

ORDINANCE NO. 2021-03
FRANCHISE AGREEMENT
BETWEEN THE TOWN OF ORCHARD CITY AND
DELTA-MONTROSE ELECTRIC ASSOCIATION

AN ORDINANCE GRANTING A FRANCHISE BY THE TOWN OF ORCHARD CITY, COLORADO, TO DELTA-MONTROSE ELECTRIC ASSOCIATION, ITS SUCCESSORS AND ASSIGNS, TO LOCATE, BUILD, CONSTRUCT, RECONSTRUCT, REPLACE, MODIFY, UPGRADE, UPRATE, RELOCATE, REMOVE, ACQUIRE, PURCHASE, EXTEND, MAINTAIN, AND OPERATE INTO, WITHIN, AND THROUGH THE TOWN OF ORCHARD CITY, DELTA COUNTY, COLORADO, ALL FACILITIES NECESSARY FOR, OR RELATED TO, THE PURCHASE, TRANSMISSION, AND DISTRIBUTION OF ELECTRICITY TO THE TOWN OF ORCHARD CITY AND THE RESIDENTS, BUSINESSES AND INDUSTRY OF THE TOWN OF ORCHARD CITY, BY MEANS OF LINES, WIRE, CABLES, FIBER, POLES, FACILITIES, EQUIPMENT OR OTHERWISE, OVER, UNDER, ALONG, ACROSS, AND THROUGH ANY AND ALL STREETS, ALLEYS, VIADUCTS, BRIDGES, ROADS, LANES, AND OTHER PUBLIC WAYS AND PLACES IN SAID TOWN OF ORCHARD CITY, AND FIXING THE TERMS AND CONDITIONS THEREOF.

BE IT ORDAINED BY THE BOARD OF TRUSTEES OF THE TOWN OF ORCHARD CITY, COLORADO, as follows:

ARTICLE 1
TITLE AND DEFINITIONS

- 1.1 This Chapter shall be known and may be cited as the "Delta-Montrose Electric Association Franchise Chapter".
- 1.2 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.
- 1.3 "Board of Trustees" refers to and is the legislative body of the Town.
- 1.4 "Company" or "DMEA" refers to and is Delta-Montrose Electric Association, a Colorado cooperative electric association, and is the grantee of rights under this Franchise.
- 1.5 "Facilities" or "Company Facilities" refer to and are all of the Company's facilities reasonably necessary to provide electric service and communication fiber into, within and

through the Town, including but not limited to substations, transmission and distribution structures, lines, wires, electrical equipment, transformers, overhead and underground lines, meters, meter reading devices, control equipment, street lights, wires, cables, fiber optic cables, electric transportation charging facilities and poles.

- 1.6 "Franchise" refers to the terms and conditions of this ordinance.
- 1.7 "Gross Revenues" refers to those amounts of money that the Company receives from the sale and/or delivery of electricity in the Town, after adjusting for refunds, net write-offs of accounts, corrections, or Regulatory Adjustments (as defined below). "Gross Revenues" shall exclude any revenue from the sale and/or delivery of electricity to the Town as a customer of the Company.
- 1.8 "Industrial Customers" refer to those Town customers which meet the criteria under applicable "Industrial — Distribution Voltage" and "Industrial – Transmission Voltage" rate tariffs for the Company.
- 1.9 "Party" or "Parties" refers to and includes the Company and the Town, either singly or collectively as the context requires.
- 1.10 "Public Project" means (1) any public work or improvement within the Town that is wholly or beneficially owned by the Town or is the result of a request and/or required by the Town as part of a development application pursuant the Town of Orchard City Municipal Code; 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, a Colorado county, or other governmental or quasi-governmental entities. For purposes of this agreement, "public work or improvement" means any project for the new construction or reconstruction of a project such as public buildings; public roads; public highways; public streets; publicly owned water mains and sewers; public parks and playgrounds; public convention facilities which are financed at least in part with public money; jails and prisons; and all other similar publicly-owned works and property. Public work or improvement does not include any project done for primarily aesthetic purposes, beautification, or view protection.
- 1.11 "PUC" refers to and is the Public Utilities Commission of the State of Colorado or other state agency succeeding to the regulatory powers of the Public Utilities Commission.
- 1.12 "Regulatory Adjustments" refers to any adjustments to the Company's revenues pursuant to federal, state or other governmental regulations, including but not limited to, credits, surcharges, refunds, and pro-forma adjustments.
- 1.13 "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.

