

RESOLUTION NO. 18-24

A RESOLUTION DECLARING THE INTENT OF LUNA COUNTY, NEW MEXICO TO ISSUE INDUSTRIAL REVENUE BONDS ENTITLED LUNA COUNTY, NEW MEXICO INDUSTRIAL REVENUE BONDS (SOUTHERN POWER COMPANY PROJECT), SERIES 2018, IN AN AGGREGATE PRINCIPAL AMOUNT OF UP TO \$223,000,000 IN CONNECTION WITH A PROPOSED PROJECT TO BE LOCATED IN LUNA COUNTY, NEW MEXICO, FOR THE PURPOSE OF INDUCING SOUTHERN POWER COMPANY AND/OR ITS AFFILIATES OR THEIR SUCCESSORS OR ASSIGNS, TO ACQUIRE THE PROJECT AND TO REIMBURSE TEMPORARY ADVANCES MADE FOR CAPITAL EXPENDITURES FROM PROCEEDS OF THE BONDS AND RELATED MATTERS.

WHEREAS, the New Mexico legislature has passed the “County Industrial Revenue Bond Act” (the “**Act**”), Sections 4-59-1 to 4-59-16 inclusive, NMSA 1978, as amended, which authorizes Luna County, New Mexico (the “**County**”) to issue industrial revenue bonds and to acquire projects as defined in the Act; and

WHEREAS, the County desires to promote industry and develop trade or other economic activity to secure and maintain a balanced and stable economy in the County and to promote public health, welfare, safety, convenience and prosperity; and

WHEREAS, Southern Power Company (together with its affiliates, successors and assigns, the “**Company**”) has made a proposal to the County (the “**Proposal**”) whereby the County would acquire, through acquisition of leasehold title to land, and fee title to certain facilities and equipment located in the County, a combustion turbine facility for use by the Company for its operations (the “**Project**”); and

WHEREAS, the Company is the only company that has requested that the County adopt an intent resolution regarding the issuance of industrial revenue bonds for a combustion turbine facility; and

WHEREAS, the Company has requested that the Project be considered by the Commission and that the Commission indicate its intent to proceed with the issuance of taxable industrial revenue bonds (the “**Bonds**”) for the financing of the Project by adopting an Inducement Resolution; and

WHEREAS, in connection with the Project, the Company has requested that the County issue Bonds in an amount of up to \$223,000,000; and

WHEREAS, the issuance of Bonds in one or more series by the County to finance all or a part of the Project, will constitute one of the inducements whereby the Company will determine to acquire land and acquire, construct, renovate and equip a facility in the County; and

WHEREAS, the Commission constitutes the governing body of the County within the meaning of the Act; and

WHEREAS, the Project has been considered by the Commission and it has been determined by the Commission that the Project (A) will be located on a site that does not require County approval (other than a building permit) for the development, installation and operation of the Project and (B) will promote the local health, general welfare, safety, convenience and prosperity of the inhabitants of the County, and the Commission desires to indicate its intent to proceed with the issuance of the Bonds for the financing of the Project; and

WHEREAS, concurrently with the issuance of the Bonds, the Company will enter into a leasing or other financing agreement with the County (the "Lease") providing for the payment of lease rentals or other payments on the Project sufficient to pay the debt service on the Bonds, subject to the prior adoption by the Commission of an ordinance approving such agreement and authorizing issuance of the Bonds (the "Bond Ordinance"); and

WHEREAS, the County and the Company understand that the adoption of this Resolution shall not obligate the County to issue the Bonds or obligate the Company to proceed with the Project, except pursuant to the terms of a Bond Ordinance to be adopted by the County and related bond documents in form and substance satisfactory to the County prior to the issuance of the Bonds;

WHEREAS, Section 4-37-7 NMSA 1978 requires that publication of the title and a general summary of the subject matter of any proposed ordinance be made in a newspaper of general circulation within the County at least two weeks prior to the meeting of the Board of County Commissioners at which the ordinance is proposed for final passage.

