

ORDINANCE NO. 35

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AN ORDINANCE GRANTING TO PUBLIC SERVICE COMPANY OF NEW MEXICO, A NEW MEXICO CORPORATION, A FRANCHISE TO FURNISH ELECTRICITY WITHIN THE COUNTY OF LUNA, 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 BOARD OF COMMISSIONERS OF LUNA COUNTY, NEW MEXICO:

ARTICLE I - SHORT TITLE

This Franchise Ordinance between Public Service Company of New Mexico ("PNM") and its successors and assigns and the County of Luna (the "County") shall be known as the "Electric Franchise Ordinance."

ARTICLE II - GRANT OF FRANCHISE

SECTION 1: The County hereby grants to PNM, subject to the terms and conditions herein, a Franchise to provide electric service to all areas within the boundaries of the County (other than within the municipal boundaries of incorporated cities and towns as now exist or are hereafter extended) (the "Franchise Area") 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 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 County within the Franchise Area.

SECTION 2: PNM and the County shall act in a reasonable manner in exercising their respective rights and obligations under this Franchise.

SECTION 3: The County, in granting this Franchise, 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 County and the inhabitants thereof.

SECTION 4: The Franchise rights and privileges extended by this grant shall never be construed or held to be exclusive. The County 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.

ARTICLE III - FRANCHISE FEE

This Franchise Ordinance may be amended at any time in accordance with Article X - Acceptance to provide for the payment of a reasonable franchise fee in the event that the County is permitted to do so under State law, as may be amended from time-to-time. PNM shall pay all reasonable actual expenses incurred by the County in the granting of this Franchise.

ARTICLE IV - TERM

SECTION 1: 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.

SECTION 2: This term of years may be renegotiated by the parties in the event state legislation is enacted promoting a state-wide system for the use of the public Rights-of-Way of municipalities and counties, and the grants of franchises to all utility providers for the use thereof.

ARTICLE V - 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 PNM shall not be liable to

anyone by reason of this Electric Franchise Ordinance or the granting of this Franchise. 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.

ARTICLE VI - 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 Utility Commission, or successor agency, as the same may be amended from time to time, in accordance with the rules and regulations of the New Mexico Public Utility Commission, or successor agency, and the statutes of the State of New Mexico.

ARTICLE VII - CONSTRUCTION ACTIVITIES

SECTION 1: Planning and Zoning Ordinances: All construction activities of PNM within the Franchise Area will be in conformance with planning and zoning ordinances then in effect.

SECTION 2: Excavations: 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 County within the Franchise Area. PNM shall provide the County with reasonable advance notice of any excavation and coordinate the timing of any excavations with the Luna County Road Department; PROVIDED HOWEVER, in the event of emergency, PNM shall notify County dispatcher immediately after determining it is necessary to excavate and, as soon as practical, notify the Luna County Road Department. PNM shall avoid any unreasonable delay in backfilling such excavations, and all such excavations shall be restored by PNM in accordance with conditions set forth by the County in any valid ordinances and/or resolutions and/or regulations which may be adopted by the County to reasonably control and monitor such activities. If such ordinances, resolutions or 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. If PNM determines to install any facilities underground, then such facilities shall be buried to a depth required by applicable statute, code or regulation.

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

ARTICLE VIII - RELOCATION OR REMOVAL OF FACILITIES

When required by the County for reasons of public safety, street construction (including rerouting, improving or widening), bridge repair or reconstruction, or change or establishment of street grade, PNM shall, at its own expense, protect, support, temporarily disconnect, relocate or remove its facilities along, under or over any Public Rights-of-Way ("Relocation Costs"); provided, however, that PNM shall not be responsible for Relocation Costs:

- (1) where by County application, specific monies can be and are obtained from Federal or State sources for Relocation Costs, provided that no County matching funds would be required, the scope of the County project would not be diminished and the County would not be required to spend additional monies;
- (2) if the specific street excavation, street construction, or street regrading is done to accommodate the actions or plans of private individuals or entities who are developing or intend to develop property within the Franchise Area, then such private individuals or entities shall be responsible for the Relocation Costs provided that in no event shall the County be liable for such Relocation Costs;

- (3) related to the construction, reconstruction, removal or relocation of streetlighting systems installed in the Public Right-of-Way at the County's request to provide streetlight service to the County, *provided that such streetlighting relocation costs are regulated by a tariff approved by the New Mexico Public Utility Commission or its successor agency; or*
- (4) that State or Federal law requires the County to pay.

It is specifically agreed and understood, however, that before the County shall authorize any such change requiring the relocation or removal of PNM's facilities, the County shall provide PNM with written notice at least sixty (60) days in advance of the commencement of the contemplated changes so that PNM may have sufficient time to make recommendations intended to minimize the cost of relocating or removing its facilities. The County agrees that it will act in good faith and use its best efforts to cooperate with PNM in attempting to implement any recommendations offered by PNM.

ARTICLE IX - INDEMNITY

PNM shall indemnify and save harmless the County, its governing body officers, agents and employees from and against any and all claims or obligations caused by the sole negligence of PNM, its officers, agents or employees, contractors or subcontractors in connection with the installation, repair, operation or maintenance of any of PNM's facilities or in any work done as authorized or required by this Franchise. The County shall give prompt notice to PNM of any claim or suit arising under this indemnity agreement and PNM or its insurer shall have the option to compromise and defend the same to the extent of their own interest. Nothing in this indemnity agreement shall be construed to depart from the present or future law of New Mexico concerning comparative negligence and contribution among or between joint tortfeasors.

ARTICLE X - ACCEPTANCE

SECTION 1: PNM shall, within thirty (30) days after the passage and approval of this Electric Franchise Ordinance or any amendment hereto, file in the office of the Clerk of the County of Luna a written statement of acceptance of this Electric Franchise Ordinance or the amendment duly signed and acknowledged by the proper officer of PNM authorized to execute such acceptance, and, if required by statute or regulation, shall file a true copy of this Electric Franchise Ordinance or the amendment and the acceptance of PNM with the New Mexico Public Utility Commission, or its successors.

SECTION 2: In the event such acceptance of this Electric Franchise Ordinance or any amendment hereto is not filed with Clerk of the County of Luna within said period, this Electric Franchise Ordinance or the amendment hereto and the rights, privileges and franchises granted by this Electric Franchise Ordinance or the amendment, as the case may be, shall be terminated and void; PROVIDED, HOWEVER, the County may by resolution extend the time herein for the filing of such acceptance for an additional period.

SECTION 3: This Electric Franchise Ordinance hereto, if accepted by PNM as hereinbefore provided, shall supersede, cancel and bind 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 the Franchise Area.

ARTICLE XI - 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 Ordinance as a whole or any part of the provisions hereof, other than the part so decided to be invalid or unconstitutional.

PASSED, ADOPTED, this 14th day of February, 1999.

APPROVED:

James G. Smith
Chairman, Board of County
Commissioners

February 11, 1999.

ATTESTED:

Natalee Pacheco
COUNTY CLERK