

ORDINANCE NO. NS-2222

**AN ORDINANCE GRANTING A NATURAL GAS FRANCHISE TO
CASCADE NATURAL GAS CORPORATION**

Findings

- A. Cascade Natural Gas Corporation is the only natural gas distribution utility in the City of Bend. Cascade Natural Gas has an existing franchise issued by the City of Bend. That franchise is expiring in October 2014.
- B. The City and Cascade Natural Gas have negotiated the terms of a new franchise. The new franchise will have a franchise fee of 5%. The terms of the new franchise are included in the attached Exhibit A.

Based on the above findings,

THE CITY OF BEND ORDAINS AS FOLLOWS:

The City of Bend grants a natural gas franchise to Cascade Natural Gas Corporation on the terms stated in the Non-exclusive Franchise Agreement between the City of Bend and Cascade Natural Gas Corporation.

First Reading: July 16, 2014

Second Reading and Adoption by Roll Call Vote: August 6, 2014

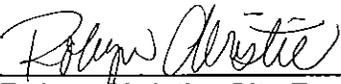
YES: Mayor Jim Clinton
Councilor Jodie Barram
Councilor Scott Ramsay
Councilor Mark Capell
Councilor Doug Knight
Councilor Sally Russell

NO: none



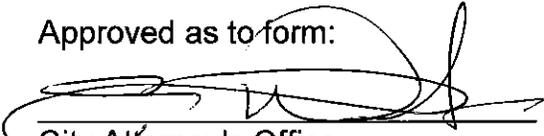
Jim Clinton, Mayor

ATTEST:



Robyn Christie, City Recorder

Approved as to form:



City Attorney's Office

EXHIBIT A

NON-EXCLUSIVE FRANCHISE AGREEMENT BETWEEN THE CITY OF BEND AND CASCADE NATURAL GAS CORPORATION

This agreement is between the City of Bend, an Oregon Municipal Corporation (“City”) and Cascade Natural Gas Corporation, a Washington corporation registered to do business in Oregon (“Franchisee”).

Section 1. Definitions

Any term defined in the Bend Code and not in this Agreement shall have the meaning provided by the Bend Code definition.

“Facilities” means the mains, lines, pipes, boxes, reducing and regulating stations, laterals, conduits and connections, valves, pumps, vaults, fixtures and other physical components of Franchisee’s natural gas distribution system within the City.

“Gross Revenues” means “gross operating revenue” as defined in Bend Code 3.20.010A.

Section 2. Grant of Authority

City grants to Franchisee the right to construct, install, maintain and operate Facilities over, in, on and under present and future City rights-of-way for the purpose of providing natural gas utility service on the terms stated in this Agreement. This franchise is not exclusive, and City reserves the right to grant a similar franchise to any other person or entity. This franchise is subject to all prior rights, interests, agreements, permits easements or licenses granted by the City, and to the City’s and the public’s right to use rights-of-way.

Section 3. Compliance with Laws, Rules and Regulations

Franchisee shall comply with all City laws and regulations (including Bend Code Title 3, other provisions of the Bend Code, and City ordinances, regulations, and standards and specifications) in installing, maintaining, repairing and operating its Facilities in rights-of-way in the City. All Facilities shall be constructed and maintained as to interfere as little as practicable with traffic and other use of rights-of-way. Right-of-way permits must be obtained prior to installation or construction of Facilities. In the event of an emergency, Franchisee may undertake work immediately to repair a break or restore service without a permit, but must inform the City as soon as reasonably possible and shall apply for a permit within two working days, but the City shall excuse a late application if Franchisee has good cause for any delay. All Facilities shall be installed and at all times maintained by Franchisee in accordance with natural gas utility industry standards. Gas mains shall be installed in utility easements, non-paved portions of City rights-of-way, or alleys whenever possible, except when necessary to cross streets or when non-paved

portions of right-of-way are not available. The precise location of lines shall be determined through the permitting process.

Section 4. Franchisee Liability, Indemnification of City and Insurance

A. Franchisee shall conduct its operations under this Franchise, including installation, construction and maintenance of its Facilities, in a safe and workmanlike manner so as not to present a danger to the public or City.

