchise shall be effective upon execution of the franchise agreement by both parties and after this Franchise Ordinance granting the same has been adopted as provided by law.

Section 12. Conditions of Franchise.

This non-exclusive franchise, grant, and privilege is granted under and subject to all applicable laws and under and subject to all of the orders, rules, and regulations now or hereafter adopted by governmental bodies now or hereafter having jurisdiction.

Section 13. Invalidity of Ordinance.

If any clause, sentence, or section of this Ordinance shall be held to be invalid, it shall not affect the remaining provisions of this Ordinance.

Section 14. Effective Date of Ordinance.

This Ordinance shall take effect and be in force on the first day of the first month after its passage and approval by the City, acceptance by the Company, and publication in the official city newspaper.

PASSED and APPROVED by the City Council April 8, 2008.

CITY OF TOPEKA, KANSAS

William W. Bunten, Mayor

ATTEST:

Brenda Younger, City Clerk