

Electricity Franchise

ORDINANCE NO. _____

AN ORDINANCE OF THE CITY OF HOBBS, NEW MEXICO, GRANTING TO SOUTHWESTERN PUBLIC SERVICE COMPANY, DBA XCEL ENERGY, A NEW MEXICO CORPORATION, ITS SUCCESSORS AND ASSIGNS, A FRANCHISE LICENSE, WITHIN THE CITY LIMITS OF THE CITY AS THEY NOW EXIST OR AS THEY MAY BE CHANGED FROM TIME TO TIME, FOR A PERIOD OF TEN (10) YEARS TO ERECT, CONSTRUCT, EQUIP, EXTEND, ALTER, MAINTAIN, REPAIR, REPLACE, REMOVE AND OPERATE, ALL WORKS, SYSTEMS, PLANTS, POLES, POLE LINES, DISTRIBUTION LINES, TRANSMISSION LINES, WIRES, GUYS, CABLES, CONDUITS, TRANSFORMERS AND OTHER DISTRIBUTION AND TRANSMISSION INSTRUMENTALITIES, FACILITIES AND APPURTENANCES NECESSARY OR PROPER FOR THE TRANSMISSION AND DISTRIBUTION OF ELECTRICITY INTO, IN, WITHIN, FROM, ACROSS, AND THROUGH THE CITY AND (ii) SUPPLY AND FURNISH TO THE CITY AND ITS INHABITANTS AND TO ANY OTHER PERSON OR PERSONS, FIRMS OR CORPORATIONS, WHETHER LOCATED WITHIN OR WITHOUT THE CITY, ELECTRIC ENERGY FOR LIGHT, POWER, COOLING, HEATING OR FOR EITHER OR ALL OF THESE PURPOSES OR FOR ANY OTHER PURPOSE OR PURPOSES FOR WHICH ELECTRICITY MAY BE USED.

WHEREAS, Southwestern Public Service Company, dba Xcel Energy, is now and has been engaged in the business of supplying and furnishing to the City of Hobbs, New Mexico, and its inhabitants and to any other person or persons, firms or corporations, whether located within or without the City, electric energy for light, power, cooling, heating or for either or all of these purposes or for any other purpose or purposes for which electricity may be used.

NOW, THEREFORE, BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF HOBBS, NEW MEXICO, that:

SECTION I. DEFINITIONS.

For the purpose of this ordinance, all terms contained herein shall have the meaning prescribed for that term in Hobbs Municipal Code Section 12.01.030, except the following terms shall have the meanings given herein:

- A. "City" shall mean the City of Hobbs, New Mexico, and any agency, department, or agent thereof;
- B. "City-Owned Property" shall mean all places owned by the City or on the City public grounds, both above and below the surface, including but not limited to City owned buildings or used buildings and structures, parks, utility and light poles, traffic signals, and pedestrian and bike paths, as the same now exist, or as they

may after the effective date of this ordinance be extended.

