

AGENDA

AGENDA OF THE WORK SESSION OF THE MAYOR AND COUNCIL OF THE CITY OF BISBEE, COUNTY OF COCHISE, STATE OF ARIZONA TO BE HELD ON TUESDAY, MARCH 2, 2010, 6:00 PM IN THE BISBEE MUNICIPAL BUILDING, 118 ARIZONA STREET, BISBEE, ARIZONA.

THE MEETING CALLED TO ORDER BY _____ AT _____ PM.

ROLL CALL

COUNCIL

Councilmember Boyd Nicholl, Ward I
Councilmember Bennie Scott, Ward III
Councilmember Luche Giacomino, Ward II
Mayor W.J. "Jack" Porter
Councilmember Anna Cline, Ward III
Councilmember Raymond Rodgers, Ward II
Councilmember Ken Budge, Ward I, Mayor Pro Tempore

STAFF

Stephen J. Pauken, City Manager
Gloria P. Gonzalez, Interim City Clerk
Dee L. Flanagan, Finance Director
John Charley, Community Development Director
Jim Elkins, Chief of Police
Jack Earnest, Fire Chief
Jennifer L. Graeme, Personnel Director
Russ McConnell, Public Works Director
Peg White, Library Director

CITY ATTORNEY

Mark J. Langlitz

THE FOLLOWING ITEM WILL BE DISCUSSED AND/OR CONSIDERED AT THIS MEETING:

1. PRESENTATION AND POSSIBLE DISCUSSION REGARDING A REVISED AGREEMENT WITH ARIZONA PUBLIC SERVICE TO MAINTAIN STREET LIGHTS IN THE CITY OF BISBEE.

MARK J. LANGLITZ, CITY ATTORNEY

ADJOURNMENT

Anyone needing special accommodations to attend this meeting should contact Gloria Gonzalez at (520) 432-6000 at least twenty-four hours before the meeting.



AGENDA ITEM NUMBER 1

REQUEST FOR COUNCIL ACTION

DATE SUBMITTED: February 25, 2010	TYPE OF ACTION: <input type="checkbox"/> RESOLUTION <input type="checkbox"/> ORDINANCE <input type="checkbox"/> FORMAL ACTION <input checked="" type="checkbox"/> OTHER: PRESENTATION	SUBJECT: PRESENTATION AND POSSIBLE DISCUSSION REGARDING A REVISED AGREEMENT WITH ARIZONA PUBLIC SERVICE TO MAINTAIN STREET LIGHTS IN THE CITY OF BISBEE.
DATE ACTION REQUESTED: March 2, 2010		
<input checked="" type="checkbox"/> REGULAR <input type="checkbox"/> CONSENT		

TO: Mayor and Council
FROM: Mark J. Langlitz, City Attorney
RECOMMENDATION: Presentation purposes only.
PROPOSED MOTION: Presentation purposes only.

DISCUSSION: City Attorney Langlitz will discuss a revised agreement with Arizona Public Service for the maintenance of street lights throughout the City of Bisbee.

Prepared by:

Reviewed by:

Jennifer L. Graeme, Personnel Director

Stephen J. Pauken, City Manager

STREETLIGHT CONSTRUCTION AND MAINTENANCE AGREEMENT

BETWEEN

ARIZONA PUBLIC SERVICE COMPANY

AND

CITY OF BISBEE

APS CONTRACT NO. 200800001

CITY OF BISBEE CONTRACT NO. _____

STREETLIGHT CONSTRUCTION AND MAINTENANCE AGREEMENT

BETWEEN

ARIZONA PUBLIC SERVICE COMPANY

AND

CITY OF BISBEE

TABLE OF CONTENTS

SECTION	PAGE
1. PARTIES	1
2. RECITALS.....	1
3. DEFINITIONS.....	2
4. CONSTRUCTION AND MAINTENANCE.....	4
5. TERM	13
6. TERMINATION.....	14
7. DESIGNATED REPRESENTATIVES AND NOTICES	14
8. FISCAL YEAR	15
9. UNCONTROLLABLE FORCES	16
10. NON-WAIVER.....	17
11. BILLING, PAYMENT AND TAXES	18
12. ANNEXATION AND ACQUISITION OF ADDITIONAL STREETLIGHT	

