

EDDY COUNTY  
ORDINANCE NO. O-10-58  
NON-EXCLUSIVE FRANCHISE AGREEMENT FOR SOUTHWESTERN PUBLIC SERVICE

ORDINANCE GRANTING A NON-EXCLUSIVE FRANCHISE TO  
SOUTHWESTERN PUBLIC SERVICE COMPANY, A NEW MEXICO  
CORPORATION AND PUBLIC UTILITY, BY EDDY COUNTY, NEW MEXICO

WHEREAS, SOUTHWESTERN PUBLIC SERVICE COMPANY, is a public utility providing services to residents of Eddy County; and

WHEREAS, pursuant to Section 4-37-1 et seq., and Section 3-42-1 et seq., N.M.S.A. 1978 Comp., as amended, Counties are authorized, by Ordinance, to grant a franchise to any person, firm or corporation for the construction and operation of any public utility; and

WHEREAS, SOUTHWESTERN PUBLIC SERVICE COMPANY and the COUNTY OF EDDY, NEW MEXICO, have negotiated and proposed terms to comprise a Franchise Agreement between the parties, with said Franchise Agreement to be in force for a term of 10 years.

NOW, THEREFORE, BE IT ORDAINED BY THE COUNTY COMMISSIONERS OF THE COUNTY OF EDDY, NEW MEXICO, THAT THIS FRANCHISE BE GRANTED TO SOUTHWESTERN PUBLIC SERVICE COMPANY, ACCORDING TO THE FOLLOWING TERMS AND CONDITIONS:

**Section 1. Grant of Franchise**

**1.1 Grant**

The County of Eddy grants to Southwestern Public Service Company, a New Mexico Corporation ("Southwestern"), its legal representatives, successors, lessees and assigns, a franchise, permit, license, right-of-way and privilege ("Franchise") (a) to erect, construct, equip, maintain, repair and operate in the County works, systems and plants ("Electric System") to generate, store, sell, transmit, conduct, distribute, convey or otherwise use electric energy, (b) to serve, supply and furnish to the County and its inhabitants and others electric energy for light, heat, power and other purposes useful to the County and its inhabitants and others, and (c) to use and occupy during the life of the Franchise all streets, avenues, alleys, highways, sidewalks, bridges, and other structures and places on public grounds of the County, both above and beneath the surface of same, as the streets, avenues, alleys, highways, sidewalks, bridges and other structures and places on public grounds of the County now existing, or as they may hereafter be extended for any lawful purposes upon the terms and conditions of the Franchise.

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1.2 Effective Date and Term of Franchise

The Franchise shall take effect thirty days from the passage hereof by the County Commission (the "Effective Date"), if accepted by Southwestern within the 30 days, and shall remain in force from and after the effective date of this resolution for a term of 10 years and shall be effective within the County's geographic boundaries, excluding any municipality, town or village. This franchise shall become effective no sooner than 30 days subsequent to the completion of the passage of this Ordinance granting a Franchise to Southwestern; if accepted after said 30 days, it shall become effective on the date of its acceptance by Southwestern.

1.3 Use of Right-of-Ways

Subject to the county's supervision and control, Southwestern 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 the Franchise, provided that (i) all work done on the streets, avenues, alleys, highways, sidewalks, bridges and other structures and places on public grounds of the County shall be done with the utmost diligence and at the least inconvenience to the public, (ii) Southwestern shall within a reasonable time restore the streets, avenues, alleys, highways, sidewalks, bridges and other structures and places on public grounds excavated by it to their original condition as nearly as possible, and (iii) the work shall be done subject to the approval of the County.

1.4 Notice of Change by County

In the event of any proposed change in the bridges, public roads, streets or highways, or in the grades or drains of the public roads, streets or highways, which would require a relocation of Southwestern's facilities, the County shall give Southwestern written notice of the proposed change at least 60 days in advance. Southwestern shall bear the cost of relocating its facilities.

1.5 Franchise Nonexclusive

The Franchise is not exclusive, and nothing in the Franchise shall prevent the County from granting to any other person, firm, or corporation, or operating itself where proper under the law, like, similar or different rights, privileges and franchises. Nothing in this Franchise shall prevent the County or other public utilities owned, maintained or operated by public entities other than the County from constructing sewers; grading, paving, repairing or altering any Right-of-Way; laying down, repairing or removing water mains; or constructing or establishing any other public work or improvement. All such work shall be done, insofar as practicable, so as not to obstruct, injure or prevent the use and operation of Southwestern's Electric System.

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- 1.6 Acceptance by Southwestern  
Southwestern shall, within 30 days of the passage of this Ordinance, file with the County its written acceptance (in the form of Exhibit A) of the Franchise and upon filing the acceptance the Franchise shall constitute all the terms of the Franchise granted by the County to Southwestern.
- 1.7 Fees & Charges  
The County shall have the right to negotiate any fees and charges that may be permitted under future legislation.