- 1.14 "Rights-of-Way" refer to and are streets, alleys, viaducts, bridges, roads, lanes, public utility easements, and other public rights-of-way and public places in the Town, excluding any easement the terms of which do not permit the use thereof by the Company. The phrase "in the Rights-of-Way" shall mean upon, above, under, across, along and within said Rights-of-Way.
- 1.15 "Town" refers to and is the municipal corporation designated as the Town of Orchard City, Delta County, Colorado, and is the grantor of rights under this Franchise.
- 1.16 "Uncontrollable Forces" means 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 reasonable efforts to perform, including, without limitation, accidents, breakdown of equipment, acts of God, floods, storms, fires, sabotage, terrorist attack, strikes, riots, war, labor disputes, forces of nature, epidemics, pandemics, orders of the government or unavailability or shortages of materials or equipment.
- 1.17 "Utility Service" means the obligation to furnish, sell, and distribute electricity.

**ARTICLE 2
GRANT OF FRANCHISE**

2.1 Grant of Franchise.

- (A) The Town grants to the Company, for the period specified in and subject to the conditions, terms, and provisions contained in this Franchise:
 - (1) The non-exclusive right, and the Company assumes the obligation, to provide Utility Service to the Town and to all Residents of the Town.
 - (2) The non-exclusive right, and the Company assumes the obligation, to acquire, construct, install, locate, maintain, upgrade, operate, and extend into, within and through the Town all Facilities reasonably necessary to furnish, sell, and distribute electricity within and through the Town.
 - (3) The non-exclusive right, and the Company assumes the obligation, to make reasonable use in the Rights-of-Way as may be necessary to carry out the terms of this Franchise subject to the Town's prior right of usage for 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.
 - (4) The non-exclusive right, and the Company hereby assumes the obligation, to provide street lighting service within the Town which shall be governed

by this Franchise, applicable Town codes and regulations, and Company's tariffs.

- (B) The rights granted by this Franchise are not, and shall not, be deemed to be granted exclusively to the Company, and the Town reserves the right to make or grant a similar franchise to any other person, firm, or corporation as allowed by law. Notwithstanding the foregoing, the Town agrees that the Company is the holder of Certificate of Public Convenience and Necessity granting the Company an exclusive service territory for the distribution of electric service to the Town subject to the rules and regulations of the PUC and the Town's rights of eminent domain as provided for, and limited by, Article II, Section 15 of Colorado Constitution and C.R.S. § 40-9.5-201, *et seq.*
- (C) Except as otherwise specifically provided in this Franchise, the Town retains the right to use, control, and regulate, through the exercise of its police power, the use of the Rights-of-Way, and the space above and beneath said Rights-of-Way; and the Town retains the right to impose such other local codes or administrative 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 public.
- (D) Neither the Town nor the Company waives any rights under the statutes and constitution of the State of Colorado or of the United States except as otherwise specifically stated in this Franchise.
- (E) This Franchise constitutes a valid and binding contract between the Company and the Town. In the event that the Franchise Fee (defined below) is declared illegal, unconstitutional, or void for any reason by any court or other proper authority, the Company shall be contractually bound to collect and pay monthly rental fees to the Town in an aggregate amount that would be, as nearly as practicable, equivalent to the amount which would have been paid by the Company as a Franchise Fee as consideration for use of the Town's Rights-of-Way.
- (F) Nothing in this Franchise shall prohibit the Company from using its Facilities as authorized by applicable laws and regulations, including leasing its Facilities to any third-party.

ARTICLE 3 TERM OF FRANCHISE

- 3.1 Term of Franchise. This Franchise shall take effect on its adoption by the Board of Trustees, and shall supersede any prior franchise grants to the Company by the Town

relating to Utility Service. Unless terminated prior to twenty (20) years in accordance with other provisions of this Franchise, the term of this Franchise shall be for twenty (20) years.

ARTICLE 4 FRANCHISE FEE

4.1 Franchise Fee.

- (A) In consideration for the rights granted in this Franchise, which provide, among other things, for the Company's use of the Rights-of-Way, which are valuable public properties acquired and maintained by the Town at great expense to its Residents, and in recognition that the grant to the Company of the use of those Rights-of-Way, and of the right to provide service to the Town's Residents, which are valuable rights, the Company 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 the Company from any other lawful taxes or fees; however, the Franchise Fee shall constitute the exclusive monetary payment by the Company to the Town for the Company's use and occupancy of the Rights-of-Way except as specifically provided for in this Franchise.
- (B) The Company shall collect from its customers within the Town limits and pay to the Town a sum of three percent (3%) of its annual Gross Revenue derived from the sale of electricity to Residents, excluding Industrial Customers, within the corporate limits of the Town (the "Franchise Fee"). The Company will not collect said 3% Franchise Fee from the Town for Utility Service provided directly or indirectly to the Town for its own consumption, including street lighting service.
- (C) A transaction or arrangement between the Company and any third-party which has the effect of circumventing payment of required Franchise Fees or evasion of payment of Franchise Fees by non-collection, non-reporting, or any other means which evade the actual collection of revenues by the Company for services delivered over the system or businesses the Company pursues derived from the operation of the system is prohibited except any such transaction which may be required by law.
- (D) No acceptance of payment by the Town from the Company 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. The Company shall remit the Franchise Fee 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. In the event that either the Town or the Company discovers that there has been an error in the calculation of the Franchise Fee payment to the Town, the error shall be corrected in the next monthly payment; except that, in the event an error by the Company results in an overpayment of the Franchise Fee to the Town, and said overpayment is in excess of Ten Thousand Dollars (\$10,000), credit for the overpayment shall be spread over the same period the error was undiscovered. If the overpayment is less than Ten Thousand Dollars (\$10,000), credit shall be taken against the next payment. In no event shall either Party be required to credit or pay any under- or overpayment which occurred more than three (3) years prior to the discovery of the error. Underpayments shall be subject to up to 1 ½% interest per month until paid or credited in full.

