

**CITY OF BOULDER  
CITY COUNCIL AGENDA ITEM**

**MEETING DATE: June 1, 2010**

**AGENDA TITLE:** Introduction, first reading and consideration of an ordinance calling a special coordinated municipal election to be held on Tuesday, the 2nd day of November, 2010, in the City of Boulder, Colorado, and providing for the submission to the electors entitled to vote thereon of the question of a franchise by the City of Boulder, Colorado, being granted to the Public Service Company of Colorado, its successors and assigns, to furnish, sell, and distribute gas and electricity to the city and to all persons, businesses, and industries within the city and the right to acquire, construct, install, locate, maintain, operate, and extend into, within, and through said city all facilities reasonably necessary to furnish, sell, and distribute gas and electricity within the city and the right to make reasonable use of all streets, public easements and other city property as herein defined as may be necessary; and fixing the terms and conditions thereof; and setting forth related details.

**PRESENTERS:**

Jane S. Brautigam, City Manager  
David J. Gehr, Acting City Attorney  
David Driskell, Executive Director of Community Planning  
Kara Mertz, Local Environmental Action Manager

**EXECUTIVE SUMMARY:**

The purpose of this request is to seek authorization for placement on the November 2, 2010, municipal election ballot of an ordinance approving the grant of a franchise to Public Service Company of Colorado (“PSCo” or “Xcel Energy”) for the use of city streets, public easements, and other city property for the Company’s provision of electrical and gas services to residents of the City of Boulder.

No decision has been made regarding whether the franchise should be placed on the ballot in November 2010. The purpose of placing this ordinance before the council is simply to keep all options open so that council may continue to consider matters related to the franchise during the 2010 ballot season. After first reading, the council may decide whether or not to put the franchise question on the ballot.

The requirements associated with ballot related franchise ordinances, state and local election laws, and the City Council's regularly scheduled business meetings through the summer dictate the timing of this first reading.

**STAFF RECOMMENDATION:**

**Suggested Motion Language:**

Staff requests council consideration of this matter and action in the form of the following motion:

Introduce, read on first reading, and publish by title only an ordinance calling a special coordinated municipal election to be held on Tuesday, the 2nd day of November, 2010, in the City of Boulder, Colorado, and providing for the submission to the electors entitled to vote thereon of the question of a franchise by the City of Boulder, Colorado, being granted to the Public Service Company of Colorado, its successors and assigns, to furnish, sell, and distribute gas and electricity to the city and to all persons, businesses, and industries within the city and the right to acquire, construct, install, locate, maintain, operate, and extend into, within, and through said city all facilities reasonably necessary to furnish, sell, and distribute gas and electricity within the city and the right to make reasonable use of all streets, public easements and other city property as herein defined as may be necessary; and fixing the terms and conditions thereof; and setting forth related details.

**COMMUNITY SUSTAINABILITY ASSESSMENTS AND IMPACTS:**

- Economic: The franchise fee of 3% of all revenues from Boulder customers from electric and natural gas sales currently results in approximately 3.9 million dollars to the general fund annually. Xcel Energy also sets aside 1% of the revenue that it receives from electricity sales to a fund that it uses to underground overhead utilities. The city also shares facilities with Xcel Energy in the public rights of way that would require the city to incur additional costs.
- Environmental: The franchise agreement provides that Xcel Energy will assist the city in meeting its Climate Action Plan. Through the franchise and associated side agreements, the city will partner with Xcel Energy in an effort to foster and support the city's clean energy goals.
- Social: A clean energy future will help mitigate the impacts of carbon-based energy on future generations.

**OTHER IMPACTS:**

- Fiscal: No fiscal impact from election due to Xcel Energy paying the cost of the election. Franchise will result in approximately \$3,900,000 revenue to the city and a 1% undergrounding fund.

- Staff time: Approval of the franchise agreement will reduce the staff time required to regulate PSCo's use of city streets.

## **BACKGROUND:**

The last franchise agreement between the city and PSCo was dated August 4, 1993. That agreement will expire on August 3, 2010.

The city and PSCo have been in negotiations on the terms of the new franchise proposal since 2008.

On April 13, 2010, the council discussed the franchise at a study session. A copy of the study session summary is attached to this memo as Attachment B. At the study session, council members expressed significant concerns about introducing a standard franchise ballot this year. Council members also expressed an interest in a strong partnership with Xcel Energy to rapidly decarbonize Boulder's energy source, while also creating new opportunities for Xcel Energy.

Council members expressed the desire to keep the option of a future franchise agreement on the table. Also, it was requested that staff attempt to extend the existing franchise agreement for one year. At this point in time, Xcel Energy has not agreed to such an extension.

## **ANALYSIS:**

### **1. Option to Continue Negotiations.**

The decision about whether to grant a franchise to Xcel Energy continues to be in flux. The staff and representatives from Xcel Energy continue to discuss issues related to the franchise. With the exception of minor details, the franchise discussions are complete. City staff and Xcel Energy have come to terms that are acceptable to both sides.

There continues to be discussion about whether the city and Xcel Energy can come to terms on matters outside of the traditional franchise agreement. These are what have been called "side agreements." They include items such as demand side management programs, access to rebates, renewable energy aggregated purchases, street lighting, joint decarbonization study, etc.

On May 24, the city manager requested that Xcel Energy enter into a franchise extension pursuant to a right of way permit until the end of the year, to put the parties past the next election. At the time this memo was submitted (mid-day on May 25, 2010) for publication in the council packet, no response had been received from Xcel Energy.

### **2. Franchise Issues Still Being Negotiated.**

The following issues are still under discussion:

- a. Issues related to the various easement types in which Xcel Energy has equipment.

- b. Issues of cost and coordination related to the relocation of utilities within public utility easements.
- c. Assorted minor issues in the franchise agreement.

**3. Ordinances Granting Franchises and Election Requirements.**

For ordinances granting franchises, the city Charter requires that there are at least 60 days between first reading and the final approval of the ordinance. During this 60 or more day period, there are publication requirements. There are no limitations on amendments that may be considered or on the number of additional readings or public hearings that may be held during that time.

In addition to the timing requirements related to reading the ordinance, there are also requirements under state and local election law to provide ballot questions to the County Clerk at least 60 days prior to the election.

There are a number of factors that lead to the timing of putting a first reading on the June 1, 2010 meeting. The first issue to consider is the City Council recess. This removes the opportunity for a mid-June consideration of a ballot question. The next factor to consider is that the first business meeting in July occurs late in the first week of the month. The last regularly scheduled council business meeting before the deadline for submitting ballot questions to the County Clerk is August 17.

Moving the first reading to the July 6, 2010 meeting leaves insufficient time to meet the 60-day requirement discussed above. It is recommended that the City Council attempt to approve its ballot questions and issues no later than the second business meeting in August. In the alternative, a special meeting could be held before September 2, 2010.

**NEXT STEPS**

The staff continues to have discussions with Xcel Energy. In the event that there is a proposal that the city manager can support, the manager will place the matter before the City Council. If a second reading is scheduled for this ordinance, any proposed changes to the franchise agreement submitted with this ordinance on first reading will be offered as amendments to this ordinance.

The following schedule is recommended:

- June 1: Introduce the ordinance with the ballot measure
- June 2 – August 3: Additional readings/public hearings
- August 17: Final passage
- September 2: Submit measure to County Clerk to be placed on ballot
- November 2: Election Day

On June 3, 2010, the City Council will have a study session to discuss “Life Without a Franchise.”

On July, 6, 2010, staff plans to provide the council with options for ballot measures related to privilege and occupation taxes for public utilities.

The staff is continuing to have discussions with Xcel Energy on the side agreements related to matters outside of the traditional franchise agreement. In the event that terms can be negotiated that the city manager can support, those items will be scheduled for City Council consideration later this summer.

**MATRIX OF OPTIONS:**

Complete first reading of this ordinance; or  
Decide not to place the matter on the ballot for the year 2010.

Approved by:



Jane S. Brautigam  
City Manager

Attachments:

- A. Proposed Ordinance
- B. Study Session Summary from April 13, 2010 (Approved by Council on May 20, 2010)

ORDINANCE NO. \_\_\_\_\_

AN ORDINANCE CALLING A SPECIAL COORDINATED MUNICIPAL ELECTION TO BE HELD ON TUESDAY, THE 2ND DAY OF NOVEMBER, 2010, IN THE CITY OF BOULDER, COLORADO, AND PROVIDING FOR THE SUBMISSION TO THE ELECTORS ENTITLED TO VOTE THEREON OF THE QUESTION OF A FRANCHISE BY THE CITY OF BOULDER, COLORADO, BEING GRANTED TO PUBLIC SERVICE COMPANY OF COLORADO, ITS SUCCESSORS AND ASSIGNS, TO FURNISH, SELL, AND DISTRIBUTE GAS AND ELECTRICITY TO THE CITY AND TO ALL PERSONS, BUSINESSES, AND INDUSTRIES WITHIN THE CITY AND THE RIGHT TO ACQUIRE, CONSTRUCT, INSTALL, LOCATE, MAINTAIN, OPERATE, AND EXTEND INTO, WITHIN, AND THROUGH SAID CITY ALL FACILITIES REASONABLY NECESSARY TO FURNISH, SELL, AND DISTRIBUTE GAS AND ELECTRICITY WITHIN THE CITY AND THE RIGHT TO MAKE REASONABLE USE OF ALL STREETS, PUBLIC EASEMENTS AND OTHER CITY PROPERTY AS HEREIN DEFINED AS MAY BE NECESSARY; AND FIXING THE TERMS AND CONDITIONS THEREOF; AND SETTING FORTH RELATED DETAILS.

The City Council finds that:

A. Public Service Company of Colorado has applied to the city for the grant of a franchise to furnish, sell, and distribute gas and electricity to the city, its residents, businesses, and industries and to make reasonable use of the city streets, public easements, and other city property to do so.

B. Section 108 of the Boulder home rule charter provides that no franchise may be granted by the city except upon the vote of the qualified taxpaying electors.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BOULDER:

Section 1. That a special coordinated municipal election be held in the various precincts and at the polling places in the city of Boulder, county of Boulder and state of Colorado, on Tuesday, the 2nd day of November, 2010, between the hours of 7:00 am and 7:00 pm.

Section 2. At that election there shall be submitted to the electors of the city of Boulder entitled by law to vote thereon the question of whether or not a franchise shall be granted by the city of Boulder to Public Service Company of Colorado, its successors and assigns, for the use of city streets, public easements, and other city property to furnish, sell, and distribute gas and electricity within the city under the terms and conditions of the franchise agreement attached hereto as Exhibit A.

Section 3. The official ballot shall contain the following ballot title, which shall also be the designation and submission clause for the question:

BALLOT QUESTION NO. \_\_\_\_\_

PUBLIC SERVICE COMPANY FRANCHISE

SHALL THE CITY OF BOULDER GRANT A FRANCHISE TO PUBLIC SERVICE COMPANY OF COLORADO TO FURNISH, SELL, AND DISTRIBUTE GAS AND ELECTRICITY TO THE CITY AND TO ALL PERSONS, BUSINESSES, AND INDUSTRIES WITHIN THE CITY AND THE RIGHT TO MAKE REASONABLE USE OF ALL STREETS AND OTHER PUBLIC PLACES AND PUBLIC EASEMENTS AS MAY BE NECESSARY?

FOR THE QUESTION \_\_\_\_\_ AGAINST THE QUESTION \_\_\_\_\_

Section 4. If a majority of all the votes cast at the election on the question submitted shall be for the question, the question shall be deemed to have passed and the franchise granted.

Section 5. The city clerk of the city of Boulder shall give public notice of the election on such question as required by law.

Section 6. The officers of the city are authorized to take all action necessary or appropriate to effectuate the provisions of this ordinance.

