

STREETLIGHT POLE USE LICENSE AGREEMENT

BETWEEN

ARIZONA PUBLIC SERVICE COMPANY

AND

TOWN OF PRESCOTT VALLEY

APS CONTRACT NO. 201407013

TOWN OF PRESCOTT VALLEY CONTRACT NO. _____

Execution Date 7/1/14

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STREETLIGHT POLE USE LICENSE AGREEMENT
BETWEEN
ARIZONA PUBLIC SERVICE COMPANY
AND
TOWN OF PRESCOTT VALLEY

1. PARTIES

The parties to this Streetlight Pole Use License Agreement (“License Agreement”) are TOWN OF PRESCOTT VALLEY, an Arizona municipal corporation, (“Town”), and ARIZONA PUBLIC SERVICE COMPANY, an Arizona corporation (“APS”), hereinafter referred to individually as “Party” and collectively as the “Parties.”

2. RECITALS

2.1 The Parties have entered into a streetlight sales agreement (APS Contract No. 56315 dated December 15, 1998) in which Town has purchased streetlight facilities from APS within the existing Town boundaries.

2.2 Additionally, the Parties entered into: i) a Streetlight Energy Agreement (APS Contract No. 56317 dated December 15, 1998) pursuant to which APS sells energy to Town for the Streetlight Facilities (the “Energy Agreement”); ii) a Streetlight Operation, Maintenance and Facilities Agreement (APS Contract No. 56319 dated December 15, 1998) pursuant to which APS operates and maintains Town’s Streetlight Facilities within APS’ service territory (the “O,M&F Agreement”); and iii) a Master License Agreement (APS Contract No. 56318 dated December 15, 1998) pursuant to which Town’s Streetlight Facilities are allowed to be attached to APS’ electric distribution poles (the “License Agreement”).

2.3 The Parties now desire to enter into this License Agreement pursuant to which the Town may attach its streetlights to APS’ electric distribution poles.

2.4 The Parties desire that this License Agreement replace and supersede the Former

Master License Agreement dated December 15, 1998.

NOW, THEREFORE, in consideration of the foregoing recitals, the promises, covenants, and provisions contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties do hereby covenant, promise and agree as follows:

3. DEFINITIONS

When initially capitalized in this License Agreement or amendments thereto, the following words or phrases shall have the meanings specified:

- 3.1 ACC: Arizona Corporation Commission.
- 3.2 Annual Attachment Fee: The fee set forth in Exhibit A assessed annually for attachment of Streetlight Facilities to each APS Pole.
- 3.3 APS Pole(s): Electric distribution poles owned by APS for which APS authorizes the attachment of the Streetlight Facilities.
- 3.4 Due Date: The thirtieth (30th) calendar day after the invoice date.
- 3.5 Effective Date: The date specified in Section 22, Execution and Effective Date.
- 3.6 Interest: The per annum rate of 18% compounded monthly.
- 3.7 Joint Pole Participant: Any entity with whom APS has entered into an agreement or arrangement to reciprocally own and furnish poles for joint use and by which both parties have agreed to a method of pro-rating the fully allocated costs of ownership and maintenance of such joint use facilities, including the safety space and supporting structure.
- 3.8 License: A revocable, nonexclusive authorization to attach Streetlight Facilities to APS Poles, subject to the terms of this License Agreement. Such License(s) shall be issued by APS, in its sole discretion.

- 3.9 Other Licensee(s): Any entity, other than Town, whom APS has authorized under any agreement or arrangement to attach its facilities to APS' Poles, for any purpose.
- 3.10 Point of Delivery: The point where energy is delivered shall be where APS' electric service wire connects to (i) Town's electric service wire, one foot beyond the end of the mast arm for overhead service to the streetlight or, (ii) at the Town's protection fuse installed in the APS-owned secondary junction box for underground service to the streetlight or, (iii) at the Town's electric service protection fuse or termination point located in the hand-hole of the Town Pole for underground service to the streetlight when no APS-owned secondary junction box exists or, (iv) five (5) feet from the Town Pole for underground service when there is no hand-hole on the Town Pole or an APS-owned secondary junction box.
- 3.11 Streetlight Facilities: The facilities owned by the Town (within APS' service territory) and generally described as metal streetlight poles dedicated only to streetlighting that may support APS' secondary conductors serving the streetlights and no other attachment(s); mast arms; luminaires and lamps; protection fuses; photo controls; external ballasts; and electric service wires which extend from the luminaires of the individual streetlight installation to the Point of Delivery.

