

ORDINANCE NO. 662

FRANCHISE AGREEMENT

AN ORDINANCE GRANTING TO SOUTHWESTERN PUBLIC SERVICE COMPANY (“SPS”) D/B/A XCEL ENERGY THE RIGHT, PRIVILEGE AND FRANCHISE TO CONDUCT WITHIN THE CITY OF POST, TEXAS, AN ELECTRICAL LIGHTING AND POWER BUSINESS AND TO ENTER UPON, ERECT, CONSTRUCT, MAINTAIN, EXTEND, REPAIR, REPLACE AND REMOVE IN, UNDER UPON, WITHIN, OVER, ABOVE, ACROSS AND ALONG ANY AND ALL OF THE PRESENT AND FUTURE PUBLIC ROADS, HIGHWAYS, STREETS, LANES, AND ALLEYS OF THE CITY OF POST, A SYSTEM OF POLES, POLE LINES, TOWERS, DISTRIBUTION LINES, TRANSMISSION LINES, WIRES, GUYS, CABLES, CONDUITS, TRANSFORMERS, AND OTHER DISTRIBUTION AND TRANSMISSION EQUIPMENT, FACILITIES AND APPURTENANCES NECESSARY OR PROPER FOR THE TRANSMISSION AND DISTRIBUTION OF ELECTRICITY INTO, IN, WITHIN, FROM, ACROSS, AND THROUGH THE CITY OF POST AS NOW EXISTING, OR AS SAID CITY LIMITS MAY HEREAFTER BE EXTENDED; AND GRANTING SPS, ITS SUCCESSORS AND ASSIGNS, THE AUTHORITY TO USE SUCH FOR THE PURPOSE OF TRANSMISSION, DISTRIBUTION, DELIVERY AND SALE OF ELECTRICITY TO THE CITY, AND TO THE INHABITANTS OF THE CITY, OR ANY OTHER PERSON OR PERSONS, FIRMS OR CORPORATIONS, WHEREVER LOCATED WITHIN OR WITHOUT THE CITY LIMITS OF POST, FOR USE BY SUCH PURCHASER OR PURCHASERS FOR ANY PURPOSE AUTHORIZED BY LAW FOR WHICH ELECTRICITY MAY BE USED OR FOR ANY OTHER PURPOSE OR USE WHICH IS OR MAY BECOME NORMAL OR CUSTOMARY IN THE RETAIL ELECTRIC INDUSTRY IN TEXAS; PROVIDING THAT THIS FRANCHISE SHALL BE EFFECTIVE FOR A PERIOD OF TWENTY (20) YEARS COMMENCING JULY 5TH, 2017; PROVIDING FOR THE TEMPORARY REMOVAL, RAISING OR LOWERING BY SPS OF ITS WIRES AND OTHER APPURTENANCES; PROVIDING FOR THE RIGHT TO, AND CONDITION OF, THE OPENING OF PAVEMENTS AND SIDEWALKS BY SPS; RETAINING ALL RIGHTS OF CITY TO REGULATE THE LOCATION OF SPS'S FACILITIES IN, UPON, ALONG, UNDER AND OVER THE STREETS, ALLEYS AND OTHER PUBLIC PLACES OF CITY, AS WELL AS TO REQUIRE THE RELOCATION OF SAME; PROVIDING FOR EFFICIENT ELECTRICAL SERVICE AND THE MAINTAINING OF SPS'S

FACILITIES; PROVIDING FOR THE USE BY CITY FOR THE PURPOSES SPECIFIED OF POLES AND CONDUITS OF SPS; PROVIDING COMPENSATION, AND METHOD OF PAYMENT OF SUCH, TO THE CITY FOR THE USE BY SPS OF THE STREETS, ALLEYS AND PUBLIC WAYS OF THE CITY; PROVIDING FOR THE MAINTAINING OF RECORDS BY SPS WITH RIGHT OF INSPECTION BY CITY RESERVING TO CITY ALL POWERS OF REGULATION; PROHIBITING ASSIGNMENT EXCEPT BY CONSENT BY CITY EXCEPT IN CERTAIN CASES; GIVING CITY'S CONSENT TO THE CUTTING AND TRIMMING BY SPS OF CONFLICTING TREES; PROVIDING A SEVERABILITY CLAUSE; PROVIDING THAT THIS FRANCHISE SHALL NOT BE EXCLUSIVE; MAKING MISCELLANEOUS PROVISIONS RELATIVE TO THIS GRANT OF FRANCHISE; REPEALING ALL PREVIOUS ELECTRICAL LIGHTING AND POWER FRANCHISE ORDINANCES; PROVIDING FOR THE ACCEPTANCE OF THIS FRANCHISE ORDINANCE BY SPS.

