

ORDINANCE NO. 1197

AN ORDINANCE GRANTING TO PUBLIC SERVICE COMPANY OF NEW MEXICO, A NEW MEXICO CORPORATION, ITS SUCCESSORS AND ASSIGNS, THE RIGHT, PRIVILEGE AND FRANCHISE TO FURNISH ELECTRICITY WITHIN THE TOWN OF SILVER CITY, NEW MEXICO, AND GRANTING TO PUBLIC SERVICE COMPANY OF NEW MEXICO, A NEW MEXICO CORPORATION, THE RIGHT TO USE ANY PUBLIC HIGHWAY, STREET, ALLEY, ROAD OR OTHER PUBLIC PLACE.

BE IT ORDAINED BY THE COUNCIL OF THE TOWN OF SILVER CITY, NEW MEXICO:

ARTICLE I - SHORT TITLE

This Franchise Ordinance between Public Service Company of New Mexico, a New Mexico corporation ("PNM" or "Company") and its successors and assigns and the Town of Silver City ("Town") shall be known as the "Electric Franchise Ordinance."

ARTICLE II - GRANT OF FRANCHISE

SECTION 1. The Town hereby grants to PNM, subject to the terms and conditions herein, the Electric Franchise Ordinance to provide electric service to all areas within the municipal boundaries of the Town as now existing or hereafter extended and all rights necessary to provide such electric service, including the right to construct, install, remove, change, alter, improve, operate and maintain an electric plant, system and facilities as may be necessary or reasonably convenient for the proper operation of such electric system in, upon, across or under any public highway, street, alley, road or other public place now or hereafter dedicated, owned or controlled by the Town within the municipal boundaries, as now existing or hereafter extended. The extent of the use of rights-of-way and "public places" shall not, however, include public safety and fire department facilities.

SECTION 2. All Company electric plant, system and facilities located within Town's dedicated parks and open spaces (or land later so dedicated), and designated trails will be in conformance with the Municipal ordinances then in effect within the Town. The Town and Company agree that electric plant, system and facilities placed contrary to this Section prior to

the effective date of this Electric Franchise Ordinance, but in conformance with the immediately prior Electric Franchise Ordinance, shall not constitute a breach of this Electric Franchise Ordinance, BUT SHALL BE SUBJECT TO THE PROVISIONS OF ARTICLE VII, SECTION 1, OF THIS FRANCHISE AGREEMENT.

SECTION 3. If after the effective date of this Electric Franchise Ordinance, should there be any new enactment or promulgation of any law, regulation or order that changes Company's or the Town's rights or obligations under this Electric Franchise Ordinance, or that pertains to any of the terms or provisions herein, including, but not limited to, the imposition, payment, collection or treatment of the franchise fees payable hereunder, then the Town and Company, by providing written notice to the other party, each shall have the right to request that affected portions of this Electric Franchise Ordinance be amended.

SECTION 4. The Town, in granting this Electric Franchise Ordinance, surrenders no privileges or rights that it may have of owning or installing any system of light, heat or power and furnishing the same to the Town and the inhabitants thereof.

SECTION 5. The Electric Franchise Ordinance rights and privileges extended by this grant shall never be construed or held to be exclusive. The Town retains and shall ever be considered as having and retaining the right and power to allow and to grant to any other person, firm or corporation and other electrical companies, electric franchise rights and privileges to be exercised in and upon its streets, highways, alleys, roads and other public places.

SECTION 6. This Electric Franchise Ordinance and all rights granted under the Electric Franchise Ordinance are subject to the lawful exercise of the police powers the Town now has or may later obtain, and are further subject to the exercise of the Town's rights as property owner under state and federal laws. Except as expressly set forth herein, neither the granting of this Electric Franchise Ordinance or any provision herein shall constitute a waiver or bar to the

exercise of any governmental right or power of the Town.

ARTICLE III - TERM

All grants and privileges herein granted and conferred upon PNM, its legal representatives, successors and assigns, shall continue in full force and effect for a period of twenty-five (25) years from the date of this Electric Franchise Ordinance.

ARTICLE IV - DUTY TO SUPPLY SERVICE

SECTION 1. PNM will strive to furnish adequate, efficient and reasonable service. Interruption of service should be reported promptly to PNM. PNM will endeavor to restore service within a reasonable time.

SECTION 2. PNM will use reasonable diligence to furnish a regular and uninterrupted supply of energy, provided, however, that service interruptions or partial interruptions may occur or service may be curtailed or fail as a result of circumstances beyond the control of PNM, or be caused by public enemies, accidents, strikes, legal processes, governmental restrictions, fuel shortages, breakdown or damages to generation, transmission or distribution facilities of PNM, and repairs or changes in PNM's generation, transmission or distribution facilities. The Company shall timely respond to emergency situations and cooperate with the Town in achieving prompt responses to such emergencies. The Company shall notify Grant County Regional Dispatch Authority of any material electrical system outage within a reasonable period of time after the Company knows of such outage.

