

ORDINANCE NO. 78

AN ORDINANCE GRANTING OZARKS ELECTRIC COOPERATIVE CORPORATION OR ITS ASSIGNEES THE RIGHT AND PRIVILEGE AND FRANCHISE TO CONSTRUCT, MAINTAIN AND OPERATE ITS ELECTRICAL SYSTEM AND TO ERECT OR INSTALL ELECTRICAL LINES ALONG THE STREETS, AVENUES, ALLEYS, ROADS AND HIGHWAYS AND OTHER PUBLIC PLACES, FOR THE PURPOSE OF DISTRIBUTING AND SELLING ELECTRICITY AND PROVIDING THE REGULATION FOR THE CONDUCT OF SAID ELECTRICAL DISTRIBUTION SYSTEM, TO DECLARE AN EMERGENCY, AND FOR OTHER PURPOSES

WHEREAS, in the State of Arkansas, municipalities are granted jurisdiction and authority over the use and control of the public rights-of-way within the corporate limits of the municipality, to the extent that such jurisdiction does not conflict with state or federal statutes or regulations; and

WHEREAS, this historic authority has included the right to assess franchise fees for the privilege of the use of such rights-of-way and of providing utility service to the public; and

WHEREAS, on numerous occasions, the courts of the State of Arkansas have referred to this right to assess franchise fees against public utilities; for example, in *Hot Springs Electric Light Co. v. Hot Springs*, 70 Ark. 300 (1902), the Arkansas Supreme Court expressly stated that cities may assess a franchise fee as a condition for the use of public rights-of-way; and

WHEREAS, the Legislature has pronounced public policy in Identical Acts 1994 (1st Ex. Sess.) Nos. 6 and 7, §§ 2, which provided, as follows: "STATEMENT OF POLICY. It is, and historically has been, the policy of the State of Arkansas to permit municipalities, as one means of raising revenues, to assess municipal franchise fees against public utilities for the privilege of providing utility services to the public and of using public rights-of-way, including streets, highways, or other public places of any kind whatsoever within municipal boundaries and such franchise fees have not been considered to be within the scope of A.C.A. §§26-73-103 so as to require a vote of the electorate;" and

WHEREAS, there is anticipated a shortfall in revenues as contrasted with expenses, creating an urgent need for the adoption of this ordinance; and

WHEREAS, it is in the interest of the City of Goshen and its citizens to establish a franchise with Ozarks Electrical Cooperative Corporation and collect a franchise fee therefrom.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL FOR THE CITY OF GOSHEN, ARKANSAS:

SECTION 1. That the City of Goshen, hereby grants to the Ozarks Electric Cooperative Corporation the exclusive right, privilege and authority within the present and all future expansions of the corporate limits of the City of Goshen (1) to sell, furnish, transmit and distribute electricity to all inhabitants and consumers within the said limits; and (2) subject to the terms, conditions and stipulations mentioned in this ordinance, consents and the right, permission and franchise is hereby given to the Ozarks Electric Cooperative Corporation, a corporation organized and existing pursuant to the laws of the State of Arkansas, Grantee, and to its successors, lessees, and assigns to lay, construct, equip, operate, repair, and maintain a system of electrical lines, including above ground and underground lines and the appurtenances for the purpose of supplying and distributing electricity for light, power, and heat and for any other related purpose, to the residents or inhabitants of the said City; and further, the right to erect, lay, construct, operate and maintain a system of electrical lines, including above ground and underground lines and the appurtenances for the purpose of conveying, conducting or distributing electricity from any point beyond said City limits in order to enable the said Grantee to distribute and sell electricity to the said City and to the residents or inhabitants thereof, and to others.

SECTION 2. So long as Grantee complies with Ordinance 69 and any amendments thereto or any similar ordinance enacted to protect city streets and rights of way, the Grantee herein is expressly given the permit (subject to the proviso hereinafter contained) to use the streets, avenues, roads, highways, alleys, sidewalks and other public places, as now laid out, or hereafter to be established, for the purpose of erecting or laying electrical lines, including above ground and underground lines and the appurtenances for the purpose of conveying or conducting electricity from any point within the said City or to any point beyond the City limits of the said City, or to any other point, through and beyond the City limits of said City, and to operate and maintain a system of electrical lines, including above ground and underground lines and the appurtenances for the distribution of electricity within said City to serve the said City and the residents and inhabitants thereof, and others; provided, however, that where alleys are accessible for erecting or laying electrical lines, the City shall have the right to require that the electrical lines shall be underground and laid in the alleys instead of the streets, so long as this is economically feasible (does not create an economic hardship). In areas of the City where all other cables, wires, or other like facilities of public utilities are placed underground, Grantee, when installing new facilities or replacing existing facilities, shall place its lines, cables, wires or other like facilities underground.

SECTION 3. Except as provided in Ordinance 69, and any amendments thereto, or any similar ordinance enacted to protect city streets and rights of way, no fees or charges of any kind shall be imposed by Grantor upon the Grantee or upon any successors, or upon any consumer of electricity for the breaking or opening of any highway, street, road, avenue, alley, or other public places, or for the laying of any main, service pipe or other connections therein, except as would be generally imposed on others performing similar work under similar circumstances and conditions.

