

ORDINANCE NO. 2012-____

AN ORDINANCE GRANTING A FRANCHISE BY THE CITY OF DURANGO, COLORADO, TO LA PLATA ELECTRIC ASSOCIATION, INC., ITS SUCCESSORS AND ASSIGNS, PROVIDING THE RIGHT TO FURNISH, SELL AND DISTRIBUTE ELECTRICITY TO THE CITY AND TO ALL PERSONS, BUSINESSES AND INDUSTRY WITHIN THE CITY; GRANTING 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 ELECTRICITY WITHIN THE CITY; GRANTING A NON-EXCLUSIVE RIGHT TO MAKE REASONABLE USE OF ALL STREETS AND OTHER PUBLIC PLACES AS HEREIN DEFINED, AS MAY BE NECESSARY TO THE EXERCISE OF SAID RIGHT; FIXING THE TERMS AND CONDITIONS THEREOF; AND DECLARING AN EFFECTIVE DATE.

WHEREAS, the City has requested an expression of interest from companies desiring to own and operate electric utilities within the City of Durango and, in response thereto, has negotiated a proposed franchise with the party responding to such request, La Plata Electric Association, Inc.; and

WHEREAS, the negotiated Franchise has been reviewed and evaluated by the City staff and the staff has recommended to the Durango City Council that the proposed Franchise be approved, subject to approval of the electorate as required pursuant to Article IX, Section 1 of the Charter of the City of Durango, Colorado; and

WHEREAS, the City of Durango has reviewed the legal, character, financial and technical qualifications of the proposed Franchisee, La Plata Electric Association, Inc., in full proceedings providing due process, and is desirous of awarding a Franchise for electric service to said applicant;

NOW, THEREFORE, THE CITY OF DURANGO HEREBY ORDAINS:

SECTION 1. GRANT OF FRANCHISE:

The City of Durango hereby grants to La Plata Electric Association, Inc. (hereinafter "Franchisee"), for the period specified herein, and subject to the conditions, terms and provisions contained in this ordinance, including specifically, but not by way of limitation, the terms and provisions set forth in Section 4(b) below, the exclusive right to furnish, sell and distribute electricity within the Franchise Area, to the City and to all residents of the City. Subject to the conditions, terms and provisions contained in this ordinance, including specifically, but not by way of limitation, the terms and provisions set forth in Section 4(b) below, the City also hereby grants to the Franchisee the exclusive right to acquire, construct, install, locate, maintain, operate and extend into, within and through the Franchise Area all facilities reasonably necessary to furnish, sell and distribute electricity within the Franchise Area and a non-exclusive right to make reasonable use of the streets and other public places as may be necessary to carry out the terms of this ordinance subject to the City's prior right of usage for municipal purposes and subject to zoning, subdivision, permit and building code requirements. These rights shall extend to all areas of the City as it is now constituted, the Franchise Area and to additional areas as the City may

increase in size by annexation or otherwise. The City and the Franchisee do not waive any of their rights under the statutes and constitutions of the State of Colorado and the United States except as otherwise specifically set forth herein.

SECTION 2. DEFINITIONS:

For the purpose of this Franchise, the following words and phrases shall have the meaning given in this section. When not inconsistent with the context, words used in the present tense include the future tense, words in the plural number include the singular number, and words in the singular number include the plural number. The words “shall” or “will” are mandatory and the word “may” is permissive. Words not defined in this section shall be given their common and ordinary meaning.

- (a) CITY shall mean the City of Durango, Colorado and all of the territory within present and future corporate boundaries.
- (b) CITY COUNCIL or COUNCIL shall mean the City Council of the City of Durango, Colorado.
- (c) DISTRIBUTION FACILITIES means that portion of the Franchisee’s electric system which delivers electric energy from the distribution substation breakers to the point of delivery to the customer, including all Franchisee’s devices connected to that system.
- (d) FACILITIES means all physical components of the Franchisee which are reasonably necessary to provide electricity into, within and through the City for distribution and sale within the City, and include, but are not limited to, plants, works, systems, transmission and distribution structures, lines, street lighting fixtures, equipment, pipes, mains, conduit, meters, transformers, underground lines, wires and cables.
- (e) FRANCHISE shall mean the licensure and grant of rights and obligations under this Franchise to the Franchisee pursuant to this ordinance.
- (f) FRANCHISE AREA shall mean that area within the corporate limits of the City of Durango, and land solely owned by the City of Durango that is outside of the corporate limits of the City of Durango.
- (g) FRANCHISEE shall mean La Plata Electric Association, Inc., its lawful successors and assigns, subject specifically to the conditions of transfer as more fully hereinafter set forth.
- (h) GROSS REVENUE shall mean all cash, payments or credits of any kind or nature received, either directly or indirectly, by the Franchisee, its affiliates, subsidiaries, parent and any other person or entity in which the Franchisee has a financial interest or which has a financial interest in the Franchisee, arising from the sale of electric service to Franchisee’s customers within the Franchise Area. The term gross revenue shall not include revenues accruing to the Franchisee

from any use of it facilities within the City by other entities or capital credits received by Franchisee from generation and transmission cooperatives or other cooperatives.

(i) OFFICIAL CITY REPRESENTATIVE or CITY MANAGER means the City Manager, his successor in office, or any officer designated by the City Charter as the chief executive officer for the City, and any employees of the City designated to act as the official City representative by the City Manager, his successors, or said Charter officer, each of whom shall be authorized to act on behalf of the City under the terms of this Franchise.

