



TO: Mayor and Councilmembers
FROM: City Manager John Moran
DATE: October 11, 2011
SUBJECT: Public Hearing to consider, discuss and act upon Ordinance # O-2011-1025-001 granting to Texas-New Mexico Power Company, its successors and assigns, the non-exclusive right to use and occupy rights-of-way within the City of Farmersville for the construction and operation of an electric transmission and distribution system upon the terms and conditions set forth in said Ordinance.

Ordinance # O-2011-1025-001 is attached

ACTION:

- 1) Open Public Hearing and call time**
- 2) Ask for those FOR the Ordinance to speak**
- 3) Ask for those OPPOSED to the Ordinance to speak**
- 4) Close the Public Hearing and call time**
- 5) Open to the Council to approve or disapprove the first reading of Ordinance # O-2011-1025-001**

(IV – A)

CITY OF FARMERSVILLE

ORDINANCE # O-2011-1025-001

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF FARMERSVILLE, TEXAS, GRANTING TO TEXAS-NEW MEXICO POWER COMPANY, ITS SUCCESSORS AND ASSIGNS, THE NON-EXCLUSIVE RIGHT TO USE AND OCCUPY RIGHTS-OF-WAY WITHIN THE CITY OF FARMERSVILLE FOR THE CONSTRUCTION AND OPERATION OF AN ELECTRIC TRANSMISSION AND DISTRIBUTION SYSTEM; PRESCRIBING CONDITIONS GOVERNING THE USE OF THE PUBLIC RIGHTS-OF-WAY; PROVIDING FOR COMPENSATION THEREFOR; PROVIDING FOR AN EFFECTIVE DATE AND A TERM OF SAID FRANCHISE; PROVIDING FOR WRITTEN ACCEPTANCE OF THIS FRANCHISE; FINDING THAT THE MEETING AT WHICH THIS ORDINANCE IS PASSED IS OPEN TO THE PUBLIC; AND PROVIDING FOR SEVERABILITY.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF FARMERSVILLE, TEXAS, THAT:

SECTION 1. GRANT OF AUTHORITY. There is hereby granted to Texas-New Mexico Power Company, its successors and assigns (herein called "Company"), the right, privilege and franchise ("Franchise") to construct, extend, maintain, and operate in, along, over, under and across the present and future streets, alleys, highways, public places and public ways ("Public Rights-of-Way") of Farmersville, Texas (herein called "City") an Electric Transmission and Distribution System ("System") consisting of electric power lines, with all necessary or desirable appurtenances (including underground conduits, poles, towers, wires, transmission lines and other structures, and telephone and communication lines for its own internal and non-commercial use), for the purposes of supplying electricity to and delivery of electricity in and through the City, the inhabitants thereof, and persons, firms and corporations beyond the corporate limits thereof, for the term set out in Section 12.

SECTION 2. PURPOSE. The provisions set forth in this ordinance represent the terms and conditions under which Company shall construct, operate, and maintain the System within the Public Rights-of-Way of the City. In granting this Franchise, the City does not in any manner surrender or waive its regulatory or other rights and powers under and by virtue of the Constitution and statutes of the State of Texas as the same

may be amended specifically including but not limited to the City's exclusive right to provide electrical service within the area subject to the City's Certificate of Convenience and Necessity. Nor does City in any manner surrender or waive any of its rights and powers under or by virtue of present or future ordinances of the City, except as may be set out herein. Not included in this Franchise are any facilities (including any equipment attached in any way to Company's facilities, whether owned by the Company or not) that provide data delivery, cable service, telephone service, and/or any other service or product not required by Company for the transmittal and delivery of electricity.

SECTION 3. OPERATION, CONSTRUCTION AND MAINTENANCE OF ELECTRIC DISTRIBUTION AND TRANSMISSION SYSTEM.

A. Company's System shall be so constructed as not to unreasonably interfere with any existing water and wastewater lines, gas lines, storm sewer lines, open drainage areas, cable, fiber optic cable, roadways, sidewalks, alleys, traffic control devices, public signs, or any other publicly owned or publicly franchised facility. Company shall promptly clean-up, repair and restore in compliance with applicable provisions of the Farmersville City Code, all thoroughfares and other surfaces which it may disturb.

B. The Company shall install, maintain, construct, operate and replace its facilities in accordance with applicable city ordinances and so as to interfere as little as possible with traffic. The placement of new facilities in the Public Rights-of-Way shall be subject to the approval of the City Manager or designee. In determining the location of the Company's new facilities within the City, the Company shall minimize interferences with then-existing or documented planned underground structures of the City or with the existing facilities of other users of the Public Rights-of-Way. In determining the location of the facilities of the City and other utility franchisees and other users of the Public Rights-of-Way within the City, the City shall minimize the interference with existing facilities of the Company and shall require other utility franchisees or users of the Public Rights-of-Way to minimize interference with existing facilities of the Company

C. Company's property and operations within the Public Rights-of-Way of the City shall be subject to such reasonable rules and regulations of the City as may be authorized by applicable law from time to time for the protection of the general public. This Franchise shall in no way affect or impair the rights, obligations or remedies of the parties under the Texas Public Utility Regulatory Act, or other state or federal law. Nothing herein shall be deemed a waiver, release or relinquishment of either party's right to contest, appeal, or file suit with respect to any action or decision of the other party, including ordinances adopted by the City that Company believes is contrary to any federal, state, or local law or regulation. The City shall endeavor to provide Company with reasonable notice and opportunity to review and comment upon any new or revised City laws, rules, or regulations that impact Company's use of the Public Rights-of-Way, but the failure to do so shall not affect the applicability of such laws, rules, or regulations to Company.