WHEREAS, the City granted to Southwestern Public Service Company ("SPS") a franchise to operate and maintain an electric system in the City of Post.

WHEREAS, SPS has requested that the City Council of the City of Post, Texas, grant an electrical lighting and power franchise at this time, and it appearing to this Council that the renewal of the franchise will be of benefit to both SPS and the City of Post; NOW, THEREFORE,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF POST, TEXAS:

I. Franchise Authorization

That subject to the terms, conditions, and provisions of this ordinance, the City of Post, Texas, hereinafter referred to as "City", does hereby grant unto Southwestern Public Service Company, a corporation incorporated under the laws of the State of New Mexico, having a permit to do business in the State of Texas, hereinafter referred to as "SPS", its successors and assigns, the right, privilege and franchise to conduct an electrical lighting

and power business within the boundaries of the City of Post, as such boundaries now exist or may hereafter be extended.

SPS shall have the right to enter upon, erect, construct, maintain, extend, repair, replace, and remove in, under, upon, within, over, above, across and along any and all of the present and future public roads, highways, streets, lanes, alleys and other public rights-of-way of the City now or hereafter owned or controlled by the City a system of poles, pole lines, towers, distribution lines, transmission lines, underground and above ground lines, wires, guys, cables, conduits, transformers, and other distribution and transmission equipment, facilities and appurtenances necessary, proper or reasonably needed for the transmission and distribution of electricity into, in, within, from, across and through the City as now existing or as the said City limits may hereafter be extended to the extent City is authorized to grant such right.

SPS, its successors and assigns, are authorized to use said poles, lines, towers, wires, guys, conduits, transformers, and other distribution and transmission equipment, facilities and appurtenances for the transmission, distribution, delivery and sale of electricity to the City and to the inhabitants of the City or any other person or persons, firms or corporations wherever located for use by such purchaser or purchasers for any purpose authorized by law for which electricity may be used or for any other purpose or use which is or may become normal or customary in the retail electric industry in Texas.

II. Term

The franchise granted to SPS shall be for a term of Twenty (20) years from July 5th, 2017. The franchise rights and privileges shall be in full force and effect thirty (30) days

from the last publication of this Ordinance provided SPS has formally accepted this franchise as provided in Section XXII.

III. Franchise Fee/Payment

As compensation and rental for the use of the streets, alleys and public ways of City in the conduct of its business under this franchise, SPS shall pay the City for the life of this franchise a sum of money equal to five percent (5%) of its gross receipts. The term 'gross receipts' shall mean the total monies received by SPS from: (a) the sale of electric energy to its retail customers within the corporate limits of Post, Texas and (b) all other fees, commissions, collections, rents, value added services, royalties and any income associated directly with the use of SPS's electric infrastructure located in the right-of-way to provide service to retail customers within the corporate limits of Post, Texas. A two percent (2%) franchise expense is currently embedded in SPS system wide rates, but all franchise expense in excess of two percent (2%) of gross receipts shall be surcharged by SPS to the customer's taking service within the corporate limits of the City. The franchise payments shall be due and payable within thirty (30) days following the end of each calendar quarter in which the gross receipts were collected. All money due and payable to City by SPS computed under the terms of the existing franchise shall be payable at the time that computation begins under this franchise. In other words, there shall be no gap in payments to the City between the termination of the existing franchise and the commencement of this franchise. Said quarterly payments above provided shall be exclusive of and in addition to ad valorem taxes. Any and all such payments made by SPS pursuant to this Section shall be credited on any amount imposed, levied or assessed against SPS by the City of Post,

pursuant to ordinance or otherwise, at any time as a charge (whether designated as rental, tax or otherwise) for the use by SPS of City's streets, alleys and public ways.

