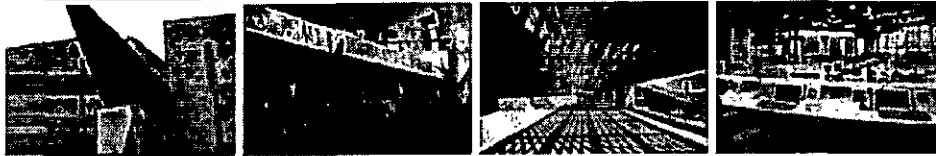


A U S T I N C I T Y C O U N C I L

AGENDA



Thursday, September 28, 2006

Back Print

Telecommunications & Regulatory Affairs RECOMMENDATION FOR COUNCIL ACTION

ITEM No. 62

Subject: Approve second reading of an ordinance granting a franchise agreement to Texas Gas Service, a division of ONEOK, Inc. to provide natural gas distribution services.

Amount and Source of Funding: Funding in the amount of \$6,548,600 in Franchise Fee Revenue was included in the Fiscal Year 2006-2007 Approved Budget.

Additional Backup Material

(click to open)

Ordinance

For More Information: Rondella Hawkins, Manager; (512)974-2422

Boards and Commission Action: Presented to Council Subcommittee for Emerging Technology and Telecommunications.

Prior Council Action: First reading of Ordinance on 08/31/06, Ordinance No. 20060831-26; Ordinance No. 860918-T,

Texas Gas Service, a division of ONEOK, Inc. ("TGS") is the primary provider of natural gas service in the City of Austin. The current franchise agreement will expire on November 17, 2006.

Key terms of this non-exclusive franchise agreement are as follows:

Term: 10-year initial term with 10-year extension for total of 20 years

Compensation: Franchise Fee of five (5) percent of gross revenues paid to City on quarterly basis

Continuation of natural gas conservation program

Reserves City's right to regulate rates and the charges for the services of the Company to its customers as provided by State law and the City Charter

Abide by City's current street-cut regulations and right-of-way management policies

City right to audit

Indemnification of the City

Third reading of ordinance is scheduled for October 5, 2006.

ORDINANCE NO.

AN ORDINANCE GRANTING A FRANCHISE TO TEXAS GAS SERVICE, A DIVISION OF ONEOK, INC., RELATING TO THE DISTRIBUTION AND SALE OF GAS IN THE CITY THROUGH THE USE OF PUBLIC STREETS, EASEMENTS, AND RIGHTS-OF-WAY; AND REPEALING ORDINANCE NO. 86-0918-T.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

PART 1. The council grants a franchise to Texas Gas Service Company, a division of ONEOK, Inc., and its legal representatives, successors, lessees and assigns, under the following terms and conditions:

SECTION 1. Definitions.

1.1. For the purpose of this Ordinance the following terms, phrases, words and their derivatives shall have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future tense, words in the plural number include the singular number, words in the singular number include the plural number, and the use of any gender shall be applicable to all genders whenever the sense requires. The words "shall" and "will" are mandatory and the word "may" is permissive. Words not defined shall be given their common and ordinary meaning.

1.2. "City" shall mean the City of Austin, Texas, a municipal corporation in the State of Texas.

1.3. "City Manager" shall mean the City Manager of the City, or his or her authorized designate.

1.4. "City Parks" shall mean and include all areas dedicated or used as a public park, recreation area, scientific area, wildlife refuge or historic site.

1.5. "Company" shall mean Texas Gas Service Company, a division of ONEOK, Inc., a corporation organized and existing under and by virtue of the laws of the State of Oklahoma, authorized to transact and actually transacting business in the State of Texas, its legal representatives, successors, lessees and assigns.

1.6. "Consumer" shall mean any person or organization within the corporate limits of the City of Austin receiving and using gas from the Company for his or her own appliances or equipment, whether or not the gas is billed directly to him or her, or to a second party. (For example, in the case of a rental unit where the utilities are part of the rent, the landlord is a Customer and the tenant is a Consumer.)

1.7. "Corporate limits" shall mean all areas lying within the City limits and full purpose annexed adjacent areas, as they may change from time to time.

1.8. "Council" shall mean the governing body of the City of Austin.

1.9. "Customer" shall mean any person or organization being billed for gas service whether used by him or her, or by others.

1.10. "Director of Public Works" shall mean the Director of the Public Works Department of the City, or successor in function.

1.11. "Distribution System" shall mean, in its entirety, all pipes, equipment and other appurtenances and any portion thereof, used or necessary for the transporting and delivery of gas to customers and consumers within the corporate limits of the City.

1.12. "Emergency" is defined as sudden and unforeseeable damage or malfunction of a portion of the Company's Austin Distribution System that creates a threat to life, health or property.

1.13. "End user" is defined as an individual or business, other than a business that generates electricity for resale to wholesale or retail customers, that consumes natural gas during the pursuit of its private or commercial purposes.

1.14. "Franchise" shall mean this Ordinance, and all rights and obligations established herein.

1.15. "Gas" shall mean natural gas and any synthetic gas distributed by the Company through its Distribution System.

1.16. "Gross Revenues" shall mean all revenue derived or received, directly or indirectly, from the sale of gas to all classes of customers and consumers (excluding gas sold to another gas utility in the City for resale to its customers within the City) within the corporate limits of the City.

(1) "Gross Revenues" shall include:

(a) revenues derived from the following 'miscellaneous charges';

- i. charges to connect, disconnect, or reconnect gas within the City;
- ii. charges to handle returned checks from consumers within the City;
- iii. such other service charges and charges as may, from time to time, be authorized in the rates and charges on file with the City;

(b) receipts from any non-utility or non-regulated services or products;

(c) gross receipts from gas sales and gross receipts from gas transportation;

(d) all revenues derived by the Company from the transportation of Transport Gas through the Company's Distribution System within the City to end users located within the City (excluding any gas transported to another gas utility in the City for resale to its customers within City);

(e) the value of gas transported by the Company for Transport Customers through the System of the Company located in the City's Public Rights-of-Way ("Third Party Sales") (excluding the value of any gas

1 transported to another gas utility in the City for resale to its customers
2 with the City), with the value of such gas to be established by utilizing
3 either the purchase price of the Transport gas as reported to the
4 Company by its Transport customers or 110% of the Houston Ship
5 Channel Index of prices for large packages of gas published each
6 month in *Inside FERC's Gas Market* (or a successor publication or
7 another publication agreed upon by the City and Company) as
8 reasonably near the time that the transportation service is performed;
9 and

10 (f) receipts from sales of materials, appliances or equipment.

