

CHAPTER 5

Franchises and Communication Systems

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ARTICLE I

Reserved

ARTICLE II

Electric Franchise

Sec. 5-2-10. Definitions.

For the purpose of this franchise agreement, the following words and phrases shall have the meanings given in this Section. When not inconsistent with 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 word *shall* is mandatory, and *may* is permissive. Words not defined in this Section shall be given their common and ordinary meaning.

Board or Board of Trustees refers to and is the legislative body of the Town of Fairplay, Park County, Colorado.

Company refers to and is the Public Service Company of Colorado, its successors, assigns, affiliates and subsidiaries.

Electric revenues refers to and is that portion of revenues which the Company receives from the sale of electricity.

Facilities refer to and are all apparatuses reasonably necessary for the Company to provide electric service into, within and through the Town, including but not limited to plants, works, systems, substations, transmission and distribution structures, lines, equipment, pipes, mains, conduit, transformers, underground lines, meters, meter reading devices, communication and data transfer equipment, control equipment, streetlights, wires, cables and poles.

Party or parties refers to and includes the Company and the Town, either singly or collectively as the context requires.

Public Utilities Commission or PUC refers to and is the Public Utilities Commission of the State of Colorado or other state agency succeeding to the regulatory powers of the Public Utilities Commission.

Residents refers to and includes all persons, businesses, industry, governmental agencies and any other entity whatsoever presently located or hereinafter to be located, in whole or in part, within the territorial boundaries of the Town.

Revenues refer to and are those amounts of money which the Company receives from its customers within the Town from the sale of electricity under rates authorized by the Public Utilities Commission to its customers within the Town and represents amounts billed under such rates as adjusted for refunds, net write-off of uncollectible accounts, corrections or regulatory adjustments. *Regulatory adjustments* refer to, by way of explanation but not limitation, credits, surcharges, refunds and pro forma adjustments pursuant to federal or state regulation.

Streets refer to and are streets, alleys, viaducts, bridges, roads, lanes and other public rights-of-way in the Town. *Streets* shall also include public easements and other public places within the Town that are suitable locations for the placement of facilities.

Town refers to and is the municipal corporation designated as the Town of Fairplay, Park County, Colorado. (Ord. 3 Art. 1, 2004)

Sec. 5-2-20. Grant of franchise.

(a) Grant of franchise.

(1) The Town hereby grants to the Company the right to use the streets within the Town to furnish, sell, transmit and distribute electricity to the Town and to all residents of the Town. The Town also hereby grants to the Company the right to acquire, construct, install, locate, maintain, operate and extend into, within and through the Town all facilities reasonably necessary to furnish, sell, transmit and distribute electricity within and through the Town. The rights granted in this franchise encompass the right to provide street lighting service to the Town. These rights shall extend to all areas of the Town as it is now constituted and to additional areas as the Town may increase in size by annexation or otherwise.

(2) If the boundaries of the Town are expanded during the term of this franchise, the Company shall extend service to residents in the expanded area at the earliest practicable time and in accordance with the Company's extension policy. Service to the expanded area shall be in accordance with requirements of the PUC and the terms of this franchise, including payment of franchise fees.

(3) The rights granted by this franchise are not, and shall not be deemed to be, granted exclusively to the Company, and the Town reserves the right to make or grant a similar franchise to any other person, firm or corporation.

(4) Except as otherwise specifically provided herein, the Town retains the right through the exercise of its police power to use, control and regulate the use of the streets and the space above and beneath said streets. The Town retains the right to impose such other regulations as may be determined by the Town to be necessary in the reasonable exercise of its police power to protect the health, safety and welfare of the public.

(b) Term of franchise. This franchise shall take effect upon its adoption and shall supersede any prior franchise grants to the Company by the Town. The term of this franchise shall be twenty (20) years. (Ord. 3 Art. 2, 2004)

Sec. 5-2-30. Franchise fee.

(a) Franchise fee. As consideration for the franchise rights granted herein, and in recognition of the fact that the grant to the Company of the right to use Town streets is a valuable right, the Company shall pay the Town a sum equal to three percent (3%) of all revenues received from the sale of electricity within the Town, excluding revenues received from the Town for the sale of electricity to the Town.

(b) Surcharge of franchise fees. The Company shall charge a franchise fee to all Town residents that use facilities of the Company in Town streets to obtain electricity. No franchise fee shall be charged to the Town for street lighting service or for electric service provided to the Town for its own consumption.

