

ORDINANCE NO. 2018-005

AN ORDINANCE OF THE TOWN OF CRESTONE GRANTING  
AN ELECTRIC FRANCHISE TO  
SAN LUIS VALLEY RURAL ELECTRIC COOPERATIVE, INC.  
TO PROVIDE ELECTRIC, TELECOMMUNICATION AND FIBER OPTIC SERVICES


WHEREAS, the Town of Crestone has, negotiated the terms of a new franchise with San Luis Valley Rural Electric Cooperative, Inc.; and

WHEREAS, the Town Board of Trustees deems it to be in the best interest of the Town to adopt the negotiated franchise, attached hereto as Exhibit A, as an Ordinance of the Town.


NOW THEREFORE, be it hereby ordained by the Board of Trustees of the Town of Crestone, Colorado that the Franchise Agreement between the Town of Crestone, Colorado and San Luis Valley Rural Electric Cooperative, Inc., its affiliates, successors and assigns, granting it the right to use the streets within the town to furnish, sell, transport, transmit and distribute electricity, and to provide telecommunication and fiber optic services (including the transmitting of voice, video and data signals) to the town and to all residents of the town, granting the right to acquire, construct, install, locate, maintain, operate and extend into, within and through the town all facilities reasonably necessary to furnish, sell, transport and distribute electricity, and to provide telecommunication and fiber optic services (including the transmitting of voice, video and data signals) within and through the town, and granting it the right to provide street lighting service to the town, and fixing the terms and conditions thereof (attached as Exhibit A) is hereby approved and adopted. The franchise fee contained in Article 3 (A) of said franchise may be adjusted as therein provided, shall be initially set at two percent (2%) of all revenues and shall not exceed five percent (5%) of such stated revenues.

THE TOWN BOARD OF TRUSTEES FINDS THAT THIS ORDINANCE IS NECESSARY FOR THE IMMEDIATE PRESERVATION OF THE PUBLIC PEACE, HEALTH, AND SAFETY, DUE TO THE NECESSITY TO PROVIDE ELECTRIC SERVICE TO RESIDENTS OF THE TOWN OF CRESTONE, AND SHALL TAKE EFFECT AND BE ENFORCED FROM AND AFTER PASSAGE OF THE SAME.

**DONE** and **SIGNED** this 13<sup>th</sup> day of August, 2018.

  
Kairina Danforth, Mayor

Attest:

  
Allyson Ransom, Town Administrator

APPROVED AS TO FORM:

\_\_\_\_\_  
Eugene L. Farish, Town Attorney

### CERTIFICATION

I hereby certify that the within Ordinance was first introduced and read in full at a regular meeting of the Town Board of Trustees of the Town of Crestone on August 13, 2018, and was published on Aug 22, 2018, 2018 and Sept. 1, 2018<sup>(Eagle)</sup>, 2018 in the Crestone Eagle, and that Ordinance was again published in full in said Crestone Eagle on Sept. 1, 2018, 2018, after passage of the same by the Town Board of Trustees at a regular meeting of the Crestone Town Board on the 13 day of August, 2018.