B. Franchisee shall defend, indemnify, and hold the City, its officers, agents, employees and volunteers harmless against all liability, claims, losses, demands, suits, fees and judgments (collectively known as 'claims') that may be based on, or arise out of damage or injury (including death) to persons or property caused by or resulting from any act or omission sustained in connection with the performance by Franchisee of this Franchise Agreement or based upon violation of any statute, ordinance or regulation by Franchisee. This indemnification required shall not apply to claims to the extent caused by the negligence or willful misconduct of the City, its officers, agents, employees and volunteers. Franchisee agrees that it is not an agent of the City and is not entitled to indemnification and defense under ORS 30.285 and ORS 30.287.

C. Franchisee shall purchase and maintain at Franchisee's expense, Commercial General Liability and Commercial Automobile insurance covering bodily injury and property damage in an amount of \$5 million per occurrence and \$10 million in aggregate. The insurance policy obtained by franchisee shall be primary and non-contributory. Franchisee shall remain fully responsible for any claims resulting from negligence or intentional misconduct of Franchisee or its subcontractors and their officials, agents and employees in performance of this Agreement, even if not covered by, or in excess of insurance limits. This insurance requirement may be met in part by self-insurance.

D. Commercial General Liability coverage shall name, by certificate and endorsement, the City, its officers, agents, employees and volunteers as additional insureds with respect to Franchisee's work or services conducted under this Agreement. Franchisee will give the City 30 days' written notice of any cancellation of or reduction in insurance coverage except if such cancellation is due to failure to pay premiums in which case 10 days' prior written notice of cancellation shall be given to City. Any failure to comply with this provision will not affect the insurance coverage.

E. Franchisee shall obtain and maintain Workers' Compensation insurance required by ORS chapter 656. Franchisee shall ensure that each of its contractors obtains and maintains workers' compensation insurance and obtains proof of the coverage before performing work.

F. Coverages provided by Franchisee must be underwritten by an insurance company authorized to do business in the state of Oregon and with a Best's rating of A-VII or higher.

G. As evidence of the insurance coverage required by this Franchise, Franchisee shall provide proof of coverage required by acceptable Certificate of Insurance and Endorsement from the carrier(s). The Certificate and Endorsement shall provide that there will be no cancellation, termination, or reduction in limits of the insurance coverage without a minimum 30-day written notice to the City except if such cancellation is due to failure to pay premiums in which case 10 days' prior written notice of cancellation is given to Company. The Certificate and Endorsement shall also state the deductible or self-insured retention level. This Agreement shall not be in effect until the required certificates and signed endorsements have been received and approved by City. Renewal certificates and endorsements will be sent to City prior to coverage expiration. The City may terminate the Franchise for failure to maintain the required insurance.

H. Franchisee grants Waiver of Subrogation to the City, its officers, agents, employees and volunteers for any claims arising out of Franchisee's work or service. Further, Franchisee agrees that in the event of loss due to any of the risks for which it has agreed to provide insurance, recovery shall be solely with its insurance carrier, and also grants to City on behalf of any insurer providing coverage to either Franchisee or City with respect to the work or services of Franchisee a waiver of any right to subrogation which any insurer or subcontractor may acquire against City by virtue of the payment of any loss under the insurance coverage.

Section 5. Construction and Conditions on Right-of-Way Occupancy

A. Use. Franchisee shall construct, install, maintain and operate its Facilities in City rights-of-way to industry standards and City's commercially reasonable satisfaction, in compliance with all City ordinances, rules, standards and specifications, policies and regulations; and in a manner so as to cause minimum interference with the proper use of rights-of-way for transportation and for other utility purposes and so as to cause minimum interference with the rights or reasonable convenience of property owners who adjoin any rights-of-way. All work in the City right of way will require a permit prior to any work being started and will require a traffic plan that is fully compliant with the City of Bend Design Standards and Specifications.

B. Construction and Maps. The Franchisee shall at all times keep maps and records showing the locations and sizes of all gas mains and all appurtenant facilities laid by it or owned by it in the City and surrounding urban growth boundary as defined in the City's Comprehensive Plan, and such maps and records shall be electronically available to the City at all times.

C. Restoration. In case of any disturbance of pavement, sidewalk, driveway or other surfacing by Franchisee, Franchisee shall, at its own cost and expense and in compliance with the City's standards and specifications, promptly replace and restore all paving, sidewalk, driveway, landscaping or surface of any street or alley disturbed. Franchisee warrants all restoration work for a period of one year from completion of the work. If Franchisee fails to make restoration as required by this section or if the restoration fails within the one year warranty period, City may, after notice to Franchisee, cause the repairs to be made at the expense of Franchisee. If Franchisee fails to reimburse the City for any costs incurred under this section within 45 days' of demand for reimbursement, City may refuse to issue additional permits.