	FACILITIES.....	19
13.	GOVERNING LAW AND VENUE.....	19
14.	SEVERABILITY	19
15.	ASSIGNMENT	19
16.	NO THIRD PARTY BENEFICIARIES	20
17.	SURVIVABILITY OF OBLIGATIONS AND LIABILITIES	20
18.	PRECEDENCE.....	21
19.	ENTIRE AGREEMENT, MODIFICATION.....	21
20.	INDEMNIFICATION.....	22
21.	LEGAL REQUIREMENTS.....	22
22.	EXECUTION AND EFFECTIVE DATE.....	23

EXHIBITS

	EXHIBIT A – REMOVAL AND INSTALLATION COSTS	A-1
	EXHIBIT B – APS LOADINGS.....	B-2

STREETLIGHT CONSTRUCTION AND MAINTENANCE AGREEMENT
BETWEEN
ARIZONA PUBLIC SERVICE COMPANY
AND
CITY OF BISBEE

1. PARTIES

The parties to this Streetlight Construction and Maintenance Agreement (the “Maintenance Agreement”) are CITY OF BISBEE, an Arizona municipal corporation, (“City”), 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. 19637 dated 12/28/1990) in which City has purchased streetlight facilities from APS within the existing City boundaries.
- 2.2. Additionally, the Parties entered into: i) a Streetlight Energy Agreement (APS Contract No. 19638 dated 12/28/1990) pursuant to which APS sells energy to City for the Streetlight Facilities (the “Energy Agreement”); ii) an Operations, Maintenance and Facilities Agreement (APS Contract No. 19639 dated 12/28/1990) pursuant to which APS operates and maintains City’s Streetlight Facilities within APS’ service territory (the “Original OM&F Agreement”); and iii) a Master License Agreement (APS Contract No. 19640 dated 10/17/1990) pursuant to which City’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 Maintenance Agreement pursuant to

which APS will construct and maintain the streetlights for City.

- 2.4. The Parties desire that this Maintenance Agreement replace and supersede the Original OM&F Agreement.

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 Maintenance Agreement or amendments thereto, the following words or phrases shall have the meanings specified:

- 3.1. APS Pole(s): Electric distribution poles owned by APS for which APS authorizes the attachment of the Streetlight Facilities.
- 3.2. City Pole(s): Streetlight poles owned by City.
- 3.3. Dawn: The time between full dark and sunrise when a Photocontrol senses sufficient sunlight to turn off streetlights.
- 3.4. Due Date: The forty-fifth (45th) calendar day after the invoice date.
- 3.5. Dusk: The time between sunset and full dark when a Photocontrol senses the lack of sufficient sunlight and turns on streetlights.
- 3.6. Effective Date: The date specified in Section 22, Execution and Effective Date.
- 3.7. Interest: The per annum rate of 18% compounded monthly.
- 3.8. Photocontrol: A photoelectric cell which is designed to turn streetlights on at Dusk and to turn streetlights off at Dawn, that meets the standards specified in American National Standards Institute (ANSI) C136.10 –1988 “Locking-Type

Photocontrol Devices and Mating Receptacles – Physical and Electrical

Interchangeability and Testing.”

- 3.9. Point(s) of Delivery: The point(s) where energy is delivered shall be where APS’ electric service wire connects to (i) City’s electric service wires one (1) foot before the service wires enter the mastarm for overhead service to the streetlight poles or, (ii) City’s protection fuse or termination point located inside the hand hole of the City Pole for underground service to the streetlight or, (iii) the point where APS’ electric service wire connects to the terminals located inside the streetlight fixture if there is no hand hole available on the City Pole for underground service to the streetlight.
- 3.10. Special Facilities: All facilities which are not Standard Facilities.
- 3.11. Standard Facilities: Streetlight Facilities for which APS has established standard specifications for installations to supply service throughout APS’ service area, as may be amended by APS from time to time (currently set forth in APS Transmission & Distribution Construction Standards copies of which are available upon request).
- 3.12. Streetlight Facilities: The facilities owned by City (within APS’ service territory) consisting of City Poles dedicated only to streetlighting service that support APS’ secondary conductors and no other APS attachment(s); streetlight mastarms; luminaires and lamps; protection fuses located in metal poles; Photocontrols; external ballasts; electric service wires from the luminaires of the individual streetlight installation to the point either i) one (1) foot beyond the end of the mastarm for overhead service to the streetlight or ii) City’s protection fuse or

termination point located inside the hand hole of the City Pole for underground service to the streetlight or, iii) the point where APS' electric service wire connects to the terminals located inside the streetlight fixture if there is no hand hole available on the City Pole for underground service to the streetlight.

