

**CITY OF EL PASO, TEXAS  
AGENDA ITEM  
DEPARTMENT HEAD'S SUMMARY FORM**

**DEPARTMENT:** City Manager's Office  
**AGENDA DATE:** February 4, 2020  
**CONTACT PERSON/PHONE:** Robert Cortinas, Chief Financial Officer, (915) 212-1067  
**DISTRICT(S) AFFECTED:** All  
**SUBJECT:**

A resolution authorizing the City Manager to sign an Agreement by and among the City of El Paso ("City"), El Paso Electric Company ("EPE") and Sun Jupiter Holdings, LLC ("Sun Jupiter"), for EPE & Sun Jupiter commitments resulting from the transfer of 100% of the ownership interest in EPE to Sun Jupiter, including, but not limited to, the retention of EPE headquarters in El Paso, maintenance of EPE jobs in EPE's service territory, an annual payment of Texas Economic Development Fund monies, a separate annual payment from Sun Jupiter to the City, the payment of City expenses related to Public Utilities Commission of Texas Docket No. 49849, the funding and completion of a renewable generation study, coordination with the City Engineer, and a future purchase option for the City, all as described in the Agreement, and with certain of the commitments surviving the termination of the Agreement under certain circumstances.

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**BACKGROUND / DISCUSSION:**

On September 20, 2019, EPE filed a franchise assignment application with the City pursuant to El Paso City Code § 15.08.013, and paragraph 14(b) of Ordinance 16090 ("Franchise Application") in connection with the Proposed Transaction described in PUCT Docket 49849.

**PRIOR COUNCIL ACTION:**

The City Council approved Ordinance 16090 July 12, 2005, amended the ordinance on November 16, 2010 (Ordinance 17460), and again March 20, 2018 (Ordinance 18772), An amendment to Ordinance 16090 was introduced January 21, 2020, with a Public Hearing to be held February 4, 2020.

**AMOUNT AND SOURCE OF FUNDING:**

N/A

**BOARD / COMMISSION ACTION:**

N/A

\*\*\*\*\*REQUIRED AUTHORIZATION\*\*\*\*\*

**DEPARTMENT HEAD:** \_\_\_\_\_

*Robert Cortinas*

**DATE:** \_\_\_\_\_

*1/28/2020*

## RESOLUTION

### BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF EL PASO:

That the City Manager be authorized to sign an Agreement by and among the City of El Paso ("City"), El Paso Electric Company ("EPE") and Sun Jupiter Holdings, LLC ("Sun Jupiter"), for EPE & Sun Jupiter commitments resulting from the transfer of 100% of the ownership interest in EPE to Sun Jupiter, including, but not limited to, the retention of EPE headquarters in El Paso, maintenance of EPE jobs in EPE's service territory, an annual payment of Texas Economic Development Fund monies, a separate annual payment from Sun Jupiter to the City, the payment of City expenses related to Public Utilities Commission of Texas Docket No. 49849, the funding and completion of a renewable generation study, coordination with the City Engineer, and a future purchase option for the City, all as described in the Agreement, and with certain of the commitments surviving the termination of the Agreement under certain circumstances.

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 2020.

### CITY OF EL PASO

\_\_\_\_\_  
Dee Margo  
Mayor

### ATTEST:

\_\_\_\_\_  
Laura D. Prine  
Interim City Clerk

### APPROVED AS TO FORM:

\_\_\_\_\_  
Karla M. Nieman  
City Attorney

### APPROVED AS TO CONTENT:

\_\_\_\_\_  
Robert Cortinas  
Support Services & CFO

## AGREEMENT

This Agreement (“**Agreement**”) is being entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2020 (the “**Effective Date**”), by and between the City of El Paso, Texas (“**City**”), El Paso Electric Company (“**EPE**”), a Texas corporation and Sun Jupiter Holdings LLC, a Delaware limited liability company (“**Sun Jupiter**”) (collectively as the “**Parties**”).