- 4.3 Franchise Fee Payment not in Lieu of Permit or Other Fees. Payment of the Franchise Fee by the Company is accepted by the Town in lieu of any utility occupation tax or any rental fee, for the Company's use or occupation of Town's Rights-of-Way, or for the installation, operation and maintenance of Company Facilities. Payment of the Franchise Fee does not exempt the Company from any other lawful tax or fee, including any fee for an excavation permit, street cut permit, or similar requirement.
- 4.4 Changes in Town Boundaries. The Town shall promptly notify the Company in writing of annexations (or de-annexation) of property into (or out of) the domain of the Town so that DMEA may appropriately adjust its collection of the Franchise Fee from Residents within the Town limits. Any amounts received for Utility Services provided to customers within the new Town limits will be included in the Gross Revenues no later than ninety (90) days after such written notice. The Company shall not be required to retroactively collect or pay any Franchise Fees on such Utility Services from Residents in any annexed area of the Town if the Town fails to provide written notice of the annexation to the Company.

ARTICLE 5 MODIFICATION OF FRANCHISE FEE

- 5.1 Change of Franchise Fee and Other Terms. In recognition of the length of the term of this Franchise, and in further recognition of the possibility of legislative and/or regulatory amendments which may allow for the wheeling of electricity through Facilities owned by the Company and located within the Town, the Parties agree that in the event of such legislative or regulatory amendments, or in any unexpected event which would result in a significant decrease in fees collected on behalf of the Town, the Company and the Town agree to modify the computation of the Franchise Fee. Said modified computation may be based upon volume of electricity delivered rather than the percentage of revenue, at the Town's discretion. The Parties agree, to the extent permitted by law, to cooperate in modifying section 4.1(B) of this Franchise to assure that the Company collects and the

Town receives the Franchise Fees or some other form that is at least the same amount as the Franchise Fees collected by the Company as of the effective date of this Franchise, and for any increases in usage.

In the event that the computation of the Franchise Fee is modified and based upon volume of electricity delivered in accordance with the provisions of this Franchise, both Parties agree that, to the extent allowable by law, the Company shall be responsible for the collection of such Franchise Fee as measured against the total amount of kilowatt-hour consumption of electricity in each month by each Resident, from all electric providers and/or distributors. Both Parties further agree that such volumetric computation shall be subject to annual adjustment to reflect inflation in accordance with a mutually acceptable price index.

Modification of the Franchise Fee as provided herein is an express term of this Agreement.

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 the Company relevant for the purpose of ascertaining compliance with the terms of this Franchise during normal business hours upon reasonable notice. The Town may use such information for the purposes of enforcing its laws, ordinances, and regulations. Nothing in this Franchise shall exempt the Company from any other requirements regarding the production of information as provided in the laws, ordinances and regulations of the Town.
- (B) To the extent allowable by law, the Company 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 collected within the Town during the previous year.
- (C) To the extent allowable by law and reasonably available, the Company shall supply the Town with all of the following information upon written request:
 - (1) Copies of the official minutes of Board of Directors meetings for the previous year;

- (2) A summary of conversions and replacements within the Town which have been accomplished or are underway by the Company, if applicable;
- (3) The Company's plans for additional conversions and replacements within the Town, if applicable;
- (4) Copies of tariffs including but not limited to all tariffs, rules, regulations, and policies relating to service by the Company to the Town and its Residents;
- (5) Copies of supporting documentation for the calculation of the Franchise Fee;
- (6) An inventory of the Company's Facilities within the Town; and
- (7) Annual and long-term reports for capital improvements planned within the Town.

6.2 Enforcement of Town Ordinances. The Town may use the Company's metered information obtained from audits for the purposes of enforcing its laws, ordinances, and regulations.

6.3 Protection of Confidential Information. Except as expressly authorized in this Franchise, all information obtained by the Town pursuant to this Section 6 shall be kept confidential and shall be utilized for the sole purpose of verifying that the Franchise Fee has been correctly computed and paid.

