

ORDINANCE NO. 119 2009

AN ORDINANCE OF THE CITY OF ASHLAND, KENTUCKY, GRANTING FOR A TERM OF TEN (10) YEARS TO NATURAL ENERGY UTILITY CORPORATION A FRANCHISE AUTHORIZING NATURAL ENERGY UTILITY CORPORATION TO OWN, MAINTAIN, CONSTRUCT AND OPERATE A GAS DISTRIBUTION SYSTEM UPON, ALONG, OVER AND UNDER THE STREETS, THOROUGHFARES, ALLEYS, SIDEWALKS, BRIDGES, PUBLIC WAYS AND OTHER PUBLIC PLACES OF SAID CITY.

WHEREAS, there exists a franchise for the privilege of constructing, operating and maintaining a gas distribution system in the City of Ashland, Kentucky, and

WHEREAS, the City authorized the letting of bid on said franchise, and

WHEREAS, after the City has duly advertised for a gas franchise, the City and Natural Energy Utility Corporation have reached an agreement regarding the gas franchise with said city subject to certain conditions set forth as further detailed herein, and

WHEREAS, the City accepts said bid of the Company, subject to certain conditions set forth as further detailed herein, and

WHEREAS, the Company has agreed to accept the terms contained herein;

NOW, THEREFORE, BE IT ORDAINED BY THE CITY OF ASHLAND, KENTUCKY:

SECTION 1. For and in consideration of the mutual covenants and agreements contained herein, the receipt and sufficiency of all of which are hereby acknowledged, Company and the City agrees as follows.



SECTION 2. The Company shall have the right and privilege of constructing, erecting, operating, and maintaining a gas distribution system, equipment and apparatus, upon, through, along, under, and over the streets within the corporate boundaries of the City as they now exist or may hereafter be extended, subject to the provisions hereof and to all powers including police power inherent in, conferred upon, or reserved to said City.

SECTION 3. (1) No pavements, sidewalks, curbs, gutters, or other such street installations shall be disturbed and no excavation in any of the said streets will be made, except with the written permission of the City through a designated employee or official.

(2) When an emergency arises which requires immediate repair, the company may disturb or excavate a street without first obtaining written permission from the City; provided that the City is notified in writing of said repair within five (5) days of the start of such disturbance or excavation. This notification shall include at least the time, date, location, and extent of excavation or other work performed.

(3) When the company shall enter upon any street for the purpose of constructing, erecting, operating, maintaining, and/or removing equipment and apparatus, it shall prosecute the work, at its own cost and expense, with due diligence to protect the public and the City. The company shall dig and close up all trenches and exposed places as rapidly as possible, provide temporary access when reasonable to limit inconvenience, and shall leave the streets in the same or better condition as prior to its entry. All such repairs shall be maintained by the company for one (1) year in as good condition as the remainder of said street. In the event the company fails, refuses, or neglects to comply with the above provisions, the City shall have the right, after notice in writing having first been given to the company or any officer or agent representing it, to do said work or make said repairs, and the cost and expense thereof shall be paid to the City by the company within thirty (30) days from the date on which an itemized bill is presented to the company.



(4) (a) In the construction, reconstruction, maintenance, or removal of any of said equipment and apparatus, the company shall have the due regard for the rights of the City and others, and shall avoid interference with and injury to the property of the City or others. Said franchisee shall comply with all the laws of the Commonwealth of Kentucky and ordinances of the City as to placing lights, danger signals, barricades, or warning signs. Such work by the company shall be done in a workmanlike manner and so as not to unnecessarily interfere with public use of any of said streets.

(b) All underground construction shall be accomplished between the hours of 9:00 AM and 3:00 PM unless otherwise authorized in writing by the City. However, the franchisee must provide notice to the City seven (7) days in advance of such underground construction. Notwithstanding these construction hours, construction shall not interfere with the services of the City or third parties.

SECTION 4. (1) Whenever the City or any of its departments, agencies, and/or agents, servants, or employees shall grade, regrade, construct, reconstruct, widen, or alter any street or shall construct, reconstruct, repair, maintain, or alter any other municipal public works therein, including but not limited to storm sewers, sanitary sewers, and street lights, it shall be the duty of the company, when so ordered by the City, within a reasonable time to change its equipment and apparatus in the street at its own expense so as to conform to the established grade or line of such street so as not to interfere with such municipal public works so constructed, reconstructed, or altered.

(2) The company shall be given access to the street plans and specifications, and any proposed modifications to such, in the possession of the City.

