

ORDINANCE NO. 7
2010 - 7

AN ORDINANCE OF THE TOWN OF OPHIR, COLORADO, GRANTING A FRANCHISE TO SAN MIGUEL POWER ASSOCIATION, INC., TO OPERATE AN ELECTRIC POWER UTILITY WITHIN THE TOWN OF OPHIR, AND FIXING THE TERMS AND CONDITIONS THEREOF

BE IT ORDAINED BY THE GENERAL ASSEMBLY OF THE TOWN OF OPHIR, COLORADO, as follows:

ARTICLE 1
TITLE AND DEFINITIONS

- 1.1 This Ordinance shall be known and may be cited as the "San Miguel Power Association Franchise Ordinance". It is sometimes herein referred to as this Ordinance or Franchise.
- 1.2 For the purpose of this Franchise, the following words and phrases shall have the meaning given in this article. When not inconsistent with context, words used in the present tense include the future tense, words in the plural 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 article shall be given their common and ordinary meaning.
- 1.3 "Town" refers to and is the municipal corporation designated as the Town of Ophir, San Miguel County, Colorado, and is the grantor of rights under this Franchise.
- 1.4 "SMPA" refers to and is San Miguel Power Association, Inc., and is the grantee of rights under this Franchise.
- 1.5 "General Assembly" refers to and is the legislative body of the Town.
- 1.6 "Facilities" refer to and are all facilities reasonably necessary to provide electric service into, within and through the Town, including but not limited to substations, transmission and distribution structures, lines, wires, electrical equipment, transformers, underground lines, meters, meter reading devices, control equipment, street lights, wires, cables and poles.
- 1.7 "Public Utilities Commission" or "PUC" or "Commission" refers to and is the Public Utilities Commission of the State of Colorado or other governmental body succeeding to the regulatory powers of the Public Utilities Commission.
- 1.8 "Residents" refer to and include all persons, businesses, industry, governmental agencies, and any other entity whatsoever, presently located or to be located, in whole or in part, within the territorial boundaries of the Town.

- 1.9 “Revenues” refer to and mean those gross revenues which SMPA receives from sale of electricity to Residents.
- 1.10 “Streets” refer to and are the rights of way of streets, alleys, viaducts, bridges, roads, lanes, public utility easements, and other public rights-of-way in the Town, excluding any such property which is not legally available for the use thereof by SMPA. “Within the Streets” shall mean upon, above, under, across, along and within said Streets.
- 1.11 “Public Utility Easement” is any easement dedicated on a subdivision plat, dedicated to, or owned or controlled by the Town or dedicated to the public, which is legally available for Facilities, by its terms.
- 1.12 “Franchise Fee” is defined in Section 4.1(B) of Article 4.

ARTICLE 1.5

RECITALS

- 1.5.1 The Ophir General Assembly has authority and discretion to grant franchises for the use of public streets and rights-of-way relevant and necessary for the delivery of public utility uses within the Town. Article XXV of the Colorado Constitution preserves to local government the exercise of "reasonable police and licensing powers". C.R.S. 40-5-101(3) provides in pertinent part: "Except as otherwise provided in section 29-20-108, C.R.S. on or after August 8, 2005, no public utility shall construct or install any new facility, plant, or system within the territorial boundaries of any local government unless the construction, or installation complies with the zoning rules, resolutions, or ordinances of the local government applicable to the property on which the facility, plant, or system is to be constructed or installed."
- 1.5.2 SMPA operates its electric utility and distributes electrical energy to Residents within (and without) the corporate limits of the Town.
- 1.5.3 SMPA desires to pursue its in-Town operations under the auspices of a duly-authorized franchise, as provided by law.
- 1.5.4 The Town desires to grant an electrical power utility franchise and obtain payment of a franchise fee as provided in this Agreement in consideration for the use by SMPA of those streets, alleys and other public ways used by SMPA in distributing and transmitting electrical energy in the Town.
- 1.5.5 In 1998 the Town and SMPA entered into a franchise pursuant to Ordinance No. 88-1.
- 1.5.6 The Town and SMPA desire to replace said franchise as more fully set forth herein.

ARTICLE 2
GRANT OF FRANCHISE

2.1 Grant of Franchise.

- (A) The Town hereby grants to SMPA, for the period specified, subject to the conditions, terms, and provisions contained in this Franchise, a non-exclusive right, and SMPA hereby assumes the obligation to furnish, sell, and distribute electricity to the Town and to all Residents of the Town. Subject to the conditions, terms, and provisions contained in this Franchise, the Town also hereby grants to SMPA a non-exclusive right, and SMPA hereby assumes the obligation, to acquire, construct, install, locate, maintain, operate, and extend into, within and through the Town all Facilities reasonably necessary to furnish, sell, and distribute electricity within and through the Town. The Town also hereby grants to SMPA a non-exclusive right, and SMPA hereby assumes the obligation, to make reasonable use of the Streets as may be necessary to carry out the terms of this Franchise subject to the Town's prior right of usage for reasonable municipal purposes and subject to applicable laws, ordinances, and regulations. These rights and obligations shall extend to all areas of the Town as it is now or hereafter constituted.
- (B) The rights granted by this Franchise are not, and shall not be deemed to be granted exclusively to SMPA, and the Town reserves the right to make or grant a similar franchise to any other person, firm, or corporation as allowed by law. However, no such use or similar franchise granted by the General Assembly will give any other party the rights to use or occupy the Facilities installed or owned by SMPA.
- (C) The Town retains the right to use, control, and regulate, through the exercise of its police power, the use of the Streets; and the Town retains the right to impose such other regulations as may be determined by the Town to be necessary in the exercise of the police power to protect the health, safety, and welfare of the Town.
- (D) Neither the Town nor SMPA waives any rights under the constitution of the State of Colorado or of the United States or the Home Rule Charter of the Town of Ophir except as otherwise specifically set forth herein.
- (E) This Franchise constitutes a valid and binding contract between SMPA and the Town. In the event that the Franchise Fee specified herein is declared illegal, unconstitutional, or void for any reason by any court or other proper authority, SMPA shall be contractually bound to collect and pay monthly rental fees to the Town in an aggregate amount that would be, as nearly as practical, equivalent to the amount which would have been paid by SMPA as the Franchise Fee hereunder as consideration for use of the Town's Streets.

- (F) The rights and obligations provided for in this Franchise encompass street lighting service to the Town, and the provisions of this Franchise apply with full and equal force to the street lighting service provided by SMPA.

ARTICLE 3 TERM OF FRANCHISE

- 3.1 Term of Franchise. This Franchise shall take effect upon its adoption and shall supersede any prior Franchise, including but not limited to Ordinance No. 88-1 passed on March 22, 1988. Unless terminated prior to thirty (30) years in accordance with other provisions as contained herein, the term of this Franchise shall be for thirty (30) years, or the duration of the Final Town Surcharge imposed pursuant to Article 4 below plus one year, whichever is shorter.

ARTICLE 4 FRANCHISE FEE

- 4.1 Franchise Fee.

- (A) In consideration for the Franchise rights granted herein, which provide, among other things, for SMPA's use of the Streets, which are valuable public properties acquired and maintained by the Town at great expense to its Residents, and in recognition that the grant to SMPA of the use of those Streets, and of the right to provide service to the Town's Residents, are valuable rights, SMPA shall collect and pay the Town the sums provided in this Section. Except as specified in this Franchise, payment of the Franchise Fee shall not exempt SMPA from any other lawful taxes or fees; however, the Franchise Fee provided for herein shall constitute the exclusive monetary payment by SMPA to the Town for SMPA's use and occupancy of the Streets except as specifically provided herein.
- (B) Notwithstanding the foregoing Section 4.1(A), initially SMPA shall not collect and pay the Town the Franchise Fee. However, at any time, the Town may, upon ninety (90) days written notice to SMPA, based upon proper authorization by the General Assembly, elect to impose the Franchise Fee in an amount equal to a percentage of Revenues, such percentage to be determined by the Town. In such case, SMPA shall, upon the expiration of the ninety (90) day notice period, collect and pay to the Town, the Franchise Fee in accordance with the provisions of this Article 4.
- (C) A transaction or arrangement between SMPA and any third party which has the effect of circumventing payment of the Franchise Fee or evasion of payment of Franchise Fee by non-collection, non-reporting, or any other means which evade the actual collection of Revenues by SMPA is prohibited.