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS, THE GOVERNING BODY OF LUNA COUNTY, NEW MEXICO:

Section 1. All actions (not inconsistent with the provisions hereof) heretofore taken by the Commission and the officers and employees of the County, related to the Proposal, the acquisition of the Project, and the sale and issuance of the Bonds therefore, be and the same hereby are ratified, approved and confirmed.

Section 2. The Commission has been informed by the Company that:

(A) The Project will consist of leased land, facilities and equipment for a combustion turbine facility;

(B) The maximum aggregate par amount of obligations to be issued with respect to the Project is \$223,000,000;

(C) The initial developer of the Project will be the Company and/or its

affiliates, or their permitted successors or assigns, as will be set forth in the Bond Ordinance;

(D) The initial operator of the Project will be the Company and/or its affiliates or their permitted successors or assigns;

(E) The Project is located in an unincorporated area of the County;

(F) The Company will make all necessary arrangements with the proposed bond purchaser for the purchase of the Bonds and the County shall have no responsibility to make such arrangements; and

(G) The Company has agreed to pay or reimburse the County for all reasonable and prudent independent bond counsel legal fees of the County related to the adoption of this Resolution, the Bond Ordinance and the issuance of the Bonds. The Company has agreed to such payment or reimbursement irrespective of whether the Bonds are issued.

Section 3. In order to promote the local health and general welfare, safety, convenience and prosperity of the inhabitants of the County, it is the Commission's intent to take all necessary and advisable steps to effect the issuance of the Bonds in an aggregate principal amount up to \$223,000,000 in one or more series in order to defray part or all of the costs of the Project. The Bonds are to be entitled substantially as follows "Luna County, New Mexico Industrial Revenue Bonds (Southern Power Company Project), Series 2018."

Section 4. The Bonds shall be payable from the revenues of the Project or other moneys payable by the Company, with respect thereto, and shall not constitute a debt or indebtedness of the County within the meaning of any provision or limitation of the Constitution or statutes of the State of New Mexico. In addition, if the Bonds are issued, the Company shall indemnify and hold harmless the County, the Commission and their respective officers, employees, designated representatives and agents (collectively, the "Indemnified Persons") from and against any liability to the Company, or to any third parties that may be asserted against the County with respect to the County's ownership of or leasehold interest in the Project or the issuance of the Bonds. Nothing contained in this Resolution or in any other instrument shall be considered as obligating the County to any pecuniary liability or a charge upon the general credit of the County or against its taxing power, it being understood that no costs are to be borne by the County and that all costs incurred by the County in connection with the Bonds are to be promptly paid or reimbursed by the Company. The County's adoption of this Resolution shall not be deemed a conclusion or expression of approval by the County or any Indemnified Person of the Company or the Project.

Section 5. The Company as agent for the County and consistent with Taxation and Revenue Department Regulation 3.2.212.22 NMAC Renumbered, will acquire the Project.

The Company will, acting as agent for the County, request delivery of Type 9 Nontaxable Transaction Certificates (“Certificates”) for the Project from the Taxation and Revenue Department. The Company will deliver a Certificate to each person selling tangible personal property to the Company for the Project as applicable under the New Mexico Gross Receipts and Compensating Tax Act. The Company shall not use the Certificates other than for the purchase of capital equipment and other tangible personal property, nor shall the Company use such Certificates after the completion of the Project. No costs, expenses or other monetary relief will be recoverable from the County by vendors generation equipment.

Section 6. When the Project is approved, the County intends to enter into an agreement with the Company pursuant to which the Company will pay to the County and the Deming Public School District (the “School District”) certain annual payments in lieu of ad valorem taxes levied on the Project property and such agreement shall be included in the Lease to be entered into by the County and the Company.

