

# City of Las Cruces<sup>®</sup>

PEOPLE HELPING PEOPLE

## Council Action and Executive Summary

Item # 14 Ordinance/Resolution# 09-292 Council District:     

For Meeting of June 1, 2009  
(Adoption Date)

**TITLE:**

**A RESOLUTION APPROVING TERMINATION OF THE FACILITY LICENSE AGREEMENT BETWEEN EL PASO ELECTRIC AND CITY OF LAS CRUCES FOR THE USE OF THE WINDOW LANE AT ITS DRIVE-THROUGH PAYMENT PROCESSING CENTER.**

**PURPOSE(S) OF ACTION:** To terminate the Facility License Agreement between El Paso Electric and City of Las Cruces that licenses the City to operate a drive-through payment processing center for its customers.

<b>Name of Drafter:</b> Gloria Podruchny		<b>Department:</b> Finance		<b>Phone:</b> 541-2050	
<b>Department</b>	<b>Signature</b>	<b>Phone</b>	<b>Department</b>	<b>Signature</b>	<b>Phone</b>
Originating Department	<i>[Signature]</i>	541-2050	Budget	<i>[Signature]</i>	2300
			Assistant City Manager	<i>[Signature]</i>	2271
Legal	<i>[Signature]</i>	541-2128	City Manager	<i>[Signature]</i>	2076

**BACKGROUND / KEY ISSUES / CONTRIBUTING FACTORS:**

In anticipation of the closure of the drive-up at the existing City Hall to accommodate construction of the federal courthouse, on April 16, 2007, City council approved a Facility Lease Agreement between El Paso Electric (EPE) and City of Las Cruces (City) via Resolution 07-319. The agreement allows the City to operate a drive-through window for accepting City utility and other payments at EPE's office building located at 1201 S. Solano Drive. The resolution also approved an adjustment to the FY06/07 budget that included an additional cashier position and other costs.

Approximately 8% of receipts processed by the City are processed through the drive-up window facility on Solano. Although there are customers who have become accustomed to using the facility, there are numerous options for making payments; mail, on-line, by phone using debit or credit cards, bank draft, drop boxes, City Hall, and (soon to come) nine Western Union sites.

Operation of the site is problematic. Mutual customers are not supposed to pay City bills at the EPE windows and vice versa. However, many are reluctant to make a

(Continue on additional sheets as required)

second trip through the drive-up window lanes to make two separate payments (one for the City utility bill and another for EPE electric bill). Cashiers for both entities find it difficult to ensure compliance, and as a result end up taking the other entity's payments, and thus create a chain of custody issue for the customers' cash payments. This condition is aggravated at busy times during the month causing substantial traffic back-ups because there is only one cashier for City drive-ups and lobby walk-in customers. Additionally, scheduling the overlap personnel for each day (cashier from City Hall travels up to Solano to relieve the drive-up cashier for lunch break) reduces the level of service available at City Hall and contributes to the need for overtime to timely process mail and remote site receipts.

Closure of the site will eliminate the problems and provide expected cost savings that are a major component of the plan for achieving the budget reductions for FY 2010 in Finance, as presented to Council at the April 22<sup>nd</sup> budget work session.

In view of the fact that the new City Hall will not provide drive-up window services and also because of the factors mentioned previously in this summary, staff recommend termination of the facility license agreement for use of a drive-up window at the facility on Solano.

**SUPPORT INFORMATION:**

Fund Name / Account Number	Amount of Expenditure	Budget Amount

1. Resolution
2. Resolution 07-319
3. Facility License Agreement between El Paso Electric and City of Las Cruces

**OPTIONS / ALTERNATIVES:**

1. Approve the Resolution which terminates the Facility License Agreement between El Paso Electric and City of Las Cruces
2. Modify the Resolution
3. Do Not Approve the Resolution and provide staff with alternative direction.

