

## ORDINANCE NO. 17-4689

AN ORDINANCE, GRANTING TO KANSAS GAS SERVICE, A DIVISION OF ONE GAS, INC., ITS SUCCESSORS AND ASSIGNS, A NATURAL GAS FRANCHISE, PRESCRIBING THE TERMS THEREOF AND RELATING THERETO, AND REPEALING ALL ORDINANCES OR PARTS OF ORDINANCES INCONSISTENT WITH OR IN CONFLICT WITH THE TERMS HEREOF.

NOW THEREFORE, BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF CHERRYVALE, KANSAS:

**SECTION 1.** That in consideration of the benefits to be derived by the City of Cherryvale, Kansas ("City"), and its inhabitants, there is hereby granted to Kansas Gas Service, a Division of ONE Gas, Inc. ("Company"), said Company operating a system for the sale, transmission and distribution of natural gas in the State of Kansas, a non-exclusive franchise for a period of ten (10) years from the effective date of this Ordinance, to construct, maintain, extend and operate its pipelines and ancillary equipment for the provision and transportation of natural gas ("Facilities") along, across, upon or under any Public Right-of-Way for the purpose of selling and distributing natural gas for all purposes to the City, and its inhabitants, and through said City and beyond the limits thereof; to obtain said natural gas from any source available; and to do all things necessary or proper to carry on said business. For purposes of this Ordinance, "Public Right-of-Way" means only the area of real property in which the City or the public has a dedicated or acquired easement or right-of-way interest in the real property. Public Right-of-Way shall include the area on, below or above the present and future streets, alleys, utility easements, avenues, roads, highways, bridges, parkways or boulevards dedicated or acquired as right-of-way. The term does not include easements obtained by private entities providing utilities services or private easements in platted subdivisions or tracts.

The grant of this franchise by the City shall not convey title, equitable or legal, in the Public Right-of-Way, and shall give only the right to occupy the Public Right-of-Way for the purposes and for the period stated in this Ordinance. This Ordinance does not:

- (1) Grant the right to use Facilities or any other property, natural gas-related or otherwise, owned or controlled by the City or a third-party without the consent of such party;
- (2) Grant the authority to construct, maintain or operate any Facility or related appurtenance on property owned by the City outside of the Public Right-of-Way;

- (3) Excuse the Company from obtaining appropriate access or attachment agreements before locating its Facilities on property owned or controlled by the City (other than Public Right-of-Way) or a third-party; or
- (4) Excuse the Company from obtaining and being responsible for any necessary permit, license, certification, grant, registration or any other authorization required by any appropriate governmental entity, including, but not limited to, the City, the FCC or the Kansas Corporation Commission (KCC).

The Company shall not provide any additional services for which a franchise is required by the City without first obtaining a separate franchise from the City or amending this Ordinance, and the Company shall not knowingly allow the use of its Facilities by any third party in violation of any federal, state or local law.

The Company shall have the right to assign, sell, lease, or otherwise transfer in any manner whatsoever to any third party not affiliated with Company the rights and privileges granted under this Ordinance as hereinafter provided. Any assignment, sale, lease, or other transfer by the Company of the franchise granted herein to any third party not affiliated with the Company shall be ineffective and void unless:

- (1) The assignment, sale, lease or transfer shall be in writing; and
- (2) The assignee, buyer, lessee or other transferee shall agree in writing to accept and become responsible for full performance of all conditions, covenants, obligations, and liabilities contained in this Ordinance; and
- (3) Such writing shall be submitted to the City Clerk of the City.

This provision shall not apply to the use of any portion of the Company's distribution system for the transportation, distribution or sale to any customer purchasing, receiving and using natural gas outside the municipal corporate limits of the City.

