

## **Ordinance No. 716-15**

**AN ORDINANCE GRANTING BLACK HILLS/COLORADO ELECTRIC UTILITY COMPANY, LP D/B/A BLACK HILLS ENERGY, ITS LESSEES, SUCCESSORS AND ASSIGNS, AN ELECTRIC FRANCHISE AND THE AUTHORITY TO CONSTRUCT, OPERATE, MAINTAIN AND EXTEND AN ELECTRIC DISTRIBUTION PLANT AND SYSTEM, AND GRANTING THE RIGHT TO USE THE STREETS, ALLEYS, AND OTHER PUBLIC PLACES WITHIN THE PRESENT OR FUTURE CORPORATE LIMITS OF THE TOWN OF FOWLER, COLORADO**

**WHEREAS**, C.R.S. §31-32-101 mandates that municipalities grant franchises only by ordinance; and

**WHEREAS**, C.R.S. §31-15-707(1)(a)(I) provides municipalities the power to authorize others to erect, own, operate and maintain electric, light and power works within the municipality;

**NOW THEREFORE BE IT ORDAINED** by the Board of Trustees of the Town of Fowler, Colorado, as follows:

### **FRANCHISE GRANTED**

The Town of Fowler, Colorado (hereinafter referred to as "Grantor"), hereby grants a non-exclusive franchise to Black Hills/Colorado Electric Utility Company, LP d/b/a Black Hills Energy, a Delaware corporation (hereinafter called "Grantee"), its lessees, successors and assigns. Grantee is hereby granted the right, privilege, franchise, permission and authority to construct, install, maintain, operate and extend in, along and across the present and future streets, alleys, avenues, bridges, public rights-of-way and public easements within the present or future corporate limits of said Grantor, an electric distribution system and all facilities necessary for the production, transmission and distribution of electrical power and energy for the purpose of carrying on a general power and light business and other operations connected therewith or incident thereto for all purposes to the inhabitants of said Grantor and consumers in the vicinity thereof, and for the distribution of electric power and energy from or through said Grantor to points beyond the limits thereof. Such facilities shall include, but not be limited to, poles, transmission lines, distribution lines, anchors, guy wires, cables, conduits, street lighting poles, transformers and all other apparatus and appliances necessary or incident thereto for all purposes for which it may be used, and to do all other things necessary and proper in providing electric service to the inhabitants of Grantor and in carrying on such business. Such lines of electric light, wire or power shall be so constructed and maintained so as to not obstruct or hinder the usual travel on any street, alley, avenue or bridge.

### **TERM**

The rights and privileges granted hereunder shall remain in effect for a period of twenty-five (25) years from the effective date of this Ordinance.

### **GOVERNING RULES AND REGULATIONS**

The franchise granted hereunder is subject to all conditions, limitations and immunities now provided for, or as hereafter amended, and applicable to the operations of a public utility, by

state or federal law. The rates to be charged by Grantee for service within the present or future corporate limits of Grantor and the rules and regulations regarding the character, quality and standards of service to be furnished by Grantee, shall be under the jurisdiction and control of such regulatory body or bodies as may, from time to time, be vested by law with authority and jurisdiction over the rates, regulations and quality and standards of service to be supplied by Grantee. Provided however, should any judicial, regulatory or legislative body having proper jurisdiction take any action that precludes Grantee from recovering from its customers any cost associated with services provided hereunder, then Grantee and Grantor shall renegotiate the terms of this Ordinance in accordance with the action taken. In determining the rights and duties of the Grantee, the terms of this Ordinance shall take precedence over any conflicting terms or requirements contained in any other ordinance enacted by the Grantor.

The right is hereby reserved to the Grantor to adopt, from time to time, in addition to the provisions herein contained, such ordinances as may be deemed necessary in the exercise of its police power, provided that such regulations shall be reasonable and not destructive of the rights herein granted, and not in conflict with the laws of the State of Colorado, or with orders of other authorities having jurisdiction in the premises.

#### **PROVISION FOR INADEQUATE ENERGY SUPPLIES**

If an energy supplier is unable to furnish an adequate supply of energy due to an emergency, an order or decision of a public regulatory body, or other acts beyond the control of the Grantee, then the Grantee shall have the right and authority to adopt reasonable rules and regulations limiting, curtailing or allocating extensions of service or supply of energy to any customers or prospective customers, and withholding the supply of energy to new customers, provided that such rules and regulations shall be uniform as applied to each class of customers or prospective customers, and shall be non-discriminatory as between communities receiving service from the Grantee.

#### **CONSTRUCTION AND MAINTENANCE OF GRANTEE'S FACILITIES**

Any pavements, sidewalks or curbing taken up and any and all excavations made shall be done in such a manner as to cause only such inconvenience to the inhabitants of Grantor and the general public as is reasonably necessary, and repairs and replacements shall be made promptly by Grantee, leaving such properties in as good as condition as existed immediately prior to excavation.