Section 7. If the electorate passes the ballot question, the city council deems this ordinance to be the ordinance granting a franchise as required by the city Charter, including Charter Section 20, "Ordinances Granting Franchise," Charter Section 108, "Franchises Granted Upon Vote," and Charter Section 109, "No Exclusive Grants-Ordinance in Plain Terms."

Section 8. If any section, paragraph, clause, or provisions of this ordinance shall for any reason be held to be invalid or unenforceable, such decision shall not affect any of the remaining provisions of this ordinance.

Section 9. This ordinance is deemed necessary for the protection of the public health, safety, and welfare of the residents of the city, and covers matters of local concern.

Section 10. The city council deems it appropriate that this ordinance be published by title only and orders that copies of the text hereof be available in the office of the city clerk for public inspection and acquisition.

INTRODUCED, READ ON FIRST READING, AND ORDERED PUBLISHED BY  
TITLE ONLY this 1st day of June 2010.

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Mayor

Attest:

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City Clerk on behalf of the  
Director of Finance and Record

READ ON SECOND READING, PASSED, ADOPTED, AND ORDERED

PUBLISHED BY TITLE ONLY this \_\_\_\_\_ day of \_\_\_\_\_, 2010.

\_\_\_\_\_  
Mayor

Attest:

\_\_\_\_\_  
City Clerk on behalf of the  
Director of Finance and Record

EXHIBIT A

ORDINANCE NO. \_\_\_\_\_

AN ORDINANCE GRANTING A FRANCHISE BY THE CITY OF BOULDER TO PUBLIC SERVICE COMPANY OF COLORADO, ITS SUCCESSORS AND ASSIGNS, TO FURNISH, SELL, AND DISTRIBUTE GAS AND ELECTRICITY TO THE CITY AND TO ALL PERSONS, BUSINESSES, AND INDUSTRIES WITHIN THE CITY AND THE RIGHT TO ACQUIRE, CONSTRUCT, INSTALL, LOCATE, MAINTAIN, OPERATE, AND EXTEND INTO, WITHIN, AND THROUGH SAID CITY ALL FACILITIES REASONABLY NECESSARY TO FURNISH, SELL, AND DISTRIBUTE GAS AND ELECTRICITY WITHIN THE CITY AND THE RIGHT TO MAKE REASONABLE USE OF ALL STREETS, PUBLIC EASEMENTS AND OTHER CITY PROPERTY AS HEREIN DEFINED AS MAY BE NECESSARY; AND FIXING THE TERMS AND CONDITIONS THEREOF; AND SETTING FORTH RELATED DETAILS.

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## ARTICLE 1 DEFINITIONS

For the purpose of this franchise, the following words and phrases shall have the meaning given in this Article. When not inconsistent with context, words used in the present tense include the future tense, words in the plural include the singular, and words in the singular include the plural. The word “shall” is mandatory and “may” is permissive. Words not defined in this Article shall be given the meaning assigned to them in the regulations of the Colorado Public Utilities Commission, 4 C.C.R. 723-3, or if undefined in such regulations, their common and ordinary meaning.

§ 1.1 “City” refers to the City of Boulder, a municipal corporation of the State of Colorado.

§ 1.2 “City Council” or “Council” refers to the legislative body of the City.

§ 1.3 “City Facilities” refers to all facilities owned by the City including but not limited to buildings, structures, City-owned street lights, traffic signals, parking lots, parks and recreational facilities, and water, sewer, storm water, reclaimed water, telecommunication and transportation systems.

§ 1.4 “Code” refers to the Boulder Revised Code, 1981, as the same may be amended from time to time.

§ 1.5 “Company” refers to Public Service Company of Colorado d/b/a Xcel Energy and its successors and assigns, including affiliates or subsidiaries that undertake to perform any of the obligations under this franchise.

§ 1.6 “Company Facilities” refer to all facilities of the Company reasonably necessary to provide gas and electric service into, within and through the City, including but not limited to plants, works, systems, substations, transmission and distribution structures, lines, equipment, pipes, mains, conduit, transformers, underground lines, gas compressors, meters, meter reading devices, communication and data transfer equipment, control equipment, gas regulator stations, Company-owned street lights, wire, cables and poles.

§ 1.7 “Design and Construction Standards” refers to those design and construction standards adopted by the City, as the same may be amended from time to time.

§ 1.8 “Electric Gross Revenues” refers to those amounts of money that the Company receives from the sale or delivery of electricity in the City, after adjusting for refunds, net write-offs of uncollectible accounts, corrections, or regulatory adjustments. Regulatory adjustments include, but are not limited to, credits, surcharges, refunds, and pro-forma adjustments pursuant to federal or state regulation. “Electric Gross Revenues” shall exclude any revenue for the sale or delivery of electricity to the City.

- § 1.9 “Energy Conservation” refers to the decrease in energy requirements of specific customers during any selected time period, resulting in a reduction in end-use services.
- § 1.10 “Energy Efficiency” refers to the decrease in energy requirements of specific customers during any selected period with end-use services of such customers held constant.
- § 1.11 “Force Majeure” refers to the inability to undertake an obligation of this franchise due to a cause that could not be reasonably anticipated by a party or is beyond its reasonable control after exercise of best efforts to perform, including but not limited to fire, strike, war, riots, terrorist acts, acts of governmental authority, acts of God, floods, epidemics, quarantines, labor disputes, unavailability or shortages of materials or equipment or failures or delays in the delivery of materials.
- § 1.12 “Gross Revenues” refers to those amounts of money which the Company receives from the sale of gas and electricity within the City under rates authorized by the Public Utilities Commission, as well as from the transportation of gas to its customers within the City and from the use of Company facilities in Streets, Public Easements and Other City Property (unless otherwise preempted by applicable federal or state law), as adjusted for refunds, net write-offs of uncollectible accounts, corrections, or regulatory adjustments. Regulatory adjustments include, but are not limited to, credits, surcharges, refunds, and pro-forma adjustments pursuant to federal or state regulation. “Gross Revenues” shall exclude any revenues from the sale of gas or electricity to the City or the transportation of gas to the City.
- § 1.14 “Other City Property” refers to the surface, the air space above the surface and the area below the surface of any property owned or controlled by the City or hereafter held by the City, not including Streets or Public Easements, that are suitable locations for the placement of Company Facilities, as determined by the City in its sole discretion.
- § 1.15 “Private Project” refers to any project that is not covered by the definition of Public Project.
- § 1.16 “Public Easement” refers to a public interest in land owned by another person that entitles the public to a specific limited use or enjoyment of said land for the use or installation, construction, reconstruction, repair or maintenance of public infrastructure such as utilities, drainage systems or transportation improvements.
- § 1.17 “Public Project” refers to (1) any public work or improvement within the City that is wholly or beneficially owned by the City; or (2) any public work or improvement within the City where fifty percent (50%) or more of the funding is provided by any combination of the City, the federal government, the State of Colorado, any Colorado county, the Regional Transportation District, and the Urban Drainage and Flood Control

District, but excluding all other entities established under Title 32 of the Colorado Revised Statutes.

- § 1.18 “Public Utilities Commission” or “PUC” refers to the Public Utilities Commission of the State of Colorado or such other state agency succeeding to the regulatory powers of the Public Utilities Commission.
- § 1.19 “Residents” refer to all persons, businesses, industries, governmental agencies, including the City, and any other entity whatsoever, presently located or to be hereinafter located, in whole or in part, within the incorporated boundaries of the City.
- § 1.20 “Street Lighting Agreement” refers to the Street Lighting and Traffic Signal Lighting Service Agreement entered into by the City and the Company contemporaneously with this franchise agreement
- § 1.21 “Streets” or “City Streets” refers to the surface, the air space above the surface and the area below the surface of any City-dedicated streets, alleys, bridges, roads, lanes, and other public rights-of-way within the City, which are primarily used for motorized vehicle traffic. Streets shall not include Public Easements or Other City Property.
- § 1.22 “Supporting Documentation” refers to all information necessary or reasonably required in order to allow the Company to design and construct any work performed under the provisions of this franchise.
- § 1.23 “Tariffs” refer to those tariffs of the Company on file and in effect with the PUC, as the same may be amended from time to time.
- § 1.24 “Traffic Facilities” refers to any City-owned or authorized traffic signal, traffic signage or other traffic control or monitoring device, equipment or facility, including all associated controls, connections and other support facilities or improvements, located in any Streets, Public Easements or Other City Property.
- § 1.25 “Utility Service” refers to the sale of gas or electricity to Residents by the Company, as well as the delivery of gas to Residents by the Company.

## ARTICLE 2 GRANT OF FRANCHISE

### § 2.1 Grant of Franchise.

A. Grant. The City hereby grants to the Company, subject to all conditions, limitations, terms, and provisions contained in this franchise agreement, the non-exclusive right to make reasonable use of City Streets, Public Easements and Other City Property as may be necessary to carry out the terms of this franchise agreement, subject

to the applicable requirements and review process set forth in the Code and the Design and Construction Standards:

- (1) To provide Utility Service to the City and to its Residents; and
- (2) To acquire, purchase, construct, install, locate, maintain, operate, and extend into, within and through the City all Company Facilities reasonably necessary for the generation, production, manufacture, sale, storage, purchase, exchange, transmission, transportation and distribution of Utility Service within and through the City.

B. Street Lighting and Traffic Signal Lighting Service. The rights granted by this franchise encompass the nonexclusive right to provide street lighting service and traffic signal lighting service as directed by the City, and the applicable provisions of this franchise agreement shall apply with full and equal force to street lighting service and traffic signal lighting service provided by the Company. Wherever reference is made in this franchise agreement to the sale or provision of Utility Service, these references shall be deemed to include the provision of street lighting service and traffic signal lighting service. Conflicting provisions of this franchise agreement notwithstanding, street lighting service and traffic signal lighting service within the City shall be governed by applicable tariffs on file with the PUC and the terms of the Street Lighting Agreement.

C. Company Facilities on Other City Property. The grant of the right to locate Company Facilities in or on Other City Property shall be subject to (1) the Company first receiving from the City a revocable license, permit or other written agreement approving the location of such Company Facilities and (2) the terms and conditions of such revocable license agreement, permit or other written agreement. The City shall not be required to grant the Company an easement for Company Facilities. To the extent that the Company's use of Other City Property is not specifically addressed by separate license agreements, permits or other written agreements, but has otherwise been authorized by the City prior to the effective date of this franchise agreement, the Company may continue such use of Other City Property under the terms of this franchise agreement; provided, however, that such prior authorization does not include an authorization for the Company to increase the size or carrying capacity of Company Facilities or the location of Company Facilities on Other City Property without prior approval of the City in writing.

## § 2.2 Conditions and Limitations.

A. Scope of Franchise. The grant of this franchise shall extend to all areas of the City as it is now or hereafter constituted; however, nothing contained in this franchise agreement shall be construed to authorize the Company to engage in activities other than the provision of Utility Service.

B. Subject to City Usage. The right to make reasonable use of City Streets, Public Easements and Other City Property to provide Utility Service to the City and its Residents pursuant to the franchise is subject to and subordinate to any City usage of said Streets, Public Easements and Other City Property.

C. Prior Grants Not Revoked. This grant is not intended to revoke any prior license, grant, or right to use the Streets, Public Easements and Other City Property and such licenses, grants or rights of use are hereby affirmed.

D. Franchise Not Exclusive. The rights granted by this franchise agreement are not, and shall not be deemed to be, granted exclusively to the Company, and the City reserves the right to make or grant a franchise to any other person, firm, or corporation.

§ 2.3 Effective Date and Term.

A. Term. This franchise shall take effect on \_\_\_\_\_, \_\_\_\_\_ and shall supersede any prior franchise grants to the Company by the City. This franchise shall terminate on \_\_\_\_\_, \_\_\_\_\_, unless extended by mutual consent.