**RESOLUTION NO. 09-292****A RESOLUTION APPROVING TERMINATION OF THE FACILITY LICENSE AGREEMENT BETWEEN EL PASO ELECTRIC AND CITY OF LAS CRUCES FOR THE USE OF THE WINDOW LANE AT ITS DRIVE-THROUGH PAYMENT PROCESSING CENTER.**

The City Council of the City of Las Cruces is informed that:

**WHEREAS**, City Council approved Resolution 07-319 approving a Facility Lease Agreement between El Paso Electric (EPE) and City of Las Cruces (City); and

**WHEREAS**, the Facility Lease Agreement allows the City to operate a drive-through payment processing center for its utility customers; and

**WHEREAS**, approximately 8% of receipts processed by the City are processed through the drive-up window facility on Solano; and

**WHEREAS**, there are numerous options for making payments; mail, on-line, by phone using debit or credit cards, bank draft, drop boxes, City Hall, and (soon to come) nine Western Union sites; and

**WHEREAS**, mutual customers are not supposed to pay City bills at the EPE windows and vice versa, and cashiers for both entities find it difficult to ensure compliance; and

**WHEREAS**, scheduling the overlap for each day to relieve the drive-up cashier for lunch break reduces the level of service available at City Hall and contributes to the need for overtime to timely process mail and remote site receipts; and

**WHEREAS**, closure of the site will eliminate the problems and provide expected cost savings that are a major component of the plan for achieving the budget reductions for FY 2010; and

**WHEREAS**, in view of the fact that the new City Hall will not provide drive-up window services, and also because of the previously mentioned factors, staff recommend termination of the Facility License Agreement for use of a drive-up window at the facility on Solano.

**NOW, THEREFORE**, Be it resolved by the governing body of the City of Las Cruces:

**(I)**

**THAT**, the City Council hereby approves termination of the Facility License Agreement between El Paso Electric and City of Las Cruces at the earliest possible date.

**(II)**

**THAT**, the payment processing services for City utility and other payments be terminated at the EPE's office building located at 1201 S. Solano Drive.

**(III)**

**THAT**, City staff is hereby authorized to do all deeds necessary in the accomplishment of the herein above.

**DONE AND APPROVED** this \_\_\_\_\_ of \_\_\_\_\_, 2009.

\_\_\_\_\_  
Mayor

ATTEST:

\_\_\_\_\_  
City Clerk

(SEAL)

Moved by: \_\_\_\_\_

Seconded by: \_\_\_\_\_

VOTE:

Mayor Miyagishima:	_____
Councillor Silva:	_____
Councillor Connor:	_____
Councillor Archuleta:	_____
Councillor Small:	_____
Councillor Jones:	_____
Councillor Thomas:	_____

Approved as to Form:

*[Handwritten Signature]*  
 \_\_\_\_\_  
 City Attorney

**RESOLUTION NO. 07-319**

**A RESOLUTION APPROVING A FACILITY LICENSE AGREEMENT BETWEEN EL PASO ELECTRIC AND CITY OF LAS CRUCES TO USE THE WINDOW LANE TO OPERATE A DRIVE-THROUGH PAYMENT PROCESSING CENTER FOR ITS CUSTOMERS, AND APPROVE AN ADDITIONAL CASHIER POSITION, AND APPROVE AN ADJUSTMENT TO THE FY06/07 BUDGET.**

The City Council of the City of Las Cruces is informed that:

**WHEREAS**, due to the imminent closing of the City Hall drive-through window, the City of Las Cruces seeks an alternative drive-through location for accepting City utility and other payments; and

**WHEREAS**, El Paso Electric Company (EPE) leases an office building located at 1201 S. Solano Drive, Las Cruces, NM where they presently operate a drive-through payment processing center for its electric utility customers; and

**WHEREAS**, the City of Las Cruces would need a license from EPE to use the window lane to operate a drive-through payment processing center for its customers; and

**WHEREAS**, the window lane will be staffed and operated by a City of Las Cruces employee for six months pursuant to this agreement; and

**WHEREAS**, an estimated yearly cost to license and staff the window lane is \$70,000. This cost includes, but is not limited to, a license fee, salary and benefits for one employee, armored car fees, communication lines, computer hardware and software, transportation costs, and office supplies; and

**WHEREAS**, the amount requested as a budget adjustment for the remainder of this fiscal year is \$11,667.

**NOW, THEREFORE, BE IT RESOLVED BY THE GOVERNING BODY OF THE CITY OF LAS CRUCES:**

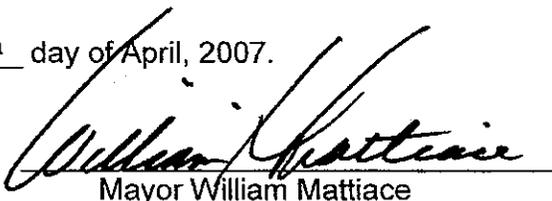
**(i)**

THAT through the Facility License Agreement, EPE licenses the City of Las Cruces to use, for consideration, the window lane in accordance with the terms and conditions prescribed by the Agreement.