Grantee agrees that for the term of this franchise, it will use its best efforts to maintain its facilities and equipment in a condition sufficient to meet the current and future energy requirements of Grantor, its inhabitants and industries. While maintaining its facilities and equipment, Grantee shall obtain permits as required by ordinance and will fix its excavations within a commercially reasonable time period, except that in emergency situations Grantee shall take such immediate unilateral actions as it determines are necessary to protect the public health, safety, and welfare; in which case, Grantee shall notify Grantor as soon as reasonably possible. Within a reasonable time thereafter, Grantee shall request and Grantor shall issue any permits or authorizations required by Grantor for the actions conducted by Grantee during the emergency situation. When excavating and fixing excavations Grantee shall perform such work so as to meet or exceed Grantor's applicable rules, regulations and ordinances then in effect.

Grantor will give Grantee reasonable notice of plans for street improvements where paving or resurfacing of a permanent nature is involved that affects Grantee's facilities. The notice shall contain the nature and character of the improvements, the rights-of-way upon which the improvements are to be made, the extent of the improvements, and the time when the Grantor will start the work, and, if more than one right-of-way is involved, the order in which the work is to proceed. The notice shall be given to the Grantee as soon as practical in advance of the actual commencement of the work, considering seasonable working conditions, to permit the Grantee to make any additions, alterations, or repairs to its facilities.

### **TREE TRIMMING**

Grantor grants Grantee the right, permission and authority to trim and remove trees upon, over, across and within all of the streets, alleys, avenues, bridges, public rights-of-way and public places of Grantor.

### **STREET LIGHTING**

Grantee will furnish, erect, maintain, clean, repair and operate, in accordance with the street lighting tariffs as approved from time to time by the Colorado Public Utilities Commission, street lights within the corporate limits of Grantor. Grantor will receive and pay for the street light service at the rates stipulated in the tariff.

Grantor may, from time to time, cause the number of street lights to be increased by making written request to Grantee, stating the number, capacity, and location desired. Such request is to be made at least ninety (90) days prior to the time such additional street lights are required by Grantor.

### **EXTENSION OF GRANTEE'S FACILITIES**

Upon receipt and acceptance of a valid application for service, Grantee shall, subject to its own economic feasibility criteria, make reasonable extensions of its distribution facilities to serve customers located within the current or future corporate limits of Grantor; provided however, that nothing in this Ordinance shall require Grantee to install new facilities underground. In the event that Grantor shall order or request Grantee to install facilities underground along any street, alley, avenue, bridge, public right-of-way or public place, Grantee shall have the right to recover from Grantor the difference in cost between placing facilities overhead and placing new facilities underground. No obligation shall extend to, or be binding upon, Grantee to install new facilities underground unless Grantee is able to obtain an easement for such facilities on adjoining private property adjacent to the public right-of-way.

### **RELOCATION OF GRANTEE'S FACILITIES**

If Grantor elects to change the grade of or otherwise alter any street, alley, avenue, bridge, public right-of-way or public place for a public purpose, unless otherwise reimbursed by federal or state legislative act or governmental agency, Grantee, upon reasonable notice from Grantor, shall remove and relocate its facilities or equipment situated in the public rights-of-way, at the cost and expense of Grantee, if such removal is necessary to prevent interference.

If Grantor orders or requests Grantee to relocate its facilities or equipment for the primary benefit of a commercial or private project, or as a result of the initial request of a commercial or private developer or other non-public entity, and such removal is necessary to prevent interference, then Grantee shall receive payment for the cost of such relocation as a precondition to relocating its facilities or equipment.

Grantor shall consider reasonable alternatives in designing its public works projects and exercising its authority under this section so as not to arbitrarily cause Grantee unreasonable additional expense. If alternative public right-of-way space is available, Grantor shall provide a reasonable alternative location for Grantee's facilities. Grantor shall give Grantee written notice of an order or request to vacate a public right-of-way; provided, however, that its receipt of such notice shall not deprive Grantee of its right to operate and maintain its existing facilities in such public right-of-way until it (a) if applicable, receives the reasonable cost of relocating the same and (b) obtains a reasonable public right-of-way, dedicated utility easement, or private easement alternative location for such facilities.

Any person or corporation desiring to move a building or other structure along, or to make any unusual use of any street, alley, avenue, bridge, public right-of-way or public place which shall interfere with the facilities or equipment of the Grantee, shall first give notice to the Grantor and the Grantee and pay a sum sufficient to cover the expense of moving Grantee's facilities and equipment in such location, and any damages incident thereto.

