

**CITY OF CARLSBAD  
MUNICIPAL FRANCHISE**

**ORDINANCE NO. 2020-06**

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**AN ORDINANCE GRANTING TO NEW MEXICO GAS COMPANY, INC., A DELAWARE CORPORATION, ITS LEGAL REPRESENTATIVES, SUCCESSORS, LESSEES AND ASSIGNS, GRANTEE HEREIN, CERTAIN POWERS, LICENSES, RIGHTS-OF-WAY, PRIVILEGES AND A FRANCHISE TO CONSTRUCT, OPERATE, AND MAINTAIN A NATURAL GAS UTILITY IN THE CITY OF CARLSBAD, NEW MEXICO, AS NOW OR HEREAFTER CONSTITUTED, WORKS, SYSTEMS AND PLANTS FOR THE HANDLING, PRODUCTION, MANUFACTURING, TRANSPORTING, STORING, SALE AND DISTRIBUTION OF NATURAL GAS INTO, OUT OF AND THROUGH SAID MUNICIPALITY TO ITS INHABITANTS, AND OTHERS, INCLUDING CUSTOMERS INSIDE, BEYOND AND OUTSIDE THE LIMITS OF SAID MUNICIPALITY; AND GRANTING TO NEW MEXICO GAS COMPANY, INC. THE RIGHT TO USE ANY PUBLIC STREET, ALLEY, ROAD OR OTHER PUBLIC PLACE WITHIN THE PRESENT OR FUTURE BOUNDARIES OF SAID MUNICIPALITY FOR A PERIOD OF TWENTY-FIVE (25) YEARS.**

**BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF CARLSBAD, EDDY COUNTY, NEW MEXICO.**

**SECTION I. GRANT OF FRANCHISE.**

That the City of Carlsbad, New Mexico (hereinafter called "Municipality"), which term includes all areas within the boundaries of said Municipality, as now existing or hereafter extended), hereby grants to New Mexico Gas Company, Inc., its legal representatives, successors, lessees and assigns (the "Company"): (i) a franchise and the authority, license, right, power and privilege to construct, operate, maintain, construct, equip, extend, alter, install, remove, change, improve and otherwise establish and operate in the Municipality, works, systems, plants, pipes and all related facilities (including those now in service) as may be necessary or reasonably convenient, for a natural gas utility to serve the Municipality and its inhabitants and others; and (ii) to sell, manufacture, store, distribute, convey or otherwise conduct, serve, supply and furnish the inhabitants of the Municipality and others, and to the Municipality, whenever the Municipality or its inhabitants may desire to contract therefor, gas for light, fuel, power, heat and any and all other useful purposes; and (iii) the said Company is hereby granted passage and rights-of-way, under, in, upon, along and across, and the right to occupy and use in any lawful way during the life of this franchise, any and all streets, avenues, easements, rights-of-way, alleys, highways, sidewalks, paths, bridges, structures and other public places of the Municipality, both above and beneath the surface of the same, as said streets, avenues, easements, rights-of-way, alleys, highways, sidewalks, paths, bridges, structures and other

public places of the Municipality now or may hereafter exist, for every and any such service, use, effect and lawful purpose as herein mentioned, provided the Company complies with all federal, state and local laws, ordinances and regulations, pertaining to the conditions and terms of this franchise.

**SECTION II. NO INTERFERENCE WITH OTHER USES.**

The Company is hereby authorized, licensed and empowered to do any and all things as may be necessary or reasonably convenient to be done and performed in executing the powers and utilizing the rights, powers and privileges herein mentioned and granted by this franchise, provided the same do not unreasonably interfere with pre-existing water, sewer and other authorized installations, and provided that all work done in said streets, avenues, easements, rights-of-way, alleys, highways, sidewalks, paths, bridges, structures and other public places of the Municipality by the Company shall be done in accordance with good engineering practices and in conformity with all applicable provisions of the City of Carlsbad, New Mexico Public Infrastructure Specifications as those specifications may be amended. The Company shall, within a reasonable time, restore as nearly as practicable all places excavated by it to the condition existing immediately prior to excavation. The Municipality shall, in the grant of other franchises, require that said franchisees similarly conduct their activities to avoid interference with those of the Company.

**SECTION III. COMPANY DEFINED.**

The Company shall have the right and privilege of transferring this franchise and all rights and privileges granted herein, so long as any successor, assign or lessee continues to serve the Municipality as a public utility. Whenever the word "Company" appears herein, it shall be construed as including its successors, assigns and lessees.