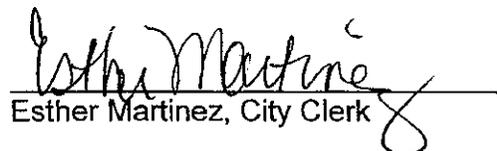
**(ii)**

THAT City staff is authorized to do all deeds necessary to accomplish the intent of this Resolution and the Agreement.

**DONE AND APPROVED** on this 16th day of April, 2007.

  
Mayor William Mattiace

ATTEST:

  
Esther Martinez, City Clerk

{SEAL}

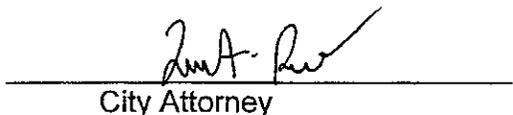
Moved by: Archuleta

Seconded by: Jones

VOTE:

Mayor Mattiace:	<u>Aye</u>
Councillor Fietze:	<u>Aye</u>
Councillor Connor:	<u>Absent</u>
Councillor Archuleta:	<u>Aye</u>
Councillor Trowbridge:	<u>Aye</u>
Councillor Jones:	<u>Aye</u>
Councillor Miyagishima:	<u>Aye</u>

APPROVED AS TO FORM:

  
City Attorney

## FACILITY LICENSE AGREEMENT

This Facility License Agreement ("Agreement") is effective ~~SEPTEMBER 4~~ SEPTEMBER 4, 2007 by and between El Paso Electric Company ("Company"), a Texas corporation, and the City of Las Cruces, New Mexico ("Licensee"), a home rule municipality organized under the laws of the State of New Mexico

### Article 1. Recitals.

- 1.1 Company leases an office building located at 1201 S. Solano Drive, Las Cruces, New Mexico (the "Building") and presently operates at the Building a walk-up and drive-through payment processing center for its electric utility customers.
- 1.2 The drive-through feature of the Building consists of four (4) service lanes, three of which are served by a pneumatic send-and-return system (each a "Pneumatic Lane" and, collectively, the "Pneumatic Lanes") equipped with one (1) lockable cash drawer serving all Pneumatic Lanes. The remaining drive-through lane, which is immediately adjacent to the Building, is served by an extendable cash drawer service window (the "Window Lane") equipped with a lockable cash drawer.
- 1.3 The walk-up feature of the Building consists of an interior service desk having three (3) service windows, each of which is equipped with a lockable cash drawer. The Building is also equipped with a lockable payment drop-box.
- 1.4 Licensee seeks a license from Company to use the Window Lane to operate a drive-through payment processing center for its customers.
- 1.5 By this Agreement, Company licenses Licensee to use, for the consideration stated below, the Window Lane in accordance with the terms and conditions prescribed by this Agreement.

### Article 2. Grant and Scope of License and Associated Fees and Charges.

- 2.1 Subject to the terms and conditions of this Agreement, Company grants Licensee a license to use the Window Lane (including its accompanying lockable cash drawer) and payment drop-box, together with ancillary use of the Building common areas including the parking lot, break room, and restroom facilities (collectively with the Window Lane, the "Premises") solely to operate a drive-through payment processing center for its customers and for no other purpose. Use of the Premises for any other purpose (save and except those activities reasonably necessary to prudently operate Licensee's drive-through customer payment processing center) are not permitted without the prior written permission of Company.
- 2.2 Unless terminated under the provisions of Article 14, the term of this Agreement shall (i) commence upon the date referenced in the initial paragraph of this

Agreement (the "Effective Date"), (ii) continue for a term of six (6) months from the Effective Date, (iii) automatically renew for a term of six (6) months upon each anniversary of the Effective Date unless terminated by either party upon written notice delivered not less than sixty (60) days prior to the expiration of the then-current term, and (iv) notwithstanding the provisions of clauses (ii) and (iii), not continue or extend beyond the expiration or termination of Company's lease agreement referenced in Section 14.2 for the Building.