Saguache  
Crescent

Allyson Ransom  
Allyson Ransom, Town Clerk

# **FRANCHISE AGREEMENT BETWEEN THE TOWN OF CRESTONE AND SAN LUIS VALLEY RURAL ELECTRIC COOPERATIVE, INC.**

## **ARTICLE 1 DEFINITIONS**

- §1.1 For the purpose of this franchise agreement, 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.
- §1.2 “Town” refers to and is the municipal corporation, A STATUTORY TOWN, designated as the Town of Crestone, Saguache County, Colorado.
- §1.3 “Co-op” refers to and is the San Luis Valley Rural Electric Cooperative, Inc., its successors, assigns, affiliates, and subsidiaries.
- §1.4 “Board” or “Board of Trustees” refers to and is the legislative body of the Town of Crestone, Saguache County, Colorado.
- §1.5 “Electric Revenues” refers to those amounts of money which the Co-op receives from the sale or delivery of electricity in the Town, after adjusting for refunds, net write-offs of uncollectible accounts, corrections, or regulatory adjustments. Regulatory adjustments include, but are not limited to, credits, surcharges, refunds, and pro-forma adjustments pursuant to federal or state regulation. “Electric Revenues” shall exclude any revenue for the sale or delivery of such services to the Town as a customer of the Co-op.
- §1.6 “Telecommunications Revenues” refers to those amounts of money which the Co-op receives from the sale or delivery of telecommunications and fiber optic services in the Town, after adjusting for refunds, net write-offs of uncollectible accounts, corrections, or regulatory adjustments. Regulatory adjustments include, but are not limited to, credits, surcharges, refunds, and pro-forma adjustments pursuant to federal or state regulation. “Telecommunications Revenues” shall exclude any revenue for the sale or delivery of such services to the Town as a customer of the Co-op.
- §1.7 “Electric Facilities” refer to and are all facilities of the Co-op reasonably necessary for the Co-op 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, street lights, wires, cables and poles.
- §1.8 “Telecommunications Facilities” refer to and are all apparatuses reasonably necessary for the Co-op to provide telecommunication and fiber optic services into, within and through

the Town, including but not limited to plants, works, systems, , equipment, , conduit, , overhead and underground cables, communication and data transfer equipment, control equipment, and poles.

- §1.9 “Force Majeure” refers to the inability to undertake an obligation of this franchise due to a cause that could not be reasonably anticipated by a party or is beyond its reasonable control after exercise of best efforts to perform, including but not limited to fire, strike, war, riots, terrorist’s acts, acts of governmental authority, acts of God, floods, epidemics, quarantines, labor disputes, unavailability or shortages of materials or equipment or failures or delays in delivery of materials. 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 a Force Majeure condition.
- §1.10 “Party” or “Parties” refers to and includes the Co-op and the Town, either singularly or collectively, as the context requires.
- §1.11 “Public Project” refers to (1) any public work or improvement within the Town that is wholly owned or wholly funded by the Town; or (2) any public work or improvement within the Town where fifty percent (50%) or more of the funding is provided by any combination of the Town, the federal government, the State of Colorado, or any Colorado county. For the purpose of this definition, funds received by the Town from any granting agency, whether public or private, will be considered Town Funds.
- §1.12 “Public Utility Easement” refers to any easement over, under, or above public or private property, lawfully acquired by or dedicated to the use of public utility companies, including the Co-op, for the placement of public utility facilities, including but not limited to Co-op facilities.
- §1.13 “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.
- §1.14 “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 as specifically approved by the Town in writing for the Co-op’s use.

## **ARTICLE 2**

### **GRANT OF FRANCHISE**

§2.1 **Grant of Franchise.**

The Town hereby grants to the Co-op the non-exclusive right to use the Streets within the Town to furnish, sell, transport, transmit, and distribute electricity, telecommunication and fiber optic service (including the transmission of voice, video and data services), to the Town and to all Residents of the Town. The Town also hereby grants to the Co-op the right to acquire, construct, install, locate, maintain, operate and extend

into, within and through the Town all Facilities reasonably necessary to furnish, sell, transport, transmit and distribute electricity, telecommunication and fiber optic service within and through the Town provided that any substations or towers shall have the advance written approval of the Town. Such electrical energy and telecommunication and fiber optic services shall be furnished at the rates and under the terms and conditions established by the Board of Directors of the Cooperative and for service to like members as on file in the office of said Cooperative at Monte Vista, Colorado, subject to any regulations which may be prescribed by any competent authority having jurisdiction in the premises provided further that Co-op will furnish any telecommunication and fiber-optic connections being offered to the general public, to the Town Hall and Town Shop at no connection or monthly service charge.

The rights granted in this franchise encompass the right to provide street lighting service to the Town. The type of street lighting provided by the Co-op shall have advance written approved by 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.

The Co-op shall not, as to rates, charges, service, facilities, rules, regulations or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage, provided that nothing in this grant shall be taken to prohibit the establishment from time to time of a graduated scale of charges and classified rate schedules to which any customer coming within an established classification would be entitled.

