

(Published in the Topeka Metro News October 7, 2013)

ORDINANCE NO. 19856

AN ORDINANCE introduced by City Manager Jim Colson, granting to Westar Energy, Inc., an electric franchise including the right to construct, operate and maintain electric transmission, distribution and street lighting facilities within the corporate limits of the City of Topeka, Kansas, and specifically repealing Franchise Ordinance No.18297.

THEREFORE 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 Westar Energy, Inc., a Kansas Corporation.

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

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 within the City, 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, that primarily benefits 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.

52 *Utility Easement* – shall mean an easement owned by or dedicated to the City for
53 the purpose of providing the Company and other utilities access to customers and users
54 of any utility service.

55 Section 2. Grant.

56 There is hereby granted to Company, the non-exclusive right, privilege, and
57 franchise to construct, maintain, extend, and operate its Facilities in, through, and along
58 the Right-of-Way of the City for the purpose of supplying electric energy to the City and
59 the inhabitants thereof for the full term of this Franchise; subject, however, to the terms
60 and conditions herein set forth. Nothing in this grant shall be construed to franchise or
61 authorize the use of the Company's Facilities or the Right-of-Way by the Company or
62 others, for any purpose not related to the provision of electric energy. The Company
63 may not allow a subsidiary, affiliate, or a third (3rd) party to acquire rights to occupy the
64 Rights-of-Way under this Franchise; provided, that nothing in this section shall prevent
65 Company from allowing the use of its Facilities by others when such use is
66 compensated to the City under the provisions of a franchise granted by the City to any
67 such third party.

68 Section 3. Term.

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

71 b. Upon written request of either the City or the Company, the franchise shall
72 be reopened and renegotiated at any time upon any of the following events:

- 73 1. Change in federal, state, or local law, regulation, or order which
74 materially affects any rights or obligations of either the City or the Company,

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

77 2. Change in the structure or operation of the electrical energy
78 industry which materially affects any rights or obligations of either the City or the
79 Company, including but not limited to the scope of the grant to the Company or
80 the compensation to be received by the City; or

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

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

87 Section 4. Compensation to the City.

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

92 A sum equal to six percent (6%) of the Gross Receipts received from such
93 Distribution of electric energy; and the above sum shall be adjusted for
94 uncollectible receivables and for receivables which are later collected.

95 b. Payment of the compensation above shall be effective on the first day of
96 the first month after approval by the City governing body and acceptance by the
97 Company. Prior to that date, payments shall continue to be calculated and be paid in

the manner previously provided in Ordinance 18297. 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.

c. Notwithstanding anything to the contrary in this Franchise, the fee provided for in this Section 4 shall not become effective within any area annexed by the City until 30 days after the City provides the Company with a certified copy of the annexation ordinance, proof of publication as required by law and a map of the city detailing the annexed area.

d. Company will use commercially reasonable efforts to ensure the accuracy of its records and of the determination of the amount of Gross Receipts subject to the fee provided for in this Section 4. In the event and to the extent the accounting rendered to the City by the Company is found to be incorrect due to Company's failure to use commercially reasonable efforts as provided herein, 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 Ordinance shall upon reasonable notice and 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 require the reasonable protection of proprietary information of the Company.

121 Section 5. Payment, Charges, and Permits.

122 The payments and compensation herein provided shall be in lieu of all other
123 licenses, taxes, charges, permits, and fees, except that the usual general property taxes
124 and special ad valorem property assessments, sales and excise taxes, or charges
125 made for privileges which are not connected with the electric energy business, will be
126 imposed on the Company and are not covered by the payments herein. The Company
127 shall not be required to obtain an excavation permit for poles located in the Right-of-
128 Way or Utility Easement provided Company attends and participates in Utility
129 Coordination Committee meetings.

130 Section 6. Use of Right-of-Way.

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

143 resolution, or ordinance proposed, adopted, or promulgated by the City. Further, the
144 Company shall comply with the following:

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

152 c. All earth, materials, sidewalks, paving, crossings, utilities, Public
153 Improvements, or improvements of any kind located within the Right-of-Way damaged
154 or removed by the Company in its activities under this Franchise shall be fully repaired
155 or replaced promptly by the Company without cost to the City, however, when such
156 activity is a joint project of utilities or franchise holders, the expenses thereof shall be
157 prorated among the participants, and to the reasonable satisfaction of the City in
158 accordance with the ordinances and regulations of the City pertaining thereto. Nothing
159 in this Franchise shall require the Company to repair or replace any materials, trees,
160 flowers, shrubs, landscaping or structures that interfere with the Company's access to
161 any of its Facilities located in a Utility Easement.

162 d. Except in the event of an emergency, as reasonably determined by the
163 Company, the Company shall comply with all laws, rules, regulations, policies,
164 resolutions, or ordinances now or hereinafter adopted or promulgated by the City
165 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 traveled way or which in any way impacts vehicular or pedestrian traffic shall be properly signed, barricaded, and otherwise protected.

e. 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.

f. For Public Projects, Company shall locate, remove, relocate, or adjust any Facilities located in the Right-of-Way within the time period specified in City's written request. 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 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 if required before the expiration of five (5) years from the date of the last relocation, removal, or adjustment of that particular facility.

