1148

# City of Las Cruces®

PEOPLE HELPING PEOPLE

## Council Action and Executive Summary

**Item #** 23 **Ordinance#** 2528 **Council District:** ___

**For Meeting of** August 17, 2009
**(Adoption Date)**

**AN ORDINANCE GRANTING TO EL PASO ELECTRIC COMPANY, A CORPORATION ORGANIZED AND EXISTING UNDER AND BY VIRTUE OF THE LAWS OF THE STATE OF TEXAS, ITS LEGAL REPRESENTATIVES, SUCCESSORS, LESSEES AND ASSIGNS, CERTAIN POWERS, LICENSES, RIGHTS OF WAY AND PRIVILEGES TO MAINTAIN, ERECT, CONSTRUCT, EQUIP, CONDUCT AND OPERATE IN THE CITY OF LAS CRUCES, NEW MEXICO, WORKS, SYSTEMS, AND PLANTS TO GENERATE, MANUFACTURE, USE, STORE, SELL, DISTRIBUTE, CONVEY OR OTHERWISE USE, CONDUCT, SERVE, SUPPLY AND FURNISH SAID CITY, ITS INHABITANTS AND OTHERS ELECTRICITY FOR LIGHT, HEAT AND POWER, AND OTHER USEFUL SERVICE, AND TO USE THE STREETS, AVENUES, ALLEYS, HIGHWAYS, PUBLIC WAYS, SIDEWALKS, BRIDGES, AND GROUNDS OF SAID CITY, FOR A PERIOD OF UP TO FIFTEEN (15) YEARS, AND PRESCRIBING CERTAIN TERMS AND CONDITIONS THEREIN MENTIONED.**

**PURPOSE(S) OF ACTION:** Granting El Paso Electric Company authorization to use City property for El Paso Electric Company's electric distribution and transmission system in exchange for conditions deemed beneficial by the City's negotiating team and the Ad Hoc Committee.

| **Name of Drafter:** Harry S. (Pete) Connelly | | **Department:** Legal | | **Phone:** 541-2128 | |
|---|---|---|---|---|---|
| **Department** | **Signature** | **Phone** | **Department** | **Signature** | **Phone** |
| Originating Department | | | Budget | | 541-2107 |
| | | | Assistant City Manager | | 541-2271 |
| Legal | | 541-2128 | City Manager | | 541-2076 |

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

On February 24, 2000, the City Council passed Resolution No. 00-238, which resolution approved a global settlement agreement between the City of Las Cruces ("City") and El Paso Electric Company ("EPE").

As part of the settlement agreement, the City was required to grant a Franchise Ordinance Agreement to EPE within an initial term of seven (7) which franchise was similar to the 1983 Franchise Ordinance Agreement between EPE and the City. That Franchise Ordinance Agreement remained in effect and was automatically extended for an additional two (2) years as the City did not exercise its purchase options granted under the Settlement

(Continue on additional sheets as required)

Agreement in accordance with the terms set forth therein. Accordingly, the franchise expired on April 30, 2009.

Prior to the expiration of the Franchise Ordinance Agreement, which was approved as Ordinance No. 1790, the City Council appointed a City negotiating team consisting of Councilors Nathan Small, Sharon Thomas, Gil Jones, and City Manager Terrence Moore, Assistant City Manager Robert Garza and Deputy City Attorney Harry S. (Pete) Connelly. Additionally, the City Council appointed an Ad Hoc Committee consisting of prominent members of the community who have both an expertise and interest in the franchise negotiations. The Ad Hoc Committee was chaired by Assistant City Manager Robert Garza.

In addition to the franchise negotiating team, which commenced negotiations with EPE in November of 2008, the City Council held a number of public input meetings to provide for input from the public concerning the franchise and recommendations concerning the franchise negotiations.

After months of negotiations, the City Staff members of the franchise negotiating team, presented on May 15, 2009 to the Ad Hoc Committee a proposed draft franchise for review by the Ad Hoc Committee. After motion duly made and seconded and unanimously passed, that committee adopted the following resolution:

*The proposed Franchise dated April 28, 2009 with the revised modifications of Section 26, Term/Extension of Term as presented by City Staff on May 15, 2009 is hereby forwarded to the City Council with the Committee's unanimous recommendation that it be adopted by the City Council at an early time.*

Thereafter, on May 20, 2009, the El Paso Electric Franchise negotiating team members unanimously recommended that the proposed draft Franchise Agreement dated April 28, 2009 and Section 26, Term/Extension of Term, dated May 15, 2009, be submitted to City Council after a general public comment hearing on the subject.

A general public comment hearing on the proposed draft Franchise Agreement was held to receive additional input from the general public on June 9, 2009.