All franchise fees that SPS fails to pay within the time period specified in this section shall bear interest equal to the interest rate as determined according to the following formula: for the period January 1 through June 30, the prime rate last published in the Wall Street Journal in the preceding December plus two percent (2%); and for the period from July 1 through December 31, the prime rate last published in the Wall Street Journal in the preceding June plus two percent (2%).

IV. Franchise Fee After Retail Competition

The franchise fee authorized herein shall form the basis on which any franchise fee is authorized and calculated according to state law after customer choice is authorized by the State of Texas in the region which encompasses the City of Post. If the Public Utility Regulatory Act, Sections 33.008(b) or 39.402(b) are changed, which change adversely impacts the franchise fee revenue the City of Post would have received, then SPS and the City of Post agree, to the extent allowed by law, to renegotiate the franchise fee provision in the preceding paragraph so as to allow the City of Post to receive the same revenues it would have received prior to such change in the law.

V. Pole Location.

Within the streets or other public rights-of-way of the City, the location and route of all poles, stubs, guys, anchors, lines, conduits, underground duct lines, manholes, and cables placed and constructed and to be placed and constructed by SPS in the construction and maintenance of its electrical lighting and power system in, within, through, or under the streets, alleys, or other public rights-of-way of the City shall be subject to reasonable

and proper regulation, control and direction of the City, or of the City official to whom such duties have been or may be delegated.

All poles, guys or anchors erected by SPS shall be so set that they will not cause diversion of surface waters in any gutter or drain so as to cause damage to adjoining property, and so that the same will interfere as little as practicable with the ordinary travel on the streets, sidewalks and other public rights-of-way of the City; the regulation and control herein reserved shall include, without limitation, the right of the City to require SPS, at SPS's expense, to relocate its poles, lines or conduits so as to permit the following activities undertaken by the City on its behalf:

- a. The widening or straightening of any street, alley or public right-of-way located within the City.
- b. The closing, opening or relocation of any street, alley or public right-of-way within the City.
- c. The location or relocation of any water or sewer lines within the City.
- d. The changing of grade of any street, alley, curb or sidewalk within the City.
- e. The construction and maintenance of parks and other public improvements owned by the City of Post located within the City.

In all cases where SPS is required to relocate, change the route of or the position of the poles, lines or the conduits, as a result of a request by the City, the City shall furnish an alternate route on which poles and lines of like construction design may be built, and provide thirty (30) days advance written notice to SPS specifying the new location, route, or position of the poles, lines, or conduits involved. SPS shall be entitled to be paid for its cost and expenses of any relocation, raising or lowering of its wires, required by the City, pursuant to this Section or Section VI, only if such expenses or costs are reimbursable or payable to SPS or the City from any source including the State of Texas, the United States or any governmental agency or subdivision of either, whether directly or indirectly.

However, nothing herein shall impose any obligation on the City to pay such costs and expenses except to the extent it actually receives funds from another source including the United States, the State of Texas, or any governmental agency or subdivision of either, for the reimbursement or payment of same. The provisions of this section shall not apply to improvements made by SPS on private easements purchased by SPS and recorded prior to any dedication of any street, alley or public way. In this latter event City shall reimburse SPS its costs and expenses of relocating facilities.

VI. Temporary Relocation

SPS, on written reasonable request of any responsible person, firm, corporation or governmental authority, shall relocate, raise or lower its wires, where located on, in, or over the streets, alleys and other public ways of City, temporarily to permit construction work in the vicinity thereof, or to permit the moving of houses or other bulky structures. The expense of such temporary relocation, raising or lowering of such wires shall be paid by the benefited party or parties, and SPS may require the payment in advance, being without obligation to remove, raise or lower its wires until such payment shall be made; provided, however, that no such payment shall be required of the City except as provided in Section V. SPS shall be given prior written notice to arrange for such temporary wire relocations. The time period and manner for providing prior written notice shall be as specified in SPS's tariff(s) governing temporary raising or lowering of lines, as may be amended from time to time, currently Rules Tariff Sheet No. V-32. Current, Rules Tariff Sheet No. V-32 requires seven days prior written notice.

