

XP Sept 2011

**APPENDIX B NATURAL GAS FRANCHISE\***

**\*Editor's note:** Appendix B formerly included Ord. No. 1150, adopted Nov. 19, 1951. This franchise expired Nov. 19, 1981. A new franchise ordinance--Ord. No. 5746, §§ 1--24, adopted Aug. 17, 1981, effective Nov. 19, 1981--has been included as a new app. B.

## ORDINANCE NO. 5746

AN ORDINANCE GRANTING A GAS FRANCHISE TO PUBLIC SERVICE GAS COMPANY OF NORTH CAROLINA, INC.

*Be It Ordained by the City Council of the City of Durham:*

**Section 1. Short title.**

This ordinance shall be known and may be cited as the "Public Service Co. of N.C., Inc. Company Gas Franchise."

**Section 2. Definitions.**

For the purposes of this ordinance, the following terms, phrases, words, and their derivations shall have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future, words in the plural number include the singular number, and words in the singular number include the plural number. The word "shall" is always mandatory and not merely directory.

- (1) *Business records* means all documents, papers, letters, plats, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts or other documentary material regardless of physical form or characteristics made or received by the company.
- (2) *City* means the City of Durham.
- (3) *Commission* means the North Carolina Utilities Commission or its successor.
- (4) *Company* means Public Service Company of North Carolina, Inc.
- (5) *Council* means the City Council of the City of Durham.
- (6) *F.E.R.C.* means the Federal Energy Regulatory Commission or its successor.
- (7) *Gas* means natural gas, mixed gas and substitute fuels approved by the commission.
- (8) *Gas system* means all facilities for the transmission and distribution of gas.
- (9) *Person* means any person, firm, partnership, association, corporation, company or organization of any kind.

**Section 3. Grant of authority.**

There is hereby granted by the city to the company the right and privilege to construct, operate and maintain a gas system in the public streets, alleys, rights-of-way, and other public places of the city, and to carry on the business of selling, transmitting and distributing gas to persons within the city. This right and privilege extends to any area within which the city has the authority to grant this franchise now or during the term of this franchise.

#### **Section 4. Term.**

The term of this franchise begins upon the effective date of this ordinance [November 19, 1981] and ends at 11:59 p.m. on September 30, 2011.

#### **Section 5. Nonexclusive grant.**

This franchise is not exclusive. The city may grant the same or similar rights and privileges to other persons at any time.

#### **Section 6. Franchise not waiver of law.**

This franchise is not a waiver of any present or future law or regulation. This franchise is not a limitation upon the authority of the city to adopt any law or regulation.

#### **Section 7. Conflict with other regulations.**

Where any provision of this franchise is in conflict with any rule of the commission or F.E.R.C., so that the company cannot reasonably comply with both the provisions of this franchise and the rule of the commission or F.E.R.C., then the company shall comply with such rule instead of the conflicting provision of this franchise; but the company shall comply with all of the provisions of this franchise where such can be done without violating rules of the commission or F.E.R.C.

#### **Section 8. Standards.**

- (1) The company shall maintain and operate its gas system in an efficient manner. The company shall provide adequate, efficient and reasonable service to the consumers of its gas in the area of this franchise.
- (2) The company shall not substantially reduce the quantity or quality of gas provided annually by the company to consumers of gas within the area of this franchise from that which the company provided in said area during the period July 1, 1980 through June 30, 1981, unless the company is authorized to reduce such quantity or quality by the council, the commission or F.E.R.C. If the demand for gas is less than the quantity which the company is required to supply under this subsection, then the company shall furnish the quantity demanded rather than the quantity otherwise required by this subsection.
- (3) The company shall comply with all applicable rules and regulations of the commission and F.E.R.C.
- (4) The company shall comply with all applicable ordinances and regulations of the city not in conflict with the rules of the commission or F.E.R.C.
- (5) Subject to the provisions of section 7 of this franchise, the company shall extend its gas

system at its own cost to serve consumers whenever at least one (1) consumer on an average of each one hundred (100) feet of pipe in the street or other public way in which the extension is to run shall first, in writing, agree to take a supply of gas at the then prevailing rates for the sale of such gas. The city council or its designee may waive the requirements of this subsection where practical difficulties, limited supplies of gas or unusually high costs make compliance with this subsection unreasonable.