The City negotiating team was able to obtain agreement from EPE on key provisions which are unique to traditional franchise agreements. Those key provisions include such items as:

- Agreed to a franchise fee methodology that is unique by basing the right-of-way rental fee on the use and occupation of City right-of-way by EPE vs. calculating the franchise fee on the basis of electric use by residents within the City. This eliminates the conflict of interest caused by the historic franchise fee methodology, i.e., when City residents conserve their use of power and energy which impacts the budget certainty for right-of-way rental payments to the City.

(Continue on additional sheets as required)

- Provides for City input to EPE concerning the maintenance of EPE's distribution infrastructure.
- Provides for EPE to incorporate technological improvements for electric service, to City residents and establishes a joint EPE-City Committee to actively review and discuss those technological advances to review and plan for long-term transmission corridor planning, to discuss prototype rate designs and to implement educational programs concerning electric usage.
- EPE will develop a tariff to provide for greater installation of underground facilities.
- Reviews reliability of critical emergency facilities within the City to improve and enhance reliability for those facilities.
- Provides a tariff to allow City residents to purchase a greater portion of their electrical requirements from renewable energy resources.
- Provides for close cooperation between EPE and City residents concerning interconnection of renewable energy facilities.
- Provides a tariff to allow for recharging electric vehicles.
- Involves the City in the integrated resource planning and the long-term transmission planning of EPE.
- Develops tariffs for customers to recognize savings based on usage on and off peak.
- Allows for consideration of the option to build EPE's next generation facility within the City.
- Eliminates the traditional long term 25 year franchise term to allow the City to timely update the franchise based on changes in the electric industry.
- The initial franchise term is set at five years, subject to two five year renewal terms. The first renewal is only granted if EPE exceeds the renewable portfolio standard set forth under New Mexico Renewable Act by 10% or more during any calendar year during the first primary term, and extends the franchise for an additional five years if EPE exceeds by 10% or more the energy efficiency goal set forth in the New Mexico Efficient Use of Energy Act by year 2020 and has installed advanced electric meters in at least 50% of the City's residences.

(Continue on additional sheets as required)

**SUPPORT INFORMATION:**

| Fund Name / Account Number | Amount of Expenditure | Budget Amount |
|---|---|---|
| N/A | N/A | N/A |

1. Ordinance.

2. Proposed Franchise Ordinance Agreement Between City of Las Cruces, New Mexico and El Paso Electric Company, a Texas Corporation, attached as Exhibit "A".

**OPTIONS / ALTERNATIVES:**

1. Approve the ordinance and the proposed Franchise Ordinance Agreement as presented.

2. Not approve the ordinance and provide direction to staff as to how to proceed.

**COUNCIL BILL NO.** 09-065

**ORDINANCE NO.** 2528

**AN ORDINANCE GRANTING TO EL PASO ELECTRIC COMPANY, A CORPORATION ORGANIZED AND EXISTING UNDER AND BY VIRTUE OF THE LAWS OF THE STATE OF TEXAS, ITS LEGAL REPRESENTATIVES, SUCCESSORS, LESSEES AND ASSIGNS, CERTAIN POWERS, LICENSES, RIGHTS OF WAY AND PRIVILEGES TO MAINTAIN, ERECT, CONSTRUCT, EQUIP, CONDUCT AND OPERATE IN THE CITY OF LAS CRUCES, NEW MEXICO, WORKS, SYSTEMS, AND PLANTS TO GENERATE, MANUFACTURE, USE, STORE, SELL, DISTRIBUTE, CONVEY OR OTHERWISE USE, CONDUCT, SERVE, SUPPLY AND FURNISH SAID CITY, ITS INHABITANTS AND OTHERS ELECTRICITY FOR LIGHT, HEAT AND POWER, AND OTHER USEFUL SERVICE, AND TO USE THE STREETS, AVENUES, ALLEYS, HIGHWAYS, PUBLIC WAYS, SIDEWALKS, BRIDGES, AND GROUNDS OF SAID CITY, FOR A PERIOD OF UP TO FIFTEEN (15) YEARS, AND PRESCRIBING CERTAIN TERMS AND CONDITIONS THEREIN MENTIONED.**

The City Council is informed that:

**WHEREAS**, the City's current franchise with El Paso Electric Company ("EPE") expired on April 30, 2009; and

**WHEREAS**, on May 15, 2009, the EPE Franchise Ad-Hoc Committee met and unanimously approved a recommendation for acceptance of the proposed franchise agreement dated April 28, 2009 with an amendment to Section 26; and

**WHEREAS**, on May 18, 2009, the City's EPE Franchise Negotiating Team met and agreed that negotiations have progressed sufficiently to recommend that the proposed franchise be sent to City Council for review and approval following a public comment meeting; and

**WHEREAS**, a public comment meeting was held on June 9, 2009, at 5:30 p.m. in City Council Chambers; and

**WHEREAS**, staff, with the assistance of the Keleher Law Firm, has drafted this ordinance to adopt the proposed Franchise Ordinance Agreement.

