

## ORDINANCE NO. 2020-22

**AN ORDINANCE GRANTING TO UNS GAS, INC. AN ARIZONA PUBLIC SERVICE CORPORATION, ITS LEGAL REPRESENTATIVES, SUCCESSORS, LESSEES AND ASSIGNS, CERTAIN POWERS, LICENSES, RIGHTS-OF-WAY, PRIVILEGES AND FRANCHISE TO CONSTRUCT, OPERATE AND MAINTAIN IN THE CITY OF FLAGSTAFF, STATE OF ARIZONA, AS NOW OR HEREAFTER CONSTITUTED, WORKS, SYSTEMS AND PLANTS FOR THE HANDLING, PRODUCTION, MANUFACTURING, TRANSPORTING, STORING, SALE AND DISTRIBUTION OF GAS INTO, OUT OF, AND THROUGH SAID MUNICIPALITY, AND FOR THE DISTRIBUTION AND SALE OF SUCH GAS TO SAID MUNICIPALITY, ITS INHABITANTS AND OTHERS, INCLUDING CUSTOMERS INSIDE, BEYOND, AND OUTSIDE OF THE LIMITS OF SAID MUNICIPALITY; AND TO USE THE STREETS, AVENUES, EASEMENTS, RIGHTS-OF-WAY, ALLEYS, HIGHWAYS, SIDEWALKS, BRIDGES AND OTHER STRUCTURES AND PLACES AND PUBLIC GROUNDS IN SAID MUNICIPALITY FOR A PERIOD OF TWENTY-FIVE (25) YEARS; AND PRESCRIBING IN CONNECTION THEREWITH CERTAIN RIGHTS, DUTIES, TERMS AND CONDITIONS HEREIN MENTIONED; AND PROVIDING FOR THE PAYMENT TO SAID MUNICIPALITY OF A PERCENTAGE OF CERTAIN REVENUES OF GRANTEE FROM ITS OPERATIONS THEREIN; AND DECLARING AN EMERGENCY**

### **Section 1 Grant of Franchise:**

The City of Flagstaff, a municipal corporation in Coconino County, Arizona, hereinafter called the "Municipality", hereby grants to and vests in UNS Gas, Inc., an Arizona public service corporation, hereinafter called the "Company", a non-exclusive franchise (the "Franchise") with the right to operate a gas plant, system, pipelines and works in the Municipality, as now or hereafter constituted, and the authority, license, power and privilege to maintain, construct, build, equip, conduct or otherwise establish and operate in the Municipality, works or systems and plants to manufacture, use, sell, store, distribute, convey or otherwise establish, conduct, serve, supply or furnish the inhabitants of the Municipality and others, and to the Municipality whenever it may desire to contract therefore, gas for light, fuel, power, heat, and the Company hereby is granted passage, right-of-way and the right to occupy and use in any lawful and reasonable way during the life of this Franchise every and any and all Municipality streets, alleys and other dedicated public rights-of-way, both above and beneath the surface of the same, now existing or may be hereinafter extended (the "Premises"), for the service, use, effect and lawful purpose as herein stated. This ordinance supersedes in totality that franchise previously granted under Ordinance No. 1879. The rights afforded to the Company herein shall include the right to make reasonable upgrades or changes to the Company's facilities in response to changes in technology in order to enhance service to the Company's customers.

### **Section 2 Use of Premises and Relocation of Facilities:**

The Company is hereby authorized, licensed and empowered to do any and all things necessary and proper to be done and performed in executing the powers and utilizing the privileges herein mentioned and granted by this Franchise, provided the same do not unreasonably conflict with water or other pipes, sewer, or other pre-existing underground installations, and that all work done in the Premises by the Company shall be done with the utmost

diligence and the least practicable inconvenience to the public or individuals, and that the Company shall, within a reasonable time, restore the Premises excavated by it to their original condition as nearly as practicable, subject to the reasonable approval of the Municipality. The Company will make every effort to coordinate all work with the Municipality. The Company shall remove or relocate its facilities as and when required by the Municipality to accommodate improvements within the Premises for the public benefit. and any removal or relocation shall be made at the sole cost and expense of the Company, unless the Company can demonstrate that its facilities were lawfully installed prior to the dedication to or acquisition by the Municipality of the property in question. Completed or "as-built" plans of any facilities installed or relocated by the Company shall be submitted by the Company to the Municipality as may be required by the Municipality's Public Works Director. All work and other actions as may be otherwise required or contemplated under this Franchise by the Company and/or its agents shall be in accordance with applicable federal and state laws, industry codes and Municipality codes, policies and the Company's Rules and Regulations approved by the Arizona Corporation Commission. Such removal or relocation shall be made as follows:

- A. The entire cost of relocation shall be borne by the Municipality if the company is required by the Municipality to relocate facilities which are located in easements or rights-of-way obtained by the Company prior to the dedication of the public street, alley or easement from which the facilities must be relocated. These prior rights of the Company would also be unaffected by any subsequent relocation.
- B. Except as covered in Paragraph A above and Paragraph G below, the Company shall bear the entire cost of relocating facilities located on public rights-of-way, the relocation of which is necessary for the Municipality's carrying out a function in the interest of the public health, safety or welfare. The Company's right to maintain its lines and facilities is subject to the paramount right of the Municipality to use its streets for all governmental purposes. Governmental purposes include, but are not limited to, the following functions of the Municipality:
  1. Any and all improvements to Municipality streets, alleys and avenues;
  2. Establishing and maintaining sanitary sewers, storm drains, and related facilities;
  3. Establishing and maintaining municipal parks, parkings, parkways, pedestrian malls, or grass, shrubs, trees and other vegetation for the purposes of landscaping any street or public property. The Municipality will consult with the Company on the placement of landscaping in the public rights-of-way where there are existing Company facilities;
  4. Providing fire protection, which will be limited to construction of fire protection facilities and Municipality installed water lines for fire protection purposes;
  5. Collection and disposal of garbage, which will be limited to the construction of collection and disposal facilities and will not apply to placement of dumpsters.
  6. Construction, maintenance and repair of all governmental buildings and facilities.

- C. The installation of pipe and other facilities to serve domestic water shall be considered both governmental and proprietary and, therefore, the actual cost of relocation shall be shared by the Company paying fifty percent (50%) and the Municipality paying fifty percent (50%).
- D. The Company shall bear the entire cost of relocation of existing facilities, irrespective of the function served, where the Municipality's facilities, or other facilities occupying a right-of-way under authority of a Municipality permit or license, are located in the public right-of-way before such right-of-way is occupied by the Company and the conflict between the Company's potential facilities and other existing facilities can only be resolved expeditiously, as determined by the Director of Public Works, by the movement of the existing Municipality's or permittee's facilities.
- E. If the Municipality participates in the cost of relocation of the Company's facilities for any reason, the cost of relocation to the Municipality shall not include any betterment to the Company's facilities as they existed prior to relocation.
- F. The Municipality will not exercise its right to require utility facilities to be relocated in an unreasonable or arbitrary manner. The Company and the Municipality may agree to cooperate on the location and relocation of other facilities in the public right-of-way. The Company will obtain, and pay for, all required building permits and buy-in fees for non-gas distribution facilities such as offices, garages, repair shops and like facilities. The Municipality will provide its normal inspection services for these construction projects. The Municipality will not, nor will it be required by the Company to, inspect, monitor or approve construction of any gas distribution facility.
- G. In the event that the Company relocates any of its facilities at the request of the Municipality for a "governmental purpose," as that phrase is defined in Section 2.B hereof, and the Municipality fails to either: (1) exercise the function which constitutes such "governmental purpose" or; (2) complete the improvement which constitutes such "governmental purpose" within three years of completion of the relocation of the company's facilities to accommodate such "governmental purpose," the Municipality shall reimburse the Company the entire and actual cost of such relocation within ninety (90) calendar days of such billing.