11 (2) "Gross revenues" shall not include:

12 (a) the revenue of any person including, without limitation, an Affiliate,
13 to the extent that such revenue is also included in Gross Revenues of
14 the Company;

15 (b) sales taxes;

16 (c) any interest income earned by the Company;

17 (d) all monies received from the lease or sale of real or personal property,
18 provided, however, that this exclusion does not apply to the lease of
19 facilities within the City's public rights-of-way;

20 (e) receipts for maintenance of appliances, machinery or equipment;

21 (f) receipts for compensation for damage to the Company's property;

22 (g) receipts for the generation of electricity;

23 (h) contributions in aid of construction; and

24 (i) revenues billed but not ultimately collected or received by the
25 Company.

26 1.17. "Public Easement" shall mean those public easements held, owned or
27 controlled by the City, the terms, conditions or limitations upon which are not
28 inconsistent with the construction or maintenance of a natural gas distribution system.

29 1.18. "Service Line" shall mean lines connected at or nearly at right angles to the
30 Company's mains and used to convey gas therefrom to the property line of customers
31 and/or consumers.

32 1.19. "Sidewalk" is that portion of a street which is not improved and maintained
33 for vehicular travel.

34 1.20. "Street" or "Alley" shall mean a publicly dedicated or maintained right-of-
35 way, a portion of which is open to use by the public for vehicular travel.

36 1.21. "Unmetered Gas" shall mean that gas being moved under pressure from the
37 Company's main lines to the customers' and/or consumers' meter.

38 1.22. "Transport gas" or "transported gas" shall mean gas owned or controlled by
39 a user or its designee (i.e., gas that is purchased or otherwise acquired by an end user
40 from someone other than the Company) and delivered by such user or its designee to the
41 Company at a point on the Company's Distribution System, such point of delivery to be
42 defined by the Company, and carried, delivered or transported through the Company's

1 system at a point of redelivery in the City by the Company to the user, for a fee. The
2 terms and conditions of the transportation arrangement, including but not limited to the
3 delivery point(s) of redelivery, measurement and location of title transfer, shall be as set
4 forth in the contract entered into between the Company and the end user and/or the
5 Company's transportation tariffs on file with the Railroad Commission of Texas or other
6 appropriate regulatory authority.
7

8 **SECTION 2.** **Granting of Franchise.**

9

10 2.1. There is hereby granted to the Company a non-exclusive Franchise to
11 maintain, construct, equip, extend, alter and otherwise establish and operate in the City,
12 as now or hereafter constituted, works, systems, plants, lines and all related facilities
13 (including those now in service) necessary or appropriate to sell, manufacture and store,
14 distribute, transport, convey or otherwise conduct, serve, supply and furnish the
15 inhabitants of the City and others, and to the City, whenever the City may desire to
16 contract therefore, gas for light, fuel, power, heat and any and all other useful purposes,
17 and the said Company is hereby granted passage, right-of-way in, under, along and
18 across, the right to occupy and use in any and all lawful way during the life of this
19 Franchise any and all streets, avenues, public easements, rights-of-way, alleys, highways,
20 sidewalks and bridges, of the City, beneath the surface of the same, as said streets,
21 avenues, public easements, rights-of-ways, alleys, highways, sidewalks, and bridges of
22 the City, now or may hereafter exist, and lawful purpose as herein mentioned.

23 2.2. The Company shall be allowed to operate and maintain all lines existing on the
24 effective date of this Franchise within City Parks; or then existing on land hereinafter
25 designated or used as a City Park, but shall not undertake a major replacement of such
26 lines or lay new lines within said City Park. In the event that the Company has no
27 feasible and prudent alternative to laying a new line or replacing a line which avoids a
28 City Park, and the cost associated therewith exceeds the cost of laying said line in whole
29 or in part within a City Park by 15% or more, then the Company may directly petition the
30 City Council for permission to cross City Park lands. The petition must include the
31 Company's grounds for its assertion that there is no prudent or reasonable alternative to
32 replacing or laying a line in a City Park. Within ninety (90) days of the filing of said
33 petition, the City Council shall, in accordance with applicable law, including without
34 limitation, Texas Parks and Wildlife Code Chapter 26, either permit the Company to use
35 City Park land, or authorize the Company to, immediately upon completion of such
36 project, adjust its rates for gas service to permit recovery of such total excess costs plus
37 applicable financing charges at the then current prime rate over a period of three (3)
38 years, by surcharge.

39 2.3. The construction, maintenance, and operation of the Company's Distribution
40 System and property of the Company subject to this Franchise shall be subject to
41 ordinances and regulations passed or approved by the City Council, to the extent that
42 such ordinances and regulations are not in conflict with the laws of the United States, the

1 State of Texas, or the orders, rules or regulations of the Railroad Commission of Texas or
2 other regulatory authority where such authorities have pre-emptive jurisdiction over the
3 subject matter of such City ordinances or regulations.

4 2.4. The initial term of this Franchise shall expire ten (10) years from the effective
5 date of this Franchise Ordinance, and shall include any period between November 17,
6 2006 and the effective date of this Franchise Ordinance. The Company agrees to provide,
7 no less than one (1) year before the expiration of the initial term, written notice of its
8 intent to renew this Franchise for the second ten (10) year term. At the end of the initial
9 ten (10) year term, the term shall be automatically renewed for one additional ten (10)
10 year term, unless:

- 11 (a) the Company is in material default under the terms of this Franchise
12 Ordinance and written notice is given to the Company by the City; or
13 (b) written notice of intent to terminate this Franchise at the expiration of the
14 initial term is given to the City by the Company; or
15 (c) written notice of intent to renegotiate this Franchise at the expiration of the
16 initial term is given to the Company by the City.

