

ORDINANCE NO. 3286

AN ORDINANCE 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 ABILENE, KANSAS.

THEREFORE BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF ABILENE, 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 Abilene, 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 but not including any Utility Easement.

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.

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

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 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.

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

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

b. Payment of the 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 3168. 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.

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.

a. 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:

b. 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.

c 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. Nothing in this Franchise shall require the Company to repair or replace any materials, trees, flowers, shrubs,

landscaping or structures that interfere with the Company's access to any of its Facilities located in a Utility Easement.

d 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 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. The Company shall promptly locate, remove, relocate, or adjust any Facilities located in the Right-of-Way 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 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 and U.S. Department of Transportation. 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 Acceptance of Terms by Company.

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

Section 10. 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 11. 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 12. 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.

Section 13. Repeal of Conflicting Ordinances.

Ordinance No. 3168, which heretofore granted a non-exclusive franchise to the Company, and which became a contract between the City and the Company in accordance with its terms, and all other ordinances and resolutions or parts thereof inconsistent or in conflict with the terms hereof, are hereby canceled, annulled, repealed, and set aside.

PASSED and APPROVED by the Governing Body on the 9th day of

November, 2015



Dennis P. Winkler
Mayor

Perry L. Soukup, CMC