

ORDINANCE 17-2023

AN ORDINANCE OF THE CITY OF OWENSBORO, KENTUCKY, PROVIDING FOR THE CREATION AND SALE OF A FRANCHISE FOR THE PRIVILEGE OF CONSTRUCTING, TRANSPORTING, OPERATING, MAINTAINING AND DISTRIBUTING NATURAL GAS ALONG AND UNDER PUBLIC RIGHT-OF-WAY WITHIN THE CITY OF OWENSBORO, KENTUCKY, FOR A TERM OF TWENTY (20) YEARS, IN CONSIDERATION FOR WHICH, THE SUCCESSFUL FRANCHISEE SHALL PAY TO THE CITY AN ANNUAL SUM EQUAL TO A MINIMUM OF THREE PERCENT (3%) OF THE GROSS REVENUES DERIVED FROM THE FRANCHISE AWARDED HEREIN; AND FURTHER ESTABLISHING A PROCESS BY WHICH THE SUCCESSFUL FRANCHISEE SHALL BE PERMITTED TO DISTURB AND EXCAVATE PUBLIC RIGHT-OF-WAY WITHIN THE CITY IN ORDER TO CONSTRUCT, INSTALL, MAINTAIN AND/OR REPAIR ITS GAS FACILITIES, FIXTURES AND OTHER INFRASTRUCTURE ON TERMS AND CONDITIONS SET FORTH HEREIN; AND FURTHER ESTABLISHING A BID PROCEDURE FOR THE AWARD OF SAID FRANCHISE TO THE SUCCESSFUL BIDDER.

WHEREAS, the existing natural gas franchise between the City of Owensboro, Kentucky, and Atmos Energy Corporation expired on May 6, 2023; and

WHEREAS, the Constitution of the Commonwealth of Kentucky, Sections 163 and 164, and Chapter 96 of the Kentucky Revised Statutes, authorize municipal corporations to require public utilities, including providers of natural gas within their boundaries, to operate under franchise agreements and to grant utilities the right to use public right-of-way on such terms and conditions as are deemed reasonable and necessary; and further KRS 82.082 authorizes the City to exercise any and all powers within its boundaries that are not in conflict with the Kentucky Constitution or state statutes; and

WHEREAS, the Board of Commissioners of the City of Owensboro, Kentucky, has found and determined that the construction, operation, maintenance

and utilization of a natural gas franchise over, across or under public right-of-way in the City of Owensboro, benefits said utility and the customers it serves and the Board has further found and determined that the construction, installation, removal, maintenance and/or repair of utility-owned facilities and other infrastructures does periodic and unavoidable disturbance that gradually results in the degradation of the City's streets and sidewalks, for which the City is entitled to reasonable compensation in order to offset and recover the costs of reconstructing, removing, repairing or resurfacing damaged public right-of-way; and

WHEREAS, in order to protect the health, safety and welfare of the citizens of Owensboro, Kentucky, to protect and preserve the City's public right-of-way and infrastructure and to provide for the orderly administration of the franchise contemplated herein, it is necessary and appropriate to require the successful franchisee to conduct its business and operations in a lawful manner in compliance with the terms and conditions set forth hereinbelow.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY OF OWENSBORO, KENTUCKY, AS FOLLOWS:

Section 1. DEFINITIONS:

As used in this Ordinance, the following words and phrases shall have the following meanings:

(A) "*Franchise*" shall mean the rights and privileges granted by the City of Owensboro to the successful bidder under the terms and provisions of this Ordinance.

(B) "*Franchisee*" shall mean the person, proprietorship, partnership, company, corporation or other entity to which the franchise created herein, is awarded by separate ordinance.

(C) "*Public Right-of-way*" shall mean the surface, the airspace above the surface and area below the surface of any street, highway, alley, avenue, boulevard, sidewalk, pedestrian/bicycle lane or trail, driveway, bridge, utility

easement or any other public ways owned, dedicated by plat, occupied or used by the public for vehicular or pedestrian transportation or access.

