

**ORDINANCE NO. 829-2017**

**AN ORDINANCE CREATING AND ESTABLISHING FOR BID A NON-EXCLUSIVE NATURAL GAS FRANCHISE FOR THE PLACEMENT OF FACILITIES FOR THE TRANSMISSION, DISTRIBUTION AND SALE OF NATURAL GAS WITHIN THE PUBLIC RIGHT-OF-WAY OF THE CITY OF DRY RIDGE FOR A FIFTEEN (15) YEAR DURATION, IMPOSING A FRANCHISE FEE IN OF THE SUM OF UP TO FIVE PERCENT (5%) OF FRANCHISEE'S GROSS RECEIPTS PER YEAR FROM THE FRANCHISEE'S SALE OF NATURAL GAS TO GAS-CONSUMING ENTITIES INSIDE THE CITY OF DRY RIDGE'S CORPORATE LIMITS AND FURTHER PROVIDING FOR COMPLIANCE WITH RELEVANT LAWS, REGULATIONS AND STANDARDS; INDEMNIFICATION; INSURANCE; CANCELLATION OR TERMINATION; AND BID REQUIREMENTS; ALL EFFECTIVE ON DATE OF PASSAGE.**

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 City Council of the City of Dry Ridge, 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 Dry Ridge, benefits said utility and the customers it serves and the City Council 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 Dry Ridge, 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 COUNCIL OF THE CITY OF DRY RIDGE:**

SECTION 1

(a) There is hereby created a non-exclusive franchise to enter upon, lay, acquire, construct, operate, maintain, install, use, and repair, in the Right-Of-Way of the City, a system or works for the transmission and distribution of natural gas within and without the corporate boundaries of the City as it now exists or may hereafter be constructed or extended, subject to the provisions of this Ordinance. Such system may include pipes, manholes, ducts, structures, and any other apparatus, equipment and facilities above and below the ground (collectively, "Equipment") necessary, essential, and/or used or useful to the transmission, distribution and sale of natural gas through the City or to any other town or any portion of the county or to any other jurisdiction ("Services"). Additionally, the Company shall have the right to use the streets with its service and maintenance vehicles in furtherance of this Franchise. Prior to beginning the construction or installation of any new facilities under this Franchise, the Company shall obtain any necessary governmental permits for such construction or installation, copies of which it shall provide to the City. For avoidance of doubt, the Company shall not be required to obtain a permit prior to undertaking any maintenance

or emergency restoration work on existing facilities. To the extent a permit is necessary for such maintenance or emergency restoration work, the Company shall make any necessary permit application filings within a reasonable period, not to exceed fifteen (15) days, following completion of the work. Work performed by the Company under this Franchise shall be performed in a workmanlike manner and in such a way as not to unnecessarily interfere with the public's use of City streets. Whenever the surface of any City street is opened, it must be restored at the expense of the Company within thirty (30) days for hard surfaces and within fifteen (15) days for soft surfaces along city streets. Such restoration shall be to a condition comparable to what it was prior to the opening thereof. By way of example, brick pavers must be restored with brick pavers and stamped concrete must be restored with stamped concrete. During seasonal periods where weather prevents the restoration within the times set forth in this Ordinance, the Company shall make temporary restorations satisfactory to the City and shall work with the City to develop a mutually agreeable and reasonable period for permanent restoration. In the event a street is opened at the request of the City for a reason other than providing adequate, efficient and reasonable service, then the City shall bear the expense of opening and restoring the street.

## SECTION 2

The following definitions apply to this Ordinance:

*City Council* means the legislative body of the City of Dry Ridge.

*Company* means the Party or Person that shall become the purchaser of said franchise, or any successor or assignee of such Party or Person.

*Facility* includes all property, means, and instrumentalities owned, operated, leased, licensed, used, furnished, or supplied for, by, or in connection with the business of the utility in the Right-Of-Way.

*Government* or *City* means the City of Dry Ridge.

*Gross Receipts* means those amounts of money which the Company 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 Kentucky Public Service Commission and represents amounts billed under such rates as adjusted for refunds, the net write-off of uncollectible accounts, corrections or other regulatory adjustments. Revenues do not include miscellaneous service charges, including but not limited to turn-ons, meter sets, insufficient funds, late fees and interest, which are related to but are not a part of the actual retail sale of gas.

