City of Las Cruces®
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Council Action and Executive Summary

Item # 6 **Ordinance/Resolution#** 2680

For Meeting of February 19, 2013 (Ordinance First Reading Date) **For Meeting of** March 18, 2013 (Adoption Date)

Please check box that applies to this item:

☐ QUASI JUDICIAL ☒ LEGISLATIVE ☐ ADMINISTRATIVE

TITLE: AN ORDINANCE GRANTING A FRANCHISE TO THE CITY OF LAS CRUCES ON BEHALF OF THE LAS CRUCES UTILITIES TO CONSTRUCT, OPERATE AND MAINTAIN SAID UTILITIES ON, UNDER AND WITHIN CITY OWNED RIGHTS OF WAY AND WITHIN THE LAS CRUCES SERVICE TERRITORIES.

PURPOSE(S) OF ACTION:

To grant a franchise to the City on behalf of the Las Cruces Utilities.

COUNCIL DISTRICT: N/A		
Drafter/Staff Contact: Marcia B. Driggers	**Department/Section:** Legal/City Attorney	**Phone:** (575) 541-2128
City Manager Signature:		

BACKGROUND / KEY ISSUES / CONTRIBUTING FACTORS:

The City of Las Cruces operates four (4) utility systems, specifically water, wastewater, solid waste and gas, known collectively as the Las Cruces Utilities, under the organizational structure of the City's Utilities Department. The Las Cruces Utilities are administered as four (4) distinct enterprise funds and pay all of their operational expenses as well as charges assessed through the City's budget process from revenue collected from approved rates, fees and charges.

The City of Las Cruces has historically been charging the Las Cruces Utilities through the budget process a fee equal to 2% of the gross revenue collected by it for the provision of utility service, which fee the Las Cruces Utilities have been collecting from its utility customers. The 2% fee was previously designated as a "payment in lieu of franchise fee" and is now designated as a "franchise fee" for each of the four (4) utilities on current City utility bills.

Concerns were raised by the Ratepayers Advisory Committee during the recent natural gas rate case before the Utilities Board as to whether the Las Cruces Utilities could lawfully charge such a fee to its gas utility customers without a franchise ordinance so authorizing. Inquiries were also raised by Utilities Board Commissioners during the public hearing on the unopposed Stipulation in the gas rate case held on June 28, 2012 as to whether the City Council could increase the 2% assessment. Las Cruces Utilities staff indicated that such an increase was a

(Continue on additional sheets as required)

possibility and that the increase would be added to utility bills. Therefore, in Article XV, staff reserved to the City the right to adjust the franchise fee to any or all of its utilities by City Council resolution so that the fee is comparable to franchise fees charged to other utilities in New Mexico and in the region. The Las Cruces Utilities are obligated to collect the 2% fee assessed on it through the budget process and, therefore, desire that the City Council approve a franchise ordinance to formalize the assessment of that fee for all four (4) of its utilities.

The City's existing franchises with Jornada Water Company, Mesa Development Center, Moongate Water Company, and River Valley View expire by operation of law on or about July 18, 2013, being twenty-five years after these franchises were adopted, if the parties to those franchises do not negotiate new franchise agreements or if they cancel the existing implied franchise contracts as held by the New Mexico Court of Appeals in Moongate vs. City of Las Cruces, Case No. 26,386. Staff intends to offer to all four (4) of the above identified private water utilities a franchise containing many of the provisions contained herein.

The City of Las Cruces is willing to grant a franchise to itself on behalf of the Las Cruces Utilities to construct, operate and maintain its utilities on, under and within City owned rights of way and within the Las Cruces Utilities service territories.

SUPPORT INFORMATION:

1. Ordinance.
2. Exhibit "A", Franchise Ordinance Agreement Between the City of Las Cruces and the City of Las Cruces on Behalf of the Las Cruces Utilities.

SOURCE OF FUNDING:

Is this action already budgeted?			
	Yes	☒	See fund summary below
	No	☐	If No, then check one below:
	Budget Adjustment Attached	☐	Expense reallocated from: _____
		☐	Proposed funding is from a new revenue source (i.e. grant; see details below)
		☐	Proposed funding is from fund balance in the _____ Fund.
Does this action create any revenue?			
	Yes	☐	Funds will be deposited into this fund: _____ in the amount of $_____for FY__.
	No	☒	There is no new revenue generated by this action.