(D) “*Gross Revenues*” refer to and are those amounts of money which the Franchisee receives from its customers within the City’s geographical limits or boundaries for the retail sale of gas under rates, temporary or permanent, authorized by the Commission and represents amounts billed under such rates as adjusted for refunds, the net write-off of uncollectible accounts, corrections or other regulatory adjustments. Additionally, Gross Revenues refers to any fees or rentals received by the Franchisee for the lease of pipeline capacity within the corporate limits of the City of Owensboro. Gross Revenues do not include miscellaneous service charges, including but not limited to turn ons, meter sets, non-sufficient funds, late fees and interest, which are related to but are not a part of the actual retail sale of gas.

(E) “*Gas Distribution System*” shall mean the system of works, pipes, pipelines, facilities, fixtures, apparatus, lines, machinery, equipment, structures, appliances, appurtenances or other infrastructure reasonably necessary for the storage, transportation, distribution or sale of natural, artificial or mixed gas to residential and commercial customers and the public generally, within the corporate boundaries of the City.

(F) “*Force Majeure*” shall mean any cause not reasonably within Franchisee’s control and includes, but is not limited to, acts of god, strikes, lockouts, wars, terrorism, riots, orders or decrees of any lawfully constituted federal, state or local body, contagions or contaminations hazardous to human life or health, fires, storms, floods, wash-outs, explosions, breakages or accidents to machinery or lines of pipe, inability to obtain or the delay in obtaining rights-of-way, materials, supplies, or labor permits, temporary failures of gas supply, or necessary repair, maintenance, or replacement of facilities used in the performance of the obligations contained hereunder.

(G) “*New Construction*” shall mean installation of piping or other apparatus by Franchisee in a new location as opposed to repair or maintenance work on existing piping or other apparatus.

Section 2. CREATION OF FRANCHISE:

(A) There is hereby created a non-exclusive Franchise to enter upon, acquire, construct, operate, maintain and repair in the Public Right-of-way of the City, a gas distribution system within the corporate boundaries of the City, subject to the provisions of this ordinance. The Franchise granted hereunder shall be extended to territories that are annexed within the City upon the same terms and conditions herein, subject to the approval of state regulatory authorities, if any such approval is required.

(B) After the initial grant of a franchise pursuant to this ordinance, the City shall not grant, to any other person or entity, a right or franchise to utilize the Public Rights-of-way for natural gas distribution purposes unless such right or franchise is to serve at least 80% of the franchise area or serves an area (or areas) of the City that Franchisee will not serve within a reasonable amount of time, not to exceed one hundred eighty (180) days. In the event the City shall grant such right or franchise to another person or entity during the term hereof, within the corporate boundaries of the City, the terms of any such right or franchise shall be no more favorable to such new additional franchisee than those terms contained in this ordinance. Additionally, any such new/additional Franchisee shall have no right to use any portion of the Gas Distribution System of initial Franchisee without the initial Franchisee's written consent.

(C) The City shall not construct or cause to be constructed, a gas distribution system duplicating Franchisee's Gas Distribution System or otherwise obtain or acquire a similar gas distribution system other than by the purchase of Franchisee's Gas Distribution System, at its fair market value, or by the acquisition of such system by the exercise of the power of eminent domain.

Section 3. TERM OF FRANCHISE:

The Franchise created herein shall be for a term of twenty (20) years from the date of the Franchise as awarded by the Owensboro Board of Commissioners. No terms of this Franchise shall survive beyond the termination date of this Franchise, with the exception of the indemnification provisions contained in Section 9, which shall survive beyond the term of the Franchise and the following

provision which shall also survive beyond the term of the Franchise: neither the City nor any other person or entity shall have any right to use any portion of Franchisee's Gas Distribution System without payment of a fair value for such system to Franchisee.

