

ORDINANCE NO. 2012-016

AN ORDINANCE GRANTING CASCADE NATURAL GAS CORPORATION, A WASHINGTON CORPORATION, ITS SUCCESSORS AND ASSIGNS, THE RIGHT, PRIVILEGE, AUTHORITY AND FRANCHISE TO SET, ERECT, LAY, CONSTRUCT, EXTEND, SUPPORT, ATTACH, CONNECT, MAINTAIN, REPAIR, REPLACE, ENLARGE, OPERATE AND USE FACILITIES IN, UPON, OVER, UNDER, ALONG, ACROSS AND THROUGH THE FRANCHISE AREA TO PROVIDE FOR THE TRANSMISSION, DISTRIBUTION AND SALE OF NATURAL GAS FOR POWER, HEAT AND LIGHT, AND ANY OTHER PURPOSES FOR WHICH NATURAL GAS AND ELECTRIC ENERGY MAY BE USED.

THE CITY COUNCIL OF THE CITY OF ARLINGTON, WASHINGTON, DO ORDAIN AS FOLLOWS:

**Section 1.
Definitions.**

1.1 Where used in this franchise (the "Franchise") the following terms shall mean:

1.1.1 "CNG" means Cascade Natural Gas Corporation, a Washington corporation, and its successors and assigns.

1.1.2 "City" means the City of Arlington, a Municipal Corporation within the State of Washington, and its successors and assigns.

1.1.3 "Franchise Area" means any, every and all right-of-way for public roads, streets, avenues, alleys, highways and other public ways of the City as now laid out, platted, dedicated or improved; and any, every and all right-of-way for public roads, streets, avenues, alleys, highways and other public ways that may hereafter be laid out, platted, dedicated or improved within the present limits of the City and as such limits may be hereafter extended. For the purpose of this definition, right-of-way includes property owned by the City in fee and used for public roads and other public ways of the City.

1.1.4 "Facilities" means, collectively, any and all (i) natural gas distribution systems, including but not limited to, gas pipes, pipelines, mains, laterals, conduits, feeders, regulators, meters, meter-reading devices, and communication systems; and (ii) any and all other equipment, appliances, attachments, appurtenances and other items necessary, convenient, or in any way appertaining to any and all of the foregoing, whether the same be located over or under ground.

1.1.5 "Ordinance" means Ordinance No. 2012-016, which sets forth the terms and conditions of this Franchise.

1.1.6 "Public right of way improvement" is a City-funded capital improvement to the public right of way.

Section 2. Facilities Within Franchise Area.

2.1 The City does hereby grant to CNG the right, privilege, authority and franchise to set, erect, lay, construct, extend, support, attach, connect, maintain, repair, replace, enlarge, operate and use Facilities in, upon, over, under, along, across and through the Franchise Area to provide for the transmission, distribution and sale of natural gas for power, heat, light and such other purposes for which gas may be used.

Section 3. Noninterference of Facilities.

3.1 CNG's Facilities shall be maintained within the Franchise Area so as not to unreasonably interfere with the free passage of traffic and in accordance with the laws of the State of Washington and the City. CNG shall exercise its rights within the Franchise Area in accordance with applicable City codes and ordinances governing use and occupancy of the Franchise Area; provided, however, in the event of any conflict or inconsistency of such codes and ordinances with the terms and conditions of this Franchise, the terms and conditions of this Franchise shall govern and control; provided, further, nothing herein shall be deemed to waive, prejudice or otherwise limit any right of appeal afforded CNG by such City codes and ordinances.

3.2 CNG shall provide the City, upon the City's reasonable request, copies of available drawings in use by CNG showing the location of its Facilities at specific locations within the Franchise Area and shall provide field markings of its underground Facilities within the Franchise Area for the design of City projects at no cost to the City. As to any such drawings so provided, CNG does not warrant the accuracy thereof and, to the extent the location of Facilities are shown, such Facilities are shown in their approximate location. With respect to any excavations within the Franchise Area undertaken by or on behalf of CNG or the City, nothing herein is intended (nor shall be construed) to relieve either party of their respective obligations arising under applicable law with respect to determining the location of utility facilities.

Section 4. Relocation of Facilities.

4.1 Whenever the City causes a public right of way improvement to be undertaken within the Franchise Area, and such public right of way improvement requires the relocation of CNG's then existing Facilities within the Franchise Area (for purposes other than those described in paragraph 4.2 below), the City shall:

- 4.1.1 provide CNG, within a reasonable time prior to the commencement of such public right of way improvement, written notice requesting such relocation; and
- 4.1.2 provide CNG with reasonable plans and specifications for such public right of

way improvement.

