

ORDINANCE NO. 225

AN ORDINANCE OF THE TOWN OF CINCO BAYOU, FLORIDA, RELATING TO A NATURAL GAS UTILITY FRANCHISE TO THE OKALOOSA GAS DISTRICT, CREATED UNDER THE LAWS OF THE STATE OF FLORIDA, PROVIDING FOR DEFINITIONS; PROVIDING FOR THE RIGHT, AUTHORITY, EASEMENT, AND PRIVILEGE TO INSTALL, OPERATE AND MAINTAIN A NATURAL GAS MANUFACTURING PLANT OR PLANTS; NATURAL GAS TRANSMISSION AND DISTRIBUTION SYSTEM AND OTHER SUCH NECESSARY FACILITIES FOR THE PURPOSE OF PROVIDING NATURAL GAS SERVICES TO ALL CLASSES OF CUSTOMERS WITHIN THE TOWN OF CINCO BAYOU, FLORIDA; PROVIDING FOR NON-EXCLUSIVE GRANT; PROVIDING GEOGRAPHIC AREA; PROVIDING A TERM; PROVIDING CONSIDERATION; PROVIDING CONSISTENT CUSTOMER RATES; PROVIDING COLLECTION PROVISION; PROVIDING ACCOUNTING, AUDIT, AND INSPECTION; PROVIDING THE TOWN NOT TO COMPETE; PROVIDING RELOCATION AT GAS DISTRICT EXPENSE; PROVIDING RELOCATION FOR PRIVATE ENTERPRISE; PROVIDING RIGHT TO PURCHASE AFTER TERMINATION OF FRANCHISE; PROVIDING NOTICE OF EXERCISE OF OPTION; PROVIDING TRANSMISSION SYSTEM AND INTERRUPTIBLE CUSTOMERS; PROVIDING ANNEXATION; PROVIDING DEFAULT CLAUSE; PROVIDING PROPER OPERATION; PROVIDING HOLD HARMLESS CLAUSE; PROVIDING SOVEREIGN IMMUNITY; PROVIDING CONTINUITY OF SERVICE MANDATORY; PROVIDING FAILURE TO REQUIRE PERFORMANCE, NOT A WAIVER; PROVIDING EXCLUSIVITY OF ORDINANCE SECTIONS; PROVIDING REPEALING CLAUSE; PROVIDING SEVERABILITY; AND PROVIDING AN EFFECTIVE DATE.

BE IT ORDAINED BY THE TOWN OF CINCO BAYOU, FLORIDA:

SECTION I. Definitions.

Wherever used in this ordinance, the following words shall have the following meaning:

1. "Town" means the Town of Cinco Bayou.
2. "District" means the Okaloosa Gas District.
3. "Corporate Limits" means the corporate limits of the Town as said limits are now established

or as such limits may hereafter be extended.

4. "Transmission System" means the District's main transmission lines, laterals, metering stations, connections and other components thereof used in the transporting of gas to connect the distribution system within the Town and to transport gas to other such distribution systems or points of destination in other cities or unincorporated territories.

5. "Distribution System" means the distribution system of the District lying within the corporate limits of the Town and all such distribution facilities of the District in the area adjacent thereto as the Town and the District shall mutually in good faith determine to constitute a component part of such distribution system. The terms, however, shall not include any interruptible customer or any connection or metering facilities of the District used in connection with its gas transmission system or any transmission line tap connections for individual customers or metering facilities for such connections.

6. "Interruptible Customer" means natural gas is offered to customers on a contract which anticipates and permits interruption of gas service on short notice.

7. "Non-Interruptible Gas" means gas sold to all classes of customers other than interruptible customers.

8. "Agreed" means an express contractual covenant.

9. "Legislative Charter" means the legislative act creating the Okaloosa County Gas District, and repealing and codifying the District's Charter, Chapter 29334, Laws of Florida, 1953, as amended, reestablishing and recreating the Okaloosa Gas District, being Chapter 2000-443, House Bill No. 1637.

10. "Fair Market Value" means the price that a willing seller would take being under no compulsion to sell and the price that a willing purchaser would pay being under no compulsion to purchase.

11. "Gross Revenues" means all sums of money which the District collected from the customers from the sale of gas within the franchise area with the exception of reasonably uncollectible receivables.

12. "Feasible" means the determination of cost effectiveness of extension of service to any and all unserved areas in the District using a single formula for analysis of economic data for all areas with final determination made by the District Board of Directors.

SECTION II. Grant of franchise privilege.