VII. Excavation of Sidewalks

If it becomes necessary in furnishing electricity as contemplated under this franchise, the City grants to SPS the right and privilege to take up pavements and sidewalks, if any, in and upon said streets, alleys and highways in said City for the purpose of making such excavation and installation as may be necessary; provided, however, that SPS shall not take up or excavate any pavement at any time without first securing the written permission of the Mayor, City Manager or the City's designated representative, which permission will not be unreasonably withheld; and provided further, that all excavations and installations so made shall be performed in a reasonable manner as will cause the least inconvenience to the public, and SPS shall promptly restore or cause to be restored to as good condition as before working thereon all such pavements, sidewalks, streets, alleys or highways excavated by it to the reasonable satisfaction of the Mayor, City Manager or the City's designated representative.

VIII. Facilities Damage

If any facilities of the City of Post shall be in any respect damaged or injured by SPS or any of its officers, agents, or employees in connection with the performance of work done under this Franchise Agreement, SPS shall pay for such damage. Conversely, if any of the facilities installed by SPS hereunder shall be in any respect damaged or injured by the City or any of its officers, agents, representatives, or employees, in connection with the performance of any work or repairs that may be done upon the streets, avenues, alleys and other public places of the City of Post, the City of Post shall pay for such damage.

IX. City's Sovereignty

The City, by the granting of this franchise, does not surrender or to any extent lose, waive, imperil or lessen the lawful powers and rights now or hereinafter vested in the City

under the Constitution and Statutes of the State of Texas to regulate the rates for services of SPS; and SPS, by its acceptance of this franchise, agrees that all such lawful regulatory power and rights as the same may be from time to time vested in the City shall be in full force and effect and subject to the exercise thereof by the City at the City's discretion.

Notwithstanding anything contained in this Ordinance to the contrary, all work done in connection with the construction, repair, maintenance and operation of all facilities of SPS is subject to the continuing police power of the City; and SPS shall comply with all present and future laws, ordinances and regulations, except when such compliance is in conflict with that authority specifically surrendered by the City herein.

X. Electric Service Provided

It shall be SPS's obligation hereunder to furnish efficient electrical service to meet standards of the industry for the area. SPS shall serve every eligible consumer in the franchise area that requests service, subject to lawful policies and rules of SPS regarding cost, customer deposits, return on investment, access and other reasonable factors. SPS shall not discriminate against any person, corporation, firm, or association in the charge for such electrical current or in the service rendered under like circumstances. SPS shall not directly or indirectly grant any discount or rebate, or give things of value to circumvent the rate schedule as approved by the appropriate regulatory authority.

XI. Nonexclusive

Nothing contained in this Ordinance shall be construed as conferring upon SPS any exclusive rights or privileges of any nature whatsoever.

XII. City Use of SPS's Pole/Duct Space

In addition to the consideration set forth elsewhere in this ordinance, SPS shall hereafter hold itself ready to furnish free of charge, subject to the use of the City, such pole space as may be reasonably required from time to time for the installation of City-owned street light equipment, traffic, police and fire alarm system conductors, and alarm or other necessary signal boxes, data transmission or telecommunication equipment (solely for the City's own use) provided that such space used by the City does not exceed the capacity of one cross-arm space on any one pole, and provided that such space is available on existing poles and has been requested three (3) days in advance in writing by the Mayor, City Manager or the City's designated representative prior to installation of SPS facilities hereunder placed within any street, alley or public way. The specific location of the street light equipment, and police and fire alarm conductors and boxes on SPS's poles shall be determined by SPS, and will be allotted at the time specific applications for space are received from the City. Where a main underground ductline is hereafter constructed or installed between manholes by SPS, SPS shall, as a part of same, provide free space for the installation by City of its traffic, police or fire alarm cables, data transmission or telecommunication equipment (solely for the City's own use) on request in writing by the Mayor, City Manager or the City's designated representative prior to construction, one top duct having one capped off entry channel and one capped off exit channel between each two manholes, such entry and exit channels leaving the duct bank enclosure outside of, but near to, such manholes, and no cable or other equipment of City shall enter SPS's manholes. SPS shall, prior to each addition by it to any duct now existing or hereafter constructed, notify the Mayor, City Manager or the City's designated representative of City of the nature and location of such intended addition; further, SPS shall, along with its application for a