*Party* or *Person* means any natural or corporate person, business association or other business entity including, but not limited to, a partnership, a sole proprietorship, a political subdivision, a public or private agency of any kind, a Utility, a successor or assign of any of the foregoing, or any other legal entity. As used in this ordinance, the term *Parties* shall collectively refer to the Company and the Government.

*Public Utility* or *Utility* means a Party or Person that is defined in KRS Chapter 278.010 as a utility and: (i) is subject to the jurisdiction of the Kentucky Public Service Commission or the Federal Energy Regulatory Commission; or (ii) is required to obtain a franchise from the Government to use and occupy the Right-Of-Way pursuant to Sections 163 and 164 of the Kentucky Constitution.

*Right-Of-Way* means the surface of and the space above and below a public roadway, highway, street, freeway, lane, path, sidewalk, alley, court, boulevard, avenue, parkway, cartway,

bicycle lane or path, public sidewalk, or easement held by the Government for the purpose of public travel and shall include Rights-Of-Way as shall be now held or hereafter held by the Government.

### SECTION 3

The Franchise created herein shall be non-exclusive and shall continue for a period of fifteen (15) years from and after the effective date of this Ordinance, as set forth in Section 5. The Company may, at its option, terminate this Franchise upon one hundred eighty (180 ) days' written notice if: (a) the City breaches any of its obligations hereunder and such breach is not cured within ninety (90) days of the Company's notice to the City of such breach; (b) the Company is not permitted to pass through to affected customers all fees payable by it under Section 9 herein; or (c) the City creates or amends any ordinance or regulation which, in the Company's sole discretion, would have the effect of: (i) substantially altering, amending or adding to the terms of this Ordinance; (ii) substantially impairing the Company's ability to perform its obligations under the Franchise in an efficient, unencumbered and profitable way; or (iii) preventing the Company from complying with applicable statutes or regulations, rules or orders issued by the Kentucky Public Service Commission. Without diminishing the Company's rights under this Section 3, the City agrees that to the extent it desires to pass or amend an ordinance or regulation which could have the effect of substantially: (i) altering, amending, or adding to the terms of this Ordinance; (ii) impairing the Company's ability to perform its obligations under this Franchise in an efficient, unencumbered and profitable way; or (iii) preventing the Company from complying with applicable statutes or regulations, rules or orders issued by the Kentucky Public Service Commission, that it will first discuss such proposed ordinance or regulation with the Company and the parties shall negotiate in good faith regarding the same.

#### SECTION 4

The Company is authorized to operate throughout all the territory within the corporate limits of the City for which it is authorized under state or federal law.

#### SECTION 5

This Ordinance shall become effective on the date of its passage and publication as required by law. The Franchise created by this Ordinance shall take effect no earlier than thirty (30) days after the City Council accepts the bid(s).

#### SECTION 6

Subject to Section 3 hereof, the Company will comply with all applicable provisions of lawful City ordinances and regulations (including any amendments thereto), unless such provisions: (i) conflict with or impair the Company's ability to comply with any rule, regulation or order issued by the Kentucky Public Service Commission related to the Company's rates or services; or (ii) are otherwise preempted by the action of any state or federal authority with jurisdiction over the Company.

The Company shall not be excused from complying with any of the terms and conditions of this Ordinance by any failure of the Government, upon any one or more occasions, to insist upon the Company's performance or to seek the Company's compliance with any one or more of such terms or conditions.

#### SECTION 7

Rights Reserved by City. Subject to the above provisions, the Franchise created by this Ordinance is expressly subject to the right of the City: (i) to repeal the same for misuse, nonuse, or the Company's failure to comply with applicable local, state or federal laws; (ii) to impose such other regulations as may be determined by the City to be conducive to the safety, welfare and

morals of the public; and/or (iii) to control and regulate the use of its Right-Of-Way as permitted by law.

#### SECTION 8

As consideration for the granting of the Franchise created by this Ordinance, the Company agrees it shall defend, indemnify, and hold harmless the Government from and against claims, suits, causes of action, proceedings, judgments for damages or equitable relief, and costs and expenses asserted against the Government that the Company's use of the Right-Of-Way or the presence or operation of the Company's equipment on or along said Right-Of-Way has caused damage to tangible property or bodily injury, if and to the extent such damage or injury is not caused by the Government's negligence, gross negligence or willful conduct. The Government shall notify the Company in writing within a reasonable time of receiving notice of any issue it determines may require indemnification.