Section 4. FRANCHISE CONSTITUTES CONTRACT:

The franchise created herein, when awarded and approved by the Board of Commissioners of the City of Owensboro, Kentucky, shall constitute a contract between the City of Owensboro and the franchisee, the terms of which shall be as herein stated and incorporated in a franchise agreement to be executed by the parties thereto.

Section 5. FRANCHISEE'S RIGHTS IN AND TO PUBLIC RIGHT-OF-WAY:

The Franchisee shall have the right and privilege of constructing, erecting, laying, operating, maintaining, replacing, removing and/or repairing a gas distribution system through, along, across and under the Public Right-of-way within the corporate boundaries of the City as it now exists or may hereafter be constructed or extended, subject to the inherent police powers conferred upon or reserved unto the City and the provisions of this ordinance.

Section 6. OPERATION OF FRANCHISE SYSTEM; EXCAVATION OF PUBLIC RIGHT-OF-WAY:

(A) The Gas Distribution System of the Franchisee shall, at all times, be installed, operated and maintained in good working condition as will enable the Franchisee to furnish adequate and continuous service to all of its residential, commercial and industrial customers. The distribution system shall be designed, installed, constructed and replaced in locations and at depths which comply with all applicable federal, state and local laws and regulations regarding minimum safety standards for design, construction, maintenance and operation of gas distribution systems.

(B) In addition to complying with all of the requirements of all applicable law, any Franchisee shall:

(1) construct and operate the Gas Distribution System under this Franchise in accordance with all generally accepted industry codes and standards that are applicable;

(2) complete work hereunder in a workmanlike manner and so as not to unnecessarily interfere with public use of the Public Right-of-way.

(C) Although the Franchisee shall have the right to disturb, break, and excavate in the Public Right-of-way of the City as may be reasonable and necessary to provide the service authorized by this Franchise, it shall give the notice and/or obtain the cut permit as required below.

(D) Franchisee shall give prior notification to the City Engineer of any construction work by Franchisee on or in any Public Right-of-way (including streets, sidewalks, curbs, gutters, drainage facilities or other street installations) that will necessarily involve the cutting of any blacktop or concrete on a Public Right-of-way, or any other excavation in a Public Right-of-way that is reasonably expected to interrupt the flow of traffic on the Public Right-of-way. In the event a street, sidewalk, curb or gutter is to be cut, the Franchisee shall obtain a "cut permit" from the City.

Nothing in the above provisions is intended to require Franchisee to give a notification to the City Engineer for any routine maintenance or repair work not involving the cutting of a public street, sidewalk, curb or gutter (in which event Franchisee would be required to obtain a "cut permit" from the City Engineer) or not involving an interruption of traffic flow on a city street.

Additionally, nothing herein is intended to impose on Franchisee any obligation to give notification to the City Engineer or obtain a "cut permit" for work on customers' service lines. Provided, Franchisee, shall be required to give advance notification to the City Engineer of installation of a new main within the city limits and provide a copy of the plans to the City Engineer of the new main.

(E) To the extent reasonably practical, Franchisee shall schedule and coordinate installation, construction, maintenance, replacement or repairs of its Gas Distribution System with proposed improvements to the City Public-Right-of-way that have been designated (and which Franchisee has specifically been

advised of) for improvement, resurfacing or repair prior to the commencement thereof. In the event Franchisee should in the future implement a written program for the systematic replacement of Gas Distribution System components located in the Public Right-of-way that have exhausted their useful life, Franchisee shall make a copy of same available to the City Engineer for inspection and shall to the extent practical, use its best efforts to follow same. Any replacement program shall, to the extent reasonably practical, be scheduled to coincide with the City's annual right-of-way pavement program.

(F) When a situation arises that requires immediate attention, Franchisee is authorized to disturb, break or excavate Public Right-of-way without first obtaining written permission from the City Engineer, provided that Franchisee files for a cut permit as soon thereafter as is reasonably practicable under the circumstances. Any restoration of disturbed or excavated Public Right-of-way shall be completed in accordance with Section 7 below.