B. Execution. The Company shall execute this franchise agreement and deliver five (5) executed originals to the City Manager prior to the City formally scheduling the City's grant of a franchise to the Company for a vote of the registered electors of the City. Within forty-five (45) days after approval of the City's grant of a franchise by vote of the registered electors of the City, the Mayor of the City and other necessary or proper officials of the City are hereby authorized and directed to sign this franchise agreement in the name of the City, and the City Clerk is hereby authorized and directed to attest to the same under seal of the City, and to do all things necessary for the delivery of this franchise agreement and for fully carrying out the grant of the franchise.

C. Condition Subsequent. Concurrently with this franchise agreement, the City and the Company have agreed to the terms of the Street Lighting Agreement. The Street Lighting Agreement shall be adopted by the City Council of the City of Boulder within 60 days of voter approval of the grant of the franchise. The Company shall signify its acceptance of the Street Lighting Agreement by executing the Street Lighting Agreement and delivering five (5) executed originals to the City Manager concurrently with its delivery of the executed originals of this franchise agreement. Failure to execute and deliver the Street Lighting Agreement to the City in accordance with this section shall render this franchise void and of no further force and effect.

**ARTICLE 3  
CITY POLICE POWERS**

§ 3.1 Police Powers. The City and the Company do not waive any of their rights under the statutes and Constitution of the State of Colorado and the United States, except as otherwise

specifically set forth herein. The Company expressly acknowledges the City's right to adopt, from time to time, in addition to the provisions contained herein, such laws, including ordinances and regulations, as it may deem necessary in the exercise of its governmental powers. If the City considers making any substantive changes in its local codes or regulations that in the City's reasonable opinion will significantly impact the Company's operations in the City's Streets, Public Easements and Other City Property, it will make a good faith effort to advise the Company of such consideration; provided, however, that lack of notice shall not be justification for the Company's non-compliance with any applicable local requirements.

§ 3.2 Regulation of Streets, Public Easements and Other City Property. The Company expressly acknowledges the City's right to enforce regulations concerning the Company's access to or use of the Streets, Public Easements, and Other City Property, including requirements for permits.

§ 3.3 Compliance with Laws. The Company shall promptly and fully comply with all laws, regulations, permits and orders enacted or issued by the City and with all applicable federal, state and local laws, regulations, permits, and orders that relate to the terms and conditions of this franchise agreement or the City's grant of franchise to the Company. This provision shall not be interpreted to allow the City to make a determination of whether the Company is in compliance with federal and state laws, regulations, permits and orders. The parties expressly agree that a determination of compliance with federal and state laws, regulations, permits and orders shall reside exclusively with the judicial or regulatory body having jurisdiction over the subject matter.

#### **ARTICLE 4 FRANCHISE FEE**

§ 4.1 Franchise Fee.

A. Fee. In partial consideration for the franchise, which provides for the Company's use of City Streets, Public Easements and Other City Property, which are valuable public properties acquired and maintained by the City at great expense to its Residents, and in recognition that the grant to the Company of the use of City Streets, Public Easements and Other City Property is a valuable right, the Company shall pay the City a sum equal to three percent (3%) of all Gross Revenues. The Company shall collect this fee from a surcharge upon Residents who are customers of the Company.

B. Obligation in Lieu of Fee. In the event that the franchise fee specified herein is declared void for any reason by a court of competent jurisdiction, unless prohibited by law, the Company shall be obligated to pay the City, at the same times and in the same manner as provided in the franchise, an aggregate amount equal to the amount which the Company would have paid as a franchise fee as partial consideration for use of the City Streets, Public Easements and Other City Property. To the extent required by law, the Company shall collect the amounts agreed upon through a surcharge upon Utility Service provided to Residents, not including the City.

C. Changes in Utility Service Industries. The City and the Company recognize that utility service industries are the subject of restructuring initiatives by legislative and regulatory authorities, and are also experiencing other changes as a result of mergers, acquisitions, and reorganizations. Some of such initiatives and changes have or may have an adverse impact upon the franchise fee revenues provided for herein. In recognition of the length of the term of this franchise, the Company agrees that in the event of any such initiatives or changes and to the extent permitted by law, upon receiving a written request from the City, the Company will cooperate with and assist the City in modifying this franchise agreement to assure that the City receives an amount in franchise fees or some other form of compensation that is the same amount of franchise fees that would have been paid to the City pursuant to this franchise agreement.

D. Utility Service Provided to City. No franchise fee shall be charged to the City for Utility Service provided to the City for its own consumption, including street lighting service and traffic signal service.

#### § 4.2 Remittance Of Franchise Fee.

A. Remittance Schedule. Franchise fee revenues shall be remitted by the Company to the City as directed by the City in monthly installments not more than thirty (30) days following the close of each month.

B. Correction of Franchise Fee Payments. In the event that either the City or the Company discovers that there has been an error in the calculation of the franchise fee payment to the City, it shall provide written notice to the other party within a reasonable time after discovering the error. If the party receiving written notice of error does not agree with the written notice of error, that party may challenge the written notice of error pursuant to Section 4.2.D of this franchise agreement; otherwise, the error shall be corrected in the next monthly payment. However, if the error results in an overpayment of the franchise fee to the City, and said overpayment is in excess of Five Thousand Dollars (\$5,000.00), credit for the overpayment shall be spread over the same period of time during which the error occurred. All franchise fee underpayments shall be corrected in the next monthly payment, together with interest computed at the rate set by the PUC for customer security deposits held by the Company, from the date when due until the date paid. In no event shall either party be required to fund or refund any overpayment or underpayment made as a result of a Company error which occurred more than five (5) years prior to the discovery of the Company error.

C. Audit Of Franchise Fee Payments.

(1) Every three (3) years commencing at the end of the third year of this franchise, the Company shall conduct an internal audit to investigate and determine the correctness of the franchise fee paid to the City. Such audit shall be limited to the

previous three (3) calendar years. The Company shall provide a written report to the City Manager containing the audit findings regarding the franchise fee paid to the City for the previous three (3) calendar years.

(2) If the City disagrees with the results of the audit, and if the parties are not able to informally resolve their differences, the City may conduct its own audit at its own expense, and the Company shall cooperate fully, including but not necessarily limited to, providing the City's auditor with all information reasonably necessary to complete the audit.

(3) If the results of a City audit conducted pursuant to subsection C.(2) concludes that the Company has underpaid the City by two percent (2%) or more, in addition to the obligation to pay such amounts to the City, the Company shall also pay all costs of the audit.

D. Fee Disputes. Either party may challenge any written notification of error as provided for in Section 4.2.B of this franchise agreement by filing a written notice to the other party within thirty (30) days of receipt of the written notification of error. The written notice shall contain a summary of the facts and reasons for the party's notice. The parties shall make good faith efforts to resolve any such notice of error by any reasonable means, including the sharing of relevant documents, before initiating any formal legal proceedings for the resolution of such error.

E. Reports. Upon written request by the City, but not more than once per year, the Company shall supply the City with reports, in such formats and providing such details as reasonably requested by the City, of all suppliers of utility service that utilize Company Facilities to sell or distribute utility service to Residents and the names and addresses of each such supplier.

§ 4.3 Franchise Fee Payment Not In Lieu of Permit or Other Fees. Payment of the franchise fee does not exempt the Company from any other lawful tax or fee imposed generally upon persons doing business within the City, including any fee for a revocable license, a right-of-way permit, a street closure permit, an excavation permit, a street cut permit, or other lawful permits hereafter required by the City, except that the franchise fee provided for herein shall be in lieu of any occupation or similar tax for the use of City Streets, Public Easements and Other City Property.

§ 4.4 Change of Franchise Fee.

A. The Company shall report to the City, within sixty days, the execution or change of any franchise agreement under which a municipality receives a franchise fee greater than is provided for herein or in which the undergrounding fund percentage is greater than established in this Article.

B. Once each year the City Council may, by ordinance, change the franchise fee and the undergrounding fund percentage established in Article 11, below, to that provided under any municipal franchise entered into by the Company in Colorado, after first giving thirty days' written notice to the Company.

## **ARTICLE 5 ADMINISTRATION OF FRANCHISE**

§ 5.1 City Designee. The City shall designate in writing to the Company an official having full power and authority to administer the franchise. The City may also designate one or more City representatives to act as the primary liaison with the Company as to particular matters addressed by this franchise agreement and shall provide the Company with the name and telephone numbers of said City representatives. The City may change these designations by providing written notice to the Company. The City's designee shall have the right, at all reasonable times, to inspect any Company Facilities in City Streets, Public Easements and Other City Property.

§ 5.2 Company Designee. The Company shall designate a representative to act as the primary liaison with the City and shall provide the City with the name, address, and telephone number for the Company's representative under this franchise agreement. The Company may change its designation by providing written notice to the City. The City shall use this liaison to communicate with the Company regarding Utility Service and related service needs for City Facilities, unless it is appropriate for the City to communicate with another Company representative regarding a particular issue.

### § 5.3 Coordination of Work.

A. The Company agrees to coordinate its activities in City Streets, Public Easements and Other City Property with the City. The City and the Company shall meet semi-annually upon the written request of the City designee to exchange their respective short-term and long-term forecasts and/or work plans for construction and other similar work which may affect City Streets, Public Easements, Other City Property, or City Facilities, including but not limited to any planned City street paving projects, transportation projects, utilities projects or other capital improvement projects, and to share information regarding anticipated projects which will require relocation of Company Facilities in City Streets, Public Easements or Other City Property. In addition, the City and the Company shall exchange additional information with a view towards coordinating their respective activities in those areas where such coordination may prove beneficial and so that the City will be assured that all provisions of this franchise agreement, building and zoning codes, and air and water pollution regulations are complied with, and that aesthetic and other relevant planning principles have been given due consideration. Meetings shall be held at a greater frequency if either party deems it necessary.

B. In addition to the foregoing meetings, the Company agrees to provide sufficient notice to the City whenever the Company initiates plans to significantly upgrade its

infrastructure, including without limitation the placement of utility poles or other Company Facilities in order to allow for City input and consultation on Company work plans prior to the time that said work plans are finalized so that the beneficial coordination described in A., above, may occur.

## **ARTICLE 6 SUPPLY, CONSTRUCTION, AND DESIGN**

§ 6.1 Purpose. The Company acknowledges the critical nature of the municipal services performed or provided by the City to the Residents which require the Company to provide prompt and reliable Utility Service and to perform related services for City Facilities. The City and the Company wish to provide for certain terms and conditions under which the Company will provide Utility Service and perform related services for the City in order to facilitate and enhance the operation of City Facilities. They also wish to provide for other processes and procedures related to the provision of Utility Service to the City.

§ 6.2 Supply. Subject to the jurisdiction of the PUC, the Company shall take all reasonable and necessary steps to provide a sufficient supply of gas and electricity to Residents.

§ 6.3 Service to City Facilities.

A. Transport Gas. To the extent the City is or elects to become a gas transport customer of the Company, the Company shall transport natural gas purchased by the City for use in City Facilities pursuant to separate contracts with the City.

B. Transport Electricity. To the extent the City is permitted by law to become and elects to become an electric transport customer of the Company, the Company shall transport electricity purchased by the City for use in City Facilities pursuant to separate contracts with the City.

§ 6.4 Restoration of Service.

A. Notification. The Company shall provide to the City daytime and nighttime telephone numbers of a designated Company representative from whom the City designee may obtain status information from the Company on a twenty-four (24) hour basis concerning interruptions of Utility Service in any part of the City.

B. Restoration. In the event the Company's gas system or electric system, or any part thereof, is partially or wholly destroyed or incapacitated, the Company shall use due diligence to restore such systems to satisfactory service within the shortest practicable time, or provide a reasonable alternative to such system if the Company elects not to restore such system.

§ 6.5 Obligations Regarding Company Facilities.

A. Company Facilities. All Company Facilities within City Streets, Public Easements and Other City Property shall be maintained in good repair, appearance and condition.