17 2.4.1. Written notices specified in Section 2.4, above, must be provided one (1)
18 year before the expiration of the initial term. The notice shall specify either the desire to
19 renegotiate or the desire to terminate this Franchise, in which event this Franchise shall
20 either be renegotiated or terminated at the end of the initial term. After renegotiation, this
21 Franchise may be extended for an additional ten (10) year term, which will include ten
22 (10) years from the date of the expiration of the initial term. The party that has been
23 provided notice of its intent to seek to renegotiate the terms of this Franchise may
24 withdraw its request prior to the expiration of the initial term of the Franchise, in which
25 event the Franchise shall be renewed automatically.

26 2.5. (A)(1) The Company shall not transfer this Franchise as part of a sale of stock or
27 assets involving the Company and some or all of its divisions and subsidiaries without the
28 written approval of the Council expressed by ordinance, and such approval shall not be
29 unreasonably withheld.

30 (2) The Council may revoke this Franchise if the Company sells, transfers, conveys
31 or otherwise disposes of its rights or interests under this Franchise, or attempts to do so,
32 without the Council's prior written consent. All rights and interests of the Company shall
33 cease if this Franchise is revoked.

34 (3) A transfer in violation of this section is void.

35 (4) The Company may not assign this Franchise to evade fee payment.

36 (B) In the event the Company expresses its intent by letter or contract to sell its
37 Distribution System located within the City of Austin, separate and apart from the other
38 assets of the Company, then the City shall have, prior to the completion of such sale of
39 the Company's Distribution System, ninety (90) days to provide notice to the Company
40 of its intent to exercise its option to commence purchasing the Company's Austin
41 Distribution System in the manner provided in Section 18 of this Franchise. The
42 Company shall provide the City with any information about the transferee of its

1 Distribution System that is within its possession within seven (7) consecutive days of a
2 written request from the City. If at the end of ninety (90) days the City has not notified
3 the Company of its intent to exercise its option to purchase the Company's Distribution
4 System, the Company may proceed with its negotiations to transfer its Distribution
5 System. The Company agrees that no transfer of its Distribution System to any transferee
6 shall be completed prior to the City's approval of the transfer of the Franchise to a
7 transferee.

8 2.6. The separation of the utility and non-utility properties of the Company into
9 separate business organizations shall not operate to trigger the requirements of this
10 section.

11 **SECTION 3.** Acceptance by Company and Effective Date.

12 3.1. This Franchise shall be accepted by the Company in writing, which
13 acceptance shall be filed with the City within sixty (60) days after the passage of this
14 Ordinance by the City Council, and when so accepted this Ordinance shall be a contract
15 duly executed by and between the City and the Company.

16 3.2. The City, by the granting of this Franchise, does not surrender or to any extent
17 lose, waive, imperil or lessen the lawful powers and rights now or hereinafter vested in
18 the City under the Constitution and Statutes of the State of Texas and under the Charter
19 of the City to regulate the rates for services of the Company; and the Company, by its
20 acceptance of this Franchise, agrees that all such lawful regulatory power and rights as
21 the same may from time to time be vested in the City shall be in full force and effect and
22 subject to the exercise thereof by the City at any time and from time to time.

23 **SECTION 4.** Service.

24 4.1. Service shall be provided by means of the use of streets, alleys, Public
25 Easements, and other public rights-of-way. If additional Public Easements are necessary,
26 they shall be the responsibility of the property owner requesting such service. All future
27 locations shall be in a space designated by the City. The Company shall not place its
28 facilities where the same will interfere with any existing cable television, electric, water,
29 street lights, fire lanes or communications lines, or obstruct or hinder in any manner the
30 various utilities serving the residents of the City.

31 4.2. The Company shall, as specified in its "Rules of Service," as are now, or as
32 shall in the future be approved by the City Council, or other regulatory authority having
33 jurisdiction, furnish service without unreasonable discrimination to all areas of the City.
34 The Company shall not deny service, or otherwise discriminate against applicants for
35 service, customers or consumers on the basis of race, religion, national origin, sex or
36 sexual orientation. The Company, and its successors and assigns, shall have the right to
37 adopt and enforce Rules of Service hereunder not inconsistent with the law of this
38 Franchise Ordinance.
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1 4.3. The City may require the Company to maintain a Termination of Service
2 Policy in its Rules of Service that is identical to or consistent with that applied to
3 similarly situated City utility customers. The City shall, commensurate with approval of
4 any such change in the Company's Rules of Service, provide for the recovery of the
5 prospective cost impact associated with the change or changes.

6 4.4. The Company shall maintain its property and equipment in good order and
7 condition consistent with the needs of the service to be rendered therefrom, but may not
8 be compelled to extend its facilities beyond the consumer's property line. It is
9 recognized that the Company shall retain full title in and right to its personal property
10 whether or not same is incorporated in real estate. The Company shall, at its own cost
11 and without expense to any of its customers or prospective customers wherever
12 permanent improvements are located on the premises of such current or prospective
13 customer and/or consumer, construct and maintain a service line of proper size and
14 capacity from its main to the property line of each current or prospective customer and/or
15 consumer. The Company shall in every instance install all necessary lines moving
16 unmetered gas.

17 4.5. The Company's system and appurtenances shall be located, installed and
18 maintained so that, to the extent reasonably practicable, the facilities do not unreasonably
19 interfere with any improvements the City may deem proper to make, or unnecessarily
20 obstruct the free use of the streets, alleys, bridges, Public Easements or public property.

21 4.6. The City Council may, in its discretion, pursuant to the authority of the City
22 Charter, require a management audit of the Company's operations in the City. The costs
23 of such audit shall be borne by the Company but recoverable through its rates.

24 4.7. The Company shall actively support the conservation of natural gas by
25 designing, implementing, monitoring, and evaluating such conservation programs. The
26 extent of the Company's specific participation in the conservation of natural gas shall be
27 determined by Ordinances that the Council may adopt, from time to time, during the term
28 of this Franchise. The Company shall work with the City to coordinate conservation
29 programs in a manner which will avoid unnecessary duplication and will enhance
30 benefits to the Community.

31 **SECTION 5.** Use of Streets and Public Easements.