**SECTION 2.** As further consideration for the granting of this franchise, and in lieu of city occupation, license or permit fees, or revenue taxes, except as expressly provided herein, the Company shall pay to the City during the term of this franchise, a "Franchise Fee" of five percent (5%) of the actual Gross Cash Receipts from the sale of natural gas and transportation services to all consumers within the corporate limits of the City, such payments to be made monthly for the preceding monthly period.

"Gross Cash Receipts" shall not include revenues from certain incidental or miscellaneous charges and accounts including, but not limited to, connection fees,

disconnection and reconnection fees, temporary service charges, delayed or late payment charges, collection fees, franchise fees and returned check charges as such terms are used in tariffs or in the natural gas industry.

Payments of the Franchise Fee shall commence with the first cycle of the monthly billing cycle beginning after the passage and adoption of this Ordinance, or as otherwise provided in Section 12 below. Prior to that date, payments shall continue to be calculated and be paid in the manner previously provided in Ordinance No. 07-4538 and amendments thereto.

Upon written request by the City, but no more than once per quarter, the Company shall submit to the City a certified statement showing the manner in which the Franchise Fee was calculated. The City shall have the right to examine within the corporate limits of the City, upon written notice to the Company no more often than once per calendar year, all books, papers and records kept by the Company in the ordinary course of business and pertaining to its business carried on by it in or through the City, necessary to verify the correctness of the Franchise Fees paid by Company.

No acceptance by the City of any Franchise Fee shall be construed as an accord that the amount paid is in fact the correct amount, nor shall acceptance of any Franchise Fee payment be construed as a release of any claim of the City. Any dispute concerning the amount due under this Section shall be resolved in the manner set forth in K.S.A. 12-2001, and amendments thereto.

Unless previously paid, within sixty (60) days of the effective date of this Ordinance, the Company shall pay to the City a one-time application fee of One Thousand Dollars (\$1,000.00). The parties agree that such fee reimburses the City for its reasonable, actual and verifiable costs of reviewing and approving this Ordinance.

The Franchise Fee required herein shall be in lieu of all taxes, charges, assessments, licenses, fees and impositions otherwise applicable that are or may be imposed by the City under K.S.A. 12-2001 and 17-1902, and amendments thereto. From and after the date hereof, the permit fees required of the Company by any ordinance presently in effect or hereafter adopted for a permit to excavate in or adjacent to any Public Right-of-Way shall be deemed a part of the compensation paid pursuant to this Section 2 and shall not be separately assessed or collected by the City; in no event, however, shall this provision be interpreted to waive the requirement of notice to the City and the procedural requirements of such ordinance. The Franchise Fee is compensation for use of the Public Right-of-Way and shall in no way be deemed a tax of any kind.

**SECTION 3.** Except as provided herein or as regulated by state or federal law, the use of any Public Right-of-Way under this franchise by the Company shall be subject to all

laws, statutes, regulations and/or city policies (including, but not limited to those relating to the construction and use of the Public Right-of-Way or other public property) now or hereafter adopted or promulgated. In addition, the Company shall be subject to all rules, regulations and policies now or hereafter adopted or promulgated by the City relating to permits, sidewalk and pavement cuts, utility location, construction coordination, and other requirements on the use of the Public Right of Way; provided however, that nothing contained herein shall constitute a waiver of or be construed as waiving the right of the Company to oppose, challenge, or seek judicial review of, in such manner as is now or may hereafter be provided by law, any such rules, regulation or policy proposed, adopted, or promulgated by the City and, further provided other than the items enumerated in this Section 3 herein, that such rules, regulations or policies shall not require the payment of additional fees or additional costs for the use of the Public Right-of-Way.

All mains, services, and pipe which shall be laid or installed under this grant shall be so located and laid as not to obstruct or interfere with any water pipes, drains, sewers, or other structures already installed. The Company shall provide, prior to commencing work, information to the City concerning work to be performed in the streets, avenues, bridges, parking areas, and public places of the City, as the City may from time to time require for purposes of record keeping. The City may require that the information be provided on its standard permit form, but without requiring approval, consent, or fees. In the event of an emergency, the Company shall have the right to commence work without having first providing such form(s).