- 2.3 Licensee shall not be provided any key, device, or code to access the Building or Premises and all such access shall be provided by on-site employees, agents, or contractors of Company. Licensee's employees, agents, and contractors may operate its customer payment processing center or occupy the Building, or both, only during Company's ordinary business hours and at times when one or more Company employee is on-site. Licensee's employees, agents, and contractors must exit the Building prior to or concurrently with the close of Company's business day and at any other time when requested by Company to allow for the Building to be vacated.
- 2.4 Notwithstanding the provisions of Section 2.3, Company shall make reasonable efforts to accommodate Licensee's request for emergency access to the Building. All such requests shall be made to Company's Supervisor of New Mexico Outlying Offices, John H. McVaugh, at (505) 639-0753.
- 2.5 No license for access to or use of the Premises or Building (other than the license granted for use of the Premises under this Article 2) is granted or authorized by this Agreement.
- 2.6 For and in consideration of the license and other good and valuable consideration granted under this Agreement, Licensee shall pay Company the applicable license fee prescribed by Section 2.7 on or before the first (1<sup>st</sup>) day of each month during the term of this Agreement and any extension thereof. In addition to the first monthly license fee payment, Licensee shall pay Company on the same date a single lump-sum, non-refundable payment of \$2,500.00 to reimburse Company for make-ready costs and expenses incurred to accommodate Licensee's occupancy and use of the Premises.
- 2.7 During the initial term of this Agreement, the monthly license fee referenced in Section 2.6 shall be \$950.00. Not less than ninety (90) days prior to the expiration of the initial term and each renewal term, if any, EPE shall provide Licensee written notice stating the applicable license fee for the immediate renewal term. If the term of this Agreement is renewed pursuant to Section 2.2, the monthly license fee for such renewal term shall be the amount stated in such notice; provided, however, that if notice is not timely provided as prescribed by this Section 2.7, the amount of such license fee for such renewal term shall remain unchanged.

**Article 3. Operation of Payment Processing Facilities.**

- 3.1 Company shall provide conspicuous signage designating each party's drive-through lanes(s) for its customers.
- 3.2 Except as provided in Section 3.5, each party shall conduct its own customer payment operations and shall not handle customer payments or inquiries intended for the other party. Each party shall refuse acceptance of and return to the tenderer all such payments, and shall refer such person(s) to the appropriate payment location(s).
- 3.3 If the Window Lane becomes obstructed or if the service window of the Window Lane malfunctions or becomes inoperable, Licensee may continue to conduct its payment processing operations at the Premises only through the drop-box (with any such use subject to the limitations and restrictions prescribed by Section 3.5). Under no circumstances shall Licensee access, use, or operate the Pneumatic Lanes or the accompanying cash drawer for any purpose.
- 3.4 Licensee shall not conduct payment processing operations from or otherwise access, use, or occupy any walk-up service window or any cash drawer at the service desk.
- 3.5 Company shall access the payment drop-box at least once each business day (at time(s) determined by Company in the exercise of its sole discretion) and assemble for delivery to Licensee at an agreed location on the Premises those customer remittances addressed to Licensee. Licensee shall not be provided a key, device, code, or other means of access to the drop-box.
- 3.6 Each party shall furnish its own office equipment and supplies and shall not use office equipment or supplies belonging to the other party.

