

## RESOLUTION NO. 2229

### A RESOLUTION GRANTING A NON-EXCLUSIVE FRANCHISE TO NORTHWEST NATURAL GAS COMPANY

#### THE TROUTDALE CITY COUNCIL FINDS AS FOLLOWS:

1. The City of Troutdale ("City") is authorized to grant non-exclusive franchises to companies desiring to occupy public Rights-of Way within the City boundaries.
2. Northwest Natural Gas Company ("Grantee"), owns, maintains, and operates, in accordance with regulations promulgated by the Public Utility Commission, or other appropriate agency, a natural gas transmission and distribution system and desires to install, operate, and maintain its Equipment in Rights-of-Way in the City of Troutdale.
3. Grantee has been operating its system in the City of Troutdale pursuant to a franchise granted by Ordinance 714. Ordinance No. 776 requires anyone installing facilities in, on or over the Rights-of-Way in the City to first obtain a franchise authorizing use of the Rights-of-Way.
4. The City of Troutdale agrees to extend the franchise to Grantee under the terms and conditions provided in this resolution.

#### NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF TROUTDALE

**Section 1. Definitions.** The following definitions shall apply generally to the provisions of this Franchise:

- 1.1 **City.** "City" means the City of Troutdale, an Oregon municipal corporation, and all of the territory within its corporate boundaries, as may change from time to time.
- 1.2 **City Facilities.** "City Facilities" means City-owned street light poles, lighting fixtures, electroliers, pipes, cable, wire, conduit, or other City-owned structures or equipment located within the Right-of-Way.
- 1.3 **Existing Structures.** "Existing Structures" means light poles, pipes, cable, wire, conduit, vaults, ducts, fiber or similar equipment that is not owned or operated by the City and that is lawfully placed in the Right-of-Way.
- 1.4 **Equipment.** "Equipment" means any tangible component, whether referred to singly or collectively, installed, maintained, or operated by Grantee for the provision of Services.

- 1.5 Emergency.** "Emergency" means a situation involving (a) an unscheduled outage affecting one or more customers, or (b) danger to public safety. Emergency also includes situations where the failure of Grantee to act would result in (a) or (b).
- 1.6 Franchise.** "Franchise" means this franchise agreement as approved by the Troutdale City Council and accepted by Grantee, according to the terms in Section 13.7 of this Franchise.
- 1.7 Grantee.** "Grantee" means Northwest Natural Gas Company, a corporation duly organized and existing under the laws of Oregon, and its lawful successors, assigns, and transferees, as approved by the City under Section 11 of this Franchise.
- 1.8 Gross Revenues.** "Gross Revenues" means revenues received from the use of the Gas Utility System within the City Limits less related net uncollectibles. Gross revenues shall include revenues from the use, rental, or lease of the Gas Facilities, except when those revenues have been paid to Grantee by another franchisee of the City and the paid revenues are used in the calculation of the franchise fee for the operations of the other franchisee within the City Limits. Gross revenues shall not include proceeds from the sale of bonds, mortgage, or other evidence of indebtedness, securities or stocks, or sales at wholesale by Grantee to any public utility or public agency when the public utility or public agency purchasing the gas is not the ultimate customer. Gross Revenues will also not include public purpose charges, provided that such charges or surcharges are required or authorized by federal or state statute, administrative rule, or by tariff approved by the OPUC and raise revenue used solely for a public purpose and not to compensate Grantee for the sale or use of natural gas or for the use, rental, or lease of Grantee's Gas Facilities in the City. Grantee may deduct from gross revenue any license, permit or other fees paid to the City in connection with the Grantee's use of the streets, bridges and public places of the City.
- 1.9 Person.** "Person" means any individual, sole proprietorship, partnership, corporation, association or other organization authorized to do business in the State of Oregon, and includes any natural person.
- 1.10 Qualified Contractor.** "Qualified Contractor" means a person that is knowledgeable about the construction and operation of a natural gas transmission and distribution system, and must be subject to and comply with the qualifying standards as it relates to the work in question as set forth in 49 CFR Part 192, Subpart N – Qualification of Pipeline Personnel.
- 1.11 Right-of-Way.** "Right-of-Way" means the space in, upon, above, along, across, over or under the public streets, roads, highways, lanes, courts, ways,