SECTION 5. Upon notice from the City, given reasonable in advance, that any street is planned to be constructed, reconstructed, widened, altered, paved, or repaved, the company shall make such extensions or changes in its equipment and apparatus, ahead of any paving, as shall be reasonable expected during the following one (1) year period; provided that if the company deems that no extension or change will be required during such period, it may refrain from doing so, but shall be precluded from disturbing the paving for such purposes for a period of one (1) year unless permission of

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the City is obtained. Any emergency repairs during this one (1) year period shall be cause for a full width restoration of any street to minimize the effect of company activity if so ordered by the City.

SECTION 6. The minimum clearance of all lines placed above the streets, and also the placement of underground facilities, shall conform to the latest industry standards including Code of Federal Regulations, 49 CFR Part 192 for installation of transmission and distribution piping. The City reserves the right to require, by ordinance, observation of greater standards of safety than those contained in such industry standards.

SECTION 7. The company agrees by the acceptance of this franchise to indemnify, keep, and save the City free and harmless from liability on account of injuries or damage to persons or property growing out of the construction, maintenance, repair, and operation of its equipment and apparatus located upon, through, along, under, or over the City's streets. If any suit to enforce such liability shall be brought against the City, either independently or jointly with the company, upon notice by the City the company shall defend the City at the cost of the company and, in the event of final judgment being obtained against the City either independently or jointly with the company, the company shall pay such judgment with all costs and hold the City harmless therefrom.

SECTION 8. The City, through its City Commission, City Manager, or such assistants as it may employ or designate, at all reasonable times, may have access to the equipment and apparatus installed under this franchise for the purpose of inspecting or examining it, and may inspect, examine, or verify all or any of the accounts, books, records, contracts, documents, or papers of the company reasonable necessary to the administration of this franchise.

SECTION 9. The franchise hereby created shall be for a set term of ten (10) years from and after July 1, 2010, but is not exclusive, and the City reserves the right to sell similar franchises to others.



SECTION 10. The company is hereby given the right to assign the franchise created by this ordinance to any person, firm, or corporation able, ready, and willing to carry out the terms of this franchise, but prior to such assignment, shall obtain consent from the City to such assignment, which consent shall not be unreasonably withheld.

SECTION 11.

(1) As consideration for the rights conferred by the granting of this franchise, and to compensate the City for the use of its streets and rights-of-way and its superintendence of the franchise, the successful bidder for the term from July 1, 2010 through June 30, 2020 shall pay to the City a fee, equal to three percent (3%) of the gross annual revenues received by the franchisee from the sale of gas to all customers within the territorial limits of the City or any other revenue generated by or attributable to facilities or equipment or apparatus located within the territorial limits of the City. Gross revenues shall also include compensation from any ancillary services, including, but not limited to, advertising stuffers inserted into periodic billing statements or other notices.

(2) (a) The Company shall remit to the City, monthly, all amounts due under this franchise. The first such remittance shall be based upon revenues received by the Company for bills rendered during the first month following the effective date of the franchise as set forth in Section 14 hereof and shall be paid within thirty (30) days following such period. Thereafter, payments shall be made within thirty (30) days after each subsequent one month period. The final payment shall be paid within thirty (30) days following the expiration of this franchise.

(b) If it is determined by the Public Service Commission (or its successor or court having jurisdiction) that all or any portion of said fee set forth in this section shall not be promptly and satisfactorily recoverable by the franchisee, the franchisee, at its election, shall thereafter be relieved of its obligation to pay such portion of the agreed franchise fee and in such case shall so notify the City in writing within five (5) working days of receipt by the



franchisee of such order of the Public Service Commission or of such court decision. In such event, the City shall have the option to terminate this franchise within thirty (30) days of receipt of said written notification from the Company.

(c) If, however, the Public Service Commission or other tribunal shall make a final determination providing for the prompt and satisfactory recovery by the franchisee of amounts payable under this section and the City has not cancelled the franchise in the interim, then the franchisee's obligation to make payment of such amounts shall resume from and after the date of notification by the City of such determination; provided, however, that any such notice shall be given in timely fashion.

(d) No acceptance of any franchise fee payment by the City shall be construed as an accord and satisfaction that the amount paid is in fact the correct amount nor shall acceptance be deemed a release to any claim the City may have for future or additional sums pursuant to this Ordinance. The City shall have the right to inspect the franchisee's income, financial, and gas consumption records relating to gross revenues in order to audit and to recomputed any amounts determined to be payable under this Ordinance. Any additional amount due to the City as a result of the audit shall be paid within ten (10) days following written notice to the franchisee by the City which notice shall include a copy of the audit report. If as a result of such audit or review the City determines that the franchisee has intentionally underpaid its franchise fee by five percent (5%) or more for any calendar month then in addition to making full payment of the relevant obligation, the franchisee shall reimburse the City for all of the reasonable costs associated with the audit or review, including all out-of-pocket costs for attorneys, accountants and other consultants. However, if such audit or review is performed in connection with a granting of a franchise, a

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transfer of control, or a modification, the franchisee shall reimburse the City for all of the reasonable costs associated with the audit or review.

