

**ORDINANCE NO. 160**

**AN ORDINANCE GRANTING A FRANCHISE TO NEW MEXICO WATER SERVICE COMPANY, ITS SUCCESSORS AND ASSIGNS, CERTAIN POWERS, LICENSES AND PRIVILEGES TO CONSTRUCT, OPERATE AND MAINTAIN A SYSTEM FOR CONVEYANCE, SALE AND DISTRIBUTION OF WATER WITHIN THE CITY OF ELEPHANT BUTTE, NEW MEXICO, AND PROVIDING FOR THE PAYMENT TO SAID CITY OF A PERCENTAGE OF REVENUES FROM THE BASIC MONTHLY SERVICES CHARGES OF GRANTEE FROM ITS OPERATIONS.**

**BE IT ORDAINED** by the Governing Body of the City of Elephant Butte, New Mexico:

**SECTION 1. Grant of Authority.**

Pursuant to NMSA 1978, § 3-42-1 and NMSA 1978, § 62-6-4.5 there is hereby granted by the City of Elephant Butte ("City") to New Mexico Water Service Company ("Company") the nonexclusive right and privilege to construct, erect, operate and maintain, under, in, upon, along and across streets, alleys, public ways and public places now in use or dedicated, and all extensions thereof, and additions thereto, in said City, works, systems, plants, pipes and all related facilities necessary or proper for the maintenance and operation in said City of the Company's water sales and supply business, provided, however, that facilities shall be placed in such a manner as to cause a minimum interference with the rights or reasonable convenience of property owners who adjoin any of said streets, alleys or public ways and places and of other persons or companies operating in said streets, alleys, public ways and public places pursuant to existing or future franchise agreements with the City. It is expressly understood that City owns, maintains and operates its own water utility that provides water services to a portion of the properties within the city. Nothing in this franchise agreement is intended to restrict the rights of the parties to continued operation of their respective water utility systems and expansions of their respective systems outside the city limits as otherwise may be authorized by law.

**SECTION 2. Use and Repair of Streets.**

The Company is hereby authorized, licensed and empowered to do any and all things as may be necessary or reasonably convenient to be done and performed in executing the powers and utilizing the rights, powers and privileges herein mentioned and granted by this franchise, provided the same do not unreasonably interfere with pre-existing water, sewer and other authorized installations. In the event of any disturbance of pavement, sidewalk, driveway or other surfacing, the Company shall, at its own cost and expense, within a reasonable time, and in a manner entirely satisfactory to the City and subject to the jurisdiction of said City respecting the subject, replace and restore all paving, sidewalk, driveway or surface of any City streets or alleys disturbed, in as good a condition as before said work was commenced, and shall clean up and remove any debris resulting from said disturbance or waterline breaks and repair any damage to the right-of-way. In the event of a public project initiated by City that requires a waterline relocation, upon written request by the City, the Company shall relocate its waterlines out of the project area at no cost to City. City shall obtain Company's input during the planning phase of any such project, provided, that City shall not be responsible for payment of any consulting fees to Company for said input. Company shall cooperate with City's contractors during construction of the project, but Company shall not be responsible for any added costs of City's contractor resulting from the contractor's delays due to Company's efforts to accommodate the project, provided, that Company shall have made all reasonable and timely efforts to accommodate the project. Company shall obtain all permits required and shall adhere to all standards promulgated by City for said excavations and repairs, including the right of City to effect the repairs itself and to assess the cost of said repairs to Company.

**SECTION 3. Consideration.**

a. The Company, for and in consideration of this franchise and as rental for the occupation and use over, upon and beneath the streets, avenues, easements, rights-of-way, alleys,

highways, sidewalks, paths, bridges, structures and other public places in the City, and except as set forth herein, in lieu of any and all "other municipal taxes" as hereinafter defined, shall, for this franchise, pay to the City each year a total aggregate sum of 3% of the Company's basic monthly service charge to customers, exclusive of sales, gross receipts taxes, or regulatory fees collected during each year for water sold to end users and consumers within the corporate limits of the City, including areas hereafter annexed into the City, under the Company's approved rates, effective from time to time, excepting therefrom, however, the gross receipts from water sold to the City for its own use.

b. As used in this section, "other municipal taxes" means and includes any and all other franchise, license, privilege, instrument, occupation, excise or revenue taxes, but does not include excise taxes imposed by the City and actually collected by the Company from its consumers, municipal occupation taxes lawfully assessed and collected on a non-utility business of the Company, general ad valorem taxes and special assessments for local improvements imposed by ordinance of the City and uniformly imposed and collected from other persons engaging in the same or similar activities and except for such other compensatory service fees which may be agreed to by the parties separately upon all or any portion of the business, revenue, property or activities of the Company located or conducted within the City during the term of this franchise.

c. Subject to the term of this franchise ordinance which shall be 25 years, said payments to the City shall continue only so long as the Company is not prohibited from making the same and assessing such cost as a pass-through to its customers by the New Mexico Public Regulation Commission or any lawful authority having jurisdiction in the premises. If any lawful authority having jurisdiction in the premises shall hereafter prohibit such payment or payments

and/or pass-through to the Company's customers, either party may terminate this agreement. Company shall identify any pass-through franchise fees as a separate line item in its customer billing.

d. Company shall make payments as provided herein on an annual basis, within 45 days of the close of the accounting period.

e. For the purposes of verifying the Company's basic monthly service charge to customers, the Company shall provide information and records as necessary to the City, upon written request and reasonable notice, to evidence the basic monthly service charge to customers.