alleys, boulevards, sidewalks, bicycle lanes, parks, bridges and places used or intended to be used by the general public for travel as the same now or may hereafter exist, that the City has the right to allow Grantee to use. For the purposes of this Franchise Agreement, the Right-of-Way shall be considered inclusive of utility easements ("UE's" or "PUE's") dedicated to the City for the purpose of providing City-owned and/or franchised utilities.

**1.12 Services.** "Services" means the transmission, distribution and sale of natural gas provided by Grantee.

**1.13 Third Party.** Any person, entity or instrumentality other than the City or the Grantee.

## **Section 2. Nature and Term of Grant.**

**2.1 Grant of Franchise.** The City hereby grants Grantee a franchise to install, operate, maintain, remove, reinstall, relocate, and replace a gas utility system, including on Existing Structures or City Facilities in the Right-of-Way for the purposes of transmitting, distributing and selling natural gas. Before Grantee installs Equipment on Existing Structures in the Right-of-Way, Grantee shall obtain permission from the owner of the Existing Structure. This Franchise authorizes Grantee to use the Right-of-Way for Services. This Franchise does not authorize Grantee to install or use facilities in the Right-of-Way for anything other than the Services as defined in Paragraph 1.11. This Franchise does not authorize Grantee to install Equipment on or in City Facilities unless Grantee enters into a separate written agreement with the City that authorizes such installations.

**2.2 Duration.** The term of this Franchise, and all rights and obligations pertaining thereto, shall be 10 years from the effective date of this resolution in accordance with Section 13.9, unless terminated sooner as provided herein.

**2.3 Non-Exclusive.** This Franchise is not exclusive. The City expressly reserves the right to grant franchises or rights to Third Parties, as well as the City's right to use the Right-of-Way for similar or different purposes, as allowed hereunder. This Franchise is subject to all deeds, easements, dedications, conditions, covenants, restrictions, encumbrances, and claims of title of record that may affect the Right-of-Way. Nothing in this Franchise shall be deemed to grant, convey, create, or vest in Grantee a real property interest in land, including any fee, leasehold interest, or easement.

**2.4 Reservation of City Rights.** Nothing in this Franchise shall be construed to prevent the City from constructing sewers, grading, paving, repairing and/or altering any Right-of-Way, laying down, repairing or removing water mains or constructing or establishing any other public work, utility or improvement, including repairs, replacement or removal of City Facilities. All work shall be done, insofar as practicable, so as to not obstruct, injure or prevent the

unrestricted use and operation of Grantee's Services under this Franchise. However, if any of Grantee's Equipment interferes with the construction or repair of any Right-of-Way, public work, utility or improvement, or City Facility, Grantee's Equipment shall be abandoned or relocated in the manner the City shall reasonably direct. Any and all abandonment or relocation shall be at Grantee's sole expense, except when such work is required for the convenience or benefit of a Third Party, Grantee shall be entitled to reimbursement for the reasonable cost thereof from such Third Party. Should Grantee fail to abandon, adjust or relocate its Equipment within sixty (60) days, or as otherwise agreed to by the City, the City may cause and/or effect such abandonment, adjustment or relocation, by a Qualified Contractor and the expense thereof shall be paid by Grantee.