Co-op will from time to time during the term of this franchise, make such enlargements and extensions of its electric, telecommunications and fiber optic systems as the business of the Cooperative and the growth of the Town justify, in accordance with the Rules and Regulations prescribed by the Board of Directors of said Co-op.

If the boundaries of the Town are expanded during the term of this franchise, the Co-op shall extend service to Residents in the expanded area at the earliest practicable time and in accordance with the Co-op's extension policy. Service to the expanded area shall be in accordance with requirements the terms of this franchise, including payment of franchise fees.

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

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. This franchise constitutes a valid and binding contract between the Co-op and the Town.

Term of Franchise. This franchise shall take effect upon its adoption and shall supersede any prior franchise granted to the Co-op by the Town. The term of this franchise shall be twenty (20) years.

### **ARTICLE 3**

#### **FRANCHISE FEE**

§3.1 Franchise Fee.

As consideration for the franchise rights granted herein, and in recognition of the fact that the grant to the Co-op of the right to use Town Streets is a valuable right, the Co-op shall pay the Town a sum equal to two percent (2%) of all Revenues received from the sale of electricity, telecommunications and fiber-optic service, within the Town, excluding revenues received from the Town for the provision of electricity, telecommunications and fiber-optic service to the Town for its own consumption or the provision of street lighting service to the Town. Such franchise fee may be adjusted within the term of this franchise by the Town giving not less than ninety (90) days' notice to Co-op; provided further that such fee shall not exceed five percent (5%) of such stated revenues.

§3.2 Surcharge of Franchise Fees.

Unless otherwise prohibited by law, the Co-op shall be permitted to surcharge to all Town residents the franchise fee payments the Co-op makes to the Town. 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. The Co-op 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 otherwise ordered by a tribunal having proper jurisdiction.

§3.3 Remittance Schedule.

Franchise fee revenues that are collected from Residents shall be remitted by the Co-op 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 Co-op 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 Co-op results in an overpayment of the franchise fee to the Town in excess of \$5,000, credit for the overpayment shall be spread over the same period the error was undiscovered; if the overpayment is \$5,000 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 3 years from the date of the over- or underpayment.

§3.4 Audit Rights; Protection of Confidential Information.

The Town Clerk, or his or her agent, shall have access to all records of the Co-op during normal business hours upon reasonable notice for the purpose of auditing to ascertain that the franchise fee has been correctly computed and paid. 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.

§3.5 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 tax laws. Upon request by the Town, the Co-op shall supply the Town with a list of all suppliers of electricity that utilize Co-op Facilities within the Town Streets to sell electricity to Town Residents.

§3.6 Franchise Fee Payment in Lieu of Certain Taxes and Other Fees.

The Town accepts payment of the franchise fee by the Co-op in lieu of any occupation tax, occupancy tax, license tax, or similar tax or fee the Town might charge the Co-op or its subcontractors for the privilege of providing telecommunication, fiber optic and electric service in the Town, for the use or occupation of Town Streets, or for the installation, operation, and maintenance of Co-op Facilities. Payment of the franchise fee does not exempt the Co-op 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, street use permit fees, or other permit fees or taxes assessed generally upon businesses.

## **ARTICLE 4**

### **SUPPLY, CONSTRUCTION AND DESIGN**

§4.1 Obligations Regarding Co-op Facilities.

The Co-op shall install, maintain, repair, renovate and replace its Facilities with due diligence in a good and workmanlike manner. Co-op Facilities shall not interfere with the Town's water mains, sewer mains or other Town uses of the

Streets. The Co-op shall construct and maintain its Facilities in such a way as to minimize interference with trees and other natural features. The Co-op shall install underground all newly constructed electric distribution lines serving newly developed areas. All other Co-op Facilities may be installed above ground unless the Town or affected Town Residents pay to the Co-op the additional costs incurred by the Co-op to construct, operate and maintain the Facilities underground.