Section 7. The County Commissioners and other appropriate County officials and employees are hereby authorized and empowered to take such steps and to do such things as may be necessary to achieve the purposes of this Resolution; provided, however, the issuance of the Bonds and the execution and delivery of any documents to which the County is a party in connection therewith shall be subject to the approval and authorization of the Commission pursuant to the Bond Ordinance, to be adopted following public notice of the Commission’s intent to adopt such Ordinance at least fourteen (14) days prior to the consideration of the Ordinance by the Commission at a public meeting, such public notice to specify the time, date and place of the Commission’s meeting. In particular, no provision of this Resolution shall in any way obligate the County or any other person to issue the Bonds, any other bonds or in any way finance the Project; and the County retains full and complete discretion with respect thereto.

Section 8. This Resolution shall not give rise to a pecuniary liability of the County and shall not give rise to a charge against its general credit or taxing powers.

Section 9. The issuance of the Bonds and the execution and delivery of any documents to which the County is a party in connection therewith shall be subject to the approval and authorization by the Commission pursuant to the Bond Ordinance following reasonable public notice of the time, date and place of the public hearing to be held on the proposed adoption of the Bond Ordinance. The County Clerk is hereby authorized to publish notice of the title and a general summary of the subject matter of the Bond Ordinance, in substantially the form attached hereto as Exhibit B, one time in a newspaper of general circulation within the County at least two weeks before the meeting of the Commission at which the Bond Ordinance is to be adopted. This authorization is in

compliance with Section 4-37-7 NMSA 1978. In connection with this Resolution, the Commission understands that the Company is not obligated to proceed with the Project and additionally, the Commission has been informed that a failure or refusal of the Commission, however arising, to adopt the Bond Ordinance will have the effect of voiding any benefits to the Company under the Act, including revoking the authority of the Company to act as agent for the County in connection with the solicitation of nontaxable transaction certificates for the Project from Taxation and Revenue, voiding the nontaxable transaction certificates issued to the Company for Project purchases and making such purchases subject to whatever tax would be due if such certificates had not been issued.

Section 10. If any section, paragraph, clause or provision of this Resolution shall for any reason be held to be invalid or unenforceable, the invalidity or unenforceability of such section, paragraph, clause or provision shall not affect any of the remaining provisions of this Resolution.

Section 11. All orders and resolutions, or parts thereof, in conflict with this Resolution are hereby repealed; this repealer shall not be construed to revive any order, resolution or part thereof, heretofore repealed.

EXHIBIT A
Schedule A
(Proposed PILOT payments)

Year (commencing on the one year anniversary of the IRB lease Agreement)	County PILOT Payments*
1	0
2	0
3	\$0
4**	\$103,500
5	\$103,500
6	\$103,500
7	\$103,500
8	\$103,500
9	\$103,500
10	\$103,500
11	\$103,500
12	\$103,500
13	\$103,500
14	\$103,500
15	\$103,500
16	\$103,500
17	\$103,500
18	\$103,500
19	\$103,500
20	\$103,500
21	\$103,500
22	\$103,500
23	\$103,500
24	\$103,500
25	\$103,500
26	\$103,500
27	\$103,500
28	\$103,500
29	\$103,500
30	\$103,500
Total	\$2,794,500

* In addition to the foregoing, by December 31, 2022, the Company will make a one-time community benefit payment of \$150,000 to the County if the IRB closing occurs.

** Proposal assumes that PILOT payments begin in 2022 – the first year the facility is operational

EXHIBIT B

**FORM OF NOTICE OF INTENT TO ADOPT
INDUSTRIAL REVENUE BOND ORDINANCE FOR PUBLICATION**

LUNA COUNTY, NEW MEXICO

NOTICE OF INTENT TO ADOPT INDUSTRIAL REVENUE BOND ORDINANCE

Notice is hereby given of the title and general subject matter contained in an ordinance which the Board of County Commissioners of Luna County, New Mexico, the governing body of the County, intends to adopt at a meeting on _____, _____, 2018 at the hour of _____ a.m. at the Luna County Courthouse Commission Chambers, 700 S. Silver Ave, Deming, New Mexico 88030 relating to the authorization, issuance and sale by Luna County, New Mexico of its industrial revenue bonds.