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

**(I)**

**THAT** the Franchise Ordinance Agreement Between City of Las Cruces, New Mexico and El Paso Electric Company, a Texas Corporation, attached hereto and incorporated herein, is hereby adopted.

**(II)**

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

**DONE AND APPROVED** on this _____ day of _____, 2009.

_____
Mayor

ATTEST:

_____
City Clerk

{SEAL}

Moved by: _____

Seconded by: _____

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

APPROVED AS TO FORM:

_____
Deputy City Attorney

# FRANCHISE ORDINANCE AGREEMENT

# BETWEEN

# CITY OF LAS CRUCES, NEW MEXICO

# AND

# EL PASO ELECTRIC COMPANY, A TEXAS CORPORATION

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**Adopted:** _____

*EXHIBIT A*

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# FRANCHISE ORDINANCE AGREEMENT

## TRADITIONAL FRANCHISE PROVISIONS

### SECTION 1: PURPOSE - COMPANY'S USE OF STREETS

The City of Las Cruces, New Mexico (hereinafter called the "City"), hereby grants unto and vests in the EI Paso Electric Company, a Corporation organized and existing under and by virtue of the laws of the State of Texas, and authorized to transact business in the State of New Mexico, (hereinafter called the "Company"), its legal representatives, successors, lessees and assigns, A FRANCHISE. This Franchise Ordinance gives the Company the right to continued use and occupancy for the purpose of constructing, reconstructing, repairing, maintaining, using, and operating facilities for the transmission and distribution of electricity together with all necessary or desirable appurtenances (including underground conduits, poles, towers, wires and transmission lines for its own uses) for the purpose of supplying electricity to the City and the inhabitants within the incorporated limits of the City. The Company is hereby granted passage, right-of-way and the right to continued use and occupancy, and to occupy and use during the life of this Franchise Ordinance, every and any and all streets, avenues, alleys, highways, public ways, sidewalks, bridges, and other public structures and public places, and public grounds of the City, both above and beneath the surface of the City, as said streets, avenues, alleys, highways, public ways, sidewalks, bridges, and other public structures and public places, and public grounds of the City now exist, or hereafter may be extended, or such as hereafter may be created within the corporate limits of the City, or as same hereafter may be extended, for the purpose of carrying out that part of its business as is authorized by the City pursuant to the terms of this Franchise Ordinance.

**SECTION 2: LICENSE - POLE RELOCATION REPLACEMENT OF PAVEMENT-APPEALS - BOND - HOLD HARMLESS AGREEMENT**

The Company is hereby authorized, licensed and empowered to do any and all things necessary and proper in executing the powers and utilizing the privileges herein mentioned and granted by this Franchise Ordinance, including the making of necessary excavations and the right to acquire, erect and maintain and operate its poles, wires and appurtenances in and on any and all of the streets, avenues, alleys, highways, public ways, sidewalks, bridges, and other public structures and public places, and public grounds of the City or pursuant to easements granted by the City, the Company is hereby authorized to extend, construct, place, locate its poles, lines, wires, connections, and appurtenances through, over, across, and under any and all of the streets, avenues, highways, public ways, sidewalks, bridges, and other public structures and public places, and public grounds of the City, subject, however, to the express approval of the appropriate City office or department and provided that such installation does not conflict with existing City infrastructure, including, but not limited to, water, gas or sewer lines, storm drains, fiber optic lines, and traffic light facilities. No part of the expense of the above-described work shall be borne by the City. The City shall have power at any time to require the Company to remove and abate, at the Company's expense, any installation or structure that is dangerous to life or property, and in case the Company, after notice, fails or refuses to act, the City shall have the power to remove or abate the same at the expense of the Company, all without compensation or liability for damages to the Company.

Both parties acknowledge the long range importance to the City in having appropriate coordination between various construction programs now in progress or contemplated for some future year by the various agencies authorized to make use of City streets, avenues, alleys, highways, public ways, sidewalks, bridges, and other public structures and public places, and

public grounds of the City. In order that such coordination shall be effective, and that possible conflicts between power poles or other facilities and future street or City utility system improvements be eliminated, the Company, prior to commencement of such work, will review and coordinate the work with the applicable City office or department. It shall be considered that projects (new construction and/or emergency replacement) consisting of four primary in-line poles or less are not of sufficient magnitude to warrant the review and coordination study by the applicable City office or department as above mentioned.