(j) PARK or PARK LAND means a recreation area within the City owned and maintained as a park, open space, or other land by the City, whether or not officially so designated.

(k) PERSON shall mean any person, firm, partnership, association, corporation, company or organization of any kind.

(l) PUBLIC UTILITIES COMMISSION or PUC means the Public Utilities Commission of the State of Colorado, or other authority succeeding to the regulatory powers of the Public Utilities Commission of the State of Colorado.

(m) RESIDENTS means all persons, businesses, industry, governmental agencies, and any other entity whatsoever, presently located or to be hereinafter located, in whole or in part, within the territorial boundaries of the City.

(n) PUBLIC WAY shall mean and refer to the surface of and the space above and below any public street, highway, freeway, bridge, land path, trail, alley, court, boulevard, sidewalk, parkway, way, lane, public way, drive, circle or other public right-of-way or public easement, including, but not limited to, public utility easements, dedicated utility strips, or rights-of-way dedicated for compatible uses and any temporary or permanent fixtures or improvements located thereon now or hereafter held by the City which shall entitle the City and the Franchisee to the use thereof for the purpose of installing, operating, repairing and maintaining an electric transmission and distribution system. Public way shall also mean any easement now or hereafter held by the City within the City for the purpose of public travel, or for utility or public service use dedicated for compatible uses, and shall include other easements or rights-of-way as shall within their proper use and meaning entitle the City and the Franchisee to the use thereof for the purposes of installing, transmitting or distributing Franchisee's electric service or other service over poles, wires, cables, conductors, ducts, conduits, vaults, manholes, compliances, attachments and other properties ordinarily necessary and pertinent to the electric distribution system. This definition does not include any of Franchisee's private rights-of-way.

SECTION 3. TERM OF FRANCHISE:

The term of this Franchise shall be twenty (20) years from the effective date hereof. Any renewals of this Franchise shall comply with the provisions and requirements of applicable Federal, state or local law and the Charter of the City of Durango, Colorado.

Notwithstanding the stated term of this Franchise, this Franchise shall be terminable by the City for cause, as more specifically hereinafter provided.

SECTION 4. EXCLUSION FROM FRANCHISE:

(a) This Franchise does not grant to the Franchisee the right, privilege or authority to engage in the community antenna (or cable) television business, although nothing herein contained shall preclude the Franchisee (1) from permitting those lawfully engaged in such business to utilize the Franchisee's facilities within the City for such purposes, or (2) from providing such service if appropriate authority is obtained.

(b) The right to use and/or occupy public ways and public places for the purposes set forth herein shall be exclusive to the Franchisee; provided, however, the City reserves the right to generate and distribute electric power and the use of public ways and other public places for such purposes. Nothing within this Franchise Agreement shall preclude or restrict the City or any of its citizens who are customers of Franchisee from generating electric power from alternative sources. Franchisee shall, upon request, provide necessary interconnections in compliance with applicable State and Federal law for the purpose of transmitting such electrical power from the alternative sources to Franchisee's facilities and shall provide production meters necessary for measuring the net power produced by such alternative sources which transmitted to Franchisee's facilities. Such interconnections and production meters shall be provided in a timely manner and at a reasonable cost as recognized by the electric industry. Net power from alternative sources connected to Franchisee's facilities shall be credited to the account of the producing party or parties at a rate not less than the rate Franchisee pays to its w wholesale supplier of electrical power and in compliance with the rules, regulations, tariffs and policies of the Franchisee in effect at the time of interconnection. Franchisee's accommodation of power from alternative sources shall be subject to contractual limitations imposed by Franchisee's wholesale supplier and any limitations imposed by State or Federal law.

Franchisee and the City agree to work cooperatively to explore and attempt to develop a Franchise policy or tariff that allows for a system of remote net metering that is of benefit to Franchisee and its members, but would not be subsidized by other customers of Franchisee.

(c) This ordinance does not grant to the Franchisee the right, privilege or authority to use or occupy any parks or park land of the City currently used or so designated or as in the future may be so used or designated except to the extent that the Franchisee is currently using or occupying said parks or park land and as otherwise authorized in writing by the City. Franchisee shall not

expand its use or occupancy of said parks or park land except by specific written authorization of the City; provided, however, that nothing herein contained shall limit or restrict the Franchisee's right to maintain, renovate, repair or replace any of Franchisee's facilities currently occupying said parks or park land.

(d) The City retains the following rights with regard to this Franchise:

(1) Except as otherwise specifically provided herein, to use, control and regulate, through the exercise of its police power, the use of public ways and other public places.

(2) To impose such other regulations, by ordinance, resolution or charter amendment, as may be determined by the City Council to be necessary in the exercise of its police power to protect the health, safety and welfare of the public; provided, however, Franchisee shall not be subject to nor required to comply with any ordinance directed solely at Franchisee or which fails to place similar burdens upon persons or entities similarly situated. Nothing herein contained shall limit or restrict the Franchisee's right to challenge the validity of any such regulations.

SECTION 5. EFFECTIVE DATE:

This ordinance shall become effective upon May 1, 2012, conditioned upon the approval by the City Council and execution by the Mayor of the City and approval of the electorate concerning the issuance of a Franchise to Franchisee as required pursuant to Section 1 of Article IX of the Charter of the City of Durango, Colorado. As of May 1, 2012, the provisions of this Franchise shall supersede all of the conditions of the existing Franchise created by Amended Ordinance No. 0-1991-2, except that the Franchise shall discharge and pay on or before April 30, 2012 all obligations and sums that shall have accrued under the provisions of the Franchise being terminated.