**SECTION IV. FRANCHISE FEE.**

The Company, for and in consideration of the granting of the franchise, rights and privileges granted herein and as rental for the occupation and use or easement over, upon and beneath the streets, avenues, easements, rights-of-way, alleys, highways, sidewalks, paths, bridges, structures and other public places in the Municipality, and, except as set forth herein, in lieu of any and all "other Municipal taxes" as hereinafter defined, shall for the term of this franchise, pay to the Municipality each year a total aggregate sum of two percent (2%) of the Company's gross receipts (exclusive of sales or gross receipts taxes) collected during each year from end users and consumers on account of gas sold and consumed within the Municipality under the Company's approved rate schedules as in effect from time to time, excepting therefrom, the gross receipts for gas sold to industrial consumers under special contract, gas sold for the generation of electricity, the sale of gas by any third-party marketer, including an affiliate of Company, the payment of sales or gross receipts taxes and franchise fees, and gas sold to the Municipality for its own use. The Company shall make such payments quarterly on or before the last day of the month following the end of each calendar quarter of each year while this provision shall remain in force and effect.

For the purpose of determining said gross receipts, the books of the Company shall at reasonable times be subject to inspection by duly authorized officials of the Municipality, upon written request, giving reasonable notice and respecting the confidential and proprietary nature of information provided to the Municipality by the Company. Notwithstanding anything herein to the contrary, the payments by the Company, provided for above, shall continue only so long as the Company is not prohibited from making the same by any lawful authority having jurisdiction. As used in this Section, the term, "other Municipal taxes" means and includes any and all other franchise, license, privilege, instrument, occupation, excise or revenue taxes and any and all other fees, charges or exactions (except excise taxes imposed by the Municipality and actually collected by the Company from its consumers, municipal occupation taxes lawfully assessed and collected on a non-utility business of the Company, general ad valorem taxes and special assessments for local improvements imposed by ordinance of the Municipality and uniformly imposed and collected from other persons engaging in the same or similar activities and except for such other compensatory service fees which may be agreed to by the parties, separately, and in writing) upon all or any portion of the business, revenue, property or activities of the Company located or conducted within the Municipality during the term of this franchise.

**SECTION V. CONSTRUCTION ACTIVITIES; RELOCATION COSTS.**

A. CONSTRUCTION ACTIVITIES. The Company shall have the right to excavate any public highway, street, alley, avenue, thoroughfare, road, pavement, sidewalk and other public places and public rights-of-way now or hereafter dedicated, owned or controlled by the Municipality within the boundaries of the Municipality, as deemed necessary or desirable by Company in its sole discretion, for the construction, operation and maintenance of the natural gas utility system and the facilities and components associated therewith. Except in the event of an emergency, the Company shall first obtain an encroachment permit from the Municipality before it performs an excavation in any public highway, street, alley, avenue, thoroughfare, road, pavement, sidewalk and other public places and public rights-of-way now or hereafter dedicated, owned or controlled by the Municipality. All work shall be done in conformity with all applicable provisions of the City of Carlsbad, New Mexico Public Infrastructure Specifications as those specifications may be amended. There shall be no unreasonable delay in the backfilling of excavations done by the Company, and all such excavations shall be restored by the Company insofar as practicable, to the condition of such property immediately prior to the excavation.

B. RELOCATION COSTS. When reasonably required by the Municipality for reasons of public safety, street construction (including rerouting, improving or widening), bridge repair or reconstruction, or change or establishment of street grade, the Company shall, at its own expense, protect, support, temporarily disconnect, relocate or remove its facilities along, under or over any Public Rights-of-Way ("Relocation Costs"); provided, however, that the Company shall not be responsible for Relocation Costs:

- (1) where by Municipality application, specific monies can be and are obtained from Federal or State sources for Relocation Costs, provided that no Municipality

matching funds would be required, the scope of the Municipality project would not be diminished and the Municipality would not be required to spend additional monies;

- (2) if the specific street excavation, street construction, or street relocation is done to accommodate the actions or plans of third parties, including but not limited to private individuals or entities who are developing or intend to develop property within the Municipality, in which case such third parties shall be responsible for the Relocation Costs, provided that in no event shall the Municipality be liable for such Relocation Costs;
- (3) if the specific street excavation, construction or relocation is done to accommodate the facilities or plans of another utility, then such utility shall be responsible for the Relocation Costs, provided that in no event shall the Municipality be liable for such Relocation Costs; and
- (4) if State or Federal law requires the Municipality to pay the Relocation Costs.