#### **CONFIDENTIAL INFORMATION**

Grantor acknowledges that certain information it might request from Grantee pursuant to this Ordinance may be of a proprietary and confidential nature, and that such requests may be subject to the Homeland Security Act or other confidentiality protections under state or federal law. If Grantee requests that any information provided by Grantee to Grantor be kept confidential due to its proprietary or commercial value, Grantor and its employees, agents and representatives shall maintain the confidentiality of such information, to the extent allowed by law. If Grantor is requested or required by legal or administrative process to disclose any such proprietary or confidential information, Grantor shall promptly notify Grantee of such request or requirement so that Grantee may seek an appropriate protective order or other relief.

#### **FORCE MAJEURE**

It shall not be a breach or default under this Ordinance if either party fails to perform its obligations hereunder due to force majeure. Force majeure consisting of any cause, whether of the kind herein enumerated or otherwise not reasonably within the control of the affected party to prevent or overcome, shall include but not be limited to, the following: 1) physical events such as acts of God, landslides, lightning, earthquakes, fires, freezing, storms, floods, washouts, explosions, breakage or accident or necessity of repairs to machinery, equipment or distribution or transmission lines; 2) acts of others such as strikes, work-force stoppages, riots, sabotage, insurrections or wars; 3) governmental actions such as necessity for compliance with any court order, law, statute, ordinance, executive order, or regulation promulgated by a governmental authority having jurisdiction. Each party shall make reasonable efforts to avoid force majeure and to resolve such event as promptly as reasonably possible once it occurs in order to resume

performance of its obligations hereunder; provided, however, that this provision shall not obligate a party to settle any labor strike.

### **HOLD HARMLESS**

Grantee, during the term of this Ordinance, agrees to save harmless Grantor from and against all claims, demands, losses and expenses arising directly out of the negligence of Grantee, its employees or agents, in constructing, operating, and maintaining its distribution and transmission facilities or equipment; provided, however, that Grantee need not save Grantor harmless from claims, demands, losses and expenses arising out of the negligence of Grantor, its employees or agents.

### **SUCCESSORS AND ASSIGNS**

All rights, privileges and authority granted to Grantee hereunder shall inure to the benefit of Grantee's lessees, successors and assigns, subject to the terms, provisions and conditions herein contained, and all obligations imposed upon Grantee hereunder shall be binding upon Grantee's lessees, successors and assigns.

### **NO THIRD PARTY BENEFICIARIES**

This Ordinance constitutes a franchise agreement between the Grantor and Grantee. No provision of this Ordinance shall inure to the benefit of any third person, including the public at large, so as to constitute any such person as a third party beneficiary of the agreement or of any one or more of the terms hereof, or otherwise give rise to any cause of action for any person not a party hereto.

### **SEVERABILITY**

If any clause, sentence or section of this Ordinance is deemed invalid by any judicial, regulatory or legislative body having proper jurisdiction, the remaining provisions shall not be affected.

### **NON WAIVER**

Any waiver of any obligation or default under this Ordinance shall not be construed as a waiver of any future defaults, whether of like or different character.

### **REPEAL CONFLICTING ORDINANCES**

This Ordinance, when accepted by Grantee as provided below, together with Ordinance Number 717-15 setting the franchise fee for electric distribution and electric generation companies shall constitute the entire agreement between the Grantor and the Grantee relating to the franchise granted by Grantor hereunder, and the same shall supersede all prior ordinances relating thereto, and any terms and conditions of such prior ordinances or parts of ordinances in conflict herewith are hereby repealed. Ordinance No. 392 of the Grantor of Fowler, Colorado, is hereby repealed as of the effective date hereof.

### **EFFECT AND INTERPRETATION OF ORDINANCE**

The captions that precede each section of this Ordinance are for convenience and/or reference only and shall not be taken into consideration in the interpretation of any of the provisions of this Ordinance.

**EFFECTIVE DATE AND ACCEPTANCE**

This Ordinance shall become effective and be a binding contract between the Grantor and Grantee upon its final passage and approval by Grantor, in accordance with applicable laws and regulations, and upon Grantee’s acceptance by written instrument, within sixty (60) days of passage by the town of Fowler Board of Trustees, and filing with the town clerk of Fowler, Colorado. The town clerk of the Town of Fowler, Colorado shall sign and affix the community seal to acknowledge receipt of such acceptance, and return one copy to Grantee. If Grantee does not, within sixty (60) days following passage of this Ordinance, either express in writing its objections to any terms or provisions contained therein, or reject this Ordinance in its entirety, Grantee shall be deemed to have accepted this Ordinance and all of its terms and conditions.

**PASSED, ADOPTED** and ordered published the 13<sup>th</sup> day of July, 2015.

**TOWN OF FOWLER**

DATED this 27<sup>th</sup> day of July, 2015.

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By: Charles R. Hitchcock  
Mayor

**ATTEST:**

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Kelly Lotrich  
Town Clerk