

Memorandum



DATE January 30, 2009
TO Honorable Mayor and Members of the City Council
SUBJECT Oncor Electric Delivery Company, LLC Franchise Renewal

The Council's February 4, 2009 agenda includes a briefing on the Oncor Electric Delivery Company LLC Franchise Renewal. The materials are attached.

Should you require additional information, please let me know.

A handwritten signature in cursive script, appearing to read 'D. Cook'.

David Cook
Chief Financial Officer

Cc: Mary K. Suhm, City Manager
Tom Perkins, Jr., City Attorney
Deborah Watkins, City Secretary
Craig Kinton, City Auditor
Ryan S. Evans, First Assistant City Manager
A.C. Gonzalez, Assistant City Manager
Jill A. Jordan, P.E., Assistant City Manager
Ramon Miguez, Assistant City Manager
Forest Turner, Interim Assistant City Manager
David Cook, Chief Financial Officer
Jeanne Chipperfield, Director, Budget & Management Svcs



Oncor Electric Delivery
Company, LLC.
Franchise Renewal
Dallas City Council
February 4, 2009

Purpose

- Brief the Council on the status of the Oncor Electric Delivery Company, LLC franchise renewal
 - Explanation of Utility Franchising
 - Other Utilities Franchised by the City
 - Electric Issues not related to Franchising
 - Current Franchise provisions
 - Key terms of proposed Franchise
 - Recommendation

Utility Franchising

- Franchise grants non-exclusive authority to use public property in exchange for monetary and other considerations
 - Utilities require use of Public Rights-of-Ways (ROW) paid for by the taxpayers to install poles and wires necessary to provide service
 - ROW includes streets, alleys, highways, public utility easements and other public ways
 - Without use of Public ROW utilities would have to purchase easements to serve customers

Utility Franchising

- Under State Constitution, City must receive fair compensation for allowing use of public property
 - ROW is a unique property and fair value is hard to determine
 - Historically a percentage of Gross Receipts was considered fair and reasonable compensation for use of ROW

Utility Franchising

- Use of public ROW is also basis for City regulation of utility service
 - The City has original jurisdiction over the Rates and services of Oncor
 - Public Utility Commission (PUC) has appellant jurisdiction
 - City's role as a landlord and as a regulator are related but must be kept separate

Utility Franchising

- Franchise is both a contract and a regulatory document
 - In part, a franchise is a contract for the lease of public property
 - Franchise also spells out certain regulatory responsibilities of City
 - Franchise prescribes regulatory obligations of the Utility
- Franchise Ordinance adopted by City Council and requires acceptance by utility

Utility Franchising

- City Charter Provisions (Chapter XIV)
 - City may confer upon any person, firm or corporation the franchise or right to use the public property of the city for the purpose of furnishing to the public any general public service or benefit
 - No exclusive franchise shall ever be granted
 - No term longer than 40 years
 - Minimum franchise fee of 4% of gross receipts

Utility Franchising

- Historically City Franchised all utilities and cable TV providers
 - Telephone
 - Cable TV
 - Gas
 - Electric

Utility Franchising, Telephone

- House Bill 1777 adopted in 1999 by State Legislature
 - Eliminated municipal franchising of “Certificated Telecommunications Providers” (CTPs)
 - CTPs were allowed to terminate existing franchises
 - Provided for compensation to cities on a per access line bases
 - Initial access line fees based on historic franchise fee payments
 - Adjusted annually by 50% of Consumer Price Index (inflation)

Utility Franchising, Cable TV

- Senate Bill 5 adopted in 2005 by State Legislature
 - State of Texas became franchising authority for Cable TV and Video providers
 - Existing franchises were grandfathered until their normal expiration date
 - Companies operating under a state issued franchise pay a 5% franchise fee to the local municipality

Utility Franchising, Cable TV Cont.