**Article 4. Improvements, Equipment, Maintenance, and Repairs.**

- 4.1 Absent Company's written permission, which may be withheld by Company in the exercise of its sole discretion, Licensee shall not make any (i) nail hole or other penetration in any door or wall of the Premises, or (ii) improvement or modification to the Premises. All permitted door and wall penetrations shall be repaired by Licensee at its sole cost and expense upon the end of the license term. Except to the extent provided in writing by Company in the exercise of its sole discretion, all permitted improvements to the Premises shall be made at Licensee's sole cost and expense and title to all improvements or other modifications shall vest in Company. Provided that Licensee is in full compliance with the terms of this Agreement, and at Company's sole discretion, Licensee may be permitted to remove, at the end of the license term, certain improvements that Licensee was allowed to place on the Premises. As a condition precedent to the removal of such improvements, Licensee shall, at its

sole cost and expense, clean up and remove from the Premises all debris resulting from the erection or dismantling of the improvement and restore the Premises to its former condition.

- 4.2 Licensee, at its sole cost and expense, shall (i) install and maintain all telephone lines and equipment and computer hardware, software, firmware and associated cabling, infrastructure, and Internet access necessary or desirable to conduct its customer payment processing operations at the Premises, and (ii) maintain and repair all improvements and modifications to the Premises permitted by Company under Section 4.1. Upon reasonable notice to Company, access to the Building for Licensee's installation of the equipment and other items referenced in clause (i) shall be granted by Company during its ordinary business hours.
- 4.3 Except as provided in Section 4.2, Company shall at its cost and expense provide all maintenance and repairs reasonably necessary for the operation of the Building as a drive-through customer payment processing center. Notwithstanding the preceding sentence or any other provision of this Agreement, Company makes no warranty or representation (and this Agreement shall not be construed or interpreted to require) that Licensee's use of or access to the Premises will be uninterrupted or error free. Company shall, within a reasonable time following receipt of written notice from Licensor describing any defect in the Premises in reasonable detail, undertake reasonable efforts to remedy such defect.

**Article 5. Supervision, Security, and Compliance with Laws and Safety Instructions.**

- 5.1 Licensee shall be solely responsible for providing adequate and appropriate (i) supervision of its directors, officers, employees, agents, and invitees and their activities conducted on the Premises, (ii) safety and security training for each of its employees or agents that will operate the Window Lane or perform supervisory or other duties or functions at the Premises, and (iii) first aid supplies for its employees and agents.
- 5.2 During its business hours, Company provides one (1) on-site unarmed security guard at the Building. The Building is locked during non-business hours, but no on-site security guard or service patrols the Building during such hours. Licensee has reviewed such procedures and, except for the armored car service referenced in Section 5.3, deems such procedures adequate for the protection of its employees, property, and customers at and in the vicinity of the Building. If and to the extent Licensee determines that any additional security measure(s) is required for the protection of its employees, property, or customers at or in the vicinity of the Building, such security measures(s) shall be provided by Licensee at its sole cost and expense; provided, however, that (i) not less than thirty (30) days prior to initiation of such additional security measure(s), Licensee shall provide Company written notice describing the proposed measure(s) in

reasonable detail and Company reserves the right, but not the duty, to allow or disallow the implementation of any or all of such measures, and (ii) notwithstanding the provisions of clause (i), no armed guards (other than armored car personnel) shall be permitted on or in the vicinity of the Building. Notwithstanding the foregoing provisions of this Section 5.2 or any other provision of this Agreement, Company shall have no duty or obligation to maintain or provide any security services or systems for Licensee's property at the Premises.

- 5.3 Licensee shall, at its sole cost and expense and not less than once during each business day, cause its collections to be transferred by armored car service from the Premises. The Window Lane cash box referenced in Section 2.1 shall be kept locked by Licensee at all times when not attended by its employees or agents. All money, checks, or other securities to be retained by Licensee at the Premises after business hours shall be locked in a secure safe which shall be provided and maintained by Licensee at its sole cost and expense.
- 5.4 All activities conducted by Licensee on the Premises shall be performed in accordance with all applicable federal, state, and local laws.
- 5.5 Company shall have the right, but not the duty, to (i) oversee the activities of Licensee on the Premises and (ii) issue or post verbal or written warnings, prohibitions, instructions, or directives which it deems, in its sole judgment, reasonable for the safety of persons or property on or in the vicinity of the Premises. Licensee shall promptly and strictly comply with all such warnings, prohibitions, instructions, or directives.