Section 7. DEGRADATION/RESTORATION OF PUBLIC RIGHT-OF-WAY:

(A) When the Franchisee shall enter upon any Public Right-of-way for the purpose of constructing, erecting, installing, operating, maintaining, repairing and/or removing any part of its Gas Distribution System, it shall promptly and diligently prosecute the work to completion at its sole expense and shall repave, cover and restore all trenches and exposed areas as quickly as circumstances permit; and shall leave all Public Right-of-way in as good a condition as existed when Franchisee entered upon same for the purpose of commencing the work. Franchisee shall perform such restoration of Public Right-of-way work in conformity with all applicable city construction standards. Any repairs to Public Right-of-way necessitated by reason of Franchisee's failure to comply with city construction standards shall be performed by Franchisee, at its expense, for a period of twelve (12) months following the date Franchisee completed the particular restoration work. However, notwithstanding the foregoing restoration requirements, Franchisee shall upon request by the City Engineer and at its sole expense, repave all street pavement located within an entire street-block if Franchisee, its employees, contractors or agents, have undertaken an authorized

excavation of street right-of-way that has been repaved within six (6) months of the excavation where Franchisee knew or should have known that it would need to excavate the new pavement within six (6) months of the City notifying Franchisee of the roads that will be repaved. Provided, however, the provisions of the foregoing sentence shall not apply to the extent the excavation was necessitated by an act of the City or by an act of God, or by an act of a third party with whom Franchisee is not in privity of contract or over whom Franchisee has no control or, in order to fix or repair a potentially, or actual, dangerous condition (e.g. an emergency) or to accommodate a request for service by a new customer. In the event Franchisee is required to repave an entire street-block of pavement right-of-way, the City shall, once the City Engineer has inspected and approved the completed project, assume responsibility for the maintenance of the improved right-of-way. All restorations or repairs of Public Right-of-way shall be performed in accordance with the City's Public Improvement Specifications and approved by the City Engineer. All restoration or repairs performed by the Franchisee may be subject to inspection at any time by the City Engineer or his designee. In the event Franchisee fails, refuses or neglects to comply with this provision, the City shall have the right, after Franchisee is first given notice and an opportunity to comply with the foregoing provisions, to repair or restore the affected Public Right-of-way; and the costs and expenses incurred by the City as a result thereof, shall be paid to the City by Franchisee within ten (10) days from the date on which an itemized bill is submitted to the Franchisee.

(B) In the construction, installation, maintenance, repair or removal of any of its Gas Distribution System, or any part thereof, Franchisee shall exercise due regard for the rights of the City of Owensboro, pedestrians and motorists, and shall not unreasonably or unnecessarily interfere with or injure, City property, or the private property of others, under, on, over, across or above the ground. Franchisee shall comply with all applicable laws with respect to signalization, placement of lights, danger signals or warning signs. All work performed by Franchisee hereunder shall be done in a workmanlike manner and shall not unnecessarily interfere with public use of the City's right-of-way or property.

(C) Franchisee shall, upon request by the City, remove, move, modify, relocate, reconstruct or adjust any of its Gas Distribution System located within Public Right-of-way, at its own expense, if the City of Owensboro, in its sole discretion, constructs, reconstructs, widens, alters, excavates, paves, repaves, repairs, changes or improves any Public Right-of-way as part of any public improvement project, and such work requested by the City shall be accomplished by Franchisee within thirty (30) days after notice thereof by the City; provided, however, if the work requested of Franchisee cannot be reasonably completed within the said thirty (30) day period, Franchisee shall have such additional time to complete its work as may mutually be agreed upon between Franchisee and the City Engineer.

(D) If the City requires the Franchisee to adapt or conform its Gas Distribution System or to in any way construct, reconstruct, remove, alter, relocate, adjust or change its system to enable any other person, firm, corporation or entity, whether public or private, other than the City, to utilize Public Right-of-way, Franchisee shall be reimbursed for all costs incurred by the Franchisee from the person, firm, franchisee, corporation or entity requesting or required by the City to perform such change, construction, removal, repair, maintenance, alteration or relocation. The City shall not be required to reimburse the Franchisee for charges to adapt or conform its Gas Distribution System or to in any way construct, reconstruct, remove, alter, relocate, adjust or change its system to enable the City to utilize Public Right-of-way.