### RECITALS:

**WHEREAS**, Sun Jupiter, IIF US Holding 2 LP (“**IIF US 2**”), and EPE filed the Joint Report and Application of EPE, Sun Jupiter, and IIF US 2 for Regulatory Approvals under Texas Utilities Code §§ 14.101, 39.262, and 39.915 with the Public Utility Commission of Texas (“**PUCT**”) on August 13, 2019, ( “**Joint Application**”) seeking the PUCT’s approval of the Agreement and Plan of Merger (“**Merger Agreement**”) by and among EPE, Sun Jupiter, and Sun Merger Sub Inc. dated as of June 1, 2019, and assigned PUCT Docket No. 49849 ( “**Proposed Transaction**”);

**WHEREAS**, the City granted to EPE a franchise to operate the electric utility for transmission and distribution of electrical energy within the boundaries of the City, Texas, on July 12, 2005, through Ordinance No. 16090 and as amended by Ordinance Nos. 17460 and 18772 (“**Franchise Agreement**”);

**WHEREAS**, EPE filed a franchise assignment application with the City pursuant to El Paso Code of Ordinances § 15.08.013 on September 20, 2019, (“**Franchise Application**”) in connection with the Proposed Transaction;

**WHEREAS**, as part of the Merger Agreement and Joint Application, Sun Jupiter committed to dedicate one hundred million dollars (\$100,000,000) to promote economic development in EPE’s service territory, including the City and the City of Las Cruces, New Mexico, to be funded and allocated at a level of five million dollars (\$5,000,000) per year for twenty (20) years (“**Economic Development Fund**”);

**WHEREAS**, Sun Jupiter desires a partner to administer the portion of the Economic Development Fund that will be allocated to EPE’s Texas service territory;

**WHEREAS**, the City’s Economic and International Development Department (“**Economic Development Department**”) actively promotes economic development in the City of El Paso, Texas, and EPE’s surrounding Texas service territory; and

**WHEREAS**, the Parties desire to set forth certain obligations and agreements with respect to the Joint Application and Franchise Application.

**NOW THEREFORE**, in consideration of the foregoing premises, the mutual promises and covenants herein contained, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

1. Economic Development Fund.

(a) Eighty million dollars (\$80,000,000) of the Economic Development Fund will be jurisdictionally allocated to EPE's Texas service territory and held in a restricted account for the purpose of promoting economic development in EPE's Texas service territory ("**Texas Economic Development Fund**").

(b) Sun Jupiter will fund the Texas Economic Development Fund through fifteen (15) equal annual installments of five million three hundred thirty-three thousand three hundred thirty-three dollars and 33/100 cents (\$5,333,333.33). Contributions to the Texas Economic Development Fund will be due by the 15<sup>th</sup> day of December of each year, with the first of the fifteen (15) installments to be due by the first December 15<sup>th</sup> to occur after the close of the Proposed Transaction.

(c) The Economic Development Department will administer the Texas Economic Development Fund in accordance with an economic development policy to be developed by the City and approved by Sun Jupiter within six (6) months after the close of the Proposed Transaction ("**Incentive Policy**").

(d) The City will make reports, at least annually, to the EPE Board of Directors regarding the activities and uses of the Texas Economic Development Fund.

(e) The Economic Development Department will make reasonable efforts to coordinate with other state and local agencies within EPE's Texas service territory regarding the uses of the Texas Economic Development Fund.

(f) If the City eliminates the Economic Development Department or the Incentive Policy, or fails to abide by the Incentive Policy, the City and Sun Jupiter will find a replacement entity to administer the balance, if any, of the Texas Economic Development Fund. Elimination of the Economic Development Department does not include a change in department name or reassigning of the duties of the Economic Development Department to another City department so long as the duties and responsibilities of the department remain substantially similar to those of the Economic Development Department.

2. General Fund Payments. In addition to the franchise fees currently due to the City under the Franchise Agreement, Sun Jupiter agrees to pay the City for use in its general fund seven hundred fifty thousand dollars (\$750,000) per year for a period of ten (10) years. The first payment shall be made no later than thirty (30) days after the close of the Proposed Transaction by electronic funds transfer as designated by the City. Each remaining annual payment will be made on or before the 30th day of June of each corresponding year.