- C. "Company" shall mean Southwestern Public Service Company ("SPS"), dba Xcel Energy, and SPS's legal representatives, successors, lessees, and assigns;
- D. "Commission" shall mean the principal governmental body of the City of Hobbs, New Mexico, its officers, or a representative person or entity as may be designated to act on its behalf;
- E. "Company Facilities" shall mean, collectively, any and all electric transmission and distribution systems used or useful in the transmission and distribution of electrical light, heat and power, including but not limited to poles, wires, lines, conduits, ducts, cables, braces, guys, anchors and vaults, transformers, generators, switches, meter devices, fixtures, studs, platforms, crossbars, manholes, cutouts, communication circuits, appliances, attachments, appurtenances and any other property to be located in, upon, along, across, under or over the City's Rights-of-Way.
- F. "Franchise" means the electric franchise granted by City to Company by this Ordinance.
- G. "Franchise Area" means the area within the jurisdictional boundaries of the City and any area annexed by the City during the term of this Franchise.
- H. "Gross Receipts" shall mean the total monies received by the Company from the sale of electricity to its retail customers within the corporate limits of the City under SPS's lighting and power rates except for the monies received from: (i) the sale of electricity to the City and all municipal, county, state, and federal governmental agencies and institutions; (ii) miscellaneous services charges; and (iii) charges for payments under this ordinance, sales taxes, and gross receipt taxes. NOTE: Commercial customers as used herein shall not be construed to include any political subdivisions of Federal, State or Local government, any cooperative organization, or industrial accounts serviced under the Company's published industrial rates as filed with the NMPRC.
- I. "NMPRC" means the New Mexico Public Regulation Commission.
- J. "Rights-of-Way" means the surface of, and the space above and below, any and all public highways, streets, roads, alleys, avenues, tunnels, and parkways of the City, and easements dedicated or granted to the City within the Franchise Area, including State highways now or hereafter established within the Franchise Area. Rights-of-Way shall not include City-Owned Property.

SECTION II. GRANT OF FRANCHISE.

By this ordinance, the City hereby grants to Company a franchise to (i) erect, construct, obtain, own, sell, equip, extend, expand, alter, maintain, repair, replace,

remove, and operate its equipment and Company Facilities on, along, across, over and under the Right-of Way within the Franchise Area (ii) serve, supply, and furnish to the City and its inhabitants and others electric energy for light, cooling, heat, power and other useful purposes to the City and its inhabitants and others; and (iii) use and occupy during the term of this Franchise all Rights-of-Way within the Franchise Area. All such occupancies of the Company's infrastructures, existing or future, shall comply with the City's Right-of-Way Management Regulations Ordinance outlined fully in Chapter 12.01 of the Hobbs Municipal Code

SECTION III. POWERS AND CONDITIONS

The Company is authorized and empowered to do any and all things necessary and proper to be done and performed in executing the powers and utilizing the privileges granted in this Franchise, subject to the City's Right-of-Way Management Regulations Ordinance.

SECTION IV. GRANT NON-EXCLUSIVE.

The franchise granted by this ordinance is not exclusive, and the City hereby reserves the right, power, and authority to grant similar rights, privileges, permission and authority to any person at any time. The City reserves the right to acquire, including the property of Company, construct, own, operate and maintain an electrical distribution system to serve all or any portion of Hobbs, New Mexico, at any time during the term of this ordinance, and to fully exercise such right in accordance with applicable law.

SECTION V. LIMITATIONS ON GRANT OF FRANCHISE.

Nothing contained in this ordinance shall be construed as authorizing Company to use, or permit the use of any portion of its electrical distribution system for any purpose other than those reasonably necessary for the transmission or distribution of electrical service, including facilities necessary for internal or intra-Company communications, unless prior written approval is obtained from the City. Company shall not acquire as a result of the location of its facilities in any existing or proposed rights-of-way, even though such location was approved by the City, any vested right or interest in any particular rights-of-way location by virtue of the franchise. Facilities installed in the rights-of-way during the term of this ordinance, or facilities in the rights-of-way which are altered such that application of the Americans with Disabilities Act (ADA) is triggered, shall comply with the requirements of the ADA. With respect to existing facilities located in rights-of-way which prevent disabled persons' use of and access to buildings, structures, facilities, sidewalks, streets, alleys or other paths of travel in violation of the requirements of the ADA, Company shall correct such violations in good faith. Within thirty (30) days of Company's receipt of a notice of a third-party complaint from the City or others identifying facilities that may cause access barriers in violation of the ADA, the Parties shall meet to review the complaint and determine an appropriate response and required repair, if any. If repair is required, the Parties shall establish

plans and time frames for the repair.

SECTION VI. CONSIDERATION FOR GRANTING FRANCHISE.