### **Section 3. Compensation.**

- 3.1 Amount.** As compensation for the benefits and privileges granted under this Franchise, and for Grantee's entry upon and deployment within the Right-of-Way, Grantee shall pay to the City an amount equal to 5.94% of Grantee's Gross Revenues (the "Franchise Fee"). This Franchise Fee includes the 2.94% of gross revenues imposed by Troutdale Ordinance 675 §1, 1999 and Troutdale Municipal Code §316.010 ("Privilege Tax").
- 3.2 Due Date.** The Franchise Fee shall be computed and paid within forty five (45) days of the last date in each calendar year quarter period (January 1 through March 31, April 1 through June 30, July 1 through September 30, and October 1 through December 31) for the term of this Franchise. Within sixty (60) days after the termination of this Franchise, the Franchise Fee shall be paid for the period elapsing since the end of the last calendar year quarter period for which compensation has been paid.
- 3.3 Report.** Grantee shall furnish to the City with each payment of compensation required by this section a statement, in a form acceptable to the City, showing the amount of Gross Revenues for the period covered by the payment. Grantee may identify information submitted to the City as confidential by prominently marking any such information with the mark "Confidential" in letters at least one-half inch in height. The City shall treat any such information as confidential and not subject to public disclosure until the City receives any public records request. However, the City shall not be prohibited from publishing in the City annual budget or annual financial statements the amount of any fees received from the Grantee. Grantee understands and accepts the City's obligation to disclose information in accordance with the Oregon Public Record law.
- 3.4 Acceptance of Payment and Recomputation.** If Grantee discovers any

error in the correct amount of compensation due, the City shall be paid within thirty (30) days of discovery of the error or determination of the correct amount. Any overpayment to the City through a confirmed error shall be refunded or offset against the next payment. Acceptance by the City of any payment due under this section shall not be deemed as an accord that the amount paid is the correct amount, nor shall any acceptance of payments be construed as a release of any claim the City may have for additional funds or as a waiver by the City of any breach of this Franchise. Neither the City nor Grantee shall be liable or responsible to the other for any underpayment or overpayment that may have occurred more than thirty-six (36) months prior to the date the City notifies the Grantee of its intent to perform an audit or financial review.

- 3.5 Notification.** If Grantee agrees to pay a franchise fee to any other jurisdiction in Oregon that in combination is higher than 5.94%, Grantee shall notify the City and the City shall have the right to require the higher amount.

#### **Section 4. Construction, Installation and Relocation.**

- 4.1 Construction and Installation.** Subject to applicable City regulations, Grantee may enter upon the Right-of-Way to perform all work that is necessary to install, operate, maintain, remove, reinstall, relocate, and replace Equipment in the City's Right-of-Way, including in or on Existing Structures within the Right-of-Way, and in or on City Facilities provided the City has authorized the installation on a City Facility in a separate written agreement, as required under Section 2.1. Grantee shall be responsible for all construction, installation, and maintenance that is performed, on or to the Grantee's Equipment. Grantee is also responsible for restoring the Right-of-Way, City Facilities, Existing Structures, and all appurtenances to their pre-construction condition or better, in accordance with applicable City standards, within fifteen (15) calendar days of completion of work on Grantee's Equipment. If Grantee's disturbance in the Right-of-Way creates a public safety hazard as determined by the City's Public Works Director, Grantee may be required to repair or restore the Public Right-of-Way within twenty-four (24) hours notice from the City, or such time as agreed between the Public Works Director and Grantee, taking into consideration weather and other relevant factors. Should Grantee fail to make such repairs or restorations within the aforementioned time frames, the City may, after providing notice to Grantee and a reasonable opportunity to cure, perform restoration of the Right-of-Way and the expense thereof shall be paid by Grantee.