A. Restoration of Service.

1. The Co-op shall provide to the Town current daytime and nighttime telephone numbers of a designated Co-op representative from whom the Town designee may obtain status information from the Co-op on a twenty-four (24) hour basis concerning interruptions of Utility Service in any part of the Town.
2. Any preplanned outage, disruption or discontinuance of the services described in this franchise by franchisee, will be given to the town by franchisee within 48 hours or as soon as reasonably practical.
3. In the event the Co-op's electric system within the Town or any part thereof, is partially or wholly destroyed or incapacitated, the Co-op shall use due diligence to restore such systems to satisfactory service within the shortest practicable time, or provide a reasonable alternative to such system if the Co-op elects not to restore such system.

§4.2 Excavation, Construction and Obligations Regarding Co-op Facilities.

- A. All Co-op Facilities within Town streets and other Town property shall be maintained in good repair, appearance and condition.
- B. All excavation, construction and other work within and upon Town streets and other Town property performed or caused to be performed by the Co-op shall be done:
  1. In a high-quality manner;
  2. In a timely and expeditious manner;
  3. In a manner which minimizes inconvenience to the public;
  4. In a cost-effective manner, which may include the use of qualified contractors;
  5. In accordance with all applicable laws, ordinances, and regulations;
  6. In accordance with all required Town permits; and
  7. All property disturbed by Co-op excavation or construction activities shall be restored by the Co-op at its expense to substantially its former condition according to existing Town laws, ordinances and regulations.

§ 4.3 Relocation of Co-op Facilities.

All new Co-op Facilities proposed to be located in the Streets shall be located so as not to interfere with a Street construction project or other public improvement or



public project of which the Co-op has been informed in writing and which is or will be undertaken by the Town. Upon the Town's request, the Co-op shall relocate, at the Co-op's expense, Electric Facilities or Telecommunications Facilities in the Streets that interfere with a Street construction project or other public improvement or public project undertaken by the Town with public funds. The Co-op shall relocate its Facilities at the request of the Town or other person to avoid interference with other projects, but the expense of the relocation and any new right-of-way shall be paid in advance by the entity or individual requesting said relocation. The relocations set forth in this franchise shall be completed within a reasonable time, not to exceed 120 days from the later of the date on which the Town designee requests in writing that the relocation commence, or the date when the Co-op is provided all supporting documentation. The Co-op shall be entitled to an extension of time to complete a relocation where Co-op's performance was delayed due to a cause that could not be reasonably anticipated by the Co-op or is beyond its reasonable control, after exercise of its best efforts to perform, including without limitation fire, strike, war, riots, acts of governmental authority, acts of God, forces of nature, judicial action, unavailability or shortages of labor, materials or equipment and failures or delays in delivery of materials. Upon request of the Co-op, the Town may also grant the Co-op reasonable extensions of time for good cause shown and the Town shall not unreasonably withhold any such extension. Any revision by the Town of supporting documentation provided to the Co-op that causes the Co-op to substantially redesign and/or change its plans regarding facility relocation shall be deemed good cause for a reasonable extension of time to complete the relocation under the franchise. When requested by the Town, representatives of the Town and the Co-op shall meet to share information regarding anticipated municipal projects which will require relocation of Co-op facilities. Such meetings shall be for the purpose of providing the Town with a timetable within which the involved Co-op facilities shall be relocated, including an anticipated start date so as to facilitate coordination with the timetable to be established by the Town for completion of the municipal project. Additionally, the Parties will work cooperatively to keep one another apprised of the status of future projects requiring relocation of Co-op Facilities, and of the Parties' respective construction plans and schedules for projects that may require relocation of Facilities located in Town Streets. In the event that the Town requests the Co-op to relocate the same Facilities within two (2) years of completion of a prior relocation made at the Co-op's expense, the subsequent relocation shall be at the Town's expense, unless said relocation is necessary to remedy public health and safety concerns not reasonably foreseeable by the Town at the time of the prior relocation. Underground Facilities shall be relocated underground. Existing above ground Transmission Facilities may be relocated above ground.

§4.4 Damage.