(c) Remittance schedule. Franchise fees that are collected from residents shall be remitted by the Company to the Town in monthly installments not more than thirty (30) days following the close of each month. All payments shall be made to the Town Clerk. In the event that either the Town or the Company discovers that there has been an error in the calculation of the franchise fee payment to the Town, the error shall be corrected in the next monthly payment subject to the following provisions: In the event an error by the Company results in an overpayment of the franchise fee to the Town in excess of five thousand dollars (\$5,000.00), credit for the overpayment shall be spread over the same period the error was undiscovered; if the overpayment is five thousand dollars (\$5,000.00) or less, credit shall be taken against the next payment. In no event shall either party be required to refund any over- or underpayment more than three (3) years from the date of the over- or underpayment.

(d) Audit rights; protection of confidential information. The Town Clerk, or his or her agent, shall have access to the metering records of the Company during normal business hours upon reasonable notice for the purpose of auditing to ascertain that the franchise fee has been correctly computed and paid. Except as provided in Subsection (f) below, all information obtained by the Town Clerk during a franchise fee audit shall be kept confidential and shall be utilized for the sole purpose of verifying that the franchise fee has been correctly computed and paid.

(e) Enforcement of Town sales and use tax laws. The Town may use the metered information obtained from franchise fee audits for the purpose of enforcing its sales and use tax laws. Upon request by the Town, the Company shall supply the Town with a list of all suppliers of electricity that utilize Company facilities within the Town streets to sell electricity to Town residents.

(f) Franchise fee payment in lieu of certain taxes and other fees. The Town accepts payment of the franchise fee by the Company in lieu of any occupation tax, occupancy tax, license tax or similar tax or fee the Town might charge the Company or its subcontractors for the privilege of doing business in the Town, for the use or occupation of Town streets or for the installation, operation and maintenance of Company facilities. Payment of the franchise fee does not exempt the Company from any lawful taxation upon its property or from any other tax not related to the franchise or the occupation or use of Town streets, including the payment of head taxes, sales taxes or other fees or taxes assessed generally upon businesses.

(g) Share of joint use payments. Within ninety (90) days following the close of each year, the Company shall pay the Town a sum equal to three percent (3%) of all revenues received from others for the placement of wires or other equipment on Company distribution poles and distribution conduit located in Town Streets. (Ord. 3 Art. 3, 2004)

Sec. 5-2-40. Supply, construction and design.

(a) Obligations regarding Company facilities. The Company shall install, maintain, repair, renovate and replace its facilities with due diligence in a good and workerlike manner. Company facilities shall not interfere with the Town's water mains, sewer mains or other municipal uses of the streets. The Company shall construct and maintain its facilities in such a way as to minimize interference with trees and other natural features. The Company shall install underground all newly constructed electric distribution lines serving new residential subdivisions. All other Company facilities may be installed above ground unless the Town or affected Town residents pay to the Company the additional costs incurred by the Company to construct, operate and maintain the facilities underground or as provided in Section 5-2-90 of this Article.

(b) Excavation and construction. All excavation and construction work performed by the Company shall be done in a manner that minimizes inconvenience to the public. All property disturbed by Company excavation or construction activities shall be restored by the Company at its expense to substantially its former condition.

(c) Relocation of Company facilities. The Company shall relocate, at its expense, facilities in the streets that interfere with a public project undertaken and paid for by the Town with public funds. The Town shall provide at its expense sufficient right-of-way for the Company to relocate its facilities. The Company shall relocate its facilities at the request of the Town or other person to avoid interference with other non-publicly-financed projects, but the expense of the relocation and the new right-of-way shall be paid in advance by the Town or by the person conducting the project and requesting the relocation. Relocation shall be completed within a reasonable time after a request and payment therefor is made (if applicable). In the event that the Town requests the Company to relocate the same facilities within five (5) years of completion of a prior relocation, the subsequent relocation shall be at the Town's expense. Underground facilities shall be relocated underground. Aboveground facilities shall be relocated above ground, unless the Town pays the additional cost of relocating aboveground facilities underground or as provided in Section 5-2-90 of this Article.

(d) Town not required to advance funds. Upon receipt of the Town's authorization for billing and construction, the Company shall extend its facilities to provide electricity to the Town for municipal uses within the Company's certificated service area without requiring the Town to advance funds prior to construction. Nothing in this Subsection shall release the Town from the obligation to pay for the extension of facilities once complete, in accord with the Company's electric tariffs on file with the Public Utilities Commission. (Ord. 3 Art. 4, 2004)

Sec. 5-2-50. Compliance.