B. Company Work within the City. All work within City Streets, Public Easements and Other City Property performed or caused to be performed by the Company shall be done:

- (1) In a high-quality manner;
- (2) In a timely and expeditious manner;
- (3) In a manner which minimizes inconvenience to the public;
- (4) In a cost-effective manner, which may include the use of qualified contractors;
- (5) In accordance with all applicable laws, ordinances, and regulations; and
- (6) In accordance with requirements set forth in the City's Code, Design and Construction Standards, and all applicable licenses, permits and written agreements between the parties.

C. No Interference With City Facilities. Subject to federal and state laws and regulations regarding vegetation management programs to which the Company is subject, Company Facilities shall not interfere with any City Facilities, or other City uses of the Streets, Public Easements or Other City Property. Company Facilities shall be installed and maintained in City Streets, Public Easements and Other City Property so as to minimize interference with other property, trees, and other improvements and natural features in and adjoining the Streets, Public Easements and Other City Property.

D. Permit and Inspection. The installation, renovation, and replacement of any Company Facilities in the City Streets, Public Easements or Other City Property by or on behalf of the Company shall be subject to permit, inspection and approval by the City. Such permitting, inspection and approval may include, without limitation, the following matters: location of Company Facilities, cutting and trimming of trees and shrubs, and disturbance of pavement, sidewalks, and surfaces of City Streets, Public Easements or Other City Property. The Company agrees to cooperate with the City in conducting inspections and shall promptly perform any remedial action lawfully required by the City pursuant to any such inspection.

E. Compliance. The Company, and all of its contractors and subcontractors, shall comply with the requirements of the Code, the Design and Construction Standards and all City laws, ordinances, regulations, permits, and standards, including without limitation, requirements of all building and zoning codes, and requirements regarding curb and pavement cuts, excavating, digging, and other construction activities. The Company shall assure that its contractors working in City Streets, Public Easements and Other City

Property hold the necessary licenses and permits required by law, including City licenses to work in the public right-of-way.

F. Increase in Voltage. Unless otherwise provide by law, the Company shall reimburse the City for the cost of upgrading the electrical system or facility of any City building or facility that uses Utility Service where such upgrading is solely caused or occasioned by the Company's decision to increase the voltage of delivered electrical energy. This provision shall not apply to voltage increases requested by the City. The Company shall not be required to reimburse the City for costs caused by voltage increases if the voltage increases are requested by the City, if they are required by law, or if by lawful order the PUC determines that the Company shall not be responsible for the cost of upgrading the electrical system or facility of any City building or facility.

§ 6.6 Excavation and Construction. The Company shall be responsible for obtaining, paying for, and complying with all applicable permits including, but not limited to, right-of-way, excavation, street closure and street cut permits, in the manner required by the laws, ordinances, and regulations of the City. Although the Company shall be responsible for obtaining and complying with the terms of such permits when performing relocations requested by the City under Section 6.8 of this franchise agreement and undergrounding requested by the City under Article 11 of this franchise agreement, the City will not require the Company to pay the fees charged for such permits

§ 6.7 Restoration. When the Company does any work in or affecting the City Streets, it shall, at its own expense, promptly remove therefrom any Company-placed obstructions and restore such City Streets or Other City Property to a condition that meets applicable City standards, including the Design and Construction Standards. If weather or other conditions do not permit the complete restoration required by this Section, the Company may with the approval of the City, temporarily restore the affected City Streets, Public Easements or Other City Property, provided that such temporary restoration is at the Company's sole expense and provided further that the Company promptly undertakes and completes the required permanent restoration when the weather or other conditions no longer prevent such permanent restoration. Upon the request of the City, the Company shall restore the Streets, Public Easements or Other City Property to a better condition than existed before the work was undertaken, provided that the City shall be responsible for any additional costs of such restoration.

A. If the Company fails to promptly restore the City Streets, Public Easements or Other City Property when there is no immediate public health and safety issue, upon giving fourteen (14) days written notice to the Company, the City may restore such City Streets, Public Easements or Other City Property or remove the Company-placed obstruction therefrom. The Company shall be responsible for the actual cost incurred by the City to restore such City Streets, Public Easements or Other City Property or to remove any Company-placed obstructions and shall reimburse the City within thirty (30) days of being billed for such work. In the course of its restoration of City Streets, Public Easements or Other City Property under this Section, the City shall not perform work on

Company Facilities unless specifically authorized by the Company in writing on a project by project basis and subject to the terms and conditions agreed to in such authorization.

B. If the Company fails to promptly restore the City Streets, Public Easements or Other City Property as required by this Section, and if, in the reasonable discretion of the City immediate action is required for the protection of public health and safety, the City may restore such City Streets, Public Easements or Other City Property or remove the obstruction therefrom. However, in the course of its restoration of City Streets, Public Easements or Other City Property under this sub-section, the City shall not perform work on Company Facilities unless specifically authorized by the Company in writing on a project by project basis and subject to the terms and conditions agreed to in such authorization.

§ 6.8 Relocation of Company Facilities.

A. Relocation Obligation. The Company shall temporarily or permanently remove, relocate, change or alter the position of any Company Facility in City Streets, Public Easements or Other City Property at no cost to the City whenever the City shall determine that such removal, relocation, change or alteration is necessary for the completion of any Public Project. If such relocation of Company Facilities is necessary due to lack of space for Company Facilities within the Public Street, Public Easement or Other City Property after City Facilities are installed, then the Company shall be required to relocate the Company Facilities at its own cost and expense, including the acquisition of any necessary real property right to accommodate such relocated Company Facilities. For all relocations, the Company and the City agree to cooperate on the location and relocation of the Company Facilities in the City Streets, Public Easements or Other City Property in order to achieve relocation in the most efficient and cost-effective manner possible. Notwithstanding the foregoing, once the Company has relocated any Company Facility at the City's direction, if the City requests that the same Company Facility be relocated within two years, the subsequent relocation shall not be at the Company's expense. Nothing provided herein shall prevent the Company from obtaining reimbursement of its relocation costs from third parties. The cost responsibility for relocations of Company Facilities from easements that are ten feet in width or less and are identified on a plat simply as "Public Utilities" shall be determined on a case-by-case basis, unless the City and the Company otherwise agree in writing.

B. Relocation from Company Property. If the City requests that the Company relocate Company Facilities from property that the Company owns in fee, or in which the Company has another real property interest that is superior to all City real property interests, the Company shall not be responsible for the costs of such relocation.

C. Private Projects. The Company shall not be responsible for the expenses of any relocation required by Private Projects, and the Company has the right to require the

payment of estimated relocation expenses from the affected party or parties before undertaking such relocation.

D. Relocation Performance. The relocations set forth in Section 6.8.A of this franchise agreement shall be completed within a reasonable time, not to exceed 90 days from the later of the date on which the City designee requests in writing that the relocation commence, or the date when the Company is provided all Supporting Documentation. The City shall provide sufficient advance notice to the Company to provide the Company at least the 90 day notice period set forth above, in order to allow the Company adequate time to comply with all applicable City code and permit requirements. Subject to Section 6.8.E, below, the Company shall be entitled to an extension of time to complete a relocation where the Company's performance was delayed due to Force Majeure or the failure of the City to provide Supporting Documentation. The Company has the burden of presenting evidence to reasonably demonstrate the basis for the delay. Upon request of the Company, the City may also grant the Company reasonable extensions of time for good cause shown and the City shall not unreasonably withhold any such extension.

E. City Revision of Supporting Documentation. The parties acknowledge that in order to prepare Supporting Documentation, the City may be required to rely upon information from the Company regarding the type and location of Company Facilities in the area. Any revision by the City of Supporting Documentation provided to the Company that causes the Company to substantially redesign and/or change its plans regarding facility relocation shall be deemed good cause for a reasonable extension of time to complete the relocation under the franchise agreement unless the information provided by the Company was the cause of the City's need to revise the Supporting Documentation. Revisions necessitated by errors in information provided to the Company by the City shall be excluded from Company-caused revisions of the Supporting Documentation.

F. Completion. Each such relocation shall be deemed complete only when the Company actually relocates the Company Facilities, restores the relocation site in accordance with Section 6.7 of this franchise agreement or as otherwise agreed with the City, and removes from the site or properly abandons on site all unused facilities, equipment, material and other impediments.

G. Scope of Obligation. The relocation obligations set forth in this Section 6.8 shall only apply to Company Facilities located in City Streets, Public Easements or Other City Property.

H. Underground Relocation. Underground facilities shall be relocated underground. Above-ground facilities shall be placed above ground unless the Company is paid for the incremental amount by which the underground cost would exceed the above ground cost

of relocation, or the City requests that such additional incremental cost be paid out of available funds under Article 11 of this franchise agreement.

I. Coordination.

(1) When requested in writing by the City or the Company, representatives of the City and the Company shall meet to share information regarding anticipated projects which will require relocation of Company Facilities in City Streets, Public Easements or Other City Property. Such meetings shall be for the purpose of minimizing conflicts where possible and to facilitate coordination with any timetable established by the City for any Public Project.

(2) The City shall make reasonable best efforts to provide the Company with two (2) years advance notice of any planned street repaving. The Company shall make reasonable best efforts to complete any necessary or anticipated repairs or upgrades to Company Facilities that are located underneath the Streets within the two-year period if practicable.

J. Proposed Alternatives or Modifications. Upon receipt of written notice of a required relocation, the Company may propose an alternative to or modification of the Public Project requiring the relocation in an effort to mitigate or avoid the impact of the required relocation of Company Facilities. The City shall in good faith review the proposed alternative or modification. The City's acceptance of the proposed alternative or modification shall be at the sole discretion of the City. In the event the City accepts the proposed alternative or modification, the Company agrees to promptly compensate the City for all additional costs, expenses or delay that the City reasonably determines resulted from the implementation of the proposed alternative.

§ 6.9 Service To New Areas. If the territorial boundaries of the City are expanded during the term of the franchise, the Company shall, to the extent permitted by law, extend service to Residents in the expanded area at the earliest practicable time if the expanded area is within the Company's PUC-certificated service territory.

§ 6.10 City Not Required to Advance Funds. Upon receipt of the City's authorization for billing and construction, the Company shall install Company Facilities to provide Utility Service to the City as a customer, without requiring the City to advance funds prior to construction. The City shall pay for the installation of Company Facilities once completed in accordance with Company Tariffs.

§ 6.11 Technological Improvements. The Company shall use its best efforts to incorporate, as soon as practicable, technological advances in its equipment and service within the City when such advances are technically and economically feasible, and are safe and beneficial to the City and its Residents.

**ARTICLE 7**  
**RELIABILITY**

§ 7.1 Reliability. The Company shall install, operate, maintain, relocate and replace Company Facilities efficiently and economically and in accordance with the high standards and best systems, methods, and skills consistent with the provision of adequate, safe, and reliable Utility Service.

§ 7.2 Franchise Performance Obligations. The Company recognizes that, as part of its obligations and commitments under this franchise agreement, the Company shall carry out each of its performance obligations in a timely, expeditious, efficient, economical, and workmanlike manner.

§ 7.3 Reliability Reports. Upon written request, the Company shall provide the City with a report regarding the reliability of Company Facilities and Utility Service.

**ARTICLE 8**  
**COMPANY PERFORMANCE OBLIGATIONS**

§ 8.1 New or Modified Service to City Facilities. In providing new or modified Utility Service to City Facilities, the Company agrees to perform as follows:

A. Performance. The Company shall complete each project requested by the City within a reasonable time. The Parties agree that a reasonable time shall not exceed one hundred eighty (180) days from the date upon which the City designee makes a written request and provides the required Supporting Documentation for all Company Facilities other than Traffic Facilities as described in this section. The Company shall notify the City within ten (10) days of receipt of the request if the Supporting Documentation is insufficient to complete the project. The Company shall be entitled to an extension of time to complete a project where the Company's performance was delayed due to Force Majeure. Upon request of the Company, the City may also grant the Company reasonable extensions of time for good cause shown and the City shall not unreasonably withhold any such extension.