**Section 2. Insurance**

Southwestern shall maintain in full force and effect at its own cost and expense each of the following policies of insurance coverage:

- 2.1 Commercial General Liability Insurance  
Such coverage shall have limits of no less than one million dollars (\$1,000,000.00) per occurrence and one million dollars (\$1,000,000.00) general aggregate. Coverage shall be at least as broad as that provided by ISO CG 00 01 1/96 or its equivalent and include severability of interests. Such insurance shall name the County, its officers, officials and employees as additional insureds per ISO CG 2026 or its equivalent. There shall be a waiver of subrogation and rights of recovery against the County, its officers, officials and employees. Coverage shall apply as to claims between insureds on the policy, if applicable.
- 2.2 Commercial Automobile Liability Insurance  
Such coverage shall have a minimum combined single limits of one million dollars (\$1,000,000.00) each occurrence and one million dollars (\$1,000,000.00) aggregate with respect to each of Southwestern's owned, hired and non-owned vehicles assigned to or used in the operation of the Electric System in the County. The policy shall contain a severability of interests provision.
- 2.3 Certificates  
Each policy shall provide that a certificate of insurance shall be provided to the County stating that the policy or policies the insurance shall not be canceled or materially changed so as to be out of compliance with these requirements without thirty (30) days' written notice first provided to the County, via certified mail, and ten (10) days' notice for nonpayment of premium. If the insurance is canceled or materially altered so as to be out of compliance with the requirements of this subsection within the term of this Franchise, Southwestern shall provide a replacement coverage policy. Southwestern agrees to maintain continuous uninterrupted insurance coverage, in at least the amounts required, for the duration of this Franchise.

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Southwestern shall furnish the County with a certificate of insurance and endorsements or a copy of the page of the policy reflecting blanket additional insured status. The certificate and endorsements for each insurance policy are to be signed by a Person authorized by that insurer to bind coverage on its behalf. The certificates and endorsements for each insurance policy are to be on standard forms or such forms as are consistent with standard industry practices.

2.4 Deductibles

Any deductible of the policies shall not in any way limit Southwestern's liability to the County.

2.5 Endorsements

All policies shall contain, or shall be endorsed so that:

- (a) The County, its officers, officials, boards, commissions, and employees shall be covered as, and have the rights of, additional insureds with respect to liability arising out of activities performed by, or on behalf of, Southwestern under this Franchise or applicable law, or in the construction, operation or repair, or ownership of the Electric System;
- (b) Southwestern's insurance coverage shall be primary insurance with respect to the County, its officers, officials, boards, commissions, employees and agents. Any insurance or self-insurance maintained by the County, its officers, officials, boards, commissions, employees and agents shall be in excess of the Southwestern's insurance and shall not contribute to it; and
- (c) Southwestern's insurance shall apply separately to each insured against whom a claim is made or lawsuit is brought, except with respect to the limits of the insurer's liability.

**Section 3. Safety**

3.1 Hazardous Substances

- (a) Southwestern shall comply with any and all applicable laws, statutes, regulations and orders concerning hazardous substances relating to Southwestern's Electric System in the Rights-of-Way.
- (b) Southwestern agrees to indemnify the County against any claims, costs, and expenses, of any kind, whether direct or indirect, incurred by the County arising out of a release of hazardous substances caused by Southwestern's Electric System.

3.2 Maintenance & Repairs

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Southwestern shall provide and use any equipment and facilities necessary to control and carry Southwestern's power so as to prevent injury to the County's property or property belonging to any Person. Southwestern, without charge to the County (except through rates for electric service set in a rate case), shall repair, renew, change and improve its facilities to keep them in good repair, and safe and presentable condition. All excavations made by Southwestern in the Rights-of-Way shall be properly safeguarded for the prevention of accidents by the placement of adequate barriers, fences or boarding. The bounds of any trenches shall be clearly designated by warning lights during periods of dusk and darkness.

3.3 Notice to Private Property Owners

Except in the case of emergency involving public safety or service interruptions to a large number of customers, Southwestern shall give notice to private property owners or legal tenants of work on private property.

3.4 Maintenance of Facilities, Abandoned or Not, Consistent With Good Utility Practice

Southwestern shall retain all liability for its facilities, whether abandoned or not, in the Rights-of-Way and shall maintain those facilities consistent with good utility practice. The County may require Southwestern to remove an abandoned facility from the Right-of-Way or modify the facility to protect the public health, welfare, safety, and convenience, or otherwise serve the public interest.

3.5 Construction of Facilities

Southwestern shall construct its facilities in the Rights-of-Ways consistent with all applicable Federal, State, and local construction codes. The County has the right to inspect and issue a "stop work order" for any unsafe condition resulting from Southwestern's construction activities.