(a) Compliance with applicable laws. The Company and all of its contractors shall comply with all applicable Town laws, ordinances and regulations. The Company shall require its contractors working in the streets to hold the necessary licenses and permits required by the Town.

(b) Compliance with Town requirements. The Company will comply with all Town building and zoning codes and requirements regarding curb and pavement cuts, excavating, digging and related construction activities.

(c) Inspection. The Town shall have the right to inspect any portion of the Company's facilities in the Town streets. The Company agrees to cooperate with the Town in conducting the inspection. (Ord. 3 Art. 5, 2004)

Sec. 5-2-60. Public Utilities Commission regulation.

(a) Compliance with orders by the Public Utilities Commission. The provision of electric service by the Company is regulated in whole or in part by regulatory agencies, including the Public Utilities Commission. The Company is obligated by law to comply with all lawful PUC orders, rules and regulations. The Town shall impose no obligation on the Company that interferes with the Company's ability to comply with lawful regulatory orders, rules and regulations.

(b) Certificates to exercise franchise rights. The Town agrees to assist the Company, if necessary, in obtaining PUC approval of a certificate to exercise the franchise rights conferred under this franchise,

including negotiating a change to any provision of this franchise agreement which the PUC may require in order to obtain the certificate. (Ord. 3 Art. 6, 2004)

Sec. 5-2-70. Town use of Company facilities.

(a) Town use of distribution poles. The Town shall have the right to attach, without paying a pole attachment fee, Town-owned police, fire and traffic control equipment, as long as such equipment is not used to produce revenue for any third party, to Company distribution poles within the Town in a manner that complies with the National Electric Safety Code and all other applicable laws, rules and regulations. All other attachments must be prescreened and approved by the Company, and the Company reserves the right to charge a reasonable fee for such attachments. The Town shall hold harmless and indemnify the Company for all liability associated with the Town's facilities on the Company's poles, including the payment of the Company's reasonable attorney and expert witness fees, if applicable. The Town's use of the Company's poles shall be in such a manner as not to constitute a safety hazard or to interfere with the Company's use of the poles. Any construction or reconfiguration that may, in the sole judgment of the Company, be required because of the Town's attachment of equipment to Company distribution poles shall be paid for by the Town.

(b) Trenches available for Town use. If the Company opens a trench to install its facilities, the Company shall provide advance notice to the Town to permit the Town to install Town facilities in the same trench at the Town's expense. The Town's installation of its facilities shall not interfere with the Company's facilities or delay the commencement or completion of the Company's construction project. (Ord. 3 Art. 7, 2004)

Sec. 5-2-80. Indemnification of the Town.

(a) Town held harmless and indemnified. The Company shall indemnify, defend and hold the Town harmless from and against all liability or damage and all claims or demands arising out of the Company's operations within the Town pursuant to this franchise. The Town shall provide prompt written notice to the Company of the pendency of any claim or action against the Town arising out of the exercise by the Company of its franchise rights. The Company shall be permitted, at its own expense, to appear and defend or to assist in defense of such claim. The Company shall not be obligated to indemnify, defend or hold the Town harmless to the extent any claim, demand or lien arises out of or in connection with any intentional or negligent act or failure to act of the Town or any of its officials, agents or employees, or to the extent that any claim, demand or lien arises out of or in connection with the use of Town facilities.

(b) Payment of ordinance expenses. The Company shall reimburse the Town for actual out-of-pocket expenses incurred in publishing notices and ordinances and conducting elections related to this franchise. (Ord. 3 Art. 8, 2004)

Sec. 5-2-90. Underground conversion of overhead electric facilities.

(a) Underground conversion at expense of Company.

(1) The Company shall allocate an annual amount, equivalent to one percent (1%) of the preceding year's electric revenues derived by the Company from the distribution of electricity to customers within the Town, for the purpose of undergrounding its overhead electric distribution facilities in the Town, provided that the undergrounding shall extend for a minimum distance of one (1) block or seven hundred fifty (750) feet, whichever is less, or as may be mutually agreed by the parties. No relocation expenses which the

Company is required to expend pursuant to Subsection 5-2-40(c) of this Article shall be charged to this allocation.

(2) Any unexpended portion of the one percent (1%) of such electric revenues shall be carried over to succeeding years, and, in addition, upon request by the Town, the Company agrees to anticipate amounts to be available under the preceding paragraph for up to three (3) years in advance. Any amounts so advanced shall be charged against otherwise available amounts which would have been expended in succeeding years until such advance is eliminated.