B. City Revision of Supporting Documentation. In order to prepare the Supporting Documentation, the City may be required to rely upon information from the Company regarding the type and location of Company Facilities in the area. Any revision by the City of Supporting Documentation provided to the Company that causes the Company to substantially redesign and/or change its plans regarding new or modified service to City facilities shall be deemed good cause for a reasonable extension of time to complete its performance, unless the information provided by the Company was the cause of the City's need to revise the Supporting Documentation.

C. Completion/Restoration. Each such project shall be complete only when the Company actually provides the service installation or modification required, restores the project site in accordance with Section 6.7 of the franchise agreement or as otherwise agreed upon with the City and removes from the site or properly abandons on site any unused facilities, equipment, material and other impediments.

§ 8.2 Adjustments to Company Facilities. The Company shall perform adjustments to Company Facilities, including raising or lowering manholes and other appurtenances in Streets, Public Easements and Other City Property, to accommodate City maintenance, repair and paving operations at no cost to the City. At the City's request, the Company shall provide manhole extension rings to the City and/or City's contractor for installation directly behind paving operations whenever this method for adjustment is deemed appropriate by the Company. In providing such adjustments to Company Facilities, the Company agrees to perform as follows:

A. Performance. The Company shall complete each requested adjustment within a reasonable time, not to exceed thirty (30) days from the date upon which the City makes a written request and provides to the Company all information reasonably necessary to perform the adjustment. The Company shall be entitled to an extension of time to complete an adjustment where the Company's performance was delayed due to Force Majeure. Upon request of the Company, the City may also grant the Company reasonable extensions of time for good cause shown and the City shall not unreasonably withhold any such extension.

B. Completion/Restoration. Each such adjustment shall be complete only when the Company actually adjusts the Company Facility to accommodate the City operations in accordance with City instructions.

C. Coordination. As requested by the City or the Company, representatives of the City and the Company shall meet regarding anticipated street maintenance operations which will require such adjustments to Company Facilities in Streets, Public Easements or Other City Property. Such meetings shall be for the purpose of coordinating and facilitating performance under this Section.

§ 8.3 Third Party Damage Recovery.

A. Damage to Company Interests. If any individual or entity damages any Company Facilities that the Company is responsible to repair or replace, then, to the extent permitted by law, the City will notify the Company within 45 days after the City has knowledge of any such incident and will provide to the Company within a reasonable time all pertinent information within its possession regarding the incident and the damage, including the identity of the responsible individual or entity.

B. Damage to City Interests. If any individual or entity damages any Company Facilities for which the City is obligated to reimburse the Company for the cost of the repair or replacement of the damaged facility, to the extent permitted by law the Company will notify the

City within 45 days after the Company has knowledge of any such incident and will provide to the City within a reasonable time all pertinent information within its possession regarding the incident and the damage, including the identity of the responsible individual or entity.

C. Meeting. The Company and the City agree to meet periodically, upon written request of either party, for the purpose of developing, implementing, reviewing, improving and/or modifying mutually beneficial procedures and methods for the efficient gathering and transmittal of information useful in recovery efforts against third parties for damaging Company Facilities.

## **ARTICLE 9 BILLING AND PAYMENT**

### §9.1 Billing for Utility Services.

A. Unless otherwise provided in its tariffs, the rules and regulations of the PUC, or the Public Utilities Law, the Company shall render bills monthly to the offices of the City for Utility Service and other related services for which the Company is entitled to payment and for which the City has authorized payment.

B. Billings for Utility Service rendered during the preceding month, except for billings pursuant to the Street Lighting Agreement which shall be governed by the terms of the Street Lighting Agreement, shall be sent to the person(s) designated by the City and payment for same shall be made pursuant to the Tariffs. Billings for services other than Utility Service rendered during the preceding months, shall be sent to the person designated by the City to receive such bill and payment for same shall be made within thirty (30) days of receipt.

C. Unless otherwise requested by the City, the Company shall provide all billings and any underlying support documentation reasonably requested by the City in an editable and manipulable electronic format that is acceptable to the Company and the City.

D. The Company agrees to meet with the City designee at least annually for the purpose of developing, implementing, reviewing, and/or modifying mutually beneficial and acceptable billing procedures, methods, and formats which may include, without limitation, electronic billing and upgrades or beneficial alternatives to the Company's current most advanced billing technology, for the efficient and cost effective rendering and processing of such billings submitted by the Company to the City.

§ 9.2 Payment to City. If the City determines after written notice to the Company that the Company is liable to the City for payments, costs, expenses or damages of any nature, then subject to the Company's right to challenge such determination, the City may deduct all monies due and owing the City from any other amounts currently due and owing the Company. Upon receipt of such written notice, the Company may request a meeting between the Company's designee and a designee of the City Manager to discuss such determination. The City agrees to

attend such a meeting. As an alternative to such deduction, the City may bill the Company for such assessment(s), in which case the Company shall pay each such bill within thirty (30) days of the date of receipt of such bill. If the Company challenges the City determination of liability, the City shall make such payments pursuant to the Company's tariffs until the challenge has been finally resolved.

## **ARTICLE 10 USE OF COMPANY ELECTRIC DISTRIBUTION POLES**

§ 10.1 City Use of Company Electric Distribution Poles. The City shall be permitted to make use of Company electric distribution poles in the City at no cost to the City for the placement of City equipment or facilities necessary to serve a legitimate police, fire, emergency, public safety or traffic control purpose, or for any other purpose consistent with the City's police powers. The City will notify the Company in advance and in writing or by electronic mail of its intent to use Company electric distribution poles and the nature of such use unless it is impracticable to provide such advance notice because of emergency circumstances, in which event the City will provide such notice as soon as practicable. The City shall be responsible for costs associated with modifications to Company electric distribution poles to accommodate the City's use of such Company electric distribution poles and for any electricity used. No such use of Company electric distribution poles shall be required if it would constitute a safety hazard or would interfere with the Company's use of Company electric distribution poles. Any such City use must comply with the National Electric Safety Code and all other applicable laws, rules and regulations.

§10.2 Existing Signs. The City shall not be required to remove its existing signs, equipment or facilities from Company electric distribution poles, unless the Company determines after consultation with the City that attachment of specific equipment or facilities on specific poles creates a safety hazard or interferes with the Company's use of its those poles. If after such determination the City is required to remove its existing equipment or facilities from those poles, the Company shall allow the City ten (10) days from the date of written notice, including by electronic mail, within which to remove its equipment or facilities. If the City fails to remove the equipment or facilities, the Company may perform the removal at the City's sole expense.

§10.3 Third Party Use of Company Facilities. If requested in writing by the City, the Company may allow other companies who hold franchises, or otherwise have obtained consent from the City to use the Streets, Public Easements or Other City Property to utilize Company electric distribution poles for the placement of their facilities upon approval by the Company and agreement upon reasonable terms and conditions including payment of fees established by the Company. No such use shall be permitted if it would constitute a safety hazard or would interfere with the Company's use of Company Facilities. The Company shall not be required to permit third party use of Company distribution facilities for the provision of utility service except as otherwise required by law.

§10.4 City Use of Company Transmission Rights-of-Way. The Company shall offer to grant to the City use of transmission rights-of-way which it now, or in the future, owns in fee within the City for trails, parks and open space on terms comparable to those offered to other municipalities; provided, however, that the Company shall not be required to make such an offer in any circumstance where such offer would constitute a safety hazard or would interfere with the Company's use of the transmission right-of-way. In order to exercise this right, the City must make specific written request to the Company for any such use

§ 10.5 Emergencies. Upon written request, the Company shall assist the City in developing an emergency management plan. In the case of any emergency or disaster, the Company shall, upon verbal request of the City, make available Company Facilities for emergency use during the emergency or the disaster period. Such use of Company Facilities shall be of a limited duration and will only be allowed if the use does not interfere with the Company's own use of Company Facilities.

## **ARTICLE 11 UNDERGROUNDING OF OVERHEAD FACILITIES**

§ 11.1 Undergrounding of Electrical Lines. The Company shall place all newly constructed electrical distribution lines in newly developed areas underground in accordance with applicable laws, regulations and orders.

§ 11.2 Underground Conversion at Expense of Company.

A. Underground Fund. The Company shall budget and allocate an annual amount, equivalent to one percent (1%) of the preceding year's Electric Gross Revenues (the "Fund"), for the purpose of undergrounding existing overhead distribution facilities in the City, as may be requested by the City. Except as provided in §6.9.H, no relocation expenses which the Company would be required to expend pursuant to Article 6 of this franchise agreement shall be charged to this Fund.

B. Unexpended Portion and Advances. Any unexpended portion of the Fund shall be carried over to succeeding years and, in addition, upon request by the City, the Company agrees to expend amounts anticipated to be available under the preceding paragraph for up to three (3) years in advance. Any amounts so expended shall be credited against amounts to be expended in succeeding years. Any Fund balance accumulated under any prior franchise shall be carried over to this franchise. The City shall have no vested interest in the Fund and any monies in the Fund not expended at the expiration or termination of this franchise shall remain the property of the Company. At the expiration or termination of this franchise, the Company shall not be required to underground any existing overhead facilities under this Article, but may do so in its sole discretion.

C. System-wide Undergrounding. If, during the term of this franchise, the Company should receive authority from the PUC to undertake a system-wide program or programs of undergrounding its electric distribution facilities, the Company will budget and allocate to the program of undergrounding in the City such amount as may be determined and approved by the PUC, but in no case shall such amount be less than the one percent (1%) of annual Electric Gross Revenues provided above.

D. City Requirement to Underground. In addition to the provisions of this Article, the City may require any above ground Company Facilities to be moved underground at the City's expense.

§ 11.3 Undergrounding Performance. Upon receipt of a written request from the City, the Company shall, to the extent of monies available in the Fund and as otherwise provided herein, underground Company Facilities in accordance with the procedures set forth in this Section.

A. Estimates. Promptly upon receipt of an undergrounding request from the City and the Supporting Documentation necessary for the Company to design the undergrounding project, the Company shall prepare a detailed, good faith cost estimate of the anticipated actual cost of the requested project for the City to review and, if acceptable to the City, the City will issue a project authorization. The Company shall notify the City within ten (10) days of receipt of the request if the Supporting Documentation is insufficient to prepare the cost estimate for the project. The City and the Company agree to meet during the period when the Company is preparing its estimate to discuss all aspects of the project toward the end of enabling the Company to prepare an accurate cost estimate. At the City's request, the Company will provide all documentation that forms the basis of the estimate. The Company will not proceed with any requested project until the City has provided a written acceptance of the Company's estimate and authorized the Company to proceed with the project. The Company's cost estimate shall be void unless accepted by the City within sixty (60) days after it has been transmitted to the City.

B. Performance. The Company shall have a reasonable time to design and complete each undergrounding project requested by the City, which may be fewer than but shall not exceed two hundred forty (240) days after it receives a written request from the City designee and all Supporting Documentation. The City shall be permitted a sixty (60) day period in which to review the Company's estimate and designs, which shall toll the running of the 240-day period. The City and the Company shall agree to a longer completion date when required for large scale undergrounding projects. The Company shall be entitled to an extension of time to complete each undergrounding project where the Company's performance was delayed due to a Force Majeure condition. Upon written request of the Company, the City may also grant the Company reasonable extensions of time for good cause shown and the City shall not unreasonably withhold any such extension.

C. City Revision of Supporting Documentation. In order to prepare the Supporting Documentation, the City may rely upon information from the Company regarding the type and location of Company Facilities in the area. Any revision by the City of Supporting Documentation provided to the Company that causes the Company to substantially redesign and/or change its plans regarding an undergrounding project shall be deemed good cause for a reasonable extension of time to complete the undergrounding project under the franchise, unless the information provided by the Company was not the cause of the City's need to revise the Supporting Documentation.