D. Company shall construct its facilities in conformance with the applicable provisions of the then current National Electric Safety Code or such comparable standards as may be adopted, provided comparable standards are not in conflict with the then current National Electric Safety Code as well as any other applicable local, state and federal requirements including but not limited to any local amendments adopted by the City.

E. Company shall cooperate with the City by providing complete information regarding the location of current and future underground conduits, and other electrical appurtenances. Reproducible copies of maps showing the location of all Company facilities within the Public Rights-of-Way shall be furnished to the City Manager, or his designee, upon request. The maps shall be provided in electronic digital format, if available. The information required by the City under this paragraph shall be subject to the confidentiality and proprietary protection under paragraph 8.E. herein.

F. Any and all excavations and obstructions in and upon the streets, alleys, and other public places in the City caused by the Company's operations under this Ordinance shall be repaired and removed as quickly as is reasonably possible, under the circumstances. All excavations shall be repaired in a good and workmanlike manner and restored to at least the condition that existed prior to the excavation.

Replacement of sod is to be of like kind, smoothed, shaped, rolled and compacted for proper landscape maintenance. The public shall be protected by barriers and lights placed, erected, marked and maintained by the Company in accordance with standards set forth in the then current Texas Manual on Uniform Traffic Control Devices (TMUTCD), as well as any other applicable local, state and federal requirements. Company warrants that any such restoration work performed in the Public Rights-of-Way shall be in satisfactory condition for a period of two (2) years from the date of completion of such work. In the event that the Company fails to repair or restore an excavation site within fourteen (14) calendar days after receipt of written notice from the City of a deficiency, the City may, at its option, perform the needed repair or restoration and the Company shall promptly reimburse the City for the cost of such repair or restoration. Except for repairs, day to day maintenance, or in cases of emergency conditions, work conducted within the Public Rights-of-Way shall require an approved permit issued by the City prior to commencement of work. In no instance shall Company be required to pay fees or bonds related to its use of the Public Rights-of-Way.

G. The Company shall have the authority to trim trees and other natural growth overhanging any of its System so as to reasonably prevent branches from coming in contact with the Company's System. The Company shall have in place a Vegetation Management Program, and shall provide the City with current copies of same, upon request. Except in emergency situations or in response to outages, Company shall notify property owners and the City prior to beginning planned System tree trimming activities. Notice to City shall be given ten (10) calendar days in advance of the commencement of such activities by phone, mail, facsimile, or in person. Notice to customers shall be given five (5) calendar days in advance by door hangers, letter, or in person. The notice to the City shall additionally include a description of the location of the affected area. Because trimming schedules are subject to change due to unforeseen factors, Company shall notify the City of any change in location or schedules as soon as practicable. System trimming for restoration due to power outages, emergency conditions, storm clean-up, or safety are not subject to prior notification. In power restoration efforts, the extent and scheduling of trimming shall be

determined by Company. Brush debris resulting from trimming shall be promptly removed by Company, as circumstances dictate. The Company's tree trimming shall conform to the ANSI A300 standards for tree care operations. The City may request the Company to remove and replace trees that the Company has trimmed in an unreasonable manner and shall cooperate with the City in determining the size, species and location of any replacement trees.

SECTION 4. INDEMNITY.

A. In consideration of the granting of this Franchise, Company shall, at its sole cost and expense, indemnify and hold the City, and its past and present officers, agents, and employees (the "Indemnitees") harmless against any and all liability arising from any claim, lawsuit, or action brought or made for or on account of any death, injuries to, or damages received or sustained by any person or persons or for damage to or loss of property arising out of, or occasioned by Company's or any of its officers, agents, or employees, intentional and/or negligent acts or omissions in connection with Company's construction, maintenance and operation of Company's System in the Public Rights-of-Way, including any court costs, expenses and defenses thereof.

B. This indemnity shall only apply to the extent that the loss, damage or injury is attributable to the negligence or wrongful act or omission of the Company, its officers, agents or employees, and does not apply to the extent such loss, damage or injury is attributable to the negligence or wrongful act or omission of the City, or the City's agents, representatives or employees or any other person or entity. This provision is not intended to create a cause of action or liability for the benefit of third parties but is solely for the benefit of the Company and the City.

C. In the event of joint and concurrent negligence or fault of both the Company and the City, responsibility and indemnity, if any, shall be apportioned comparatively in accordance with the laws of the State of Texas without, however, waving any governmental immunity available to the City under Texas law and without waiving any of the defenses of the parties under Texas law.

Further, in the event of joint and concurrent negligence or fault of both the Company and the City, responsibility for all costs of defense shall be apportioned between the City and Company based upon the comparative fault of each.

D. In fulfilling its obligations to defend and indemnify City, Company shall have the right to select defense counsel, subject to City's approval, which will not be unreasonably withheld. Company shall retain defense counsel within seven (7) business days of City's written notice that City is invoking its right to indemnification under this Contract. If Company fails to retain counsel within such time period, City shall have the right to retain defense counsel on its own behalf, and Company shall be liable for all defense costs incurred by City.