SECTION 6. FRANCHISE FEE:

In consideration for the grant of this Franchise, the Franchisee shall pay the City a sum equal to four and sixty-seven hundredths percent (4.67%) of all gross revenues, as hereinabove defined, received from the sale and distribution of electricity to customers within the City. Payment of the franchise fee shall not exempt the Franchisee from any lawful taxation upon its property or from sales and use taxes and from fees and taxes that are uniform and of general applicability within the Franchise Area. All amounts paid to the Franchisee by the City or any of its departments for electric service shall be excluded from computation of the franchise fee.

The franchise fee shall be paid to the City monthly within twenty (20) days of the close of each month. At the time payment of the franchise fee is made from Franchisee to the City, Franchisee shall also provide to the City a monthly report of gross revenues, as herein defined, during the preceding month which substantiates the accompanying payment. The City reserves the right to require evidence

of certified financial statements to support the franchise fee paid by the Franchisee, and to otherwise audit the books and records of the Franchisee as is deemed necessary by the City. In the event that any such audit shows that Franchisee has underpaid the franchise fee, Franchisee shall reimburse the City for the underpayment, together with any applicable interest. Should the audit reflect an underpayment of five thousand dollars (\$5,000.00) or more, Franchisee shall pay to the City the cost of the audit. Failure to pay franchise fees within thirty (30) days of the date due shall result in a one percent (1%) per month penalty for each month, or portion thereof, until the delinquent franchise fee had been paid to the City. Failure to pay franchise fees for a period of ninety (90) days or more shall be grounds for termination of this Franchise as more specifically hereinafter provided.

SECTION 7. PAYMENT OF FEE REFUNDABLE:

In the event the Franchisee is required or allowed by an appropriate authority having jurisdiction in the premises to make a refund or other adjustment in its rates to its customers, the franchise fee payments shall be similarly adjusted consistent with the order of refund or other adjustment. The Franchisee shall also be allowed to adjust the franchise fee payments to reflect the net write-off of uncollectable accounts. Except as otherwise provided herein, in the event that the Franchisee overpays the franchise fee in an amount less than or equal to five thousand dollars (\$5,000.00), credit for the overpayment shall be taken by the Franchisee against the next franchise fee payment. If the Franchisee overpays the franchise fee in an amount greater than \$5,000.00 but less than \$25,000.00, the City shall be allowed up to three (3) years within which to refund the overpayment. If the overpayment is in an amount greater than \$25,000.00, the City shall be allowed up to five (5) years within which to refund any such overpayment. All refunds shall take the form of a credit against the amounts otherwise owing by the Franchisee to the City as franchise fees. In no event shall the City be required to refund any overpayment made as a result of an error by the Franchisee which occurred more than three (3) years prior to the discovery of the Franchisee's error. Upon discovery by the Franchisee of any such error by the Franchisee, the Franchisee shall promptly notify the City of the discovery.

SECTION 8. CONTRACT OBLIGATION:

This Franchise Ordinance constitutes a valid and binding contract between the City and the Franchisee. In the event that the Franchise fee specified in this ordinance is declared illegal, unconstitutional or void for any reason by any Court or other proper authority, the Franchisee shall be contractually bound to pay the City a monthly occupation tax or fee in an aggregate amount that would be, as nearly as practical, equivalent to the amount which would have been paid by the Franchisee as a franchise fee hereunder.

SECTION 9. SUPERVISION BY CITY MANAGER:

The City Manager, or official City representative, is hereby designated the official of the City having full power and authority to take appropriate action for and on behalf of the City and its inhabitants to

enforce the provisions of this Franchise and to investigate any alleged violations of failures of the Franchisee to comply with the provisions hereof or to adequately and fully discharge its responsibilities and obligations hereunder. The failure or omission of said official City representative to so act shall not constitute any waiver or estoppel nor limit independent action by other City officials.

In order to facilitate such duties of the said official City representative, the Franchisee agrees:

(a) To allow said official City representative reasonable access to any part of the Franchisee's plant, works and systems, and that said City official may observe and require tests to determine the quality of the electric service supplied to the customers of the Franchisee, with particular reference to the standards of service provided herein and as may be prescribed by the rules and regulations and tariffs of the Franchisee approved by the USDA, Rural Utilities Service ("RUS") or the Public Utilities Commission from time to time, if any.

(b) That the official City representative may investigate and convey to the Franchisee any complaint of any customer of the Franchisee within the City with respect to the quality and price of electric service and the appropriate standards thereof.

(c) Upon request to submit to said official City representative copies of all filings which the Franchisee makes with the RUS or the Public Utilities Commission, including, but not limited to, its annual report, all advice letters, and applications, together with existing transcribed supporting testimony and exhibits. In addition, irrespective of whether the City intervenes in a proceeding before the Public Utilities Commission, the Franchisee, upon the City's reasonable notice, not to exceed three (3) business days, will provide the City access to all non-confidential documents provided other parties in connection with any such proceeding.

(d) To grant said official City representative reasonable access to the books and records of the Franchisee insofar as they relate to any matters covered by this Franchise and to provide said City official with such reasonable and necessary reports containing or based upon information readily obtainable from the Franchisee's books and records as the City may from time to time request with respect to the electric service supplied under this Franchise.