- Time Warner Cable Municipal Franchise expires 12/31/2015
- Four entities operate in the City under a State issued Franchise:
 - AT&T
 - Verizon
 - Grande Communications
 - Charter Communications

Utility Franchising, Gas

- Atmos Energy Corp
 - Provides Natural Gas service pursuant to City franchise
 - Ordinance #162740 as amended
 - Expires December 3, 2009
 - Will automatically be renewed for one additional 10 year term unless written notice is given 120 days before the expiration
 - Requires franchise fee of 4% of gross receipts

Utility Franchising, Electric

- Oncor Electric Delivery Company LLC
 - Holds a Certificate of Convenience and Necessity (CCN) to provide electric delivery service within the City
 - CCN issued by the Public Utility Commission of Texas
 - CCN grants exclusive right to serve within its service area
 - Municipal franchise still required to use Public ROW

Utility Franchising, Electric

- Other Oncor Issues

- Rates and Services

- Rates are not covered by the franchise
 - Rates charged to customers are regulated by the City
 - Oncor's customers are Retail Electric Providers not end use customers (Oncor is only the distribution company)
 - Oncor filed a rate case with cities on June 30, 2008
 - Dallas and other cities rejected the rate increase
 - Oncor appealed that decision to the Public Utility Commission (PUC Docket No. 35717)
 - Rate case is still pending

Utility Franchising, Electric

- Other Oncor Issues Cont.
 - Tree Trimming
 - Tree trimming issues are not covered by the Franchise
 - Tree trimming is not regulated by the City
 - State law authorizes utility to trim trees as necessary to provide reliable service
 - Trees are major causes of electrical outages
 - Oncor trims trees to help minimize outages
 - Oncor arborists will meet with citizens to discuss tree trimming issues and concerns

Utility Franchising, Electric

- Other Oncor Issues Cont.
 - Street-lighting
 - Street-lighting not covered by Franchise
 - Street-lighting requirements are being reviewed by the PUC as part of the on going rate case (PUC Docket No. 35717)
 - City of Dallas is participating in that proceeding through the Steering Committee of Oncor Cities

Oncor Electric Delivery Company, LLC

- **Current franchise**

- Granted to Texas Utilities Electric Company
 - Oncor Electric Delivery Company is successor
- 15 year term was to expire September 30, 2008
- In September, 2008, City Council authorized a 6 month extension to March 31, 2009
- Many franchise provisions are no longer appropriate since deregulation
- Many provisions of current franchise are now covered by Right-Of-Way (ROW) use provisions in City Code
- Compensation methodology was changed during the term from 4% of gross receipts to a fee per Kilowatt hour of electricity delivered (required by electric deregulation)
- FY 2008-2009 Revenue Budget is \$48 Million
- No explicit authority to approve transfer of control

Oncor Franchise

- **BACKGROUND**

- Staff has met with Oncor representatives on numerous occasions over past twelve months to negotiate new franchise.

- Negotiating on behalf of the City were:

- Dave Cook, Chief Financial Officer

- Nick Fehrenbach, Manager of Regulatory Affairs

- Don Knight, Assistant City Attorney

- Craig Kinton, City Auditor (Audit Provisions)

- Negotiating on behalf of Oncor were:

- Ron McCune, Debra Anderson, Howard Fisher, Debbie Dennis, and Autry Warren

Oncor Franchise

- **BACKGROUND**

- The proposed franchise is an agreement between the City and Oncor (subject to Council approval)
- Oncor has agreed to accept the terms of the proposed franchise (subject to approval by their Board of Directors)
 - Board of Directors is scheduled to consider at their February 18, 2009 meeting

Oncor Franchise Key Terms

- Oncor Facilities in the ROW
 - City retains the right to regulate the placement of facilities in the ROW
 - All facilities in the ROW must comply with the National Electrical Safety Code
 - While the City may require under-grounding of certain facilities provisions must be made for Oncor to recover increased cost

Oncor Franchise Key Terms

- Compensation
 - Fee per kilowatt hour of electricity delivered plus 4% of Discretionary Service Charges
 - Estimated to be \$48 million annually
 - Revenue will vary from year to year due to weather

Oncor Franchise Key Terms

- Compensation Cont.
 - Current Fee is \$0.002753 per kWh
 - Fee was last increased January 1, 2009
 - Can not increase fee again until after the rate case currently before the Public Utility Commission has concluded (PUC Docket No. 35717)
 - After conclusion of the rate case, Fee per kWh may be increased from time to time during term of the franchise
 - Oncor must agree to the increase
 - Oncor must be given opportunity to recover the fee from customers

Oncor Franchise Key Terms

- Compensation (cont.)
 - In addition to the per kWh fee, Oncor will pay the City 4% of discretionary service charges including Contributions In Aid of Construction (CIAC)
 - These fees not required by current franchise
 - Consistent with City Charter requirements of minimum of 4% franchise fee
 - Will result in additional revenue of approximately \$500k annually
 - Oncor requires that the City sign a release and settlement agreement similar to what litigating cities signed