(D) No acceptance of payment by the Town from SMPA shall be construed as an agreement that the amount paid is the correct amount, nor shall acceptance be construed as a release of any claim of which the Town may have for additional sums due and payable under this Franchise.

4.2 Remittance Schedule. SMPA shall remit the Franchise Fee to the Town quarterly within 60 days of each calendar quarter. All payments shall be made to the Town. In the event that either the Town or SMPA discovers that there has been an error in the calculation of the Franchise Fee, the error shall be corrected in the next quarterly payment; except that, in the event an error by SMPA results in an overpayment of the Franchise Fee to the Town, and said overpayment is in excess of Five Thousand Dollars (\$5,000), credit for the overpayment shall be spread over the same period the error was undiscovered. If the overpayment is less than Five Thousand Dollars (\$5,000), credit shall be taken against the next payments. In no event shall the Town be required to refund any overpayment made as a result of a SMPA error which occurred more than three (3) years prior to the discovery of SMPA error. Underpayments shall be subject to 1 ½ % interest per month until paid in full.

4.3 Franchise Fee Payment not in Lieu of Permit or Other Fees. Payment of the Franchise Fee by SMPA is accepted by the Town in lieu of any utility occupation tax or any rental fee, for SMPA's use or occupation of Town Streets, or for the installation, operation and maintenance of SMPA Facilities. Payment of the Franchise Fee does not exempt SMPA from any other lawful tax or fee, including any fee for an excavation permit, street cut permit, or similar requirement, or sales and use taxes and general *ad valorem* property taxes.

4.4 Surcharge Overview: Town Surcharge and Regional Surcharge. In order to partially fund the incremental additional costs of underground construction of approximately nine (9) miles of a new 115kV Nucla-Telluride Transmission Line across portions of Specie and Wilson Mesas (the "Project") proposed by Tri-State Generation & Transmission Association, Inc. ("Tri-State"), SMPA will impose an underground surcharge on all Residents (the "Town Surcharge") and all of SMPA's customers within the Regional Surcharge Area, as hereinafter defined (the "Regional Surcharge"). The Town Surcharge is calculated as a percentage of revenue of each customer's total bill, which methodology is also to be applied to SMPA's other customers who will be subject to the surcharge within the Regional Surcharge Area (as hereinafter defined). The regional surcharge area (the "Regional Surcharge Area") is roughly defined as follows: the Towns of Telluride, Mountain Village, Ophir, and Sawpit, as well as that portion of San Miguel County described as the eastern portion of unincorporated San Miguel County, from the top of Lizard Head Pass (the Dolores County line) through the Trout Lake/San Bernardo area, the Telluride region, and down valley through the Placerville area to the Specie Creek bridge, as well as the Ilium Valley, and Specie, Wilson, and Sunshine Mesas. SMPA's ratepayers located on Hastings Mesa would not be served by the proposed Nucla-Telluride 115kV transmission line and, therefore, would not be subject to the proposed

Regional Surcharge.

- 4.5 Town Surcharge Calculation and Implementation. The Town Surcharge shall be based on a percentage of the revenue for the total bill for each account. SMPA shall implement the Town and Regional Surcharge with a retroactive effective date of July 29, 2010. In no event, however, shall SMPA implement and assess Residents with the Town Surcharge unless and until the Regional Surcharge is implemented and assessed to all applicable customers subject to the Regional Surcharge, as identified in this Article 4.
- 4.6 Initial Town Surcharge Calculation. The Regional Surcharge and the Town Surcharge shall be determined based on the actual incremental costs associated with the Project. It likely will require at least two (2) years of construction to completely construct and energize the transmission line, therefore Tri-State's final costs and the surcharge ultimate contribution to the underground construction costs will not be known until the later part of 2012 at the earliest. As a result, SMPA shall use an initial estimated yearly debt service amount (the "Initial Yearly Debt Service Amount") for the Regional Surcharge of \$930,485. Based on 2007 SMPA revenue data and an estimated SMPA Initial Yearly Debt Service of \$930,485, the Initial Town Surcharge and the Initial Regional Surcharge would be 7.47411% of a current SMPA utility bill (the "Initial Town Surcharge" and the "Initial Regional Surcharge"). In the event of growth in the Regional Surcharge Area and the Town that should result in a collection of an amount in excess of the projected Initial Yearly Debt Service Amount, SMPA shall apply this additional yearly surcharge revenue to pay down the principal on the Regional Surcharge debt at the time the Project is complete, as determined by Tri-State. Revenue from the Initial Town Surcharge and the Initial Regional Surcharge shall be deposited into a SMPA controlled cash management interest bearing escrow account until implementation of the Final Town Surcharge and Final Regional Surcharge, as discussed below. If the Project is not implemented SMPA shall refund (to its ratepayers who paid the funds) the funds accrued in the escrow account, including any and all interest accrued on the same. SMPA shall provide the Town with regular statements of the escrow account. The Initial Town Surcharge and the Initial Regional Surcharge shall continue to be imposed on Residents until such time as SMPA and Tri-State have an approved and audited final cost figure for the Project. This approved and audited final cost figure for the completed Project, less any pre-payment as discussed above, shall determine a new Final Annual Debt Service (the "Final Annual Debt Service"). This Final Annual Debt Service calculated over the term of the debt service set by Tri-State, along with an interest rate as set by Tri-State, and the then current annual SMPA revenues in the Surcharge Area, shall determine the Final Town Surcharge and the Final Regional Surcharge. This Final Town Surcharge shall be provided to the Town pursuant to the notice provisions of Article 17.4 of this Franchise.
- 4.7 Final Town Surcharge Calculation. When the audited final Project cost figures, along with the permanent financing for the surcharge portion of the underground construction costs, have been definitively determined, SMPA shall convert from collecting the Initial Town Surcharge to a Final Town Surcharge (the "Final Town Surcharge") and Final Regional Surcharge (the "Final Regional Surcharge"). Notice of SMPA's conversion

from the Initial Town Surcharge to the collection of the Final Town Surcharge shall be provided to the Town pursuant to the notice provisions of Article 17.4 of this Franchise. Similar to the Initial Town Surcharge, the Final Town Surcharge shall be based on the Final Annual Debt Service, as discussed in paragraph 4.6, divided by the overall yearly revenue that SMPA receives from the entire Regional Surcharge Area. Each subsequent year after the imposition of the Final Town Surcharge and the Final Regional Surcharge, SMPA shall provide year end revenue data by March 1 of the following year and for subsequent years. Any excess revenues collected via the Initial Town Surcharge, the Final Town Surcharge, the Regional Surcharge and the Final Regional Surcharge, resulting from the growth of SMPA system revenue, will be applied to the principal of the Regional Surcharge debt, in order to shorten the term of the loan and save the Regional Surcharge Area customers interest expense.

- 4.8 Town Surcharge Exceeding the Duration of the Franchise. SMPA may need to collect the Final Town Surcharge and the Final Regional Surcharge beyond the term of this Franchise to fully satisfy the surcharge share of its contribution to the Project. Upon subsequent negotiations to renew this Franchise, the Town will consider, in good faith, a franchise agreement with SMPA that would continue the collection of the Final Town Surcharge, if needed.
- 4.9 Surcharge Approval. In addition to the Town's approval of the imposition of the Town Surcharge, the Town specifically agrees that the Town Surcharge: (i) is not an unreasonable difference as to rates, charges, service or facilities under C.R.S. 40-9.5-106; (ii) is not unjust or unreasonable under C.R.S. 40-9.5-106; and (iii) is within SMPA's authority under C.R.S. 40-9.5-117.
- 4.10 Future Surcharges. No surcharges for the conversion of existing overhead facilities within the Town to underground locations shall be imposed within the Town without the prior written consent of the Ophir General Assembly to such conversion, which consent may be withheld in its sole and absolute discretion.