SECTION 10. ADEQUATE SUPPLY AT LOWEST REASONABLE COST:

The Franchisee shall at all times take all reasonable and necessary steps to assure an adequate supply of electricity to its customers at the lowest reasonable cost consistent with long-term reliable supply. Should electric power be made available to the Franchisee, from whatever source, including any agency or instrumentality of the United States of America, regional agency, the City, or locally distributed generation within the City at less total cost than the total cost which would be incurred by the Franchisee

to supply such electric power from its own systems and under circumstances which will not adversely affect the Franchisee or its operations, the Franchisee will attempt to purchase such lower cost electric power and to pass on to its customers any savings resulting from the purchase. If the supply of electricity to its customers should be interrupted, the Franchisee shall take all necessary and reasonable actions to restore such supply at the earliest practicable time. The Franchisee shall continue to encourage and provide programs for its customers to receive electric power generated locally from renewable sources and to seek to purchase locally generated electric power for use by residents in the City in accordance with the provisions of Section 4(b).

SECTION 11. CITY REVIEW OF CONSTRUCTION DESIGN:

Except in emergency circumstances, prior to construction of any significant electric facilities (i.e. substations and transmission lines), or of a building or similar structure within the City, the Franchisee shall furnish to the City a description of the type and proposed location thereof, unless the City has previously notified the Franchisee, in writing, that such notice is unnecessary. In addition, upon request, the Franchisee shall assess and report on the impact of its proposed construction upon the City's environment. Such plans and reports may be reviewed by the City to assure, at a minimum:

- (a) That all applicable laws including building and zoning codes and air and water pollution regulations are complied with; and
- (b) That City standards pertaining to landscaping are complied with.

The Franchisee shall comply with all regulatory requirements of the City and shall incorporate all other reasonable changes requested by the City consistent with prudent engineering practice.

SECTION 12. COMPLIANCE WITH CITY REQUIREMENTS:

The Franchisee will comply with all City requirements regarding curb and pavement cuts, excavation, digging and related construction activities as well as any reasonable direction provided by the City regarding placement of poles and other similar facilities within the City. In no event shall such City direction interfere with prudent engineering practices of the Franchisee.

The Franchisee and the City shall meet each year and exchange copies of their reports regarding annual and long-term planning for capital improvement projects with descriptions of construction activities including, to the extent known, the timing and method of construction. Such reports shall be exchanged within thirty (30) days after the issuance thereof. Except for emergencies, all installations shall be coordinated with the City's municipal planning and street improvement, and information systems planning programs.

SECTION 13. INSTALLATION AND MAINTENANCE OF FACILITIES:

(a) All structures, lines and equipment erected by Franchisee within the City shall be so located as to cause minimum interference as determined by the City, consistent with prudent engineering practice, with the proper use of public ways and public places, and so as to cause minimum interference with the rights or reasonable convenience of property owners. The Franchisee shall submit to the City plans for construction of any transmission line extension within the City for approval of location prior to the commencement of construction. Any plans submitted for such approval shall be approved or denied within fifteen (15) business days of submittal. Failure to approve or deny within said fifteen (15) day period shall be deemed approval of the submitted plans. Approval of location shall not be unreasonably withheld by the City. Any construction in street, alleys or public ways shall comply with Sections 21-66 and 21-68 of the City Code and the Franchisee or its contractor shall also submit, prior to construction, a traffic control plan consistent with Policy 84-3 of the City, a copy of which has been furnished to the Franchisee. Where poles, conduits or other wire-holding structures of any public utility are available for use by Franchisee, the Franchisee shall use such poles, conduits and structures if the permission and consent of such public utility can be obtained by Franchisee and such use is consistent with prudent engineering practice.

(b) In cases of Franchisee's disturbance of any public way or public place, Franchisee shall, at its own cost and expense, and in a manner approved by the City, replace and restore such public way or public place in as good condition as existed before the work involving such disturbance was commenced, such reasonable determination to be made by the City accordance with applicable street standards as adopted by the City. All Franchisee's structures, lines, equipment and connections in, over, under and upon all streets shall be kept and maintained by the Franchisee in a safe and suitable condition, and in good order and repair as determined by the City in accordance with prudent engineering practice. In the event that the City incurs any out of pocket expenses paid to third-parties who are not employees of the City to obtain compliance with the Franchisee's use of any public way or public place, Franchisee shall reimburse the City for such expenses reasonably incurred.

(c) Upon receipt of reasonable advance notice, not to be less than five (5) business days, the Franchisee shall, at its own expense, protect, support, temporarily disconnect, temporarily relocate in the public way, or temporarily remove from the public way, any property of the Franchisee when lawfully required by the City by reason of traffic conditions, public safety, freeway and street construction, change or establishment of street grade, installation of sewers, drains, gas or water pipes, or any other type of public structures or improvements by the City; provided, however, Franchisee shall in all cases have the right of abandonment of its property. If public funds are separately available to any utility using such public way for the purpose of defraying the cost of such disconnection, temporary relocation or temporary removal, such funds shall also be made available to the Franchisee.

(d) Any fixtures placed in any public way by Franchisee shall be placed in such a manner as not to interfere with the usual travel on such public way as determined by the City.

(e) Franchisee shall, upon request of any person holding a special transport permit issued by the City, temporarily raise or lower its wires to permit the moving of buildings. The expense of such temporary removal or raising or lowering of wires shall be paid by the person requesting the same, and the Franchisee shall have the authority to require such payment, in advance. Franchisee shall be given not less than forty-eight (48) hours advance notice to arrange for such temporary wire relocation.