Section 8. COMPENSATION FOR USE OF PUBLIC RIGHT-OF-WAY AND CONSIDERATION FOR FRANCHISE:

(A) In consideration for the granting and exercise of the rights and privileges created under any franchise granted pursuant to this ordinance and for the use by Franchisee of the streets, roads, highways, alleys, and public ways, Franchisee shall pay to the City, within thirty (30) days after the end of each calendar quarter, a franchise fee equal to three percent (3%) of Franchisee's Gross Revenues for the preceding calendar quarter. Franchisee may add a line-item surcharge to the monthly bills of customers located within the City, which

surcharge may be designated as a City franchise fee in an amount sufficient to recover the franchise fee paid by the Franchisee to the City, in the manner authorized by Franchisee's tariffs on file with the Kentucky Public Service Commission.

(B) The Franchise fee provided herein, together with any charges of the City for water, sewage, and garbage services provided by the City to Franchisee, and any occupational license fees or property tax payable to the City by the Franchisee, shall constitute the only amount for which Franchisee shall be obligated to pay to the City and shall be in lieu of any and all other costs, levies, assessments, fees, or other amounts, of any kind whatsoever, that the City, currently or in the future, may charge Franchisee or assess against Franchisee's property. The franchise fee herein contemplated shall be uniformly and equally applied to all natural gas and electric utilities, of like services or any other natural gas service that competes with the Franchisee, such that Franchisee will be excused from collecting and paying franchise fees and/or taxes if Franchisee's competitors are not also required to do so.

(C) If during the term of the Franchise the boundaries of the City are expanded, the City will promptly notify Franchisee in writing of any geographic areas annexed by the City during the term hereof ("Annexation Notice"). Any such Annexation Notice shall be sent to Franchisee by certified mail, return receipt requested, and shall contain the effective date of the annexation, maps showing the annexed area and such other information as Franchisee may reasonably require in ascertaining whether there exist any customers of Franchisee receiving natural gas service in said annexed area. To the extent there are such customers therein, then the revenue of Franchisee derived from the retail sale of natural gas to such customers shall become subject to the franchise fee provisions hereof effective on the first day of Franchisee's billing cycle immediately following Franchisee's receipt of the Annexation Notice. The failure by the City to advise Franchisee in writing through proper Annexation Notice of any geographic areas which are annexed by the City shall relieve Franchisee from any obligation to remit any franchise fees to City based upon revenues derived by Franchisee from the

retail sale of natural gas to customers within the annexed area prior to City delivering an Annexation Notice to Franchisee in accordance with the terms hereof.

(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.

(E) The City shall have the right to inspect records related to the Franchisee's income, financial condition, and to gross revenues in order to audit, and to re-compute 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 underpaid its franchise fee by five percent (5%) or more for any six (6) month period then in addition to making full payment of the relevant obligation it shall reimburse the City for all of the reasonable costs associated with the audit or review. If such audit or review is performed in connection with the granting of a new Franchise, an extension of the terms of this Franchise, a sale or transfer of control of the Franchisee, or a substantive modification of the terms to, or an assignment of this Franchise, 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.

(F) 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 the prime rate plus two percent (2%). Overpayments discovered by the City or the Franchisee shall be an adjustment on the next monthly payment without interest.

Section 9. ADDITIONAL REQUIREMENTS; INSURANCE AND INDEMNIFICATION AND PERFORMANCE BOND:

(A) During the term of this Franchise, Franchisee shall, at its own cost and expense, maintain a self insurance program at levels that are equal to or greater than what Franchisee presented to the City prior to the granting of this Franchise.