32 5.1. The Company is hereby authorized, licensed and empowered to do any and all
33 things necessary and proper to be done and performed in executing the powers and
34 utilizing the privileges herein mentioned and granted by this Franchise, provided the
35 same do not conflict with existing water pipes, sewers, electric power lines, telephone
36 lines, cable television lines and other authorized installations, and provided that all work
37 done in said streets, avenues, Public Easements, Rights-of-Way, alleys, highways,
38 sidewalks, and bridges by the Company shall be done with the utmost diligence and
39 without unnecessary inconvenience to the public or individuals. Further, the Company's
40 use of the foregoing shall be in accordance with all City Ordinances and the "Standard
41
42

1 Specifications for Cuts in Public Rights-of-Way.”

2 5.2. The mainlines of the Company shall be laid in alleys, streets, and avenues,
3 and other Public Easements, and when in streets and avenues, shall be laid parallel with
4 the curb line thereof, or in such locations as shall be most practical. The Company's main
5 lines shall be installed or replaced at depths which comply with all applicable state and
6 federal rules and regulations establishing minimum safety standards for the design,
7 construction, maintenance and operation of pipelines, provided, however, that in no case
8 shall any main be laid less than 18 inches below the established street grade, without
9 permission of the Director of Public Works.

10 5.3. When the Company shall desire to lay any mains hereunder, and before
11 commencing its construction work, it shall submit to the Director of Public Works or
12 other proper authority an application for permit, and a map or plan showing the streets,
13 avenues, alleys, and other Public Easements wherein it proposes to construct its facilities.
14 The Director of Public Works or other proper authority, shall respond in writing to the
15 Company within ten (10) calendar days of the Company's submission either approving or
16 rejecting the plan and if a rejection, listing the reasons for such rejection. Actual
17 approval by the Director of Public Works or other proper authority shall constitute a
18 permit to the Company for the opening of all of the streets, avenues, alleys and other
19 public places shown on the map or plan, and for the construction or laying of the
20 mainlines and other facilities or equipment by the Company. Provided, however, that it
21 shall not be necessary for the Company to secure a permit for the laying of service lines
22 from the mainline pipes of the Company to its customers and/or consumers. Nor shall the
23 Company be required to secure a permit in advance of excavation in the event of an
24 emergency, as defined herein, provided that the Company shall file with the Director of
25 Public Works no later than ten (10) days after the last day of such an emergency, the
26 information that the Company would have been required to pre-file had there not been an
27 emergency and detailed information that describes the circumstances of said emergency.

28 5.4. In furtherance of the public interest in safety, health and public welfare and to
29 facilitate the safe management of public right of way, the construction, expansion,
30 reconstruction, excavation, use, maintenance and operation of the Company's
31 Distribution System and property is subject to all generally applicable City requirements.
32 In addition to any other City requirements, the Company shall provide the City's Office
33 of Right of Way Management, or such other officials as the City may designate
34 construction plans and maps showing the routing of any new construction and
35 construction plans, forty- five (45) days prior to the commencement of construction
36 which involves an alteration to the surface or beneath the surface of the public right-of-
37 way, to the extent generally required. The Company shall not begin construction until the
38 plans and drawings have been approved in writing by the Office of Right of Way
39 Management; this approval shall not be unreasonably delayed. The Company shall
40 participate in the Austin Utility Location Coordination Committee (“AULCC”) meetings
41 and coordinate new construction with the AULCC. The Company's facilities shall bear
42 the identification marks established by the AULCC if the facilities are installed after the

1 AULCC establishes identification marks.

2 5.5. In the event of a conflict between the provisions of this Section 5 and those of
3 City Code Chapter 14-11 or other ordinance of general applicability that regulates the use
4 of City public rights-of-way, the provisions of the City Code shall govern.
5

6 **SECTION 6.** **Work by the City and Others.**
7

8 6.1. City reserves the right to lay, and permit to be laid, sewer, cable television,
9 water, telephone and other pipelines, cables and conduits, and to perform and permit to
10 be performed any underground or overhead work that may be necessary or proper in,
11 across, along, over, or under any street, alley, highway, Public Easement, or public place
12 occupied by the Company. The City shall be liable to the Company only for any damage
13 to the facilities of the Company, the producing cause of which is the negligence of the
14 City or its employees.

15 6.2 If the City requires the Company to adapt or conform its Distribution System,
16 or in any way alter, relocate or change its property to enable any person, firm, corporation
17 or entity (whether public or private), other than the City, to use the public ways, the
18 Company shall be entitled to reimbursement from the person, firm, corporation or entity
19 desiring or occasioning such change for any and all loss, cost or expense occasioned
20 thereby.
21

22 **SECTION 7.** **Changes for Governmental Purposes.**
23

24 7.1. If, during the period of this Franchise, the City shall elect to alter or change
25 the grade or alignment of any street, alley or other Public Easement, or any water pipe,
26 wastewater pipe, or any overhead or underground structure within the corporate limits or
27 the extraterritorial jurisdiction of the City, so as to conflict with the facilities of the
28 Company, the Company shall remove or relocate, as necessary, all of its facilities at its
29 own expense. Schedules for this work shall be developed by designated representatives of
30 the Company and the City. If such representatives cannot agree on the schedule, the City
31 Manager, after consultation with the Company, shall establish a schedule. This schedule
32 shall provide for a minimum of thirty (30) days to exist between the time the schedule is
33 furnished to the Company and the time that any specific work to be done by the Company
34 covered in the schedule is to begin.

35 7.2. Whenever any such project is funded, in whole or in part, with federal or state
36 highway monies, if the federal or state government provides compensation for utility
37 adjustments, the City shall request that compensation be provided to the Company by the
38 funding authority. If the City receives such requested utility adjustment compensation, it
39 shall deliver same to the Company.