District is hereby granted a non-exclusive franchise, including every right and privilege appertaining thereto, to erect, construct, own, install, extend, renew, repair, improve, operate and maintain a gas manufacturing plant or plants, gas transmission system, gas distribution system and

other such facilities or equipment as may be necessary or desirable for the purpose of providing gas services, and lawful activities necessary to perform and provide gas services enumerated in the District's Legislative Charter, in, upon, above, over, under and across the present and future highways, sidewalks, easements, dedications and other public property within the franchise area, such mains, pipes, and conduits and other property as may be necessary and appurtenant to a gas service system, and the right to transmit same to the inhabitants within the franchise area. The District shall not be required to obtain any permit or pay any fees for its said use and purposes, but the District shall reasonably coordinate closely with the Town and keep the Town reasonably advised of its activities involving public streets and public property.

SECTION III. Non-exclusive grant.

The right to use and occupy said highways, sidewalks, easements, dedications and other public property for the purpose herein set forth shall not be exclusive, and the Town reserves the right to grant a similar use in said highways, sidewalks, easements, dedications and other public property to any other person.

SECTION IV. Geographic area.

This franchise covers the geographical area of the entire town limits of the Town of Cinco Bayou, Florida. District agrees that the limits of the franchise are subject to expansion or reduction by annexation and contraction of municipal boundaries and that the District has no vested right in a specific area. The District hereby agrees to provide service to any and all areas that may be annexed to the Town provided that feasibility of the area annexed meets the same feasibility requirements for extension of service as other areas serviced by the District. Subject to reasonable and diligent priority, service to all areas proven feasible should be available within six (6) months of notification by the Town that the annexed area desires natural gas service. Any and all annexed areas will fall under the same terms and conditions of this ordinance as the current areas now located within the Town. The Town agrees to notify the District of the names and addresses of the residents in newly annexed areas within sixty (60) days of the date of annexation.

SECTION V. Term.

The franchise shall be granted for a term period of ten (10) years. Provided, however, that the franchise is subject to review at the end of five (5) years upon the request of either party in writing within ninety (90) days of the expiration of the first five (5) years. The purpose of this review is to evaluate any substantial changes in the needs of the Town or the District including any developments or innovations in the energy industry. In such an event, the parties shall make a good faith effort to mutually resolve such needs and changes. Either party may request review of the agreement at any time for the purpose of addressing changes in operating environment, market conditions, new legislation, or any other situations that significantly affect delivery of natural gas services.

SECTION VI. Consideration.

A. District shall pay to the Town a sum equal to six percent (6%) of gross revenues collected from the customers from the sale of gas. Payment to the Town shall be made in monthly payments during the year, with the last payment within thirty (30) days of the close of each fiscal year, and without demand by the Town. Any adjustment payment due the Town resulting from the District's annual audit shall be made to the Town by the District within thirty (30) days of the completion of the District's annual audit.

B. It is further understood and agreed that the consideration paid pursuant to this ordinance shall not be added on as a separate item on the customer's bill unless and until such time as the District separately itemizes such amounts in its system-wide billing.

C. No acceptance of any payment shall be construed as an accord that the amount paid is, in fact, the correct amount, nor shall such acceptance of payment be construed as a release of any claim the Town may have for further or additional sums. If a recomputation results in additional revenue to be paid to the Town, such amount shall be subject to a surcharge of the lesser of twelve percent (12%) per annum, or the prime rate effective the date the payment was originally due as reported in the Wall Street Journal.

D. In the event that any payment is not made within thirty (30) days of when due, interest on such payment shall apply from such date at the prime rate effective the date the payment was originally due as reported in the Wall Street Journal.

E. The District shall pay the Town a sum equal to six percent (6%) of gross revenues provided, however, the maximum cost of gas from which the gas franchise fee is calculated shall not exceed the annualized cost of gas included in the District's approved annual budget for the fiscal year. The preceding limitation of payments will not become effective until at least 75% of the members of the Okaloosa Gas District have approved either a franchise agreement or an amendment to a franchise agreement containing this paragraph.

SECTION VII. Customer Rates.

By acceptance of this franchise, the District specifically agrees that the Town's customers' rates are consistent and shall remain consistent with rates to customers within Okaloosa County, including all other municipalities.

SECTION VIII. Collection Provision.

The District hereby agrees to collect and remit to the Town any lawfully levied utility taxes now existing or hereinafter enacted upon gas customers of the District within the Town limits.

SECTION IX. Accounting; Audit; Inspection.

The District agrees that it will cause an annual audit immediately after the end of each fiscal year to be made of its books, records, and accounts by a certified public accountant and will furnish a copy thereof to the Town. The District shall keep an accurate set of books and records reflecting the gross revenues derived under and pursuant to the franchise rights herein granted. The Town may, upon reasonable notice at any reasonable time during business hours, have its certified public accountant make examinations at the District's office of any and all of its books and records for the purpose of verifying any of the statements of receipts herein provided.