The Company's use of the Public Right-of-Way shall always be subject and subordinate to the City's use of the Public Right-of-Way for any public purpose. The City may exercise its home rule powers in its administration and regulation related to the management of the Public Right-of-Way; provided that any such exercise must be competitively neutral and may not be unreasonable or discriminatory, nor in conflict with state or federal law.

The City reserves the right to lay or permit to be laid cables, electric conduits, water, sewer, gas or other pipelines and to do or permit to be done any underground work deemed necessary and proper by the City, along, across, over or under the Public Rights-of-Way. In permitting such work to be done, the City shall not be liable to the Company for any damage to the Company's Facilities unless the City or its agents or contractors are negligent in causing said damage.

Whenever by reason of establishing a grade or changes in the grade of any street or in the location or manner of construction of any Public Right-of-Way, cables, electric conduits, water, sewer, gas or other underground structures, it shall be deemed

necessary by the City to alter, change, adapt or conform any portion of the Company's Facilities located in the Public Right-of-Way, such alterations or changes shall be made within a reasonable time by the Company, as ordered in writing by the City, without claim for reimbursement or compensation for damages against the City; provided, however, that this provision is not intended to require the Company to alter, change, adapt or conform any portion of its Facilities without reimbursement or compensation where the right to locate the same, whether by private right-of-way grant, utility easement or otherwise, was acquired prior to its location in the Public Right-of-Way.

If the City shall require the Company to adapt or conform its Facilities or in any way to alter, relocate or change its property to enable any other person, firm, corporation or entity (whether public or private), other than the City, to use the Public Right-of-Way, the Company shall be reimbursed by the person, firm corporation or entity desiring or occasioning such change for any and all loss, cost or expense occasioned thereby.

Company shall participate in the Kansas One Call utility location program.

The Company shall cooperate promptly and fully with the City and take all reasonable measures necessary to provide accurate and complete information regarding the location of its Facilities located within the Public Right-of-Way when requested by the City. Such location and identification shall be promptly communicated in writing to the City without cost to the City, its employees, agents or authorized contractors. The Company shall designate and maintain an agent, familiar with the Facilities, who is responsible for providing timely information needed by the City for the design and replacement of Facilities in the Public Right-of-Way during and for the design of Public Improvements (as defined in Section 4).

The City shall promptly notify the Company in writing of areas newly annexed into or deannexed from the corporate limits of the City, and the Company shall update its records for the purpose of payment of franchise fees as soon as reasonably practicable after receiving such notice.

After written notice from the City, the Company shall promptly locate, remove, relocate, or adjust any Facilities located in the Public Right-of-Way, if reasonably necessary and requested by the City, for any project planned or undertaken and financed by the City or any governmental entity for construction, reconstruction, maintenance, or repair of public facilities or improvements, or any other purpose of a public nature paid for with public funds (a "Public Project"). Such location removal, relocation, or adjustment for a particular Public Project shall be performed by the Company without expense to the City, its employees, agents, or authorized contractors, and shall be specifically subject to rules and regulations of the City pertaining to such. If additional location, removal, relocation, or adjustment is the result of the inaccurate or mistaken information of the

Company, the Company shall be responsible for costs associated with such without expense to the City.

It shall be the responsibility of the Company to take adequate measures to protect and defend its Facilities in the Public Right-of-Way from harm or damage. If the Company fails to accurately locate Facilities when requested, it shall have no claim for costs or damages against the City. The Company shall be responsible to the City and its agents, representatives, and authorized contractors for all damages including, but not limited to, delay damages, repair costs, down time, construction delays, penalties or other expenses of any kind arising out of the failure of the Company to perform any of its obligations under this Ordinance.