4. CONSTRUCTION AND MAINTENANCE

4.1. General: APS shall construct and maintain the Streetlight Facilities within APS' service territory for City in accordance with the terms and conditions of this Maintenance Agreement. APS' obligation to perform maintenance of Streetlight Facilities attached to QWEST owned poles is subject to City acquiring such attachment rights from QWEST.

4.1.1. Operation Time: Operation of the Streetlight Facilities shall be from Dusk to Dawn. Notwithstanding the foregoing, City agrees that APS cannot guarantee that all of the Streetlight Facilities will always operate as intended. Therefore, it is understood and agreed that APS will be in compliance with this Section 4.1.1 by completing repairs within the following time frames:

4.1.1.1. Repairs after Notification:

4.1.1.1.1. APS shall clear hazards associated with Streetlight Facilities which have been knocked down that block traffic or present an imminent safety risk to the public within four (4) hours after notification by City. Storm or other large scale damage may require

a longer hazard clearance time. APS shall notify City when this occurs.

4.1.1.1.2. APS shall use reasonable efforts to complete normal maintenance (as specified in Section 4.2.1 herein) within ten (10) work days after notification by City. However, if the maintenance requires cable replacement or cable repair, APS shall use reasonable efforts to complete said cable replacement or cable repair within twenty (20) work days after the need for repair or replacement has been identified by APS.

4.2. Work to be Performed by APS:

4.2.1. Standard Facilities – Normal Construction and Maintenance: City agrees that APS is obligated to perform only the following construction and maintenance work for Standard Facilities.

4.2.1.1. Bulb replacement - may include group replacement and/or spot replacement.

4.2.1.2. Streetlight head, mastarms, protection fuses and Photocontrol replacements.

4.2.1.3. Streetlight ballast replacements.

4.2.1.4. Streetlight pole identification number replacement.

4.2.1.5. Spot replacement of non-functional mercury vapor and incandescent lights with other Standard Facilities.

4.2.2. Special Facilities – Normal Construction and Maintenance: City agrees that APS is obligated to perform only the following construction and maintenance work for Special Facilities. All material and labor for construction and maintenance of Special Facilities shall be billable to City under Section 4.3.4.

4.2.2.1. Bulb replacement - may include group replacement and/or spot replacement.

4.2.2.2. Streetlight head, mastarms, protection fuses and photo control replacements.

4.2.2.3. Streetlight ballast replacements.

4.2.2.4. Streetlight pole identification number replacement.

4.2.3. Additional Work: The following constitutes additional work which APS is not obligated to perform, unless specifically directed to do so by City, conditioned upon City's agreement to pay the applicable charges set forth in this Maintenance Agreement.

4.2.3.1. Replacement of all poles and all fixtures associated with vehicle, storm related or other damage.

4.2.3.2. Replacement of old steel or wood poles that, as determined by City, have deteriorated to such a condition that replacement is necessary.

4.2.3.3. Installation, relocation or upgrade of City owned street light facilities associated with road widening projects.

- 4.2.3.4. All concrete work and black top work associated with pole replacements.
- 4.2.3.5. Conversion of functional streetlight lamps and luminaires to other Standard or Special Facilities and the replacement of certain associated mastarms in order to complete said conversions.
- 4.2.3.6. All work specifically asked for by City which requires APS to rearrange existing facilities on a pole or requires APS to replace the existing pole with a more suitable pole.
- 4.2.3.7. Replacement of City owned electric service wire in mastarms and metal poles.

4.2.4. Assistance with Claims: At no cost to City, APS will provide any and all information, including but not limited to, documents, photographs, and testimony related to the work performed under this Maintenance Agreement to assist City with collecting damages from other parties who have harmed City's Streetlight Facilities.

4.3. Charges to City:

- 4.3.1. In addition to the charges described below and any other charges set forth in this Maintenance Agreement, City is responsible for all permit, inspection and other fees assessed by state, county or local government associated with streetlight work. Other fees may include, but are not limited to, plan or design review fees and traffic engineering or traffic control plan review fees. City shall also reimburse APS' actual incurred

costs for traffic control, lane closure and other costs associated with performing streetlight construction and maintenance work. APS shall render City a bill describing such fees or costs and City shall make payment in accordance with Section 11, BILLING, PAYMENT AND TAXES. The monthly charge per luminaire for normal construction and maintenance as set forth in Section 4.2.1 will be fixed as follows:

\$2.53 for the initial five (5) year period commencing upon the Effective Date;

\$3.11 for years six (6) through ten (10); and

\$3.82 for years eleven (11) through fifteen (15).