3. Low Income Assistance Program. Within ninety (90) days of closing of the Proposed Transaction, EPE will coordinate with the City on efforts to enhance EPE's current low income assistance programs and EPE will make recommendations and proposals for consideration to the City. Sun Jupiter will pledge up to one million dollars (\$1,000,000) to be paid in equal installments of two hundred thousand dollars (\$200,000) per year over a period of five (5) years to support

enhancements to EPE's low income assistance programs.

4. Franchise Assignment.

(a) No later than February 28, 2020, the City will place on its agenda for consideration one or more ordinances that:

(1) Approve the Franchise Application and

(2) Eliminate the restrictions placed on the City regarding the use of the Additional Fee, as defined by the Franchise Agreement, after July 29, 2030, by lowering the percentage of the Street Rental Charge, as defined by the Franchise Agreement, subject to the economic development restriction in Section 13(b) of the Franchise Agreement from 1.75% to 1.00% ("**Franchise Amendment**").

(b) EPE will accept the Franchise Amendment within thirty (30) days of the adoption of the ordinance by the City.

5. City Expenses Related to Docket No. 49849. EPE will pay the City two hundred thousand dollars (\$200,000) for the City's reasonable consultants and attorneys fees incurred due to the City's intervention in Docket No. 49849 ("**City Public Interest Fees**") no later than thirty (30) days after the later of (1) the close of the Proposed Transaction; (2) EPE's receipt of invoices supporting the City Public Interest Fees; or (3) the termination of the Proposed Transaction for any reason without a closing, provided, however, that the City Public Interest Fees shall not be paid if the City opposes the Proposed Transaction, either directly or indirectly, in any proceeding before a governmental or regulatory body, with the exception of PUCT Docket No. 49849 in which the City originally opposed the Proposed Transaction but subsequently signed the Stipulation.

6. Renewable Generation Study.

(a) Within one year after the close of the Proposed Transaction, EPE will complete a study concerning renewable generation, as defined in Texas Utilities Code § 39.904(d) ("**Renewable Generation Study**"). EPE will share the results of the Renewable Generation Study with the City within thirty (30) days of the Renewable Generation Study's completion. Should EPE not be able to complete the study within one year, EPE may request additional time to complete the Renewable Generation Study from the City, and the City shall not unreasonably withhold its consent to the extension.

(b) The Renewable Generation Study will cover, but is not limited to, the following topics:

(1) The technical feasibility of integrating utility-scale renewable generation into EPE's utility system and the changes and impacts EPE's transmission and distribution system;

(2) Possible costs and operational impacts related to the integration of utility-scale renewable generation into EPE's Texas service territory;

(3) Legislative or regulatory changes, if any, that may be required to increase

utility-scale renewable generation in EPE's Texas service territory and the legislative strategies necessary to implement such legislative or regulatory changes;

(4) Potential voluntary renewable generation program offerings to allow customers to increase their use of renewable resources within the El Paso, Texas, city limits and EPE's Texas service territory;

(5) Reasonable commitments that EPE can make to increase the integration of renewable generation in EPE's Texas generation portfolio;

(6) Grant opportunities for EPE, the City, or both to increase the integration of renewable generation in EPE's Texas generation portfolio; and

(7) Potential renewable generation programs to assist with low income assistance programs such as the Low Income Home Energy Assistance Program or additional incentives for distributed generation.

(c) EPE shall designate material contained in the Renewable Generation Study as confidential to the extent that it relates to critical infrastructure, as that phrase is understood in Texas Government Code § 418.181, or to the extent that it contains sensitive information that would not be subject to public release under the Texas Public Information Act, as codified in chapter 552 of the Texas Government Code. The City will use its best efforts to not publicly distribute such designated material to parties outside of the City El Paso. The City will also provide EPE with notice of an open records request implicating such material so that EPE may assert its rights under the Texas Public Information Act.