3.6 Tree Trimming

Southwestern Shall have the authority to trim trees or other natural growth overhanging any of its Electric System in the County's Rights-of-Way so as to reasonably prevent branches from coming in contact with Southwestern's wires, cables, or other equipment. Southwestern shall not engage in excessive trimming. Southwestern shall ensure compliance with the North American Electric Reliability Corporation's Transmission Vegetation Management Program, reliability standard FAC-003-1, the safety requirements for pruning, repairing, maintaining, and removing trees endorsed by the American National Standards Institute (specifically, the ANSI A300 pruning standards), State laws, and general ordinances or regulations of the County regarding tree trimming. The County shall provide such ordinances or regulations to Southwestern

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upon reasonable request. Southwestern shall have an opportunity to make comment on any proposed ordinances or regulations related to tree trimming in the same fashion as the general public. Except during an emergency or the recovery after an emergency, Southwestern shall notify the County and its residents at least three (3) days prior to entering onto property to perform any tree trimming activities. Southwestern further agrees that, within one year of its acceptance of this Franchise, and on a yearly basis thereafter, it will engage in a campaign to educate its customers within the County through bill inserts or other reasonable methods regarding prudent tree selection and planting around power lines.

**Section 4. Miscellaneous Provisions**

**4.1 Hold Harmless**

Southwestern shall hold the County, its officers and agents harmless from any and all liability or claims of loss that may arise to be incurred from the erection, construction or operation of Southwestern's Electric System and which are attributable to the negligence of Southwestern.

**4.2 Force Majeure**

Southwestern shall not be responsible or liable to any person, firm, or corporation for the interruption of any service provided by Southwestern arising from floods, fires, wind storms, ice storms, accidents, acts of God or any other cause beyond its control, but in case of any such interruption Southwestern shall use reasonable diligence to re-establish service as soon as possible.

**4.3 Conflicts**

All or part of any resolutions or orders in conflict with the Franchise are repealed.

**4.4 Severability**

If any Section, subsection, paragraph, term or provision of this Franchise is determined to be illegal, invalid or unconstitutional by any court or agency of competent jurisdiction, such determination shall have no effect on the validity of any other Section, subsection, paragraph, term or provision of this Franchise, all of which will remain in full force and effect for the term of the Franchise.

**4.5 Preferential or Discriminatory Practices Prohibited**

Throughout the term of this Franchise, Southwestern shall fully comply with all equal employment or non-discrimination provisions and requirements of Federal, State, and local laws and regulations relating thereto.

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4.6 Notices

Throughout the term of the Franchise, each party shall maintain and file with the other a local address for the service of notices by mail. All notices shall be sent postage prepaid to such respective address and such notices shall be effective upon the date of mailing. These addresses may be changed by the County or the Southwestern by written notice at any time. At the Effective Date of this Franchise:

Southwestern's contact address shall be:

Southwestern Public Service, c/o Excel Energy  
Attention: Ben Jaime, Community Relations Manager  
525 East Bender  
Hobbs, NM 88240

The County's contact address shall be:

County of Eddy  
Attention: Eddy County Manager  
101 W. Greene, Suite 110  
Carlsbad, NM 88220

4.7 Publication Costs

Southwestern shall reimburse the County for all reasonable costs incurred in publishing this Franchise, if such publication is required.

4.8 Binding Effect

This Franchise shall be binding upon the parties hereto, their permitted successors and assigns.

4.9 No Joint Venture

Nothing herein shall be deemed to create a joint venture or principal-agent relationship between the parties, and neither party is authorized to, nor shall either party act toward third Persons or the public in any manner which would indicate any such relationship with the other.

4.10 Waiver

The failure of the County at any time to require performance by the Southwestern of any provision hereof shall in no way affect the right of the County hereafter to enforce the same. Nor shall the waiver by the County of any breach of any provision hereof be taken or held to be a waiver of any succeeding breach of such provision, or as a waiver of the provision itself or any other provision.

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4.11 Agreement in Entirety

This Franchise and all Exhibits represent the entire understanding and agreement between the parties hereto with respect to the subject matter hereof and supersede all prior oral negotiations between the parties.

4.12 Open Records

(a). The County, including the County's auditor or his/her authorized representative, shall have access to, and the right to inspect, any books and records of Southwestern, and its parent corporations and Affiliates which are related to the administration or enforcement of the terms of this Franchise.