#### SECTION 9

Franchise Fees. For the privilege of utilizing said public streets and rights of ways, the Company, its successors and assigns, shall be required to pay to the Government quarterly five (5) percent of Gross Receipts per month from the Company's sale of natural gas to gas-consuming entities (which includes businesses, industrial facilities and dwellings) inside the City's corporate limits.

Unless otherwise agreed in writing, no acceptance of any franchise fee payment by the Government 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 Government may have for future or additional sums pursuant to this Franchise. Any additional and non-disputed amount

due to the Government shall be paid within ten (10) days following written notice to the Company by the Government.

If any franchise fee is owed to the Government, the Government shall have the right to inspect the Company's natural gas income records no more than once, annually, related to the Company's natural gas gross receipts within the City for a time period consisting of the lesser of the effective date of the franchise or the most recent two years (the Audit Period). The Government shall retain the right to audit and to re-compute any amounts determined to be payable under this agreement for the Audit Period; provided, however, that such audit shall take place within twelve (12) months following the close of the Company's fiscal year. If, as a result of such audit or review, the Government determines that Company has underpaid its franchise fees to the Government in any twelve (12) month period by ten percent (10%) or more, then, in addition to making full payment of the relevant obligation, Company shall reimburse the Government for all expenses incurred as a result of an audit or review and such payments shall be paid within the thirty (30) days following written notice to the Company by the Government, which notice shall include a copy of the audit report and copies of all invoices for which the Government seeks reimbursement. If the audit shows that the Company has overpaid its franchise fee in any twelve (12) month period, then the Government will promptly make a payment to the Company of the overpayment amount and Company will make appropriate bill adjustments to affected customer's bill to credit back the overpayment.

Once the Government has exercised its right to audit any fiscal year, such year shall not be includable within the scope of any subsequent audit by the Government unless agreed to by the Company.



If any franchise fee is owed to the Government, in the event that any franchise fee payment or recomputed amount is not made to the Government on or before the applicable dates heretofore specified, interest shall be charged from such date at the annual rate of 2% over prime interest rate, unless the Company demonstrates that the non-payment is the result of an act or omission of the Commonwealth of Kentucky or the City and wholly beyond the fault of the Company.

Any other fees assessed to the Company in connection with the Company's operation within the City pursuant to this franchise, including use of the City's public ways, including fees associated with permits and licenses of whatever nature, shall be payable by the Company only if and to the extent such fee is provided for under the laws of the Commonwealth of Kentucky and to the extent the Company is authorized by the Kentucky Public Service Commission (or its successor) to pass through such fees to the entities served by it inside the City's corporate limits.

To the extent the Company actually incurs other reasonable incremental costs in connection with its compliance with the Government's ordinances, the Government agrees that the Company may recover such amounts from its customers pursuant to the terms of a tariff filed with and approved by the Kentucky Public Service Commission, if otherwise permitted by law.

#### SECTION 10

The Company shall maintain in force through the term of the Franchise insurance coverage for general liability insurance, auto liability and workers compensation, in accordance with all applicable laws and regulations. The Company shall maintain a general liability and auto liability coverage minimum limit of \$2,000,000 per occurrence. The Company may elect to self-insure all or part of this requirement.

#### SECTION 11

The Company agrees to charge such rate or rates as may from time to time be fixed by the Kentucky Public Service Commission or any successor regulatory body and will give notice of same as required by KRS 278.180 and the Orders of the Kentucky Public Service Commission construing same.

## SECTION 12

(a) In the event the Government believes the Company has materially breached this franchise or violated one of its terms, the Government shall provide written notice to the Company that states the precise alleged breach or violation and shall provide the Company a reasonable opportunity, not to exceed thirty (30) days from receipt of notice, to provide evidence that such breach or violation has not occurred or to take action to cure such breach or violation.

(b) If after thirty days, the Company has either failed to provide evidence of such breach or violation not occurring or has failed to commence action to cure such breach or violation, the City reserves the right to assess a penalty in the amount of \$500 per violation or breach.

If payment of any penalty assessed under this provision not made to the Government on or before the applicable dates specified, interest shall be charged from such date at the annual rate of 2% over prime interest rate, unless the Company demonstrates that the non-payment is the result of an act or omission of the Commonwealth or the City and wholly beyond the fault of the Company.

The Parties retain all rights available under the law of the Commonwealth of Kentucky with respect to enforce provisions of this Ordinance or any contract derived from the passage of this Ordinance, including the right to seek remedies at law, and direct damages.