4. LICENSE FOR ATTACHMENT TO POLES

- 4.1 Grant of License: Subject to the terms and the other provisions of this License Agreement, APS hereby grants to Town a License to maintain the location of those Streetlight Facilities which, on the Effective Date of this License Agreement, are attached to APS Poles, in the location that they are then attached. Further, APS agrees to issue to Town, upon its request, from time to time, subsequent to the Effective Date of this License Agreement, new Licenses

authorizing the attachment of Town owned Streetlight Facilities to various APS Poles as designated by APS in its sole discretion.

4.2 Other Rights Reserved:

4.2.1 Neither the use of APS Poles as authorized herein nor payment of any fees or charges required under this License Agreement shall create or vest in Town any ownership or property rights in such APS Poles. Town's right here in shall be and remain a license. Neither this License Agreement nor any License granted, or which may be granted, hereunder shall constitute an assignment of any of APS' rights to use any public thoroughfare or other public or private property at the location of APS Poles.

4.2.2 Nothing contained in this License Agreement shall be construed to compel APS to construct, retain, extend, place, or maintain APS electric distribution poles or other facilities for the benefit of Town which are not needed for APS' own service requirements. If it becomes necessary or desirable to relocate or remove APS Poles, APS will notify Town of the need to relocate or remove Town's Streetlight Facilities located thereon thirty (30) calendar days prior to such relocation or removal; except that in an emergency, the notice will be provided within thirty (30) calendar days after the relocation or removal. APS will perform the relocation or removal of the Streetlight Facilities located on APS Poles. The relocation or removal will be at Town's expense in accordance with Exhibit B, unless such relocation or removal is made at APS' request or convenience. If APS relocates or removes its APS Poles at the request of Town or a third party, Town or the third party (as the case may be) shall be responsible to pay the costs of relocating or removing the Streetlight

Facilities located thereon. Where the APS Pole has been knocked down, all requests for re-installing Streetlight Facilities on the re-installed APS Pole, or installing new Streetlight Facilities on an APS Pole, shall be requested in writing by Town. At Town's request, APS will provide the Town with a project-specific cost estimate or unit cost estimate of the work to be done. APS shall not commence the work until such estimate has been paid by Town, except that APS, at its sole option, may accept a letter of understanding (prior to any work being performed by APS) in which Town commits to pay APS for such services upon completion of the services.

- 4.2.3 Nothing contained in this License Agreement shall be construed as a limitation, restriction, or prohibition against APS with respect to any agreement and/or arrangement which APS has previously entered into or may in the future enter into with any third parties regarding the APS Poles covered by this License Agreement. The rights of Town shall be subject to an existing agreement and/or arrangement, entered into prior to installation of the Streetlight Facilities, but shall have priority over any such future agreement(s) and/or arrangement(s) entered into after the installation of the Streetlight Facilities.
- 4.2.4 No License granted hereby or in the future under this License Agreement shall extend to any of APS' electric distribution poles where the placement of the Streetlight Facilities would result in terminating the rights of APS, Other Licensees, and/or Joint Pole Participants, to occupy the property on which such electric distribution poles are located. If the existence of the Streetlight Facilities on APS Poles would cause a termination of the right

of APS, Other Licensees, and/or Joint Pole Participants, or any of them, to occupy such property, upon the written consent of Town which shall not be unreasonably withheld, APS shall be authorized to remove the Streetlight Facilities at Cities expense. The removal costs will be in accordance with Exhibit B

4.3 Annual Attachment Fees:

4.3.1 The Annual Attachment Fee shall be as specified in Exhibit A hereto.

4.3.2 The Annual Attachment Fee shall be adjusted effective January 1 of each year. The amount of such adjustments shall be calculated by utilizing the cost index numbers from the most recent edition of the Handy Whitman Index of Public Utility Construction Costs (“H/W Index”), Plateau Region (E-5), Distribution Plant; Poles, Towers and Fixtures (FERC Account No. 364). The percentage of change in the annual average index numbers will be applied to the previous year’s Annual Attachment Fee to determine the current year’s Annual Attachment Fee, effective January 1st of each year. The initial Annual Attachment Fee for attachments in existence prior to the Effective Date of this License Agreement shall be assessed at the annual rate set forth in Section 4.3.1 above, prorated from the effective date of this License Agreement to the end of the initial calendar year.