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

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

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

j. All technical standards governing construction, reconstruction, installation, operation, testing, use, maintenance, and dismantling of the Facilities in the Right-of-Way shall be in accordance with applicable present and future federal, state, and City laws and regulations, including but not limited to the most recent standards of the Kansas Corporation Commission, U.S. Department of Transportation, and City's standard technical specifications unless inconsistent with state or federal laws. 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.

k. 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.

l. Permission is hereby granted to the Company to trim trees upon and overhanging the right-of-way and utility easements. The Company shall perform line clearance work in accordance with regulations established under OSHA 29 CFR 1910.269. All pruning operations shall be performed by personnel qualified to perform the work and in accordance with the latest versions of ANSI Z133.1 (Safety Requirements for Pruning, Repairing, Maintaining and Removing Trees, and Cutting Brush) and ANSI A300 (Part 1) (Standard Practices for Tree, Shrub, and Other Woody Plant Maintenance). For routine trimming operations, customers shall be contacted at least one (1) week in advance by either personal contact or by informational door hanger.

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.

Section 9. Termination and Forfeiture of Franchise.

In case of failure on the part of the Company, its successors, and assigns to comply with any of the provisions of this Ordinance, or if the Company, its successors, and assigns should do or cause to be done any act or thing prohibited by or in violation of the terms of this Ordinance, the Company, its successors, and assigns shall forfeit all rights and privileges granted by this Ordinance and all rights hereunder shall cease, terminate and become and null and void, provided that said forfeiture shall not take effect until the City serves a written notice upon the manager of the Company, at its principal office in the City, setting forth in detail in such notice, the neglect or failure complained of, and the Company shall have thirty (30) days thereafter in which to comply with the conditions of this Franchise.

If at the end of such thirty (30) day period the City deems that the conditions of this Franchise have not been complied with by the Company, the City may cancel this Franchise in accordance with the following procedure:

1. Before the City terminates the franchise, it shall first serve a written notice upon Company setting forth in such notice the neglect or failure alleged to have occurred.

2. Company shall have ninety (90) calendar days in which to comply with the conditions of the franchise.

3. If within ninety (90) calendar days after receipt of the notice, Company has not instituted an action in a court of competent jurisdiction to determine whether Company has violated the terms of this franchise, such franchise shall be terminated at the end of the ninety (90) calendar day period.

283 4. If within ninety (90) calendar days, Company does institute an action in a court of competent
284 jurisdiction to determine whether Company has violated the terms of this franchise and that the franchise
285 is subject to termination by reason of a violation of the terms, then, in such event, the franchise will
286 terminate thirty (30) calendar days after the final judgment is rendered.

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

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

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

299 Section 11. Acceptance of Terms by Company.

300 Within thirty (30) days after approval of this Ordinance by the governing body, the
301 Company shall file with the City Clerk of the City its acceptance in writing of the
302 provisions, terms and conditions of this Ordinance. This Ordinance shall constitute a
303 non-exclusive contract between the City and the Company.

304 Section 12. Conditions of Franchise.

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

308 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 approval by the City governing body, publication in the official city newspaper, and acceptance by the Company.

Section 15. Repeal of Conflicting Ordinances.

Ordinance No. 18297, which heretofore granted a non-exclusive franchise to the Company, and which became a contract between the City and the Company is hereby canceled and repealed.

PASSED and APPROVED by the Governing Body on the 1st day of October, 2013.

CITY OF TOPEKA, KANSAS

Larry E. Wolgast, Mayor

ATTEST:

Brenda Younger, City Clerk

ACCEPTANCE OF FRANCHISE ORDINANCE

To the Governing Body of the City of Topeka, Kansas

Westar Energy, Inc., for itself, its successors and assigns, hereby accepts in writing the Ordinance and all rights and privileges therein granted, passed by the Governing Body of the City of Topeka, Kansas, on the 1st day of October, 2013, designated as an amendment for Ordinance No. 19856, and entitled:

AN ORDINANCE, granting to Westar Energy, Inc., its successors and assigns, an electric franchise, prescribing the terms thereof and relating thereto, and repealing all ordinances or parts of ordinances inconsistent with or in conflict with the terms hereof.

This acceptance is executed and filed as provided in **Section 4** of said Ordinance, and said Company hereby agrees to all the terms and conditions of said Ordinance

Dated at Topeka, Kansas, this 21st day of October, 2013.

By: _____

Doug Sterbenz

Executive Vice President and Chief Operating Officer

Attest: _____

Secretary

State of Kansas

County of: Shawnee

City of: Topeka

I, Brenda Younger, City Clerk of the City of Topeka, Kansas, do hereby certify that the foregoing is a true and correct copy of acceptance of Ordinance No. 19856 of the City of Topeka as therein described, the original of which acceptance was filed in the office of the Clerk of said City on the 21st day of October, 2013, and is now recorded among the original records thereof, and that I am the keeper of the same.

Witness my hand and the official seal of said City, this 22nd day of October, 2013.

Brenda Younger
City Clerk