(3) The final decision as to which projects are selected for undergrounding rests with the Town subject to the provisions of this Section. The specific scheduling of such projects rests with the Company, which shall make every reasonable effort to complete such projects within the time requested by the Town.

(b) Relocation expenses not charged against remaining balances. No relocation expenses which the Company is required to expend pursuant to Subsection 5-2-40(c) of this Article shall be charged against the balance remaining in the existing underground fund, nor shall the Town be responsible for such costs.

(c) System-wide undergrounding costs. If the Public Utilities Commission requires a system-wide program or programs of undergrounding electric distribution facilities at the Company's expense, the Town shall not be responsible for paying the costs of any undergrounding pursuant to such program.

(d) Review of undergrounding projects. The Town and the Company shall mutually plan in advance the scheduling of approved undergrounding projects to be undertaken according to this Section as part of the review and planning for other Company construction projects. The Town and the Company agree to meet as required to review the progress of the current undergrounding projects designated by the Town and to review planned future undergrounding projects. The Company need not approve an undergrounding project if it would create a significant risk to safety or operational integrity, but it shall provide to the Town written notification of any such nonapproval and the basis for nonapproval.

(e) Cooperation with other utilities. When undertaking a project of undergrounding, the Town and the Company shall work with other utilities or companies which have overhead lines to attempt to underground all such lines as part of the same project. When other utilities or companies are placing their lines underground, the Company shall cooperate with those utilities and companies and undertake to underground Company facilities as part of the same project where financially, technically and operationally feasible. Notwithstanding the foregoing, nothing in this Subsection shall require the Company to pay for undergrounding of its distribution lines except as required by Subsection 5-2-40(c) of this franchise. (Ord. 3 Art. 9, 2004)

Sec. 5-2-100. Transfer of franchise.

(a) Consent of Town required. The Company shall not transfer or assign any rights under this franchise to an unaffiliated third party, except by merger with such third party or except when the transfer is made in response to legislation or regulatory orders, unless the Town shall approve in writing such transfer or assignment. Approval of the transfer or assignment shall not be unreasonably withheld.

(b) Transfer fee. In order that the Town may share in the value this franchise adds to the Company's operations, any transfer or assignment of rights under this franchise requiring the approval of the Town under Subsection (a) above shall be subject to the condition that the transferee shall promptly pay to the Town a

transfer fee, which shall be calculated by multiplying one million dollars (\$1,000,000.00) by a fraction of which the numerator equals the then population of the Town which is served by the Company, and the denominator equals the then population of the City and County of Denver. Such transfer fee shall not be recovered from a surcharge placed only on the rates of Town residents. (Ord. 3 Art. 10, 2004)

Sec. 5-2-110. Municipalization.

(a) Town's right to condemn. During the term of this franchise, the Town agrees not to condemn the facilities of the Company or to otherwise restrict the Company's opportunity to conduct business in the Town, except as specifically provided in Section 31-15-707, C.R.S.

(b) Operation of a municipal utility or competing distributors. If, during the term of this franchise, the Town operates a municipal electric utility or issues to another entity a franchise to use the streets for the placement of electric facilities, the Company shall no longer be required to collect and pay franchise fees under Section 5-2-30 of this Article unless substantially the same terms and conditions apply to the service provided by the Town or by the other entity. In addition, the following subsections of this franchise shall no longer apply to the Company unless substantially the same provisions are applicable to all other electric distributors, including the Town: Subsections 5-2-30(c), (d), (e) and (g); 5-2-40(a), (b) and (c); 5-2-50(a), (b) and (c); 5-2-70(a) and (b); 5-2-90(a), (d) and (e); and 5-2-100(a) and (b). (Ord. 3 Art. 11, 2004)

Sec. 5-2-120. Uncontrollable forces.

Neither the Town 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 uncontrollable forces, which shall include but not be limited to accidents, breakdown of equipment, shortage of materials, acts of God, floods, storms, fires, sabotage, terrorist attack, strikes, riots, war, labor disputes, forces of nature, the authority and orders of government and other causes or contingencies of whatever nature beyond the reasonable control of the party affected, which could not reasonably have been anticipated and avoided. (Ord. 3 Art. 12, 2004)

Sec. 5-2-130. Breach.