D. Notification. Franchisee shall comply with the requirements of Oregon Utility Notification Law and implementing rules and regulations.

E. Relocation. City may require Franchisee to relocate its Facilities. If the removal or relocation of Facilities is caused directly by development of private property or other third-party project and the removal or relocation of Facilities occurs within the area to be developed, or is made for the convenience of a third-party, Franchisee may charge the expense of removal or relocation to the developer or other third-party. Franchisee shall be solely responsible for enforcing collection from the developer or other third-party, but Franchisee shall not be required to remove or relocate Facilities for the benefit of third-parties until it receives payment for the removal or relocation. If the removal or relocation of Facilities results from City's need to provide public facilities, is a City project, or is otherwise requested by City and is made for the purpose of improving a street to City standards or other improvement for the benefit of the public, Franchisee will remove or relocate its Facilities at Franchisee's expense within a reasonable time after notification by City. City will make a reasonable effort to provide Franchisee with an alternate location for its Facilities within City rights-of-way. If the City requires the subsequent relocation of the same facility within five years of the initial relocation, City shall bear the expense of the subsequent relocation.

F. Right-of-Way Vacation. City shall retain public utility easements if it vacates any public right-of-way where Franchisee has Facilities. If Franchisee's facilities must be relocated from a vacated public right-of-way, the petitioner of the vacation will bear the expense of moving the facilities.

G. Placement of Facilities. Franchisee shall not knowingly place its Facilities where they will interfere with any existing or known future City utility, gas, electric or telephone fixture, power, sanitary sewer, storm sewer or water facility. Franchisee will consult with City Engineer prior to placement of Facilities, and will comply with all City ordinances, policies, rules and regulations in connection with its placement of Facilities.

Section 6. Transfer of Franchise

Franchisee shall not sell, assign, dispose of, lease or transfer in any manner whatsoever any interest in this Franchise or in the Facilities authorized by this Franchise, or any part of the Facilities, without written consent of City, which consent shall not be unreasonably withheld. The City may impose reasonable conditions on its approval of any transfer, including but not limited to the requirement that the transferee acknowledge in writing and agree to be bound by the terms of this Franchise. City shall have the right to collect from Franchisee City's actual administrative costs associated with processing a transfer request, including the cost of ascertaining the financial responsibility of the proposed transferee.

Section 7. City Rights in Franchise

A. City Supervision and Inspection. City shall have the right to inspect all construction and installation of Franchisee's Facilities to insure compliance with governing laws, ordinances, rules and regulations.

B. Termination or Abandonment of Franchise. Upon any termination of this Franchise, all Facilities installed or used by Franchisee shall be removed by Franchisee at Franchisee's expense or abandoned in place with approval of the City and the property upon which the Facilities were used restored by Franchisee to the condition it was in before installation.

Section 8. Franchise Fee

A. Franchisee shall pay monthly to City 5% of Franchisee's gross revenues received from customers within the city limits of the City excluding amounts charged and received for separately billed governmental taxes and governmental fees. City may increase the franchise fee rate to an amount not to exceed the maximum permissible franchise fee of 8% (the base franchise fee of 3% and the incremental franchise fee of 5% of gross revenues) by providing at least 90 days' written notice of the increase.

B. The fee required by this section shall be due and payable within 30 days after the end of each month. Any payment not made when due shall bear 9% annual interest, compounded monthly, from the date due until paid.

C. With each payment, Franchisee shall furnish City with a written statement in the format as provided in Exhibit A, under oath, executed by an officer of Franchisee, verifying the amount of gross revenues of Franchisee within City for the monthly period covered by payment.

D. City's acceptance of any payments due under this section shall not be considered a waiver by City of any breach of this franchise.