ARTICLE 7 RATES

7.1 General Provisions. Rates charged by the Company for service provided pursuant to this Franchise shall be fair and reasonable. The Company 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. The Company 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 while taking into account deliverability of electricity and other pertinent design conditions which maintain high safety and service reliability standards.

7.2 Comparable rates. For each rate category within the Company's service area, the rates charged to customers within the Town shall be no higher than the lowest rates charged to the Company's customers in the same rate category, excluding franchise fees, rental 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 the Company for street lighting and Town-owned facilities shall be no higher than the lowest rates charged to the Company's customers for the same rate category, excluding franchise fees, rental fees, surcharges and other taxes, if applicable.

**ARTICLE 8
SUPPLY, CONSTRUCTION AND DESIGN**

8.1 Supply; Reliability.

- (A) The Company shall at all times take all reasonable and necessary steps to assure the adequate supply, transmission, and distribution of electricity to the Town and its Residents at the lowest reasonable cost consistent with the terms of this Franchise. In addition, the Company shall operate its Facilities pursuant to the highest practicable level of service quality and reliability in providing electricity to the Town and its Residents. The Company recognizes that maintaining service reliability is a substantial obligation under this Franchise. Upon the Town's request, the Company will provide the Town copies of service reliability reports.
- (B) If the supply, transmission, or distribution of electricity to the Town or any Resident is interrupted, the Company shall take all necessary and reasonable actions to restore such supply in the shortest practicable time. If the supply of electricity is to be interrupted due to a planned outage, except in cases of emergency outage repair, the Company shall take adequate reasonable efforts to notify its customers and the Town in advance. The Company shall keep on file in its office and/or on its website, copies of its rate schedules, standards for service, rules, policies, and regulations 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) The Company shall provide to the Town telephone numbers of the Company's dispatch center that will permit the Town to obtain status reports from the Company on a twenty-four hour basis concerning interruptions of the supply of electricity in any portion of the Town. The Town agrees that any non-published Company telephone numbers shall be considered confidential and not disclosed to any third-parties, to the extent permitted by law.

8.2 Obligations Regarding Company Facilities.

- (A) All work by the Company 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 and individuals;
 - (4) in a cost-effective manner, which may include the use of qualified private contractors; and
 - (5) in accordance with Company policies and procedures but all times subject to applicable laws, ordinances, and regulations.
- (B) The installation, repair, or maintenance of Company Facilities shall not interfere with water facilities, sanitary or storm sewer facilities, communication facilities, or other uses of the Rights-of-Way. Interference with private property, landscaping and other natural features shall be minimized.
- (C) The Company shall promptly repair all damage caused by Company's negligent activities or Facilities within the Town to substantially its former condition. 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 the Company shall promptly reimburse the Town for the reasonable cost of such repairs. Notwithstanding anything to the contrary in this Franchise, provided that the Company has followed its requirements under Colorado's 811 "call-before-you-dig" law, the Company shall not be responsible for the repair or cost of any damages due to an improperly identified locate or an unidentified water main, sewer, or other structure.
- (D) All non-electrical work performed by the Company 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. The Company shall promptly perform reasonable remedial action required by the Town pursuant to any such inspection. The Company shall have the authority under this Franchise to cut, prune, and/or remove vegetation in accordance with its standard vegetation management requirements and procedures. Upon request by the Town, and in accordance with the Company's applicable policies, the Company will provide as-built drawings, but only if such drawings exist, for Company Facilities in the Rights-of-Way.
- (E) Except in emergency situations, where the installation, upgrade or replacement of any Facilities in the Rights-of-Way by or on behalf of the Company requires relocation of Company Facilities in the Rights-of-Way, the location shall be subject to inspection and approval by the Town; provided that, the Town agrees that such location shall be consistent with the current location of any upgrade or replacement of any existing Facilities, for example, overhead Facilities shall remain overhead and underground Facilities shall remain underground. Such inspection and approval may include, but not be limited to, the following matters implicated by relocation of Facilities in the Rights-of-Way: cutting and trimming of trees and shrubs and disturbance of pavements, sidewalks, and surfaces of streets.

- (F) The Company and all of its contractors shall comply with all applicable Town laws, ordinances, and regulations. The Company shall require its contractors working in the Rights-of-Way to hold the necessary licenses and permits required by the Town and other entities having jurisdiction.
- (G) The Company shall provide, when available, as-built drawings in digital formats and providing such details as reasonably requested by the Town in accordance with the Company's applicable policies, of each Company Facility which exists within the Town.

8.3 Excavation and Construction. The Company shall be responsible for obtaining all applicable permits, including any excavation and/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 Company construction or excavation activities shall be restored by the Company at its expense to substantially its former condition according to then existing Town laws, ordinances, and regulations.