Where existing poles and facilities are installed in City streets, street right-of-ways, alleys, highways, public ways, sidewalks, bridges, and other public structures and public places, and public grounds of the City and it is determined that such poles and facilities are in conflict with authorized street widening and street improvements, the project to relocate the poles and facilities to a mutually acceptable location shall be subject to the approval of the applicable City office or department. All of such pole relocation work and installation shall be performed by the Company at no expense to the City. All work done in said streets, rights of way, alleys, highways, public ways, sidewalks, bridges, and other public structures and public places, and public grounds of the City by the Company, shall be performed with reasonable diligence; and the Company shall, within a reasonable time, restore such streets, alleys, and public grounds excavated by it, to their original condition as nearly as possible; and said work shall be done subject to the approval and acceptance of the applicable City office or department. To the extent these relocation projects require the Company to relocate its facilities outside the existing right-of-way, the City will assist the Company, as necessary in the judgment of the City, to obtain new right-of-way or easements, including the use of the City's condemnation powers.

No trench excavations or pavement cuts in any public way shall be commenced under the license herein granted until a permit to commence such work is secured from the applicable City office or Department.

The replacement of pavement shall be performed in accordance to City standards and ordinances. All expenses associated with such replacement of pavement shall be borne by the Company, whether completed by private contractors or by City work force.

Appeals from decisions of the applicable City office or department may be taken to the City Council.

The City and its officers, agents and employees shall be indemnified and held harmless for all claims, losses and damages to persons or property on account of or resulting from the Company's operation, work, duties, and obligations pursuant to the terms of this Franchise Ordinance.

**SECTION 3: COMPANY'S RIGHT TO TERMINATE SERVICE**

The Company will adhere to all New Mexico Public Regulation Commission ("NMPRC") rules, regulations and procedures regarding provision of electric services to customers. Subject to NMPRC rules and regulations, in the case of refusal or failure on the part of any customer to pay the Company proper charges for electricity consumed or to observe reasonable rules and regulations established by the Company, the Company shall have the right to disconnect its service and wires to the premises of such customer and to remove all facilities furnished and owned by the Company.

**SECTION 4: COMPANY'S RIGHT TO TREE-TRIM**

The Company shall have the authority to trim trees upon and overhanging streets, avenues, highways, public ways, sidewalks, bridges, and other public structures, public places,

and public grounds of the City so as to prevent the branches of such trees from coming in contact with the wires of the Company. All tree trimming shall be done under the supervision and direction of the Company and at the expense and liability of the Company.

## SECTION 5: EXTENSION OF ELECTRICAL SERVICE

In providing extensions of electrical service, the Company shall adhere to its line extension policy as approved and amended by the NMPRC. To the extent the Company proposes changes to the Company's line extensions policy, the Company will provide reasonable advanced notice to the Joint Committee (Section 13) of the proposed changes.

## SECTION 6: FRANCHISE RIGHT-OF-WAY RENTAL

The Company, its successors, lessees and assigns, for and in consideration of the granting of this Franchise Ordinance, and as rental fee for the occupation, use and easements over, upon, and beneath the streets, avenues, alleys, highways, public ways, sidewalks, bridges, and other public structures and public places, and public grounds of the City, shall pay monthly to the City, beginning with the time hereinafter set forth, and thereafter during all the time this franchise shall remain in force and effect the following rental fee:[1]

A. For each year this Agreement remains in effect, the Company shall pay an annual rental fee equal to the sum of (1) a base fee in the amount of $414.91 per acre (Vp) which is based initially upon the franchise fee in the existing Franchise Agreement (P) times the acres of right-of-way and easement area available in that year for use by the Company within the City's municipal boundaries as adjusted each year by the CPI calculation in 6B, yielding an adjusted annual amount referred to as Vn. [Vn = Vp

[1] A mathematical example of the calculation is attached hereto (see paragraph 6F), and that formula is referenced throughout this Section. Fee = (P + XVn) CPI.

(CPI)] plus (2) an amount to be determined on a prospective annual basis by the City for the number of additional acres added to the City boundaries in the previous year (x) of right-of-way and easements, also adjusted annually by the CPI calculation.

B. The base fee in A(1) above, shall be fixed for the first year of the franchise term. Starting on the first day of the second year of the franchise term and occurring every year thereafter, the franchise fee shall be the charges described in A(1) and A(2) as increased by the cumulative and compounded CPI-U over the prior calendar year.

C. To the extent that the Company in the previous calendar year has under or over collected from the city residents the total fee amounts for that year set in A(1) and A(2) above, the Company shall, beginning each year redetermine the new kWh charge for all accounts within the City so as to true up by refund or collection on a kWh basis in the next calendar year the total amount of that under or over collection.