SECTION 5. LIABILITY INSURANCE. Company shall, at its sole cost and expense, obtain, maintain, or cause to be maintained, and provide, throughout the term of this Franchise, insurance in the amounts, types and coverages in accordance with the following City requirements. Such insurance may be in the form of self-insurance to the extent permitted by applicable law or by obtaining insurance, as follows:

1. Commercial general or excess liability on an occurrence or claims made form with minimum limits of five million dollars (\$5,000,000) per occurrence and ten million dollars (\$10,000,000) aggregate. To the extent that coverage is maintained on a claims made form, the minimum limits are ten million dollars (\$10,000,000) per occurrence and twenty million dollars (\$20,000,000) aggregate. This coverage shall include the following:
 - (a) Products/completed operations to be maintained for two (2) years.
 - (b) Personal and advertising injury.
 - (c) Contractual liability
 - (d) Explosion, collapse, or underground (XCU) hazards.
2. Automobile liability coverage with a minimum policy limit of one million dollars (\$1,000,000) combined single limit each accident. This coverage shall include all owned, hired and non-owned automobiles.

3. Statutory workers' compensation benefits in accordance with the statutes and regulations of the State of Texas. Company must provide the City with a waiver of subrogation for workers compensation claims.
4. Company must name the City, which includes all authorities, commissions, divisions, and departments, as well as elected and appointed officials, agents, and volunteers, as additional insureds under the coverage required herein, except Workers' Compensations Coverage. The certificate of insurance must state that the City is an additional insured.
5. Company shall require its contractors and subcontractors to maintain, at their sole cost and expense, insurance in the same amounts and under the same conditions as specified herein for Company. Company shall maintain at all times, and shall provide to City upon request, proof of its contractors' and subcontractors' compliance with this requirement.
6. The Company shall provide proof of insurance in accordance with this Franchise within 30 days of the effective date of the Franchise and annually thereafter. Company will not be required to furnish separate proof when applying for permits.

SECTION 6. NON-EXCLUSIVE FRANCHISE. This Franchise is not exclusive, and nothing herein contained shall be construed so as to prevent the City from granting other like or similar rights, privileges and franchises to any other person, firm, or corporation.

SECTION 7. COMPENSATION TO THE CITY.

A. In consideration of the grant of said right, privilege and franchise by the City and as full payment for the right, privilege and franchise of using and occupying the said Public Rights-of-Way, and in lieu of any and all occupation taxes, assessments, municipal charges, fees, easement taxes, franchise taxes, license, permit and inspection fees or charges, street taxes, bonds, street or alley rentals, and all other taxes, charges, levies, fees and rentals of whatsoever kind and character which the City

may impose or hereafter be authorized or empowered to levy and collect, excepting only the usual general or special ad valorem taxes which the City is authorized to levy and impose upon real and personal property, sales and use taxes, and special assessments for public improvements, Company shall pay to the City a franchise fee as set forth herein.

B. Company shall pay to the City on a quarterly basis, a charge, as authorized by Section 33.008(b) of PURA, currently the product of a factor of \$0.14013 multiplied by each kilowatt hour of electricity delivered by Company to each retail customer whose consuming facility's point of delivery is located within the City's municipal boundaries, as such charge may be revised from time to time by agreement of the parties, per the quarterly schedule as follows:

Payment Due Date	Quarter Upon Which Payment is Based
May 15	January 1 – March 31
August 15	April 1 – June 30
November 15	July 1 – September 30
February 15	October 1 – December 31

Payments shall continue in like manner for any extension of this Franchise as provided in Section 12 hereof.

C. In addition, Company shall pay City a sum equal to four percent (4%) of gross revenues received by Company from services identified in Section 6.1.2.3 "Discretionary Service Charges Other Than Construction Charges," in its Tariff for Retail Delivery Service (Tariff), effective 11/30/2006, that are for the account and benefit of an end-use retail electric consumer located within the Farmersville, Texas city limits. Company will, upon request by City, provide a cross reference to Discretionary Service Charge numbering changes that are contained in Company's current approved Tariff.

1. The franchise fee amounts based on "Discretionary Service Charges" referenced above shall be calculated on an annual calendar year basis, (i.e. from January through December 31 of each calendar year).

2. The franchise fee amounts that are due based on “Discretionary Service Charges” shall be paid at least once annually on or before April 30 each year based on the total “Discretionary Service Charges”, as set out in Section 7.C, received during the preceding calendar year. The initial Discretionary Service Charge franchise fee amount will be paid on or before April 30, 2011 and will be based on the calendar year through December. The final Discretionary Service Charge franchise fee amount will be paid on or before April 30, 2016 and will be based on the calendar year January 1 through December 31, 2015.
3. Company may file a tariff or tariff amendment(s) to provide for the recovery of the franchise fee on Discretionary Service Charges. However, Company’s obligation to pay the franchise fee to City on such Discretionary Service Charges is not dependent upon whether Company files a tariff or tariff amendment, it being agreed by both Parties that City and Company have the authority to agree to the level and amount of franchise fee payments made hereunder.
4. City agrees (i) to the extent the City acts as regulatory authority, to adopt and approve that portion of any tariff which provides for 100% recovery of the franchise fee on Discretionary Service Charges; (ii) in the event the City intervenes in any regulatory proceeding before a federal or state agency in which the recovery of the franchise fees on such Discretionary Service Charges is an issue, the City will take an affirmative position supporting the 100% recovery of such franchise fees by Company; and (iii) in the event of an appeal of any such regulatory proceeding in which the City has intervened, the City will take an affirmative position in any such appeals in support of the 100% recovery of such franchise fees by Company.
5. City agrees that it will take no action, nor cause any other person or entity to take any action, to prohibit the recovery of such franchise fees by Company.