The Co-op shall promptly repair all damage to the Streets or property in the streets and eliminate any dangerous condition in the Streets caused by Co-op activities or Facilities. If such damage poses an immediate hazard to the health or safety of the public, the Town shall provide notice of the situation to the Co-op immediately, and may take reasonable action to abate said hazard, and the Co-op shall reimburse the Town for said reasonable action; provided, however, that the Co-op shall not be liable for costs incurred by the Town for providing emergency police or fire services generally made available to the public. In all other instances of damage to the Streets or property in the Streets or dangerous conditions in the Streets caused by Co-op activities or Facilities, the Town shall give notice to the Co-op of the damage or condition and allow the Co-op a reasonable time to repair said damage or eliminate said condition. If the Co-op fails to repair the damage or eliminate the condition within a reasonable time after notice, the Town may repair the damage or eliminate the condition, and surcharge the Co-op, but shall not perform any work on Co-op Facilities.

§4.5 Technological Improvements.

The Co-op shall use its best efforts to incorporate, 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.

§4.6 Town Not Required to Advance Funds.

Upon receipt of the Town's authorization for billing and construction, the Co-op shall extend its Electric Facilities to provide electricity to the Town for municipal uses within the Co-op's certificated service area, without requiring the Town to advance funds prior to construction.

**ARTICLE 5**  
**COMPLIANCE**

§5.1 Compliance with Applicable Laws.

The Co-op and all of its contractors shall comply with all applicable Federal, State and Town laws, ordinances, rules and regulations. The Co-op shall require its contractors working in and upon the streets to hold the necessary licenses and permits required by the Town.

§5.2 Compliance with Town Requirements.

- A. The Co-op will comply with all Town building and zoning codes and requirements regarding curb and pavement cuts, excavating, digging, and related construction activities.
- B. The installation, renovation, replacement and maintenance of any Co-op facilities in and upon the Town streets or other Town property by or on behalf of the Co-op shall

be subject to permit, inspection to ensure that said work has been performed in accordance with all Town ordinances and regulations applicable to all franchised, licensed, or permitted users of the Streets, and approval by the Town. Such permitting inspection and approval may include, but shall not be limited to, the following matters: location of Town facilities, cutting and pruning of trees and shrubs; provided, however, Co-op' shall have the right to cut, prune, and/or remove vegetation in accordance with its standard vegetation management requirements and procedures, and disturbance of pavement, sidewalks and surfaces of Town streets or other Town property in accordance with § 4.4. The Co-op agrees to cooperate with the Town in conducting inspections and shall promptly perform any remedial action at company expense, lawfully required by the Town pursuant to any such inspection.

- C. The Co-op shall reimburse the Town for the cost of upgrading the electrical system or facility of any Town building or facility that uses utility service where such upgrading is solely caused or occasioned by the Co-op's decision to increase the voltage of delivered electrical energy. This provision shall not apply to voltage increases required by law or voltage increases requested by the Town.
- D. The Co-op shall provide within 30 days of project completion, on a project by project basis, as-built drawings of any Co-op facility installed within the Town streets or contiguous to the Town streets. As used in this section, as-built drawings refers to the facility drawings as maintained in the Co-op geographical information system, or any equivalent Co-op's system.
- E. Co-op shall in its best effort, incorporate within the Town, improvements and technological advances in its equipment and service, when such improvements and advances are technologically and economically feasible and are safe and beneficial to the Town and its residents.

## **ARTICLE 6**

### **TOWN USE OF CO-OP FACILITIES**

#### **§6.1 Town Use of Distribution Poles.**

The Town shall have the right to attach, without paying a pole attachment fee, Town-owned police, fire, traffic control equipment, banners and holiday lighting to Co-op distribution poles within the Town in a manner that complies with the applicable Safety Codes. Such attachments must be pre-screened and approved by the Co-op. The Co-op reserves the right to charge a reasonable fee for all other attachments. The Town shall hold harmless and indemnify the Co-op for all liability associated with the Town's facilities on the Co-op's poles. The Town's use of the Co-op's poles shall be in such a manner as not to constitute a safety hazard or to interfere with the Co-op's use of the poles. Any construction or reconfiguration that may, in the sole judgment of the Co-op, be required because of the Town's attachment of equipment to Co-op distribution poles shall be paid for by the Town.

§6.2 Trenches Available for Town Use.