40 7.3. The City shall allow in any rate-setting proceeding, or shall support in any
41 appellate proceeding, as a reasonable and necessary cost, amounts equal to all of the
42 capital facilities in the city, county and state capital improvement projects generally

1 affecting the City incurred or budgeted by the Company from the end of the test period
2 through the twelve (12) months after new rates are expected to be set, as known and
3 measurable changes to the Company's rate base and cost of service. The Company's
4 reserve for depreciation shall be adjusted by an amount equal to depreciation on such
5 increment of capital costs for one-half of the known and measurable change period. The
6 Company in the alternative and at its sole option may choose to accept an addition to the
7 Company's rate base equal to two percent (2%) of the cumulative city, county, and state
8 capital improvement budgets affecting the Austin area. Either option shall be accepted,
9 adopted and otherwise supported by the City as meeting the Company's burden of proof
10 in support of such known and measurable changes.

11 12 **SECTION 8.** **Company Rules and Regulations, Jurisdiction.**

13
14 8.1. The Company and its successors and assigns shall have the right to adopt and
15 enforce Rules of Service for service hereunder not inconsistent with the law or this
16 Franchise, and shall be subject to the original jurisdiction of the City or other regulatory
17 authorities having jurisdiction from time to time.

18 8.2. This Franchise shall be governed in accordance with and construed by the
19 laws of the State of Texas. If there is a dispute between the City and the Company on
20 any issue arising under this Franchise Ordinance or the operation of the Franchise created
21 thereunder, other than where an appeal is subject to the Texas Gas Utility Regulatory Act
22 or subsequent regulatory authority, as it may be amended from time to time, the parties
23 agree that trial of such action shall be vested exclusively in the Travis County State
24 District Courts or in the United States District Court for the Western District of Texas.

25 26 **SECTION 9.** **Curtailments.**

27
28 9.1. The Company agrees to actively seek to provide the best mix of gas supply at
29 the lowest prices consistent with its duty to provide safe and reliable services to its
30 customers. The Company shall make an annual report to the City of its gas supply
31 activities relating to Austin, and in addition shall provide such a report upon the
32 circumstances in which it is required to undergo a management audit as set out in this
33 Franchise.

34 9.2. The Company shall exercise its best efforts under reasonable terms and
35 conditions, to maintain an adequate supply of natural gas to meet the requirements of
36 residential consumers, hospitals and essential governmental services within the municipal
37 limits of the City of Austin.

38 9.3. The Company's undertakings shall be subject to its ability, by use of due
39 diligence and normal business methods, to obtain and place in service the necessary
40 materials and facilities. Moreover, the Company shall be excused from failure or delay in
41 performing such obligations if and to the extent occasioned by an act of God, fire,
42 explosion, flood, act of a public enemy, contagion or contamination hazardous to human

1 life or health, legal restraints, labor difficulties, material shortages, interruption or
2 deficiency of gas supply not attributable to default of the Company or, without
3 limitations, any other cause or combination of causes not reasonably within the
4 Company's ability to anticipate or control. The Company shall notify the City promptly
5 and in no case less than thirty (30) days of its intent to utilize this provision of this
6 Franchise. In any case of shortage of gas supply due to any cause where the Company,
7 by reason thereof, is unable to furnish gas for all purposes, preference shall be as
8 specified in the curtailment procedure set forth in its Rules of Service.
9

10 **SECTION 10.** **Annexations by City.**

11
12 The City shall notify the Company in writing of the annexation of any new
13 territory into the city limits of the City. Upon receipt of notice of annexation from the
14 City, the Company shall have sixty (60) days to begin collecting and paying the
15 Franchise Fee for any revenues received from the Company's customers and/or
16 consumers residing in the newly annexed territories.
17

18 **SECTION 11.** **Fees, Rates.**

19
20 11.1. Since the streets, rights-of-way, and Public Easements to be used by the
21 Company in the operation of its system within the boundaries of the City are valuable
22 public properties acquired and maintained by the City at great expense to its taxpayers,
23 and since the grant to the Company of the use of said streets, rights-of-way, and Public
24 Easements is a valuable property right without which the Company would be required to
25 invest substantial capital in right-of-way costs and acquisitions, and since the City will
26 incur costs in regulating and administering the Franchise, the Company shall, throughout
27 the term of this Franchise, pay the City the aggregate sum of five percent (5%) of the
28 Company's total gross revenues (exclusive of the Texas Limited Sales Tax), collected for
29 gas utility service to consumers within the corporate limits of the City under the
30 Company's rates, effective from time to time, excepting therefrom, however, the gross
31 receipts from gas sold to the City for its own use.
32

33 11.2. The Franchise Fee shall be paid quarterly to the City on or before the 15th
34 day of the second month following the end of the quarterly period for which said
35 payment is due. The Franchise Fee payment shall be made via electronic funds transfer.
36 At the time said payment is made, the Company shall deliver to the City's Office of
37 Telecommunications and Regulatory Affairs or successor in function, a summary
38 statement indicating the derivation and calculation of such electronic funds transfer
39 payment. For purposes of determining such fee, the books of the Company shall at all
40 reasonable times be subject to inspection by the duly authorized representatives of the
41 City, subject to the City providing twenty (20) days written notice to the Company of its
42 intent to conduct such inspection. The inspection and audit shall be limited to the three
(3) years immediately preceding the date of the written notice. The expense of all audits

1 and reviews of all Company records for the purpose of the operation of this Franchise
2 shall be paid by the Company and recovered in tariff on file for this Franchise.

3 11.2.1 In the event any quarterly payment is made after 5:00 p.m. on the date due,
4 the Company shall pay to the City a late payment charge of the greater of:

5 (a) \$100, or

6 (b) Simple interest at 10% annual percentage rate of the total amount past
7 due.

8 11.3. The Franchise Fee shall be in lieu of any and all other rentals or
9 compensation or Franchise, license, privilege, instrument, occupation, excise or revenue
10 taxes or fees and all other exactions or charges (except ad valorem property taxes, permit
11 fees prescribed by the City's Department of Public Works, special assessments for local
12 improvements, and such other charges imposed uniformly upon persons, firms or
13 corporations then engaged in business with the City), or permits upon or relating to the
14 business, revenue, Franchise, gas lines, installations and systems, conduits, storage tanks,
15 pipes, fixtures and other facilities of the Company and all other property of the Company
16 and its activities, or any part thereof, in the City which relate to the operations of the
17 Company's gas distribution system.