D. With each payment of compensation required by Section 7.B, Company shall furnish to the City a statement, executed by an authorized officer of Company or designee, providing the total kWh delivered by Company to each retail customer's point of delivery within the City and the amount of payment for the period covered by the payment.

E. With each payment of compensation required by Section 7.C., Company shall furnish to the City a statement, executed by an authorized officer of Company or designee, reflecting the total amount of gross revenues received by Company from services identified in its "Tariff for Retail Delivery Service," Section 6.1.2.3, "Discretionary Service Charges Other Than Construction Charges."

F. If either party discovers that Company has failed to pay the entire or correct amount of compensation due, the correct amount shall be determined by mutual agreement between the City and Company and the City shall be paid by Company within thirty (30) calendar days of such determination. Any overpayment to the City through error or otherwise will, at the sole option of the City, either be refunded or offset against the next payment due from Company. Acceptance by the City of any payment due under this Section shall not be deemed to be a waiver by the City of any breach of this Franchise Agreement, nor shall the acceptance by the City of any such payments preclude the City from later establishing that a larger amount was actually due or from collecting any balance due to the City.

G. Interest on late payments and underpayments shall be calculated in accordance with the interest rate for customer deposits established by the Public Utility Commission of Texas in accordance with Texas Utilities Code Section 183.003 as amended for the time period involved.

H. No taxes, fees, or other payments by Company to the City, including, but not limited to, ad valorem taxes, shall reduce the franchise fees payable to City hereunder, except as agreed to by the City in Section 7.

SECTION 8. ACCOUNTING MATTERS.

A. Company shall keep accurate books of account at its principal office for the purpose of determining the amount due to the City under this Franchise.

B. The City may conduct an audit or other inquiry in relation to a payment made by Company. The City may, if it sees fit, upon reasonable notice to the Company, have the books and records of the Company examined by representatives of the City to ascertain the correctness of the reports agreed to be filed herein.

C. The Company shall make available to the auditor during the Company's regular business hours and upon reasonable notice, such personnel and records as the City may, in its reasonable discretion, request in order to complete such audit, and shall make no charge to the City therefore.

1. If as the result of any City audit, Company is refunded/credited for an overpayment or pays the City for an underpayment of the franchise fee, such refund/credit or payment shall be made pursuant to the terms established in Sections 7.F. and 7.G.

D. If as a result of a subsequent audit, initiated within two years of an audit which resulted in Company making a payment to the City due to an underpayment of the franchise fee of more than 5%, Company makes another payment to the City due to an underpayment of the franchise fee of more than 5%, the City may immediately treat this underpayment as an Uncured Event of Default and exercise the remedies provided for in Section 13.C. The Company shall assist the City in its review by responding to all requests for information no later than thirty (30) days after receipt of a request.

E. If the Company provides confidential or proprietary information to the City, the Company shall be solely responsible for identifying such information with markings calculated to bring the City's attention to the proprietary or confidential nature of the information. The City agrees to maintain the confidentiality of any information obtained from Company so designated to the extent allowed by law. City shall not be liable to Company for the release of any information the City is required to release by law. City shall provide notice to Company of any request for release of non-public information prior to releasing the information so as to allow Company adequate time to pursue available remedies for protection. If the City receives a request under the Texas Public Information Act that includes Company's proprietary or confidential information, City will notify the Texas Attorney General of the proprietary or confidential nature of the document(s). The City also will provide Company with a copy of this notification, and

thereafter Company is responsible for establishing that an exception under the Texas Public Information Act allows the City to withhold the information.

SECTION 9. RIGHT OF RENEGOTIATION.

A. Should either Company or the City have cause to believe that a change in circumstances relating to the terms of this Franchise may exist, it may request that the other party provide it with a reasonable amount of information to assist in determining whether a change in circumstances has taken place.

B. Should either party hereto determine that based on a change in circumstances, it is in the best interest to renegotiate all or some of the provisions of this Franchise, then the other party agrees to enter into good faith negotiations. Said negotiations shall involve reasonable, diligent, and timely discussions about the pertinent issues and a resolute attempt to settle those issues. The obligation to engage in such negotiations does not obligate either party to agree to an amendment of the Franchise as a result of such negotiations. A failure to agree does not show a lack of good faith. In the event the parties fail to agree to an amendment, this Franchise will remain in full force and effect. If, as a result of renegotiation, the City and Company agree to a change in a provision of the Franchise, the change shall become effective upon passage of an ordinance by the City in accordance with Texas law and acceptance of the amendment by Company.

SECTION 10. RELOCATION OF FACILITIES.

A. The City reserves the right to lay, and permit to be laid, storm, sewer, gas, water, wastewater and other pipe lines, cable, and conduits, or other improvements and to do and permit to be done any underground or overhead work that may be necessary or proper in, across, along, over, or under a Public Rights-of-Way occupied by Company. The City also reserves the right to change in any manner any curb, sidewalk, highway, alley, public way, street, utility lines, storm sewers, drainage basins, drainage ditches, etc. Upon request by City, Company shall relocate, remove, or alter its facilities at Company's expense whenever such relocation, removal, or alteration is made necessary by Public Right-of-Way or utility improvements, provided that the City

shall provide Company with at least thirty (30) days notice and shall specify a new location for such facilities along the Public Rights-of-Way.