(B) **Indemnification:** Franchisee shall at all times indemnify and hold harmless the City, its officials, boards, members, agents, and employees free and harmless against any and all claims, suits, causes of action, proceedings, judgments for damages or equitable relief, and costs and expenses, including reasonable attorney's fees arising from liability or claims of liability on account of injuries or damage to persons or property growing out of the construction, maintenance, repair and operation of its gas system. In the event that suit shall be brought against the City either independently or jointly with the Franchisee on account hereof, the said Franchisee, upon notice by the City, shall defend the City in any such suit at the cost of the Franchisee and in the event of final judgment being obtained against the City either independently or jointly with the Franchisee, the Franchisee shall pay such judgment with all costs and hold the City harmless therefrom except to the extent such claims, suits, causes of action, proceedings, damages, liabilities or judgments were caused by the act or omission of the City, its officials, boards, members, agents, or employees.

(C) **Performance Bond:** The Franchisee shall abide by all performance bond requirements of the City as governed by the City's ordinances, regulations and permitting processes. Notwithstanding the above-mentioned bonding requirements, the Franchisee shall be required to provide a performance guarantee for significant projects with construction costs of two hundred thousand dollars (\$200,000) or more involving the Public Right-of-way. This performance guarantee shall be set in an amount and duration as reasonably determined by the City upon discussing and viewing the scope of such a project with the Franchisee, and shall be in favor of the City to be issued by an entity subject to jurisdiction and venue in Daviess County, Kentucky.

(D) At all times and under all circumstances the Franchisee shall be obligated to do everything reasonably within its power to ensure that its customers

in the City of Owensboro receive uninterrupted service, unless such customer has elected interruptible service. The Franchisee shall have facilities available in Owensboro to accept payments from customers and have sufficient Owensboro based personnel to reasonably provide customer services and emergency response to Owensboro customers.

Section 10. TRANSFER OR ASSIGNMENT OF FRANCHISE:

(A) No assignment or transfer of control of this Franchise or the Gas Distribution System subject to this Franchise shall take place without at least sixty (60) days advance written notice to the City.

(B) Any entity operating the Gas Distribution System in the City of Owensboro as a result of an assignment or transfer of control of this Franchise or the Gas Distribution System shall assume and be responsible for all of the following obligations and liabilities under:

- (1) This Franchise and
- (2) All federal, state and local statutes, ordinances, codes and/or regulations.

(C) The Franchisee shall not object to the City's intervention in any action before the Public Service Commission involving the assignment or transfer of control of the Franchisee.

(D) Franchisee may transfer or assign the franchise created by this ordinance to any other person, proprietorship, partnership, firm or corporation without the consent of the City, upon approval of the Kentucky Public Service Commission.

Section 11. CITY'S RIGHT OF INSPECTION AND ACCESS TO FACILITIES OF FRANCHISEE:

(A) The City, through its Board of Commissioners, City Manager, City Engineer, City Attorney, or such other assistants as it may employ or designate, at all times reasonable, shall have access to, and the right to inspect, all or any of the property owned or used in part or in whole by the Franchisee in its operating and maintaining the Gas Distribution System under this Franchise and located within the Public Right-of-way. In like manner, the City's above-mentioned officers and

assistants may at all reasonable times and under reasonable conditions with prior notice, inspect, examine or verify all or any of the accounts, books, records, contracts, documents or papers of the Franchisee (other than “confidential information” as determined from time to time by the Kentucky Public Service Commission) relating to Gross Revenues in the City of Owensboro in order to audit and recompute any amounts determined to be payable under this Ordinance consistent with the provisions of Section 8 of this Ordinance. In the event that the City determines that it desires an audit of this Franchise, the Franchisee shall comply with all reasonable requests of the City pertaining to obtaining any information or documentation from the Franchisee reasonably necessary to the administration of this Franchise.

(B) The Franchisee shall provide City and/or its Board of Commissioners with information pertaining to its provision of services pursuant to this Franchise upon reasonable request. This may include, but is not necessarily limited to attending public meeting(s) involving some or all of the Board of Commissioners in order to provide such information upon reasonable advance notice and providing an annual update to the Board of Commissioners upon its request.