After receipt of such notice and such plans and specifications, CNG shall relocate such Facilities within the Franchise Area at no charge to the City. The City will make its best efforts to avoid the need for such moving or changing whenever possible. In the event the city receives any Federal, state or other funds for gas line relocating purposes, the Grantee will be given credit to the extent any such funds are actually received by the City.

4.2 Whenever (i) any public or private development within the Franchise Area, other than a public right of way improvement, requires the relocation of CNG's Facilities within the Franchise Area to accommodate such development; or (ii) the City requires the relocation of CNG's Facilities within the Franchise Area for the benefit of any person or entity other than the City, then in such event, CNG shall have the right as a condition of such relocation, to require such developer, person or entity to make payment to CNG, at a time and upon terms acceptable to CNG, for any and all costs and expenses incurred by CNG in the relocation of CNG's Facilities.

4.3 Any condition or requirement imposed by the City upon any person or entity, other than CNG, that requires the relocation of CNG's Facilities shall be a required relocation for purposes of paragraph 4.2 above (including, without limitation, any condition or requirement imposed pursuant to any contract or in conjunction with approvals or permits for zoning, land use, construction or development).

4.4 Nothing in this Section 4 "Relocation of Facilities" shall require CNG to bear any cost or expense in connection with the location or relocation of any Facilities then existing pursuant to easement or such other rights not derived from this Franchise.

Section 5. Indemnification.

5.1 CNG hereby releases, covenants not to bring suit and agrees to indemnify, defend and hold harmless the City, its officers, employees, agents and representatives from any and all claims, costs, judgments, awards or liability to any person, including claims by CNG's own employees for which CNG might otherwise be immune under Title 51 RCW, for injury or death of any person or damage to property caused by or arising out of the negligent acts or omissions of CNG, its agents, servants, officers or employees in the performance of this Franchise, and any rights granted hereunder. If CNG is required to indemnify and defend the City, CNG shall control the defense. CNG shall not settle such claim, judgment, award or liability without the consent of the City, which consent shall not be unreasonably withheld. This section is not, and shall not be interpreted or shall not constitute as to third parties, a waiver of any defense or immunity available to the City. CNG, in defending any suit, action, claim or proceeding on behalf of the City, shall be entitled to assert in any such suit, action, claim or proceeding every defense or immunity the City could assert on its own behalf. This franchise agreement shall not be interpreted to constitute a waiver by the City of any of its defenses of immunity or limitations on liability pursuant to Washington law or statute.

Inspection or acceptance by the City of any work performed by CNG at the time of completion of construction shall not be grounds for avoidance by CNG of any of its

obligations under this Section. Said indemnification obligations shall extend to claims which are not reduced to a suit and any claims which may be compromised prior to the culmination of any litigation or the institution of any litigation.

In the event that CNG refuses the tender of defense in any suit or any claim, said tender having been made pursuant to the indemnification provision contained herein, and said refusal is subsequently determined by a court having jurisdiction (or such other tribunal that the parties shall agree to decide the matter), to have been a wrongful refusal on the part of CNG, then CNG shall pay all of the City's costs for defense of the action, including all expert witness fees, costs, and attorney's fees, including costs and fees incurred in recovery under this indemnification provision.

In the event of liability for damages arising out of bodily injury to persons or damages to property caused by or resulting from the concurrent negligence of CNG and the City, its officers, employees and agents, CNG's liability hereunder shall be only to the extent of CNG's negligence. It is further specifically and expressly understood that the indemnification provision provided herein constitutes CNG's waiver of immunity under Title 51 RCW, solely for the purposes of this indemnification. This waiver has been mutually negotiated by the parties. The provisions of this Section shall survive the expiration or termination of this Franchise.

Section 6. Insurance

6.1 CNG shall procure and maintain for the duration of this Franchise, insurance against claims for injuries to persons or damages to property which may arise from or in connection with the exercise of the rights, privileges and authority granted hereunder to CNG, its agents, representatives or employees. CNG shall provide a copy of a Certificate of Insurance to the City for its inspection prior to the adoption of this Franchise Ordinance, and such insurance certificate shall evidence a policy of insurance that includes:

- A. Automobile Liability insurance with limits no less than \$1,000,000 Combined Single Limit per occurrence for bodily injury and property damage; and
- B. Commercial General Liability insurance, written on an occurrence basis with limits no less than \$1,000,000 combined single limit per occurrence and \$2,000,000 aggregate for personal injury, bodily injury and property damage. Coverage shall include but not be limited to: blanket contractual; products and completed operations; broad form property damage; explosion, collapse and underground (XCU); and employer's liability.