(a) If the Company fails to perform any of the terms and conditions of this franchise and such failure is within the Company's control, the Town may notify the Company of the specific failure and shall allow the Company a reasonable time within which to remedy the failure. If the Company does not remedy the failure and the failure is of a substantial nature, the Board of Trustees may terminate this franchise after a full evidentiary hearing. Termination of the franchise shall be by no less than seventy-five percent (75%) vote of all members of the Board of Trustees.

(b) Judicial review. Any such termination of the franchise shall be subject to judicial review as provided by law. (Ord. 3 Art. 13, 2004)

Sec. 5-2-140. Amendments.

This franchise may be amended only by a writing signed by both the Company and the Town, which is approved in the same manner as is required for the passage of the ordinance codified herein. (Ord. 3 Art. 14, 2004)

Sec. 5-2-150. Miscellaneous.

(a) Successors and assigns. The rights, privileges, franchises and obligations, in whole or in part, granted and contained in this Article shall inure to the benefit of and be binding upon the Company, its successors, assigns, affiliates and subsidiaries.

(b) Third parties. Nothing contained in this franchise shall be construed to provide rights to third parties.

(c) Representatives. Both parties shall from time to time designate, in writing, representatives for the Company and the Town to whom notices shall be sent regarding any action to be taken under this Article. Notice shall be delivered in person or by certified mail to the persons and addresses hereinafter stated, unless the persons and addresses are changed at the written request of either party. Until any such change shall be made, notices shall be sent as follows:

To the Town:

Town of Fairplay
Attn: Town Administrator
400 Front Street
PO Box 267
Fairplay, CO 80440-0267

To the Company:

Cynthia Evans
Vice President
Public Service Company of Colorado
1225 17th Street, Suite 900
Denver, CO 80202

(d) Surcharge to Town residents. The Company shall be permitted to surcharge to residents of the Town the franchise fee payments it makes to the Town. The Company shall be permitted to surcharge to residents of the Town any other payments it makes to the Town only to the extent and in the manner permitted by law or as otherwise ordered by the PUC.

(e) Severability. Should any one (1) or more provisions of this franchise be determined to be illegal or unenforceable, all other provisions nevertheless shall remain effective; provided, however, that the parties shall forthwith enter into good-faith negotiations and proceed with due diligence to draft a substitute term that will achieve the original intent of the parties hereunder.

(f) Entire agreement. This franchise constitutes the entire agreement of the parties with respect to the matters contained herein and supersedes any and all prior written or oral agreements, negotiations, correspondence, understandings and communications with respect to this franchise.

(g) Headings for reference only. The headings in this Article are for reference only and convey no substantive rights or impose no substantive obligations on the parties.

(h) Responsibility for language. The Town and the Company hereby acknowledge that each bears coextensive and identical responsibility for the language in this franchise. In case of ambiguity, there shall be no presumptions based upon responsibility for drafting this franchise.

(i) No waiver of rights. Neither the Town nor the Company waives any rights under the statutes and constitution of the State or of the United States except as otherwise specifically set forth herein.

(j) Prevailing party. In any judicial or administrative action to enforce any of the terms or conditions of this franchise, the prevailing party shall be entitled to recover its costs and expenses incurred in such action, including reasonable attorney fees.

(k) Approval of franchise. The Company shall promptly file, in writing, its acceptance of this franchise and of any amendment of this franchise following the Town's final approval of the same. The failure to file such an acceptance within forty-five (45) days of said final adoption shall be deemed an acceptance of such franchise or amendment thereof. (Ord. 3 Art. 15, 2004)

ARTICLE III

Emergency Telephone Service

Sec. 5-3-10. Charge imposed.

There is hereby imposed, pursuant to Section 29-11-101, et seq., C.R.S., upon all telephone exchange access facilities within the Town, an emergency charge in an amount not to exceed two percent (2%) of the tariff rate as approved by the Public Utilities Commission, or seventy cents (\$0.70) per line, whichever is less. Upon recommendation of the Emergency Telephone Service Authority, the Board of Trustees may, by resolution, raise or lower the emergency telephone charge, but in no event shall such charge exceed the amount of two percent (2%) of the tariff as approved by the Public Utilities Commission or seventy cents (\$0.70) per line, whichever is less. (Ord. 1, 1990 §3; Ord. 3, 1997 §3)

Sec. 5-3-20. Collection authorized.

Telephone service suppliers providing telephone service in the Town are hereby authorized to collect the emergency telephone charge imposed by this Article in accordance with Section 29-11-101, et seq., C.R.S. (Ord. 1, 1990 §4)