8.4 Relocation of Company Facilities.

- (A) Except as provided in 8.4(B) below, relocation of electric Facilities installed or maintained in the Rights-of-Way or Town property pursuant to this Franchise or any previous franchises shall be made by the Company at its expense, if at any time the Town requests the Company to relocate the same in order to permit the construction of a Public Project.
- (B) The provisions of 8.4(A) above are intended to be applied to Public Projects only. The provisions shall not apply, and the Company shall not be responsible for, payment of costs associated with relocation of Facilities when the following apply:
 - (1) relocation of the Facilities is primarily for aesthetic purposes, beautification or view protection; or
 - (2) relocation involves Facilities owned by the Company in privately held easements, including without limitation, Facilities located in prescriptive easements benefitting the Company; or
 - (3) relocation involves existing underground utilities properly located within public easements according to Town specifications, if such relocation is not necessary to the Public Project.
- (C) The Company shall complete such relocations as soon as practicable from the date when the Town makes its request, but in any event within 90 days after such request; except that the Company may be granted an extension of time for completion equivalent to any delay caused by conditions not under its control. Upon written request, the Town may extend the period of time for completion of a

relocation where the scope of the relocation and/or existing circumstances makes a 90-day completion time unreasonable. In such cases, the Town's consent to a longer completion time shall not be unreasonably withheld or conditioned.

- (D) When requested by the Town or the Company, representatives of the Town and the Company shall meet to share information regarding anticipated Town projects that will require relocation of Company 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 the Company from the proposed relocation, and establish timetables with anticipated commencement and completion dates.
 - (E) Following relocation, all property shall be restored to substantially its former condition by the Company at its expense (or at Town's expense in accordance with Section 12.1) in accordance with then existing Town laws, ordinances, and regulations.
 - (F) The Town shall use its best efforts to obtain funding for utility relocations in connection with Public Projects receiving federal or state funds. When public funds are utilized for the purposes of utility relocation, the Town shall utilize said funds for Company utility relocations in a manner consistent with other utility relocations.
 - (G) No expenses pursuant to this article paid or reimbursed shall be surcharged specifically against Residents of the Town.
- 8.5 Service to New Areas. If the boundaries of the Town are expanded during the term of this Franchise, the Company shall extend service to Residents in the expanded area at the earliest practicable time and in accordance with the Company's extension policy. Service to the expanded area shall be in accordance with 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, the Company shall extend its Facilities to provide Utility Service to the Town for municipal uses within the Town limits or for any major municipal facility outside the Town limits, and within the Company's certificated service area, without requiring the Town to advance funds prior to construction. Upon completion, the Town shall pay all invoices within 30 days of receipt.
- 8.7 Technological Improvements.
- (A) The Company shall generally introduce and install, as soon as practicable, technological advances in its equipment and Utility 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 Utility Services, the Company's system shall, at all times, be no less advanced than any other system operated by the Company within the Company's service area; provided, however, should an upgrade of the Utility Services provided to customers within the Town be requested by the Town Board of Trustees, the Company 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. The Company shall submit to the Town related information upon the Town Board of Trustees' request, including, but not limited to a plan for provision of such services, or a justification indicating the reason(s) such services are not feasible for the Company's customers within the Town. Company retains the right to make the final decision as to the technological improvements and/or upgrades made by the Company.

- 8.8 Scope of Activities Authorized By Franchise. The provisions of this Franchise apply specifically to electric services, including telecommunications relating to electric services. Nothing in this agreement precludes the Company from engaging in any other lawful activities that are not subject to franchise agreements.

ARTICLE 9 COMPLIANCE

- 9.1 Town Regulation. The Town expressly reserves, and the Company 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 of its citizens. The Company 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 electric Facilities such as transmission lines and substations within the Town, or of a building or other structure within the Town, the Company shall furnish to the Town the plans and a description of the proposed location of such Facilities, building, or structure. In addition, upon request by the Town, the Company 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. The Company shall comply with all regulatory requirements of the Town and shall incorporate all other reasonable changes requested by the Town.

- 9.3 Inspection. The Town shall have the right to inspect, at all reasonable times, any portion of the Company's Facilities in the Town's Rights-of-Way. The Company agrees to cooperate with the Town in conducting the inspection and 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 COMPANY FACILITIES