- A. **FRANCHISE FEE** – In consideration for this Franchise which provides terms related to the use and occupy the City Rights-of-Way, Company shall pay an amount equal to four percent (4.0%) of the Gross Receipts (“Franchise Fee”) to the City throughout the term of this Franchise. Payment of the Franchise Fee by Company to City for use of City Rights-of-Way shall be in lieu of other franchise, license, privilege, pole, instrument, occupation, or taxes, fees, charges or other excises or extractions (except: general ad valorem property taxes and special assessments for local governments; and the sales and gross receipt taxes authorized by Section 3-18-2 NMSA 1978; or any other lawful fee imposed generally upon persons doing business within the Town) upon the Company’s business, revenue, Company Facilities, or other property in the City during the term of this franchise. Payment of the Franchise Fee by Company to City does not exempt the Company from any lawful permitting fee imposed generally upon persons doing business within the City.
- B. **PAYMENTS.** Franchise Fee payments to the City shall be computed monthly for the preceding calendar month. Each monthly payment shall be due and payable no later than thirty (30) days after the last day of the preceding month.
- C. **ACCEPTANCE OF PAYMENT AND RECOMPUTATION.** No acceptance of any payment shall be construed as an accord by the City that the amount paid is, in fact, the correct amount, nor shall any acceptance of payments be construed as a release of any claim the City may have for further or additional sums payable or for the performance of any other obligation of Company hereunder.
- D. **ALTERNATIVE COMPENSATION.** In the event the obligation of Company to compensate the City through Franchise Fee payments is lawfully suspended or eliminated, in whole or part, then Company shall pay to the City compensation equivalent to the compensation paid to the City by other similarly situated users of the City’s Rights-of-Way for Company’s use of the City’s Rights-of-Way, provided that in no event shall such payments exceed the equivalent of five percent (5%) of Company’s Gross.

To assure proper payment as herein provided, the books of the Company shall be open to inspection by the City at all reasonable times. Notwithstanding anything to the contrary in this ordinance, the payments shall continue only so long as: (i) SPS is not prohibited from making the payment by any lawful authority having jurisdiction; or (ii) the City does not levy, charge, or collect, or attempt to levy, charge, or collect other franchise, license, privilege, occupation, excise, or revenue taxes or other extractions which conflict with subparagraph A. above. If any lawful authority having jurisdiction prohibits the payments or the City does levy, charge, or collect, or attempts to levy, charge, or collect, other franchise, license, privilege, occupation, excise, or revenue taxes or other extractions, then SPS’s obligation to make the payments provided for in

this Section VI of this ordinance shall cease.

SECTION VII. RIGHT-OF-WAY ORDINANCE INCORPORATED.

As a condition of City's grant of franchise to Company as contemplated by NMSA 1978, § 3-42-1, Company shall strictly comply with the provisions of the City's Right-of-Way Management Regulations Ordinance as outlined fully in Chapter 12.01 of the Hobbs Municipal Code, and expressly incorporated herein. Any subsequent amendments to the Right-of-Way Management Regulations Ordinance shall be binding on Company after Company has been afforded reasonable notice and opportunity to comply. Nothing contained in this ordinance shall be interpreted to in any way limit the rights and remedies available to City pursuant to Chapter 12.01 of the Hobbs Municipal Code.

SECTION VIII. ANNEXATIONS.

This ordinance shall apply to any property properly annexed to the City as provided by law, upon such annexation.

SECTION IX. STANDARDS OF SERVICE.

The NMPR has general and exclusive power and jurisdiction to regulate and supervise Company in respect to its rates and service regulations and in respect to its securities, all in accordance with provisions of the New Mexico Public Utility Act (NMSA 1978, § 62-6-4). A copy of Company's rates and service regulations are on file for public reading at the office of Southwestern Public Service Company during normal working hours.