- 4.2 No Interference.** Grantee, in the performance and exercise of its rights and obligations under this Franchise, shall not interfere in any manner with the existence and operation of any Rights-of-Way, sanitary sewers, water mains, storm drains, poles, aerial and underground electrical and telephone wires, electroliers, cable television, and other telecommunications, utility, communication system or municipal property, without the express written approval of the owner or owners of the affected utility, property or properties.
- 4.3 Prohibitions.** Chapter 12.11 of the Troutdale Municipal Code requires all new utility lines to be placed below ground. Therefore, Grantee is prohibited from installing any new overhead utility lines. Additionally, except for emergencies or when reasonably necessary, Grantee shall not perform work in the Right-of-Way any earlier nor any later than the hours allowed by Troutdale Municipal Code 8.24 (Noise Control) without first obtaining a noise variance from the Troutdale Police Department, and/or as limited by other applicable ordinances. Grantee shall not perform any excavation or other activity that is likely to result in discharge of visible or measureable erosion or sediments to the public storm and surface water systems without first implementing erosion and sediment control measures in accordance with the City's erosion and sediment control requirements.
- 4.4 Compliance with Laws.** Grantee shall comply with all applicable federal and state laws and City ordinances, resolutions, rules and regulations in the exercise and performance of its rights and obligations under this Franchise.
- 4.5 Obtaining Required Permits.** Grantee shall obtain a permit from the City's Public Works Department prior to excavation, installation, operation, maintenance, removal, reinstallation, relocation or replacement of the Equipment in the Right-of-Way, except for maintenance of above-ground equipment. The City shall promptly respond to Grantee's requests for permits and shall otherwise cooperate with Grantee in facilitating Grantee's deployment of Equipment in the Right-of-Way in a reasonable and timely manner.
- 4.6 Emergency Repairs.** In the event Emergency repairs to Grantee's Equipment are necessary, Grantee shall as soon as reasonably possible notify the City of the need for such repairs. Grantee may immediately initiate such Emergency repairs and, if permits are required by City, apply for appropriate permits the next business day or as soon as reasonably possible following discovery of the Emergency. In the event excavation is necessary in conjunction with the repairs, Section 4.1 shall also apply.
- 4.7 Location of Equipment.** Grantee shall install all Equipment in the Right-of-Way below ground (except for regulators, reliefs, metersets and similar equipment that is typically surface-mounted) and in a general location prescribed by the City. Grantee shall maintain a map showing the proposed locations of Grantee's planned initial installation of Equipment in the Rights-of-

Way prior to deployment of the Equipment. Grantee shall allow the City to review the updated map as needed. The updated map shall identify all new Equipment that was installed.

- 4.8 Relocation.** Grantee understands and acknowledges that City shall have the right to require Grantee to change the location of its Equipment or to remove its Equipment from the Right-of-Way. Grantee shall, at the City's direction, relocate or abandon Equipment at Grantee's sole cost and expense, whenever the City reasonably determines that the public interest requires the relocation or removal. If Grantee shall fail to relocate or abandon any Equipment as requested by the City within sixty (60) calendar days or as otherwise agreed to by the City, the City may cause the Equipment to be relocated or removed by a Qualified Contractor at Grantee's sole expense. Upon receipt of a demand for payment from the City, Grantee shall reimburse the City for the reasonable costs the City incurred within sixty (60) calendar days. Whenever removal or relocation of Grantee's equipment is required for the convenience or benefit of a Third Party, Grantee shall be entitled to reimbursement for its costs from such Third Party, provided the removal or relocation is completed within sixty (60) calendar days, or as otherwise agreed with the Third Party, from the date of a written request from the Third Party. The City shall not be responsible for obtaining such reimbursement. When the relocation is necessitated by a project that is funded with both City funds and funds of a Third Party, Grantee shall be entitled to reimbursement for its costs from the Third Party in a proportion equal to the percentage of the total project cost that was funded by the Third Party.
- 4.9 Damage to Right-of-Way.** Whenever the installation, operation, maintenance, removal, reinstallation, replacement or relocation of Equipment damages or disturbs the Right-of-Way, City Facilities, or Existing Structures, Grantee, at its sole cost and expense, shall promptly repair and return them to the condition they were in before they were damaged or disturbed, as approved by the Public Works Director or the owner of the Existing Structures, respectively. Repairs to City Facilities shall be performed in accordance with the City's constructions standards. If Grantee does not repair them as just described, within fifteen (15) calendar days or as otherwise agreed to by the City, then the City may, upon fifteen (15) calendar days prior written notice to Grantee, repair them at Grantee's sole expense. If the damage creates a public safety hazard as determined by the Public Works Director, Grantee may be required to repair or restore the Public ROW within twenty-four (24) hours notice from the City, or such time as agreed between the Public Works Director and Grantee, taking into consideration weather and other relevant factors. Should Grantee fail to make such repairs or restorations within the aforementioned time frames, the City may, after providing notice to Grantee and a reasonable opportunity to cure, repair damage by Grantee in the Public ROW and the expense