(f) Upon forty-eight (48) hours advance notice to the City, Franchisee shall have authority to trim trees that are overhanging public ways and public places of the franchise area, so as to prevent the branches of such trees from coming in contact with the wires of Franchisee. Notice shall not be required of Franchisee in cases of emergency. At the option of the City, such trimming may be done by the City or by a third-party under the City's supervision and direction at the reasonable expense of the Franchisee. Should the trimming of trees by Franchisee result in the destruction of any otherwise healthy trees, Franchisee shall be responsible for the reasonable cost of replacement or reasonable compensation to the owner thereof. All pruning, trimming or removal of trees shall be accomplished in accordance with the requirements of Sections 26-56 through 26-62 of the Durango City Code.

(g) The City shall have the right to make additional use, for any public or municipal purpose, of any conduits controlled or maintained by or for Franchisee in any public way, provided such use by the City does not interfere with the present or future reasonable usage of such conduits by Franchisee. In the event of such usage, the City shall indemnify and hold harmless the Franchisee against and from any and all claims, demands, causes of action, cost or liabilities of every kind and nature whatsoever arising out of such use of the Franchisee's conduits, inclusive of reasonable attorney's fees. The size and quantity of any conduits utilized by Franchisee for extension of electric or fiber optic transmission or distribution lines shall be of sufficient size, as approved by the City, to allow use by other franchisees of the City or the City consistent with prudent engineering practice. Franchisee shall also have the right to make additional use of conduits controlled or maintained exclusively by the City, and shall indemnify and hold harmless the City against and from any and all claims, demands, causes of action, costs or liabilities of every kind and nature whatsoever arising out of such use of the City's conduits, inclusive of reasonable attorney's fees.

SECTION 14. PERMANENT RELOCATION OF FRANCHISEE'S FACILITIES:

If at any time the City requests the Franchisee to permanently relocate any facilities installed or maintained in public ways pursuant to this Franchise or previous franchises, in order to permit the City to make any use of public ways to construct any public improvement or to build any public project, such

relocation shall be made by the Franchisee at its expense and shall be completed within a reasonable time not to exceed one hundred eighty (180) days from the date on which the City requests that such relocation work commence; provided, however, that such time period may be enlarged with the approval of the City, which approval shall not be unreasonably withheld. The Franchisee shall, in any event, be granted an extension of time for completion of the relocation equivalent to any delay caused by conditions not under Franchisee's control. Following the relocation of Franchisee's facilities, all property disturbed by said relocation shall be restored to substantially its former condition by the Franchisee at its expense. Except where required to serve the City as a customer, nothing herein contained shall be construed to impose any obligation upon the City to make any payment for any relocation of Franchisee's facilities. Nothing herein contained shall be construed to require relocation of Franchisee's facilities within private easements or privately held property rights of the Franchisee. The Franchisee and the City will cooperate and incorporate the best engineering and construction practices to facilitate relocation of facilities sooner than the one hundred eighty days (180) when "build/design" practices are utilized by the City.

SECTION 15. NON-INTERFERENCE WITH PUBLIC WORKS:

The Franchisee's facilities shall not interfere in any way with the City's telecommunication facilities, traffic signal lights or with water or sewer mains or other municipal uses of public ways or public places. All such facilities shall be installed on City and private property so as to cause minimal interference with such public works facilities.

SECTION 16. RESTORATION OF SERVICE:

In the event the Franchisee's electric system, or any part thereof is partially or wholly destroyed or incapacitated, the Franchisee shall use due diligence to restore its system to satisfactory service within the shortest practicable time.

SECTION 17. UNDERGROUND ELECTRIC LINES:

Franchisee shall construct, operate and maintain all underground distribution facilities within the Franchise Area within a legally established easement, if public ways are not such to accommodate the such facilities. Nothing contained in this section shall require Franchisee to construct, operate or maintain underground any ground-mounted appurtenances, pedestals or other related equipment.

When undertaking a project of undergrounding, either as a matter of Franchisee's convenience or when required pursuant to this Section, the City and the Franchisee shall work with other utilities or companies which have their lines overhead to attempt to have all lines underground as part of the same project. The Franchisee shall not be required to pay the cost of any other utility or company in connection with work under this section.

SECTION 18. COMPLIANCE WITH CLIMATE AND POLLUTION LAWS:

In continued compliance with **environmental** laws the Franchisee shall use its best efforts to take measures which will result in its facilities and operations meeting the standards required by applicable City, county, state and federal air and water pollution laws and laws regulating the transportation of hazardous substances and wastes. **Every two years while this agreement is in effect**, the Franchisee will provide the City with a status report of such measures.

SECTION 19. TECHNOLOGICAL AND EFFICIENCY IMPROVEMENTS:

The Franchisee shall generally **test**, introduce, **encourage the use of** and install, as soon as practicable, technological advances in its **distribution facilities** 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 **and especially where such advances relate to the increased and more efficient use of renewably generated electric power**. The Franchisee shall review and **annually** report advances which have occurred in the electric utility industry that have been incorporated into the Franchisee's operations in the City during the previous year or will be so incorporated within the six (6) months following completion of said report.

The Franchisee shall cooperate with the City in allowing the City to comment on the Franchisee's Rules and Regulations, and Policies for net metering and renewable generation opportunities, as well as energy efficiency programs.

SECTION 20. SERVICE TO NEW AREAS:

If, during the term of this Franchise, the boundaries of the City are expanded, the Franchisee shall extend service to residents of the newly incorporated areas in accordance with the Franchisee's extension policy at the earliest practicable time. Service to annexed areas shall be in accordance with the terms of this Franchise Ordinance, including payment of franchise fees.