**Section 3 Company's Compliance with Municipality Code; Plan Submitted for Approval; Construction near Municipality Facilities:**

3.1 The Company shall obtain all necessary permits (without cost, or related fees or other financial obligation to the Company pursuant to Section 8 hereof) for work in the public rights-of-way. All work in the public rights-of-way will be in compliance with applicable Municipal Codes, standards and regulations as they exist at that time. Prior to commencing any work in a right-of-way (except in emergency circumstances), the Company shall submit plans of work to be performed to the Municipality's Public Works Director for review and approval, and obtain any permit necessary for such work. The Company, upon receipt from the Municipality of any finalized plans that would require construction or relocation of Company facilities, shall advise the Municipality on the estimated amount of work required and the anticipated necessary timeframe of such work within 90 days of receipt of such plans. For purposes of budgeting and asset

allocation by the Company, the Company shall have six months from the receipt of such finalized plans in which to design and to complete construction or relocation of the necessary facilities.

3.2 Representatives of the Municipality and the Company shall, during the entire term of this Franchise, meet at least once in each calendar year to review any projects involving the construction or modification of Municipality rights-of-way within the subsequent five-year period in order for both parties to adequately plan and budget for such actions and to determine the extent of work required of the Company, if any, for such projects.

#### **Section 4 Indemnification:**

The Company shall defend, indemnify and hold harmless the Municipality against all liabilities, claims, demands or judgments, excluding the portion of such liabilities proximately caused by the Municipality's own negligence, for injury to any person or property caused by the acts or omissions of the Company in whole or in part, in the construction, operation, repair, extension or maintenance of its property or facilities.

#### **Section 5 Insurance:**

The Company agrees that at all times during the existence of this Franchise, that it will maintain in force, at its own expense, a general liability insurance, self-retention or general asset program to adequately insure and/or protect the legal liability of the Company with respect to the installation, operation, and maintenance of its facilities, together with all the necessary and desirable appurtenances authorized by this Franchise, to occupy the Premises. Such insurance program will provide protection for bodily injury and property damage arising from the operation by the Company of its facilities. The Company shall file with the Municipality documentation of such liability insurance, self-retention or general asset program within 30 days following the request of the Municipality. The City of Flagstaff shall be named as an "Additional Insured" under the policy. The policy limits or any insurance maintained in compliance with this section shall not limit the Company's indemnification requirements under Section 4 of this Franchise.

#### **Section 6 Applicable Rates and Charges:**

The rates and charges to be charged by the Company for furnishing gas service hereunder and the rules and regulations to be made and enforced by the Company for the conduct of its business shall be those on file and in effect with the Arizona Corporation Commission applicable to the service.

#### **Section 7 Assignment:**

The Company shall have the right and privilege of assigning this Franchise and all obligations, rights and privileges granted herein, as long as prior notice of such assignment is presented to the Municipality, and whenever the word "Company" appears herein, it shall be construed as applying to its successors, lessees and assigns.

#### **Section 8 Franchise Fee; Additional Fees and Taxes:**

8.1 The Company, its successors, lessees, and assigns, for and in consideration of the granting of this franchise and as rental for the occupation and use of or easement over, upon and benefit the streets, avenues, easements, rights-of-way, highways, alleys, sidewalks, and bridges in said Municipality, shall pay to the Municipality, during the term of this franchise, a total

aggregate sum of two percent (2%) of the gross receipts of the Company, its successors, lessees and assigns, during such year, for gas sold within the corporate limits of the Municipality, subject to limitations hereafter stated: such gross receipts to consist of the total amount collected from users and consumers on account of gas sold and consumed within the corporate limits of the Municipality under the Company's rates in existence at the time, excepting therefrom, however, the gross receipts for gas sold to the Municipality. Payments shall be in lieu of any and all fees or charges assessed by the Municipality in any way associated with the Company's use, construction or inspection of the Premises. It is the parties' express intention, that the franchise fee calculation formula set forth in this Ordinance No. 2020-22 shall not have the effect of reducing or lessening franchise fees payable to the Municipality, all factors remaining equal, as would have been payable under Ordinance No. 1879; and, if either party observes a reduction in the franchise fee, the parties will meet and discuss the formula, and adjust the formula or application thereof as appropriate to achieve the parties' intention. The City Council shall have authority to approve an amendment to this Section 8.1 of this franchise on behalf of Municipality, if necessary, to achieve the parties' intention. Beginning on the Effective Date of this Franchise as set forth herein, payment as described herein shall be payable in quarterly amounts within 30 days after the end of each calendar quarter.