B. When Company is required by City to remove or relocate its poles, towers, conduits, cables, and other facilities to accommodate Public Right-of-Way improvements, and Company is eligible under Federal, State, County, City or other local agencies or programs for reimbursement of costs and expenses incurred by Company as a result of such removal or relocation and such reimbursement is required to be handled through City, Company costs and expenses shall be included in any application by City for reimbursement, if Company submits its cost and expense documentation to City prior to the filing of the application. City shall provide reasonable notice to Company of the deadline for Company to submit documentation of the costs and expenses of such relocation to City.

C. If City abandons any Public Rights-of-Way in which Company has facilities, such abandonment shall be conditioned on Company's right to maintain its use of the former Public Rights-of-Way and on the obligation of the party to whom the Public Rights-of-Way is abandoned to reimburse Company for all removal or relocation expenses if Company agrees to the removal or relocation of its facilities following abandonment of the Public Rights-of-Way. If the party to whom the Public Rights-of-Way is abandoned requests the Company to remove or relocate its facilities and Company agrees to such removal or relocation, such removal or relocation shall be done within a reasonable time at the expense of the party requesting the removal or relocation. If relocation cannot practically be made to another Public Rights-of-Way, the expense of any right-of-way acquisition shall be considered a relocation expense to be reimbursed by the party requesting the relocation.

D. If the City requires the Company to adapt or conform its facilities, or in any manner to alter, relocate, or change its property to enable any other entity other than the City to use, or use with greater convenience, said Public Rights-of-Way, the Company shall not be bound to make such changes until such other entity shall have undertaken, with good and sufficient bond, to reimburse the Company for any costs, loss, or expense which will be caused by, or arises out of such change, alteration, or relocation of Company's property or facilities.

SECTION 11. TRANSFER AND ASSIGNMENT. The rights granted by this Franchise inure to the benefit of Company and any parent, subsidiary, or affiliate providing electric distribution services as provided in this Franchise, now or hereafter existing. Upon assignment to such parent, subsidiary or affiliate, such parent, subsidiary or affiliate assumes all obligations of Company hereunder and is bound to the same extent as Company hereunder. Company shall give City written notice within ninety (90) days of assignment to a parent, subsidiary or affiliate. In the event Company assigns this Franchise to someone other than a parent, subsidiary or affiliate (Assignee), Company shall give City notice concurrently with notice provided to the Public Utility Commission of the sale or transfer of assets. Any such assignment shall require that said Assignee assume all obligations of Company and be bound to the same extent as Company hereunder. If, within the first ninety (90) days after assignment to someone other than a parent, subsidiary or affiliate, City shall identify a failure to comply with a material provision of this Franchise, City shall have the right to treat such failure to comply as an Uncured Event of Default and immediately implement the provisions of Section 13, including the right to terminate the Franchise.

SECTION 12. TERM. This Ordinance shall become effective upon Company's written acceptance hereof, said written acceptance to be filed by Company with the City within sixty (60) days after final passage and approval hereof. The right, privilege and Franchise granted hereby shall expire on December 31, 2016; provided that, unless written notice is given by either party hereto to the other not less than sixty (60) days before the expiration of this Franchise, it shall be automatically renewed for an additional period of six (6) months from such expiration date and shall be automatically renewed thereafter for like periods until canceled by written notice given not less than sixty (60) days before the expiration of any such renewal period.

SECTION 13. DEFAULT, REMEDIES AND TERMINATION.

A. Events of Default. The occurrence, at any time during the term of this Franchise Agreement, of any one or more of the following events, shall constitute an Event of Default by Company under this Franchise Agreement:

1. The failure of Company to pay the franchise fee on or before the due dates specified herein.
2. Company's breach or violation of any of terms, covenants, representations or warranties contained herein or Company's failure to perform any material obligation contained herein.

B. Uncured Events of Default.

1. Upon the occurrence of an Event of Default which can be cured by the immediate payment of money to City or a third party, Company shall have thirty (30) calendar days from receipt of written notice from City of an occurrence of such Event of Default to cure same before City may exercise any of its rights or remedies provided for in Section 13.C.
2. Upon the occurrence of an Event of Default by Company which cannot be cured by the immediate payment of money to City or a third party, Company shall have sixty (60) calendar days (or such additional time as may be agreed to by the City) from receipt of written notice from City of an occurrence of such Event of Default to cure same before City may exercise any of its rights or remedies provided for in Section 13.C.
3. If the Event of Default is not cured within the time period allowed for curing the Event of Default as provided for herein, such Event of Default shall, without additional notice, become an Uncured Event of Default, which shall entitle City to exercise the remedies provided for in Section 13.C.

C. Remedies. The City shall notify the Company in writing, of an alleged Uncured Event of Default as described in Section 13.B, which notice shall specify the alleged failure with reasonable particularity. The Company shall, within thirty (30) calendar days after receipt of such notice or such longer period of time as the City may specify in such notice, either cure such alleged failure or in a written response to the City either present facts and arguments in refuting or defending such alleged failure or

state that such alleged failure will be cured and set forth the method and time schedule for accomplishing such cure. In the event that such cure is not forthcoming, City shall be entitled to exercise any and all of the following cumulative remedies:

1. The commencement of an action against Company at law for monetary damages.
2. The commencement of an action in equity seeking injunctive relief or the specific performance of any of the provisions, that as a matter of equity, are specifically enforceable.
3. The termination of this Franchise.

D. Remedies Not Exclusive. The rights and remedies of City and Company set forth in this Franchise Agreement shall be in addition to, and not in limitation of, any other rights and remedies provided by law or in equity. City and Company understand and intend that such remedies shall be cumulative to the maximum extent permitted by law and the exercise by City of any one or more of such remedies shall not preclude the exercise by City, at the same or different times, of any other such remedies for the same failure to cure. However, notwithstanding this Section or any other provision of this Franchise Agreement, City shall not recover both liquidated damages and actual damages for the same violation, breach, or noncompliance, either under this Section or under any other provision of this Franchise.