SECTION X. Town not to compete.

The Town agrees that it shall not, during the term of this franchise, construct, acquire, own or operate, directly or indirectly, a gas plant or gas transmission or gas distribution system within its corporate limits except through the exercise of the option to purchase hereinafter provided in this ordinance or except in the event this franchise is terminated prior to the end of the term of this franchise.

SECTION XI. Relocation at District expense.

The District agrees that in all cases the location or relocation of all plants, transmission lines, distribution lines, fittings, appliances, appurtenances and all components and installations of the District and the construction thereof or any change or extension, removal or relocation necessitated by a change by the Town of the grade, width or location of any street, alley or other public way, except as provided in succeeding Paragraph XII, the District will promptly, at its own expense, change or move its structures so as to conform thereto and further agrees to restore any and all public right-of-ways disturbed by the District to their original condition (as determined by the Town). The District further agrees that it will, in advance of any paving or repaving of any street, alley or other public way, and upon reasonable notice thereof, install and construct, at its own expense, any conduit, transmission lines, distribution lines and other installations reasonably necessary for its future use in said street, alley or other public way, so as to prevent, so far as possible, the disturbance by the District of any pavement; provided further, however, that the Town further agrees that it will in advance of any such paving or repaving of any street, alley or other public way, notify the District of such plans in advance and coordinate the same with the District for the purpose of planning to achieve maximum economic cost savings to both parties.

SECTION XII. Relocation for private enterprises.

It is agreed that in the event of the closing or abandonment of any street, alley or other public way by the Town to accommodate the request of private persons or corporations solely for the benefit of such private persons or private corporations containing District gas transmission lines, distribution lines, metering or other facilities, that the Town will require as a condition for granting such request that such private persons or corporation defray and pay the actual cost of removing or relocating same.

SECTION XIII. Restoration.

The District agrees to repair all property, public or private, altered or damaged by it, its agents or employees in the performance of its duties herein, in as good or better condition as it was before being damaged or altered.

SECTION XIV. Right to purchase after expiration of franchise.

As a condition precedent to the taking effect of this grant, the Town does hereby reserve and the District gives and grants to the Town, the right, after expiration of ten (10) years to purchase the gas distribution system within the corporate limits of the Town, including necessary component parts of the gas distribution system at valuation of fair market value, which fair market value shall be determined by arbitration under Florida Statutes governing arbitration methods. This option to purchase is further subject to the condition that upon the exercise of the option, the Town shall take and purchase from the District its entire requirements of gas for use and for resale in the communities and areas supplied by the distribution system, and the District shall sell and deliver to the Town such gas to the extent that same is available at such rates and charges as shall be established from time to time by the Board of Directors of the District; such rates and charges to be fair, equitable, and just commensurate to the same price charged other like customers.

SECTION XV. Notice of exercise of option.

In the event the Town exercises its option to purchase at the expiration of the term of this franchise as enumerated in preceding Section XIV, such option shall be exercised by giving notice in writing not less than sixty (60) days prior to such expiration signed by the Mayor or other chief executive officer of the Town accompanied by a resolution of the governing body of the Town authorizing the exercise of such option.

SECTION XVI. Transmission system and interruptible customers.

In the event the Town exercises its option to purchase the distribution system, the District shall have the right to continue to supply any interruptible customers theretofore supplied by the distribution system including any such customers situated within the corporate limits of the Town. In the event the District so elects to continue to supply any such customer or customers, and shall so notify the Town in writing within sixty (60) days after the receipt of notice from the Town of the exercise of the option in Section XV of this ordinance, the right, privilege, authority and franchise granted by the Town to the District by this ordinance shall continue in force and effect with respect to any such customer or customers, and the Town shall, without charge, permit the District to make such use of the facilities of such distribution system as may be necessary to permit the District to supply such customer or customers.

The obligation of the District to make payments provided for in Section VI of this ordinance shall thereupon cease and terminate.

SECTION XVII. Annexation provision.

The District hereby agrees to provide service to any and all areas that may be annexed to the Town provided feasibility of the area annexed meets the same feasibility requirements for the extension of service as other areas within the District. Service to all areas proven feasible should be available within six (6) months of notification by the Town that the annexed area desires natural gas service. If an area annexed by the Town is already being served by the District, the District will begin to collect all applicable franchise fees (as provided herein) within sixty (60) days of notification by the Town. Any and all annexed areas will fall under the same terms and conditions of this ordinance as the current areas now located within the Town. The Town agrees to notify the District of the names and addresses of the residents in newly annexed areas within sixty (60) days of the date of the annexation.

SECTION XVIII. Default clause.