8.2 Notwithstanding any provision contained herein to the contrary, the Company shall pay, in addition to the payment provided herein, the following charges, taxes and fees as may be established in a code or ordinance properly adopted by the Municipality: (a) general ad valorem property taxes; (b) transaction privilege and use tax as authorized by law and collected by the Company for its sales to its customers within the present and future corporate limits of the Municipality; and (c) other charges, taxes or fees levied upon businesses generally throughout the Municipality that has a rational basis and is applied in a non-discriminatory manner.

8.3 If any lawful authority having jurisdiction in the Municipality hereafter prohibits payments, the obligation to make such payments hereinabove provided for shall forthwith cease. For the purpose of verifying amounts payable hereunder, the books and records of the Company shall be subject to inspection by duly authorized officers or representatives of the Municipality at reasonable times.

8.4 As noted in Section 8.1, payments are due quarterly. If the Company fails to deposit the franchise fee payment with the Municipality's Management Services Division (or other financial department designated by Municipality) by the twentieth (20<sup>th</sup>) day of the month immediately succeeding the date the fee became due and payable, the Company shall be assessed (i) a five percent (5%) late fee, and (ii) interest at the rate of twelve percent (12%) per annum of any unpaid balance (exclusive of late fees), said interest being calculated from the first day the payment become due.

8.5 Notwithstanding the provisions of Section 8.1, should the Company enter into any franchise with any entity of this State which provides for a higher percentage of Company gross receipts payments than two percent (2%), the Municipality shall automatically receive the same higher percentage rate payment.

### **Section 9 Approval and Acceptance of Franchise:**

This Franchise shall be accepted by the Company in writing, which acceptance shall be filed with the Municipality Clerk within 60 days after the passage of this Ordinance. After approval by voters pursuant to Section 13 herein and adoption of this Ordinance pursuant to the

Municipality Code, this Agreement shall be a contract duly executed by and between the Municipality and the Company.

**Section 10 Independent Provisions:**

If any section, paragraph, subdivision, clause, phrase or provision hereof shall be adjudged invalid or unconstitutional, the same shall not affect the validity hereof as a whole, or any part or provision other than the part so decided to be invalid or unconstitutional.

**Section 11 Term:**

This Franchise shall commence on October 3, 2020 (the "Effective Date") and continue in full force and effect for a period of 25 years. The Municipality may terminate this Franchise in the event the Municipality formally finds, after notice and hearing that the Company has failed to comply with any material provisions of this Franchise or has failed to correct any failure after 30 days written notice.

**Section 12 Ownership of Company Property:**

All plant, system, pipelines, facilities, works, and all other physical property installed or operated by the Company in accordance with the terms of this Franchise shall be and remain the property of the Company, and upon expiration of this Franchise or any extension or renewal thereof, the Company is hereby granted the right to enter upon the Premises for the purpose of removing any and all plant, system, pipelines, facilities, works and other property of the Company, at any time within six (6) months after termination of this Franchise or any extension or renewal thereof. Upon removal of Company property, the Company shall restore the property of Municipality per the requirements of Section 2.

**Section 13 Voter Approval:**

The terms of this Agreement shall only become effective after its approval by a majority vote of the qualified electors of the City at a regular election or at a special election duly and regularly called by the City Council of the City of Flagstaff for that purpose. The Company shall pay all of the City's expenses incurred in conducting the franchise election, but if more than one item is on the same ballot, the Company shall pay only that portion of the City's election expenses determined to be directly attributable to Company or otherwise as reasonably practicable, by dividing all of the City's expenses by the total number of measures or offices, presented on the ballot and adding any expenses, as may be required by Arizona Revised Statutes, associated directly with this Franchise election.

PASSED AND ADOPTED by the City Council of the City of Flagstaff this 1st day of September, 2020.

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MAYOR

ATTEST:

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CITY CLERK

APPROVED AS TO FORM:

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CITY ATTORNEY