thereof shall be paid by Grantee. Upon the receipt of a demand for payment from the City, Grantee shall reimburse the City within sixty (60) calendar days for the reasonable costs the City incurred.

- 4.10 Safety.** Grantee shall insure that all work performed in the Right-of-Way is performed in a manner that ensures safety of workers and the public. Grantee shall provide temporary traffic control in accordance with applicable standards.

**Section 5. Maintenance.** Grantee shall install and maintain all Equipment in a manner that prevents injury to the Right-of-Way, the City's property or the property belonging to another Person within the City. Grantee shall, at its own expense, repair, renew, change, and improve Equipment from time to time as may be necessary to accomplish this purpose.

**Section 6. Vacation.** Whenever the City shall vacate any street or public place for the convenience or benefit of any person or governmental agency and instrumentality other than the City, Grantee's rights shall be preserved as to any of its facilities then existing in such street or public place.

## **Section 7. General Financial, Liability and Insurance Provisions.**

### **7.1 Insurance.**

(A) Grantee shall maintain public liability and property damage insurance that protects Grantee and the City, as well as the City's officers, agents and employees, from the claims referred to in Section 7.2. The insurance shall provide coverage at all times of not less than \$2,000,000 for each occurrence, and \$3,000,000 aggregate, plus cost of defense. The limits of the insurance shall be subject to statutory changes as to maximum limits of liability imposed on municipalities of the State of Oregon during the term of this Franchise, and if the limits of liability provided under the Oregon Tort Claims Act, ORS 30.270, or other applicable law should be raised to an amount exceeding those dollar amounts, then Grantee shall provide a policy of insurance that covers such increased amount of liability. The insurance shall be without prejudice to coverage otherwise existing and shall name as additional insureds the City and its officers, agents, and employees. Notwithstanding the naming of additional insureds, the insurance shall protect each insured in the same manner as though a separate policy had been issued to each, but nothing in this Section 7.1(A) shall operate to increase the insurer's liability as set forth elsewhere in the policy beyond the amount or amounts for which the insurer would have been liable if only one person or interest had been named as insured. The coverage must apply as to claims between insureds on the policy. The insurance shall provide that the insurance shall not be canceled or materially altered without thirty (30) days' prior written notice first being given to the City. If the insurance is canceled or materially altered within the term of this Franchise, Grantee shall maintain continuous uninterrupted coverage, in the terms and amount



addresses for providing notice, if the change of address is provided in writing and delivered in the manner set forth above.

## **Section 10. Forfeiture and Remedies.**

**10.1 Forfeiture.** In addition to any other rights set out elsewhere in this Franchise, and subject to court review of the reasonableness of its actions, the City reserves the right to declare a forfeiture of the Franchise, and all of Grantee's rights arising thereunder, in the event that Grantee: commits fraud or deceit upon the City; is unable or unwilling to pay its debts or is declared bankrupt; fails to pay the Franchise Fee; fails to submit a timely response regarding the calculation of this Franchise Fee; or fails to comply with Section 4,5 or 7 of this Franchise.