4.3.2 Charges for additional work, including but not limited to that set forth in Section 4.2.3 and project management not specifically covered under normal construction and maintenance, Section 4.2.1, shall be levied in accordance with Exhibit A and/or in a project-specific cost estimate to be provided by APS, at APS' discretion. APS shall supply City at City's request with a cost estimate of the work to be done, but APS shall not commence work until such estimate has been approved by City in writing. City shall make payment in accordance with Section 11, BILLING, PAYMENT AND TAXES. APS reserves the right to revise the costs in Exhibit A upon the annual anniversary of the Effective Date, including the project management fee, through submittal of a revised Exhibit A to reflect APS' increased or decreased costs. In no event shall APS' revised costs increase more than 6% above the increase in the average of (1) the

Producer Price Index (PPI) Commodities, Group: Metals and Metal Products, Item: Outdoor Lighting equipment, including parts, (Series ID: WPU10830522) and (2) the Current Employment Statistics (CES) Super Sector: Utilities, Industry: Electric Power Transmission and Distribution (Series ID: CEU4422112006) for the preceding calendar year as published by the U.S. Department of Labor, Bureau of Labor Statistics.

4.3.3 APS shall provide written notice to City of APS' intent to revise the costs in Exhibit A and the amount of such revision 180 calendar days prior to the annual anniversary of the Effective Date. If APS fails to provide the notice as specified herein, APS shall waive its right to revise the costs in Exhibit A for the next succeeding year.

4.3.4 Charges for work done on an emergency basis, as determined by APS, and work done on Special Facilities, shall be based on actual costs, including applicable loadings incurred by APS plus the rate of return authorized by the ACC. Such loadings shall include, the applicable items set forth on Exhibit B. Payment of such emergency and special facility charges shall be made in accordance with Section 11, BILLING, PAYMENT AND TAXES.

4.4. Work to be Performed by City:

4.4.1. City shall be responsible for all work pertaining to wiring at intersections beyond APS' meter at points where APS has meters installed.

4.4.2. It shall be the sole responsibility of City to investigate and pursue claims against any parties responsible for accidents and incidents involving

damage to City-owned Streetlight Facilities and to collect damages from the responsible party. APS shall notify City of damages discovered in the normal course of business or as requested by City.

4.4.3. City shall provide APS reasonable ingress and egress for performance of services under this Maintenance Agreement.

4.4.4. City further acknowledges, represents, warrants, and agrees that by entering into this Maintenance Agreement, City has not delegated or waived any of its rights, duties, responsibilities, or options regarding streetlight layout or design, but retains sole authority and responsibility for determining the reasonable level or amount of light to be provided along its streets, including the number, type and location of streetlights to be installed.

4.4.5. City further agrees that APS' assistance or recommendations regarding streetlight designs, layouts, or lighting levels, or the amount of streetlight service being provided by APS shall not be relied upon by City as satisfying any standard that may be adopted by or imposed upon City.

4.4.6. City shall provide a City-approved layout or engineer stamped drawing for all additional streetlight facilities. APS shall design a power source for the streetlights on City-approved streetlight layout or engineer stamped drawing.

4.5. Warehousing: During the term of this Maintenance Agreement, APS shall at no cost to City warehouse the materials and supplies necessary for the construction, maintenance, and repair and/or replacement of the Standard Facilities. Special

Facilities shall be warehoused by APS at APS' sole discretion at a cost mutually agreed upon by the Parties.

4.6. Extension of Streetlight Facilities:

4.6.1. For isolated streetlighting installations, all additional facilities required including but not limited to streetlight poles, mastarms, luminaires, bulbs and Photocontrols shall be installed by APS at City expense and per the schedule attached as Exhibit A.

4.6.2. For streetlighting installations within commercial, industrial projects or residential subdivisions, all additional facilities required including but not limited to streetlight poles, mastarms, luminaires, bulbs and Photocontrols shall be installed by APS or a developer at City or developer expense. If the installation is performed by APS, APS will be reimbursed in accordance with either the schedule attached as Exhibit A or a project-specific cost estimate, at APS' discretion after approval in writing by City. APS shall provide City or developer with the cost of the work to be performed and City or developer shall make payment in accordance with Section 11, BILLING, PAYMENT AND TAXES.

4.7. Ownership of Facilities: All streetlight facilities installed by APS (in accordance with this Maintenance Agreement) within the City boundaries (as they exist at the time of installation) shall become the property of City.