Section 9. Franchisee Records and Reports

Franchisee shall keep accurate books of financial accounts at an office within the State of Oregon throughout the term of this franchise and for six years after the expiration or termination of this Agreement. Franchisee shall produce all books and records directly concerning its gross revenues and other financial information deemed necessary by City for purposes of calculation of the franchise fee for inspection by City, upon 10 days' written notice, during normal working hours. City may require periodic reports from Franchisee relating to its operation within City. City shall have the right during the term of this franchise or within 180 days after expiration or termination of the franchise to audit Franchisee's records for the period of three years prior to the audit. If the audit reveals underpayment of 5% or more, the City may expand the audit to cover up to 6 years. The audits shall be undertaken by a qualified person or entity selected by City. The cost of the audit shall be borne by City, unless the results of the audit reveal an underpayment of more than 5% of the franchise fee for the period audited. In the case of underpayment of 5% or more, the full cost of the audit shall be paid by Franchisee. Franchisee shall immediately pay the amount of the underpayment as determined by the audit to City together with 9% annual interest from the date the payment should have been made to the date the payment is actually made. Any audit information obtained by City under these provisions shall be kept confidential to the maximum extent allowed by Oregon law, except that this obligation shall not prevent the City from introducing audit results in any forum where enforcement of the provisions of this franchise is at issue.

Section 10. Permit and Inspection Fees

Nothing in this Agreement shall be construed to limit the right of City to require Franchisee to pay permit fees or reasonable costs incurred by City in connection with the issuance of a permit, making an inspection, or performing any other service for or in connection with Franchisee or its Facilities.

Section 11. Enforcement and Termination of Franchise for Violation

A. Time of payment and performance are of the essence in the Franchise. The following shall be events of default:

1. Default in Payments. The failure of Franchisee to pay City when due any amounts required by this Agreement and the failure continues for 10 days after the due date and written notice from the City.
2. Default in Other Provisions. Franchisee's failure to cure a default of any other provision of this Agreement within 90 days after notice from City of the default. If the default is curable but cannot reasonably be cured within 90 days, the City shall refrain from termination while Franchisee is diligently attempting to cure the default.

B. Termination for Defaults Not Cured. The City may terminate this Franchise for defaults that are not cured within the time allowed by Subsection A of this section by providing a notice of termination to Franchisee. Franchisee may challenge the notice of termination by providing a written protest to the City Manager within 10 business days of the date of the notice of termination. The City Manager, on receipt of the protest, shall either grant the protest, in which case the Franchise will remain in place, or refer the matter to the City Council for a decision. The termination will not become final until after the decision by the City Manager or City Council. Because of the potential public health and safety risks that could arise as a result of cessation of natural gas delivery within the City, if the City decides to terminate the Franchise, it shall set a termination date that allows for implementation of a plan to assure continued natural gas delivery service.

Section 12. Remedies not Exclusive; Waiver

All remedies granted the City under this Agreement are cumulative, and recovery or enforcement of one is not a bar to the recovery or enforcement of any other remedy. Failure to enforce any provision of this Agreement shall not be construed as a waiver of a breach of any other term, condition or obligation of this Agreement.

Section 13. Franchise Term

This Franchise is granted for a term of 10 years beginning on the date on which the ordinance authorizing this Franchise is effective. The Agreement shall be extended for one 10-year term if neither party provides written notice of non-renewal to the other party at least six months prior to the expiration of the initial term.

Section 14. Severability

If any section, subsection, sentence, clause or portion of this Agreement is for any reason held invalid or rendered unconstitutional by any Court of competent jurisdiction, that portion shall be deemed a separate, distinct, independent and severable provision and the holding shall not affect the validity or constitutionality of the remaining portion of this Agreement. If for any reason, the franchise fee is invalidated by any court or governmental agency, then the highest permissible franchise fee allowed shall be the franchise fee.

Section 15. Notices

Any notice required or permitted under this Agreement shall be deemed given when received or when deposited with postage prepaid in the United States Mail as registered or certified mail addressed as follows:

TO CITY:
City Manager
City of Bend
710 NW Wall Street
Bend, OR 97701

TO FRANCHISEE:
Cascade Natural Gas Corporation
Attn: Region Manager
64500 OB Riley Road, Suite #2
Bend, OR 97701

or to other address specified by either party in writing.

Section 16. Interpretation/Jurisdiction

Interpretation of the Franchise shall be governed by laws of the State of Oregon and any legal action relating to this Franchise shall be brought in Deschutes County Circuit Court.

CITY OF BEND

Eric King, City Manager
Date:

FRANCHISEE

By: _____

Title: _____

Date: _____