It is specifically agreed and understood, however, that before the Municipality shall authorize any such change requiring the relocation or removal of the Company's facilities, the Municipality shall provide the Company with written notice at least sixty (60) days in advance of the commencement of the contemplated changes so that the Company may have sufficient time to make recommendations intended to minimize the cost of relocating or removing its facilities. The Municipality agrees that it will act in good faith and use its best efforts to cooperate with the Company in attempting to implement any recommendations offered by the Company. The Company understands that time is of the essence when the Municipality requests that the Company protect, support, temporarily disconnect, relocate or remove its facilities. The Company shall not unreasonably delay such work.

#### **SECTION VI. INDEMNIFICATION.**

The Company shall indemnify the Municipality, its governing body officers and employees from and against the pro-rata share of all judgments attributable to the negligence of the Company in connection with the installation, repair, operation or maintenance of any of the Company's facilities. The Municipality shall give prompt notice to the Company of any claim or suit arising under this indemnity agreement and the Company or its insurer shall have the option to compromise and defend the same to the extent of their own interests. Nothing in this indemnity agreement shall be construed to depart from the present or future law of New Mexico concerning contribution among or between joint tortfeasors.

#### **SECTION VII. NO THIRD PARTY BENEFICIARIES.**

This gas franchise ordinance constitutes a franchise agreement between the Municipality and Company as the only parties and no provision of this franchise shall in any way inure to the benefit of any third person (including the public at large) so as to constitute any such person as a third party beneficiary of the agreement or of any one or more of the terms hereof, or

otherwise give rise to any cause of action in any person not a party hereto.

**SECTION VIII. ACCEPTANCE OF ORDINANCE.**

A. The Company shall, within thirty (30) days after the passage and approval of this Ordinance, file in the office of the County Clerk of the County of Eddy and the Municipal Clerk of the Municipality, a written statement of acceptance duly signed and acknowledged by the proper officer of the Company authorized to execute such acceptance.

B. In the event such acceptance is not filed within said period, this ordinance and the rights, privileges, powers and obligations contained herein shall be terminated and void; PROVIDED, HOWEVER, the Municipality may by resolution extend the time herein for the filing of such acceptance for an additional period.

C. This ordinance, if accepted by the Company as hereinbefore provided, as adopted pursuant to N.M.S.A. § 3-42-1 (1978), shall supersede, cancel and be in lieu of any and all other existing or prior grants of rights, permission and authority to the Company or any predecessor companies or assignors of the Company to construct, operate and maintain any system for the sale, manufacture, storage, distribution, conveyance and supply of pipeline gas for light, fuel, power, heat or other purpose within the Municipality.

**SECTION IX. TERM OF FRANCHISE.**

Pursuant to NMSA 1978, Section 62-1-3, all rights and privileges herein granted and conferred upon the Company shall continue in full force and effect for a period of twenty-five (25) years from the date that is thirty (30) days following the adoption and passage of this Ordinance.

**SECTION X. SEVERABILITY.**

If any section, paragraph, subdivision, clause, phrase, or provision of this ordinance shall be adjudged invalid or unconstitutional, the same shall not affect the validity of this ordinance as a whole or any part of the provisions hereof, other than the part so determined to be invalid or unconstitutional.

**SECTION XI. RESERVATION OF RIGHTS.**

The Municipality, in granting this franchise, surrenders no privileges or rights that it may have of owning or installing any system of light, heat, power, or communication and furnishing the same to the Municipality and its inhabitants.

**SECTION XII.**

In the event of breach of this agreement by either party hereto, the prevailing party shall enjoy all rights and remedies allowed in law or equity and shall recover reasonable attorneys' fees in any suit arising from the breach or enforcement of this agreement.

**SECTION XIII. BOUNDARY CHANGES.**

The Municipality shall promptly notify the Company in writing of any changes in the boundaries of the Municipality ("Boundary Changes") and specifically identify the effective date of such

boundary changes, with such notice provided no longer than thirty (30) days following the effective date of any extension or contraction of such boundaries ("Boundary Change Notice(s)"). Such Boundary Change Notice(s) shall be delivered to:

New Mexico Gas Company, Inc.  
Attn: Tax Department  
7120 Wyoming Blvd. NE, Ste. 20  
Albuquerque, NM 87109

The Company shall make good-faith efforts to apply Boundary Changes to new customer accounts beginning thirty (30) days after receipt of the Boundary Change Notice, for those new accounts for which inclusion within the franchise area can be verified.

ADOPTED AND PASSED THIS 14th DAY OF APRIL, 2020.

/s/ DALE JANWAY

DALE JANWAY, MAYOR  
City of Carlsbad, New Mexico

ATTEST:

/s/ NADINE MIRELES

Municipal Clerk  
City of Carlsbad, New Mexico