E. Termination. In accordance with the provisions of Section 13.C, this Franchise may be terminated upon thirty (30) business days prior written notice to Company. City shall notify Company in writing at least fifteen (15) business days in advance of the City Council meeting at which the questions of forfeiture or termination shall be considered, and Company shall have the right to appear before the City Council in person or by counsel and raise any objections or defenses Company may have that are relevant to the proposed forfeiture or termination. The final decision of the City Council may be appealed to any court or regulatory authority having jurisdiction. Upon timely appeal by Company of the City Council's decision terminating the Franchise, the effective date of such termination shall be either when such appeal is withdrawn or a court order upholding the termination becomes final and unappealable. Until the

termination becomes effective the provisions of this Franchise shall remain in effect for all purposes.

F. The failure of either party to insist in any one or more instances upon the strict performance of any one or more of the terms or provisions of this Franchise shall not be construed as a waiver or relinquishment for the future of any such term or provision, and the same shall continue in full force and effect. No waiver or relinquishment shall be deemed to have been made by either party unless said waiver or relinquishment is in writing and signed by such party waiving or relinquishing the future of any such term or provision.

SECTION 14. PUBLIC PURPOSE. All of the provisions contained in this Ordinance are hereby declared to be for a public purpose, and are in the interests of the health, safety, and welfare of the general public.

SECTION 15. SEVERABILITY. It is hereby declared to be the intention of the City Council of the City of Farmersville that the phrases, clauses, sentences, paragraphs, and sections of this Ordinance are severable, and if any phrase, clause, sentence, paragraph, or section of this Ordinance should be declared unconstitutional by valid judgment or final decree of any court of competent jurisdiction, such unconstitutionality shall not affect any of the remaining phrases, clauses, sentences, paragraphs, or sections of this Ordinance, since the same would have been enacted by the City Council without incorporation in this Ordinance of any such unconstitutional phrase, clause, sentence, paragraph, or section.

SECTION 16. NOTICE. Any notices required or desired to be given from one party to the other party to this Ordinance shall be in writing and shall be given and shall be deemed to have been served and received if: (i) delivered in person to the address set forth below; (ii) deposited in an official depository under the regular care and custody of the United States Postal Service located within the confines of the United States of America and sent by certified mail, return receipt requested, and addressed to such party at the address hereinafter specified; or (iii) delivered to such party by courier

receipted delivery. Either party may designate another address within the confines of the continental United States of America for notice, but until written notice of such change is actually received by the other party, the last address of such party designated for notice shall remain such party's address for notice.

CITY

City Manager
City of Farmersville
205 South Main Street
Farmersville, TX 75442-2209

COMPANY

Vice President of Operations
Texas-New Mexico Power Company
577 North Garden Ridge Blvd
Lewisville, Texas 75067

With copy to:
Legal Department
Texas-New Mexico Power Company
225 East John Carpenter Freeway,
Suite 1500
Irving, Texas 76109

SECTION 17. ACCEPTANCE. In order to accept this Franchise, Company must file with the City Secretary its written acceptance of this Franchise ordinance within sixty (60) days after its final passage and approval by City. Company shall pay all publication expense regarding notification of the Franchise ordinance.

SECTION 18. FUTURE AMENDMENTS. This Ordinance may be amended only by the mutual written agreement of the City and the Company.

SECTION 19. ORDINANCE PASSED AT PUBLIC MEETING. It is hereby officially found that the meeting at which this Ordinance is passed is open to the public and that due notice of this meeting was posted, all as required by law.

SECTION 20. EFFECTIVE DATE. This Ordinance shall become effective upon Company's written acceptance hereof in accordance with Section 17.

SECTION 21. REPEAL. This Ordinance shall supersede any and all other franchises granted by the City to Company, its predecessors and assigns.

SECTION 22. GOVERNMENTAL IMMUNITY. All of the regulations provided in this ordinance are hereby declared to be governmental and for the health, safety and welfare of the general public. Any member of the City Council or any City official or employee charged with the enforcement of this ordinance, acting for the City of Farmersville in the discharge of his/her duties, shall not thereby render himself/herself personally liable; and he/she is hereby relieved from all personal liability for any damage that might accrue to persons or property as a result of any act required or permitted in the discharge of his/her said duties.

SECTION 23. Injunctions. Any violation of this ordinance can be enjoined by a suit filed in the name of the City of Farmersville in a court of competent jurisdiction, and this remedy shall be in addition to any penal provision in this ordinance or in the Code of the City of Farmersville.

SECTION 24. Engrossment and Enrollment. The City Secretary of the City of Farmersville is hereby directed to engross and enroll this Ordinance by copying the exact Caption and the Effective Date clause in the minutes of the City Council of the City of Farmersville and by filing this Ordinance in the Ordinance records of the City.

PASSED on first reading on the 11th day of October, 2011, and second reading on the 25th day of October, 2011 at properly scheduled meetings of the City Council of the City of Farmersville, Texas, there being a quorum present, and approved by the Mayor on the date set out below.

APPROVED THIS 25th DAY OF OCTOBER, 2011.