18 11.4. Said Franchise Fee shall accrue to the City only so long as the City, after
19 notice and the opportunity to cure in the instance of disagreement between the parties,
20 does not charge, levy, require or collect any other rentals or compensation of franchise,
21 license, privilege, instrument, occupation, inspection, excise or revenue taxes, fees or
22 other exactions or charges relating to the operation of the Company's gas Distribution
23 System in the City as aforesaid.

24 11.5 The Franchise Fees defined in the Franchise Ordinance are a reasonable and
25 necessary operating expense of Company and may be fully recovered by Company by
26 collection from its customers in the City, whether asserted retroactively or prospectively,
27 by revising its rate schedules, assessing an additional charge to the monthly bills of its
28 customers within the City, adding an additional charge to the Company's purchased gas
29 adjustment clause for the City or in any legal manner approved by the City.

30 11.6. Company shall be allowed to fund, in the rate base, a reserve account to
31 provide for an orderly accumulation of funds necessary for payment of the five percent
32 (5%) Franchise Fee specified in Section 11.1.

33 11.7. (A) Each transportation customer of the Company shall disclose to the
34 Company the purchase price of said gas. Should the transportation customer fail or
35 refuse to disclose or furnish such purchase price to Company, Company shall establish
36 same by utilizing 110% of the Houston Ship Channel Index of prices for large packages
37 of gas published each month in *Inside FERC's Gas Market Report* (or a successor
38 publication or another publication agreed upon by the City and Company) for the period
39 of time the transportation service is performed.

40 (B) The Company shall use all due diligence in collecting from customers any and
41 all fees required by this Franchise agreement, but shall not be responsible for paying
42 same to City if the Company's customer refuses to pay the fee imposed on the purchase

1 price of the gas transported, and remains delinquent in payment of such fee for a period
2 greater than thirty days. The Company shall be responsible for the uncollected fee on any
3 gas thereafter transported through the rights of way of the City to the Company's
4 transportation customer, but in no event shall the customer be relieved.

5 11.8. (A) The City Council hereby expressly reserves the right, power, and
6 authority to fully regulate and fix the rates and charges for the services of the Company to
7 its consumers as provided by State law and the City Charter.

8 (B) The Company may from time to time propose changes in its general rates by
9 filing an application with the City Secretary for the consideration of the City Council.
10 Within a reasonable time consistent with law, the City Council shall afford the Company
11 a fair hearing with reference to the application and shall either approve or disapprove the
12 proposed changes or make such order as may be reasonable.

13 (C) In order to ascertain any and all facts, the City Council or its designate shall
14 have full power and authority to inspect, or cause to be inspected, the books of the
15 Company, and to inventory and appraise, or cause to be inventoried, and appraised, the
16 property of the Company, and to compel the attendance of witnesses and the production
17 of books and records.

18 (D) The City shall not allow as to rates or services an unreasonable preference or
19 advantage to anyone within a service classification, nor allow the Company to subject
20 anyone within a service classification to any unreasonable prejudice or discrimination.
21 Neither shall the Company grant, directly or indirectly, any rebate, in the form of money
22 or any other thing of value, to any consumer in order to circumvent the rate schedules
23 filed with the City pursuant to this Franchise Ordinance.

24 (E) The City Council has authority to require the Company to allocate costs of
25 facilities, revenues, expenses, taxes, and reserves between the City and other
26 municipalities or unincorporated areas, consistent with State Law.

27 11.9. The Company agrees that the City may, at any time during the term of this
28 Agreement, at the expense of the Company, obtain expert assistance and advice in
29 determining fair, just, and reasonable rates to be charged by the Company to its
30 consumers in the corporate limits of the City, and in determining the extent to which the
31 Company is complying with the terms and conditions of this Ordinance. The Company
32 agrees to pay reasonable expenses in connection therewith, or reimburse the City for the
33 same, which expense the Company shall be entitled to recover through rates and tariffs.

34 11.10. The Company shall file annually with the City's Chief Financial Officer, or
35 his designate, no later than four (4) months after the end of the Company's fiscal year,
36 annual audited statements of the Company. The certified public accountant preparing the
37 statement shall certify that the statement is in accordance with applicable generally
38 accepted accounting principles.

39
40 **SECTION 12. Indemnity.**

41
42 The Company shall indemnify, defend, and save harmless the City, its agents,

1 officers and employees, against and from any and all claims by or on behalf of any
2 person, firm, corporation, or other entity, arising from the Company's construction,
3 operation or management of its transmission or Distribution System, or arising from any
4 act of negligence of the Company, or any of its agents, contractors, servants, employees,
5 or licenses, including a breach of the Company's obligation under this Franchise
6 Agreement to provide the City information contained in written reports that is free of
7 material misrepresentation, and from and against all costs, counsel fees, expenses and
8 liabilities incurred in or about any such claim or proceeding brought thereon; except that
9 the indemnity provided for in this paragraph shall not apply to any liability resulting from
10 the negligence or intentional acts or omissions of the City, its officers and employees. In
11 the event a claim allegedly arises from the concurrent fault of both the City and the
12 Company, the Company must indemnify the City to the full proportionate extent to which
13 the Company is found to be responsible. The City shall promptly notify the Company of
14 any claim or cause of action which may be asserted against the City relating to or
15 covering any matter against which the Company has agreed, as set forth above, to
16 indemnify, defend and save harmless the City. The Company reserves the right, but not
17 the obligation, to employ such attorneys, expert witnesses and consultants as it deems
18 necessary to defend against the claim or cause of action. The Company shall have the
19 right to investigate, defend and compromise all claims referred to herein after conferring
20 with the City's Law Department. It is understood that it is not the intention of either the
21 City or the Company to create any liability, right or claim for the benefit of third parties
22 and this franchise ordinance is intended and shall be construed for the sole benefit of the
23 City and the Company.

SECTION 13.

Insurance.

24
25
26
27 The Company will maintain a level of insurance in consideration of the Company's
28 obligations and risks undertaken pursuant to this Franchise that is consistent with best
29 industry practices. Such insurance may be in the form of self-insurance to the extent
30 permitted by applicable law, under an approved formal plan of self-insurance maintained
31 by the Company in accordance with sound accounting and risk-management practices. A
32 current certificate shall be provided to the City. The Company shall be responsible for
33 paying all self-insurance retention and insurance deductibles associated with the payment
34 of any claim arising from activities conducted under this Franchise.