(Continue on additional sheets as required)

BUDGET NARRATIVE:

N/A

FUND EXPENDITURE SUMMARY:

Fund Name(s)	Account Number(s)	Expenditure Proposed	Available Budgeted Funds in Current FY	Remaining Funds	Purpose for Remaining Funds
Gas (5200)	763100 763102	$209,844 $254,791	$209,844 $254,791	$0 $0	N/A N/A
Water (5300)	763100	$285,880	$285,880	$0	N/A
Wastewater (5400)	763100	$216,900	$216,900	$0	N/A
Solid Waste (5500)	763100	$191,110	$191,110	$0	N/A

OPTIONS / ALTERNATIVES:

1. Vote "Yes"; this will approve the City granting a franchise to itself on behalf of the Las Cruces Utilities to construct, operate and maintain its utilities on, under and within City owned rights of way and within the Las Cruces Utilities service territories.
2. Vote "No"; this will not approve the City granting a franchise to itself on behalf of the Las Cruces Utilities to construct, operate and maintain its utilities on, under and within City owned rights of way and within the Las Cruces Utilities service territories.
3. Vote to "Amend"; this could allow Council to propose modifications to the ability of the City to grant a franchise to itself on behalf of the Las Cruces Utilities to construct, operate and maintain its utilities on, under and within City owned rights of way and within the Las Cruces Utilities service territories.
4. Vote to "Table"; this could allow Council to postpone consideration of the City granting a franchise to itself on behalf of the Las Cruces Utilities to construct, operate and maintain its utilities on, under and within City owned rights of way and within the Las Cruces Utilities service territories.

(Continue on additional sheets as required)

REFERENCE INFORMATION:

The resolution(s) and/or ordinance(s) listed below are only for reference and are not included as attachments or exhibits.

N/A

(Continue on additional sheets as required)

COUNCIL BILL NO. 13-025
ORDINANCE NO. 2680

AN ORDINANCE GRANTING A FRANCHISE TO THE CITY OF LAS CRUCES ON BEHALF OF THE LAS CRUCES UTILITIES TO CONSTRUCT, OPERATE AND MAINTAIN SAID UTILITIES ON, UNDER AND WITHIN CITY OWNED RIGHTS OF WAY AND WITHIN THE LAS CRUCES SERVICE TERRITORIES.

The City Council is informed that:

WHEREAS, the City of Las Cruces operates four (4) utility systems, specifically water, wastewater, solid waste and gas, known collectively as the Las Cruces Utilities, under the organizational structure of the City's Utilities Department; and

WHEREAS, the Las Cruces Utilities are administered as four (4) distinct enterprise funds and pay all of their operational expenses as well as charges assessed through the City's budget process from revenue collected from approved rates, fees and charges; and

WHEREAS, the City of Las Cruces has been charging the Las Cruces Utilities through the budget process a fee equal to 2% of the gross revenue collected by it for the provision of utility service, which fee the Las Cruces Utilities have been collecting from its utility customers; and

WHEREAS, the 2% fee was previously designated as a "payment in lieu of franchise fee" and is now designated as a "franchise fee" for each of the four (4) utilities on current City utility bills; and

WHEREAS, concerns were raised by the Ratepayers Advisory Committee during the recent natural gas rate case before the Utilities Board as Case No. 2011-003(G) as to whether the Las Cruces Utilities could lawfully charge such a fee to its gas utility customers without a franchise ordinance so authorizing; and

WHEREAS, inquiries were also raised by Utilities Board Commissioners during the public hearing on the unopposed Stipulation in the gas rate case held on June 28, 2012 as to whether the City Council could increase the 2% assessment. Las Cruces Utilities staff indicated that such an increase was a possibility and that the increase would be added to utility bills; and

WHEREAS, the Las Cruces Utilities are obligated to collect the 2% fee assessed on it through the budget process and, therefore, desire that the City Council approve a franchise ordinance to formalize the assessment of that fee for all four (4) of its utilities; and

WHEREAS, the City's existing franchises with Jornada Water Company, Mesa Development Center, Moongate Water Company, and River Valley View expire by operation of law on or about July 18, 2013, being twenty-five years after these franchises were adopted, if the parties to those franchises do not negotiate new franchise agreements or if they cancel the existing implied franchise contracts as held by the New Mexico Court of Appeals in *Moongate vs. City of Las Cruces*, Case No. 26,386; and

WHEREAS, staff intends to offer to all four (4) of the above identified private water utilities a franchise containing many of the provisions contained herein; and

WHEREAS, the City of Las Cruces is willing to grant a franchise to itself on behalf of the Las Cruces Utilities to construct, operate and maintain its utilities on, under and within City owned rights of way and within the Las Cruces Utilities service territories.