CNG may satisfy the requirements of this section by a self-insurance program or membership in an insurance pool providing substantially the same coverage as set forth above.

Section 7. Vacation or Disposal of Franchise Area.

7.1 In the event the City vacates or disposes of any portion of the Franchise Area during the term of this Franchise, the City shall provide CNG prior notice of same, and in its vacation or disposal procedure shall reserve an easement for utilities suitable for CNG's Facilities if the

Arlington City Council deems such action to be in the best interests of the public welfare and the City.

**Section 8.
Default.**

8.1 If CNG willfully violates or fails to comply with any of the provisions of this Franchise, or through willful misconduct or gross negligence fails to heed or comply with any notice given CNG by the City under the provisions of this Franchise, then CNG shall, at the election of the Arlington City Council, forfeit all rights conferred hereunder and this Franchise may be revoked or annulled by the Council after a hearing held upon notice to CNG.

Section 9. Remedies to Enforce Compliance.

9.1 The City may elect, in lieu of the provisions of Section 8 above and without any prejudice to any of its other legal rights and remedies, to obtain an order from the superior court having jurisdiction compelling CNG to comply with the provisions of this Ordinance and to recover damages and costs incurred by the City by reason of CNG's failure to comply. In addition to any other remedy provided herein, the City reserves the right to pursue any remedy to compel or force CNG and/or its successors and assigns to comply with the terms hereof, and the pursuit of any right or remedy by the City shall not prevent the City from thereafter declaring a forfeiture or revocation for breach of the conditions herein.

**Section 10. City Ordinances and
Regulations.**

10.1 Nothing herein shall be deemed to restrict the City's ability to adopt and enforce all necessary and appropriate ordinances regulating performance of the conditions of this Franchise, including any valid ordinance made in the exercise of its police powers in the interest of public safety and for the welfare of the public. The City shall have the authority at all times to control by appropriate regulations the location, elevation, manner of construction and maintenance of any Facilities within the Franchise Area by CNG, and CNG shall promptly conform with all such regulations, unless compliance would cause CNG to violate other requirements of law or applicable regulation. The provisions of Arlington Municipal Code shall apply to performance of the conditions of this Franchise except as may be inconsistent or in conflict with the provisions of this Franchise.

**Section 11. Nonexclusive
Franchise.**

11.1 This Franchise is not, and shall not be deemed to be, an exclusive Franchise. This Franchise shall not in any manner prohibit the City from granting other and further franchises over, upon, and along the Franchise Area that do not interfere with CNG's rights under this Franchise. This Franchise shall not prohibit or prevent the City from using the Franchise Area or affect the jurisdiction of the City over the same or any part thereof.

**Section 12. Franchise
Term.**

12.1 This Franchise is and shall remain in full force and effect for a period of twenty (20) years from and after the effective date of the Ordinance; provided, however, CNG shall have no rights under this Franchise nor shall CNG be bound by the terms and conditions of this Franchise unless CNG shall, within sixty (60) days after the effective date of the Ordinance, file with the City its written acceptance of the Ordinance.

**Section 13.
Assignment.**

13.1 This Franchise may not be assigned or transferred without the written consent of the City. In the case of transfer or assignment as security by mortgage or other security instrument in whole or in part to secure indebtedness, such consent shall not be required unless and until the secured party elects to realize upon the collateral. CNG shall provide prompt written notice to the City of any such assignment or transfer, and all of the provisions, terms, conditions, and requirements this Franchise shall be binding upon successors and assigns as if they were specifically mentioned wherever CNG is named herein.

**Section 14.
Acceptance.**

14.1 Within sixty (60) days after the passage and approval of this Ordinance, this Franchise may be accepted by CNG by its filing with the City Clerk an unconditional written acceptance thereof. Failure of CNG to so accept this Franchise within said period of time shall be deemed a rejection thereof by CNG, and the rights and privileges herein granted shall, after the expiration of the sixty day period, absolutely cease and determine, unless the time period is extended by ordinance duly passed for that purpose.

**Section 15.
Survival.**

15.1 All of the provisions, terms, conditions and requirements of Sections 4, Relocation of Facilities; 5, Indemnification; and 6, Insurance; of this Franchise shall be in addition to any and all other obligations and liabilities CNG may have to the City at common law, by statute, or by contract, and shall survive the termination or expiration of this Franchise and any renewals or extensions thereof.