If at any time the New Mexico Public Utility Act (NMSA 1978, § 62-6-4) is amended or repealed with the effect of such action being the deletion of standards of service in the City as are now in effect and no successor is named by the State of New Mexico, the City reserves the right to establish standards of service consistent with those now in effect in the City or at the time of any such amendment or repeal. If standards of service are established by the City and the City becomes the regulative authority for such standards of service, the costs (in excess of established costs) for such standards of service, will be borne by the rate payers of the City.

SECTION X. INTERRUPTION OF SERVICE

SPS shall not be liable to the customer nor shall the customer be liable to SPS by reason of failure of SPS to deliver or the customer to receive electrical energy as the result of fire, strike, riot, explosion, flood, accident, breakdown, acts of God, the public enemy, or other conditions beyond the control of the party affected; it being the intention of each party to relieve the other of the obligation to supply or to receive energy when, as a result of any of the above mentioned causes, either party may be unable to deliver or use, in whole or in part, electrical energy to be delivered or received. But, in case of

such interruption, SPS shall use reasonable diligence to re-establish service as soon as possible.

SECTION XI. TERMINATION.

If any payment herein provided to be paid is not paid when due after thirty (30) days written notice from City to Company of such non-payment (which period of thirty (30) days commence with the day after receipt of such notice), this ordinance may be terminated by the City. If the Company substantially fails to comply with any of the other material provisions of this ordinance and fails to cure same or is unable to provide justification for such non-compliance within sixty (60) days after it has received written notice from the City claiming such non-compliance with any of the material terms and provisions of this ordinance, then City shall give Company an additional written notice that this ordinance will be terminated effective ninety (90) days after receipt of said notice to Company, unless Company corrects such noncompliance within said period of time. If the City and Company disagree over whether Company has substantially failed to comply with any of the material provisions of this ordinance or has failed to cure an alleged non-compliance, the ordinance shall continue until agreement is reached between the City and Company resolving the matter or until the matter has been litigated through the Courts to final judgment. Non-compliance by Company of any terms and provisions of this ordinance due to force majeure or any cause beyond its control does not constitute reason for termination of this ordinance.

SECTION XII. ASSIGNMENT.

The rights of the Company hereunder shall not be assignable without first giving the City at least thirty (30) days' notice prior to filing with the NMPRC of the Company's intention to assign its franchise rights hereunder. The Company shall assist the City Manager in providing information which reflects the financial ability (e.g., financial audit) and the management ability (e.g. experience and resume of proposed management) of its proposed Assignee to operate a public utility. The aforesaid thirty (30) days' notice shall not commence to run until Company has initiated good faith efforts to provide the assistance or information as requested by the City Manager. The rights, powers, limitations, duties and restrictions herein provided for shall inure to and be binding upon the parties hereto and upon their respective successors and assigns.

SECTION XIII. INTENTIONALLY OMITTED.

SECTION XIV. TERM.

Pursuant to NMSA 1978, § 3-42-1(B), the franchise granted herein shall take effect at least thirty (30) days after this ordinance is adopted and shall continue in force and effect for a period of ten (10) years thereafter, or until this ordinance shall be terminated for noncompliance by Company with the terms and conditions imposed herein, or with such reasonable restrictions, limitations and regulations as the City Commission may

from time to time impose by ordinance, or until Company shall permit its corporate existence to expire without renewal, whichever of the foregoing shall first occur.

SECTION XV. CONFLICTS BETWEEN MUNICIPAL CODE AND AGREEMENT.

This ordinance hereby incorporates all applicable provisions of the Hobbs Municipal Code. Any conflict between the provisions of this ordinance and the Hobbs Municipal Code, except as otherwise provided in this ordinance, shall be resolved in favor of the provisions of the Code. The City represents that it is unaware of any conflicts between this ordinance and the Hobbs Municipal Code.

SECTION XVI. PUBLICATION COSTS.

This ordinance shall be published as provided by NMSA 1978, § 3-42-1(B) and the cost thereof shall be paid by the Company upon presentation of an invoice for publication and proof of publication by the City as provided by NMSA 1978, § 3-42-1(E).