4.8. New Equipment: In the future, it is anticipated that new streetlight facilities will be developed and become available to the industry. APS agrees to acquire and install any such facilities selected by City for subsequent installations, although

such facilities will be considered Special Facilities, subject to the provisions of this Maintenance Agreement until such time that the parties mutually agree that such streetlight facilities (or other streetlight facilities) shall constitute Standard Facilities.

4.8.1 Remote Monitoring Equipment: In the future, it is anticipated that the use of remote monitoring equipment may occur. Should such monitoring equipment come into use, the Normal Construction and Maintenance Fee may be adjusted to reflect the acquisition costs and use of such monitoring equipment. Such adjustments shall be negotiated and mutually agreed upon by both parties before any such monitoring equipment is put into use.

4.9. Multi-use Poles: At street intersections where City desires to install a traffic signal and streetlight on the same pole, and where APS has distribution conductors other than streetlight conductors passing over such location, APS shall install, where feasible, a multi-use steel pole for mounting of traffic signal, streetlight, and distribution conductors. It is the intent of the Parties that a minimum number of poles be installed at, and in close proximity to, street intersections. APS shall endeavor not to install a pole within one hundred (100) feet of a multi-use pole, and where feasible shall remove other poles within one hundred (100) feet of a multi-use pole. The installation of multi-use poles and the removal or relocation of other APS-owned distribution poles within one hundred (100) feet of such multi-use pole shall be made at City's request for an additional charge to be determined by APS and paid in advance by City.

- 4.10. Inventory Lists and Records: APS shall supply the following records in an electronic format, time and manner to be mutually agreed upon by both parties, to City: (1) inventory lists showing Streetlight Facilities subject to this Maintenance Agreement and indicating location, lamp rating, type of pole and luminaire, (2) APS' records relating to City's streetlighting service, (3) copies of inventory lists with new additions to Streetlight Facilities that include locations of new and existing or changed streetlights, lamp rating, type of pole and luminaire and (4) APS shall also provide City, at agreed upon intervals, copies of APS' updated Geographic Information Systems maps showing street light locations.
- 4.11. Sale of Poles After Effective Date: If after the Effective Date, APS' distribution facilities are removed from an APS Pole and the APS Pole then only supports APS' secondary conductor and a City owned Streetlight, APS will notify City as provided herein and City has the option of purchasing the streetlight only pole or removing its streetlight and paying APS for said removal per Exhibit A.

5. TERM

- 5.1. This Maintenance Agreement shall terminate five (5) years from the Effective Date (the "Term"); *provided, however*, that the Term shall thereafter be extended for subsequent five (5) year blocks of time, on the same terms and conditions, unless either Party gives the other Party written notice of its intention not to renew this Maintenance Agreement, no less than ninety (90) calendar days prior to the scheduled termination date.

6. TERMINATION

6.1. Termination for Default: If City or APS fails to comply with any of the terms and conditions of this Maintenance Agreement or defaults in any of its obligations under this Maintenance Agreement, and fails within thirty (30) days after the date of written notice from City or APS to correct such non-compliance or default, City or APS may, at its option and in addition to any other rights or remedies it may have, immediately terminate this Maintenance Agreement issued pursuant hereto, under which such non-compliance or default has occurred.

6.2. Cancellation By City: The Parties hereto acknowledge that this Maintenance Agreement is subject to cancellation by City 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 Maintenance 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 as provided herein.

APS:
Patrick Mcdermutt
Arizona Public Service Co.
P.O. Box 53999, Station 3532
Phoenix, Arizona 85004
Telephone: 602-371-6134
FAX: 602-371-7473
E-mail: patrick.mcdermott@aps.com

CITY:
Telephone: _____
FAX: _____
E-mail: _____

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 Co.
Vice President and General Counsel
400 N. 5th Street, Station 9068
Phoenix, Arizona 85004

To CITY:
CITY OF BISBEE

With a copy to:

Arizona Public Service Co.
Section Leader – Outdoor Lighting
Station 3532
P.O. Box 53999
Phoenix, AZ 85072-3999

CITY OF BISBEE

7.3. Invoices and payments pursuant to this Maintenance Agreement shall be sent to:

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

CITY OF BISBEE

8. FISCAL YEAR

The obligation of City to make any payments hereunder is subject to the provisions of the Arizona State Budget Law and BISBEE City Code provisions which require that the BISBEE City Council make necessary appropriations for such payments in each fiscal year. City shall take all steps reasonably available to it to cause such payments to be

included in its budget presented to City Council each fiscal year in the form of an appropriation for monies that will be due under this Maintenance Agreement during the subsequent year.