#### **Article 6. Open Flames, Intoxicants, Firearms, and Fireworks Prohibited.**

- 6.1 In connection with its use of the Premises under this Agreement, Licensee shall not:
- (a) permit any burning material or open flame on or within the Premises (including incense, tobacco, candles, or oil lamps);
  - (b) furnish, or permit any employee, licensee, or invitee of Licensee to possess, consume, be under the influence of, or furnish to any person, any alcoholic beverage or unlawful substance on or in the vicinity of the Premises;
  - (c) possess or permit any employee, licensee, or invitee of Licensee to discharge or possess any firearm or other weapon on the Premises; or
  - (d) possess or permit any employee, licensee, or invitee of Licensee to discharge or possess any fireworks or other explosives on the Premises.

- 6.2 Licensee shall warn Company of, remove, and take appropriate measures to exclude from the Premises, any person referenced in Section 6.1(b), Section 6.1(c), or Section 6.1(d).

**Article 7. Utilities, Janitorial Services, and Disposal of Refuse.**

- 7.1 During its ordinary business hours, Company shall provide without charge for Licensee's use and consumption on the Premises (i) electricity and water, and (ii) heating, ventilation, and air conditioning. If, in the exercise of Company's sole discretion, Company determines that Licensee's use of electricity or water, or both, is excessive, Company may install separate metering devices for such utilities and Licensee shall reimburse Company for all costs of such installation and Licensee's use and consumption of such metered utilities.
- 7.2 Company shall, without additional charge to Licensee, provide janitorial services for the Building. Such services shall be provided in the quality and quantity and at times deemed satisfactory to Company in the exercise of its sole discretion.
- 7.3 Notwithstanding the provisions of Section 7.2, Licensee shall maintain the Premises in a clean and orderly condition and shall not allow its refuse to accumulate on the Premises. Licensee may use refuse receptacles provided for Licensee's use on the Premises or, at its sole cost and expense, remove such refuse for disposal.

**Article 8. Non-Disclosure.**

- 8.1 If, notwithstanding the practices and procedures described in Article 3, Licensee obtains or receives Confidential Information (as defined below) of Company in connection with this Agreement, Licensee shall (i) immediately assemble and deliver such Confidential Information to Company at the Building, and (ii) not disclose such Confidential Information to any person or entity other than as provided in clause (i) of this Section 8.1 or as may be required by law.
- 8.2 For purpose of this Article 8, "Confidential Information" shall mean and include, with respect to Company, (i) all of Company's customer names, service and billing addresses, account numbers and historic data and information, and commodity consumption, and (ii) other information identified by Company as proprietary or confidential in writing.

**Article 9. Damage Exclusions and Limitation of Liability.**

- 9.1 **NOTWITHSTANDING ANY OTHER PROVISION OF THIS AGREEMENT, NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY FOR SPECIAL, INCIDENTAL, CONSEQUENTIAL, PUNITIVE, OR EXEMPLARY DAMAGES, LOSS OF PROFITS OR REVENUE, LOSS OF USE OF PROPERTY, OR OTHER ECONOMIC LOSS OR DAMAGE. ALL UNPAID AMOUNTS DUE**

COMPANY UNDER THIS AGREEMENT FOR LICENSE FEES AND MAKE-READY CHARGES SHALL BE DEEMED TO CONSTITUTE DIRECT DAMAGES FOR PURPOSES OF THIS SECTION 9.1.

- 9.2 NOTWITHSTANDING ANY OTHER PROVISION OF THIS AGREEMENT, IN NO EVENT AND UNDER NO CIRCUMSTANCES SHALL THE AGGREGATE LIABILITY OF EITHER PARTY TO THE OTHER PARTY UNDER ANY THEORY OF LIABILITY (INCLUDING BREACH OF CONTRACT OR WARRANTY, TORT (INCLUDING NEGLIGENCE AND STRICT LIABILITY), PREMISES LIABILITY, OR OTHERWISE) EXCEED THE AMOUNT OF \$25,000.00 (EXCLUSIVE OF THE AMOUNTS DUE COMPANY FOR LICENSE FEES AND MAKE-READY CHARGES).