(d) EPE shall report to the City Council no less than two (2) times per year on EPE's progress towards renewable generation commitments, opportunities, and goals that are identified by the Renewable Generation Study. The City and EPE will coordinate on efforts to implement legislative, regulatory, or other policy changes identified as part of the Renewable Generation Study.

7. Coordination with City Engineer. EPE will coordinate with the City Engineer within six (6) months after the close of the Proposed Transaction to identify:

(a) Land under the control of EPE that the City desires to utilize for public recreation, exercise, relaxation, travel, or pleasure in accordance with Section 75.0022 of the Texas Civil Practice and Remedies Code and

(b) Poles, lines, conduits, or other construction that EPE maintains that may need to be installed or relocated in accordance with Section 3 of the Franchise Agreement.

8. Maintenance. City and EPE will coordinate quarterly regarding maintenance issues that affect community safety or aesthetics on land and street lighting under the control of EPE. EPE will give higher priority to work order for continuous street lighting on controlled access/State highways and major arterials. During the course of the quarterly meetings, EPE and the City will establish processes and procedures for work orders and develop benchmarks based on industry

standards and align with community impacts.

9. Final Stipulation in PUCT Docket 49849. The Parties will use best efforts to obtain prompt adoption of a final order by the PUCT approving the Joint Application consistent with the terms of this Agreement.

10. EPE Employee Matters. For so long as IIF US 2 owns Sun Jupiter, Sun Jupiter agrees that it will not relocate jobs outside of the EPE service territory and will not reduce EPE's workforce as a result of the Proposed Transaction and EPE will maintain sufficient employment levels as required to furnish EPE's customers with safe, adequate, efficient, and reasonable electric service.

11. EPE Headquarters. For so long as IIF US 2 owns Sun Jupiter, Sun Jupiter will never move EPE's headquarters outside the City of El Paso.

12. City's Future Purchase Option. This Section 12 shall apply for so long as IIF US 2 owns Sun Jupiter:

(a) In the event Sun Jupiter decides to consider a sale of one hundred percent (100%) of its equity interests in, or all of the assets and liabilities of EPE ("**Sale Transaction**"), Sun Jupiter will first provide notice to the City of the potential Sale Transaction (a "**Potential Sale Notice**"). The City will use best efforts to protect information related to a Sale Transaction from public disclosure consistent with the exceptions in chapter 552 of the Texas Government Code, including, Texas Government Code § 552.110.

(b) Within one hundred twenty (120) days of receipt by the City of a Potential Sale Notice ("**Exclusive Offer Period**"), the City will have the exclusive right to either (i) make a bona fide binding offer to purchase EPE or all of the assets and liabilities of EPE ("**Offer**") or (ii) provide a waiver of the right to make an Offer during the Exclusive Offer Period ("**Waiver**"). The Offer, if made, shall remain open for at least thirty (30) days during which time Sun Jupiter will consider the Offer in good faith.

(c) If the City makes an Offer during the Exclusive Offer Period and Sun Jupiter does not accept the Offer, Sun Jupiter shall provide a written acknowledgement that (i) Sun Jupiter has provided the City with the Potential Sale Notice and (ii) the City made an Offer and Sun Jupiter did not accept such Offer ("**Acknowledgment**"). After Sun Jupiter provides the Acknowledgment in accordance with this paragraph, Sun Jupiter may enter into a definitive agreement with a third party for a Sale Transaction if Sun Jupiter reasonably determines such third party's offer contains terms and conditions that, on the whole, are more favorable to Sun Jupiter than those contained in the Offer. Sun Jupiter shall have twenty-four (24) months to complete the Sale Transaction with such a third party ("**Acknowledgment Completion Period**") before a new Potential Sale Notice must be issued.

(d) If the City provides a Waiver in response to a Potential Sale Notice, then Sun Jupiter will invite the City to participate in any process it runs with third party potential acquirers to effectuate a Sale Transaction ("**Sale Process**") and the City may make an Offer pursuant to the terms and conditions of the Sale Process, which terms and conditions shall be applicable to all participants in the Sale Process. Sun Jupiter shall have twenty-four (24) months to complete a Sale

Transaction in the Sale Process (“**Sale Process Completion Period**”) before a new Potential Sale Notice must be issued.