SECTION 21. REPORTS IN OPERATIONS OF FRANCHISEE:

The Franchisee shall submit reasonable financial and other necessary reports containing or based on information from the Franchisee's books and records as the City may from time to time request with respect to the operations of the Franchisee under this Franchise, provided that such information can be provided at a reasonable cost. Such reports may be changed from time to time as may be mutually agreeable between the City and the Franchisee. Initially, the City requests the following reports, on or before May 1 of each year commencing May 1, 2013:

- (a) On an annual basis the return earned by the Franchisee on operations and the rate base used for calculation of such return as is currently provided or as may in the future be provided to the Public Utilities Commission in conjunction with various adjustment clause provisions.

(b) A list of all real property and leasehold interests in real property owned by the Franchisee within the municipal boundaries of Durango as the same may be changed from time to time, excepting public and other easements. Upon request by the City, such listing shall include the legal description and land area of each listed property and shall be accompanied by a map showing the location of each listed property.

(c) Short term (less than two (2) years) and long-range (over two (2) years) plans for all capital improvements, construction and excavation within the City or affecting service to the City and its residents.

(d) An itemization of actions taken during the preceding 12 month period to increase the use of renewable power by the Franchisee or by customers of the Franchisee within the City.

SECTION 22. BILLS:

On request the Franchisee shall provide the City with a complete listing of all the accounts for which the City is the customer, inclusive of location address.

SECTION 23. JOINT USE:

The Franchisee shall permit use of its facilities by the City, including the City's fiber network used strictly for municipal use, or other Franchisees of the City so long as such grantees are not in competition with the Franchisee and so long as such grantees obtain the permission of the City and pay to the Franchisee the appropriate fees, if any; provided, such joint use shall not unreasonably interfere with the Franchisee's use of these facilities, and provided also that said use does not create a safety hazard nor result in any additional expense or the assumption of any additional liability by the Franchisee. The Franchisee and the City agree to use RUS-approved joint use agreements and all provisions and requirements of the RUS-approved joint use agreement shall remain enforceable, except that the Franchisee shall waive any attachment fees for those attachments on Franchisee's facilities located in the Public Way. .

SECTION 24. ANNEXATION TO THE CITY:

When any property owned by the Franchisee is or becomes eligible for voluntary annexation to the City and is not simultaneously eligible for voluntary annexation to another municipal corporation, the Franchisee shall petition to annex the same to the City upon request made by the City; provided, no condition of such annexation shall impair the Franchisee's ownership or then existing use of its property and water or water rights for public utility purposes. Except as herein provided, the Franchisee agrees to meet all terms and conditions imposed upon the annexation by the City that are not more stringent than those imposed generally upon property owners seeking annexation of their land to the City. The Franchisee shall be exempt from a public donation of land, money or water rights arising from such mandatory annexation under this section to the extent that the land being annexed is committed,

dedicated and being fully utilized by facilities related to generation, transmission or distribution of electric service under this ordinance, and provided further that said exemption from public donation shall not extend to any unimproved land or land not so directly committed, dedicated and currently used.

SECTION 25. CITY HELD HARMLESS:

The Franchisee shall construct, maintain and operate its facilities in a manner which provides reasonable protection against injury or damage to persons or property; provided, however, said obligation of the Franchisee hereunder shall not increase or decrease its liability on third-party claims; and provided further that the Franchisee's obligation to the City hereunder shall not be diminished by said exception. The Franchisee shall hold the City harmless and indemnify the City from and against all lawsuits, liability, damage, claims, demands, judgment and losses whatsoever in nature, and reimburse the City for all its reasonable expenses arising out of the operations of the Franchisee within the City and the securing of and the exercise by the Franchisee of the Franchise rights granted in this ordinance, including any third-party claims, administrative hearings and litigation. None of the City expenses reimbursed by the Franchisee under this section shall be surcharged. Nothing herein contained shall obligate the Franchisee to hold the City harmless and indemnify the City to the extent any lawsuits, liability, damage, claims, demands, judgments and losses shall have been found to have arisen out of or in connection with any negligent act, failure to act or intentional wrongdoing of the City or of its officers, agents or employees, by final decision of a court of competent jurisdiction in an action where the City is a party.

SECTION 26. FINANCIAL RESPONSIBILITY:

At the time of the execution of this ordinance, and from time to time at the City's request, not more frequently than annually, the Franchisee shall submit to the City as a confidential document, proof of its ability to meet its obligation to indemnify the City as required by Section 25 of this ordinance. This proof may take the form of insurance coverage, adequate funding of self-insurance, or the provision of a bond. The City may require, from time to time, and the Franchisee agrees to provide, additional reasonable funding of the Franchisee's indemnification obligations in the event such obligations are self-insured. Nothing herein contained shall create any right in any third-party or cause the City to be liable to any party for a failure to so act.

SECTION 27. PAYMENT OF EXPENSES INCURRED BY CITY IN RELATION TO FRANCHISE ORDINANCE:

At the City's option, the Franchisee shall pay in advance or reimburse the City for expenses incurred in publication of notices, publication and codification of ordinances, and photocopying of documents arising from the negotiation and adoption of this Franchise Ordinance. None of the City's expenses reimbursed by the Franchisee under this section shall be surcharged against Durango rate payers. Nothing contained in this section shall limit the Franchisee's indemnification obligation to the City under Section 25 of this ordinance.