permit to open a street for the purpose of laying a new duct, provide the Mayor, City Manager and, if requested by the Mayor, the City's engineer, each with a set of plans showing the type, number, and location in the street, of the ducts to be constructed. City, prior to the original installation by it of its equipment in any such top duct, shall notify SPS three (3) days in advance of the time and place it intends to make such entry and installation. All cables installed by the City in SPS ducts shall be of the non-metallic, sheathy type to prevent corrosive or electrolytic action between the City and SPS-owned cables. All City-owned conductors and cables, whether on poles or in ductlines, shall be constructed, maintained and operated in such manner as to not interfere with or create a hazard in the operation of SPS's electrical transmission and distribution system. Further, all City-owned traffic, police and fire alarm conductors, and alarm boxes, and any City circuits on SPS poles and all cables installed by City in ducts constructed by SPS, shall be installed in strict compliance with the applicable provisions of the National Electrical Safety Code and other applicable federal, state and local codes.

Provided further, that no part or portion of this Section shall ever be construed as requiring SPS to make any additional expenditure over and above its normal and ordinary cost, and if the City's requirements hereunder cause an additional cost or expense in enlarging, removing, adding to or otherwise changing SPS's facilities, City shall reimburse SPS for the full amount of such costs. SPS shall not in any case be liable for damages or claims of damages to any person or persons arising from or growing out of the attachment of City's equipment, or arising from or growing out of the construction, operation or maintenance of such facilities. The City further agrees to indemnify and hold SPS harmless

from any and all damages or claims for damages by reason of the construction, maintenance or operation of the City's facilities as set forth in this Section.

XIII. Annual Receipts Report/Right to Audit

On request by the Post Mayor or City Manager, SPS shall provide a statement, certified by a duly qualified officer of SPS, showing the gross receipts of SPS within the City of Post (as defined above). For the purpose of determining the amount of the gross receipts of SPS at all times during the continuance of the rights herein granted, SPS shall keep at the disposal of and open to inspection by any auditor authorized and appointed by City at all reasonable times, books of accounts and other records showing a full, true, complete and accurate account of the gross receipts of SPS from its electric lighting and power sales for consumption within the corporate limits of the City for the prior three calendar years.

XIV. Indemnification

SPS shall indemnify and save the City harmless from all claims, demands or causes of action brought against the City occasioned by or arising out of the construction, reconstruction, maintenance, or repair of SPS's electrical lighting and power system, or in any way growing out of the granting of this franchise either directly or indirectly; provided, however, that the provisions of this Section shall not be applicable to any claims, damages, actions or causes of actions proximately resulting from the use by City, or its officers, agents, representatives or employees, of SPS's poles and ductlines for the installation, maintenance or removal of City's equipment, as provided in Section XII, or for which the City is otherwise liable as provided herein.

XV. Authority

In granting this franchise it is understood that the lawful power vested by law in the City to require all persons or corporations to discharge the duties and undertaking for the performance of which this franchise was made, is reserved; this grant is made subject to all the rights, powers and authorities either of regulation or otherwise reserved to the City by its ordinances or by the general laws of the State.

XVI. Assignment/Transfer of Franchise

The rights, franchises and privileges hereby granted shall not be transferred or assigned by SPS except with the consent of the City Council of the City of Post expressed by Ordinance passed by said City Council; provided, however, SPS may mortgage or pledge its rights hereunder for security or obligations owing by SPS; and provided further, that a transfer could be made in a merger, consolidation or re-organization proceeding to which SPS is a party or to a subsidiary corporation or affiliate corporation of SPS or wherein SPS sells its entire physical assets. It is specifically recognized that Public Utility Regulatory Act, Chapter 39 Restructuring of Electric Utility Industry, it is anticipated that at some date in the future SPS will unbundle into a power generation company, a retail electric provider, and a transmission and distribution utility. At the time any such unbundling to comply with retail electric deregulation were to occur, the franchise granted herein will go with the distribution utility and the franchise fee thereafter will be calculated as provided in Section III of this franchise.