ARTICLE 5 MODIFICATION OF FRANCHISE FEE

- 5.1 Change of Franchise Fee and Other Terms. In recognition of the length of the term of the Franchise, and in further recognition of the possibility of legislative regulatory amendments which may allow for the wheeling of electricity through the Facilities, the parties agree that in the event of such regulatory amendments, or in any unexpected event which would result in a significant decrease in the Franchise Fee, SMPA and the Town agree to modify the computation of the Franchise Fee in accordance with Section 16.2 of Article 16.
- 5.2 Change of Franchise Fee. Once during each calendar year of the Franchise term the Town, upon giving ninety (90) days' notice to SMPA of its intention to so do, may review

and change the Franchise Fee the Town may be entitled to receive as a part of the Franchise. SMPA shall report to the Town within 60 days of the execution of a subsequent franchise or of any change of an existing franchise, which increases the franchise fee in any other municipality to which SMPA supplies electric service. If the Town decides the fee shall be changed within the Town, it shall provide for such change by ordinance, as discussed in 4.1(B).

ARTICLE 6 DISCLOSURE OF RECORDS

6.1 Town Information Rights.

- (A) The Town, or its designated representative or agent, shall have access to the books and records of SMPA during normal business hours upon reasonable notice for the purpose of ascertaining compliance with the terms of this Franchise. The Town may use such information for the purposes of enforcing its laws, ordinances, and regulations and negotiating amendments to the Franchise. Nothing herein shall exempt SMPA from any other requirements regarding the production of information as provided in the laws, ordinances and regulations of the Town.
- (B) To the extent not prohibited by law, SMPA shall supply the Town with all of the following information annually without cost to the Town:
 - (1) Annual reports, including but not limited to, its annual report to its consumers; and
 - (2) Annual financial summaries of the Revenues during the previous year; and
 - (3) SMPA shall prepare and submit to the Town a map showing the location of its system, showing location, incident to the distribution system, so far as such Facilities can reasonably be projected. The map shall be updated annually and shall be delivered to the Town Clerk's office with ten (10) days of written request by the Town. SMPA shall also submit the map on digital media. Such map may not be used for facility engineering or design purposes, and shall not take the place of formal line locates which shall be provided by SMPA upon written request.
- (C) To the extent allowable by law, SMPA shall supply the Town with all of the following information upon written request and at no cost to the Town:
 - (1) Copies of the official minutes of Board of Directors meetings; and

- (2) A summary of conversions and replacements within the Town which have been accomplished or are underway by SMPA, if applicable; and
 - (3) SMPA's plans for additional conversions and replacements within the Town, if applicable; and
 - (4) Copies of tariffs including but not limited to all tariffs, rates, surcharges, rules, regulations, and policies relating to service by SMPA to the Town and its Residents, and to other Towns for purposes of verifying compliance with Article 7.2, below; and
 - (5) Copies of supporting documentation for the calculation of the Franchise Fee; and
 - (6) An inventory of SMPA Facilities within the Town; and
 - (7) Annual and long-term reports for capital improvements planned within the Town.
- (D) The Town agrees that, except as permitted by law, it will not use the information for any purpose other than its intended use. The Town further agrees that, except as required by law, it will not release the information to any other person without prior written notice to SMPA and that information identified by SMPA as confidential or customer identification shall be redacted.

6.2 Enforcement of Town Ordinances. The Town may use the meter information obtained from audits for the purposes of enforcing its laws, ordinances, and regulations and negotiating amendments to the Franchise.

ARTICLE 7 RATES

- 7.1 General Provisions. Rates charged by SMPA for service hereunder shall be fair and reasonable. SMPA agrees that it shall be subject to all authority now or hereafter possessed by any regulatory body having jurisdiction to fix just, reasonable, and compensatory electric rates. SMPA further agrees that the system shall be so designed, constructed, and sources of electricity utilized as to provide the most economic development and favorable rate structure possible, taking into account deliverability of electricity, economics, load profiles, and other pertinent conditions.
- 7.2 Comparable rates. For each rate category within SMPA's service area, rates charged to customers within the Town shall be no higher than the lowest rates charged to SMPA's customers in the same rate category, excluding franchise fees, surcharges and other taxes, if applicable.

- 7.3 Rates applicable to Town Street Lighting and Town-owned facilities. Rates charged to the Town by SMPA for street lighting and Town-owned facilities shall be no higher than the lowest rates charged to SMPA's customers for the same rate category, excluding franchise fees, surcharges and other taxes, if applicable.

ARTICLE 8 CONSTRUCTION AND DESIGN

8.1 Reliability.

- (A) SMPA shall at all times take all reasonable and necessary steps to assure the reasonably continuous and adequate distribution of electricity to the Town and its Residents at the lowest reasonable cost consistent with the term of this Franchise. In addition, SMPA shall operate its Facilities pursuant to the highest practicable level of service quality and reliability in providing electricity to the Town and its Residents. SMPA recognizes that maintaining service reliability is a substantial obligation under this Franchise. Upon the Town's written request, SMPA will provide the Town copies of service reliability reports at no cost to the Town.
- (B) If the distribution of electricity to the Town or any resident of the Town is interrupted, SMPA shall take all necessary and reasonable actions to restore such distribution in the shortest practicable time. If the distribution of electricity is to be interrupted due to a planned outage, except in cases of emergency outage repair, SMPA shall take adequate reasonable efforts to notify its customers and the Town in advance. SMPA shall keep on file in its local office copies of its Rate Schedules, Standards for Service, Rules and Regulations, and Service Connection and Extension Policies concurrently in effect or filed with the PUC or other competent authority having jurisdiction in the premises, which copies shall be made available to the Town and its Residents, upon written request.
- (C) SMPA shall provide to the Town telephone numbers of SMPA's dispatch center that will permit the Town to obtain status reports from SMPA on a twenty four hour basis concerning interruptions of the distribution of electricity in any portion of the Town.

8.2 Obligations Regarding SMPA Facilities.

- (A) All work by SMPA shall be done in accordance with standards set by the Rural Utilities Service and United States Department of Agriculture, and performed in a good and workmanlike manner.
- (B) The installation, repair, or maintenance of SMPA Facilities shall not interfere with water facilities, sanitary or storm sewer facilities, communication facilities, or

other uses of the Streets. Interference with landscaping and other natural features shall be minimized.

- (C) SMPA shall promptly repair all damage to non- SMPA property caused by SMPA activities or Facilities. If such damage poses a threat to the health, safety, or welfare of the public or individuals, the Town may cause repairs to be made, and SMPA shall promptly reimburse the Town for the cost of such repairs.
- (D) All non-electrical work is subject to inspection by the Town and a determination by the Town that said work has been performed in accordance with all applicable laws, ordinances, and regulations of the Town. SMPA shall promptly perform reasonable remedial action required by the Town pursuant to any such inspection. It shall be a condition of the Town's approval that, for any Facility installed, renovated, or replaced after the effective date of this Franchise, SMPA shall provide the Town with as-built drawings of each such Facility in such formats and providing such details as reasonably requested by the Town. Such drawings may not be used for facility engineering or design purposes, and shall not take the place of formal line locates which shall be provided by SMPA upon written request.
- (E) The installation, renovation, relocation and replacement of any Facilities in the Streets by or on behalf of SMPA shall be subject to inspection and approval by the Town as to location. Such inspection and approval may include, but not be limited to, the following matters: location of Facilities in Streets; cutting and trimming of trees and shrubs; disturbance of pavements, sidewalks, and surfaces of Streets.
- (F) SMPA and all of its contractors shall comply with all applicable Town laws, ordinances, and regulations. SMPA shall require its contractors working in the Streets to hold the necessary licenses and permits required by the Town and other entities having jurisdiction.

