

ORDINANCE NO. 1296-10

AN ORDINANCE GRANTING A NON-EXCLUSIVE GAS UTILITY FRANCHISE TO NORTHWEST NATURAL GAS COMPANY, AND FIXING TERMS, CONDITIONS AND COMPENSATION OF SUCH FRANCHISE.

THE CITY OF TUALATIN, OREGON ORDAINS AS FOLLOWS:

Section 1: Definitions and Explanations.

(1) As used in this ordinance:

(a) "City" means the City of Tualatin and the areas within its boundaries, including its boundaries as extended in the future.
(b) "Council" means the legislative body of the City.
(c) "Grantee" means the corporation referred to in Section 2 of this ordinance.

(d) "Gas mains" includes all gas transmission and distribution facilities located on or under any street, bridge or public place within the City.

(e) "Person" includes an individual, corporation, association, firm, partnership and joint stock company.

(f) "Public place" includes any city-owned park, place or grounds within the City that is open to the public but does not include a right of way.

(g) "Right of Way" includes a street, alley, avenue, road, boulevard, sidewalk, thoroughfare, bridge or public highway within the City, but does not include a public place.

(2) As used in this ordinance, the singular number may include the plural and the plural number may include the singular.

Section 2: Rights Granted.

Subject to the conditions and reservations contained in this ordinance, the City hereby grants to NORTHWEST NATURAL GAS COMPANY, a corporation, the right, privilege and franchise to:

(1) Construct, maintain and operate a gas utility system within the City.

(2) Install, maintain and operate on and under the streets, bridges and rights of way of the City, facilities for the transmission and distribution of gas to the City and its inhabitants and to other customers and territory beyond the limits of the City; and

(3) Transmit, distribute and sell gas.

Section 3: Use of Right of Way by Grantee.

(1) Before the Grantee may use or occupy any right of way, the Grantee shall first obtain permission from the City to do so and shall comply with any special conditions the City desires to impose on such use or occupation.

(2) The compensation paid by the Grantee for this franchise includes all compensation for the use of rights of way located within the City as authorized.

Section 4. Duration.

This franchise is granted for a period of 10 years from and after the effective date of this ordinance.

Section 5. Franchise Not Exclusive.

This franchise is not exclusive, and shall not be construed as a limitation on the City in:

(1) Granting rights, privileges and authority to other persons similar to or different from those granted by this ordinance.

(2) Constructing, installing, maintaining or operating any City-owned public utility.

Section 6. Public Works and Improvements Not Affected by Franchise.

The City reserves the right to:

(1) Construct, install, maintain and operate any public improvement, work or facility.

(2) Do any work that the City may find desirable on, over or under any right of way or public place.

(3) Vacate, alter or close any right of way or public place, provided that the City shall make available to Grantee an alternative right-of-way for the location of its facilities.

(4) Whenever the City excavates or performs any work in any of the present and future rights of way and public places of the City, or contracts, or issues permits, for such excavation or work where such excavation or work may disturb Grantee's gas mains, pipes and appurtenances, the City shall notify Grantee in writing sufficiently in advance of such contemplated excavation or work to enable Grantee to take such measures as may be deemed necessary to protect such gas mains, pipes and appurtenances from damage and possible inconvenience or injury to the public. In any such case, the Grantee, upon request, shall furnish maps or drawings to the City or contractor, as the case may be, showing the approximate location of all its structures in the area involved in such proposed excavation or other work.

(5) Whenever the City vacates a right of way or public place for the convenience or benefit of a person or governmental agency or instrumentality, Grantee's right under this franchise shall be preserved as to any of its facilities then existing in such right of way or public place.

Section 7: Continuous Service.

The Grantee shall maintain and operate an adequate system for the distribution of gas in the City. The Grantee shall use due diligence to maintain continuous and uninterrupted 24-hour a day service which shall at all times conform at least to the standards common in the business and to the standards adopted by state authorities and to standards of the City that are not in conflict with those adopted by the state authorities. Under no circumstances shall the Grantee be liable for an interruption or failure of service caused by an act of God, unavoidable accident or other circumstances beyond the control of the Grantee through no fault of its own.

Section 8: Safety Standards and Work Specifications.