In the event of contemplated transfer of this franchise, under the terms of this section permitting transfer without consent of City Council, SPS shall notify the City of Post of the contemplated transfer by written notice delivered to the City Secretary not less than sixty (60) days prior to accomplishment of any merger, consolidation or re-

organization proceeding or transfer of its entire physical assets; and will provide the City Council an opportunity to confer with the proposed transferee concerning proper acceptance of the terms of this franchise.

Prior to exercising any rights hereunder, any purchaser or transferee of SPS shall file with the Mayor or City Manager a written acceptance of this franchise setting forth an agreement to be bound by all terms and provisions hereof.

XVII. Tree Trimming

To the extent that the City has authority to do so, it gives to SPS, during the life of this franchise, the right, license, privilege and permission to trim trees upon and overhanging the streets, alleys, sidewalks and public places of City, so as to prevent the branches of such trees from coming in contact with the wires or other equipment of SPS. SPS agrees that it will fully protect and indemnify City from any and all claims, demands, actions, causes of actions, damages and expenses arising because of such trimming by SPS under the provisions of this Section.

XVIII. Notice of Default

The franchise rights and privileges hereinabove granted to SPS, its successors and assigns are and shall be at all times, during the term and life of this franchise, contingent upon the faithful and punctual performance of and compliance with all acts, requirements and provisions of this Ordinance, and any amendment hereof, by SPS, its officers, agents and employees on its part to be performed, complied with and abided by, and if at any time SPS shall refuse or fail to keep, perform, comply with and abide by all and singular the acts, requirements and provisions of this Ordinance, or any amendment, within sixty (60) days from receipt of written notice from the Mayor or City Manager acting by Order of the

City Council setting forth in detail the facts constituting default of SPS and what is required to cure such default; and upon continued failure of SPS to keep, perform, comply with and abide by such acts, requirements and provisions of this Ordinance or any amendment or failure to cure the default set forth in such written notice, the City Council may terminate, at its option, this franchise and all privileges and rights herein granted to said SPS. The notice herein mentioned shall be sufficient, if given to the Director of Community Services for SPS located in Amarillo, Texas.

XIX. Removal of Dangerous Objects

The City shall have power at any time to require SPS to remove and abate at its own expense any installation or structure that is dangerous to life or property, and in case SPS, after reasonable notice, fails or refuses to act, the City shall have the power using reasonable means and methods to remove or abate the same at expense of SPS, all without compensation or liability for damages to SPS.

XX. Severability

If any provision, section, subsection, sentence, clause or phrase of this Ordinance is, for any reason, held to be unconstitutional, void or invalid (or for any reason unenforceable), the validity of the remaining portions of this Ordinance shall not be affected thereby.

XXI. Prior Franchise Repealed

This franchise replaces all former franchise ordinances granted to SPS or its predecessors, which are hereby repealed, which repeal is effective as of the time the franchise herein granted takes effect. There is specifically and particularly repealed, effective as of that time, that certain Ordinance No. 94 passed by the City of Post, granting

to Southwestern Public Service Company, its successors and assigns, a franchise for a period of twenty years.

XXII. Final Passage/Acceptance

SPS shall, within thirty (30) days from the date of the final passage of this Ordinance by the City Council of the City of Post, file with the City Secretary of Post, a written statement signed in its name and behalf by an officer of SPS duly authorized by its Board of Directors in the following form:

"The Honorable Mayor and the City Council of the City of Post:

Southwestern Public Service Company, for itself, its successors and assigns, hereby accepts the attached Ordinance finally passed by the City Council of Post, the _____ day of _____, 20____ and agrees to be bound by all of its terms and provisions.

Southwestern Public Service Company


By: _____
President

Dated the _____ day of _____, 20____.

AND IT IS SO ORDERED.

Passed by City Council on this 13 day of June, 2017

CITY OF POST



Archie Gill, Mayor

ATTEST:



Deana Smith, City Secretary