D. Project Management. Upon the City's request that the Company underground distribution facilities using the Fund, the Company and the City shall each assign a project manager to represent it during the undergrounding project. The City's project manager shall be identified at the time it submits its Supporting Documentation for the project. The Company's project manager shall be identified during the design phase of the project. The project managers, along with identified support staff, shall meet bi-weekly during construction, unless the parties agree otherwise, to review the progress of the undergrounding project, project costs, changes and projected completion dates and cost. The project managers shall be accessible throughout the duration of the undergrounding project.

E. Completion/Restoration. Each undergrounding project shall be deemed complete only when the Company actually undergrounds the designated Company Facilities, restores the undergrounding site in accordance with Section 6.7 of this franchise agreement or as otherwise agreed with the City and removes from the site any unused overhead or ground-mounted facilities, equipment, material and other impediments and properly abandons on site any unused underground facilities, equipment, material and other impediments. "Unused" for the purposes of this section shall mean the Company is no longer using the facilities in question and has no plans to use the facilities in the foreseeable future.

F. Report of Actual Costs. Upon completion of each undergrounding project, the Company shall submit to the City a detailed report of the Company's actual cost to complete the project and the Company shall reconcile this total actual cost with the accepted cost estimate. The report shall be provided within 120 days after completion of the underground project.

G. Audit of Underground Projects. The City may require that the Company undertake an independent audit of up to two (2) undergrounding projects in any calendar year. The cost of any such independent audit shall reduce the amount of the Fund. The Company shall cooperate fully with any audit and the independent auditor shall prepare and provide to the City and the Company a final audit report showing the actual costs associated with completion of the project. If a project audit is required by the City, only those actual project costs confirmed and verified by the independent auditor as

commercially reasonable and commercially necessary to complete the project shall be charged to the Fund balance.

§ 11.4 Audit of Underground Fund. Upon written request of the City, but no more frequently than once every three (3) years, the Company shall audit the Fund for the City. Such audits shall be limited to the previous three (3) calendar years. The Company shall provide the audit report to the City and shall reconcile the Fund consistent with the findings contained in the audit report. If the City has concerns about any material information contained in the audit, the parties shall meet and make good faith attempts to resolve any outstanding issues. If the matter cannot be resolved to the City's reasonable satisfaction, the Company shall, at its expense, cause an independent auditor to investigate and determine the correctness of the charges to the Fund. The independent auditor shall provide a written report containing its findings to the City and the Company. Only those costs confirmed and verified by the independent auditor as commercially reasonable and commercially necessary to complete the undergrounding projects requested by the City shall be charged to the Fund. The Company shall reconcile the balance of the Fund consistent with the findings contained in the independent auditor's written report.

§ 11.5 Cooperation with Other Utilities. When the Company is undertaking an undergrounding project, the City and the Company shall coordinate with other utilities or companies that have their facilities above ground to attempt to have all facilities undergrounded as part of the same project. When other utilities or companies are placing their facilities underground, to the extent the Company has received prior notification, the Company shall cooperate with these utilities and companies and undertake to underground Company facilities as part of the same project where financially, technically and operationally feasible. The Company shall not be required to pay for the cost of undergrounding the facilities of other companies.

§ 11.6 Planning and Coordination of Undergrounding Projects. The City and the Company agree to meet, as required, to review planned future undergrounding projects. The purpose of such meetings shall be to further cooperation between the City and the Company to achieve the orderly undergrounding of Company Facilities. At such meetings, the parties shall review future undergrounding requests, including but not limited to, conversions, known or anticipated Public Projects, known or anticipated Private Projects, known or anticipated Company projects and the Company's plans for additional undergrounding.

## **ARTICLE 12 PURCHASE OR CONDEMNATION**

§12.1 City's Right to Purchase or Condemn. The right of the City to construct, purchase or condemn any public utility works or ways and the Company's rights in connection therewith, as provided by the Colorado Constitution and statutes, are hereby expressly reserved and each party shall have the rights provided by law relating to condemnation; provided, however, no award shall be made for the value of the franchise or public rights-of-way.

**ARTICLE 13**  
**MUNICIPALLY-PRODUCED UTILITY SERVICE**

§ 13.1 City Reservation. The City expressly reserves the right to engage in the production of utility service to the extent permitted by law. The Company agrees to negotiate in good faith long-term contracts to purchase City-generated power made available for sale, consistent with PUC requirements. The Company further agrees to offer transmission and delivery services to the City that are required by judicial, statutory and/or regulatory directives and that are comparable to the services offered to any other customer with similar generation facilities.

§ 13.2 Franchise Not to Limit City's Rights. Nothing in this franchise prohibits the City from becoming an aggregator of utility service or from selling utility service to customers should it be permissible under law.

**ARTICLE 14**  
**ENVIRONMENT AND CONSERVATION**

§ 14.1 Environmental Leadership. The City and the Company agree that sustainable development, environmental excellence and innovation shall form the foundation of the Utility Service provided by the Company under this franchise agreement. The Company is committed to sustainable development and energy conservation for the term of this agreement by continuing to provide leadership, support and assistance, in collaboration with the City, to identify, develop, implement and maintain new and creative programs. The Company agrees to continue to actively pursue reduction of carbon emissions attributable to its electric generation facilities with a rigorous combination of Energy Conservation and Energy Efficiency measures, Clean Energy measures, and promoting and implementing the use of Renewable Energy Resources on both a distributed and centralized basis. The Company shall strive to conduct its operations in a way that avoids adverse environmental impacts where feasible, subject to the ongoing regulatory oversight of the Colorado PUC and other state and federal regulatory agencies. The Company shall continue to cost-effectively monitor its operations to mitigate environmental impacts; shall meet or exceed the requirements of environmental laws, regulations and permits; shall invest in cost-effective environmentally-sound technologies; shall consider environmental issues in its planning and decision-making; and shall support environmental research and development projects and partnerships in its service territory through various means, including but not limited to corporate giving and employee involvement. The Company shall continue to explore ways to reduce water consumption at its facilities and to use recycled water, where feasible. The Company shall continue to work with the U.S. Fish and Wildlife Service to develop and implement avian protection plans to reduce electrocution and collision risks by eagles, raptors and other migratory birds with transmission and distribution lines. On or before December 1 of each year, the Company shall provide the City with a written report describing its progress in carbon reduction and other environmental efforts, including the actions the Company has taken or plans to take to reduce greenhouse gas emissions. The parties shall meet at a mutually convenient time and place for a discussion of such. In meeting its obligation under this section,

the Company is not precluded from providing existing internal and external reports that may be used for other reporting requirements.

§ 14.2 Energy Conservation and Efficiency.

A. Energy Efficiency Programs. The City and the Company recognize and agree that Energy Conservation and Energy Efficiency programs offer opportunities for the efficient use of energy and reduction of customers' energy consumption and costs. The City and the Company further recognize that creative and effective Energy Conservation solutions are crucial to sustainable development. The Company recognizes and shares the City's desire to advance the implementation of cost-effective Energy Conservation and Energy Efficiency programs that direct opportunities to Residents to manage more efficiently their use of energy and, thereby, create the opportunity to reduce their energy consumption, costs, and impact on the environment in order to assist the City in meeting its Climate Action Plan goals. The Company shall seek authority from the PUC to develop and offer Energy Efficiency programs to its customers. Subject to PUC approval, the Company commits to offer programs that attempt to capture market opportunities for cost-effective Energy Efficiency improvements such as municipal specific programs that provide cash rebates for efficient lighting, energy design programs to assist architects and engineers to incorporate energy efficiency in new construction projects, and recommissioning programs to analyze existing systems to optimize performance and conserve energy. Subject to PUC approval, the Company commits to offer Demand Side Management (DSM) programs and succeeding programs, which provide customers the opportunity to reduce their energy usage. In doing so, the Company recognizes the importance of (i) implementing cost-effective programs, the benefits of which could otherwise be lost if not pursued in a timely fashion and (ii) developing cost-effective energy management programs for the various classes of the Company's customers, including low-income Residents. The Company shall advise the City and City Residents of the availability of assistance that the Company makes available for investments in Energy Conservation through its account managers, area manager, newspaper advertisements, bill inserts and Energy Efficiency workshops and by maintaining information of these programs on the Company's website. Further, the Company shall designate a conservation representative to act as the primary liaison with the City who will provide the City with information on how the City may take advantage of reducing energy consumption in City Facilities and how the City may participate in Energy Conservation and Energy Efficiency programs sponsored by the Company.

B. Renewable Energy Resource Programs. The Company agrees to consider Renewable Energy Resource programs as an integral part of the Company's provision of Utility Service to its customers. The Company agrees to comply with the mandates of United States and Colorado law concerning Energy Efficiency and clean energy technologies. Unless otherwise required by law, the Company shall obtain electricity from renewable sources equivalent to at least 30% of retail sales by 2020. The Company will promote a significant role for Renewable Energy Resources in its future resource

acquisitions, consistent with acceptable rate impacts, legislative requirements, and applicable provisions of law.

C. The Company will continue to promote existing or new programs in its service territory to comply with applicable provisions of law relating to renewable resources. The City actively supports the Company's compliance with the renewable resource standards required by law. The Company agrees that, in complying with this provision, it shall take the following steps to encourage participation by the City and the Company's customers in available renewable resource programs:

- (1) Notify the City regarding all eligible renewable resource programs;
- (2) Provide the City with support regarding how the City may participate in eligible renewable resource programs;
- (3) Advise Residents regarding participation in eligible renewable resource programs.

Notwithstanding the foregoing, to the extent that any Company assistance is needed to support Renewable Energy Resource Programs that are solely for the benefit of Company customers located within the City, the Company retains the sole discretion as to whether to incur such costs.

§ 14.3 Continuing Commitment. It is the express intention of the City and the Company that the collaborative effort provided for in this article continue for the entire term of this agreement. The City and the Company also recognize, however, that the programs identified in this article may be for a limited duration and that the regulations and technologies associated with Energy Efficiency and Energy Conservation are subject to change. Given this variability, the Company agrees to maintain its commitment to sustainable development, Energy Efficiency and Energy Conservation and renewable resource energy programs for the term of this franchise by continuing to provide leadership, support and assistance, in collaboration with the City, to identify, develop, implement and maintain new and creative programs similar to the programs identified in this franchise agreement in order to assist the City achieve its environmental and Climate Action Plan goals.

§ 14.4 PUC Approval. The Company shall not be required to invest in technologies or to incur costs for the implementation and maintenance of programs without having received approval from the PUC that enables the Company to recover the cost of that investment or those programs through the ratemaking process.

**ARTICLE 15**  
**TRANSFER OF FRANCHISE**

§ 15.1 Consent of City Required. The Company shall not transfer or assign any rights under the franchise to an unaffiliated third party, unless the City approves such transfer or assignment in writing. Approval of the transfer or assignment shall not be unreasonably withheld.

§ 15.2 Transfer Fee. In order that the City may share in the value this franchise adds to the Company's operations, any transfer or assignment of rights granted under this franchise requiring City approval, as set forth herein, shall be subject to the condition that the Company shall promptly pay to the City a transfer fee in an amount equal to the proportion of the City's then-population provided Utility Service by the Company to the then-population of the City and County of Denver provided Utility Service by the Company multiplied by One Million Dollars (\$1,000,000.00). Except as otherwise required by law, such transfer fee shall not be recovered from a surcharge placed only on the rates of Residents.