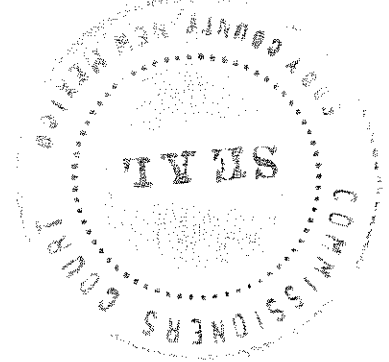
(b). The County is bound by the open public records and open public meetings laws of the State of New Mexico. The County, therefore, can not guarantee the confidentiality of any information provided to the County under this Franchise agreement.

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PASSED, ADOPTED AND APPROVED THIS 5 DAY OF October, 2010.

THE BOARD OF COMMISSIONERS OF  
EDDY COUNTY, NEW MEXICO

By Tony W. Hernandez  
Tony Hernandez, Vice-Chairman



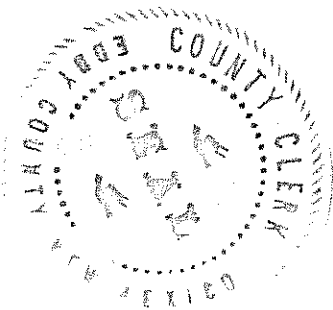
ATTEST:  
Darlene Rosprim  
Darlene Rosprim, County Clerk

CERTIFICATE OF EDDY COUNTY CLERK

I, DARLENE ROSPRIM, Eddy County Clerk, hereby certify that Eddy County Ordinance Number 10-58 being a Grant of a Franchise to Southwestern Public Service Company, was passed, approved and adopted by the Eddy County Board of Commissioners on the 5<sup>th</sup> day of Oct, 2010.

Darlene Rosprim  
Darlene Rosprim, Eddy County Clerk

My term expires on: 12/31/2010



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EXHIBIT A  
TO FRANCHISE GRANTED TO  
SOUTHWESTERN PUBLIC SERVICE COMPANY  
BY EDDY COUNTY, NEW MEXICO  
DATED October 5, 2010

To: The Eddy County Board of Commissioners  
Eddy County, New Mexico  
Carlsbad, New Mexico

In accordance with Section 1.2 of the Franchise granted to Southwestern Public Service Company by Eddy County, New Mexico, on October 5, 2010, Southwestern Public Service Company, a New Mexico Corporation, accepts the Franchise.

Please indicate the date of the filing of this written acceptance in the space provided and return one copy to Southwestern Public Service Company.

Dated this 22nd day of October, 2010.

SOUTHWESTERN PUBLIC SERVICE COMPANY

By Riley Hill  
President and CEO

Filed with the County of Eddy, New Mexico, on this 1st day of November 2010.

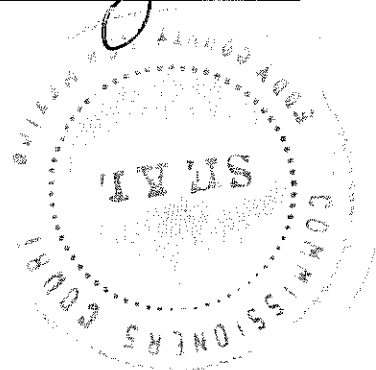
BOARD OF COMMISSIONERS OF  
EDDY COUNTY, NEW MEXICO

By [Signature]

ATTEST:

[Signature]  
Darlene Rosprim, Eddy County Clerk

My term expires on: 12/31/2010



## NOTICE OF PUBLIC HEARING

Proposed County Ordinance O-10-58

AN ORDINANCE GRANTING A NON-EXCLUSIVE FRANCHISE TO  
SOUTHWESTERN PUBLIC SERVICE COMPANY, A NEW MEXICO  
CORPORATION AND PUBLIC UTILITY, BY EDDY COUNTY, NEW MEXICO

The Eddy County Commission has scheduled a public hearing for 9:50 a.m. on Tuesday, October 5, 2010, in the Eddy County Commission Chambers, Eddy County Administration Complex, 101 W. Greene, Room 211, Carlsbad, NM 88220, to receive comments on proposed County Ordinance O-10-58.

Copies of the proposed ordinance may be obtained at the Office of the County Manager, 101 W. Greene, Suite 110, Carlsbad, NM 88220, (575) 887-9511, between 8:00 a.m. and 5:00 p.m., Monday – Friday. Written comments can be submitted to the same address no later than 5:00 p.m. Tuesday, September 28, 2010. The proposed ordinance will be posted on the county web site: [www.co.eddy.nm.us](http://www.co.eddy.nm.us). Questions may be directed to the County Manager at the above address. Anyone needing special accommodations should contact the County Manager's Office at the above address.

Eddy County Board of Commissioners

Allen R. Sartin, County Manager

STATE OF NEW MEXICO COUNTY OF EDDY  
RECORDED ON OCTOBER 8, 2010 AT 10:06 A.M.  
IN BOOK 2 PAGE 0199 OF THE ORDINANCE RECORDS  
DARLENE ROSPRIM, COUNTY CLERK