D. The City and Company shall both make available to the other, the records necessary to confirm the prospective adjustments to be made pursuant to A(2), B and C.

E. The payments required by A(1) and (2) shall be made to the City in twelve (12) monthly installments on or after the expiration of thirty (30) days from and after the first day of each month of each year from and after and during all the time this Franchise Ordinance shall remain in force and effect.

F. An example of the rental fee calculation is attached hereto and incorporated by reference as Attachment B.

G. Costs to the Company for any and all payments made pursuant to this Section 6, will be separately stated as a line item on customer's bills and shall be paid by the customers residing within the City as required by New Mexico law.

## SECTION 7: COLLECTION OF ADDITIONAL MUNICIPAL GROSS RECEIPTS TAX

The provisions of Section 6 shall not be construed to excuse the Company from collecting from its electric service customers and paying over to the City additional municipal gross receipts tax levied, in the event the City shall, at any time during the term of this Franchise Ordinance, enact such additional municipal gross receipts tax.

## SECTION 8: NOTICE OF FILING

Notwithstanding that ratemaking authority in New Mexico resides with the NMPRC, the Company agrees that, before filing a rate change application with the NMPRC, it will give the City and the Joint Committee established by Section 13, thirty days advanced notice of such filing. In the event the City elects to intervene, the Company agrees to provide the City with available physical planning studies, system expansion plan, engineering, statistical, billing and other data pertinent to the rate change application as governed by the PRC rules of procedure.

## SECTION 9: QUALITY OF SERVICE

A. The Company shall to the fullest extent possible, consistent with the just and reasonable rates allowed by the NMPRC, provide adequate and efficient electric service within the City limits to meet the needs and demands of the actual and potential users thereof within the City.

B. It shall be the Company's obligation to the public to maintain its property in good repair and working order, except when prevented from doing so by forces and conditions not reasonably within the control of the Company, including, but not limited to, fires, strikes, riots, war, storms, floods, state or federal restrictions, or other occurrences beyond the control of the Company. Upon the occurrence of any such events, the Company shall do all things reasonably within its power to restore normal, efficient and economical electric service.

C. The Company will provide to the City its policy for inspecting, repairing, and upgrading its distribution facilities within the City so as to allow the City to monitor that activity. To the extent such distribution facilities are determined by the City and Company to need repairs or upgrade, the Company will, in a timely manner, and pursuant to its internal budgeting and maintenance schedules, make those repairs and improvements.

**SECTION 10: TECHNOLOGICAL IMPROVEMENTS AND TRIGGERS TO RE-OPEN PROVISIONS AND/OR EXTEND THE TERM OF FRANCHISE**

A. The Company shall use its best efforts to incorporate technological advances in its equipment and service when such advances have been shown to be technically and economically (taking into consideration the undepreciated costs of existing facilities) feasible, safe and beneficial. The Company shall review technological advances which have occurred in the electric utility industry, and if it believes it appropriate and economic, will incorporate such advances in the Company's operations subject to any required regulatory approvals.

B. Except for the traditional franchise provisions contained in Sections 1 through 9, 11 and 12 of this Franchise Agreement, the Company and the City, through the Joint Committee established under Section 13 hereafter, agree to review, from time to time, significant technological advances in the provision of electric service and equipment to the electric customers within the City. To the extent such advances can be made available to the City's electric customers, both the Company and the City will attempt to amend provisions of this Franchise to provide such advanced technology to the City and its residents as a part of this Agreement. That amendment could include, based upon the good faith negotiations between the City and the Company, the extension of the term of this Franchise Agreement, taking into consideration such items as the additional cost incurred in making such technology advances available and the amortization period necessary for that additional cost so as to avoid the

Company having to recognize stranded cost or plant on its books from its investment in such new technologies.

C. The City will support before the NMPRC the recovery by the Company of those technology costs incurred by the Company and recommended for recovery by the Joint Committee established pursuant to Section 13.

**SECTION 11: UNDERGROUND FACILITIES**

The Company, upon request of the City, shall develop a tariff, to be approved by the NMPRC (subject to prior review and comment by the City), to provide for design and use of underground cables and facilities in place of existing above ground facilities in such locations identified by the City other than for new subdivision or similar developments covered by the Company's existing line extension policy and which additional cost shall be borne by the customers receiving service at such locations.

**SECTION 12: ENHANCED RELIABILITY**

A. If reasonably determined to be necessary by the City and the Company to ensure improved reliability of electrical power in the event of an emergency to the City's public safety facilities (identified from time to time by the City and submitted to the Section 13 Joint Committee), the Company agrees to establish and maintain during the term of this Franchise Ordinance alternate circuits or other reliability improvement measures to supply electrical power for those public safety facilities. The Company will also retain a consultant, at its cost, to review and recommend how reliability can be improved for up to a total of four additional public safety facilities per year identified by the City. The City and the Company shall reasonably attempt to agree on the allocation between them of the additional cost to provide such improved reliability.