(1) The facilities of the Grantee shall at all times be maintained in a safe, substantial and workmanlike manner.

(2) For the purpose of carrying out the provisions of this section, the City may provide such specifications as may be necessary or convenient for public safety or the orderly development of the City. The City may amend and add to such specifications from time to time.

Section 9: Emergency Operation Provisions

The Grantee will provide the City with an Emergency Response Plan detailing procedures for response to emergencies involving Gas Facilities and other system components. The Grantee may update this plan from time to time, with notice to the City. To the extent practicable, the Emergency Response Plan will include at least the following information:

(1) The names of 24-hour and telephone numbers of responsible parties with the authority to commit the resources of the Grantee.

(2) The name and 24-hour telephone numbers of the Grantee's Emergency Coordinator and other emergency contacts available to response during emergencies.

(3) How the Grantee's response personnel will interface with local first responders during emergencies.

Section 10: Control of Construction.

The Grantee shall file with the City maps showing the location of any construction, extension or relocation of its gas mains in the right of way and public places of the City and shall obtain approval from the City of the location and plans prior to commencement of the work. The City may require the Grantee

to obtain a permit before commencing the construction, extension or relocation of any of its gas mains.

Section 11: Right of Way Excavations and Restorations.

(1) Subject to the provisions of this ordinance, the Grantee may make necessary excavations for the purpose of constructing, installing, maintaining and operating its facilities. Except in emergencies, and in the performance of routine service connections and ordinary maintenance, on private property, prior to making an excavation in the traveled portion of a right of way or public place, and, when required by the City, in any untraveled portion of a right of way or public place, the Grantee shall obtain approval from the City of the proposed excavation and of its location. Grantee shall give notice to the City by telephone, electronic data transmittal or other appropriate means prior to the commencement of service or maintenance work and as soon as is practicable after the commencement of work performed under emergency conditions.

(2) When any excavation is made by the Grantee, the Grantee shall promptly restore the affected portion of the right of way or public place to the same condition in which it was prior to the excavation. The restoration shall be in compliance with specifications, requirements and regulations of the City in effect at the time of such restoration. If the Grantee fails to restore promptly the affected portion of a right of way or public place to the same condition in which it was prior to the excavation, upon thirty (30) days prior written notice to Grantee, the City may make the restoration and the cost thereof shall be paid by the Grantee.

Section 12: Location and Relocation of Facilities.

(1) All facilities of the Grantee shall be placed so that they do not interfere unreasonably with the use by the City and the public of the right of way and public places and in accordance with any specifications adopted by the City governing the location of facilities.

(2) The City may require, in the public interest, the removal or relocation of facilities maintained by the Grantee in the rights of way and public places of the City, and the Grantee shall remove and relocate such facilities within a reasonable time after receiving notice to do so from the City. The cost of such removal or relocation of its facilities shall be paid by the Grantee, but when such removal or relocation is required for the convenience or benefit of any person, governmental agency or instrumentality other than the City, Grantee shall be entitled to reimbursement for the reasonable cost thereof from such person, agency or instrumentality. The City shall provide the Grantee with timely notice of any anticipated requirement to remove or relocate its facilities and shall cooperate with the Grantee in the matter of assigning or allocating the costs of removal or relocation.

Section 13: Compensation.

(1) As compensation for the franchise granted by this ordinance, the Grantee shall pay to the City an amount equal to five percent (5%) of the gross revenue collected by the Grantee from its customers for gas consumed within the City. Gross revenue shall be computed by deducting from the total billings of the Grantee, the total net write-off of uncollectible accounts, revenues derived from the sale or transportation of gas supplied under an interruptible tariff schedule, revenues paid directly by the United States of America or any of its agencies, and sales of gas at wholesale by the Grantee to any public utility or public agency where the public utility or public agency purchasing such gas is not the ultimate consumer. Any increase in the rate of compensation payable under this franchise shall be owed only for charges both billed to and paid by Grantee's customers after the date of franchise acceptance by the Grantee.

(2) The compensation required by this section shall be due for each calendar year, or fraction thereof, within sixty (60) days after the close of such calendar year, or fraction thereof. Within sixty (60) days after the termination of this franchise, compensation shall be paid for the period elapsing since the close of the last calendar year for which compensation has been paid.