4.3.3 The total Annual Attachment Fee assessed as of the beginning of each anniversary of the Effective Date shall be based upon the total number of licensed APS Poles on record, multiplied by the Annual Attachment Fee effective for that year. The total number of pole attachments on record shall be the number of pole attachments for which a License has been

issued, less the number of pole attachments whose License has been terminated, as of the last day of the previous year.

4.3.4 APS shall use good faith efforts to provide written notice to Town of APS' intent to adjust the Annual Attachment Fee and the amount of such adjustment 60 calendar days prior to the adjustment.

4.4 Limitation of Liability and Reservation of Rights:

APS shall not be liable to Town for any special, incidental, indirect, or consequential loss or damage arising out of Town's use of APS Poles and/or Streetlight Facilities being located thereon. APS reserves to itself, its successors and assigns, the right to locate and maintain its poles, including the APS Poles, and to operate its facilities in such a manner as will best enable APS to fulfill its electric service requirements.

5. TERM

This License Agreement shall remain in effect until terminated in accordance with the Termination section below.

6. TERMINATION

6.1 Termination at Will: Either Party has the right to terminate this Agreement at any time and for any reason by giving the other Party ninety (90) days advanced written notice for the termination

6.2 Termination for Default: If Town or APS fails to comply with any of the terms and conditions of this License Agreement or defaults in any of its obligations under this License Agreement, and fails within thirty (30) days after the date of written notice from Town or APS to correct such noncompliance or default, Town or APS may, at its option and in addition to any other rights or remedies it may

have, immediately terminate this License Agreement issued pursuant hereto, under which such noncompliance or default has occurred.

6.3 Removal of Streetlight Facilities Following Termination:

6.3.1 In the event of termination of this License Agreement and/or any License(s), APS may remove Town’s Streetlight Facilities from APS Poles affected by such termination; provided, however, that Town shall be liable for and pay all applicable attachment fees to APS until the Streetlight Facilities are actually removed from APS Poles. Town shall pay APS for the removal of Town’s Streetlight Facilities from APS Poles as specified in Exhibit B.

6.4 Cancellation By Town: The Parties hereto acknowledge that this License Agreement is subject to cancellation by the Town for a conflict of interest pursuant to the provisions of Section 38-511, Arizona Revised Statutes.

7. DESIGNATED REPRESENTATIVES AND NOTICES

7.1 Designated Representatives: All communications relating to the day-to-day activities under this License Agreement shall be exchanged between the following designated representatives who are authorized to act on behalf of that Party. Either Party may change said designated representatives from time to time by giving advance written notice.

APS:
Arizona Public Service Company
Attention: Streetlight Management
P.O. Box 53933, Station 3536
Phoenix, Arizona 85072-3933

Town:
Town of Prescott Valley
Town Manager
7501 E. Civic Circle
Prescott Valley, AZ 86314

7.2 Notices: Any legal notices and communications required or provided for hereunder shall be in writing and shall be send by first class, registered, certified or express mail, return receipt requested, postage prepaid, or by comparable

delivery service, or by hand, or by facsimile (with the original sent by first class mail) to the following:

To APS:

Arizona Public Service Company
Office of Corporate Secretary
400 N. 5th Street, Station 8602
Phoenix, Arizona 85004

To Town:

Town of Prescott Valley
Town Manager
7501 E. Civic Circle
Prescott Valley, AZ 86314

With a copy to:

Arizona Public Service Company
Attention: Streetlight Management
P.O. Box 53933, Station 3536
Phoenix, Arizona 85072-3933