The title of the proposed Ordinance is:

AUTHORIZING THE ISSUANCE AND SALE OF LUNA COUNTY, NEW MEXICO TAXABLE INDUSTRIAL REVENUE BONDS (SOUTHERN POWER COMPANY PROJECT) SERIES 2018, IN A MAXIMUM PRINCIPAL AMOUNT OF \$223,000,000 IN ONE OR MORE SERIES TO PROVIDE FUNDS TO FINANCE THE ACQUISITION, CONSTRUCTION, AND EQUIPPING OF AN INDUSTRIAL REVENUE BOND PROJECT FOR USE BY SOUTHERN POWER COMPANY OR ITS AFFILIATES, SUCCESSORS OR ASSIGNS; AUTHORIZING THE EXECUTION AND DELIVERY OF AN INDENTURE, A LEASE, A BOND PURCHASE AGREEMENT, THE BONDS AND OTHER DOCUMENTS IN CONNECTION WITH THE ISSUANCE OF THE BONDS AND THE PROJECT; MAKING CERTAIN DETERMINATIONS AND FINDINGS RELATING TO THE BONDS AND THE PROJECT; RATIFYING CERTAIN ACTIONS TAKEN PREVIOUSLY; AND REPEALING ALL ACTIONS INCONSISTENT WITH THIS ORDINANCE.

As proposed in the Ordinance: (1) the Bonds will be issued under the authority of the New Mexico County Industrial Revenue Bond Act, Chapter 4, Article 59, NMSA 1978, as amended; (2) the proceeds of the Bonds will finance the acquisition, construction and equipping of a combustion turbine facility located in unincorporated Luna County, New Mexico (the "Project") for the use by Southern Power Company, or its affiliates, successors or assigns (the "Company"); and (3) the Project will be leased by the County to the Company.

Under the terms of a proposed Lease Agreement (the "Lease") between the County and the Company, the Company will be obligated to pay rent for the Project sufficient to pay, when due, the principal of, interest on and redemption price, if any, of the Bonds and to make certain other payments as provided in the Lease. The Bonds will be issued pursuant to an Indenture (the

“Indenture”) among the County and a trust depository. The Bonds will be sold to a bond purchaser pursuant to the terms of a proposed Bond Purchase Agreement.

THE PRINCIPAL OF, INTEREST ON AND REDEMPTION PRICE OF THE BONDS WILL NEVER CONSTITUTE AN INDEBTEDNESS OF THE COUNTY WITHIN THE MEANING OF ANY PROVISION OR LIMITATION OF THE CONSTITUTION OR LAWS OF THE STATE OF NEW MEXICO. THE BONDS WILL NEVER CONSTITUTE NOR GIVE RISE TO A PECUNIARY LIABILITY OF THE COUNTY OR A CHARGE AGAINST ITS GENERAL CREDIT OR TAXING POWERS.

The Bonds will mature, bear interest, be subject to prior redemption and contain other terms and provisions all in accordance with the Indenture and the Ordinance.

A copy of the Ordinance in draft form is on file in the office of the County Clerk at 700 S. Silver Ave, Deming, New Mexico 88030 and will be available for inspection during normal business hours. All members of the public are invited to attend the hearing, and will be provided opportunity to ask questions about, and to express their opinions concerning, the proposed Ordinance.

This notice is given pursuant to Section 4-37-7 NMSA 1978.

Dated: _____ 2018.

County Clerk

(To be published once in a newspaper of general circulation in Luna County at least two weeks before consideration of Bond Ordinance)

PASSED, ADOPTED, SIGNED AND APPROVED this 10 day of May, 2018.

BOARD OF COUNTY
COMMISSIONERS OF LUNA COUNTY,
NEW MEXICO



Barbara Reedy, District 1 Commissioner

Barbara Reedy

Linda Smrkovsky, District 2 Commissioner

Linda M. Smrkovsky

John Sweetser, District 3 Commissioner

ABSENT

ATTEST:

Andrea Rodriguez
County Clerk