8.3 Excavation and Construction. SMPA shall be responsible for obtaining all applicable permits, including any excavation, encroachment, or street cut permits, in the manner required by the laws, ordinances, and regulations of the Town. All public and private property whose use conforms to restrictions in public easements disturbed by SMPA construction or excavation activities shall be restored by SMPA at its expense to substantially its former condition according to then existing Town laws, ordinances, and regulations.

8.4 Location and Relocation of SMPA Facilities.

- (A) Except as located as of the date of this Franchise, the location of SMPA's Facilities shall be subject to the prior approval of the Town, shall be located to maximize the potential use of the right of way, minimize interference with the Town's use of the right of way and the Town's facilities, and conform to

requirements of Town standards and specifications.

- (B) If at any time the Town requests SMPA to relocate its Facilities, in order to allow the Town to make any use of Streets, or if at any time it shall become necessary or convenient, because of a change in the grade, by reason of the improving, repairing, constructing, or maintaining of any Streets, by reason of traffic conditions, or public safety, or by reason of installation of any type of Town utility facilities, project or other improvement, to move or change SMPA's Facilities within or adjacent to Streets in any manner, either temporarily or permanently, the Town shall endeavor to notify SMPA in writing at least 90 days in advance, except when impractical or in the case of emergencies, of the Town's intention to perform or have such work performed. SMPA shall thereupon, at its cost, accomplish the necessary relocation, removal or change within a reasonable time from the date of the notification, or immediately in the case of emergencies so long as necessary design and rights of way are completed. Upon SMPA's failure to accomplish such work, the Town may perform such work at SMPA's expense and SMPA shall reimburse the Town within 30 days after receipt of a written invoice therefore. Following relocation, all property negatively impacted by the activities of SMPA shall be restored to, at a minimum, the condition which existed prior to construction by SMPA at SMPA's expense, and revised as-built plans submitted to the Town.
- (C) The Town may require the relocation of Facilities which are improperly installed in a location different from that approved by the Town following the procedures set out in (B) above.
- (D) When requested by the Town or SMPA, representatives of the Town and SMPA shall meet to share information regarding anticipated Town projects that will require relocation of SMPA Facilities. Such meetings shall be for the purpose of providing both parties the opportunity to, in good faith, evaluate reasonable alternatives and/or cost saving measures in an attempt to minimize the fiscal impact upon SMPA from the proposed relocation, and establish timetables with anticipated commencement and completion dates.
- (E) Following relocation, all property negatively impacted by the activities of SMPA shall be restored to substantially its former condition by SMPA at its expense, in accordance with then existing Town laws, ordinances, and regulations.
- (F) Relocated Facilities shall be underground, unless exempted pursuant to Article 12. The Town will not require relocation solely to cause the undergrounding of Facilities.
- (G) SMPA may recover costs it incurs for relocation or undergrounding of Facilities when the work was ordered by the Town pursuant to paragraphs 8.4(B) or 12.1(B)(3), through an increase in the Franchise Fee that is retained by SMPA

instead of being paid to the Town ("Recovery"). The Recovery shall be amortized over five years without interest, or a longer or shorter period as is appropriate to avoid increases in excess of 10% to electric bills. SMPA shall consult with the Town concerning an appropriate Recovery schedule but the final decision shall be SMPA's. When the remaining term of this Franchise is insufficient to accommodate the Recovery amortization period, the term of this Franchise shall be automatically extended to encompass the Recovery schedule, provided that SMPA has notified Town of such anticipated Recovery schedule prior to imposition of the Recovery. SMPA shall provide the necessary financial records to the Town to allow it to monitor such Recovery. Upon receipt of an order from the Town to relocate or underground Facilities, SMPA shall provide a good faith estimate of the cost of such relocation or undergrounding ("Cost"). If the estimated Cost, plus the outstanding balance of any prior Recoveries, exceeds \$150,000, the Town agrees to pay the amount in excess of \$150,000 as so adjusted. If the actual Cost causes the balance of total Recoveries to exceed \$150,000, the Town shall not be responsible for such excess, and the Recovery shall include such excess.

- (H) SMPA shall report to the Town within sixty (60) days of the execution of a subsequent franchise or of any change of an existing franchise which includes terms that are more favorable to the Town than this Section 8.4.

8.5 Service to New Areas. If the boundaries of the Town are expanded during the term of this Franchise, SMPA shall extend service to Residents in the expanded area at the earliest practicable time and in accordance with SMPA's extension policy. Service to the expanded area shall be in accordance with the terms of this Franchise, including payment of Franchise Fees.

8.6 Town Not Required to Advance Funds. Upon receipt of the Town's authorization for billing and construction, SMPA shall extend its Facilities to provide electric service to the Town for municipal uses within the Town limits or for any major municipal facility outside the Town limits, and within SMPA certificated service area, without requiring the Town to advance funds prior to construction. Upon completion, the Town shall pay any invoice within 30 days of receipt.

8.7 Technological Improvements.

- (A) SMPA shall generally introduce and install, as soon as practicable, technological advances in its equipment and service within the Town when such advances are technically and economically feasible and are safe and beneficial to the Town and its Residents.
- (B) While maintaining flexibility in the provision of services, SMPA's system shall, at all times, be no less advanced than any other system operated by SMPA within SMPA's service area, taking into account deliverability of electricity, economics,

load profiles, and other pertinent conditions; provided, however, should an upgrade of the utility services provided to customers within the Town be requested by the Town, SMPA shall have the right to meet, confer, and negotiate with the Town concerning the economic practicality of such an upgrade, giving due consideration to the remaining term of the Franchise and other reasonable incentives. SMPA shall submit to the Town related information upon the Town's written request, including, but not limited to: a plan for provision of such services, or a justification indicating the reason such services are not feasible for SMPA's customers within the Town. SMPA retains the right to make the final decision as to the technological improvements or upgrades made by SMPA.

- (C) Scope of Activities Authorized By Franchise. The provisions of this Franchise apply specifically to electric services. Nothing in this Franchise precludes SMPA from engaging in any other lawful activities that are not subject to franchise ordinances.

8.8 Renewable Power/Energy Efficiency.

- (A) SMPA will continue with its efforts to promote power from renewable sources within or near the Town and will make power from renewable sources available for purchase to Town and its Residents, to the extent power from renewable sources is available to SMPA. To assist the Town in its efforts to promote power from renewable sources within the Ophir Valley and promote energy efficiency within the Town, SMPA shall contribute up to one hundred thousand dollars (\$100,000.00) over a 10 year period towards renewable energy and energy efficiency project or projects undertaken by the Town (the "Contribution"). The timing of the Contribution and the type of project or projects shall be determined solely by the Town. The Contribution will be reduced by SMPA Cost of Undergrounding as defined in Article 12.4 of this Franchise, subject to a maximum reduction of twenty-five thousand dollars (\$25,000.00).
- (B) In specific consideration of duration of the franchise term, and as settlement of issues relating to the prior franchise, SMPA agrees to deposit into an interest-bearing escrow account the sum of seventy-five thousand dollars (\$75,000), to securely fund a portion (and possibly all) of this Contribution. Interest shall accrue to the credit of SMPA, and the Town shall be a party to the escrow agreement with authorization to effect release of the escrow deposit and accrued interest following not less than sixty days (60) advance written notice to SMPA. The form of the escrow agreement shall be approved and the \$75,000.00 escrow deposit shall be delivered not less than sixty days (60) following execution of this Franchise. The escrow agent shall be located in San Miguel County. The parties shall equally share escrow costs.
- (C) In the event that the Town generates electrical power from sources located within the Ophir Valley and desires to utilize such electrical power in connection with

the operation of the Town's municipal facilities or equipment, SMPA agrees not to charge the Town a wheeling charge for transmission of such power.