In the event that the District shall default in the observance or performance of any one or more of the agreements, duties or obligations or conditions of this ordinance, and if any such default or defaults shall continue for a period of six (6) months (exclusive of all times during which the District may be delayed or interfered with, without its connivance, by unavoidable accidents, acts of God, natural disasters or the public enemy, labor strikes or the orders of judgments of any commission or court entered in any suit or proceeding brought without its connivance) after written notice thereof to the District from the Town stating the alleged default on the part of the District, then and in each and every such case the Town, in addition to all other rights and remedies allowed by law, shall be entitled to terminate the grant made to the District under this ordinance.

SECTION XIX. Proper operation.

All plants, transmission lines, distribution lines, fittings, appliances, appurtenances, and all components and installations of the District shall be maintained in reasonably good condition and repair and the District shall observe all federal and state safety requirements and regulations. The District and the Town mutually agree that the location, appearance and aesthetic qualities of such facilities are important considerations and agree to participate during the term of this franchise in a cooperative effort in the location, relocation and construction of such facilities to achieve the most feasible and desirable result compatible with sound economic consideration of the District.

SECTION XX. Hold harmless clause.

The District shall indemnify and save harmless the Town from any and all damages, judgments, costs and expenses of any kind which may arise or result by reasons of or in consequence of the acts or neglect of the District, its agents or servants to fully comply with the provisions of this ordinance, and will save and keep harmless the Town from any and all damages, judgments, costs and expenses caused by, or incident to, or in any manner resulting from the District's operation, installation, maintenance, construction, relocation or other acts or omissions of the District providing prompt notice in writing of all claims for such damages, costs and expenses and reasonable opportunity to

defend against the same are given to the District by the Town, together with all information thereon in its possession.

The District agrees to carry adequate liability insurance in accord with prudent industry standards at all times covering its operations, including automobile liability coverage. The District will provide the Town proof of insurance and timely notification of the policies.

SECTION XXI. Sovereign immunity.

Nothing in this franchise agreement shall be construed to waive either party's immunity from liability under the doctrine of sovereign immunity or Section 768.28, Florida Statutes.

SECTION XXII. Continuity of Service Mandatory.

It shall be the right of all customers to continue receiving service insofar as their financial and other obligations to the District are honored. In the event that the District elects to overbuild, rebuild or modify the system, or the Town gives notice of intent to terminate or fails to renew this franchise, the District shall act to ensure that all customers receive continuous, uninterrupted service for the duration of the franchise regardless of the circumstances. In the event of a change of franchise, the District shall cooperate with the Town in maintaining continuous service to all customers. During such period, District shall be entitled to the revenues for any period during which it operates the system, and shall be entitled to reasonable compensation for its services when it no longer operates the system.

SECTION XXIII. Failure to require performance, not a waiver.

The failure of either party at any time to require performance by the other party of any provision hereof shall not affect the right of either party thereafter to enforce same; nor shall waiver by either party of any breach of any provision hereof be taken or held to be a waiver of any succeeding breach or as a waiver of any provision itself.

SECTION XXIV. Exclusivity of ordinance sections.

Should any section or provision of this ordinance or any portion hereof be declared by a court of competent jurisdiction to be invalid, such decision shall not affect the validity of the remainder, as a whole or any part hereof, other than the part declared to be invalid.

SECTION XXV. Repealing clause.

All ordinances or parts of ordinances in conflict herewith are hereby repealed to the extent of such conflict.

SECTION XXVI. Severability.

If any section, subsection, sentence, clause or phrase of this ordinance for any reason be held invalid or unconstitutional by the decision of any court of competent jurisdiction or administrative agency, such decision shall not affect the validity of remaining portions thereof. The District hereby declares that it would have accepted the provisions of this ordinance and each section, subsection, sentence, clause or phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases be declared illegal, invalid or unconstitutional. The invalidity of any portion of this ordinance shall not abate, reduce or otherwise affect any consideration or other obligation by the District of the franchise granted hereunder; provided further, however, that the Town may terminate the franchise when the invalidated provision may not be so amended as to preserve the purposes for which it was agreed to in the original franchise and when said invalidated provision is found by the Town to be essential to the franchise as a whole.

SECTION XXVII. Effective date.

This ordinance shall be in full force and effect from and after its passage and approval; this franchise shall commence on January 1, 2012, for a term of ten (10) years provided the District unconditionally accepts this ordinance in writing filed with the Town Clerk within thirty (30) days from the date of adopting this Ordinance.

ADOPTED IN SESSION THIS 14 day of June, 2012.

ATTEST:

BY: Nell Dykes
Nell Dykes, Town Manager/Clerk

THE TOWN OF CINCO BAYOU, FLORIDA

BY: Theresa Farley
Theresa Farley, Mayor