Town of Prescott Valley
Town Manager
7501 E. Civic Circle
Prescott Valley, AZ 86314

7.3 Invoices and Payments: Invoices and payments pursuant to this License

Agreement shall be sent to:

Arizona Public Service Company
P.O. Box 53920, STA 9996
Phoenix, AZ 85072-3920

Town of Prescott Valley
Town Manager
7501 E. Civic Circle
Prescott Valley, AZ 86314

8. FISCAL YEAR

The obligation of Town to make any payments hereunder is subject to the provisions of the Arizona State Budget Law and Town Code provisions which require that the Town Council make necessary appropriations for such payments in each fiscal year. Town shall take all steps reasonably available to it to cause such payments to be included in its budget presented to Town Council each fiscal year in the form of an appropriation for monies that will be due under this License Agreement during the subsequent year. However, the foregoing does not alter Town's obligation to pay for services actually

received, nor does it change APS' right to terminate this License Agreement for non-payment in accordance with the Termination section above.

9. UNCONTROLLABLE FORCES

9.1 Definition: An "Uncontrollable Force" shall mean any cause beyond the control of the Party affected, including but not restricted to failure of or threat of failure of facilities, flood, earthquake, geohydrologic subsidence, tornado, storm, fire, lightning, epidemic, war, riot, commotion, civil disturbance or disobedience, labor dispute, labor or material shortage, sabotage, restraint by court order or public authority (whether valid or invalid), and action or nonaction by or inability to obtain or keep the necessary authorizations or approvals from any governmental agency or authority, which by exercise of due diligence it shall be unable to overcome. It is the intent of the Parties that the foregoing examples shall not be used as a limitation on the term "uncontrollable force" in interpreting or construing this License Agreement. Rather the Parties intend a liberal interpretation of the term and accordingly intend that in questions of assumption of risk or contingencies, whether foreseen or not, the presumption shall be that risks not explicitly assumed by a Party are not assumed by said Party if, in fact, they are uncontrollable even with foresight.

9.2 Effect of Uncontrollable Force: If either Party, by reason of an Uncontrollable Force, is rendered unable, wholly or in part to perform its obligations under this License Agreement, then upon said Party giving notice and particulars of such Uncontrollable Force in writing to the other Party promptly after learning thereof, the obligations of said Party so far as they are affected by such Uncontrollable Force shall be suspended during the continuance of any inability so caused but for no longer period and the effects of such cause shall, so far as possible, be

remedied with all reasonable dispatch. However, nothing contained herein shall be so construed as to require a Party to settle any strike or labor dispute in which it may be involved. The affected Party shall not be responsible for its delay in performance under this License Agreement during delays caused by an Uncontrollable Force nor shall such Uncontrollable Force give rise to a claim for damages or constitute default.

9.3 Uncontrollable Force Limit: If a Party's obligation to perform is suspended for a period of ninety (90) continuous calendar days due to an Uncontrollable Force, or for any other reason, the other Party shall have all rights and remedies of law and equity, including but not limited to, the right to terminate this Agreement.

10. NON-WAIVER

The failure of either Party to insist upon strict performance of any of the provisions of this License Agreement, or to exercise any of the rights or remedies provided by this License Agreement, or any delay in the exercise of any of the rights or remedies, shall not release either Party from any of the responsibilities or obligations imposed by law or by this License Agreement, and shall not be deemed a waiver of any right of either Party to insist upon strict performance of this License Agreement.

11. BILLING, PAYMENT AND TAXES

11.1 Annual Attachment Fee: The initial total Annual Attachment Fee shall be payable within thirty (30) calendar days of the Effective Date of the License. Thereafter, the total Annual Attachment Fee shall be payable in advance, as of the first day of January of the applicable year.

11.2 Payment: APS shall receive payment from Town on or before the Due Date.

Payment shall be mailed to the address specified in Section 7.3. Amounts which

are not paid when due shall bear Interest from the Due Date until such time as payment is received by APS.