**ARTICLE 16**  
**CONTINUATION OF UTILITY SERVICE**

§ 16.1 Continuation of Utility Service. In the event this franchise is not renewed at the expiration of its term or is terminated for any reason, and the City has not provided for alternative utility service, the Company shall have no right to remove any Company Facilities pending resolution of the disposition of the system unless otherwise ordered by the PUC, and shall continue to provide Utility Service within the City until the City arranges for utility service from another provider. The Company further agrees that it will not withhold any temporary Utility Services necessary to protect the public. The City agrees that in the circumstances of this Article, the Company shall be entitled to monetary compensation as provided in the Company's tariffs on file with the Public Utilities Commission and the Company shall be entitled to collect from Residents and shall be obligated to pay the City, at the same times and in the same manner as provided in the franchise, an aggregate amount equal to the amount which the Company would have paid as a franchise fee as consideration for use of the City's Streets, Public Easements and Other City Property. Only upon receipt of written notice from the City stating that the City has adequate alternative Utility Service for Residents and upon order of the PUC shall the Company be allowed to discontinue the provision of Utility Service to the City and its Residents. This provision shall survive the termination of this franchise agreement.

**ARTICLE 17**  
**INDEMNIFICATION AND IMMUNITY**

§ 17.1 City Held Harmless. The Company shall indemnify, defend and hold the City harmless from and against claims, demands, liens and all liability or damage of whatsoever kind on account of or arising from the grant of this franchise, the exercise by the Company of the related rights, or from the operations of the Company within the City, and shall pay the costs of defense plus reasonable attorneys' fees. The City shall (a) give prompt written notice to the Company of

any claim, demand or lien with respect to which the City seeks indemnification hereunder and (b) unless in the City's judgment a conflict of interest may exist between the City and the Company with respect to such claim, demand or lien, shall permit the Company to assume the defense of such claim, demand, or lien with counsel satisfactory to the City. If such defense is assumed by the Company, the Company shall not be subject to any liability for any settlement made without its consent. If such defense is not assumed by the Company or if the City determines that a conflict of interest exists, the parties reserve all rights to seek all remedies available in this franchise against each other. Notwithstanding any provision hereof to the contrary, the Company shall not be obligated to indemnify, defend or hold the City harmless to the extent any claim, demand or lien arises out of or in connection with any negligent or intentional act or failure to act of the City or any of its officers or employees.

§17.2 Immunity. Nothing in this Section or any other provision of this agreement shall be construed as a waiver of the notice requirements, defenses, immunities and limitations the City may have under the Colorado Governmental Immunity Act (§ 4-10-101, C.R.S., *et. seq.*) or of any other defenses, immunities, or limitations of liability available to the City by law.

## **ARTICLE 18 BREACH**

§18.1 Non-Contestability. The City and the Company agree to take all reasonable and necessary actions to assure that the terms of this franchise agreement are performed and neither will take any legal action to secure modification of this franchise agreement. However, the Company reserves the right to seek a change before the PUC in its tariffs, including but not limited to the rates, charges, terms, and conditions of providing Utility Service to the City and its Residents and the City retains all rights it may have to intervene and participate in any such proceedings. The City, similarly, reserves the right to amend the Code and the Design and Construction Standards.

§ 18.2 Breach.

A. Notice/Cure/Remedies. Except as otherwise provided in this franchise agreement, if a party (the "breaching party") to this franchise agreement fails or refuses to perform any of the terms or conditions of this franchise agreement (a "breach"), the other party (the "non-breaching party") may provide written notice to the breaching party of such breach. Upon receipt of such notice, the breaching party shall be given a reasonable time, not to exceed thirty (30) days, in which to remedy the breach.

B. Termination of Franchise by City. In addition to the foregoing remedies, if the Company fails or refuses to perform any material term or condition of this franchise agreement (a "material breach"), the City may provide written notice to the Company of such material breach. Upon receipt of such notice, the Company shall be given a reasonable time, not to exceed ninety (90) days, within which to remedy the material breach. If the Company does not remedy the material breach within the time allowed in

the notice, the City may, at its sole option, terminate the franchise and this franchise agreement. This remedy shall be in addition to the City's right to exercise any of the remedies provided for elsewhere in this franchise agreement. Upon such termination, the Company shall continue to provide Utility Service to the City and its Residents until the City makes alternative arrangements for such service and until otherwise ordered by the PUC, and the Company shall be entitled to collect from Residents and shall be obligated to pay the City, at the same times and in the same manner as provided in this franchise agreement, an aggregate amount equal to the amount which the Company would have paid as a franchise fee as consideration for use of the City Streets, Public Easements and Other City Property. This provision shall survive the termination of the franchise and this franchise agreement.

C. Company Shall Not Terminate Franchise. In no event does the Company have the right to terminate this franchise agreement.

D. No Limitation. Except as provided herein, nothing in this franchise agreement shall limit or restrict any legal rights or remedies that either party may possess arising from any alleged breach of this franchise agreement.

## **ARTICLE 19 AMENDMENTS**

§ 19.1 Proposed Amendments. At any time during the term of this franchise, the City or the Company may propose amendments to this franchise agreement by giving thirty- (30-) days written notice to the other of the proposed amendment(s) desired, and both parties thereafter, through their designated representatives, will, within a reasonable time, negotiate in good faith in an effort to agree upon mutually satisfactory amendment(s). However, nothing contained in this section shall be deemed to require either Party to consent to any amendment proposed by the other Party.

§ 19.2 Effective Amendments. No alterations, amendments or modifications to this franchise agreement shall be valid unless executed by an instrument in writing by the parties, adopted with the same formality used in adopting this franchise agreement, to the extent required by law. Neither this franchise agreement, nor any term hereof, may be changed, modified or abandoned, in whole or in part, except by an instrument in writing, and no subsequent oral agreement shall have any validity whatsoever.

## **ARTICLE 20 EQUAL OPPORTUNITY**

§ 20.1 Economic Development. The Company is committed to the principle of stimulating, cultivating and strengthening the participation and representation of persons of color, women and members of other under-represented groups within the Company and in the local business community. The Company believes that increased participation and representation of under-

represented groups will lead to mutual and sustainable benefits for the local economy. The Company is also committed to the principle that the success and economic well-being of the Company is closely tied to the economic strength and vitality of the diverse communities and people it serves. The Company believes that contributing to the development of a viable and sustainable economic base among all Company customers is in the best interests of the Company and its shareholders.

§ 20.2 Employment.

A. The Company is committed to undertaking programs that identify, consider and develop persons of color, women and members of other under-represented groups for positions at all skill and management levels within the Company.

B. The Company recognizes that the City and the business community in the City, including women- and minority-owned businesses, provide a valuable resource in assisting the Company to develop programs to promote persons of color, women and members of under-represented communities into management positions, and agrees to keep the City regularly advised of the Company's progress by providing the City a copy of the Company's annual affirmative action report upon the City's written request.

C. In order to enhance the diversity of the employees of the Company, the Company is committed to recruiting diverse employees by strategies such as partnering with colleges, universities and technical schools with diverse student populations, utilizing diversity specific media to advertise employment opportunities, internships, and engaging recruiting firms with diversity specific expertise.

D. The Company is committed to developing a world-class workforce through the advancement of its employees, including persons of color, women and members of under-represented groups. In order to enhance opportunities for advancement, the Company will offer training and development opportunities for its employees. Such programs may include mentoring programs, training programs, classroom training, and leadership programs.

E. The Company is committed to a workplace free of discrimination based on race, color, religion, national origin, gender, age, military status, sexual orientation, marital status, or physical or mental disability or any other protected status in accordance with all federal, state or local laws. The Company shall not, solely because of race, creed, color, religion, sex, age, national origin or ancestry or handicap, refuse to hire, discharge, promote, demote or discriminate in matters of compensation, against any person otherwise qualified, and further agrees to insert the foregoing provision or its equivalent in all agreements the Company enters into in connection with this franchise.

F. The Company shall identify and consider women, persons of color and other under-represented groups to recommend for its Board of Directors, consistent with the

responsibility of boards to represent the interests of the Shareholders, customers and employees of the Company.

§ 20.3 Contracting.

A. It is the Company's policy to make available to minority- and women-owned business enterprises and other small and/or disadvantaged business enterprises the maximum practical opportunity to compete with other service providers, contractors, vendors and suppliers in the marketplace. The Company is committed to increasing the proportion of Company contracts awarded to minority- and women-owned business enterprises and other small and/or disadvantaged business enterprises for services, construction, equipment and supplies to the maximum extent consistent with the efficient and economical operation of the Company.

B. The Company agrees to maintain and continuously develop contracting and community outreach programs calculated to enhance opportunity and increase the participation of minority- and women-owned business enterprises and other small and/or disadvantaged business enterprises to encourage economic vitality. The Company agrees to keep the City regularly advised of the Company's programs.

C. The Company shall maintain and support partnerships with local chambers of commerce and business organizations, including those representing predominately minority-owned, women-owned and disadvantaged businesses, to preserve and strengthen open communication channels and enhance opportunities for minority-owned, women-owned and disadvantaged businesses to contract with the Company.

§ 20.4 Coordination. City agencies provide collaborative leadership and mutual opportunities or programs relating to City based initiatives on economic development, employment and contracting opportunity. The Company agrees to review Company programs and mutual opportunities responsive to this Article with these agencies, upon their request, and to collaborate on best practices regarding such programs and coordinate and cooperate with the agencies in program implementation.

**ARTICLE 21  
MISCELLANEOUS**

§ 21.1 No Waiver. Neither the City nor the Company shall be excused from complying with any of the terms and conditions of this franchise agreement by any failure of the other, or any of its officers, employees, or agents, upon any one or more occasions, to insist upon or to seek compliance with any such terms and conditions.

§ 21.2 Successors and Assigns. The rights, privileges, and obligations, in whole or in part, granted and contained in this franchise agreement shall inure to the benefit of and be binding upon the Company, its successors and assigns, to the extent that such successors or assigns have

succeeded to or been assigned the rights of the Company pursuant to Article 15 of this franchise agreement.

§ 21.3 Third Parties. Nothing contained in this franchise agreement shall be construed to provide rights to third parties.

§ 21.4 Notice. Both parties shall designate from time to time in writing representatives for the Company and the City who will be the persons to whom notices shall be sent regarding any action to be taken under this franchise agreement. Notice shall be in writing and forwarded by certified mail or hand delivery to the persons and addresses as hereinafter stated, unless the persons and addresses are changed at the written request of either party, delivered in person or by certified mail. Until any such change shall hereafter be made, notices shall be sent as follows:

**To the City:**

Mayor of Boulder  
1777 Broadway  
Boulder, Colorado 80306

City Manager  
City of Boulder  
1777 Broadway  
Boulder, Colorado 80306

With a copy to:

City Attorney  
City of Boulder  
1777 Broadway  
Boulder, Colorado 80306

**To the Company:**

Regional Vice President, Customer and Community Services  
Public Service Company of Colorado  
P.O. Box 840  
Denver, Colorado 80201

With a copy to:

Legal Department  
Public Service Company of Colorado  
P.O. Box 840  
Denver, Colorado 80201

§ 21.5 Examination of Records.

A. The parties agree that a duly authorized representative of the City shall have the right to examine any books, documents, papers, and records of the Company reasonably related to the Company's compliance with the terms and conditions of this franchise agreement. Information shall be provided within thirty (30) days of any written request. Any books, documents, papers, and records of the Company in any form that are requested by the City that contain confidential information shall be conspicuously identified as "confidential" or "proprietary" by the Company. In no case shall any privileged communication be subject to examination by the City pursuant to the terms of this section. "Privileged communication" means any communication that would not be discoverable due to the attorney-client privilege or any other privilege that is generally recognized in Colorado, including but not limited to the work product privilege. The work product privilege shall include information developed by the Company in preparation for PUC proceedings.

B. With respect to any information requested by the City which the Company identifies as "Confidential" or "Proprietary":

(1) The City will maintain the confidentiality of the information by keeping it under seal and segregated from information and documents that are available to the public;

(2) The information shall be used solely for the purpose of determining the Company's compliance with the terms and conditions of this franchise agreement;

(3) The information shall only be made available to City employees and consultants who represent in writing that they agree to be bound by the provisions of this subsection B;

(4) The information shall be held by the City for such time as is reasonably necessary for the City to address the franchise issue(s) that generated the request and shall be returned to the Company when the City has concluded its use of the information. The parties agree that in most cases, the information should be returned within one hundred twenty (120) days. However, in the event that the information is needed in connection with any action that requires more time, including, but not necessarily limited to litigation, administrative proceedings and/or other disputes, the City may maintain the information until such issues are fully and finally concluded.