(6) The company shall bear the entire cost of adapting or changing the burners or other equipment of its customers when such adaptation or change is necessitated by the transmission or distribution by the company of gas with properties different from the properties of gas customarily transmitted or distributed by the company in the year preceding the effective date of this franchise.

### **Section 9. Conditions on use of streets.**

(1) The company shall construct, operate and maintain its gas system so as to cause minimum interference with the public use of streets, alleys, rights-of-way and other public places and to cause minimum interference with the rights or reasonable convenience of property owners who join any of the said streets, alleys, rights-of-way or other public places.

(2) The company shall locate the gas mains and pipes of its gas system in the public streets, alleys, rights-of-way and public places at places designated by the city. The company shall not lay its gas mains or pipes in the same trench in which water or sewer lines or pipes are laid. The company shall construct and locate its gas mains and pipes so as not to interfere with the construction, location and maintenance of sewer or water connections or sewer or water mains.

### **Section 10. Excavation in public streets; restoration; damage.**

(1) Whenever the company excavates in the public streets, alleys, rights-of-way or public places of the city pursuant to this franchise, such excavation shall be made by the company in compliance with the laws and regulations of the city in effect at the time of such excavation.

(2) The company shall not excavate in any public street, alley, right-of-way or public place unless the company shall first have applied for and received a written permit from the city manager of the city, or his designee, granting to the company permission for such excavation. The company shall pay to the city a fee in an amount prescribed by the city for each such permit. The permit shall prescribe the area where the excavation is to be made, the estimated length of time within which the excavation and work is expected to be completed and any other conditions. In emergencies involving public safety, the company shall proceed with all necessary operations without the necessity of having first obtained the permit prescribed by this subsection. In such emergencies, however, the company shall obtain the required permit at the earliest practical opportunity. Provided, however, the company shall have the right to seek relief from the city council from the prescribed area within which any such excavation is to be made or from the withholding of a permit. Such request for relief by the company shall be based upon the economic feasibility of the excavation within the prescribed area or other considerations.

(3) Immediately after the company installs or repairs gas mains or pipes, the company shall refill the trenches in which the mains and pipes are located according to the standard practices of the city in the installation of the city's water and sewer system. The company shall promptly restore and replace the pavement, sidewalks, curbs, gutters, streets, alleys, or highways destroyed, disturbed, or damaged by such work with like materials to their former condition at the company's expense. When the company cuts or disturbs a section of sidewalk paving, the company shall restore the whole section by a new one rather than replace only the sidewalk paving lying within the area actually cut. The restoring of the pavement, sidewalks, curbs, gutters, streets and highways shall be done by the company in accordance with specifications of

the city, and shall be subject to inspection by the city. Immediately after the aforesaid work has been completed, the company shall notify the city manager or his designee, in writing, that the work has been done. If the company fails, neglects or refuses to refill such trenches and excavations as herein provided, or fails, neglects or refuses to restore the pavement, sidewalks, curbs, and gutters to their former condition, as herein provided, within ten (10) days after such gas mains and pipes have been laid therein or repaired, as herein further provided, then the city may do all or such part of said work as may remain undone, at the cost and expense of the company, for which the company shall reimburse the city upon the presentation of a bill by the city therefor.

(4) The company shall, within fifteen (15) days of the receipt of the bill referred to in subsection (3) of this section, reimburse the city for any expense the city may incur in repairing, refilling, paving or resurfacing any cut or excavation that may be made in the streets, sidewalks, alleys or public places of the city by the company.

(5) The company shall not open, disturb or encumber, at any one time, any more of such public streets, sidewalks, alleys, highways, or public places than may, in the opinion of the city manager or his designee, be necessary to enable it to proceed with advantage in laying or repairing the company's gas mains and pipes; nor shall the company permit any such street, sidewalk, alley, highway or public place so opened, disturbed or encumbered by it in the installation, construction, or repair of its gas mains or pipes to remain open or the public way disturbed or encumbered for a longer period of time than shall, in the opinion of the city manager or his designee, be necessary. In all cases where any such highway or other public way shall be excavated, disturbed or encumbered by the company, the company shall take all precautions necessary or proper for the protection of the public and shall maintain adequate warning signs, barricades, signals, and other devices necessary or proper to adequately give notice and warning to the public of the existence of all actual conditions present.