(3) The Grantee shall furnish a statement to the City showing the amount of gross revenue of the Grantee within the City for the period covered by the payment computed on the basis set out in subsection (1) of this section with each payment of compensation required by this section. The compensation for the period covered by the statement shall be computed on the basis of the gross revenue so reported. If the Grantee fails to pay the entire amount of compensation due the City through error or otherwise, the difference due to City shall be paid by the Grantee within fifteen (15) days from discovery of the error or determination of the correct amount. Any overpayment to the City through error or otherwise, shall be offset against the next payment due from the Grantee.

(4) Acceptance by the City of any payment due under this section shall not be deemed to be a waiver by the City of any breach of this franchise occurring prior thereto, nor shall the acceptance by the City of any such payments preclude the City from later establishing that a larger amount was actually due, or from collecting any balance due to the City.

(5) Late payments shall accrue interest from the due date at 9%, and shall be computed based on the actual number of days elapsed from the due date until payment is made. Interest shall accrue without regard to whether the City has provided notice of delinquency.

(6) The City may require one audit during the term of this agreement.

A) The City may audit Grantee's calculation of Gross Revenues. Within 30 days after receiving a written request from the City, or such other time frame as agreed by both parties, Grantee shall furnish, in accordance with Section 16 of this agreement, the City and any auditor retained by the City:

(a) information sufficient to demonstrate that Grantee is in compliance with this Franchise; and

(b) in accordance with Section 16, access to all books, records, maps and other documents maintained by Grantee with respect to

Grantee facilities that are necessary for the City to perform such audit., provided that only payments that occurred or should have occurred during a period of thirty-six (36) months prior to the date the City notified the Grantee of its intent to perform an audit of financial review shall be subject to such audit or financial review. Grantee shall provide access to such information to City within the City during regular Grantee business hours.

B) If the City's audit shows that the amounts due to the City are higher than those based on the Grantee's calculations of Gross Revenue, then Grantee shall pay the difference within sixty (60) days after the delivery to Grantee of the audit results. In addition to paying any underpayment, Grantee shall pay interest at the prevailing annual average yield of the State of Oregon's local government investment pool (also called the Oregon Short-Term Fund-OSTF), but not penalties, as specified in this Franchise, from Revenue resulted in an overpayment to the City by five percent or more in any one year, the Grantee may deduct such overpayment from the next annual franchise fee payment. If the City's audit shows that the amounts due to the City based the Grantee's calculation of Gross Revenue deviated by five percent (5%) or more in any one year from the City's calculation during the audit, Grantee shall reimburse the City for the cost of the audit, not to exceed one percent (1%) of the total annual franchise payment for the applicable audit period.

(7) Upon 30 days' prior written notice by either party to the other, the amount of such annual compensation shall be subject to renegotiation and redetermination at or before the expiration of the first five-year period, respectively, of the term of the franchise hereby granted, for the ensuing five-year period of said franchise term.

(8) In the event the Grantee enters into a franchise agreement with another municipality in the State of Oregon for a term comparable to this Franchise and Grantee agrees to pay a franchise fee that is higher than the fees set out in this Franchise, Grantee shall notify City in writing of the details of this arrangement within sixty (60) days of its effective date. Upon receipt by the City of this notice, City may elect to renegotiate the franchise fee for this Franchise and require payment of a similar fee as provided to the third party. Any change in the Franchise fee under this section shall become effective on January 1 of the following calendar year.

Section 14: Expiration.

At the end of the Franchise term, if the City and Grantee are negotiating another franchise and have not concluded their negotiations, Grantee's rights and responsibilities shall be controlled by this Franchise until the City grants a new franchise and Grantee accepts it.

Section 15: Books of Account and Reports.

The Grantee shall keep accurate books of account at an office in Oregon for the purpose of determining the amounts due to the City under Section 12 of

this ordinance. The City may inspect the books of account at any time during business hours and may audit the books from time to time. The Council may require periodic reports from the Grantee relating to its operations and revenues within the City.

Section 16: Supplying Maps Upon Request.