ARTICLE 9 COMPLIANCE

- 9.1 Town Regulation. The Town expressly reserves, and SMPA expressly recognizes, the Town's right and duty to adopt, from time to time, in addition to the provisions herein contained, such laws, ordinances, and regulations deemed necessary by the Town in the exercise of its police power for the protection of the health, safety, and welfare. SMPA shall comply with all applicable laws, ordinances, and regulations of the Town, including but not limited to all Town building and zoning codes, and requirements regarding curb and pavement cuts, excavating, digging, and other construction activities.
- 9.2 Town Review of Plans. Prior to construction of any significant Facilities such as transmission lines and substations within the Town, or of a building or other structure within the Town, SMPA shall furnish to the Town the plans and a description of the proposed location of such Facilities, building, or structure. In addition, upon written request by the Town, SMPA shall assess and report on the impact of its proposed construction on the Town environment. Such plans and reports may be reviewed by the Town to ensure that all applicable laws, including building and zoning codes and air and water pollution requirements, are met, that aesthetic and good planning principles have been given due consideration, and that adverse impact on the environment has been minimized. SMPA shall comply with all regulatory requirements of the Town.
- 9.3 Inspection. The Town shall have the right to inspect, at all reasonable times, any portion of SMPA's electric system used to serve the Town and its Residents. SMPA agrees to cooperate with the Town in conducting the inspection to correct any safety issues affecting the Town's interest in a prompt and efficient manner. Said inspection shall be performed only by qualified inspectors working under a professional engineer's license.

ARTICLE 10 USE OF SMPA FACILITIES

- 10.1 Town Use. The Town shall be permitted to make all reasonable use of SMPA's underground conduits, distribution poles and street lighting poles for any Town purpose so long as such use complies with appropriate safety codes including SMPA's safety regulations. Said use shall be without cost to the Town so long as such use does not unreasonably interfere with SMPA's use or future use of its Facilities or create a hazard. The Town shall be responsible for all costs, including maintenance costs, associated with any modifications to SMPA's Facilities to accommodate the Town's use of such Facilities.

- 10.2 Non-Competitor's Use. SMPA shall allow telecommunications companies and/or cable companies who hold a franchise or encroachment permit from the Town to utilize SMPA's distribution poles and other suitable overhead structures or underground conduits for the placement of their facilities based upon SMPA's joint use agreements, so long as such terms and conditions are not inconsistent with SMPA's obligations under this Franchise. SMPA shall not be required to assume any liability nor to be put to any additional expense in connection with any such use; nor be required to permit any such use for the distribution of electricity. No such use shall be required if it would constitute a safety hazard or would unreasonably interfere with SMPA's use of the same.
- 10.3 Competitor's Use. If SMPA chooses, or is required by law, to transport electricity supplied by other entities over SMPA's Facilities to Town Residents, such transportation shall not be prohibited under this Franchise. SMPA shall periodically report to the Town a list of all entities for which SMPA is providing such transport services, and to the extent allowable by law the names and addresses of each such entity and each Town resident to whom electricity is transported, and the amount of electricity transported by SMPA for each such entity. Nothing in this Franchise shall preclude the Town from collecting from such entities or Residents all applicable taxes and fees required by the Town's laws, ordinances, and regulations.
- 10.4 Emergency Use. In the case of any emergency or disaster, SMPA shall, upon reasonable request of the Town, cooperate and upon mutual consent, make available its Facilities for emergency use. For purposes of this section, the terms "emergency" or "disaster" shall be defined as any period of time declared an emergency or disaster by appropriate Federal or State agencies. Such use of SMPA Facilities shall be of a limited duration and will only be allowed if the use does not interfere with SMPA's own use of its Facilities occasioned by such emergency or disaster. Such use of SMPA Facilities shall comply with all safety rules and regulations of SMPA. Notwithstanding the terms of Section 11.1 (B), the Town agrees to indemnify and hold harmless SMPA, its officers, employees, and insurers, from and against all liability, claims, and demands on account of injury, loss, or damage, including without limitation claims arising from bodily injury, sickness, disease, death, property loss or damage, or any other loss of any kind whatsoever, which arise out of or are in any manner connected with such use, if such injury, loss, or damage is caused in whole or in part by, or is claimed to be caused in whole or in part by, the act, omission, error, professional error, mistake, negligence, or other fault of the Town, any subcontractor or the Town, or any officer, employee, representative of the Town, or which arise out of any worker's compensation claim of any employee or the Town or of any employee of any subcontractor of the Town. The Town agrees to investigate, handle, respond to, and to provide defense for and defend against, any such liability, claims or demands at the sole expense of the Town, or at the option of SMPA, agrees to pay SMPA or reimburse SMPA for the reasonable defense costs incurred by SMPA in connection with any such liability claims or demands. The Town also agrees to bear all other costs and expenses related thereto, including court costs and attorney fees, whether or not any such liability claims or demands alleged are groundless, false, or fraudulent. The obligation of this section shall not extend to any injury, loss, or damages to the extent it is

caused solely by the act, omission, error, professional error, mistake, negligence, or other fault of SMPA, its officers, or its employees.

- 10.5 Trenches Available for Town Use. The Town and SMPA agree that it is in the best interest to the community to share and combine facilities in common trenches, ductways, or conduits, so long as such use does not create code violations or safety concerns. SMPA and Town hereby agree to work together to see that facilities are combined to minimize impacts to the community.
- 10.6 Underground Conduit. If SMPA installs new electric underground conduit or opens a trench or replaces such conduit, SMPA shall provide adequate advance notice of such activity to permit additional installation of similar conduit and pull wire for the Town and other overhead users at their cost. If the Town desires to have additional similar conduit and pull wire for its use, it will so notify SMPA and provide similar conduit and pull wire to SMPA at the Town's expense. SMPA agrees to install such conduit and pull wire for the Town, and the Town shall pay the prorated amount of SMPA's actual cost attributable to installing the Town's conduit and pull wire. "Actual cost" shall not include SMPA's cost of opening and closing the trench. SMPA shall not be liable for any damage for this conduit and pull wire subsequent to successful installation.

ARTICLE 11 INDEMNIFICATION OF THE TOWN

11.1 Town Held Harmless.

- (A) SMPA agrees to indemnify and hold harmless the Town, its officers, employees, insurers, and self-insurance pool, from and against all liability, claims, and demands on account of injury, loss, or damage, including without limitation claims arising from bodily injury, sickness, disease, death, property loss or damage, or any other loss of any kind whatsoever, which arise out of or are in any manner connected with this Franchise, if such injury, loss, or damage is caused in whole or in part by, or is claimed to be caused in whole or in part by, the act, omission, error, professional error, mistake, negligence, failure to comply with the terms and conditions of this Franchise, or other fault of SMPA, any subcontractor of SMPA, or any officer, employee, representative of SMPA, or which arise out of any worker's compensation claim of any employee or SMPA or of any employee of any subcontractor of SMPA. SMPA agrees to investigate, handle, respond to, and to provide defense for and defend against, any such liability, claims or demands at the sole expense of SMPA, or at the option of the Town, agrees to pay the Town or reimburse the Town for the reasonable defense costs incurred by the Town in connection with any such liability claims or demands. SMPA also agrees to bear all other costs and expenses related thereto, including court costs and attorney fees, whether or not any such liability claims or demands alleged are groundless, false, or fraudulent. The obligation of this Paragraph (A) shall not

extend to any injury, loss, or damages to the extent it is caused solely by the act, omission, error, professional error, mistake, negligence, or other fault of the Town, its officers, or its employees.