Section 12. BREACH OF FRANCHISE; REMEDIES:

(A) If the City finds that the Franchisee has violated any of the following provisions of this Franchise, the following penalties shall be recoverable. The decision of the City shall be the final administrative decision and shall be in writing and provide the basis for the decision. The decision shall not become effective for a period of thirty (30) days during which period Franchisee may appeal to a court of competent jurisdiction.

(1) For failure to complete any construction project by no later than the ending term of any Franchise awarded pursuant to this Ordinance or any extension thereof, the Franchisee shall pay five hundred dollars (\$500.00) per day or part thereof that the violation continues; in lieu of a penalty, the Franchisee may post a performance bond, letter of credit or other surety acceptable to the City in an amount sufficient to complete

such construction projects. This section shall not apply to any projects for which performance bonds or other surety is already pledged.

(2) For failure to provide data and reports which are required to be provided by the terms of the Franchise within thirty (30) days after being requested by the City, the Franchisee shall pay one hundred dollars (\$100.00) per day or part thereof that the violation continues.

(3) For failure to pay the franchise fee within fifteen (15) days after City has notified Franchisee that the franchise fee was not received when due pursuant to Section 8 of this Franchise, the Franchisee shall pay one hundred dollars (\$100.00) per day or part thereof that the violation continues.

(B) If the Franchisee fails to comply within thirty (30) days of receipt by Franchisee of any Commission resolution directing compliance with any other provisions of this Franchise the Franchisee shall pay one hundred dollars (\$100.00) per day or part thereof that the violation continues. The decision of the Commission may be appealed to a court of competent jurisdiction.

(C) The Franchisee shall not be excused from complying with any of the terms and conditions of this Franchise by any failure of the City, upon any one or more occasions, to insist upon the Franchisee's performance or to seek the Franchisee's compliance with any one or more of such terms or conditions. Payment of penalties shall not excuse non-performance under this Franchise. The right of the City to seek and collect penalties as set forth in this section is in addition to its right to terminate and cancel the Franchise.

(D) In addition to all other rights and powers pertaining to the City by virtue of the Franchise or otherwise, the City, by and through its Commission, reserves the right to terminate and cancel this Franchise awarded pursuant to this Ordinance and all rights and privileges of the Franchisee hereunder in the event that the Franchisee:

(1) Willfully violates any material provision of the Franchise or any material rule, order, or determination of the City made pursuant to the

Franchise, except where such violation is without fault or through excusable neglect, including but not limited to cases of force majeure;

- (2) Willfully attempts to evade any material provision of the Franchise or practices any fraud or deceit upon the City;
- (3) Knowingly makes a material misrepresentation of any fact in the application, proposal for renewal, or negotiation of the Franchise; or
- (4) Fails to begin service restoration following seventy-two (72) consecutive hours of interrupted service, except when approval of such interruption is obtained from the City. Such approval shall not be unreasonably withheld. In cases of force majeure or acts beyond the Franchisee's control approval by the City shall be granted. The Franchisee shall provide, if requested by the City, daily restoration status reports.

In the event the City believes it has the right to terminate this franchise under the provisions above, the City may terminate the franchise and rights granted to Franchisee hereunder, provided, however, that such termination shall not be effective unless and until the procedures described below have been followed:

- (a) City must deliver to Franchisee, by certified or registered mail, a written notice signed by the mayor or other duly authorized member of City's governing body, attested by the City's secretary, and sealed with the official seal of the City. Such notice must (i) fairly and fully set forth in detail each of the alleged acts or omissions of Franchisee that the City contends constitutes a substantial breach of any material provision hereof, (ii) designate which of the terms and conditions hereof the City contends Franchisee breached, and (iii) specify the date, time, and place at which a public hearing will be held by the governing body of the City for the purpose of determining whether the allegations contained in the notice did in fact occur, provided, however, that the date of such hearing may not be less than thirty (30)

days after the date of such notice.