The Grantee shall maintain on file, at an office in Oregon, maps and operational data pertaining to its operations in the City. Upon reasonable notice, an authorized representative of the City may inspect the maps and data any time during business hours at an office of the Grantee. Grantee and the City may determine that the locations of certain gas facilities should be confidential as the public interest may require. In such a case, Grantee is under no obligation to provide records of the location of these facilities to the City and the City shall treat any public record disclosing the location of these facilities as confidential, subject to the provisions of state law and the Oregon Public Records Law. The City shall limit access to any such confidential record to trustworthy employees of the City with a need to know the information set out in the record. The City shall store any such confidential record in a secure and private place and avoid making and distributing copies of the record.

Section 17: Indemnification.

The Grantee shall indemnify and save harmless the City and its officers, agents and employees from any and all loss, cost and expense arising from damage to property and/or injury to, or death of, persons due to any wrongful or negligent act or omission of the Grantee, its agents or employees in exercising the rights, privileges and franchise hereby granted.

Section 18: Assignment of Franchise.

This franchise shall be binding upon and inure to the benefit of the successors, legal representatives and assigns of the Grantee.

Section 19: Termination of Franchise for Cause.

The City may terminate this franchise as provided in this Section, subject to Grantee's right to a court review of the reasonableness of such action, upon the willful failure of the Grantee to perform promptly and completely each and every material term, condition or obligation imposed upon it under or pursuant to this ordinance. The City shall provide the Grantee written notice of any such failure and the Grantee shall have sixty (60) days from receipt of notice to cure such failure, or if such failure cannot reasonably be cured within sixty (60) days, to commence and diligently pursue curing such failure.

Section 20: Remedies Not Exclusive; When Requirement Waived.

All remedies and penalties under this ordinance, including termination of the franchise, are cumulative, and the recovery or enforcement of one is not a bar to the recovery or enforcement of any other such remedy or penalty. The remedies and penalties contained in this ordinance, including termination of the franchise, are not exclusive and the City reserves the right to enforce the penal provisions of any ordinance or resolution and to avail itself of any and all remedies available at law or in equity. Failure to enforce shall not be construed as a waiver of a breach of any term, condition or obligation imposed upon the Grantee by or pursuant to this ordinance. A specific waiver of a particular breach of any term, condition or obligation imposed upon the Grantee by or pursuant to this ordinance shall not be a waiver of any other or subsequent or future breach of the same or of any other term, condition or obligation, or a waiver of the term, condition or obligation itself.

Section 21: Acceptance.

The Grantee shall, within thirty (30) days from the date this ordinance takes effect, file with the City its written unconditional acceptance of this franchise, and if the Grantee fails so to do, this ordinance shall be void.

Section 22. Effective Date and Repeal of Prior Ordinance

This ordinance is effective retroactively to January 1, 2010. Ordinance No. 1037-99 is repealed, effective on January 1, 2010.

INTRODUCED AND ADOPTED this 8th day of February, 2010.

CITY OF TUALATIN, Oregon

BY: _____
Mayor

ATTEST:

BY: B. O'Leary
City Recorder

APPROVED AS TO LEGAL FORM

Brenda L. Braden
CITY ATTORNEY

ACCEPTANCE OF FRANCHISE

TO THE CITY COUNCIL OF THE CITY OF TUALATIN, OREGON

WHEREAS, The City of Tualatin, Oregon, on February 8th, 2010, passed Ordinance No. 1296-10, entitled:

AN ORDINANCE GRANTING A NON-EXCLUSIVE GAS UTILITY FRANCHISE TO NORTHWEST NATURAL GAS COMPANY AND FIXING TERMS, CONDITIONS AND COMPENSATION OF SUCH FRANCHISE.

NOW, THEREFORE, Northwest Natural Gas Company, the Franchisee, accepts the terms, conditions and provisions of Ordinance No. 1296-10 and agrees to be bound and comply with the Ordinance for itself and its successors and assigns.

IN WITNESS WHEREOF, Northwest Natural Gas Company, by and through its duly authorized officers executes this instrument as below subscribed this 10th day of February, 2010.

Northwest Natural Gas Company

By: Margaret K. Murphy

Title: Vice President - General Counsel