APPROVED:

BY: _____
Joseph E. Helmberger, P.E., Mayor

ATTEST:

Edie Sims, City Secretary

APPROVED AS TO FORM AND LEGALITY:

Alan D. Lathrom, City Attorney



TO: Mayor and Councilmembers
FROM: City Manager John Moran
DATE: October 11, 2011
SUBJECT: Public Hearing to consider, discuss and act upon Ordinance # O-2011-1025-002 amending Section 5.112 of the City of Farmersville, Texas Code Of Ordinances, entitled "Taxation of Tangible Personal Property in Transit" by deleting said section in its entirety and replacing it with a new Section 5.112 also entitled "Taxation of Tangible Personal Property in Transit" to allow the continued taxation of "goods-in-transit" in accordance with the requirements of SB 1 (2011), and Section 11.253(j-1) of the Texas Tax Code

Ordinance # O-2011-1025-002 is attached

ACTION:

- 1) **Open Public Hearing and call time**
- 2) **Ask for those FOR the Ordinance to speak**
- 3) **Ask for those OPPOSED to the Ordinance to speak**
- 4) **Close the Public Hearing and call time**
- 5) **Open to the Council to approve or disapprove the first reading of Ordinance # O-2011-1025-002**

(IV – B)

**CITY OF FARMERSVILLE
ORDINANCE # O-2011-1025-002**

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF FARMERSVILLE, TEXAS, AMENDING ARTICLE 5 OF THE CODE OF ORDINANCES, ENTITLED "BUSINESS AND COMMERCE," BY AMENDING SECTION 5.112 ENTITLED "TAXATION OF TANGIBLE PERSONAL PROPERTY IN TRANSIT" BY DELETING SAID SECTION IN ITS ENTIRETY AND REPLACING IT WITH A NEW SECTION 5.112 ALSO ENTITLED "TAXATION OF TANGIBLE PERSONAL PROPERTY IN TRANSIT"; PROVIDING FOR THE AD VALOREM TAXATION OF TANGIBLE PERSONAL PROPERTY IN TRANSIT OR "SUPER FREEPORT" GOODS, PURSUANT TO SECTION 11.253 OF THE TEXAS TAX CODE, AS AMENDED; PROVIDING A SEVERABILITY CLAUSE; PROVIDING A REPEALER CLAUSE; AND PROVIDING FOR SAID ORDINANCE TO TAKE EFFECT FROM AND AFTER ITS PASSAGE.

WHEREAS, in 2001, the Texas Legislature approved Senate Joint Resolution 6, which was subsequently approved by the eligible voters of the State of Texas authorizing a "super freeport" property tax exemption for certain tangible personal property; and

WHEREAS, the Texas Legislature in the 80th Legislative Session approved House Bill 621 (hereinafter referred to as "HB 621"), as the enabling statute for the "super freeport" or goods-in-transit property tax exemption approved by the voters in 2001; and

WHEREAS, HB 621 added Section 11.253 to the Texas Tax Code thereby exempting from property taxes any tangible personal property (other than oil and gas, aircraft, dealer's motor vehicle inventory, dealer's boat inventory, dealer's heavy equipment inventory, and retail manufactured housing) that is located at a site for less than 175 days and is not under the control of the property owner; and

WHEREAS, pursuant to HB 621 (2001) the City Council of the City of Farmersville, Texas, on December 11, 2007, approved Ordinance Number 2007-59, which established the taxation of goods-in-transit; and

WHEREAS, in the First Called Session in 2011, the Texas Legislature approved Senate Bill 1 (hereinafter referred to as "SB 1 (2011)"), which amended Section 11.253 of the Texas Tax Code addressing the taxation of goods-in-transit; and

WHEREAS, Section 11.253(j-1) of the Texas Tax Code, as added by SB 1 (2011), provides that the City Council of the City of Farmersville, Texas, "may not tax such goods-in-transit in a tax year that begins on or after January 1, 2012, unless the governing body of the taxing unit takes action on or after October 1, 2011, in the manner required for official action by the governing body, to provide for the taxation of the goods-in-transit. The official action to tax the goods-in-transit must be taken before January 1 of the first tax year in which the governing body proposes to tax goods-in-transit. Before acting to tax the exempt property, the governing body of the taxing unit must conduct a public hearing as required by Section 1-n(d), Article VIII, Texas Constitution. If the governing body of a taxing unit provides for the taxation of the

goods-in-transit as provided by this subsection, the exemption prescribed by Subsection (b) does not apply to that unit. The goods-in-transit remain subject to taxation by the taxing unit until the governing body of the taxing unit, in the manner required for official action, rescinds or repeals its previous action to tax goods-in-transit or otherwise determines that the exemption prescribed by Subsection (b) will apply to that taxing unit"; and

WHEREAS, the City Council of the City of Farmersville, Texas, held a public hearing prior to the passage of this Ordinance, consistent with SB 1 (2011), and Section 11.253(j-1) of the Texas Tax Code; and

WHEREAS, the City Council of the City of Farmersville, Texas, finds and determines that the goods-in-transit or "super freeport" exemption as authorized by Section 11.253 of the Texas Tax Code is not in the best interest of the City of Farmersville, Texas, and that goods-in-transit should be subject to ad valorem taxation.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF FARMERSVILLE, TEXAS, THAT:

SECTION 1. Findings Incorporated

All the above premises are hereby found to be true and correct and are hereby approved and incorporated into the body of this Ordinance as if copied in their entirety.