(6) Whenever the city or the North Carolina Department of Transportation or its successor shall grade or regrade any public street, alley, sidewalk, highway or other public way, in, along, under or across which the company shall have installed any of its gas mains or pipes, it shall be the duty of the company, at the request of the city manager or his designee and at the company's own cost and expense, to promptly change said gas mains or pipes so as to conform to the new grade which is then being or has been established by the city.

(7) In the event of an interruption or impairment of service or failure of supply of gas for reasons beyond the control of the company, the company shall use every reasonable effort and prompt diligence to restore such service with as little interruption as possible and in all events within a reasonable time, and such interruption or failure for such reasons shall not constitute a breach of this franchise.

(8) Whenever it is necessary to shut off or interrupt service for the purpose of making repairs, adjustments or installations, the company shall do so at such time as will cause the least amount of inconvenience to its customers, and unless such repairs are unforeseen and immediately necessary, it shall make a reasonable effort to notify its customers that an interruption of service will take place. This subsection does not require the company to schedule repairs, adjustments or installations at times other than during regular business hours.

(9) If the city decides to pave or repave a street and gives ninety (90) days' prior notice to the company of the city's intention to pave or repave such street, then the company shall perform such work as the company deems necessary for the extension of new lines or the repair of existing lines within said street prior to the time the city begins paving or repaving of the street. If the company fails to perform such work prior to the street being paved or repaved, then the company shall not excavate in such newly paved or repaved street for a period of three (3) years following the completion of paving or repaving unless such excavation is authorized by the city or unless such excavation is necessary to deal with an emergency or to comply with the requirements of section 8(5) of this franchise.

(10) The company shall preserve and protect trees located within the streets, alleys, rights-of-way and public places of the city from damage by the company. The company shall comply with regulations of the city concerning the preservation and protection of trees [see chapter 21]. The company shall notify the city manager or his designee whenever it is necessary for the company to excavate by means of trenching around trees located in public streets, alleys, rights-of-way or other public places. The company shall pay to the city the cost of treating, removing and replacing any tree which has been damaged or destroyed as a result of the excavation work of the company or as a result of a leakage of gas into the soil surrounding such tree from the company's gas system.

### **Section 11. Inspection.**

The city shall have the right to inspect all construction and installation work performed by the company pursuant to this franchise and to make such other inspections as it shall deem necessary to insure compliance with this franchise by the company.

### **Section 12. Plat of gas system.**

The company shall maintain maps and plats of its gas system within the area covered by this franchise. Such maps and plats shall be maintained in the company's offices in Durham, North Carolina.

### **Section 13. Access to business records.**

The city shall have access to the business records of the company at all reasonable times. The company shall provide to the city a copy of any business record requested by the city at the company's expense. This section does not apply to any business record which is made private by any state or federal law or regulation.

### **Section 14. Rates.**

(1) If the company shall file any notice, application, petition or request in any form with the commission for authority to increase its rates or to make any revision or change which would have the effect of increasing its rates, the company shall simultaneously give written notice to the city manager of the city of such filing and shall simultaneously file with the city manager of the city, at the company's expense, a copy of any such notice, application, petition or request.

(2) The company, upon request of the city and within thirty (30) days after giving the notice required under subsection (1) of this section, shall provide a representative, knowledgeable as to the facts of such notice, application, petition or request, to meet with the council or person designated by the council and fully explain the reasons for any such notice, application, petition or request for any rate increase. Such representative shall provide all information requested by the council or person designated by the council relevant to such notice, application, petition or request.

### **Section 15. Preferential or discriminatory practices prohibited.**

The company shall not make or grant any unreasonable preference or advantage to any person, nor subject any person to any unreasonable prejudice or disadvantage in its exercise of the rights and

privileges granted by this franchise, provided however that nothing in this franchise shall be deemed to prohibit the establishment of a graduated scale of charges and classified rate schedules consistent with G.S. 62-140 to which any customer coming within such classification would be entitled.