- 10.1 Town Use. The Town shall be permitted to make all reasonable use of the Company's distribution poles and street lighting poles for any Town purpose so long as such use complies with appropriate safety codes, including the Company's safety regulations. To the extent permitted by law, said use shall be without cost to the Town so long as such use does not unreasonably interfere with the Company's use of its Facilities for distribution of electricity or telecommunications services or create a hazard. The Town shall be responsible for all costs, including maintenance costs, associated with any modifications to the Company's Facilities to accommodate the Town's use of such Facilities. To the extent permitted by law, the Town shall hold harmless and indemnify the Company for the Town and its employees, agents, and representatives acts or failures to act related to the Town's use of Company's Facilities.
- 10.2 Non-Competitor's Use. The Company shall allow telecommunications companies and/or cable companies who hold a franchise or encroachment permit from the Town to utilize the Company's distribution poles and other suitable overhead structures for the placement of their facilities based upon the Company's joint use pole attachment agreement, so long as such terms and conditions are not inconsistent with the Company's obligations under this Franchise. The Company 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 the Company's existing or documented future use of the same.
- 10.3 Competitor's Use. If the Company chooses, or is required by law, to transport electricity supplied by other entities over the Company's Facilities to Town Residents, such transportation shall not be prohibited under this Franchise. The Company shall periodically report to the Town a list of all entities for which the Company 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 the Company 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, the Company shall, upon reasonable request of the Town, make available its Facilities for emergency use during the emergency or the disaster period. Such use of Company Facilities shall be of a limited duration and will only be allowed if the use does not interfere with the Company's own use of its Facilities occasioned by such emergency or disaster. To the extent permitted by law, the Town shall hold harmless and indemnify the Company for the Town and its employees, agents, and representatives acts or failures to act related to such use of Company's Facilities.
- 10.5 Trenches Available for Town Use. The Town and Company agree that it is in the best interest of the community for the Town and Company to share and combine Company Facilities and Town facilities in common trenches, ductways, etc. The Company and Town agree to work together to see that such facilities are combined to minimize impacts to the community. The Town's installation of its facilities shall not interfere with the Company's Facilities or delay the commencement or completion of the Company's construction projects.

ARTICLE 11 INDEMNIFICATION OF THE TOWN

- 11.1 Town Held Harmless.
- (A) The Company shall construct, maintain, and operate its Facilities in a manner which provides reasonable protection against injury or damage to persons or property; provided, however, said obligation of the Company shall not increase or decrease its liability on third-party claims.
- (B) The Company shall save the Town harmless and indemnify the Town from and against all liability or damage and all claims or demands whatsoever in nature, and reimburse the Town for all its reasonable expenses, including attorneys' fees, arising out of the operations of the Company within the Town and the securing of and the exercise by the Company of the rights granted in this Franchise, including any third-party claims, administrative hearings and litigation. Notwithstanding anything in this Franchise to the contrary, the Company shall not be obligated to indemnify or hold the Town harmless to the extent any claim, demand or liability 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 the extent that any claim, demand or liability arises out of, or in connection with, the use of any facilities of the Town.

- (C) The indemnification extended pursuant to this Franchise shall include delay damages as that term is contemplated 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 the Company either agrees it is responsible or which were caused as the result, in whole or in part, of the acts or omissions of the Company in the performance of its obligations under this Franchise. Unless the Company otherwise agrees in writing, in no event shall the Company 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 the Company acting on behalf of or within the Town's control. Nothing contained in this Franchise shall be construed as an acknowledgment by the Parties that the Company, 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.*
 - (D) 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.
 - (E) Notwithstanding any provision in this Franchise to the contrary, the Company shall not be obligated to indemnify, defend or hold the Town harmless in any manner inconsistent with the doctrine of comparative negligence in Colorado.
- 11.2 Notice to Company. The Town will provide prompt written notice to the Company of the pendency of any claim or action against the Town arising out of the exercise by the Company of its Franchise rights. The Company will be permitted, at its own expense, to appear and defend or to assist in defense of such claim.
- 11.3 Financial Responsibility. At the Town's request, but not more frequently than annually, the Company 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. The Company shall supply the Town with a list

of its insurance companies with the types of coverage, but not levels of insurance. The Town may require, from time to time, and the Company agrees to provide, additional reasonable funding of the Company's indemnification obligations as a self-insured, if the Company is acting as a self-insurer.

- 11.4 Payment of Ordinance Expenses. At the Town's option, the Company shall reimburse the Town for reasonable and proportionate expenses incurred in publication of ordinances and initial implementation of this Franchise, with such costs not to exceed \$500. No such expenses paid or reimbursed shall be surcharged specifically against residents of the Town.

ARTICLE 12 UNDERGROUNDING OF OVERHEAD FACILITIES

- 12.1 Undergrounding of Facilities at Expense of Town. Upon request by the Town, the Company agrees to underground existing overhead Facilities at the Town's expense, except when relocation is otherwise required in accordance with the provisions of § 8.4(A), in which case the cost to relocate the Facilities underground shall be paid by the Town, reduced by the cost of construction had the Facilities been relocated above ground.
- 12.2 Cooperation with Other Utilities. When undertaking a project of undergrounding, the Town and the Company 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, the Company shall cooperate with these utilities and companies and undertake to underground Company facilities as part of the same project where feasible.
- 12.3 Review and Planning for Undergrounding Projects. The Town and the Company 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 Company construction projects. The Town and the Company agree to meet, as required, to review the progress of the current undergrounding projects and to review planned future undergrounding projects. The Company 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. The Company need not approve an undergrounding project if it would create a significant risk to safety or operational integrity, but it shall provide to the Town written notification of any such non-approval and the grounds therefore.