SECTION 28. BREACH OF CONTRACT:

In the event the Franchisee fails to fulfill a substantial obligation under this ordinance after notice of default and a reasonable period within which to cure said default, the City shall have a breach of contract claim against the Franchisee, in addition to any other remedy provided by law or elsewhere in this Franchise Ordinance.

SECTION 29. CONSENT OF CITY REQUIRED:

The Franchisee shall not sell, transfer or assign this Franchise or any rights under this Franchise to another, by stock exchange or otherwise, excluding the sale, transfer or assignment to a wholly-owned subsidiary or through corporate merger or reorganization of the Franchisee not involving a third-party, unless the City shall approve in writing of such sale, transfer or assignment of the rights herein created. Approval of the sale, transfer or assignment shall not be unreasonably withheld.

SECTION 30. 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 rights of the Franchisee in connection therewith, as provided by the Colorado Constitution and Colorado statutes, are hereby expressly reserved.

SECTION 31. NEGOTIATED PURCHASE PRICE OR CONDEMNATION AWARD:

Upon the exercise of the City's option to purchase Franchisee's facilities, the parties shall negotiate in good faith to determine a mutually acceptable purchase price pursuant to C.R.S. § 40-9.5-204. No value shall be given to this Franchise or to public rights-of-way. If the City and the Franchisee cannot reach agreement as to the purchase price or acceptable payment term within one hundred eighty (180) days after commencement of negotiations, the City may commence condemnation proceedings, and each party shall have the rights provided by law relating to condemnation; provided, however, no award shall be made for the value of this Franchise or public rights-of-way.

SECTION 32. CONTINUED COOPERATION BY FRANCHISEE:

In the event the City exercises its option to purchase or condemn Franchisee's facilities, the Franchisee agrees that it will continue to supply any service it supplies under this ordinance, in whole or in part, at the City's request. The Franchisee's facilities shall be available for continued service until nine (9) months after a final order is entered in a condemnation proceeding or the effective date of a purchase agreement between the parties; provided, however, said obligation to maintain the Franchisee's facilities shall not exceed a twenty-four (24) month period after the termination of this Franchise. The Franchisee shall continue to provide service pursuant to the terms of this ordinance for said twenty-four (24) months until the City has either purchased or condemned the Franchisee's facilities or alternative arrangements have been made to supply electricity to the City and its residents, whichever date shall

earlier occur. If Franchisee continues to provide service at the City's request after such purchase or condemnation, no Franchise fees shall be payable to the City and the City shall bear the expense of maintaining and repairing the facilities necessary for the provision of electric service to the City.

The Franchisee shall cooperate with the City by making available then existing pertinent records which are not privileged to enable the City to evaluate the feasibility of acquisition by the City of the Franchisee's facilities. The Franchisee shall not be obligated to conduct studies or accrue data without reimbursement by the City, but will make such studies if reimbursed its cost for the same. The Franchisee shall take no action which could inhibit the City's ability to effectively or efficiently use the acquired facilities. At the City's request, the Franchisee shall supply electricity for use by the City in the City-owned system at a rate and pursuant to terms and conditions determined by the parties through good-faith negotiations.

SECTION 33. LIMITATIONS ON FRANCHISEE'S REMOVAL:

If at the time of termination of the Franchise granted under this ordinance no renewal has been negotiated between the City and the Franchisee, the Franchisee shall not be required nor shall it have a right to remove its facilities immediately from the public ways and public places. At the City's request and within a reasonable time not to exceed nine (9) months, the Franchisee shall remove from the public ways and public places, at the Franchisee's expense, all facilities belonging to the Franchisee located above the surface of the ground which are not purchased by the City at the termination of the Franchise. Further, the Franchisee, at the request of the City, shall remove, at the Franchisee's expense, all underground facilities which are not purchased by the City within nine (9) months after the receipt by the Franchisee of written notice from the official City representative that said underground facilities constitute a hazardous condition or interfere with the municipal use of the subsurface of said public ways and public places. After said removal all public property shall be restored by the Franchisee to its condition just prior to removal. The Franchisee need not remove any property from said public ways and public places which it shall continue to use and maintain pursuant to contractual arrangements with the City. The parties agree to negotiate in good faith all necessary terms and conditions regarding usage and/or removal of facilities.

SECTION 34. FORFEITURE:

If the Franchisee fails to perform any of the terms or conditions of this Franchise and such failure is not the result of a condition of force majeure, the City, acting by and through its Council, may determine, after notice to the Franchisee and hearing, that such failure is of a substantial nature. Upon receiving notice of such determination, the Franchisee shall have a reasonable time, not to exceed six (6) months within which to remedy the violations unless the parties otherwise agree in writing. If after such reasonable time, corrective actions have not been successfully taken, the City, acting by and through its Council, shall determine whether any or all of the rights and privileges granted the Franchisee under this Franchise shall be forfeited. Such determination shall be made by the Council after a hearing with notice

to the Franchisee and an opportunity to be heard. For the purposes of this section, the terms force majeure shall mean acts of God, strikes, lockouts, acts of public enemies, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, civil disturbances, explosions, inability with reasonable diligence to obtain materials, and any other causes not within the control of the party claiming a suspension, which by the exercise of due diligence, such party shall not have been able to avoid or overcome.

Any such declaration of forfeiture shall be subject to judicial review as provided by law. Nothing herein contained shall limit or restrict any legal rights that the City or the Franchisee may possess arising from any violation of this Franchise.