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

(I)

THAT the Franchise Ordinance Agreement, attached hereto as Exhibit "A", is hereby adopted.

(II)

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

DONE AND APPROVED this _____ day of _____, 20___.

APPROVED:

_____
Mayor

ATTEST:

_____
City Clerk

(SEAL)

VOTE:
Mayor Miyagishima: _____
Councillor Silva: _____
Councillor Smith: _____
Councillor Pedroza: _____
Councillor Small: _____
Councillor Sorg: _____
Councillor Thomas: _____

Moved by: _____

Seconded by: _____

APPROVED AS TO FORM:

_____
Marcia B. Driggers
Utilities Attorney

FRANCHISE ORDINANCE AGREEMENT BETWEEN THE CITY OF LAS CRUCES AND THE CITY OF LAS CRUCES ON BEHALF OF THE LAS CRUCES UTILITIES

THIS FRANCHISE ORDINANCE AGREEMENT as approved in City of Las Cruces Ordinance No. _____ is entered into on this ____ day of March, 2013 between the **CITY OF LAS CRUCES** ("City"), a New Mexico municipal corporation, and the **CITY OF LAS CRUCES ON BEHALF OF THE LAS CRUCES UTILITIES** ("Las Cruces Utilities").

(I) RIGHTS

THAT Las Cruces Utilities is authorized to construct, operate and maintain its water system, its wastewater system, its natural gas system and its solid waste collection system, on, under and within City owned rights of way, which include roadways, alleys and bridges and within the Las Cruces Utilities service territories.

(II) RESPONSIBILITIES

The placement of Las Cruces Utilities infrastructure shall not interfere with the use of said rights of way by motor vehicles and pedestrians or with any underground utility lines or other underground facilities. Las Cruces Utilities infrastructure within City owned rights of way shall meet applicable City standards such as City design standards. Prior to any non-emergency construction within City owned rights of way, Las Cruces Utilities shall coordinate the construction with appropriate City departments; and shall obtain any permits required from non-City regulatory agencies.

(III)
FRANCHISE NOT EXCLUSIVE

Las Cruces Utilities' right to use and occupy City owned rights of way is not exclusive, and the City reserves the right to grant a similar use of its rights of way to any other person or entity.

(IV)
ONE CALL NOTIFICATION SYSTEM - DAMAGE REPORT

Las Cruces Utilities shall comply with the requirements of the appropriate one call notification system and applicable state statutes. Las Cruces Utilities shall appropriately report any damage to underground utility lines and underground facilities caused by excavation undertaken by or on behalf of it in compliance with appropriate state requirements.

(V)
EXCAVATION

Las Cruces Utilities shall restore the surface of any City owned rights of way following any excavation therein by it. However, Las Cruces Utilities shall not recreate any pre-existing defective condition, but rather shall restore the surface to a reasonably useful condition. The replacement of pavement shall be performed in accordance with City standards. All expenses associated with such replacement of pavement shall be borne by Las Cruces Utilities whether completed by private contractors for Las Cruces Utilities, or by or on behalf of the City.

(VI)
RELOCATION OF INFRASTRUCTURE

When it is determined by the City that any portion of Las Cruces Utilities' infrastructure is located in conflict with an authorized City construction project, the City will jointly coordinate with the appropriate City department to relocate such portions of its system to a location acceptable to the City. All such relocation work, including any right of way acquisition from

third parties, shall be fully performed by Las Cruces Utilities at no expense to the City. Las Cruces Utilities may contract with the City for the City to perform any such relocation required under this franchise ordinance at its expense, or as otherwise negotiated between the parties.