B. The Company shall make available a consultant to the other customers within the City who have a need for enhanced reliability of electrical service to make recommendations to those customers; the cost of such consultation and necessary improvements shall be borne by the requesting customer.

C. The Company will provide annually to the City and the Joint Committee established in Section 13 and otherwise as requested by any customer, its reliability data from its SAIDI report, as available, concerning specific locations within its Las Cruces system.

**SECTION 13: JOINT COMMITTEE**

A. The Company and City will establish a Joint Committee consisting of three representatives of the Company and three representatives appointed by the Mayor, subject to the advice and consent of the City Council, to meet on a regular basis, as appropriate, to discuss and review coordination of important matters between the Company and City, including review of Section 10 issues and Section 26 performance standards. Such subjects also will include, but are not limited to, reviewing implementation of energy efficiency and renewable energy applications within the City, long-term transmission corridor planning, maintenance and upgrading of the Company's infrastructure, prototype rate designs to provide incentive for conservation and efficient use of energy and reviewing developments of new technology within the electric industry. This Joint Committee will report annually to the City Council its recommendations including improving energy efficiency and renewable energy usage within the City, any proposed extension of the franchise pursuant to Section 10 or 26 and such other matters as the Joint Committee determines vital to manage the relationship between the City and Company under this Franchise.

B. The Joint Committee shall additionally, as part of its duties, implement educational programs for electric users within the City (which do not duplicate mandated or approved PRC programs), so as to promote energy conservation and cost effective use of energy and generally educate the residents on electric safety and usage issues.

## ENERGY EFFICIENCY AND RENEWABLE ENERGY PROVISIONS

### SECTION 14: INCREASED USE OF RENEWABLE ENERGY RESOURCES

A. During the term of this Agreement, the Company will keep in effect a NMPRC-approved tariff that allows the residents of the City to individually elect to purchase a greater portion of their electrical requirements from renewable energy sources. A tariff will also be filed, upon request by the City if determined to be technologically proven and economic, to install advanced meters for the customer's use. The Company will allocate the cost of such advanced meters to the customer requesting such meters or as otherwise directed by the NMPRC.

B. The Company will make the authorized payments to the residents of the City who have installed renewable energy resources pursuant to tariffs as approved from time to time by the NMPRC under the New Mexico Renewable Energy Act or other legislation then in effect.

### SECTION 15: CITY RESIDENTS' SOLAR AND QUALIFYING FACILITY INSTALLATION

The Company will timely comply with the rules and regulations adopted by the NMPRC relating to the Company's requirement to interconnect "qualifying facilities" of small power producers (as defined by the Federal Energy Regulatory Commission (FERC) in 18 C.F.R., Part 292, Subpart B, Section 292.201, as amended), to purchase excess power and energy from qualifying facilities and to sell supplemental, back-up, maintenance and interruptible power

facilities to those producers, pursuant to but not limited by 17.9.570 NMAC, 17.9.568 NMAC, 17.9.569 NMAC and such other rules and regulations adopted by the NMPRC pursuant to the New Mexico Renewable Energy Act, NMSA 1978, § 62-16-1, et seq., so as to assure that the solar installations and other "qualifying facilities" located within the City are timely interconnected and receive "avoided costs" payments required pursuant to NMAC 17.9.570.11.

Notwithstanding any other terms or condition of this Franchise Agreement or of this section, neither the City nor its residents is in any way precluded from developing, installing, distributing or purchasing renewable energy or distributed generation facilities or related energy or capacity for their on-site use, as otherwise permitted by applicable Federal or State law, as may be amended over time subject, however, to any applicable FERC tariff wheeling charge.

**SECTION 16: ELECTRIC VEHICLE RE-CHARGE FACILITY**

Upon request of the City, the Company will develop a tariff to be approved by the NMPRC that allows the City to purchase electricity from the Company used to provide re-charge facilities and energy to its residents' electric vehicles.

**SECTION 17: RENEWABLE ENERGY, INTEGRATED RESOURCE PLANNING AND DEMAND SIDE MANAGEMENT APPLICATIONS**

A. The Company will keep the City and the Section 13 Joint Committee informed, with input from the City and the Joint Committee, concerning its development of the integrated resource plan pursuant to NMPRC proceedings pertaining to integrated resource planning. This may potentially provide to City residents additional renewable energy, integrated resource planning and demand side management options.

As part of the educational programs provided by Section 13B, the Company also will hold public meetings to discuss those programs.