If the Co-op opens a trench to install its Facilities, the Co-op 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 Co-op's Facilities or delay the commencement or completion of the Co-op's construction project.

**ARTICLE 7**  
**INDEMNIFICATION OF THE TOWN**

§7.1 Town Held Harmless and Indemnified.

The Co-op shall indemnify, defend, and hold the Town harmless from and against all liability, damage, or judgments, and all claims or demands arising out of Co-op's operations within the Town pursuant to this franchise. The Town shall provide prompt written notice to the Co-op of the pendency of any claim or action against the Town arising out of the exercise by the Co-op of its franchise rights. The Co-op and the Town shall be permitted, at their own respective expense, to appear and defend or to assist in the defense of such claim(s). The Co-op shall not be obligated to indemnify, defend, or hold the Town harmless to the extent any liability, damage, judgment, 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 liability, damage, judgment, claim, demand, or lien arises out of or in connection with the use of Town facilities.

§7.2 Payment of Ordinance Expenses.

The Co-op shall reimburse the Town for actual out-of-pocket expenses incurred in publishing notices and ordinances and conducting elections related to this franchise.

**ARTICLE 8**  
**UNDERGROUND CONVERSION OF OVERHEAD ELECTRIC FACILITIES**

§8.1 Undergrounding of New Lines.

Co-op shall place all newly constructed electrical distribution lines underground unless approved otherwise by the Town.

§8.2 Overhead Conversion of Electrical Lines.

Co-op agrees to allocate an annual amount, equivalent to one percent (1%) of the preceding calendar year's Electric Revenues derived from members within the Town, for the purpose of undergrounding Co-op's existing overhead Electric Distribution Facilities within the Town as requested by the Town (the "Undergrounding Funds"). Any

unexpended portion of the one percent (1%) revenues shall be carried over to succeeding years provided further that the total balance carried in said fund shall not exceed \$500,000. Except as provided in Section 4.3 no relocation expenses which Co-op would be required to expend pursuant to Article 4 of this Franchise Agreement shall be charged to this allocation. Co-op shall not withhold approval of the plans of the Town except where essential for safety or protection of the operating integrity of Co-op's electric system. If, after any and all undergrounding of Co-op power lines has taken place and no additional Co-op overhead lines remain in the Town, the remaining Undergrounding Fund shall be relinquished by the Town back to the Co-op.

§8.3 Planning and Coordination of Undergrounding Projects.

The Town and Co-op shall mutually plan in advance the scheduling of undergrounding projects to be undertaken according to this Article as part of the review and planning for other Town and Co-op construction projects. In addition, the Town and Co-op agree to meet, as required, to review the progress of then-current undergrounding projects and to review planned future undergrounding projects. The purpose of such meetings shall be to further cooperation between the Town and the Co-op to achieve the orderly undergrounding of Co-op facilities. At such meetings, the parties shall review:

- A. Undergrounding, including conversions, public projects and replacements that have been accomplished or are underway, together with Co-op's plans for additional undergrounding; and
- B. Public projects anticipated by the Town.

§8.4 Cooperation with Other Utilities.

When undertaking an undergrounding project, the Town and Co-op shall work with other utilities or companies that have overhead lines in the area of the undergrounding project in an attempt to underground all lines as part of the same project. When other utilities or companies such as cable television and telephone companies or other utilities with overhead facilities embark upon a program of underground construction where Co-op has overhead facilities in the area, Co-op shall cooperate with these utilities and companies and undertake to underground Co-op as part of the same project at no cost to the Town. Co-op shall not be required to pay for the cost of undergrounding the facilities of other companies or the Town.

§8.5 Town Requirement to Underground.

In addition to the provisions of this Article, the Town may require any above ground Co-op facilities to be moved underground at the Town's expense provided such

undergrounding is technically feasible and will not, in the Co-op's sole opinion, adversely affect the Co-op's electric system performance.