SECTION 2. Amendment to Article 5 of the Code of Ordinances, entitled "Business and Commerce," by amending Section 5.112 entitled "Taxation of Tangible Personal Property in Transit" by deleting said section in its entirety and replacing it with a new Section 5.112 also entitled "Taxation of Tangible Personal Property in Transit"

Article 5, "'Business and Commerce" of the Code of Ordinances of the City of Farmersville, Texas, is amended by deleting Section 5.112 thereto entitled "Taxation of tangible personal property in transit" and replacing said section with a new Section 5.112 also entitled "Taxation of tangible personal property in transit" which shall read as follows:

"SEC. 5.112 TAXATION OF TANGIBLE PERSONAL PROPERTY IN TRANSIT

A. *Definitions.* The following terms have the same meaning as defined in Section 11.253 of the Texas Tax Code, as amended.

1. The terms "dealer's motor vehicle inventory," "dealer's vessel and outboard motor inventory," "dealer's heavy equipment inventory," and "retail manufactured housing inventory" have the meanings assigned by Subchapter B, Chapter 23 of the Texas Tax Code, as amended.
2. The term "goods-in-transit" is defined to mean tangible personal property that:

- a. is acquired in or imported into this state to be forwarded to another location in this state or outside this state;
 - b. is stored under a contract of bailment by a public warehouse operator at one or more public warehouse facilities in this state that are not in any way owned or controlled by the owner of the personal property for the account of the person who acquired or imported the property;
 - c. is transported to another location in this state or outside this state not later than 175 days after the date the person acquired the property in or imported the property into this state; and
 - d. does not include oil, natural gas, petroleum products, aircraft, dealer's motor vehicle inventory, dealer's vessel and outboard motor inventory, dealer's heavy equipment inventory, or retail manufactured housing inventory.
3. The term "location" means a physical address.
 4. The term "petroleum product" means a liquid or gaseous material that is an immediate derivative of the refining of oil or natural gas.
 5. The terms "Bailee" and "Warehouse" have the meanings assigned by Section 7.102 of the Texas Business and Commerce Code, as amended.
 6. The term "Public Warehouse Operator" means a person that:
 - a. is both a bailee and a warehouse; and
 - b. stores under a contract of bailment, at one or more public warehouse facilities, tangible personal property that is owned by other persons solely for the account of those persons and not for the operator's account.
- B. A person is not entitled to an exemption from taxation of the appraised value of that portion of the person's property that consists of goods-in-transit. A person's property consisting of goods-in-transit is hereby subject to ad valorem taxation pursuant to Section 11.253 of the Texas Tax Code, as amended."

SECTION 3. Cumulative Repealer

This Ordinance shall be cumulative of all other Ordinances and shall not repeal any of the provisions of such Ordinances except for those instances where there are direct conflicts with the provisions of this Ordinance. Ordinances or parts thereof in force at the time this Ordinance shall take effect and that are inconsistent with this Ordinance are hereby repealed to the extent that they are inconsistent with this Ordinance. Provided however, that any complaint, action, claim or lawsuit which has

been initiated shall continue to be governed by the provisions of such Ordinance and for that purpose the Ordinance shall remain in full force and effect.

SECTION 4. Savings

All rights and remedies of the City of Farmersville are expressly saved as to any and all violations of the provisions of any Ordinances which have accrued at the time of the effective date of this Ordinance; and, as to such accrued violations and all pending litigation, both civil and criminal, whether pending in court or not, under such Ordinances, same shall not be affected by this Ordinance but may be prosecuted until final disposition by the courts.

SECTION 5. Severability

It is hereby declared to be the intention of the City Council of the City of Farmersville that the phrases, clauses, sentences, paragraphs, and sections of this Ordinance are severable, and if any phrase, clause, sentence, paragraph, or section of this Ordinance should be declared unconstitutional by valid judgment or final decree of any court of competent jurisdiction, such unconstitutionality shall not affect any of the remaining phrases, clauses, sentences, paragraphs, or sections of this Ordinance, since the same would have been enacted by the City Council without incorporation in this Ordinance of any such unconstitutional phrase, clause, sentence, paragraph, or section.

SECTION 6. Governmental Immunity

All of the regulations provided in this ordinance are hereby declared to be governmental and for the health, safety and welfare of the general public. Any member of the City Council or any City official or employee charged with the enforcement of this ordinance, acting for the City of Farmersville in the discharge of his/her duties, shall not thereby render himself/herself personally liable; and he/she is hereby relieved from all personal liability for any damage that might accrue to persons or property as a result of any act required or permitted in the discharge of his/her said duties.

SECTION 7. Injunctions

Any violation of this ordinance can be enjoined by a suit filed in the name of the City of Farmersville in a court of competent jurisdiction, and this remedy shall be in addition to any penal provision in this ordinance or in the Code of the City of Farmersville.

SECTION 8. Engrossment and Enrollment

The City Secretary of the City of Farmersville is hereby directed to engross and enroll this Ordinance by copying the exact Caption and the Effective Date clause in the minutes of the City Council of the City of Farmersville and by filing this Ordinance in the Ordinance records of the City.

SECTION 9. Effective Date

This Ordinance shall take effect immediately from and after its passage and publication of the caption as required by law.

PASSED on first reading on the 11th day of October, 2011, and second reading on the 25th day of October, 2011 at properly scheduled meetings of the City Council of the City of Farmersville, Texas, there being a quorum present, and approved by the Mayor on the date set out below.

APPROVED THIS ____ DAY OF _____, 2011.

APPROVED:

BY: _____
Joseph E. Helmberger, P.E., Mayor

ATTEST:

Edie Sims, City Secretary

APPROVED AS TO FORM AND LEGALITY:

Alan D. Lathrom, City Attorney