- (B) SMPA hereby waives any claim for damages to its Facilities against the Town, its officers and employees, except for damages caused by the negligence, recklessness, or the specific intent of the Town, its officers, employees, representatives or contractors.
- (C) SMPA agrees to procure and maintain, at its own cost, a policy or policies of insurance sufficient to insure against all liability, claims, demands, and other obligations assumed by SMPA pursuant to Paragraph (A). Such insurance shall be in addition to any other insurance requirements imposed by this Franchise or by law. Evidence of qualified self-insurance status may be substituted for the insurance required by this paragraph. SMPA shall not be relieved of any liability, claims, demands, or other obligations assumed pursuant to Paragraph (A) by reason of its failure to procure or maintain insurance, or by reason of its failure to procure or maintain insurance in sufficient amounts, durations, or types.
- (D) SMPA shall procure and maintain the minimum insurance coverages in the minimum amounts listed below. All coverages shall be continuously maintained to cover liability claims, demands, and other obligations assumed by SMPA pursuant to Paragraph (A). In the case of any claims-made policy, the necessary retroactive dates and extended reporting periods shall be procured to maintain such continuous coverage. The Town has the right, every five years, to require SMPA to increase the minimum CGL and comprehensive automobile coverage amounts by a reasonable amount to be determined by review of coverage requirements for similiar electrical cooperatives and municipalities.
 - (1) Worker's Compensation insurance to cover obligations imposed by applicable laws for any employee engaged in the performance of work under this Franchise, and employers' liability insurance with minimum limits of five hundred thousand dollars (\$500,000) each accident, five hundred thousand dollars (\$500,000) disease-policy limit, and five hundred thousand dollars (\$500,000) disease-each employee. Evidence of qualified self-insured status may be substituted for the worker's compensation requirements of this paragraph.
 - (2) Commercial general liability (CGL) insurance with minimum combined single limits of one million dollars (\$1,000,000) each occurrence and one million dollars (\$1,000,000) aggregate. The policy shall be applicable to premises and operations. The policy shall include coverage for bodily injury, broad form property damage (including completed operations), personal injury (including coverage for contractual and employee acts), blanket contractual, independent contractors, products, and completed

operations. The policy shall include coverage for explosion, collapse, and underground hazards. The policy shall contain a severability of interests provision. The policy shall name the Town as an additional insured.

- (3) Comprehensive automobile liability insurance with minimum combined single limits for bodily injury and property damage of not less than one million dollars (\$1,000,000) each occurrence and one million dollars (\$1,000,000) aggregate with respect to each of SMPA's owned, hired and non-owned vehicles assigned to or used in performance of the services. The policy shall contain a severability of interests provision. If SMPA has no owned automobiles, the requirements of this paragraph (3) shall be met by each employee of SMPA providing services to the Town under this Franchise.
- (E) The policy required by Paragraphs (D)(2) and (3) above shall be endorsed to include the Town and the Town's officers and employees as additional insureds. Every policy required above shall be primary insurance and any insurance carried by the Town, its officers, or its employees, or carried by or provided through any insurance pool of the Town, shall be excess and not contributory insurance to that provided by SMPA. No additional insured endorsement to any policy shall contain any exclusion for bodily injury or property damage arising from completed operations. SMPA shall be solely responsible for any deductible losses under any policy required above.
- (F) The certificate of insurance provided to the Town shall be completed by SMPA's insurance agent as evidence that policies providing the required coverages, conditions, and minimum limits are in full force and effect, and shall be reviewed and approved by the Town prior to any commencement of the Franchise. No other form of certificate shall be used. The certificate shall identify this Franchise and shall provide that the coverages afforded under the policies shall not be cancelled, terminated or materially changed until at least thirty (30) days prior written notice has been given to the Town. The completed certificate of insurance and any updates or amendments thereto shall be sent to the Town.
- (G) Failure on the part of SMPA to procure or maintain policies providing the required coverages, conditions, and minimum limits shall constitute a material breach of this Franchise after the Town has provided SMPA written notice of the failure, and 60 days thereafter to cure any failure to procure or maintain policies. Thereafter, if SMPA has failed to cure, the Town may terminate this Franchise (subject to continuing collection of the surcharge under 8.4(G) above), or at its discretion, the Town may procure or renew any such policy or any extended reporting period thereto and may pay any and all premiums in connection therewith, and all monies so paid by the Town shall be repaid by SMPA to the Town upon demand, or the Town may offset the cost of the premiums against any monies due to SMPA from the Town.

- (H) The parties hereto understand and agree that the Town is relying on, and does not waive or intend to waive by any provision of this Franchise, the monetary limitations (presently \$150,000 per person and \$600,000 per occurrence) or any other rights, immunities, and protections provided by the Colorado Governmental Immunity Act, CRS 24-10-101 et seq., as from time to time amended, or otherwise available to the Town, its officers, or its employees.
- (I) The indemnification hereby extended shall include delay damages as that term is used in C.R.S. § 24-91-103.5 *et seq.*, as amended from time to time, or any successor law thereto, awarded against the Town in favor of contractors for damages incurred by contractors for delays experienced in the performance of public works contracts entered into with the Town; provided, however, that said indemnification shall extend only to those delays in performance of public works contracts for which SMPA either agrees it is responsible or which were caused as the result, in whole or in part, of the acts or omissions of SMPA in the performance of its obligations under this Franchise. Unless SMPA otherwise agrees in writing, in no event shall SMPA be required to indemnify the Town for any delay damages awarded against the Town unless and until a final determination has been made by a court of competent jurisdiction that the delay damages suffered by a contractor were the result of the acts or omissions of SMPA acting on behalf of or within the Town's control. Nothing herein shall be construed as an acknowledgment by the parties that SMPA, in exercising its rights and obligations under this Franchise, is an entity controlled by, subject to the control of or acting on behalf of the Town for the purposes of C.R.S. § 24-91-103.5, *et seq.*
- (J) In the event of litigation for a breach of this Franchise or for an interpretation of this Franchise, the prevailing party shall be reimbursed for all costs related thereto, including reasonable attorney's fees by the non-prevailing party.

11.2 **Financial Responsibility.** At the time of approval of this Franchise by the Town, and from time to time at the Town's written request, but not more frequently than annually, SMPA shall submit to the Town, as a confidential document, proof of its ability to meet its obligations under this Franchise, including its ability to indemnify the Town as required by this article. This proof may take the form of insurance coverage, adequate funding of self-insurance, or the provision of a bond. SMPA shall supply the Town with a list of its insurance companies with the types of coverage, but not levels of insurance. Said list shall be kept current by annual revisions as of January 1 during the term of Franchise. The Town may require, from time to time, and SMPA agrees to provide, additional reasonable funding of SMPA's indemnification obligations as a self-insured, if SMPA is acting as a self-insurer. The Town, its officers, and its employees, shall be included as additional insureds as respects this Franchise on each liability or excess liability policy maintained by SMPA.

ARTICLE 12
UNDERGROUNDING OF OVERHEAD FACILITIES

12.1 Undergrounding of Facilities.

(A) (1) All new or relocated Facilities, other than minor relocation of one or two poles, involving the use of poles or above ground wires are hereby prohibited within the Town, including within road or highway rights of way controlled by the Colorado Department of Transportation or San Miguel County. All such new or relocated Facilities, other than minor relocation of one or two poles, shall be installed underground. This provision shall not apply to transmission lines when the General Assembly after notice and hearing, as appropriate in its sole discretion, has approved a new or relocated route, with or without conditions.

(2) Existing above ground electric lines, wires and cables may be repaired or replaced overhead on existing poles, but additional or upgraded wires, lines or cables shall be placed underground.

(3) Existing poles may be repaired or replaced with poles of a similar or smaller size, unless three or more poles in a line are to be replaced or relocated within a six month time frame, in which case all related Facilities shall be constructed substantially underground.

(4) These provisions shall apply on public or private property. SMPA is encouraged, but not required, to install conduit with space available for rental to other parties, or to rent available conduit space from the Town or others rather than construct new excavations.

(B) Existing overhead Facilities may be converted to underground locations in any of the following alternative manners:

(1) Pursuant to the procedures of C.R.S. § 29-8-101 *et seq.*

(2) When ordered by the Town where the Town is willing to pay and assume the cost of conversion.