The Company shall be subject to the following fees and costs in connection with its use and occupancy of the Public Right-of-Way: (i) all expense of publishing the ordinance adopting this Ordinance; (ii) in the event that the repairs or replacements set forth under Section 5 have not been timely completed by Company, the City may charge an excavation fee for each street or pavement cut to recover the costs associated with construction and repair activity; (iii) inspection fees to recover all reasonable costs associated with City inspection of the work of the Company in the Public Right-of-Way when the Facilities are of such a scope and magnitude so as to require the City to incur such inspection costs by an outside party; and (iv) the repair and restoration costs associated with repairing and restoring the Public Right-of-Way because of damage caused by the Company, its assigns, contractors, and/or subcontractors in the Public Right-of-Way. Such repair and restoration costs shall be paid in advance to the street superintendent of the City.

**SECTION 4.** At least 30 days prior to commencing any activities related to the construction, maintenance, or extension of its Facilities along, across, upon or under the Public right of way, the Company shall submit to the City written plans detailing all such activities together with an application for permit and permit fee. In the event of an emergency, Company shall have the right to commence work without having first providing such plans, provided such plans are submitted within 3 business days of commencement of work. The Company shall coordinate the installation, construction, maintenance, and operation of its Facilities in the Public Right-of-Way in a manner which minimizes adverse impact on existing or contemplated public facilities, buildings, or capital improvements, including, without limitation, streets, alleys, sidewalks, sewer, water, drainage, right-of-way improvements, and other Public Projects (collectively, "Public Improvements"), as reasonably determined by the City. The Company's Facilities shall be so constructed and maintained as not to obstruct or hinder the usual travel or public safety on such public ways or obstruct the legal use by other utilities.

**SECTION 5.** All earth, materials, sidewalks, paving, crossings, utilities, Public Improvements, or improvements of any kind located within the Public Right-of-Way that are damaged, displaced, or removed by the Company shall be fully repaired or replaced to their prior condition or to existing municipal standards as are then in existence, and in a manner satisfactory to the duly authorized representatives of the City, within 30 days of completing such activity as is permitted under this Ordinance without cost to the City.

**SECTION 6.** It is recognized that the natural gas to be delivered hereunder is to be supplied from a pipeline system transporting natural gas from distant sources of supply; and the Company, by its acceptance of this franchise as hereinafter provided, does obligate itself to furnish natural gas in such quantity and for such length of time, limited by the terms hereof, as the said sources and said pipelines are reasonably capable of supplying.

**SECTION 7.** Company, its successors and assigns, in the construction, maintenance, and operation of its natural gas system, shall use all reasonable and proper precaution to avoid damage or injury to persons and property, and shall indemnify, defend, and hold and save harmless the City from any and all claims, damage, injury, and expense caused by the negligence of said Company, its successors and assigns, or its or their agents or servants. The Company or the City shall promptly advise the other in writing of any known claim or demand against the Company or the City related to or arising out of the Company's activities in the Public Right-of-Way.

**SECTION 8.** The Company shall have the right to make and enforce such reasonable rules and regulations as it may deem necessary for the extension of its Facilities, the sale of its gas, and the prudent conduct of its business, provided that such rules and regulations shall neither be in conflict with the laws of the State of Kansas, with the orders, rules or regulations of the Kansas Corporation Commission or other regulatory authority having jurisdiction, nor with the ordinances and regulations of the City insofar as they are consistent with the jurisdiction of the Kansas Corporation Commission or such other regulatory authority.

**SECTION 9.** During the term of this Ordinance, the Company shall obtain and maintain insurance coverage at its sole expense with financially reputable insurers that are licensed to do business in the State of Kansas. Should the Company elect to use the services of an affiliated captive insurance company for this purpose, that insurer shall possess a certificate of authority from the Kansas Insurance Commissioner. The Company shall provide not less than the following insurance:

- (1) Workers' compensation as provided for under any worker's compensation or similar law in the jurisdiction where any work is performed with an employers' liability limit equal to the amount required by law.