The payment of penalties or damages shall not excuse non-performance under this Ordinance. The right of the Parties to seek and collect damages as set forth in this section is in addition to its right to terminate and cancel as set forth in Section 13 of this Ordinance.

In no event shall either Party be liable under this Agreement to the other Party any special, incidental, punitive, exemplary or consequential damages.

### SECTION 13

(a) In addition to all other rights and powers pertaining to the Parties by virtue of the Franchise created by this Ordinance or otherwise, the Government, by and through its City Council, and the Company, each reserve the right to terminate and cancel this Franchise and all rights and privileges of the hereunder in the event that the other Party:

- (1) Willfully violates any material provision of this Franchise, except where such violation is without fault or through excusable neglect;
- (2) Willfully attempts to evade any material provision of this Franchise or practices any fraud or deceit upon the other Party;
- (3) Knowingly makes a material misrepresentation of any fact in the application, proposal for renewal, or negotiation of this Franchise; or
- (4) Is no longer able to provide regular and customary uninterrupted service to its customers in the franchise area.

(b) Prior to attempting to terminate or cancel this Franchise pursuant to this section, the City's Mayor or his or her designee, or the City Council, or the Company shall make a written demand that the Company or City do, or comply with, any such provision, rule, order or determination. If the violation, found in Section 13(a), by the Company or the City continues for a period of thirty (30) days following such written demand without written proof that corrective

action has been taken or is being actively and expeditiously pursued, the Government may place its request for termination of this Franchise as early as the next regular City Council meeting agenda. The Government shall cause to be served upon the Company, at least ten (10) days prior to the date of such City Council meeting, a written notice of intent to request such termination and the time and place of the meeting, legal notice of which shall be published in accordance with any applicable laws. In the event of a breach by the City, the Company retains all rights available under the law of the Commonwealth of Kentucky with respect to enforce provisions of this Ordinance or any contract derived from the passage of this Ordinance, including the right to seek remedies at law, and direct damages or termination of the contract or franchise.

(c) Any violation by the Company or its successor or the City of the material provisions of this Franchise, or the failure promptly to perform any of the provisions thereof, shall be cause for the forfeiture of this Franchise and all rights hereunder if, after written notice to the Company or City and a reasonable opportunity to cure, such violations, failure or default continue as set forth in Section 13(a).

#### SECTION 14

Right to Cancel. The City Council shall have the right to terminate the Franchise created by this Ordinance thirty (30) days after the appointment of a receiver or trustee to take over and conduct the business of the Company, whether in receivership, reorganization, bankruptcy or other action or proceeding, unless such receivership or trusteeship shall have been vacated prior to the expiration of said thirty (30) days, unless:

1. Within thirty (30) days after his election of appointment, such receiver or trustee shall have fully complied with all the provisions of this Ordinance and remedied all defaults thereunder; and,
2. Such receiver or trustee, within said thirty (30) days shall have executed an agreement, duly approved by the court having jurisdiction in the premises, whereby such receiver or trustee assumes and agrees to be bound by each and every provision of this Ordinance and the Franchise granted to the Company.

#### SECTION 15

In the event of a change of Kentucky law whereby retail rates of natural gas customers are no longer regulated by the Public Service Commission, the Government shall have the option of terminating this Franchise with the Company. If this Franchise is terminated by the Government pursuant to this provision, the Government and the Company shall have a duty to negotiate in good faith with respect to offering a mutually acceptable franchise to the Company.

#### SECTION 16

The Company shall conform to at least the minimum standards or requirements in federal and state law or regulation in the operation of its natural gas system pursuant to this Ordinance. In addition to complying with other applicable law, the Company agrees that:

- (a) All materials and equipment used or installed in construction shall be of first class quality, and any defect in the work, materials or equipment, whether latent or patent, will be remedied by the Company at its cost;

- (b) Construction, reconstruction, maintenance, or removal of any facilities, shall be performed with due regard for the rights of the Government and others, and shall not unnecessarily interfere with, or in any way injure the property of the Government or others under, on, or above the ground, or otherwise unduly interfere with the public use of the rights-of-way;
- (c) Placement of lights, danger signals or warning signs shall be undertaken by the Company in compliance with applicable law; and
- (d) Unless exempted by the Government, facilities shall be installed underground at any location where all other utilities' facilities that are used to provide customer service are then being installed underground, or when otherwise required under the Ordinances, and shall be in conformance with the applicable requirements of this Ordinance and those set forth in the Code, the Zoning Ordinance, or any other applicable local law or regulation. The Company assumes all responsibility for damage or injury resulting from its placement or maintenance of any facilities.