- A. Upon receipt of a written request from the Town, Co-op shall, to the extent of monies available in the Fund and as otherwise provided herein, underground Co-op facilities in accordance with the procedures set forth in this Section 8.5. Co-op shall complete each undergrounding project requested by the Town within a reasonable time, not to exceed two hundred and seventy (270) days from the later of the date upon which the Town designee makes a written request and the date the Town provided to Co-op all supporting documentation.
- B. Any revision by the Town of supporting documentation provided to Co-op that causes Co-op to substantially redesign and/or change its plans regarding an undergrounding project shall be deemed good cause for a reasonable extension of time to complete the undergrounding project under the Franchise.
- C. Each such undergrounding project shall be deemed complete only when Co-op actually undergrounds the designated Co-op facilities, restores the undergrounding site in accordance with the applicable provisions of this Franchise or as otherwise agreed with the Town designee and removes from the site or properly abandons on site any unused facilities, equipment, material and other impediments.
- D. Promptly upon receipt of an undergrounding request from the Town and the supporting documentation necessary for Co-op to design the undergrounding project, Co-op shall prepare a detailed, good faith cost estimate of the anticipated actual cost of the requested project for the Town to review and, if acceptable, issue a project authorization. Co-op shall not proceed with any requested project until the Town has provided a written acceptance of the Co-op's estimate.
- E. Upon completion of each undergrounding project, Co-op shall submit to the Town a detailed report of Co-op's actual cost to complete the project and Co-op shall reconcile this total actual cost with the accepted cost estimate.
- F. The Town may require that Co-op undertake an independent audit of any undergrounding project for which the actual cost is five hundred thousand dollars (\$500,000) or greater. The cost of any such independent audit shall reduce the amount of the fund. Co-op shall cooperate fully with any audit and the independent auditor shall prepare and provide to the Town and Co-op a final audit report showing the actual costs associated with completion of the project. If a project audit is required by the Town, only those actual project costs, including reasonable internal costs and overhead as charged to the project by Co-op's normal cost accounting rules

and protocols, confirmed and verified by the independent auditor as commercially reasonable and commercially necessary to complete the project shall be charged to the fund.

§8.6 Audit of Underground Fund.

Upon written request of the Town, but no more frequently than once every three (3) years, Co-op shall audit the fund for the Town. Such audits shall be limited to the previous three (3) calendar years. Co-op shall provide the audit report to the Town and shall reconcile the fund consistent with the findings contained in the audit report. If the Town has concerns about any material information contained in the audit, the parties shall meet and make good faith attempts to resolve any outstanding issues. If the matter cannot be resolved to the Town's reasonable satisfaction, Co-op shall, at its expense, cause an independent auditor, selected by agreement with the Town, to investigate and determine the correctness of the charges to the underground fund. The Co-op shall reconcile the fund consistent with the findings contained in the independent auditor's written report. If the independent auditor's report confirms Co-op's allocations, costs and expense, the Town shall be responsible for one hundred percent (100%) of the cost for the independent auditor's work and report.

It is further understood and agreed that any undergrounding shall extend for a minimum distance of one (1) block or 750 feet, whichever is less or as may be mutually agreed by the parties. Undergrounding shall only be required for lines of 7,500 or less voltage. The parties agree to synchronize their work plans so that there is at least two (2) year's advance notice of underground installation

The final decision as to which projects are selected for undergrounding rests with the Town, subject to the provisions of this Article. The specific scheduling of such projects rests with the Co-op, which shall make every reasonable effort to complete such projects within the time requested by the Town.

§8.6 Review of Undergrounding Projects.

The Town and the Co-op shall mutually plan in advance the scheduling of approved undergrounding projects to be undertaken according to this article as part of the review and planning for other Co-op construction projects. The Town and the Co-op 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 Co-op 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 no approval and the basis for no approval.

## **ARTICLE 9**

### **TRANSFER OF FRANCHISE**

§9.1 **Consent of Town Required.**

The Co-op 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 requirements, unless the Town shall approve in writing such transfer or assignment. Approval of the transfer or assignment shall not be unreasonably withheld.

§9.2 **Transfer Fee.**

In order that the Town may share in the value this franchise adds to the Co-op's operations, any transfer or assignment of rights under this franchise requiring the approval of the Town under §10.1 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 by a fraction of which the numerator equals the then population of the Town which is served by the Co-op, 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 the Town Residents except as otherwise required by a tribunal having proper jurisdiction.