(2) Commercial general liability, including coverage for contractual liability and products completed operations liability on an occurrence basis and not a claims made basis, with a limit of not less than Two Million Dollars (\$2,000,000) combined single limit per occurrence for bodily injury, personal injury, and property damage liability. The City shall be included as an additional insured with respect to liability arising from the Company's operations under this Ordinance.

As an alternative to the above insurance requirements, the Company may demonstrate to the satisfaction of the City that it is self-insured and as such Company has the ability to provide coverage in an amount not less than one million dollars (\$1,000,000) per occurrence and two million dollars (\$2,000,000) in aggregate, to protect the City from and against all claims by any person whatsoever for loss or damage from personal injury, bodily injury, death or property damage occasioned by the Company, or alleged to so have been caused or occurred.

The Company shall, as a material condition of this Ordinance, prior to the commencement of any work and prior to any renewal thereof, deliver to the City a certificate of insurance or evidence of self-insurance, satisfactory in form and content to the City, evidencing that the above insurance is in force and will not be cancelled or materially changed with respect to areas and entities covered without first giving the City thirty (30) days prior written notice and naming the City as an additional insured.

The Company shall, as a material condition of this Ordinance, prior to the commencement of any work and prior to any renewal thereof, deliver to the City a performance bond, in a form acceptable to the City, in the amount of \$50,000. The bond is to ensure the appropriate and timely performance in the construction and maintenance of Facilities located in the Public Right-of-Way and must be issued by a surety company authorized to transact business in the State of Kansas, and satisfactory to the City in form and substance.

**SECTION 10.** In case of failure on the part of the Company to comply with any of the provisions of this Ordinance, or if the Company should do or cause to be done any act or thing prohibited by or in violation of the terms of this Ordinance, the Company shall forfeit all rights, privileges and franchise granted herein, and all such rights, privileges and franchise hereunder shall cease, terminate and become null and void, and this Ordinance shall be deemed revoked or terminated, provided that said revocation or termination, shall not take effect until the City has completed the following procedures: Before the City proceeds to revoke and terminate this Ordinance, it shall first serve a written notice upon Company, setting forth in detail the neglect or failure complained of, and the Company shall have sixty (60) days thereafter in which to comply with the



conditions and requirements of this Ordinance. If at the end of such sixty (60) day period the City determines that the neglect or failure complained of has not been cured, the City shall take action to revoke and terminate this Ordinance by an affirmative vote of the governing body present at a public meeting and voting, setting out the grounds upon which this Ordinance is to be revoked and terminated; provided, to afford the Company due process, the Company shall first be provided reasonable notice of the date, time and location of the governing body's consideration, and shall have the right to address the governing body regarding such matter; and further provided, if the nature of the default is such that it cannot be reasonably cured within the above said sixty (60) day period, and the governing body believes the Company has in good faith timely commenced its cure and is diligently pursuing the completion of the same, the Company may, in the City's sole discretion, be given a reasonable additional period of time to complete its cure. Nothing herein shall prevent either party from invoking any other remedy that may otherwise exist at law. Upon any determination by the governing body to revoke and terminate this Ordinance, Company shall have thirty (30) days to appeal such decision to the District Court of Johnson County, Kansas. This Ordinance shall be deemed revoked and terminated at the end of this thirty (30) day period, unless the Company has instituted such an appeal. If the Company does timely institute such an appeal, such revocation and termination shall remain pending and subject to the court's final judgment. Provided, however, that the failure of the Company to comply with any of the provisions of this Ordinance or the doing or causing to be done by the Company of anything prohibited by or in violation of the terms of this Ordinance shall not be a ground for the revocation or termination thereof when such act or omission on the part of the Company is due to any cause or delay beyond the control of the Company or to bona fide legal proceedings.

**SECTION 11.** In granting its consent hereunder, the City does not in any manner waive its regulatory or other rights and powers under and by virtue of the laws of the State of Kansas as the same may be amended, applicable Federal laws or regulations as the same may be amended, its Home Rule powers under the Constitution of the State of Kansas, nor any of its rights and powers under or by virtue of present or future ordinances of the City.