SECTION 14.

Equal Employment Opportunity.

35
36
37
38 14.1. The Company shall adhere to equal employment practices within the City of
39 Austin, and to all federal, state and local rules and laws pertaining to discrimination,
40 equal employment and affirmative action.

41 14.2. The Company shall provide equal employment opportunity to minorities,
42 women and the physically disabled at all levels and in all phases of operation. In

1 addition, the Company shall promulgate an affirmative action policy which shall cover, in
2 addition to employment: training, the granting of internships, purchasing, and the
3 employment of subcontractors.

4 14.3. Company shall make all reasonable efforts to comply with its affirmative
5 action commitments.

6
7 **SECTION 15. Forfeiture and Termination.**
8

9 15.1. In addition to all other rights and powers retained by the City under this
10 Franchise or otherwise, the City reserves the right to declare this Franchise forfeited and
11 to terminate the Franchise and all rights and privileges of the Company hereunder in the
12 event of a material breach of its terms and conditions. A material breach by the
13 Company shall include, but shall not be limited to, the following:

14 (A) Failure on more than three (3) occasions to pay when due the Franchise Fee
15 prescribed by Section 11 hereof. Failure to pay a single installment of the Franchise Fee
16 in full (including late payment charges in accordance with §11.2.1) within thirty (30)
17 days after the due date, in the absence of a bona fide dispute communicated to the City in
18 writing on or before the due date of the applicable Franchise Fee installment, is a material
19 breach.

20 (B) Failure to materially provide the services provided for in this Franchise
21 Ordinance;

22 (C) Material misrepresentation of fact in the application for or negotiation of the
23 Franchise; and

24 (D) Conviction of any director, officer, employee or agent of the Company of the
25 offense of bribery or fraud connected with or resulting from the awarding of this
26 Franchise to the Company.

27 15.2. The foregoing shall not constitute a material breach if the violation occurs
28 without fault of the Company or of its employees or occurs as a result of circumstances
29 beyond its control. Company shall not be excused by mere economic hardship or by
30 malfeasance or the malfeasance of its directors, officers, or employees.

31 15.3. In order for the City to declare forfeiture, the City shall make a written
32 demand that the Company comply with any such provision, rule, order, or determination
33 under or pursuant to this Franchise. If the violation by the Company continues for a
34 period of forty-five (45) days following such written demand without written proof that
35 the corrective action has been taken or is being actively and expeditiously pursued to
36 completion, the Council may take under consideration the issue of termination of the
37 Franchise. The City shall cause to be served upon the Company, at least twenty (20) days
38 prior to the date of such a Council meeting, a written notice of intent to request such
39 termination and the time and place of the meeting. Public notice shall be given of the
40 meeting and issue which the Council is to consider.

41 15.4. The Council shall hear and consider the issue, shall hear any person
42 interested therein, and shall determine, in its discretion, whether or not any violation by

1 the Company has occurred.

2 15.5. If the Council shall determine that the violation by the Company was the
3 fault of the Company and within its control, the Council may declare the Franchise of the
4 Company forfeited and terminated, or the Council may grant to Company a period of
5 time for compliance. Nothing herein shall be deemed a waiver of the Company's right to
6 pursue all available legal remedies.

7
8 **SECTION 16. Change of Control.**
9

10 Upon the foreclosure or other judicial sale of all or a substantial part of the
11 Distribution System within the corporate limits of the City, or upon the leasing of all or a
12 substantial part of the Distribution System, the Company shall notify the City of such
13 fact, and such notification shall be treated as a notification that a change in control of the
14 Company has taken place and the provisions of this Franchise governing the consent of
15 the Council to such changes in control of the Company shall apply.

16
17 **SECTION 17. Receivership and Bankruptcy.**
18

19 17.1. The Council shall have the right to cancel this Franchise one hundred twenty
20 (120) days after the appointment of a receiver or trustee to take over and conduct the
21 business of the Company, whether in receivership, reorganization, bankruptcy or other
22 action in proceeding, whether voluntary or involuntary, unless such receivership or
23 trusteeship shall have been vacated prior to the expiration of said one hundred twenty
24 (120) days, or unless;

25 17.2. Within one hundred twenty (120) days after his or her election or
26 appointment, such receiver or trustee shall have fully complied with all the provisions of
27 this Franchise and remedied all defaults thereunder; or

28 17.3. Such receiver or trustee, within one hundred twenty (120) days, shall have
29 executed an Agreement, duly approved by the court having jurisdiction, whereby the
30 receiver or trustee assumes and agrees to be bound by each and every provision of this
31 Franchise granted to the Company.

32
33 **SECTION 18. Purchase.**
34

35 18.1. The City shall have the option to purchase the Company's Distribution
36 System within the City of Austin.

37 18.2. The following are conditions precedent to the exercise of City's option to
38 purchase:

39 18.2.1. The City must provide the Company with written notice of the City's
40 intention to exercise its option to purchase the Company's property devoted to the
41 Distribution System.

42 18.2.2. Within thirty (30) days after receipt of the notice of intention to exercise its

1 option, the Company shall make a written offer ("Offer") stating the cash price at which
2 the Company is willing to close the purchase and sale of the Distribution System., Within
3 ninety (90) days of the receipt of the Offer, the City must give written notice to the
4 Company (a) that the Offer is rejected and the appraisal procedures set forth in Section
5 18.3 are to be initiated, (b) that the City agrees to purchase the Distribution System for
6 cash at the cash price stated in the Offer, or (c) withdraw its notice of intent to exercise its
7 purchase option.

8 18.2.3 If the City agrees to purchase the Distribution System at the price stated in
9 Company's Offer, the parties shall negotiate the terms of a definitive purchase agreement
10 in good faith. Closing shall take place within thirty days after satisfaction of all
11 conditions precedent to the sale in the purchase agreement are satisfied, or at such other
12 time upon which the parties may mutually agree.