ARTICLE 13 TRANSFER OF FRANCHISE

- 13.1 Consent of Town Required. The Company shall not sell, re-sell, transfer, assign or convey any rights under this Franchise, to any unaffiliated third-party, including any merger with such unaffiliated third-party, nor undergo any corporate reorganization or other change which would result in any modification of the Company'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 the Company sell, assign, transfer, convey, or otherwise dispose of its rights or interests under this Franchise, without the proper approval, the Town may revoke this Franchise. Upon revocation, all rights and interests of the Company under this Franchise shall cease. For the purposes of this Section, a change of control of the Company is a transfer.

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 the Company in connection therewith, as provided by the Colorado Constitution and statutes, is expressly reserved, and may be exercised by the Town only in accordance with such statutes and law in effect as of the date of this Franchise, including Article II, Section 15 of Colorado Constitution and C.R.S. § 40-9.5-201, *et seq.*
- (B) The Company 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 the Company in connection therewith, as provided for, and limited by, Article II, Section 15 of Colorado Constitution and C.R.S. § 31-15-707 *et seq.*, with the amount of compensation as provided by C.R.S. § 40-9.5-201 *et seq.*, 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, the Company 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 request, for up to a twenty-four month period after the Town has either purchased or condemned the Company's Facilities or alternative arrangements have been made. Both Parties will exercise due diligence to wind up the affairs as soon as practical.
- (D) The Company shall cooperate with the Town by making available such records as will enable the Town to evaluate the feasibility of acquisition of Company Facilities. The Company 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. The Company shall take no action, which could inhibit the Town's ability to effectively or efficiently use the acquired Facilities.

- (E) Notice of Intent to Purchase or Condemn. Unless the Town and Company agree otherwise, the Town shall provide the Company no less than one (1) year's prior written notice of its intent to purchase or condemn Company Facilities. Nothing in this Section shall be deemed or construed to constitute a consent by the Company to the Town's purchase or condemnation of Company Facilities, nor a waiver of any Company defenses or challenges related thereto.
- 14.2 Negotiated Purchase Price or Condemnation Award. If the Town desires to purchase Company Facilities and if the Company desires to sell such Facilities, the Parties shall negotiate in good faith to determine a mutually acceptable purchase price in accordance with C.R.S. § 31-15-707 (to the extent it is not in conflict with C.R.S. §40-9.5-204), and C.R.S. § 40-9.5-204, as such statute was in effect as of the date of this Franchise, for up to ninety (90) days; said purchase price shall exclude the value of this Franchise. If agreement is not reached, the Town and the Company reserve all rights to assert their respective positions with respect to the steps the Town would need to take to condemn Company Facilities; however, no award shall be made for the value of this Franchise.
- 14.3 Town-Produced Electricity. The Company 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 that right at any time. The Company shall not curtail wholesale purchases of Town-generated electricity.
- 14.4 Purchase of Real Property of Company by Town. If at any time during the term of this Franchise, the Company proposes to sell or dispose of any of its real property held in fee simple located in whole or in part in the Town, it shall grant to the Town the right of first refusal to purchase the same. Nothing in this provision shall preclude the Company 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 the Company, including all or a portion of any Company owned street lighting facilities, equipment, system, and plant. The Company understands and agrees that the Town may choose to so purchase or condemn such street lighting service at any time; provided that any such condemnation is in accordance with the law.
- 14.6 Exercise of Rights Under This Article. The Town recognizes that when the Company evaluated the economic feasibility of withdrawing from its previous wholesale electric service contract, the Company reasonably expected that it would continue long-term Utility Service within the Town's municipal boundaries until at least March 1, 2033. In light of this expectation and notwithstanding anything to the contrary in this Franchise, the Town agrees that if it exercises any of its rights under this Article 14 prior to March 1, 2033, then the Town will compensate the Company for decreased Utility Service sales to

address the Company's revenue shortfall that would otherwise not exist through that 2033 date. In the case of purchase or condemnation before March 1, 2033, the Town and Company agree that such amount shall be added to the purchase price calculation in Section 14.2 and is part of the fair market value for any such purchase or condemnation.