In adopting and passing this Ordinance, neither the City's nor the Company's present or future legal rights, positions, claims, assertions or arguments before any administrative agency or court of law are in any way prejudiced or waived. By the City's adopting and passing this Ordinance and the Company's acceptance hereof as provided in Section 12, neither the City nor the Company waive any rights, but instead expressly reserve any and all rights, remedies, and arguments the City or the Company may have at law or equity, without limitation, to argue, assert, and/or take any position as to the legality

or appropriateness of any present or future laws, non-franchise ordinances and/or rulings.

**SECTION 12.** This franchise Ordinance shall take effect and be in force from and after its passage, approval by the City, acceptance by the Company, and publication in the official City newspaper. Company shall have sixty (60) days after the final passage and approval of this franchise Ordinance to file with the City Clerk its acceptance in writing of the provisions, terms and conditions of this franchise Ordinance and when so accepted, this franchise Ordinance and acceptance shall constitute a contract between the City and Company and such contract shall be deemed effective on the date Company files its acceptance with the City.

**SECTION 13.** This franchise Ordinance, when accepted as provided above, (i) shall constitute the entire agreement between the City and the Company relating to this franchise, and the same shall supercede and cancel any prior understandings, agreements, or representations regarding the subject matter hereof, or involved in negotiations pertaining thereto, whether oral or written, (ii) shall be binding upon the parties, including their successors and assigns, and (iii) shall not be amended or further obligations imposed without mutual consent of the parties hereto.

**SECTION 14.** Upon written request of either the City or the Company, the franchise shall be reopened and renegotiated at any time upon a change in federal, state, or local law, regulation, or order which materially affects any rights or obligations of either the City or Company, including, but not limited to, the scope of the grant to the Company or the compensation to be received by the City.

The franchise fee percentage rate set forth in Section 2 shall in no event exceed the percentage rate hereafter approved to calculate any fee paid to the City by any other person or entity for use of the Public Rights-of-Way if such fee is based in any way on the amount of revenues or gross receipts from the transportation, distribution, or sale of natural gas or electric energy, excluding any municipally-owned electric utility, by such other person or entity to customers within the City. If at any time after the effective date of this Ordinance the fee or rate required to be paid by another utility distribution company is less than the percentage rate set forth in Section 2, then the percentage rate set forth in Section 2 shall be reduced to equal such lesser percentage rate on the date such lesser percentage rate becomes effective and without any further action by the City.

**SECTION 15.** Notwithstanding anything to the contrary in this Ordinance, the fees provided for in Section 2 above shall not become effective within any area annexed by the City until the beginning of the monthly billing cycle which begins no more than 60 days after the date that the City provides the Company with a certified copy of the

annexation ordinance, proof of publication as required by law and a map of the City detailing the annexed area.

**SECTION 16.** The franchise is granted pursuant to the provisions of K.S.A. 12-2001 and amendments thereto.

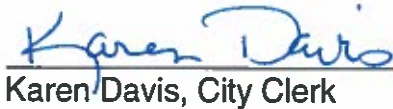
**SECTION 17.** Any and all ordinances or parts of ordinances in conflict with the terms hereof are hereby repealed or considered as having no effect as of the first cycle of the monthly billing cycle as referenced in Section 2 of this ordinance.

**SECTION 18.** Should the Kansas Corporation Commission take any action with respect to this franchise Ordinance and any amendment thereto which precludes Company from recovering from its customers any costs or fees provided for hereunder, the parties hereto shall renegotiate this franchise Ordinance in accordance with the Commission's ruling.

Adopted by the Governing Body of the City of Cherryvale, Kansas on the 18<sup>th</sup> day of December 2017.

  
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John M. Wright, Mayor

ATTEST:

  
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Karen Davis, City Clerk