SECTION XVII. INDEMNIFICATION.

Company, for itself and its agents, employees, subcontractors, and the agents and employees of any subcontractors, shall, at its own expense and throughout the terms of this ordinance, indemnify, defend, and hold harmless the City and any of its elected or appointed officers and employees, from any and all claims, demands, actions, damages, decrees, judgments, attorney fees, costs, and expenses which the City, or such elected or appointed officers or employees, may suffer, or which may be recovered from, or obtainable against the City, or such elected or appointed officers or employees, as a result of, by reason of, or arising out of the installation, use, or maintenance by Company of its electrical distribution system or the exercise by Company of any or all of the rights, privileges, permission, and authority conferred herein, or as a result of any alleged act or omission on the part of Company in performing or failing to perform any of its obligations under this ordinance. Company is not, however, liable and is not required to indemnify or hold harmless the City and any of its elected or appointed officers and employees for any damages caused by the negligence of any agents, servants and/or employees of the City.

SECTION XVIII. SEVERABILITY.

If any section, subsection, sentence, clause, phrase, or other portion of this ordinance is, for any reason, declared invalid, in whole or in part, by any court, agency, commission, legislative body, or other authority of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent portion. Such declaration shall not affect the validity of the remaining portions hereof which other portions shall continue in full force and effect. In the event of a subsequent change in applicable law so that the provision which had been held invalid is no longer invalid, said provision shall thereupon return to full force and effect without further action by the parties and shall thereafter be binding on Company and the City. If the terms of this ordinance are materially altered due to changes in or rulings regarding governing law, then the parties

agree to negotiate in good faith to amend this ordinance so as to restore the original intent of Company and City and preserve the benefits bargained for by each party.

SECTION XIX. NO THIRD PARTY BENEFICIARY.

It is not intended by any of the provisions of this ordinance to create for the public, or any member thereof, a third-party beneficiary right or remedy, or to authorize anyone to maintain a suit for personal injuries or property damage pursuant to the provisions of this ordinance. The duties, obligations, and responsibilities of the City with respect to third parties shall remain as imposed by New Mexico law.

SECTION XX. CONSTRUCTION OF AGREEMENT.

The terms and provisions of this ordinance shall not be construed strictly in favor of or against either party, regardless of which party drafted any of its provisions. This ordinance shall be construed in accordance with the fair meaning of its terms.

SECTION XXI. GOVERNING LAW.

This ordinance and the franchise granted herein will be governed by the laws of the State of New Mexico with respect to both their interpretation and performance. Jurisdiction for any dispute arising from this ordinance shall lie with the Fifth Judicial District Court in Lea County, New Mexico.

SECTION XXII. REPEALER.

Once in effect, this ordinance shall repeal Ordinance No. 782 in its entirety.

SECTION XXIII. ACCEPTANCE AND EFFECTIVE DATE.

Barring any objections to this ordinance as contemplated by NMSA 1978, § 3-42-1(C), Company shall have sixty (60) days from and after the passage and approval of this Ordinance to file its written acceptance thereof with the City Clerk, and upon such acceptance being filed, this ordinance shall take effect and be in force from and after the date of its passage and approval by the Mayor, and shall effectuate and make binding the agreement provided by the terms hereof.

[SIGNATURE PAGE FOLLOWS]

PASSED, ADOPTED AND APPROVED this ___ day of _____, 20__

SAM D. COBB, Mayor

ATTEST:

JAN FLETCHER, City Clerk

Southwestern Public Service Company, for itself, its successors and assigns, hereby accepts the foregoing Ordinance passed, adopted and approved by the City of Hobbs, the _____ day of _____, 20__, and agrees to be bound by all of its terms and provisions.

Southwestern Public Service Company

By: _____
President, TX & NM

Dated the _____ day of _____, 20__