(VII)
INABILITY TO TIMELY RELOCATE

The City reserves the right to complete the required relocation of any portion of Las Cruces Utilities' infrastructure located in conflict with an authorized City construction project if Las Cruces Utilities is unable to timely relocate such portions of its system within the time requested by the City, and to bill Las Cruces Utilities for the City's reasonable relocation expenses including the cost of any right of way acquisition from third parties.

(VIII)
TERM AND EFFECTIVE DATE

This franchise ordinance shall expire on January 1, 2038. It shall become effective thirty (30) days after adoption by the City Council and acceptance by the City Manager on behalf of Las Cruces Utilities. The dates of adoption and acceptance are set forth below. After such adoption and acceptance and within said thirty (30) day period, this franchise ordinance shall be published twice in full by the City Clerk at Las Cruces Utilities' sole expense not less than seven (7) days apart as provided in NMSA 1978, Section 3-42-1 (1965).

(IX)
ACCEPTANCE OF FRANCHISE

This franchise ordinance shall be accepted by Las Cruces Utilities in writing within thirty (30) days from the date this ordinance is adopted by the City Council. If not so accepted, this franchise ordinance shall be repealed and negotiation for a new franchise may take place between the City and Las Cruces Utilities at the City's sole discretion. After this franchise

ordinance has been accepted by Las Cruces Utilities in the space provided at the end of this instrument, this ordinance franchise shall become a contract duly executed between the City and the City on behalf of Las Cruces Utilities.

(X)
SCOPE

This franchise ordinance incorporates all of the understandings between the parties hereto concerning the subject matter hereof, and all such understandings have been merged into this written franchise ordinance. No prior understanding, verbal or otherwise, of the parties or their agents shall be enforceable unless embodied in this franchise ordinance.

(XI)
ASSIGNMENT

This franchise ordinance may not be assigned by Las Cruces Utilities on behalf of any of its utilities.

(XII)
AMENDMENTS

This franchise ordinance shall not be amended except by ordinance in writing executed by the parties hereto.

(XIII)
SAVINGS CLAUSE

If at any provision of this franchise ordinance, except the provision containing the franchise fee, shall be adjudged invalid or unconstitutional, the same shall not affect the validity of this ordinance as a whole or any provision thereof, other than the part so decided to be invalid or unconstitutional.

(XIV)
PARAGRAPH HEADINGS

The paragraph headings of this franchise ordinance are inserted only for reference and in no way define, limit, or describe the scope or intent of this franchise ordinance nor affect its provisions.

(XV)
PAYMENT BY FRANCHISEE

Las Cruces Utilities shall pay to the City during the term of this franchise a franchise fee in the amount of 2% of the gross revenue received by Las Cruces Utilities for the provision of utility service to all customers within and without the City limits. Gross revenue shall not include the franchise fee, New Mexico gross receipts tax, water or wastewater development impact fees, or water rights fees. To facilitate the City's annual budget process, and as part of Las Cruces Utilities budget submissions to the City, it will provide the City with an estimate of such gross revenue for the upcoming fiscal year. One-twelfth (1/12) of that estimated sum shall be paid to the City on or before the 21st day of each month during the upcoming fiscal year. The monthly payments based on estimated gross revenue shall be reconciled against the actual gross revenue collected before the close of the City's fiscal year, and the appropriate credit or additional payment will be processed. The City reserves the right to inspect Las Cruces Utilities' monthly gross receipts reports to determine the appropriate franchise fee payment. The City further reserves the right to adjust the franchise fee to any or all of its utilities by City Council resolution so that the fee is comparable to franchise fees charged to other utilities in New Mexico and in the region.

(XVI)
COLLECTION OF CITY GROSS RECEIPTS TAX

Las Cruces Utilities is required to collect and pay the applicable gross receipts tax notwithstanding the franchise fee required to be paid to the City.

EXECUTED on this _____ day of March, 2013.

CITY OF LAS CRUCES

By:_____
Ken Miyagishima, Mayor

ATTEST

_____
Esther Martinez-Carrillo, CMC
City Clerk

ACCEPTANCE OF FRANCHISE ORDINANCE AGREEMENT

The City of Las Cruces on behalf of Las Cruces Utilities accepts the conditions set forth in the above Franchise Ordinance Agreement on this _____ day of _____, 2013.

CITY OF LAS CRUCES

By: _____
Robert L. Garza, P.E.
City Manager