Upon forfeiture, the Franchisee shall continue to provide service to the City and its residents consistent with the obligations set forth in Section 32 of this Franchise Ordinance. If the Franchisee fails to provide such service, it shall be liable for damages to the City and its residents.

SECTION 35. RIGHT OF FIRST REFUSAL:

In the event the Franchisee at any time during the term of this Franchise proposes to sell or dispose of any of its real property located within the City or any of Franchisee's facilities, it shall grant to the City the right of first refusal with respect to the purchase of such property. The Franchisee shall obtain a qualified appraisal on any such property and the City shall have sixty (60) days within which to exercise the right of first refusal by giving written notice to the Franchisee. Should the City not provide the required written notice, the Franchisee may proceed to negotiate with others for the sale of such property provided that the Franchisee may not sell such property for an amount less than ninety-five percent (95%) of the appraised value without first providing the City an opportunity to purchase such property at such lesser price, in which event the City must notify the Franchisee in writing within thirty (30) days if it wishes to purchase such property. It is understood that nothing in this paragraph shall preclude the Franchisee from transferring real property or facilities to a subsidiary, affiliate, or corporate entity resulting from the merger, consolidation or reorganization of Franchisee, without first according the City the rights referred to above, provided that if the transferee or successor proposes to sell or dispose of such property, it shall not do so without first affording the city such rights.

SECTION 36. CHANGING CONDITIONS:

Should the Franchisee, during the term of this Franchise, accept or enter into a franchise with any other Colorado municipality which contains terms, conditions or provisions different from those of this Franchise, the Franchisee shall offer the City such different terms, conditions, or provisions, which may be accepted by the City and become effective and binding upon the parties once submitted to and approved by a vote of the registered electors of the City at the next municipal election.

SECTION 37. AMENDMENT TO FRANCHISE:

At any time during the term of this Franchise, the City through its City Council, or the Franchisee may propose amendments to this Franchise by giving thirty (30) days written notice to the other of the proposed amendment or amendments 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 amendments.

No amendment or amendments to this Franchise shall be effective until mutually agreed upon by the City and the Franchisee and thereafter submitted to and approved by a vote of the registered electors of the City, if required under applicable law. Such election shall be at the expense of the respective party proposing such amendments.

SECTION 38. NO WAIVER:

Neither the City nor the Franchisee shall be excused from complying with any of the terms and conditions of this Franchise 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.

SECTION 39. SUCCESSORS AND ASSIGNS:

The rights, privileges, franchises and obligations granted and contained in this ordinance shall inure to the benefit of and be binding upon the Franchisee, its successors and assigns as the same may succeed to the rights of the Franchisee pursuant to Section 29 of this ordinance.

SECTION 40. REPRESENTATIVES:

Both parties shall designate from time to time, in writing, representatives who will be the persons to whom notices shall be sent regarding any action to be taken under this ordinance. Notice shall be in writing and forwarded by certified mail or hand delivery to the persons designated at the addresses hereinafter stated, unless the names 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 to the City Manager and the Franchisee's General Manager. Currently, the addresses for the respective parties are as follows:

FRANCHISEE:

Chief Executive Officer
P. O. Box 2750
Durango, Colorado 81302

CITY:

City Manager
949 East 2nd Avenue
Durango, Colorado 81301

SECTION 41. REIMBURSEMENT OF COSTS:

In the event either party institutes litigation against the other for a breach of this ordinance or for an interpretation of this ordinance, the prevailing party shall be entitled to recover in conjunction with such litigation all costs related thereto, inclusive of reasonable attorney's fees.

SECTION 42. SEVERABILITY:

Should any one or more of the provisions of this ordinance be determined to be illegal, invalid, or unenforceable, 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 replacement provisions that will achieve the original intent of the parties hereunder with respect to any provision which is held illegal, invalid, or unenforceable.

SECTION 43. ENTIRE AGREEMENT:

This ordinance constitutes the entire agreement of the parties. There have been no representations made other than those contained herein.

SECTION 44. THIRD-PARTIES:

Nothing herein contained shall be construed to provide rights to third-parties.

SECTION 45. CITY APPROVAL:

This grant of Franchise shall not become effective unless and until approved by a majority vote of the City Council and approved by a vote of the registered electors of the City.

SECTION 46. FRANCHISEE APPROVAL:

The Franchisee shall, within fifteen (15) days after approval of this Franchise by a vote of the registered electors of the City, verify its written approval of this Franchise and all of the terms and provisions set forth herein through execution by the Franchisee's President or other authorized officer of the Statement of Acceptance as hereinafter set forth. At the time of such execution, the Franchisee shall also deliver to the City a duly certified copy of a resolution adopted by the Franchisee's Board of Directors approving the terms and provisions of this Franchise and authorizing the corporate officer to execute the same on behalf of the Franchisee. If the Franchisee shall fail to timely accept the terms and provisions of this Franchise or to furnish the certified copy of the Board Resolution as hereinabove required, this Franchise shall, at the election of the City, become null and void.

Approved and adopted this _____ day of _____,

CITY OF DURANGO, COLORADO

City Clerk

Mayor

STATEMENT OF ACCEPTANCE

The foregoing Franchise is accepted and approved this _____ day of _____, 2011 with the express agreement that the City of Durango shall be held harmless from any and all liability, loss or damage arising out of the exercise by La Plata Electric Association, Inc., its successor and assigns, of any of the rights hereby conferred.

LA PLATA ELECTRIC
ASSOCIATION, INC.

Attest:

Title: _____

Title: _____