Nothing in this ordinance and its grant of a franchise shall be construed in such manner as to in

any manner abridge the right of the City to pass and enforce the necessary police regulations for the purpose of protecting the citizens of said City and their property and the property of the Grantee.

Grantee shall at all times keep and display the necessary danger signals and proper guards around all excavations and obstructions and shall keep sufficient space in good condition for the travel of vehicles on at least one side of all excavations and obstructions, and shall as soon as practicable restore all openings on the highway, road, street, avenue, alley and other public places to condition equally as good as before said openings or obstructions were made. Anything to the contrary notwithstanding, when in the judgment of Grantee it is necessary for the safety of the citizens, to divert or detour traffic from the area of excavations they have the power to so do upon notice to said City.

SECTION 4. The Grantee shall do no injury to any highway, road, street, avenue, alley, lane, bridge, stream or water course, park or public place, except as specifically allowed, nor with any public or private sewer or drainage system, or water lines, now or hereafter laid or constructed by the said City, or by any authorized person or corporation, but no sewer or water pipes, electric conduits, telephone or TV cables shall be so laid as to interfere unnecessarily with any electrical line, which shall have been erected or laid, prior to the time of laying such electric conduits, telephone and TV cables, sewer or water pipes. The Grantee shall fully indemnify and save harmless the City from any and all claims for damage for which said City shall or might be made or become liable by reason of the granting of this franchise, or any negligence or carelessness on the part of said Grantee, or because of any act or omission of the Grantee in the construction and operation of its system of mains and pipes.

SECTION 5. Electrical service shall be provided under the terms and conditions herein specified and pursuant to state law, more particularly, the rules and regulations of the Arkansas Public Service Commission governing utility service, as well as Grantee's rules and regulations governing electrical service on file with the Arkansas Public Service Commission and as interpreted and enforced by grantee. All utility services shall conform with these rules and regulations, as well as any other applicable rules and regulations, federal or state laws, including but not limited to the Arkansas Electric Code.

The rates which are to be charged by Grantee for electrical service hereunder shall be those which are now lawfully approved or prescribed, and as said rates may, from time to time, be lawfully approved or prescribed by the Arkansas Public Service Commission or any successor regulatory authority having jurisdiction thereof.

The Grantee shall have the right to make and enforce as a part of the conditions under which it will supply electricity for heat, power, light, or other purposes as herein provided, all needful rules and regulations not inconsistent with law and the provisions of this franchise.

SECTION 6. The Grantee shall furnish promptly to the proper authorities any and all

information which may be asked for by them in regard to the size, location or depths of any of the overhead lines, underground lines, mains, conduits, service pipes, or other facilities in any form whatsoever, and any other information in regard to its occupation of roads, highways, streets, avenues, or public grounds of said City, which they may demand. Whenever the word Grantee occurs in this ordinance, it shall mean and it shall be understood to be the Ozarks Electric Cooperative Corporation, its successors, lessees or assigns, and whenever the words "authorities" or "proper authorities" occur in this franchise they shall mean and shall be understood to mean the authorized officer or officers, committee or board representing the City of Goshen, Arkansas, or Grantor.

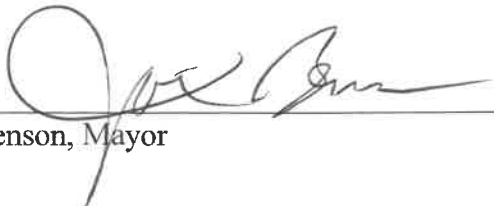
SECTION 7. During the life of this franchise the Grantee shall pay to Grantor each year a franchise tax in an amount equal to: three percent (3 %) of the Grantee's revenues before taxes for residential and commercial revenues as paid to the Grantee by residential and commercial customers located within the corporate limits of the City of Goshen. Payments shall be made by the Grantee to the Grantor in quarterly installments and Grantee shall have thirty (30) days after the end of each calendar quarter within which to make such payment. Residential and commercial electricity revenues are those revenues so classified pursuant to Grantee's uniform classification standards. Grantor shall have the right to examine and verify, from the records of the Grantee, any data relating to the gross revenues of Grantee from customers on which said franchise tax is due. In the event of a controversy between the Grantor and Grantee as to the amount of gross revenues received by Grantee in the City of Goshen upon which said tax is due, such controversy shall be referred to the Arkansas Public Service Commission, or such successor regulatory agency which may have jurisdiction over the Grantee, for final determination, and the decision of said Commission shall be binding upon both parties hereto.

It is expressly agreed and understood by the Grantor and Grantee that the aforesaid payment shall constitute and be considered as complete payment and discharge by the Grantee, its successors and assigns, of all licenses, fees, charges, impositions or taxes of any kind (other than automobile license fees, improvement districts, special millage taxes, and the general ad valorem taxes) which are now or might in the future be imposed by the Grantor under authority conferred upon the Grantor by law. In the event such other tax or taxes are imposed by Grantor, the obligation of the Grantee set forth in Section 7 hereof, to pay the franchise taxes annually shall immediately terminate.