Oncor Franchise Key Terms

- Compensation (cont.)
 - The City of Denton and other cities sued TXU for underpayment of franchise fees in 2001
 - Denton claimed they were owed 4% fee on discretionary service charges among other things
 - Dallas did not participate in law suit because our franchise did not require payment of these fees
 - TXU settled the suit and agreed to pay these fees to litigating cities going forward without an admission of past liability
 - Settlement was extended to non-litigating cities
 - Currently paid to most cities on the system

Oncor Franchise Key Terms

- Compensation (cont.)
 - Franchise fees are in lieu of all other fees and charges due City with the exception of ad valorem taxes, sales and use taxes, and special taxes and assessments for public improvements
 - Oncor will also reimburse City for reasonable rate case expenses
 - City waived reimbursement of rate case expenses in current franchise
 - Expenses in current rate case are being reimbursed by settlement agreement with Oncor

Oncor Franchise Key Terms

- Right to Audit
 - City has right to audit books and records of Oncor as necessary to ensure proper compensation under franchise
 - Oncor will have 20 days to produce “relevant” documents
 - If Oncor and the City Auditor can not agree on what documents are “relevant”, then Oncor and City shall select a third party agreeable to both to assist them to reach agreement
 - After a reasonable time if no agreement is reached City may pursue other available remedies

Oncor Franchise Key Terms

- Conformance with Public Improvements
 - Oncor must relocate its facilities at its own expense to accommodate changes to the street, alley, sidewalk or public ways required by the City for any public purpose.

Oncor Franchise Key Terms

- Office Location
 - Oncor will keep its principal office within the City limits of Dallas for the term of the Franchise
- Good Faith Effort
 - Oncor agrees to faithfully adhere to all applicable federal, state and City rules and regulations pertaining to non-discrimination, equal employment and affirmative action. Oncor also agrees to continue in its commitment to maintain fairness and equality in the workplace and in its purchases of goods, equipment, and other services.

Oncor Franchise Key Terms

- Administration of Franchise
 - Daily oversight and administration of the franchise given to the City Manager or her designee
 - Prior franchise assigned oversight of the franchise to the Director of Revenue and Taxation (position and the department no longer exist)

Oncor Franchise Key Terms

- Change of Control
 - The PUC has authority to review a transfer of ownership pursuant to Sections 37.154 and 39.915 of the Public Utility Regulatory Act
 - City may participate in a proceeding at the PUC and provide testimony in support or against such a transfer
 - If the PUC no longer has jurisdiction to review transfer, then the City shall have the authority to review prior to any such transfer

Oncor Franchise Key Terms

- Term
 - Fifteen (15) year initial term
 - Unless written notices are provided by either party, franchise will automatically renew for six month terms
 - Maximum term, including automatic renewals, is forty years
 - Maximum term of forty years is a charter requirement

Options

1. Adopt Franchise as negotiated by Staff
 - Maintains City control of ROW
 - Provides reasonable compensation to City
 - Oncor to keep principal office in Dallas
2. Reject Franchise and direct staff to continue negotiations
 - Would require extension of current franchise for a minimum of three months

City Manager's Recommendation

1. Adopt Franchise as negotiated by Staff

What's Next

- February 11, 2009 agenda item to authorize City Manager to execute the release and settlement agreement pertaining to discretionary service charges
- February 11, 2009 agenda item to adopt franchise as negotiated by staff
- February 18, 2009 Oncor Board Meeting to approve acceptance of Franchise Ordinance

COMPROMISE, SETTLEMENT AND RELEASE AGREEMENT - 2008

This Compromise, Settlement, and Release Agreement (the “Agreement”) is made and entered into as of the date set forth below by and between the City of Dallas (the “City”) and Oncor Electric Delivery Company LLC (Oncor):

WHEREAS, in 2001-2002, Oncor, was a party to a lawsuit (the “Litigation”) which involved a dispute with several cities with regard to the calculation and amount of franchise fees paid by TXU Electric (predecessor to Oncor);

WHEREAS, the Litigation was resolved by agreement and TXU Electric agreed to offer the City the same benefits offered to the Plaintiffs in the Litigation and the City declined to accept the offer by TXU Electric to release any claims related to the payment of franchise fees prior to and through December 31, 2001 and to have the option to amend their franchise to begin to receive franchise fee payments effective January 1, 2002 on miscellaneous service revenues (now known as Discretionary Service Charges);