(3) When ordered by the Town in connection with incidental and episodic conversions associated with public improvements, such as street widening, sidewalk construction and utility construction, at the cost of SMPA subject to the provisions of ¶8.4(G) above.

(C) The General Assembly may grant a variance from the undergrounding requirements of subsection (A) above if it finds, following a public hearing with published notice thereof, that the following criteria are met:

(1) (a) The relocation of existing poles and overhead wires was ordered by the Town pursuant to Subsection 8.4(B), but the Town has not ordered undergrounding pursuant to subsection (B)(3) above, and the new location is not substantially different than the existing location; or

(b) An existing 44kv or larger electrical transmission line is being relocated to mitigate a significant safety hazard; or (c) Undergrounding is impractical because of technical issues or unreasonable interference posed by other existing underground utilities and structures in the Streets;

and

(2) The location of the Facilities is consistent with paragraph 8.4 and will be consistent with the public health, safety and welfare.

12.2 Cooperation with Other Utilities. When undertaking a project of undergrounding, the Town and SMPA shall coordinate with other utilities or companies which have their facilities above ground to attempt to have all facilities undergrounded as part of the same project. When other utilities or companies are placing their facilities underground, SMPA shall cooperate with these utilities and companies and undertake to underground SMPA Facilities as part of the same project where feasible. All parties shall pay their own costs associated with such projects.

12.3 Review and Planning for Undergrounding Projects. The Town and SMPA shall mutually plan in advance the scheduling of approved undergrounding projects to be undertaken according to this Article as a part of the review and planning for other SMPA construction projects. The Town and SMPA agree to meet, as required, to review the progress of the current undergrounding projects and to review planned future undergrounding projects. SMPA agrees to use due diligence to see that approved undergrounding projects are, to the extent reasonably practicable, completed prior to the expiration of this Franchise.

12.4 Undergrounding on Porphyry Street. Notwithstanding any provisions to the contrary in this Franchise, the costs of undergrounding existing overhead distribution lines on Porphyry Street shall be governed by this paragraph. The Town and SMPA shall cooperate to underground the distribution lines in the public right of way on Porphyry Street within five years from the effective date of this Franchise. The Town shall not charge SMPA any permit or other fees for such activities, and shall trench and install conduit at its cost to SMPA's specifications. The Town shall provide necessary trenching at its sole cost and expense and make its rights-of-way available for such purpose. The Town shall arrange for any necessary easements for and consents to the placement of necessary underground cable, conduits and equipment, and above ground equipment and pad mount transformers in the public right of way where required. SMPA shall install the new underground distribution lines and de-energize and remove the existing overhead lines and poles following energizing of the new underground lines. Neither the Town nor SMPA shall be responsible for the costs of undergrounding secondary services to

Residents. The residential secondary service, along with undergrounding the service cables, may be required to replace their service entrance panel and meter box to be able to accommodate the new underground cable. SMPA estimates its costs under this paragraph to be twenty seven thousand, two hundred dollars (\$27,200.00), plus a contingency of five thousand dollars (\$5,000.00) (the "SMPA Cost of Undergrounding"). SMPA shall notify the Town of the final SMPA Cost of Undergrounding within sixty (60) days of completion of the project, pursuant to the notice provisions of Article 17.4 of this Franchise. Even if the actual cost to SMPA is higher, in no event shall SMPA Cost of Undergrounding exceed twenty-five thousand dollars (\$25,000.00).

- 12.5 Pursuant to the Town's police powers and independent of the Franchise, the Town Manager is authorized to order any Residents whose property is located within the Porphyry Street undergrounding section described in section 12.4, above, to install secondary services to the Residents at the cost of the Resident, and to perform such undergrounding in the event of failure or refusal of the Resident to promptly comply with such order and collect the costs thereof as a mechanic's lien upon the property of such Residents.

ARTICLE 13 TRANSFER OF FRANCHISE

- 13.1 Consent of Town Required. SMPA shall not sell, re-sell, transfer, assign or convey any rights under this Franchise, or the assets held by SMPA for use under this Franchise which are in the public rights-of-way, to any third party, including any merger with such third party, nor undergo any corporate reorganization or other change which would result in any modification of SMPA's obligations under this Franchise, without first obtaining written approval of the Town; provided, however, that this condition shall not be construed to restrict or prevent the issuance of bonds, debentures, or other evidence of indebtedness, or the issuance of additional stock, needed or useful for the purpose of financing the system or any portion thereof. Should SMPA sell, assign, transfer, convey, or otherwise dispose of its rights or interests under this Franchise, including SMPA's system or capacity on its system, or attempt to do so, without the proper approval, the Town may revoke this Franchise. Upon revocation, all rights and interests of SMPA under this Franchise shall cease. In addition, any sale, re-sale, transfer, assignment, or conveyance in violation of this Section shall be null and void and unenforceable.

ARTICLE 14 MUNICIPALIZATION

- 14.1 Town's Right To Purchase Or Condemn.
- (A) The right of the Town to construct, purchase, or condemn any public utility works or ways, and the Facilities and rights of SMPA in connection therewith, as

provided by the Colorado Constitution and statutes, is hereby expressly reserved, and may be exercised by the Town in accordance with such statutes.

- (B) SMPA understands and agrees that the right of the Town to construct, purchase, or condemn any public utility works or ways, and the Facilities and rights of SMPA in connection therewith, as provided by the Colorado Constitution and the Town's charter, are hereby expressly reserved, and that such right may be exercised at any time by the Town.
 - (C) In the event the Town exercises its option to purchase or condemn, SMPA agrees that it will continue to maintain its Facilities and to supply any service it supplies under this Franchise, in whole or in part, at the Town's written request, and at the Town's cost, for up to a twenty-four month period after the Town has either purchased or condemned SMPA's Facilities or alternative arrangements have been made. Both parties will exercise due diligence to wind up the affairs as soon as practical.
 - (D) SMPA shall cooperate with the Town by making available such records as will enable the Town to evaluate the feasibility of acquisition of SMPA Facilities. SMPA shall not be required to conduct studies or accrue data without reimbursement by the Town, but shall make such studies if reimbursed its costs for the same. SMPA shall take no action, which could inhibit the Town's ability to effectively or efficiently use the acquired Facilities.
- 14.2 Negotiated Purchase Price or Condemnation Award. If the Town desires to purchase SMPA Facilities and if SMPA desires to sell such Facilities, the parties shall negotiate in good faith to determine a mutually acceptable purchase price for up to ninety (90) days; said purchase price shall exclude the value of this Franchise. If agreement is not reached, the Town and SMPA reserve all rights to assert their respective positions with respect to the steps the Town would need to take to condemn SMPA Facilities; however, no award shall be made for the value of the Franchise.
- 14.3 Town-Produced Electricity. SMPA understands and agrees that the Town expressly reserves the right to obtain or produce electricity for its own purposes and wholesale transactions, and the Town may exercise such right at any time within then existing laws and regulations. SMPA shall not curtail wholesale purchases of Town-generated electricity except as otherwise provided in this paragraph. If the Town engages in the production of electricity, SMPA agrees to negotiate in good faith for the purchase thereof in accordance with its tariffs, policies and applicable PUC rules and regulations, but only within the limits of its then-existing contractual limitations. Alternatively, SMPA agrees to transmit the Town-generated power between the generation unit and designated end point to the extent that such transmission is feasible within the then-existing system of SMPA. SMPA may charge for such transmission a just and reasonable rate calculated on the basis of the Facilities actually used by SMPA to provide this service.

- 14.4 Purchase of Real Property of SMPA by Town. If at any time during the term of this Franchise, SMPA proposes to sell or dispose of any of its real property located in whole or in part in the Town, it shall grant to the Town the right of first negotiation to purchase the same. Nothing in this provision shall preclude SMPA from disposing of its real property in a timely fashion.
- 14.5 Purchase or Condemnation of Street Lighting System. The provisions of this Article apply with full and equal force to the purchase or condemnation by the Town of all or a portion of the street lighting service provided by SMPA, including all or a portion of any SMPA owned street lighting facilities, equipment, system, and plant. SMPA understands and agrees that the Town may choose to so purchase or condemn such street lighting service at any time.