## TRANSMISSION AND DISTRIBUTION PLANNING

### SECTION 18: LONG TERM TRANSMISSION PLANNING

The Joint Committee established under Section 13 also will meet and review, as appropriate, the Company's long-term planning requirements and how those impact the City. The Joint Committee will address long-term transmission corridor planning to enable the City, its residents and developers to have advance knowledge of the Company's plans. The Company, as requested from time to time by the Community Development Department, will review the City's Master Plan and the Regional Plan 2040, to provide its input concerning the Company's plans for transmission corridors to coordinate planning under the City's master plan.

## RATE DESIGN PROVISIONS

### SECTION 19: ON AND OFF PEAK TARIFF

The Company will develop for its next rate case anticipated (to be filed in the May 30, 2009 time frame) tariffs to be approved by the NMPRC with a rate design for seasonal, time of day, on and off-peak power, and energy by class applicable to appropriate electric users within the City. The Company will communicate and discuss that filing with the City concerning the proposed rate design.

**SECTION 20: ECONOMIC DEVELOPMENT RATE**

The Company will review the possibility, pursuant to the NMPRC regulations, of providing for economic development rates for electric customers within the City. The Company will advise the City of the result of such review.

## OTHER PROVISIONS

**SECTION 21: ACCEPTANCE OF FRANCHISE**

This Franchise Ordinance shall be accepted by the Company in writing within 30 days from the date this Franchise Ordinance is passed by the City Council. At or before the acceptance of this Franchise, the Company will pay the City $50,000 and the cost of advertising this Ordinance (the "Acceptance Fee"). If not so accepted, this Franchise Ordinance shall be repealed and negotiation for a new Franchise Ordinance may take place between the City and the Company; PROVIDED, that in any such negotiation neither party shall be bound by the terms of this Franchise Ordinance. It is hereby made an essential condition in the granting of this Franchise Ordinance, and its use and enjoyment by the Company, its successors, lessees, and assigns, that the acceptance by the Company, its successors, lessees, and assigns, of the Franchise Ordinance and the rights and privileges hereby granted shall be the acceptance by the Company, its successors, lessees and assigns, of all the conditions, reservations and restrictions herein provided and contained; and when this Franchise Ordinance has been accepted as aforesaid in the space provided at the end of this instrument, this Franchise Ordinance shall be and become a contract duly executed by and between the City and the Company, PROVIDED, however, that excepting for mortgagees, stockholders, bondholders, or any others having any lien or claim of whatever sort against the Company including its rights and privileges as herein

granted, the Company will make no transfer, assignment, lease, or other succession of or to the rights herein granted, without the approval of the City, which approval shall be granted as to any person or entity which provides information sufficient to demonstrate that it is financially sound and technically qualified to provide electric distribution service, and the regulatory agencies having jurisdiction over the Company's operations in no way define, limit or describe the scope or intent of this Franchise Ordinance nor affect its terms and provisions.

**SECTION 22: REPEAL OF CONFLICTING ORDINANCES**

All other ordinances or parts of ordinances or agreements between the parties in conflict herewith are hereby repealed and superseded.

**SECTION 23: SCOPE**

This Franchise Ordinance incorporates all of the agreements, covenants and understandings between the Parties hereto concerning the subject matter hereof, and all such covenants, agreements and understandings have been merged in this written Franchise Ordinance. No prior agreement or understanding, verbal or otherwise, of the parties or their agents regarding the subject matter hereof, shall be enforceable unless embodied in the Franchise Ordinance.

**SECTION 24: AMENDMENTS**

This Franchise Ordinance shall not be altered, changed or amended, except by ordinance in writing and executed by the parties hereto.

**SECTION 25: PARAGRAPH HEADINGS**

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

**SECTION 26: TERM/EXTENSION OF TERM**

A. This Franchise Ordinance shall take effect and be in force 30 days after the passage and adoption of this Franchise Ordinance and shall expire on _____, 2014 (the "Primary Term"). Subject to the outcome of any referendum petition, the date of passage and adoption being set forth below. However, after such passage and adoption and during the aforementioned 30 day period, this Franchise Ordinance (1) must be published at the expense of the Company in full, in two weekly issues of a newspaper published in the City of Las Cruces, New Mexico, said publications not less than seven days apart; (2) proof of such publication must be submitted by affidavit from the publisher and placed in the appropriate City records, and (3) this Franchise Ordinance must be accepted in writing by the Company in the space provided at the end of this instrument; otherwise, this Franchise Ordinance shall be null and void.