11.3 Disputed Bill: If any portion of any bill is disputed, the undisputed amount shall be paid when due.

11.3.1 The Party discovering the error shall notify the other Party in writing of the disputed amount and the reasons the charges are believed to be in error. Within 60 days, the Parties shall meet to resolve the dispute. If the dispute cannot be resolved within 180 days, either Party may request mediation, or the dispute may be referred to a mutually agreed upon mediator by the Parties to resolve the dispute.

11.4 Delinquent Bill: If Town's bill becomes delinquent, due to non-payment for a period of thirty (30) days after the invoice date, APS shall have the right at its option:

11.4.1 To exercise any remedy provided by law, including immediate termination of this License Agreement. Suspension and/or termination shall not relieve Town of its obligation to pay any amounts previously due nor shall such suspension or cancellation invalidate any other agreement with Town.

11.4.2 To charge interest at the rate of 18% per annum for all charges unpaid after the thirty (30) day period until the past due charges, including interest accrued thereon, are paid in full.

The failure of APS to exercise such sanction shall not constitute a waiver by APS of any rights hereunder.

11.5 Taxes: Town shall pay any and all applicable sales tax, transaction privilege tax, use tax or like tax assessed or assessable as the result of APS providing services hereunder.

12. ANNEXATION AND ACQUISITION OF ADDITIONAL STREETLIGHT FACILITIES

If Town annexes additional property or additional Streetlight Facilities, the terms and conditions of this License Agreement will apply upon the effective date of said annexation or purchase.

13. GOVERNING LAW AND VENUE

This License Agreement shall be governed, construed and enforced in accordance with the substantive laws of the State of Arizona. Any suit to enforce this License Agreement shall be brought in the Superior Court of Maricopa County.

14. SEVERABILITY

If any provision of this License Agreement is determined by a court of competent jurisdiction to be unenforceable or illegal, then said provision(s) or amendments thereto shall be severed from this License Agreement and the remainder shall continue in full force and effect unless otherwise mutually agreed between the Parties.

15. ASSIGNMENT

Neither Party shall assign its rights, nor delegate its duties, or otherwise dispose of any right, title, or interest in all or any part of this License Agreement, or assign any monies due or payable hereunder without the prior written consent of the other Party. Such consent shall not be unreasonably withheld. Notwithstanding the foregoing, either Party may, without the need for consent from the other Party, (a) transfer, pledge, or assign this License Agreement as security for any financing; (b) transfer, assign or delegate this License Agreement or its rights hereunder or delegate or subcontract its obligations

hereunder to an affiliated entity, parent entity or subsidiary of such Party, or (c) transfer, assign or delegate this License Agreement to any person or entity succeeding to all or substantially all of the assets of such Party. To the extent a transfer does not require consent, the transferring Party shall provide notice within thirty (30) calendar days to the other Party of the transfer and the effective date thereof. Any transfer in violation of this Section 15 shall be deemed null and void.

16. NO THIRD PARTY BENEFICIARIES

APS acknowledges and represents that Section 15 of this License Agreement entitled, "ASSIGNMENT," is not intended to and does not create any claims, rights, remedies, or benefits exercisable by any third party.

Town acknowledges and represents that this License Agreement is not intended to and does not create any claims, rights, remedies, or benefits exercisable by any third party and that neither APS nor Town undertakes any responsibility or obligation to any third party by virtue of this License Agreement, and neither shall be liable to any third party by virtue of the nature, location, quality or quantity of streetlights, or other cause arising directly or indirectly out of this License Agreement or its performance by either Party.

17. SURVIVABILITY OF OBLIGATIONS AND LIABILITIES

The covenants, representations, indemnifications and warranties of the Parties unless otherwise expressly provided shall survive the expiration or termination of this License Agreement.

18. PRECEDENCE

18.1 Order of Precedence: In the event of conflict between this License Agreement and any referenced document, the order of precedence shall be this License Agreement followed by any other referenced document, in the order in which they are referenced in the Table of Contents.

18.2 Amended Documents: Any amendment shall have priority over the document it amends, and any amended document shall have the same precedence classification as stated in Section 18.1.