WHEREAS, subsequently in 2008 during franchise renewal negotiations, the City has requested and the Company has agreed to provide, certain terms of the Litigation agreement to the City effective beginning January 1, 2009 upon the City’s agreement to release any claims related to the payment of franchise fees on miscellaneous service revenues (now known as Discretionary Service Charges) provided for in Oncor’s approved tariff prior to and through December 31, 2008; and

WHEREAS, the claims that Oncor has requested the City to release are doubtful as to validity and amount, and the consideration that the City will receive under a renewed Oncor franchise will provide value to the City substantially equivalent to or greater than the value of the claims being released;

NOW, THEREFORE, in order to fully and finally resolve all disputes and claims arising out of the calculation and payment of franchise fees on miscellaneous service revenues (Discretionary Service Charges) to the City by Oncor prior to and through December 31, 2008, for the mutual promises and covenants set forth in this Agreement, the adequacy and sufficiency of which consideration is acknowledged, the City and Oncor agree as follows:

1. REVISION TO THE ELECTRIC FRANCHISE ORDINANCE

Effective January 1, 2009, Oncor agrees to, at the election of the City, provide that the Discretionary Services Charges identified in Section 6.1.2 of the Tariff for Retail Delivery applicable to Oncor effective January 1, 2002 which are directly paid by the customer and which are those charges identified as items DD1 through and inclusive of DD24 in said tariff, shall be subject to an additional franchise fee based on 4% of such charges which additional franchise fee shall be paid to the City. The following additional provisions will be included in the franchise:

A. The franchise fee amounts based on "Discretionary Service Charges" shall be calculated on an annual calendar year basis, i.e., from January 1 through December 31 of each calendar year. The franchise fee amounts that are due based on "Discretionary Service Charges" shall be paid at least once annually on or before April 30 each year based on the total "Discretionary Service Charges DD1-DD24" received during the preceding calendar year.

B. The City acknowledges that Oncor may file with the Texas Public Utility Commission and/or the City a tariff amendment in compliance with the terms of this agreement, which will provide that Oncor shall have the right to collect from the customer the franchise fee on such Discretionary Service Charges such that the customer shall bear 100% of the franchise fee on such Discretionary Service Charges. The City acknowledges that Oncor is an intended third-party beneficiary of this agreement and, to the extent authorized by law, agrees to cooperate with Oncor in

order for Oncor to pass through to customers the entire franchise fee on such Discretionary Service Charges by taking the following actions: (i) to the extent the City acts as regulatory authority, by adopting and approving that portion of any tariff in compliance with the terms of this Agreement which provides for 100% recovery of such franchise fees; (ii) in the event the City intervenes in any regulatory proceeding before a federal or state agency in which the recovery of the franchise fees on such Discretionary Service Charges is an issue, the City will take an affirmative position supporting the 100% recovery of such franchise fees by Oncor and; (iii) in the event of an appeal of any such regulatory proceeding in which the City has intervened, the City will take an affirmative position in any such appeals in support of the 100% recovery of such franchise fees by Oncor.

C. The City, to the extent authorized by law, further agrees not to take any action to prevent the recovery of the franchise fees on such Discretionary Service Charges by Oncor and to take other action which may be reasonably requested by Oncor to provide for the 100% recovery of such franchise fees by Oncor.

Attachment A to this agreement is a copy of Section 6.1.2 of the Tariff for Retail Delivery effective 1/1/02. Since that time, as a result of actions at the Public Utility Commission, revisions to the numbering system for Discretionary Service Charges have been implemented and a cross reference to the current numbering system is provided as Attachment B.

2. RELEASE OF ONCOR AND ITS AFFILIATES BY THE CITY

Except for claims arising out of a breach of this Agreement, the City of Dallas, on behalf of itself and its successors and assigns and any and all persons, entities or municipalities claiming by, through or under them, hereby **RELEASES, DISCHARGES AND ACQUITS**, forever and for all purposes, Oncor Electric Delivery Company, its agents, employees, officers, directors, shareholders,

partners, insurers, attorneys, legal representatives, successors and assigns as well as their affiliated corporations, and its subsidiaries, from and against any and all liability which they now have, have had or may have, and all past, present and future actions, causes of action, claims, demands, damages, costs, expenses, compensation, losses and attorneys' fees of any kind or nature whatsoever, or however described, whether known or unknown, fixed or contingent, in law or in equity, whether asserted or unasserted, whether in tort or contract, whether now existing or accruing in the future arising out of or related to the payment, calculation or rendition of franchise fees on miscellaneous service revenues (Discretionary Service Charges) to the City on or before December 31, 2008 and all claims which could be asserted against Oncor in litigation in any way related to the payment, calculation or rendition of franchise fees on miscellaneous service revenues (Discretionary Service Charges) by Oncor on or before December 31, 2008. This release is intended to only release claims related to the payment, calculation or rendition of franchise fees on miscellaneous service revenues (Discretionary Service Charges) by Oncor on or before December 31, 2008 and is not intended to release any other claim or cause of action that any party to this Agreement has, known or unknown, or which accrues in the future. This release does not apply to any other claim or cause of action related to payment of franchise fees calculated on the basis of kilowatt hours delivered.