#### **SECTION 4. Transfer.**

The Company shall have all rights and privileges granted herein, and whenever the word "Company" appears herein, it shall be construed as including its successors, assigns and lessees so long as any successor, assign or lessee continues to serve the City as a public utility. Nothing contained in this section shall be construed to impair the right of the City to appear and object to any such transfer before the New Mexico Public Regulation Commission or any public authority having lawful jurisdiction over the transfer.

#### **SECTION 5. Police Power.**

The Company shall, at all times during the life of this franchise, be subject to all lawful exercise of the police power by the City and to such reasonable regulation as the City may, by resolution or ordinance, hereafter provide.

**SECTION 6. Liability and Indemnity.**

Subject to the limitations of NMSA 1978, §§ 56-7-1 and 56-7-2, it is expressly understood and agreed by and between the Company and the City that the Company shall indemnify and save harmless the City, its governing body, officers, agents and employees, from all loss sustained by the City on account of any suit, judgment, execution, claim or demand whatsoever, resulting from the negligence on the part of said Company or its employees or contractors in the construction or maintenance of its water system in the City. The City shall promptly notify the Company's representative after the presentation of any claim or demand either by suit or otherwise made against the City.

**SECTION 7. Payment for Services.**

The City agrees to pay to the Company in accordance with standard tariff schedules the rates and charges for all water services rendered by the Company to the City.

**SECTION 8. Reservation of Rights.**

The City, in granting this franchise, surrenders no privileges or rights that it may have of owning or installing any water system and furnishing the same to the City and its inhabitants.

**SECTION 9. Severability.**

If any section, paragraph, subdivision, clause, phrase or provision of this franchise shall be adjudged invalid or unconstitutional, the same shall not affect the validity of this ordinance as a whole or any part of the provisions hereof, other than the part so determined to be invalid or unconstitutional.

**SECTION 10. Default and Remedies.**

In the event of breach of this franchise by either party, the prevailing party shall enjoy all rights and remedies allowed in law or equity and shall recover reasonable attorney's fees in any suit arising from breach or enforcement of this franchise.

**SECTION 11. Notices.**

All notices and productions required of either party by this franchise shall be delivered to the other party by certified mail, return receipt requested, or such other means that include adequate means for acknowledging receipt, with the delivery to be acknowledged by a signed and dated receipt, to the following officials at the designated address, unless another official or address has been designated in writing by the part to receive the delivery, to-wit:

City: City Manager  
P.O. Box 1080  
Elephant Butte, NM 87935

Company: General Manager  
New Mexico Water Service Company  
401 Horner Street  
Rio Communities, New Mexico 87002

**SECTION 12. Term.**

Upon acceptance of this ordinance by the Company as provided herein, the franchise and rights herein granted shall continue in force and effect for a term of 25 years after the effective date of the ordinance, provided, that either party may request negotiations based on changed circumstances at three-year intervals, and provided further that upon failure of the parties to reach agreement on such request, either party may terminate this agreement and the City may repeal the ordinance.

**SECTION 13. Acceptance by Company.**

a. The Company shall, within thirty (30) days after the passage and approval of this ordinance, file in the office of the city Clerk a written statement of acceptance duly signed by the proper officer of the company authorized to execute such acceptance.


b. In the event such acceptance is not filed within said period, this ordinance and the rights, privileges, powers and obligations contained herein shall be terminated and void, provided, that the City may by resolution extend the time herein for the filing of such acceptance for an additional reasonable period.

c. This ordinance, if accepted by the Company, shall supersede, cancel and be in lieu of any and all other existing or prior grants of rights, permission and authority to the company or any predecessor companies or assigns of the Company to construct, operate and maintain any system for the sale, manufacture, storage, distribution, conveyance and supply of water within the city limits of the City.

**SECTION 14. Effective Date.**

Subject to the conditions for acceptance provided in section 13 of this agreement, this ordinance shall take effect and be in full force and effect thirty (30) days after its passage and approval.

**PASSED, APPROVED AND ADOPTED** this 4<sup>th</sup> day of MAY, 2016.

  
\_\_\_\_\_  
Eunice Kent, Mayor

Attest:

  
\_\_\_\_\_  
Karen Rieth, City Clerk





# ACKNOWLEDGMENT

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

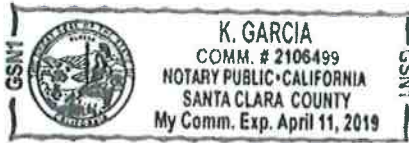
State of California  
County of Santa Clara

On 5/11/16 before me, K. Garcia, Notary Public  
(insert name and title of the officer)

personally appeared PAUL TOWNSLEY  
who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.



Signature  (Seal)