19. ENTIRE AGREEMENT, MODIFICATION

This License Agreement shall constitute the entire agreement between the Parties and shall supersede all prior contracts, proposals, representations, negotiations, or letters pertaining to the subject matter of this License Agreement, whether written or oral, including the Original License Agreement. The Parties shall not be bound by or be liable for any statement, representation, promise, inducement, or understanding of any kind not set forth in this License Agreement and this License Agreement shall only be modified by an amendment signed by both Parties. The terms of this Section shall in no way effect the obligation of Town to pay amounts due under the Original License Agreement; provided that the payments are for use of APS Poles rendered before the Original License Agreement was superseded by this License Agreement. This License Agreement includes all documents attached hereto and incorporated herein by reference. Specifically included as exhibit to this License Agreement and attached hereto are the following:

Exhibit A – Annual Attachment Fee

Exhibit B – Removal and Installation Cost

20. INDEMNIFICATION

Notwithstanding anything to the contrary contained in that certain Franchise Agreement between the Parties hereto, each Party making a covenant, agreement, representation or warranty in this License Agreement shall indemnify and hold harmless the Party for whose benefit such covenant, agreement, representation or warranty is made, against any and all injury, loss, cost, damage, or expense of any kind (including reasonable attorney's fees) resulting from any breach of any such covenant, agreement, representation or

warranty; provided however that such injury, loss, cost, damage or expense is not the result of negligence, willful misconduct or a breach of this License Agreement by the Party to be indemnified. In order for the requirement of indemnification to be enforceable, the Party wishing to be indemnified must give the other Party notice of the event which caused the injury, loss, cost, damage or expense, along with notice of the intent to seek indemnification therefore, within 180 days of the date the Party wishing to be indemnified first learns of the event.

21. LEGAL REQUIREMENTS

21.1 Laws and Regulations: The Parties shall at all times observe and comply with all applicable laws, ordinances, statutes, rules or regulations including without limitation those of OSHA and the National Electrical Safety Code, which in any manner relate to any rights and obligations under this License Agreement.

21.2 Safety Statute: Nothing contained in this License Agreement shall be construed in any way to limit, restrict, substitute, or waive, in whole or in part, any of the Parties' obligations under Article 6.4, HIGH VOLTAGE POWER LINES AND SAFETY RESTRICTIONS, of Section 1, Title 40, Chapter 2 of the Arizona Revised Statutes, or any other laws, regulations, codes, standards, or industry practices pertaining to activities near overhead electric lines.

22. EXECUTION AND EFFECTIVE DATE

Each Party to this License Agreement hereby represents and warrants that (i) it has full authority to enter this License Agreement and to perform all responsibilities and obligations thereunder and that all necessary actions, if any, to authorize the execution, delivery and performance of this License Agreement have been taken, (ii) the person executing this License Agreement on its behalf has been duly authorized to execute this

License Agreement, and (iii) this License Agreement constitutes legally binding and enforceable obligations of such Party. This License Agreement shall be effective as of the 1st day of July, 2014.

ARIZONA PUBLIC SERVICE COMPANY

SIGNATURE: _____

NAME: _____

TITLE: _____

TOWN OF PRESCOTT VALLEY,

SIGNATURE: _____

NAME: _____

TITLE: _____

ATTEST:

Town Clerk

APPROVED AS TO FORM:

Town Attorney

EXHIBIT A
STREETLIGHT POLE USE LICENSE AGREEMENT
BETWEEN
ARIZONA PUBLIC SERVICE COMPANY
AND
TOWN OF PRESCOTT VALLEY

ANNUAL ATTACHMENT FEE

Commencing January 1, 2014, the Annual Attachment Fee for calendar year 2014 shall be \$6.69 per APS Pole.

EXHIBIT B

STREETLIGHT POLE USE LICENSE AGREEMENT
BETWEEN
ARIZONA PUBLIC SERVICE COMPANY
AND
TOWN OF PRESCOTT VALLEY

REMOVAL AND INSTALLATION COST

A project-specific cost estimate or unit cost estimate shall be provided by APS. APS shall supply Town at Town's request with a cost estimate of the work to be done, but APS shall not commence work until such estimate has been paid by Town, except that APS, at its sole option, may accept a letter of understanding (prior to any work being performed by APS) in which Town commits to pay APS for such services upon completion of the services.