ARTICLE 15 BREACH

- 15.1 Breach. Except as otherwise provided in this Franchise, if a Party (the "Breaching Party") to this Franchise fails or refuses to perform any of the terms or conditions of this Franchise (a "Breach"), the other Party (the "Non-Breaching Party") may provide written notice to the Breaching Party of such Breach. Upon receipt of such notice, the Breaching Party shall be given a reasonable time, not to exceed ninety (90) days in which to remedy the Breach or, if such Breach cannot be remedied in ninety (90) days, such additional time as reasonably needed to remedy the Breach, but not exceeding an additional ninety (90) day period, or such other time as the Parties may agree. If the Breaching Party does not remedy the Breach within the time allowed in the notice, the Non-Breaching Party may exercise any legal rights or remedies available at law, including without limitation, specific performance of the applicable term or condition to the extent allowed by law and recovery of actual damages, but excluding any special, punitive or consequential damages.
- 15.2 Other Legal Remedies. Nothing in this Franchise shall limit or restrict any legal rights or remedies that either Party may possess arising from any alleged violation of this Franchise.
- 15.3 Continued Obligations. Upon termination of the Franchise, the Company shall continue to provide Utility Service to the Town and its Residents (and shall continue to have associated rights and grants needed to provide such service) until the Town makes alternative arrangements for such service and until otherwise ordered by the PUC and the Company shall be entitled to collect from Residents and, upon the Town complying with applicable provisions of law, shall be obligated to pay the Town, at the same times and in the same manner as provided in this Franchise, an aggregate amount equal to the amount which the Company would have paid as a Franchise Fee as consideration for use of the Rights-of-Way. Unless otherwise provided by law, the Company shall be entitled to collect such amount from Residents.

ARTICLE 16 APPROVAL; AMENDMENTS

- 16.1 Approval of Franchise. The Company shall promptly file, in writing, its acceptance of this Franchise upon approval of this ordinance by the Town Board of Trustees.
- 16.2 Terms Impacted by Legislative and Regulatory Changes. The Town and the Company 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 and/or of the Company. In the event of such regulatory changes, the Town and the Company may need to amend various provisions of this Franchise and agree to negotiate in good faith in reaching such amendments.

- 16.3 Proposed Amendments. At any time during the term of this Franchise, the Town or the Company may propose amendments to this Franchise by giving thirty (30) days written notice to the other of the proposed amendment(s) desired, and both Parties thereafter, through their designated representatives, will, within a reasonable time, negotiate in good faith in an effort to agree upon mutually satisfactory amendment(s). However, nothing contained in this Section shall be deemed to require either Party to consent to any amendment proposed by the other Party.

**ARTICLE 17
MISCELLANEOUS**

- 17.1 No Waiver. Neither the Town nor the Company 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. Neither the Town or Company waives any rights under statutes or the Constitution of the State of Colorado or of the United States except as otherwise specifically set forth in this Franchise.
- 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 the Company, its successors and assigns, to the extent that such successors or assigns have succeeded to or been assigned the rights of the Company pursuant to Article 13.
- 17.3 Third-Parties. Nothing contained in this Franchise shall be construed to provide rights or remedies to third-parties.
- 17.4 Notice. The Company 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:
 Mayor
 9661 2100 Road
 Austin, Colorado 81410

To the Company:
 Chief Executive Officer
 11925 6300 Road
 Montrose, Colorado 81401

- 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 in this Franchise and supersedes any and all prior written or oral agreements, 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 any litigation arising out of this Franchise shall be in the **District Court of Montrose County, Colorado**.
- 17.8 Uncontrollable Forces. Neither Town nor the Company shall be in breach of this Franchise if a failure to perform any of the duties under this Franchise is due to Uncontrollable Forces.
- 17.9 Earlier Franchises Superseded. This Franchise shall constitute the only franchise between the Town and the Company related to the furnishing of Utility Service, and it supersedes and cancels all former electric franchises between the Parties.

INTRODUCED on first reading by the Board of Trustees of the Town of Orchard City this 13th day of October 2021 and set for hearing before interested parties to be held on the 10th day of November 2021 with such hearing to begin at 7:00 p.m.

Mayor

ATTEST:

Town Clerk

After a public hearing, the above Ordinance was **INTRODUCED, READ AND ADOPTED** by the Town Board the 10th day of November 2021, to become effective thirty days after the date of publication of this Ordinance.

Mayor

ATTEST:

Town Clerk

CERTIFICATION

STATE OF COLORADO)

) ss.

COUNTY OF DELTA, TOWN OF ORCHARD CITY)

The undersigned, Melissa Oelke, as Town Clerk of the Town of Orchard City, Colorado, does hereby certify that the foregoing is a true and accurate copy of Ordinance No. 2021-03 adopted by the Board of Trustees on 10th day of November 2021, and that the same was duly published in a newspaper of general circulation with the Town of Orchard City on, 17th day of November 2021.

Melissa Oelke, Town Clerk

(SEAL)

Company:

Town:

Delta-Montrose Electric Association, a
Colorado cooperative electric association

Town of Orchard City, Delta County,
Colorado

By: _____
_____, CEO

By: _____
Ken Volgamore, Mayor