**Article 10. Disclaimers and Waivers.**

- 10.1 LICENSEE AGREES AND ACKNOWLEDGES THAT COMPANY HAS NOT MADE ANY WARRANTY, EXPRESS, IMPLIED, OR AT COMMON LAW, BY STATUTE OR OTHERWISE, RELATING TO THE PREMISES. COMPANY NEGATES AND DISCLAIMS, AND LICENSEE WAIVES, ANY WARRANTY OF (i) MERCHANTABILITY, (ii) FITNESS FOR A PARTICULAR PURPOSE, OR (iii) HABITABILITY. IT IS THE INTENTION OF THE PARTIES THAT THE PREMISES BE PROVIDED BY COMPANY AND ACCEPTED AND USED BY LICENSEE ON AN AS IS AND WITH ALL FAULTS BASIS.

**Article 11. Force Majeure.**

- 11.1 Neither party shall be liable for failure to perform or delay in performance of any obligation under this Agreement (other than the payment of money) resulting from or contributed to by any (i) flood, fire, severe weather condition, or other acts of God, (ii) war, whether declared or undeclared, (iii) civil disturbance, insurrection, or riot, (iv) act of civil, military, or governmental authority, or (v) other cause not within the reasonable control of such party.
- 11.2 The affected party shall with reasonable promptness after it becomes aware of such force majeure event provide the other party written notice of the occurrence and nature of such event.
- 11.3 In the event of a delay in performance excusable under this Article 11, the time for performance of the affected obligation will be extended by a period of time reasonably necessary to overcome the effect of such delay.

**Article 12. Condemnation.**

- 12.1 If all or any part of the Premises is taken by any public or private authority under the power of eminent domain, this Agreement shall terminate and any prepaid license fees shall be ratably refunded to Licensee. All compensation awarded or

paid in the event of such taking shall be the property of Company; provided, however, that Company shall not be entitled to any portion of the award made to Licensee for loss of business or depreciation to or the cost of removal of Licensee's permitted improvements and personal property from the Premises.

**Article 13. Assignment Prohibited.**

- 13.1 Licensee shall not assign this Agreement or all or any part of its rights under this Agreement to any person or entity. Any attempted assignment in violation of this Section 13.1 shall be null and void.

**Article 14. Termination.**

- 14.1 Either party may upon written notice terminate this Agreement if the other party breaches a material provision of this Agreement and such breach is not fully cured within thirty (30) days following the non-performing party's receipt of notice describing the nature of such breach in reasonable detail. In such event, the non-breaching party may take such action to enforce any other rights or remedies available under this Agreement, applicable law, and/or principles of equity.
- 14.2 Licensee acknowledges that Company is a lessee and not the owner of the Building. Accordingly, and withstanding any other provision of this Agreement, this Agreement will immediately and automatically terminate without prior notice to Licensee and without any liability to Company (other than the return of any prepaid license fees, which shall be refunded to Licensee on a prorata basis) upon the expiration or termination of Company's lease of the Building for any reason, including the condemnation of the Building or Company's default under the applicable lease agreement for the Building.
- 14.3 The provisions of Articles 8, 9, 10, 12, and 17 and Section 14.3 shall survive the termination or expiration of this Agreement.

**Article 15. No Interference.**

- 15.1 This Agreement will in no way or manner interfere with the Company's right to maintain or repair the Premises. Company will give Licensee notice of the commencement of any such operations, and, to the extent deemed necessary by Company for the safety of persons or property or to facilitate such maintenance or repairs, Licensee will be prohibited from entering upon any portion of the Premises on which such operations are being conducted for the duration of the conduct of such operations. Provided that such exclusions do not exceed three (3) consecutive business days, no compensation (including the abatement or refund of license fees) or damages shall be payable to Licensee for such exclusions or any attendant interruption of business functions at the Premises. In

the event such exclusion exceeds three (3) continuous business days, the parties shall convene in an attempt to agree upon an appropriate and equitable solution.