- (e) In the event that any franchise payment or recomputed amount is not made on or before the applicable dates heretofore specified, interest shall be charged from such date at the annual rate of eight percent (8%). Overpayments discovered by the City or the franchisee shall be an adjustment on the next monthly payment without interest.
- (f) The City reserves the right to require the franchisee to collect any consumer or other tax or other fee that may be imposed on subscribers by the City.

SECTION 12. (1) The consideration set forth in the preceding section shall be paid and received in lieu of any tax, license, charge, fee, street or alley rental, or any other character of charge for the use and occupancy of the streets. It shall further be in lieu of any inspection fee tax, easement tax, franchise tax whether levied as an ad valorem, special, or other character of tax, and any other tax, license, fee, or imposition other than the usual general or special ad valorem property taxes now or hereafter levied.

(2) Should the City not have the legal power to declare that the payment of the foregoing consideration shall be in lieu of such taxes, licenses, fees, and impositions, then the City declares that, should any such tax, license, fee, or other imposition be imposed upon the company, then to the extent necessary, the consideration to be paid hereunder may be applied toward the satisfaction of such obligations.

SECTION 13. (1) Any violation by the company, its vendee, lessee, or successor of the provisions of this franchise or any material portions thereof, or the failure promptly to perform any of the provisions thereof, shall be cause for the forfeiture of this franchise and all rights hereunder after written notice to the company and continuation of such violation, failure or default.



(2) For violation of any of the following provisions of this Ordinance, the penalties shall be recoverable as follows:

- (a) For intentional failure to complete any construction requiring a permit in accordance with the time constraints, set forth in this Ordinance, unless the City Manager specifically approves the delay by resolution because of reasons beyond the control of the franchisee, the franchisee shall forfeit five hundred dollars (\$500.00) per day or part thereof that the violation continues.
- (b) For intentional failure to provide data and reports as requested by the City and as required in this Ordinance the franchisee shall forfeit one hundred dollars (\$100.00) per day or part thereof that the violation continues.
- (c) For intentional failure to comply with the operational standards following the City Manager directing franchisee to make improvements pursuant to this Ordinance, the franchisee shall forfeit two hundred dollars (\$200.00) per day or part thereof that the violation continues.
- (d) For intentional failure to complete any construction or alteration of Equipment and Apparatus pursuant to the time constraints set forth in this Ordinance or within such time as is set by the City Manager, the franchisee shall forfeit five hundred dollars (\$500.00) per day or part thereof that the violation continues.
- (e) For intentional failure to pay the franchise fee when due pursuant to Section 12 or any itemized bill presented by the City pursuant to this Ordinance,

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the franchisee shall forfeit one hundred dollars (\$100.00) per day or part thereof that the violation continues.

- (f) For intentional failure to comply within thirty (30) days of any City Commission resolution directing compliance with any other provisions of this Ordinance, the franchisee shall forfeit one hundred dollars (\$100.00) per day or part thereof that the violation continues.
- (g) The franchisee shall not be excused from complying with any of the terms and conditions of this Ordinance by any failure of the City, upon any one or more occasions, to insist upon the franchisee's performance or to see franchisee's compliance with any one or more of such terms or conditions. Payment of penalties shall not excuse non-performance under this Ordinance. The right of the City to seek and collect penalties as set forth in this section are in addition to its right to terminate and cancel as set forth in this Ordinance.

SECTION 14. The franchise created by this ordinance shall become effective on July 1, 2010, as expressed in the ordinance of acceptance which additionally fixes the fees to be paid.

SECTION 15. All ordinances and parts of ordinances in conflict herewith, to the extent of such conflicts only, are hereby repealed.

SECTION 16. This ordinance shall be in full force and effect from and after its adoption, readoption and publication, as required by law.



SECTION 17. It is hereby authorized that publication of this ordinance be in summary form.

Thomas E. Kelley
MAYOR

ATTEST:

Delores Mussen
CITY CLERK

ADOPTED BY THE BOARD OF COMMISSIONERS: SEP 03 2009
READOPTED BY THE BOARD OF COMMISSIONERS: SEP 17 2009
PUBLISHED: _____

APPROVED FOR FORM:

Richard W. Mott
CITY ATTORNEY

FRANCHISE ACCEPTED BY:
NATURAL ENERGY UTILITY CORPORATION

H. Jay Freeman
H. JAY FREEMAN, PRESIDENT

REQUESTED/SPONSORED BY: STEPHEN W. CORBITT, CITY MANAGER

/ORDINANCE/Franchise-Gas.Natural Energy