SECTION 8. This franchise shall take effect and continue and remain in force perpetually as provided in Section 44 of Acts of 1935, No. 324, Acts of the State of Arkansas (presently codified as Ark. Code Ann. §14-200-103), as same may be amended from time to time, and upon the written acceptance by the Grantee of the terms and conditions of this franchise.

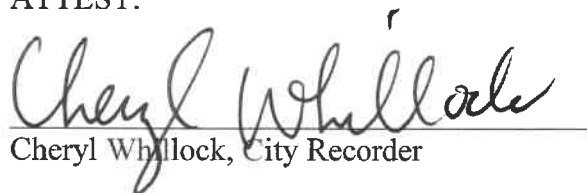
SECTION 9. If any section, paragraph, subdivision, clause, phrase or provision of this ordinance shall be adjudged invalid or unconstitutional, the same shall not affect the validity of this ordinance as a whole, or any part or provision, other than the part so decided to be invalid or unconstitutional.

SECTION 10. EMERGENCY CLAUSE: Because the issue of revenue is important, because without additional revenue the City will not be able to provide certain services which are expected by the citizenry, it is viewed that an immediate solution is necessary thereby creating an emergency. It is hereby declared that based on the conditions set forth herein, an emergency exists and this Ordinance, being necessary for the immediate protection of the health, safety, and welfare of the citizens of Goshen, Arkansas, shall be in effect immediately upon its passage, approval, and publication.



Joe Benson, Mayor

ATTEST:



Cheryl Whillock, City Recorder

APPROVED AS TO FORM:



Charles Harwell, City Attorney

ROLL CALL VOTE ADOPTING THE ORDINANCE

Names Of Those Voting YEA

Names Of Those Voting NAY

Paula Anderson
Andy Bethell
Jamie Boyd
Dr. Brian Buell
Max Poye

Absent

J.J. Lockhart

ROLL CALL VOTE ADOPTING THE EMERGENCY CLAUSE

Names Of Those Voting YEA

Paula Anderson
Andy Bethell
Jamie Boyd
Dr. Brian Buell
Max Poye

Names Of Those Voting NAY

Absent

J.J. Lockhart

The Ozarks Electric Cooperative Corporation, a corporation, grantee, hereby accepts the above franchise subject to the terms and conditions therein this ____ day of _____, 2008.

OZARKS ELECTRIC COOPERATIVE CORPORATION

By _____
President

CERTIFICATION

I, Charles L. Harwell, certify that I am the City Attorney for the City of Goshen; that I am the person authorized to certify documents from the official records of the City of Goshen; that on February 12, 2008, at the regularly scheduled meeting of the City Council of Goshen, the attached Ordinance No. 78 was first read as required by statute; that the second and third reading was, by separate motion, adopted by a vote of five alderman in favor, with none opposed, waived on February 12, 2008; that the ordinance was adopted on February 12, 2008, by motion made and duly seconded, by a vote of five alderman in favor, with none opposed; and that upon separate motion made, seconded and passed by vote of five alderman in favor and none opposed, on February 12, 2008, the emergency clause was adopted; that subsequently, the ordinance was posted in five public places within the City of Goshen and, therefore is, by law, considered effective; and that said ordinance, having properly adopted and now effective, is officially part of the records of the City of Goshen.



Charles L. Harwell

RECEIVED MAR 28 2008

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March 26, 2008

Mr. Charles Harwell
Cypert, Crouch, Clark & Harwell
P. O. Box 1400
Springdale, AR 72765-1400

**Re: *Ozarks Electric Cooperative Corporation –
City of Goshen Franchise Fee***

Dear Charles:

Pursuant to our telephone conversation of the other day, enclosed please find original Ordinance No. 78 of the City of Goshen, Arkansas, which you sent to Ozarks Electric Cooperative Corporation.

You will note that Ozarks has not signed the line of the Ordinance whereby it “accepts the above franchise subject to the terms and conditions this ____ day of _____, 2008.” As I indicated to you by phone, the reason is that the Ordinance contains terms and conditions which may, and in my opinion, clearly are not, authorized by the enabling statute. Specifically, those aspects of the Ordinance which suggest that the City has the authority or power to require that certain electric lines be placed underground would not be reasonable. Other terms and conditions related to maintenance and the like may well also not be within the purview of the enabling statute and, probably, conflict with the jurisdiction with the Arkansas Public Service Commission to regulate those aspects of an electric cooperative.

For that reason, we cannot accept the Ordinance under those terms and conditions. However, it is clear that the City of Goshen has the right to enact the franchise fee and, having done so, Ozarks will begin adding the amount of that fee to bills to members within the City of Goshen and will deal with that franchise fee collected as required by statute.

Mr. Charles Harwell
March 26, 2008
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In the event that you believe it necessary that Ozarks agree with or accept the Ordinance, I will be happy to discuss the removal of some of the terms and conditions which I believe are faulty and the Ordinance can be amended. Otherwise, we will continue to collect and remit the fee as required.

Yours very truly,


John R. Eldridge, III

JRE/mlb
Enclosure

cc: Mr. Mitchell Johnson
Mr. Troy Scarbrough
Todd Townsend