3. WARRANTY AS TO OWNERSHIP OF CLAIMS AND AUTHORITY

- A. The City warrants and represents that it is the owner of the claims being compromised, settled, discharged and released pursuant to this Agreement and each further warrants and represents that it has not previously assigned all or any part of such claims to another entity or person. The City warrants and represents that there are no liens of any nature, assignments or subrogation interests in or to the money paid to the City under the terms of this Agreement. The City warrants that it will take all action necessary to properly execute and deliver this agreement.
- B. Oncor warrants that the person(s) executing this Agreement on their behalf have authority to bind the entity for whom such person signs this Agreement.

4. NO ADMISSION OF LIABILITY

This Agreement is made to compromise, terminate and to constitute an accord and satisfaction of all of the claims released by this Agreement and Oncor admits no liability, fault or wrongdoing of any nature or kind whatsoever and expressly denies and disclaims any liability, fault or wrongdoing alleged or which could have been alleged with regard to the claims asserted in the Litigation if the City had become a party to the Litigation or any similar claims which might be asserted by the City against Oncor.

5. RECOVERY OF DAMAGES DUE TO BREACH

In the event of breach by any party of the terms and conditions of this Agreement, a non-breaching party shall be entitled to recover all expenses as a result of such breach, including, but not limited to, reasonable attorneys fees and costs.

MISCELLANEOUS PROVISIONS

6. It is understood and agreed that all agreements and understandings by and between the parties to this Agreement with respect to the payment of franchise fees and the settlement of any claims related to the payment of franchise fees are expressly embodied in this Agreement and that this Agreement supersedes any and all prior agreements, arrangements or understandings between the parties relating to the claims released pursuant to this Agreement or any matters related thereto executed by the parties.

7. The parties acknowledge and agree that the terms of this Agreement are all contractual and not mere recitals.

8. The parties acknowledge that they have read this Agreement, understand its terms, and that this Agreement is entered into voluntarily, without duress, and with full knowledge of its legal significance.

9. This Agreement may not be modified in any manner, nor may any rights provided for herein be waived, except by an instrument in writing signed by each party.

10. This Agreement shall be binding upon and shall inure to the benefit of the parties and their respective successors and assigns.

11. Should any term or any provision of this Agreement be declared invalid by a court of competent jurisdiction, the parties agree that all other terms of this Agreement are binding and have full force and effect as if the invalid portion had not been included.

12. The parties represent and warrant that no party has been induced to enter this Agreement by a statement, action or representation of any kind or character made by the persons or entities released under this Agreement or any person or persons representing them, other than those expressly made in this Agreement.

13. It is understood and agreed that this Agreement may be executed in a number of identical counterparts, each of which shall be deemed an original for all purposes.

14. The headings contained herein are for convenience and reference only and are agreed, in no way, to define, describe, extend or limit the scope or intent of this Agreement or its provisions.

15. This Agreement shall be construed in accordance with the laws of the State of Texas.

IN WITNESS WHEREOF, this Agreement has been executed by the parties as of the date set forth.

THE CITY OF DALLAS, TEXAS

By: _____
Its: _____
Date: _____

**ONCOR ELECTRIC DELIVERY
COMPANY, LLC**

By: _____
Its: _____
Date: _____

STATE OF TEXAS '
 '
COUNTY OF DALLAS '

This instrument was acknowledged before me on the ____ day of ____ 2008,
by _____, as _____ on behalf of the City of Dallas

Notary Public, State of Texas

STATE OF TEXAS '
 '
COUNTY OF DALLAS '

This instrument was acknowledged before me on the ____ day of ____ 2008,
by _____, of Oncor Electric Delivery Company, LLC, on behalf of said
corporation.

Notary Public, State of Texas

Attachments

1. Draft Franchise Agreement
2. Release and Settlement Agreement