(e) For the avoidance of doubt, except during an Acknowledgment Completion Period, a Sale Process (except as set forth in (d) above) or Sale Process Completion Period, the City may make an Offer at any time.

(f) The City will abide by the Texas Government Code exceptions from public disclosure commitment made in paragraph (a) to this Section 12 if the City is making an Offer outside of the Exclusive Offer Period.

(g) The City does not waive any rights with respect to franchise assignment as set forth in El Paso City Code § 15.08.013 or Section 14(b) of the Franchise Agreement provided, however, that the City shall not unreasonably withhold any required consent to the assignment of the franchise to a third party following Sun Jupiter’s compliance with this Section 12.

13. Miscellaneous.

(a) *Amendments and Waivers.* Any provision of this Agreement may be amended or waived only if such amendment or waiver is in writing and is signed by the Parties hereto. No course of dealing on the part of any party to this Agreement, nor any failure or delay by any Party to this Agreement with respect to exercising any right, power, or privilege hereunder will operate as a waiver thereof.

(b) *Counterparts.* This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same instrument.

(c) *Entire Agreement.* This Agreement contains the entire understanding of the Parties with respect to the subject matter hereof and supersede all prior agreements, arrangements, discussions, and undertakings between the Parties (whether written or oral) with respect to the subject matter hereof.

(d) *Governing Law and Venue.* This Agreement is made under, construed in accordance with, and governed by the laws of the State of Texas. Venue shall be in the State District Courts in El Paso County, Texas.

(e) *Headings.* The headings contained in this Agreement are used solely for convenience and do not constitute a part of this Agreement between the Parties, nor should they be used to aid, to construe, or to interpret this Agreement.

(f) *Severability.* If any provision of this Agreement is held to be illegal, invalid, or unenforceable under present or future law, such provision shall be fully severable, this Agreement shall be construed and enforced as if such illegal, invalid, or unenforceable provision had never comprised a part of this Agreement and the remaining provisions of this Agreement shall remain in full force and effect and shall not be affected by the illegal, invalid, or unenforceable provision or by its severance from this Agreement. Furthermore, in lieu of such illegal, invalid, or unenforceable provision, the Parties agree to negotiate in good faith a provision as similar in terms

to such illegal, invalid, or unenforceable provision as may be possible and be legal, valid, and enforceable.

(g) *Successors and Assigns.* This Agreement is binding upon and inures to the benefit of the Parties and their respective successors and assigns except for the rights and obligations contained in Sections 10, 11, and 12, which bind only the Parties.

(h) *Termination.* In the event that the Proposed Transaction is not closed by the End Date (as such term is defined in, and may be extended under, the Merger Agreement), the rights and obligations of the Parties under this Agreement shall terminate except for those contained in Sections 4(a)(2), 4(b), and 5; provided however, that the rights and obligations under Sections 4(a)(2) and 4(b) shall terminate if the City fails to (1) fulfill the terms of Section 9 or (2) adopt an ordinance or ordinances consistent with the Sections 4(a)(1) and 4(a)(2). Sun Jupiter will have no obligations under this Agreement in the event of a termination of this Agreement.

*[THE REMAINDER OF THIS PAGE HAS INTENTIONALLY BEEN LEFT BLANK; SIGNATURE PAGE FOLLOWS.]*

IN WITNESS WHEREOF, the parties hereto, being duly authorized, have duly executed and delivered this Agreement as of the Effective Date.

Sun Jupiter:

Sun Jupiter Holdings LLC  
a Delaware limited liability company

By: \_\_\_\_\_  
Name: Andrew Gillett  
Title: Authorized Signatory

El Paso Electric Company  
a Texas Corporation

By: \_\_\_\_\_  
Name: ADRIAN J. RODRIGUEZ  
Title: INTERIM CEO

APPROVED AS TO FORM  
OFFICE OF THE GENERAL COUNSEL AKP

City:

The City of El Paso, Texas

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_