SECTION 3. This Electric Franchise Ordinance constitutes a franchise agreement between the Town and PNM as the only parties and no provision of this franchise shall in any way inure to the benefit of any third person (including the public at large) so as to constitute any such person as a third party beneficiary of the agreement or of any one or more of the terms hereof, or otherwise give rise to any cause of action in any person not a party hereto.

ARTICLE V - RATES TO BE CHARGED

The rates to be charged by PNM for furnishing electricity shall be those rates effective by tariffs filed with the New Mexico Public Regulation Commission ("NMPRC"), as the same may be amended from time to time, in accordance with the rules and regulations of the NMPRC and the statutes of the State of New Mexico.

ARTICLE VI - CONSTRUCTION ACTIVITIES

SECTION 1. Municipal Ordinances. All construction activities of PNM within the municipal limits of the Town will be in conformance with the Municipal ordinances then in effect within the Town, and with Town-specified design and construction standards as may apply by provision of the Town's Municipal Code.

SECTION 2. Excavations and Pole Placements. PNM shall have the right to excavate any public highway, street, alley, road or other public place now or hereafter dedicated, owned or controlled by the Town within its municipal boundaries, as now existing or hereafter extended; subject to the limitations provided herein this Electric Franchise Ordinance and the Town's Municipal Code. There will be no unreasonable delay in backfilling such excavations, and all such excavations shall be restored by PNM in accordance with valid ordinances and regulations which may be adopted by the Town to reasonably control and monitor such activities. If such ordinances and regulations are not adopted or effective, it shall then be the responsibility of PNM to restore such property, insofar as practicable, to the original condition of such property. PNM shall coordinate its excavation with the Town, including public safety and public works departments.

SECTION 3. Tree Trimming and Obstructions. PNM shall have the right and authority to trim trees overhanging or within any public way to remove any obstruction within any public way in order to eliminate or minimize interferences with its plant, lines or system.

ARTICLE VII - RELOCATION OR REMOVAL OF FACILITIES

SECTION 1. PNM, at its expense, shall protect, support, temporarily disconnect, relocate or remove along, under, or over any street, alley, or any other public place, PNM's equipment or facilities when reasonably required by the Town for reasons of public safety, street excavation, street construction or the change or establishment of street grade; provided however, that this provision shall not apply to any relocations made pursuant to the Urban Renewal Law (Section 3-46-1 to 3-46-45 NMSA 1978 Comp.) for which total reimbursement is made from federal funds. PNM also agrees to remove abandoned utility poles once all pole attachers have removed their facilities from PNM's pole. Notwithstanding the foregoing, if PNM abandons a utility pole, which then becomes the property of any pole attachers, such as cable companies or telephone companies, pursuant to a pole attachment or joint use agreement, PNM shall not be obligated to remove such pole.

SECTION 2. Within a reasonable time of the Town's written request, Company shall provide the Town a list of all pole attachers which the Company has contracted with to attach to the Company's facilities located in the public highway, street, alley, road or other public place dedicated, owned or controlled by the Town within the municipal boundaries. Notwithstanding the foregoing, the Company shall have no obligation to provide any information on such list under this Section to the extent disclosure of such information is limited by any confidentiality agreement or any law or regulation.

SECTION 3. Upon submittal by the Town of Town or other construction plans, the Company shall review and identify locations of wires and facilities within a reasonable time of the Town's written request.

ARTICLE VIII - INDEMNITY

SECTION 1. PNM shall assume and pay all judgments rendered against it for damages to

persons or property resulting from the construction or operation of its electric business within the Town, both present and as may be extended during the life of this Electric Franchise Ordinance. PNM agrees to indemnify the Town, its officers, agents and employees against all judgments against the Town, its officers, agents and employees resulting from PNM's own negligence in the construction or operation of its electric facilities within the Town.

SECTION 2. Any liability incurred by the Town in connection with this Electric Franchise Ordinance is subject to the immunities and limitations of the New Mexico Tort Claims Act, Section 41-4-1, et. seq. NMSA 1978, as amended. The Town and its “public employees” as defined in the New Mexico Tort Claims Act, do not waive sovereign immunity, do not waive any defense and do not waive any limitation of liability pursuant to law. No provision in this Electric Franchise Ordinance modifies or waives any provision of the New Mexico Tort Claims Act.