## **ARTICLE 10**

### **MUNICIPALIZATION**

§10.1 **Town's Right to Condemn.**

During the term of this franchise, the Town shall have the right to condemn the Facilities of the Co-op only as provided under applicable law.

If, during the term of this franchise, the Town operates a municipal utility or issues to another entity a franchise to use the Streets for the placement of electric, telecommunication or fiber optic facilities the Co-op shall no longer be required to collect and pay franchise fees under Article 3 unless substantially the same terms and conditions apply to the service provided by the Town or by the other entity. In addition, the following sections of this franchise shall no longer apply to the Co-op unless substantially the same provisions are applicable to all other electric and gas distributors, including the Town: Articles 3, 4, 6, 8 and 9.



**ARTICLE 11**  
**UNCONTROLLABLE FORCES**

§11.1 **Force Majeure.**

Neither the Town nor the Co-op shall be in breach of this franchise ordinance if a failure to perform any of the duties under this franchise is due to force majeure.

**ARTICLE 12**  
**BREACH**

§12.1 **Breach.**

If the Co-op fails to perform any of the terms and conditions of this franchise and such failure is within the Co-op's control, the Town may notify the Co-op of the specific failure and shall allow the Co-op a reasonable time within which to remedy the failure. If the Co-op 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 this franchise shall be by ordinance enacted by the affirmative vote of a majority of the members of the entire Board. In addition to termination, the Town shall have any other remedy provided at law or equity for the enforcement of contracts, including, without limitation, specific performance to the extent the same may be ordered by a court of competent jurisdiction.

§12.2 **Judicial Review.**

Any such termination of the franchise shall be subject to judicial review as provided by law and shall be brought in the District Court of the Twelfth Judicial District for the State of Colorado.

**ARTICLE 13**  
**AMENDMENTS**

§13.1 **Amendments to Franchise.**

This franchise may be amended only by a writing signed by both the Co-op and the Town, which is approved in the same manner as is required for the approval of this franchise.

**ARTICLE 14**  
**MISCELLANEOUS**

§14.1 **Successors and Assigns.**

The rights, privileges, franchises and obligations, in whole or in part, granted and contained in this ordinance shall inure to the benefit of and be binding upon Co-op, its successors, assigns, affiliates, and subsidiaries.

§14.2 Third Parties.

Nothing contained in this franchise shall be construed to provide rights to third parties.

§14.3 Continuation of Utility Service.

In the event this franchise is not renewed at the expiration of its term or is terminated for any reason, the Co-op agrees to continue to provide utility service for a period of not more than 6 months. The Co-op further agrees that it will not withhold any temporary utility services necessary to protect the public.

§14.4 Representatives.

Both parties shall designate, from time to time, representatives for the Co-op and the Town to whom notices shall be sent regarding any action to be taken under this ordinance. Notice shall be in writing and 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 Clerk

Town of Crestone  
P. O. Box 64  
Crestone, CO 81131

With a copy to:

Town Attorney  
Eugene L. Farish, Esq.  
739 First Avenue  
P.O. Box 430  
Monte Vista, CO 81144

To the Co-op:

Chief Executive Officer  
San Luis Valley Rural Electric Cooperative, Inc.  
3625 W US highway 160  
Monte Vista, CO 81144

§14.5 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 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.

§14.6 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 agreements, negotiations, correspondence, understandings, and communications with respect to this franchise.

§14.7 Headings for Reference Only.

The headings in this franchise are for reference only and convey no substantive rights or impose no substantive obligations on the Parties.

§14.8 No Waiver of Rights.

Neither the Town nor the Co-op waives any rights under the statutes and constitution of the State of Colorado or of the United States except as otherwise specifically set forth herein.

§14.9 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.

§14.10 Approval of Franchise.

The Co-op shall promptly execute, 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 execute such an acceptance within 45 days of said final adoption shall be deemed an acceptance of such franchise or amendment thereof.

**SAN LUIS VALLEY RURAL ELECTRIC COOPERATIVE, INC.**

By:

Loren H. Howard, Chief Executive Office