(b) Within thirty (30) days following the adjournment of the public's hearing described in the subsection above, the City must deliver to Franchisee, by certified or registered mail, a written notice signed by the mayor or other duly authorized member of City's governing body, attested by the City's secretary, and sealed with the official seal of the City, setting forth (i) the acts and omissions of Franchisee described in the first notice that the governing body of the City determines to have in fact occurred and (ii) the specific terms and conditions hereof listed in the first notice that the governing body of the City determines to have in fact been breached by such acts or omissions of Franchisee.

(c) The City must permit Franchisee the opportunity to substantially correct all of the breaches hereof set forth in the written notice described in the subsection above within sixty (60) days after Franchisee's receipt of such notice.

Section 13. FORCE MAJEURE:

Notwithstanding anything expressly or impliedly to the contrary contained herein, in the event Franchisee is prevented, wholly or partially, from complying with any obligation or undertaking contained herein by reason of any event of Force Majeure, then, while so prevented, compliance with such obligations or undertakings shall be suspended, and the time during which Franchisee is so prevented shall not be counted against it for any reason.

Section 14. GENERAL PROVISIONS:

(A) Franchisee may remove all or any part of its Gas Distribution System upon the expiration or termination of the Franchise and rights granted hereby. Franchisee shall have a reasonable period of time to effectuate such removal following the expiration or termination of this Franchise.

(B) Any franchise granted pursuant to this ordinance shall extend to, be binding upon, and inure to the benefit of, the parties hereto, and their respective successors and assigns.

(C) In the event of a conflict between the provisions of any Ordinances of the City or portions thereof, and any of the terms and provisions of a franchise granted pursuant to this ordinance, the terms of said franchise shall prevail.

(D) The City, by granting of any franchise pursuant to this ordinance, does not surrender 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 Commonwealth of Kentucky; provided, however, that no ordinance, law, regulation or rule adopted or enacted by the City shall in any way impair, alter, lessen, modify or restrict the rights of the Franchisee under and established by any franchise granted pursuant to this ordinance including, but not limited to, the use of the Public Right-of-way in connection with Franchisee's acquisition, construction, ownership, installation, laying, operation, maintenance, repair or removal of the Gas Distribution System.

(E) Any Franchise awarded pursuant to this ordinance shall be governed by the laws of the Commonwealth of Kentucky, both as to interpretation and performance. In the event of a conflict between the terms of any Franchise created pursuant to this ordinance and the laws of the Commonwealth of Kentucky, the laws of the Commonwealth shall prevail and be controlling. The venue for any litigation related to a Franchise created pursuant to this ordinance shall be in the court of competent jurisdiction in Daviess County, Kentucky.

(F) Any Franchise awarded pursuant to this ordinance does not create a contractual relationship with or right of action in favor of a third party against either the City or the Franchisee.

Section 15. SEVERABILITY:

If any section, subsection or provision of this ordinance or any part thereof is for any reason found unconstitutional or held to be in conflict with any applicable statute or rule of law, or is otherwise held to be unenforceable, the invalidity of any such section, subsection or provision shall not affect any or all other remaining sections and provisions of this ordinance, which shall remain in full force and effect.

Section 16. CONFLICTING ORDINANCES; ORDERS REPEALED:

All prior ordinances, municipal orders, or policies or parts thereof in conflict herewith, are to the extent of such conflict, hereby repealed.

Section 17. EFFECTIVE DATE OF FRANCHISE AND ORDINANCE:

The Franchise created by this ordinance shall become effective when a responsive bid is accepted and notice of award is given to the successful bidder. This ordinance shall become effective upon its legal adoption and publication in the manner prescribed by statute.

INTRODUCED AND PUBLICLY READ ON FIRST READING, this the 6th day of June, 2023.

PUBLICLY READ AND APPROVED ON SECOND READING, this the 20th day of June, 2023.

Thomas H. Watson, Mayor

ATTEST:

Beth Davis, City Clerk