B. To provide incentive to the Company to promote renewable energy, energy efficiency and advanced technology, the City agrees to extend the Primary Term of this franchise for up to two consecutive periods of five years each starting at the initial termination date set out in Section 26A, under the following terms and conditions:

(1) If, during the Primary Term, the Company exceeds the renewable portfolio standard set forth in the New Mexico Renewable Act (NMSA 1978, Section 62-16-4 (2007)) by ten percent or more for a calendar year **[subject to substituting new**

**language from EPE]** (the "RPS Test"), the term of this Franchise Ordinance shall be extended for an additional five-year period to expire on _____, 2019 (the "First Renewal Term"). The Company shall deliver to the City a copy of its annual report to the NMPRC regarding its compliance with the renewable portfolio standard, and a calculation demonstrating that the Company has met the RPS Test. Upon delivery of such report and calculation, unless Commission Staff files objection to the Company's annual report within 60 days of filing, this Franchise Ordinance shall be extended through the end of the First Renewal Term. If the Company has not met the RPS Test by the end of the Primary Term, then this Franchise Ordinance shall expire at the end of the Primary Term.

(2) If, during the First Renewal Term, the Company (a) exceeds by ten percent or more the energy efficiency goal set forth in the New Mexico Efficient Use of Energy Act (1978 NMSA, Section 62-17-5) to be achieved by the year 2020 (the "Efficiency Goal") for a calendar year **[subject to substituting new language from EPE]**, *and* (b) the Company has installed advanced meters (as such term may hereinafter be defined by the NMPRC) in at least fifty percent of residential customer's homes within the City municipal boundaries (the "Technology Goal"), then the term of this Franchise Ordinance shall be extended for an additional five-year period to expire on _____, 2024 (the "Second Renewal Term"). The Company shall deliver to the City copies of its applicable reports to the NMPRC and appropriate calculations, showing that both the Efficiency Goal and the Technology Goal have been met. These reports are reviewed by a Commission independent evaluator. Upon delivery of such reports and calculation, approved by the independent evaluator, this Franchise Ordinance

shall be extended through the end of the Second Renewal Term. If the Company fails to meet the Efficiency Goal and the Technology Goal by the end of the First Renewal Term, then this Franchise Ordinance shall expire at the end of the First Renewal Term.

**SECTION 27: SAVINGS CLAUSE - REPEAL**

If any section, paragraph, subdivision, clause, phrase or provision of this Franchise Ordinance except the provision containing the Franchise Ordinance rental or tax shall be adjudged invalid or unconstitutional, the same shall not affect the validity of this Franchise Ordinance as a whole, or any part or provisions thereof other than the part so decided to be invalid or unconstitutional. If the Franchise tax or rental is declared invalid, or unconstitutional, then this entire Franchise Ordinance shall be null and void.

**SECTION 28: DISPUTE RESOLUTION**

Any dispute that may arise between the parties under this Agreement shall be submitted for resolution first to the City Manager of the City of Las Cruces and the Vice President of New Mexico Affairs for the Company and if they cannot resolve the dispute within thirty days after submittal, then to the Mayor of the City of Las Cruces and the President and Chief Executive Officer of the Company (or their designated representatives). If the Mayor and the President and Chief Executive Officer of the Company cannot resolve the dispute or agree upon action within thirty (30) days following such submission, then the dispute may be submitted to mediation upon a mutual agreement of the parties. In the event the parties do not agree to mediate the dispute or if the dispute is not resolved by the parties through mediation within ninety (90) calendar days after the dispute arises, the parties agree that the matter may be submitted to litigation in the Third Judicial District Court of the State of New Mexico which has jurisdiction herein.

**SECTION 29: OTHER**

A. The Company will continue to be actively involved in community affairs in the City by contributing to charitable, civic and economic development causes consistent with past practices in the Las Cruces and El Paso communities.

B. The Company hereby agrees that, subject to any and all regulatory and governmental approvals, that it will include in its next request for proposal (RFP) for a generation addition to its system, an option to build within the city limits the next generation facility that the Company decides to construct after completion of the generation facility currently being built by the Company (which is the El Paso Combined Cycle Unit). The Company, in its sole discretion and subject to applicable regulatory approvals, shall have the right to determine in that RFP the type (including, but not limited *to,* the fuel source), size and other specifications of such facility and to select the successful RFP proposal.

DATED this _____ day of _____, 2009.

CITY OF LAS CRUCES

_____
Mayor

ATTEST:

_____
City Clerk

APPROVED AS TO FORM:

_____
Harry S. (Pete) Connelly
Deputy City Attorney

ACCEPTANCE

The above Franchise Ordinance/Agreement is hereby accepted as to all of its terms, conditions, and provisions on this _____ day of _____, 2009.

EL PASO ELECTRIC COMPANY,
a Texas Corporation

By _____
President

ATTEST:

_____
Secretary

00061929