**10.2 Notice and Opportunity to Cure.** The City shall give Grantee thirty (30) days prior written notice of its intent to exercise its rights under Section 10.1, stating the reasons for declaring a forfeiture. If Grantee cures the stated reason within the thirty (30) day notice period, or if Grantee initiates efforts to remedy the stated reason and, to the City's satisfaction, the efforts continue in good faith, the City shall not exercise its right to terminate the Franchise via forfeiture. If Grantee fails to cure the stated reason within the thirty (30) day notice period, or if Grantee does not undertake and/or maintain efforts to remedy the stated reason to the City's satisfaction, then the City may declare the Franchise forfeited and terminate the Franchise. In no event shall the City exercise its rights under this section if a bonafide, good-faith dispute exists between the City and Grantee.

**10.3 Additional Remedies.** In addition to any rights set out elsewhere in this Franchise, as well as its rights under the City Code, the City reserves the right at its sole option to revoke this Franchise in the event that any provision becomes invalid or unenforceable and the City expressly finds that such provision constituted a consideration material to the grant of the Franchise.

**10.4 Electing Remedies.** In determining which remedy or remedies are appropriate, the City shall consider the nature of the violation, the person or persons burdened by the violation, the nature of the remedy required in order to prevent further such violation, and any other matters the City deems appropriate.

**Section 11. Assignment.** This Franchise shall not be assigned or transferred without the prior written consent of the City, which consent shall not be unreasonably withheld, conditioned, or delayed, provided the Franchise is transferred or assigned to an entity that controls, is controlled by, or is under the common control of the Grantee. If the City consents to an assignment or transfer of the Franchise, the transfer or assignment shall not be effective until the assignee or transferee has complied with the requirements in Section 7 and filed a

signed acceptance of the terms of this Franchise.

**Section 12. 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 13. Miscellaneous Provisions.**

**13.1 Waiver of Breach.** The waiver by either party of any breach or violation of any provision of this Franchise shall not be deemed to be a waiver or continuing waiver of any subsequent breach or violation of the same or any other provision of this Franchise.

**13.2 Severability of Provisions.** If any one or more of the provisions of this Franchise is held by a court of competent jurisdiction to be invalid or unenforceable or preempted by federal or state laws or regulations, such provision(s) shall be deemed severable from the remaining provisions of this Franchise and shall not affect the legality, validity, or constitutionality of the remaining portions of this Franchise.

**13.3 Contacting Grantee.** Grantee shall be available to the staff of any City department twenty-four (24) hours a day, seven (7) days a week, to respond to problems or complaints resulting from the installation, operation, maintenance, or removal of the Equipment. The City may contact Grantee at (503) 226-4211 regarding such problems or complaints.

**13.4 Governing law and Choice of Forum.** This Franchise shall be governed and construed by and in accordance with the laws of the State of Oregon without reference to its conflicts of law principles. If suit is brought by a party to this Franchise, the parties agree that trial of such action shall be vested exclusively in the state courts of Oregon, County of Multnomah, or in the United States District Court for the District of Oregon.

**13.5 Representations and Warranties.** Each of the parties to this Franchise represents and warrants that it has the full right, power, legal capacity, and authority to enter into and perform the parties' respective obligations hereunder and that such obligations shall be binding upon such party without the requirement of the approval or consent of any other person or entity in connection herewith, except as required in Section 2.1 above.

**13.6 Amendment of Franchise.** This Franchise may not be amended, except pursuant to a written instrument signed by Grantee and approved by the Troutdale City Council.

**13.7 Entire Agreement.** This Franchise contains the entire understanding between the parties with respect to the subject matter herein. There are no

representations, agreements, or understandings (whether oral or written) between or among the parties relating to the subject matter of this Franchise that are not fully expressed herein.

**13.8 Acceptance.** The Grantee shall, within thirty (30) days after the Council adopts this resolution, file with the City its written unconditional acceptance of this franchise, and if the Grantee fails so to do, this resolution shall be void.

**13.9 Effective Date.** This resolution shall be effective thirty (30) days after adoption.

**YEAS: 6  
NAYS: 1  
ABSTAINED: 0**



**Doug Daoust, Mayor**

Date 11/14/13



**Debbie Stickney, City Recorder**

**Adopted: November 12, 2013**