ARTICLE 15 BREACH

15.1 Breach

(A) If SMPA fails to perform any of the terms and conditions of this Franchise and such failure is within SMPA's control, the Town may require SMPA to show cause, at a hearing before the General Assembly, the reasons its rights and privileges under this Franchise should not be forfeited, or other penalties imposed as provided by this Franchise or by law. No such hearing shall be held unless SMPA has first been given notice of its failure and reasonable time, not to exceed ninety days, in which to remedy the failures. If SMPA does not remedy the failures, the General Assembly may determine, at such a hearing, whether such failure to perform and SMPA's failure to remedy the same occurred, and if so, whether such failure to perform is substantial. The General Assembly may impose one or more of the following remedies or penalties for a substantial failure to perform:

(1) A civil penalty of \$500 for each day or portion thereof that the failure was committed or continued. SMPA understands and agrees that such liquidated damages are intended to compensate the Town for the additional efforts of the Town in administering and enforcing the Franchise, for inconvenience to Town operations and to the Residents, and loss of confidence in government and morale of the Town and its Residents when Franchise obligations are not met. Such damages are uncertain in amount and difficult to measure and prove accurately. By this Franchise, SMPA agrees that the liquidated damages specified herein are reasonable in amount and are not disproportionate to actual anticipated damages; and/or

(2) Forfeiture of all rights under this Franchise; and/or

- (3) Any other remedies available to the Town by law.
 - (B) The Town may take action to correct the failure, and SMPA shall promptly reimburse the Town for the cost of such action.
- 15.2 Judicial Review. Any declaration of forfeiture by the General Assembly shall be subject to judicial review.
- 15.3 Other Legal Remedies. Nothing herein shall limit or restrict any legal rights or remedies that the Town may possess arising from any alleged violation of this Franchise.
- 15.4 Continued Obligations. Upon forfeiture, SMPA shall continue to provide service to the Town and its Residents until the Town makes alternative arrangements for such service.

ARTICLE 16 APPROVAL; AMENDMENTS

- 16.1 Approval of Franchise. SMPA shall file with the Town Clerk its written acceptance of this Franchise and all of its terms and provisions no later than thirty (30) days after its receipt of written notice that the second reading of this Franchise has been approved by the Town's General Assembly. The acceptance shall be in a form and content approved by the Town Attorney. If the Association shall fail to timely file its written acceptance as herein provided, this Franchise shall be come null and void.
- 16.2 Terms Impacted by Legislative and Regulatory Changes. The Town and SMPA recognize that the electric utility industry is the subject of numerous restructuring initiatives by legislative and regulatory authorities. Some of the initiatives and changes may have an effect upon the terms that would be adverse to the customers within the Town or SMPA. In the event of such regulatory changes, the Town and SMPA may need to amend various provisions of this Franchise, and agree to negotiate in good faith in reaching such amendments.
- 16.3 Effect on Existing Franchise; Prior Acts. This Franchise shall supersede in its entirety the franchise granted pursuant to Ordinance 88-1. This Franchise shall not operate to modify or terminate any currently unknown claims or causes of action with respect to the prior franchise. All known claims or causes of action against SMPA or Town for breach or default of the existing franchise granted pursuant to Ordinance 88-1, including but not limited to imposition of the Regional Surcharge described in section 4.4 or reduction in collection of franchise fee pursuant to sections 9 and 10 of Ordinance 88-1, are hereby waived and released.

ARTICLE 16.5

- 16.5.1 Limitations on Association Removal. In the event this Franchise is not renewed at the expiration of its term or SMPA terminates any service provided herein for any reason whatsoever, and the Town has not purchased or condemned the Facilities and has not provided for alternative electrical service, SMPA shall have no right to remove said Facilities until the Public Utilities Commission authorizes abandonment. SMPA further agrees it will not withhold any temporary services necessary to protect the public and shall be entitled only to monetary compensation in no greater amount than it would have been entitled to under its then-current tariffs. Only upon authorization by the Public Utilities Commission shall SMPA be entitled to remove any or all of said Facilities in use under the terms of this Franchise. In so removing its electrical Facilities, SMPA shall, at its own expense and in a timely manner, refill any excavations that shall be made by it in public rights-of-way, and shall repair any damage to such rights-of-way resulting from such removal, in accordance with Town standards.

ARTICLE 17 MISCELLANEOUS

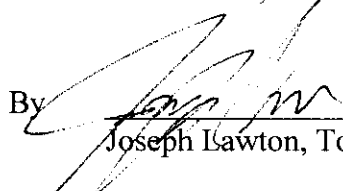
- 17.1 No Waiver. Neither the Town nor SMPA shall be excused from complying with any of the terms and conditions of this Franchise by any failure of the other, or any of its officers, employees, or agents, upon any one or more occasions, to insist upon or to seek compliance with any such terms and conditions.
- 17.2 Successors and Assigns. The rights, privileges, and obligations, in whole or in part, granted and contained in this Franchise shall inure to the benefit of and be binding upon SMPA, its successors and assigns, to the extent that such successors or assigns have succeeded to or been assigned the rights of SMPA.
- 17.3 Third Parties. Nothing contained in this Franchise shall be construed to provide rights or remedies to third parties.
- 17.4 Representatives. SMPA and the Town shall designate the persons to whom notices shall be sent regarding any action to be taken under this Franchise. All Notice shall be in writing and forwarded by mail or hand delivery to the persons and addresses as stated below, unless changed by written notice given to the other. Until change is made, notices shall be sent as follows:
- | | |
|--------------|-----------------|
| To the Town: | To SMPA: |
| Town Manager | General Manager |
- 17.5 Severability. Should any one or more provisions of this Franchise be determined to be illegal or unenforceable, all other provisions nevertheless shall remain effective; provided, however, the parties shall enter into good faith negotiations and proceed with

due diligence to draft a substitute term which will achieve the original intent of the parties.

- 17.6 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 negotiations, correspondence, understandings and communications with respect to this Franchise.
- 17.7 Construction and Enforcement. Colorado law shall apply to the construction and enforcement of this Franchise. The parties agree that venue for any litigation arising out of this Franchise shall be in the District Court of San Miguel County. Nothing herein, however, shall restrict or prohibit the Town from pursuing available remedies before the Colorado Public Utilities Commission and any appeals therefrom to the District Court for the County of Denver, Colorado.
- 17.8 Other Franchises. In the event SMPA becomes subject to Franchise or ordinance terms of another municipality or regulations of a county significantly more advantageous to the municipality or county, the Town may unilaterally enact similar provisions by ordinance following prior written notice to SMPA of final hearing on such ordinance(s).
- 17.9 Recitals Incorporated. The Recitals set forth in Article 1.5 are incorporated herein as essential terms hereof.


TOWN OF OPHIR, COLORADO

By


Joseph Lawton, Town Mayor

CERTIFICATE OF TOWN CLERK

The foregoing Ordinance was introduced at a meeting of the Ophir General Assembly on September 21, , 2010 and read by title thereafter, and was adopted as amended by a majority vote at a meeting of the General Assembly on Oct 19th, 2010.


Valerie Hill, Town Clerk

SAN MIGUEL POWER ASSOCIATION, INC.

Acceptance of Ordinance 2010-7

The undersigned General Manager of San Miguel Power Association, Inc. ("SMPA") does hereby certify that, pursuant to Section 16.1 of Article 16 of Ordinance 2010-7 adopted by the General Assembly of the Town of Ophir on October 19, 2010 (the "Ordinance"), the Board of Directors of SMPA (i) accepted and approved the Ordinance on November 17, 2010, and (ii) agrees to the terms and conditions of the Ordinance.

Dated November 17, 2010.



Kevin L. Ritter, General Manager and CEO