13 18.3. Upon initiation of the appraisal procedures set forth in this section, the
14 Company and the City shall each appoint an appraiser within thirty (30) days after
15 delivery of the written election for appraisal under Section 18.2. The appraisers shall be
16 experienced in the evaluation of gas distribution systems, and neither appraiser shall have
17 worked for either the City or the Company within five (5) years of the date of
18 appointment or be otherwise disqualified from rendering independent judgment. The
19 City and the Company shall each immediately provide the name, mailing address and
20 telephone number of its appointee to the other party. The appointed appraisers shall
21 agree on the appointment of a third appraiser with like qualifications.

22 18.3.1 Within thirty (30) days after appointment of the third appraiser and after no
23 less than least fifteen (15) days written notice to the parties, the appraisers shall
24 commence their determination of the appraisal value of the Distribution System.

25 18.3.2. Within ninety (90) days after the commencement of the appraisal process,
26 the appraisers shall each file with the City and the Company a written proposed decision
27 on the appraised value, including detailed written findings explaining the basis of the
28 proposed valuation. The factors for the appraisers to consider in arriving at a fair market
29 value for the Company's facilities shall include, but not be limited to, the following:

30
31 (A) the book value of the assets constituting the Company's Distribution System
32 within the City of Austin;

33 (B) the age and condition of the physical plant and equipment;

34 (C) the discounted future revenue stream generated from the customer base; and

35 (D) the remaining useful life of the Company's distribution system within the City
36 of Austin.

37 18.4. Closing shall be held at a mutually agreeable location one hundred twenty
38 (120) days after the City's receipt of the Offer ninety (90) days after the final decision of
39 the appraisers becomes final. At the closing, the City shall pay in the case the cash price
40 stated in the Offer or the final appraisal value, as appropriate.

41 18.5. The time periods specified in this section may be modified or extended only
42 by a writing duly authorized and executed by both the City and the Company. Such

1 authorization shall not be unreasonably withheld, provided that any such request shall be
2 made in writing and received by the other party within a reasonable time prior to the
3 expiration of the time period sought to be extended.

4 18.6. In the event the City decides not to purchase the Company's Distribution
5 System or the City is financially unable to close the purchase of the Company's
6 Distribution System within the time set forth herein, the City's purchase right shall be
7 deemed waived and the City shall reimburse the Company for all the Company's costs
8 and expenses expended in preparing for the purchase transaction.
9

10 **SECTION 19. Severability.**

11
12 19.1. If any word, phrase or one or more provisions of this Franchise are held to
13 be void, voidable, or unenforceable by a court of competent jurisdiction in a final judicial
14 action, the word(s), phrase(s), or provision(s) are severed from the remaining provisions
15 of the Franchise. Such a word, phrase, or provision shall not affect the legality, validity,
16 or constitutionality of the remaining portions of this Franchise. The City and the
17 Company enter into this Franchise and each of its provisions regardless of any provision
18 that is held to be illegal, invalid, or unconstitutional, provided, however, that the City and
19 the Company each reserves the right to terminate the Agreement authorized by this
20 Franchise Ordinance if any provision set out herein is held to be illegal, invalid or
21 unconstitutional.

22 19.2. Nothing herein contained shall be construed as granting any exclusive
23 Franchise or right.
24

25 **SECTION 20. Interpretation.**

26
27 The use of captions or headings for the various sections of this Ordinance are for
28 convenience of parties only and do not reflect the intent of the parties. The rule of
29 interpretation to resolve ambiguities in a contract against the party drafting such contract
30 shall not apply to this Franchise.
31

32 **SECTION 21. Dispute Resolution.**

33
34 21.1. If a dispute arises out of or related to the Franchise, or the breach thereof, the
35 parties agree to negotiate prior to prosecuting a suit for damages. However, this section
36 does not prohibit the filing of a lawsuit to toll the running of a statute of limitations or to
37 seek injunctive relief. Either party may make a written request for a meeting between
38 representatives of each party within fourteen (14) calendar days after receipt of the
39 request or such later period as agreed by the parties. Each party shall include, at a
40 minimum, one (1) senior level individual with decision-making authority regarding the
41 dispute. The purpose of this and any subsequent meeting is to attempt, in good faith, to
42 negotiate resolution of the dispute. If within thirty (30) calendar days after such meeting,

1 the parties have not succeeded in negotiating a resolution of the dispute, they will
2 proceed directly to mediation as described below. Negotiation may be waived by a
3 written Agreement signed by both parties, in which event the parties may proceed
4 directly to mediation as described below.

5 21.2. If the efforts to resolve the dispute through negotiation fail, or the parties
6 waive the negotiation process, the parties may select, within thirty (30) calendar days, a
7 mediator trained in mediation skills to assist with resolution of the dispute. Should they
8 choose this option, the City and the Company agree to act in good faith in the selection of
9 the mediator and to give consideration to qualified individuals nominated to act as
10 mediator. Nothing in the Franchise prevents the parties from relying on the skills of a
11 person who is trained in the subject matter of the dispute or a contract interpretation
12 expert. If the parties fail to agree on a mediator within thirty (30) calendar days of
13 initiation of the mediation process, the mediator shall be selected by the Travis County
14 Dispute Resolution Center (DRC).

15 21.3 The parties agree to participate in mediation in good faith for up to thirty
16 (30) calendar days from the date of the first mediation session. The City and the
17 Company will share costs of the mediator selected to mediate the dispute, equally.
18

19 **PART 2.** In compliance with Article XI (*Franchises and Public Utilities*), Section 3
20 (*Ordinance Granting Franchise*) of the City Charter, the Company shall bear the expense
21 of publishing the full text of this ordinance in a newspaper of general circulation in the
22 City within five days after each of the three readings of this ordinance.

23 **PART 3.** If any of the terms of this ordinance conflict with the City Charter, the terms of
24 the Charter prevail.

25 **PART 4.** Ordinance No. 86-0918-T is repealed on the effective date of this ordinance.

26 **PART 5.** This ordinance takes effect on _____, 2006.

27 **PASSED AND APPROVED**

28
29 §
30 §
31 §
_____, 2006

32 Will Wynn
33 Mayor

34
35
36 **APPROVED:** _____

37 David Allan Smith
38 City Attorney

ATTEST: _____

37 Shirley A. Gentry
38 City Clerk