C. If an Open Records Act request is made by any third party for confidential or proprietary information that the Company has provided to the City pursuant to this franchise agreement, the City will promptly notify the Company of the request and shall allow the Company to defend such request at its sole expense, including filing a legal

action in any court of competent jurisdiction to prevent disclosure of such information. In any such legal action the Company shall join the person requesting the information and the City. In no circumstance shall the City provide to any third party confidential information provided by the Company pursuant to this franchise agreement without first conferring with the Company. The Company shall defend, indemnify and hold the City harmless from any claim, judgment, costs or attorney fees incurred in participating in such proceeding.

D. Unless otherwise agreed between the Parties, the following information shall not be provided by the Company: confidential employment matters, specific information regarding any of the Company's customers, information related to the compromise and settlement of disputed claims including but not limited to PUC dockets, information provided to the Company which is declared by the provider to be confidential, and which would be considered confidential to the provider under applicable law.

E. Reports. Upon written request by the City, but not more than once per year, the Company shall supply the City with reports, in such formats and providing such details as reasonably requested by the City, of all suppliers of utility service that utilize Company Facilities to sell or distribute utility service to Residents and the names and addresses of each such supplier.

§ 21.6 Reliability Reports. Upon written request, the Company shall provide the City with a report regarding the reliability of Company Facilities and Utility Service.

§21.7 List of Utility Property. The Company shall provide the City, upon request not more than every two (2) years, a list of utility related property owned or leased by the Company within the City. All such records must be kept for a minimum of four (4) years.

§21.8 Other Information. Upon written request, the Company shall provide the City Manager or the City Manager' designee with:

A. Copies of all applications, advice letters and periodic reports, together with any accompanying non-confidential testimony and exhibits, filed by the Company with the PUC;

B. A copy of the Company's or its parent company's consolidated annual financial report, or alternatively, a URL link to a location where the same information is available on the Company's web site;

C. Maps or schematics indicating the location of specific Company Facilities, including gas or electric lines, located within the City, to the extent those maps or schematics are in existence at the time of the request; and

D. A copy of any report required to be prepared for a federal or state agency detailing the Company's efforts to comply with federal and state air and water pollution laws.

§21.9 Payment of Taxes and Fees.

A. The Company shall pay and discharge as they become due, promptly and before delinquency, all taxes, assessments, rates, charges, license fees, municipal liens, levies, excises, or imposts, whether general or special, or ordinary or extra-ordinary, of every name, nature, and kind whatsoever, including all governmental charges of whatsoever name, nature, or kind, which may be levied, assessed, charged, or imposed, or which may become a lien or charge against this agreement ("Impositions"), provided that Company shall have the right to contest any such Impositions and shall not be in breach of this section so long as it is actively contesting such Impositions.

B. The City shall not be liable for the payment of taxes, late charges, interest or penalties of any nature other than pursuant to applicable tariffs on file and in effect from time to time with the PUC.

§21.10 Conflict of Interest. The parties agree that no official, officer or employee of the City shall have any personal or beneficial interest whatsoever in the services or property described herein and the Company further agrees not to hire or contract for services any official, officer or employee of the City to the extent prohibited by law, including ordinances and regulations of the City.

§21.11 Certificate of Convenience and Necessity. The City agrees to support any application the Company may file with the PUC to obtain a certificate of public convenience and necessity to exercise the rights and obligations granted under this franchise.

§21.12 Authority. Each party represents and warrants that except as set forth below, it has taken all actions that are necessary or that are required by its ordinances, regulations, procedures, bylaws, or applicable law, to legally authorize the undersigned signatories to execute this agreement on behalf of the parties and to bind the parties to its terms. The persons executing this agreement on behalf of each of the parties warrant that they have full authorization to execute this agreement. The City acknowledges that notwithstanding the foregoing, the Company requires a certificate of public convenience and necessity from the PUC in order to operate under the terms of this franchise agreement.

§21.13 Severability. Should any one or more provisions of this franchise agreement be determined to be unconstitutional, illegal, unenforceable or otherwise void, all other provisions nevertheless shall remain effective; provided, however, the parties shall forthwith enter into good faith negotiations and proceed with due diligence to draft one or more substitute provisions that will achieve the original intent of the parties hereunder.

§21.14 Force Majeure. Neither the City nor the Company shall be in breach of this franchise if a failure to perform any of the duties under this franchise is due to Force Majeure as defined herein.

§21.15 Earlier Franchises Superseded. This franchise agreement shall constitute the only franchise agreement between the City and the Company for the furnishing of Utility Service, , and it supersedes and cancels all former franchises agreements between the parties hereto.

§21.16 Titles Not Controlling. Titles of the paragraphs herein are for reference only, and shall not be used to construe the language of this franchise agreement.

§21.17 Applicable Law. Colorado law shall apply to the construction and enforcement of this franchise agreement. The parties agree that venue for any litigation arising out of this franchise agreement shall be in the District Court for Boulder County, State of Colorado.

§21.18 Payment of Expenses Incurred by City in Relation to Franchise Agreement. The Company shall pay for expenses incurred for the franchise election, including the publication of notices, publication of ordinances, and photocopying of documents.

**IN WITNESS WHEREOF**, the parties have caused this agreement to be executed as of the day and year first above written.

**CITY OF BOULDER**

ATTEST:

\_\_\_\_\_  
City Clerk on behalf of the  
Director of Finance and Record

\_\_\_\_\_  
Susan Osborne, Mayor

APPROVED AS TO FORM:

\_\_\_\_\_  
Attorney for the City of Boulder

**PUBLIC SERVICE COMPANY OF  
COLORADO**

By: \_\_\_\_\_  
Jay Herrmann  
Regional Vice President

Attest: \_\_\_\_\_  
Asst. Secretary

**Study Session Summary**

**April 13, 2010- Boulder's Long-Term Energy Strategy, Renewable Energy Credits and the Xcel Franchise**

**PRESENT:**

**City Council:** Suzy Ageton, Matthew Appelbaum, KC Becker, Macon Cowles, Crystal Gray, George Karakehian, Lisa Morzel, Mayor Susan Osborne, Deputy Mayor Ken Wilson

**Staff members:** Jane S. Brautigam, David Gehr, David Driskell, Jonathan Koehn

**PURPOSE**

The study session outlined the development of a long-term energy strategy and illustrated how energy efficiency, renewable energy and alternative power resources can be integrated into the region's existing power system to meet growing energy demands in a way that is cost-effective, reliable, risk reducing, and improves environmental quality. The intent of the study session was to provide an overview of these issues, provide a forum for City Council discussion, and outline proposed next steps for council consideration and feedback.

**OVERVIEW OF THE PRESENTATION**

The presentation was made by Jonathan Koehn and City Manager Jane Brautigam. Koehn provided an introduction to Boulder's energy sources and current portfolio. He reviewed specific supply-side issues as they relate to Boulder's Climate Action Plan, overall sustainability efforts, and our ability to meet the climate action goal.

In section 2 of the presentation, Koehn outlined and discussed the rationale for developing a "long-term energy strategy" for Boulder, including the components that would or could be addressed and the process and initial steps toward its development.

In section 3, Koehn discussed the applications and uses for Renewable Energy Credits (RECs) and how they relate to Boulder's short and long-term goals to reduce emissions. He discussed information specific to the Boulder Canyon Hydroelectric Facility, the ongoing negotiations with Xcel Energy to re-negotiate the Power Purchase Agreement (PPA) for the facility, and the RECs associated with the power generation at the site.

City Manager Jane Brautigam presented information on the role of the franchise agreement with Xcel Energy, specifically regarding the status of negotiations, proposed timeline, and potential outcomes.

**COUNCIL RESPONSES TO STUDY SESSION QUESTIONS:**

The study session memo proposed the following questions for City Council consideration:

1. *Should the city include the purchase of Renewable Energy Credits for its energy portfolio to assist in reaching the CAP goals? If so, does City Council agree with staff's recommendation to purchase RECs associated with the Boulder Canyon Hydroelectric Facility and other hydroelectric facilities?*
2. *Does council have any concerns with the Xcel Franchise strategy outlined in the study session material?*

Renewable Energy Credits:

Council discussed the role that Renewable Energy credits (RECs) play in meeting the city's Climate Action Plan goal. While there was some interest in maximizing the amount of revenue generated by the facility, Council's feedback was to negotiate the Power Purchase Agreement (PPA) with Xcel to retain 100% of the RECs generated at the Boulder Canyon facility.

Council member's comments included:

1. A protocol regarding the counting of RECs will likely be sorted out at the state and federal level.
2. Suggest that the city retain the maximum amount of revenue and account for the RECs against our goals.
3. The decision about the RECs should be driven by whatever requires Xcel to do more. If Xcel cannot use the RECs from this facility, they will need to generate additional renewables to make up the short-fall.
4. Council had general questions and concerns about the WindSource Program: specifically how customer's subscriptions result in the addition of renewable energy.
5. Is there additional hydro generation potential in the city?

Xcel Franchise:

Council discussed the Xcel Franchise at some length and expressed significant concerns about introducing a standard franchise on the ballot this year. Council agreed that a strong partnership with Xcel will be the most advantageous option for the city to rapidly decarbonize, while creating new opportunities for Xcel. While council members felt that alternative options should be fully explored and understood, they also supported the concept of continuing to engage in negotiations with Xcel. Council expressed a desire to keep the option of a future franchise agreement on the table, but would like staff to negotiate for at least a one-year extension. Should Xcel not agree to the extension, staff should pursue the steps necessary to put an occupational tax on the ballot in lieu of a franchise fee in November, 2010.

Council member's comments included:

1. The community should be able to see the full list of items the city and Xcel Energy have been negotiating.
2. It is unlikely that there will be anything substantive derived from the negotiations with Xcel by May, 2010.
3. Boulder and Xcel should see this as an opportunity for a public/private partnership, which is not defined by the franchise.

4. Staff should broaden the involvement of the discussions to include economic vitality and facilitate meetings with largest energy users to discuss their role in our energy future.
5. It is troubling that the city does not have access to consumption data.
6. The city needs the right team to be working with Xcel on the options.
7. Staff should work hard to buy time. A one-year extension is good, but two years would be better.
8. The city's and Xcel Energy's goals need to be much more parallel before taking a franchise to voters.
9. The areas staff has been negotiating should be made available to the public (**Attachment B** is an update to council from June 4, 2009 highlighting the areas that staff has been negotiating with Xcel).
10. There is a general concern over lack of progress in the negotiations. Xcel backed away from the table for at least a year.
11. ~~Xcel is impacted by the "most favored nation" issue. This will need to be~~ discussed in order to address the potential of innovative options.
12. A 10-year off ramp is too distant; technologies are rapidly changing.
13. The city should focus on what results in the most distributed generation overall. To date, the most impactful efforts have taken place at the State Legislature. These are efforts that Xcel would have taken regardless of a franchise with Boulder.
14. It is extremely important that Boulder partner with other communities.
15. The city needs to be clear on what would happen if the occupation tax failed in lieu of the franchise fee.
16. While it may not be possible to achieve meaningful options in the next six weeks, staff should continue to push hard to see what can be accomplished. These need to be public discussions. Once the outcome is known, then a discussion about the real options can take place.
17. Staff has put considerable effort into this process.
18. What are the opportunities that might emerge with HB 1365 (Clean Air Clean Jobs Act)? How can Boulder partner with Xcel to achieve the maximum amount of cleaner energy sources through this bill?
19. Not only is the expansion of local distributed generation important, the reliance on coal is becoming increasingly problematic.
20. The city should push to get an extension from Xcel. It would be problematic to let the current franchise simply expire.