**Article 16. Notices.**

16.1 Except as otherwise provided in this Agreement, all notices under this Agreement shall be in writing and be effective upon delivery if delivered by (i) hand, (ii) certified or registered United States mail, postage prepaid, or (iii) facsimile, provided that service by facsimile after 5:00 p.m. local time of the recipient shall be deemed delivered on the following business day, as follows:

(a) if notice is to Licensee:

The City of Las Cruces, New Mexico  
Attention Robert Romano, Treasurer  
P. O. Box 20000  
Las Cruces, New Mexico 88004  
Facsimile (505) 541-2039; or

(b) if notice is to Company:

El Paso Electric Company  
Attention R. Clay Doyle, Vice President  
of New Mexico Affairs  
P. O. Box 910  
Las Cruces, New Mexico 88004  
Facsimile (505) 523-3592

16.2 Each party may change its address for purposes of notice under this Agreement by notice complying with Section 16.1.

**Article 17. Miscellaneous.**

17.1 This Agreement is intended to confer rights and benefits only to the signatory parties. No person or entity other than the signatory parties shall have any enforceable right under this Agreement and all rights of action for any breach of this Agreement are hereby reserved to such parties.

17.2 This Agreement prevails over prior communications between the parties or their representatives concerning these matters. This Agreement is integrated and contains the entire agreement between the parties and no representations, warranties, or promises have been made or relied on by any party other than those set forth in this Agreement. This Agreement was drafted by counsel for the parties, and there shall not be a presumption or construction against any party, each such party expressly waiving the doctrine of *contra proferentum*.

- 17.3 This Agreement may not be amended or modified except by a written instrument executed by a duly authorized representative of each party.
- 17.4 From time to time subsequent to the date of this Agreement and without further consideration and subject to the other terms of this Agreement, each party shall promptly execute and deliver such other instruments as the other party may request to fully accomplish the transactions contemplated by this Agreement.
- 17.5 The rights and remedies conferred by this Agreement are cumulative and the exercise of such rights or remedies shall be without prejudice to the enforcement of any other right or remedy authorized by this Agreement, common law, statute, or equity. No waiver of any breach or default shall be deemed or construed to constitute a waiver of any other violation or other breach of any of the terms, provisions, and covenants contained in this Agreement, and forbearance to enforce one or more of the remedies provided on an event of default shall not be deemed or construed to constitute a waiver of such default or of any other remedy provided for in this Agreement.
- 17.6 This Agreement shall be governed by and construed pursuant to the laws of the State of New Mexico without reference to its conflicts of law or choice of laws provisions.
- 17.7 Prior to filing litigation, the parties shall attempt to resolve disputes or disagreements arising under or in connection with this agreement through discussions between the parties' respective representatives. If a dispute or disagreement cannot be resolved through such efforts, upon the request of either party, the party's senior representatives (or their respective designees) shall meet as soon as conveniently possible, but in no case later than thirty (30) days after such request is received, to attempt to resolve such dispute or disagreement. If the parties' efforts to resolve such dispute or disagreement is unsuccessful and legal action is filed in connection therewith, the prevailing party shall be entitled to court costs, collection costs, and reasonable attorneys' fees in addition to any other relief to which that party may be entitled.
- 17.8 If any term or provision of this Agreement is determined to be invalid, void, or unenforceable, the remaining terms and provisions of this Agreement shall, to the extent reasonable and practicable, continue in full force and effect.
- 17.9 The headings of Articles and Sections are designed to facilitate prompt reference to subject matter and shall be disregarded when resolving any dispute concerning the meaning or interpretation of any language contained in the Agreement.
- 17.10 This Agreement and the license granted herein are subject to and limited by the terms of the Company's lease agreement referenced in Section 14.2 for the Building. Any irreconcilable conflict between the terms of this Agreement and

Company's lease agreement for the Building shall be governed and controlled by such Building lease agreement.

17.11 This Agreement may be executed in multiple counterparts, each of which shall be deemed an original but all of which collectively shall constitute but one and the same document.

The City of Las Cruces, New Mexico

By: [Signature]  
 Signature  
Terrence Moore  
 Name  
City Manager  
 Title  
8/8/07  
 Date

El Paso Electric Company

By: [Signature]  
 Signature  
R. CLAY DOYLE  
 Name  
VICE PRESIDENT - N.M. AFFAIRS  
 Title  
8/29/07  
 Date

**APPROVED AS TO FORM  
 OFFICE OF THE GENERAL COUNSEL**

[Handwritten scribble]

Approved as to Form

[Signature]  
 City Attorney