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 Maintenance 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 Maintenance 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 Maintenance 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 at law and equity, including but not limited to, the right to terminate this Maintenance Agreement.

10. NON-WAIVER

The failure of either Party to insist upon strict performance of any of the provisions of this Maintenance Agreement, or to exercise any of the rights or remedies provided by this Maintenance 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 Maintenance Agreement, and shall not be deemed a waiver of any right of either Party to insist upon strict performance of this Maintenance Agreement.

11. BILLING, PAYMENT AND TAXES

11.1. Billing: APS shall render bills to City on a monthly basis for services furnished during the preceding billing month.

11.2. Payment: APS shall receive payment from City 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.

11.4. Delinquent Bill: If City's bill becomes delinquent, due to non-payment for a period of forty-five (45) calendar 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 Maintenance Agreement. Suspension and/or termination shall not relieve City of its obligation to pay any amounts previously due nor shall such suspension or cancellation invalidate any other agreement with City.

11.4.2. To charge interest at the rate of 18% per annum for all charges unpaid after the forty-five (45) 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: City 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 City annexes additional territory or purchases additional Streetlight Facilities, the terms and conditions of this Maintenance Agreement will apply upon the effective date of said annexation or purchase.

13. GOVERNING LAW AND VENUE

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

14. SEVERABILITY

If any provision of this Maintenance 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 Maintenance 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 Maintenance 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, upon notice to the other party but without the need for consent from the other Party, (a) transfer, pledge, or assign this Maintenance Agreement as security for any

financing; (b) transfer, assign or delegate this Maintenance 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 Maintenance 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 prompt notice to the other Party within thirty (30) calendar days of such 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 Maintenance Agreement entitled, "ASSIGNMENT," is not intended to and does not create any claims, rights, remedies, or benefits exercisable by any third party.

City acknowledges and represents that this Maintenance 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 City undertakes any responsibility or obligation to any third party by virtue of this Maintenance 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 Maintenance 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 Maintenance Agreement.

18. PRECEDENCE

18.1. Order of Precedence: In the event of conflict between this Maintenance Agreement and any referenced document, the order of precedence shall be this Maintenance 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 Maintenance 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 Maintenance Agreement, whether written or oral, including the Original OM&F 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 Maintenance Agreement and this Maintenance 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 City to pay amounts due under the Original OM&F Agreement; provided that the payments are for services rendered before the Original OM&F Agreement was superseded by this Maintenance Agreement. This Maintenance Agreement includes all documents attached hereto and incorporated herein by reference. Specifically included as an exhibit to this Maintenance Agreement and attached hereto are the following:

Exhibit A - Removal and Installation Costs

Exhibit B - APS Loadings

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 Maintenance 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 Maintenance 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 injury, loss, cost, damage or expense, along with notice of the intent to seek indemnification therefore, within one hundred eighty (180) calendar days of the date the Party wishing to be indemnified first learns of the injury, loss, cost, damage or expense.

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, and any City of BISBEE supplements and requirements thereto, which in any manner relate to any rights and obligations under this Maintenance Agreement.

21.2. Safety Statute: Nothing contained in this Maintenance 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 Maintenance Agreement hereby represents and warrants that (i) it has full authority to enter this Maintenance 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 Maintenance Agreement have been taken, (ii) the person executing this Maintenance Agreement on its behalf has been duly authorized to execute this Maintenance Agreement, and (iii) this Maintenance Agreement constitutes legally binding and enforceable obligations of such Party. This Maintenance Agreement shall be effective as of the ____ day of _____, 20____.

ARIZONA PUBLIC SERVICE COMPANY

SIGNATURE: _____

NAME: _____

TITLE: _____

CITY OF BISBEE, ARIZONA

SIGNATURE: _____

NAME: _____

TITLE: _____

ATTEST:

City Clerk

APPROVED AS TO FORM:

City Attorney

EXHIBIT A

STREETLIGHT CONSTRUCTION AND MAINTENANCE AGREEMENT
BETWEEN
ARIZONA PUBLIC SERVICE COMPANY
AND
CITY OF BISBEE

REMOVAL AND INSTALLATION COSTS

EXHIBIT B

**STREETLIGHT CONSTRUCTION AND MAINTENANCE AGREEMENT
APS LOADINGS**

APS Engineering

Hauling Services

Load Management

Inspection / Administration

Procurement Services

Transportation

APS Warehouse

Administration and General / Engineering and Supervision

Administration and General Only

Payroll