#### SECTION 17

This Ordinance and any Franchise awarded pursuant to it shall be governed by the laws of the Commonwealth of Kentucky, both as to interpretation and performance. The venue for any litigation related to this Ordinance and any Franchise awarded pursuant to it shall be in a court of competent jurisdiction in Grant County, Kentucky.

## SECTION 18

This Ordinance and any Franchise awarded pursuant to it does not create a contractual relationship with or right of action in favor of a third party against either the Government or the Company.

## SECTION 19

If any section, sentence, clause or phrase of this Ordinance is held unconstitutional or otherwise invalid, such infirmity shall not affect the validity of the remaining Ordinance unless the rights of the City or Company are materially altered or impaired.

## SECTION 20

It shall be the duty of the City's Mayor, or his/her designee, to offer for sale at public auction the Franchise and privileges created hereunder. Said Franchise and privileges shall be sold to the highest and best bidder or bidders at a time and place fixed by the City's Mayor after he or she has given due notice thereof by publication or advertisement as required by law. In awarding the franchise, the City shall consider the technical, managerial, and financial qualifications of the bidder to perform its obligations under the franchise.

## SECTION 21

Bids and proposals for the purchase and acquisition of the franchise and privileges hereby created shall be in writing and shall be delivered to the City's Mayor, or his or her designee, upon the date(s) and at the times(s) fixed by him or her in said publication(s) or advertisement(s) for receiving same. Thereafter, the City's Mayor shall report and submit to the City Council, at the

time of its next regular meeting or as soon as practicable thereafter, said bids and proposals for its approval. The City Council reserves the right, for and on behalf of the Government, to reject any and all bids for said franchise and privileges; and, in case the bids reported by the City's Mayor shall be rejected by the Council, it may direct, by resolution or ordinance, said franchise and privileges to be again offered for sale, from time to time, until a satisfactory bid therefore shall be received and approved.

As further consideration for the granting of this Franchise, the Company agrees to pay all publication costs and attorneys' fees, up to a maximum amount of \$3,000.00, the City incurs in the granting of this Franchise. The above-mentioned costs shall be invoiced by the City to the Company and the Company shall pay said costs within thirty (30) days of receipt of said invoice.

In addition, any bid submitted by a corporation or person not already owning within the territorial limits of the City a plant, equipment, and/or Facilities sufficient to render the service required by this Ordinance must be accompanied by cash or a certified check drawn on a bank of the Commonwealth of Kentucky, or a national bank, equal to five percent (5%) of the fair estimated cost of the system required to render the service, which check or cash shall be forfeited to the Government in case the bid should be accepted and the bidder should fail, for thirty (30) days after the confirmation of the sale, to pay the price and to give a good and sufficient bond in a sum equal to one-fourth (1/4) of the fair estimated cost of the system to be erected, conditioned that it shall be enforceable in case the purchaser should fail, within sixty (60) days, to establish and begin rendering the service in the manner set forth in this Ordinance. Such deposit need not be made by a corporation or person already owning within the territorial limits of the City a plant, equipment, and/or Facilities sufficient to render the service required by this Ordinance.



SECTION 22

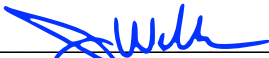
The Franchise shall not be assignable without the written consent of the City; however, Franchisee may assign the Franchise to any affiliate, parent, or subsidiary entity which may, during the Term of the Franchise, assume the obligation to provide natural gas throughout and for consumption within or outside the City without being required to seek the City's consent to such assignment. The Company shall provide the City with any notices required under the law of the Commonwealth of Kentucky.

If the Company experiences a foreclosure or other judicial sale of all or a substantial part of the Company's Facilities located with the City of Dry Ridge, the Company shall provide the Government with any notices required under the law of the Commonwealth of Kentucky.


SECTION 23

This Ordinance shall be in full force and effect from and after its reading, adoption and publication.

APPROVED:

  
\_\_\_\_\_  
Jim Wells, Mayor

ATTEST:

  
\_\_\_\_\_  
City Clerk

1<sup>st</sup> Reading: April 17, 2017

Adoption: May 1, 2017

Publication: May 4, 2017