### **Section 16. Approval of transfer.**

The company shall not sell, transfer, assign or lease its gas system, or any substantial part thereof to another person nor transfer any rights under this franchise to another person without the prior approval of the council. No sale, transfer, assignment or lease shall be effective until the vendee, assignee or lessee has filed in the office of the city clerk an instrument, duly executed and approved by the city attorney, reciting the fact of such sale, transfer, assignment or lease, and accepting the terms of this franchise and agreeing to perform all the conditions hereof. Provided however this section shall not apply to the conveyance by the company of a security interest in any of the company's gas system in the city for the purpose of securing payment of the company's secured obligations or to regular trading in listed securities on recognized markets.

### **Section 17. Bankruptcy or receivership.**

Should the company go into bankruptcy or into the hands of a receiver or other court officer, either voluntarily or involuntarily, or reorganize or merge or consolidate under provisions of law, or should the properties and business of the company be foreclosed or sold to satisfy any lien or indebtedness or obligation of the company, the interest, rights and remedies of the city in respect to said properties and operations shall not be affected or prejudiced, and any receiver, assignee, trustee, purchaser, or successor, whether by operation of law or otherwise, so succeeding to or representing the interest or position of the company in respect to the property shall be bound by this ordinance and the terms and provisions hereof, and shall be bound to carry out and perform the obligations and duties imposed upon the company by this ordinance.

### **Section 18. Company to save city harmless.**

(1) The company shall hold harmless the city and the city's officers, agents and employees from every loss, cost, expense, claim, judgment, execution, suit or demand resulting or in any manner arising from the action or inaction of the company in constructing, operating or maintaining a gas system, in carrying on the business of selling, transmitting or distributing gas, or in exercising or failing to exercise any right or privilege granted by this franchise.

(2) If the city or any officer, agent or employee of the city is sued in any court by any person on account of the action or inaction of the company in constructing, operating or maintaining a gas system, or carrying on the business of selling, transmitting or distributing gas, or exercising or failing to exercise any right or privilege granted by this franchise, the company shall defend all such suits and pay the final judgment resulting therefrom, and shall, at the option of the city or any officer, agent or employee of the city who is a defendant in such suit, be made a party to the suit.

### **Section 19. City taking part in litigation.**

The company shall not object to the city's taking part, by intervention or otherwise, at its option, in any suit, action or proceeding instituted by or against the company in which any judgment or decree or act can be rendered foreclosing any lien on any of the company's property, or affecting the rights, powers or duties of the company to do or not to do anything which by this franchise it is obligated or may be required to do or not to do, and also to taking such steps in any such proceeding as may be

deemed essential to protect the interest of the public or the City.

### **Section 20. Statutory authority.**

This franchise is granted pursuant to article 5 of chapter 6 of the Charter of the City of Durham, the same being chapter 671, Session Laws of 1975, as amended. The rights prescribed in section 71 of article 5, chapter 6 of said Charter are reserved to the city.

### **Section 21. Forfeiture.**

Any violation by the company of the provisions of this franchise or the failure by the company to promptly perform any of the provisions hereof shall be cause for the forfeiture of this franchise and all rights hereunder. The council may revoke and terminate this franchise upon sixty (60) days' written notice to the company and the continuation of such violation, failure or default. Provided, however, that nothing herein contained shall deprive either of the parties of its right of appeal to the Courts.

### **Section 22. Separability.**

Should any part, term or provision of this franchise be declared illegal, unauthorized or in conflict with any law of the United States or the State of North Carolina by any court of competent jurisdiction or to be in conflict with any valid rule or regulation duly promulgated by any agency or regulatory body of the United States or the State of North Carolina, the remaining portions or provisions of this franchise shall not be affected thereby.

### **Section 23. Acceptance.**

This franchise and its terms and provisions shall be accepted by the company in writing, executed and acknowledged by it in such way as may be necessary to meet the approval of the city attorney, and filed with the city clerk, who shall record the same in the book of ordinances. Such written acceptance may be upon or at the end of a copy of the ordinance, and it shall state and express the acceptance of this ordinance and its terms, conditions and provisions; and said company shall agree in said written acceptance to abide by, to observe and to perform the same.

### **Section 24. Effective date of franchise.**

This franchise shall be effective from and after November 19, 1981.