ARTICLE IX - FRANCHISE FEE

SECTION 1. PNM, for and in consideration of the Town's granting of this Electric Franchise Ordinance, and as the fee for the permit to occupy, and as a rental for the occupation, use, easement, or right-of-way in, upon, across and under any highway, street, alley, road or any other public place in the Town, shall pay to the Town during January, April, July and October of each year during all the time these provisions shall remain in full force and effect, a total aggregate sum of two and one half percent (2.50%) of the gross receipts which PNM receives from the sale of electricity within the municipal boundaries of the Town for the next preceding three months’ period to residential and commercial customers as classified by PNM’s rate schedules. PNM shall make payments on a quarterly basis, on or before the 30th day following the close of each quarter, to the Treasurer of the Town. Concurrently with each payment, PNM shall furnish a written report showing the amount of such gross receipts for the quarter involved. The Town agrees that the franchise fee and payments made hereunder are and shall

be in lieu of any and all other franchise, license, privilege, occupation, excise or revenue tax (except general ad valorem property taxes, and special assessments for local improvements, and locally adopted gross receipts tax increments) upon the business, revenue or property of PNM, or any part thereof, situate in the Town during the term of this Electric Franchise Ordinance.

SECTION 2. The Town may, from time to time, during business hours and upon reasonable advance written notice, inspect and audit, at its own cost, PNM's books and records that are directly related to the payment of the franchise fees and for the purpose of determining whether franchise fees have been accurately computed and paid pursuant to this Article IX.

SECTION 3. The Town shall notify PNM in writing of any changes in the municipal boundaries of the Town within thirty (30) days of any extension or contraction of such municipal boundaries becoming effective. Such notice shall be delivered to:

Public Service Company of New Mexico
Attn: Tax Department; MS 2708
Alvarado Square
Albuquerque, NM 87158

The notice shall provide a description of the new and former municipal boundaries and provide PNM copies of all annexation ordinances and maps. PNM shall have no obligation to calculate, collect or pay the franchise fee attributable to any newly extended municipal boundaries until thirty (30) days have elapsed from PNM's receipt of such notice.

ARTICLE X - INSURANCE

Company at its own cost and expense, shall carry and maintain in full force and effect during the term of this Electric Franchise Ordinance, commercial general liability insurance covering bodily injury and property damage liability, with limits of coverage in the maximum amount which the Town could be held liable under the New Mexico Tort Claims Act for each person injured and

for each accident resulting in damage to property. Insurance required under this Article X may be satisfied by equivalent coverage provided by excess liability insurance. Such excess liability insurance may be excess of self-insured retention amounts usually maintained by the Company in the conduct of its business.

ARTICLE XI - ACCEPTANCE

SECTION 1. PNM shall, within thirty (30) days after the passage and approval of this Electric Franchise Ordinance, file in the office of the Town Administrator of the Town of Silver City, New Mexico, a written statement of acceptance duly signed and acknowledged by the proper officer of PNM authorized to execute such acceptance.

SECTION 2. In the event such acceptance is not filed within said period, this Electric Franchise Ordinance and the rights, privileges and franchises granted hereunder shall be terminated and void; PROVIDED, HOWEVER, the Town may by resolution extend the time herein for the filing of such acceptance for an additional period.

SECTION 3. This Electric Franchise Ordinance, if accepted by PNM as hereinbefore provided, shall supersede, cancel and be in lieu of any and all other existing or prior grants of rights, permission and authority to PNM or any predecessor companies or assignors of PNM to construct, operate and maintain any system for the production, transmission, distribution and sale of electricity for lighting, heating, power or other purpose within this Town, more particularly the rights granted under Town of Silver City Ordinance No. 1103, dated January 11, 2005 to the Company's predecessor in interest, Texas-New Mexico Power Company.

ARTICLE XII - AMENDMENT, ADDENDUM AND VENUE

At any time during the term of this Electric Franchise Ordinance, the Town or the Company may propose an amendment or addendum to this Electric Franchise Ordinance by giving thirty (30) days written notice to the other of the proposed amendment or addendum desired, and both

parties thereafter, through their designated representatives, will, within a reasonable time, negotiate in good faith in an effort to agree upon a mutually satisfactory amendment. Such amendment shall become effective upon adoption and passage by the Town in accordance with the requirements of local and state law. In the event that suit shall be brought by either party, the parties agree that venue shall be exclusively vested in the Second or Sixth Judicial District Court of New Mexico or, where otherwise appropriate, exclusively in United States District Court for the District of New Mexico.

ARTICLE XIII - PARTIAL INVALIDITY

If any section, paragraph, subdivision, clause, phrase, or provision of this Electric Franchise Ordinance shall be adjudged invalid or unconstitutional, the same shall not affect the validity of this Electric Franchise Ordinance as a whole or any part of the provisions hereof, other than the part so decided to be invalid or unconstitutional.

PASSED, ADOPTED AND APPROVED by vote of the Council of the Town of Silver City, Grant County, New Mexico, this 13th day of March, 2012.

(Seal)

/s/

James R. Marshall, Mayor

ATTEST:

/s/

Ann L. Mackie, Town Clerk