**Section 16.
Notice.**

16.1 Any notice or information required or permitted to be given to the parties under this Franchise agreement may be sent to the following addresses unless otherwise specified:

CITY OF ARLINGTON
Public Works Director
238 N. Olympic Ave.
Arlington, WA 98223

CASCADE NATURAL GAS
8113 W Grandridge Blvd.
Kennewick, WA 99336

**Section 17.
Severability.**

17.1 If any section, sentence, clause or phrase of this Ordinance should be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of any other section, sentence, clause or phrase of this Ordinance unless such invalidity or unconstitutionality materially alters the rights, privileges, duties, or obligations hereunder, in which event either party may request renegotiation of those remaining terms of this Franchise materially affected by such courts' ruling.

**Section 18.
Miscellaneous.**

18.1 If any provision, term, condition or portion of this Franchise shall be held to be invalid, such invalidity shall not affect the validity of the remaining portions of this Franchise, which shall continue in full force and effect. The headings of sections and paragraphs of this Franchise are for convenience of reference only and are not intended to restrict, affect or be of any weight in the interpretation or construction of the provisions of such sections or paragraphs.

18.2 This Franchise may be amended only by written instrument, signed by both parties, which specifically states that it is an amendment to this Franchise and is approved and executed in accordance with the laws of the State of Washington. Without limiting the generality of the foregoing, this Franchise (including, without limitation, Section 5 above) shall govern and supersede and shall not be changed, modified, deleted, added to, supplemented or otherwise amended by any permit, approval, license, agreement or other document required by or obtained from the City in conjunction with the exercise (or failure to exercise) by CNG of any and all rights, benefits, privileges, obligations or duties in and under this Franchise, unless such permit, approval, license, agreement or other document specifically:

18.2.1 references this Franchise; and

18.2.2 states that it supersedes this Franchise to the extent it contains terms and conditions that change, modify, delete, add to, supplement or otherwise amend the terms and conditions of this Franchise.

In the event of any conflict or inconsistency between the provisions of this Franchise and the provisions of any such permit, approval, license, agreement or other document, the provisions of this Franchise shall control.

18.3 This Franchise is subject to the provisions of any applicable tariff on file with the

Washington Utilities and Transportation Commission or its successor. In the event of any conflict or inconsistency between the provisions of this Franchise and such tariff, the provisions of such tariff shall control.

Section 19. No Third Party Beneficiary.

19.1 Nothing in this Franchise shall be construed to create any rights in or duties to any third party, nor any liability to or standard of care with reference to any third party, nor confer any right or remedy upon any person other than the City and CNG. No action may be commenced or prosecuted against either the City or CNG by any other party claiming beneficiary of this Franchise and nothing this Franchise shall release or discharge any obligation or liability of any third party to either the City or CNG.

Section 20. Effective Date.

20.1 This Ordinance, being an exercise of a power specifically delegated to the City legislative body, is not subject to referendum, and shall take effect (5) days after passage and publication of an approved summary thereof consisting of the title.

Section 21. Cost of Publication.

21.1 The cost of the publication of this Ordinance shall be borne by CNG.

Passed by the City Council of the City of Arlington the 4th day of September, 2012.

APPROVED:

Barbara Tolbert

BARBARA TOLBERT, MAYOR

ATTEST/AUTHENTICATED:

Kristin M. Banfield
KRISTIN BANFIELD, CITY CLERK

APPROVED AS TO FORM:

BY: Steve J. Peiffle
CITY ATTORNEY, STEVEN J. PEIFFLE

CERTIFICATION OF ORDINANCE

I, Kristin Banfield, being the duly appointed and acting Clerk of the City of Arlington, Washington, a municipal corporation, do hereby certify that the following Ordinance #2012-016 was approved at the September 4, 2012 City Council meeting.


ORDINANCE #2012-016

“AN ORDINANCE GRANTING CASCADE NATURAL GAS CORPORATION, A WASHINGTON CORPORATION, ITS SUCCESSORS AND ASSIGNS, THE RIGHT, PRIVILEGE, AUTHORITY AND FRANCHISE TO SET, ERECT, LAY, CONSTRUCT, EXTEND, SUPPORT, ATTACH, CONNECT, MAINTAIN, REPAIR, REPLACE, ENLARGE, OPERATE AND USE FACILITIES IN, UPON, OVER, UNDER, ALONG, ACROSS AND THROUGH THE FRANCHISE AREA TO PROVIDE FOR THE TRANSMISSION, DISTRIBUTION AND SALE OF NATURAL GAS FOR POWER, HEAT AND LIGHT, AND ANY OTHER PURPOSES FOR WHICH NATURAL GAS AND ELECTRIC ENERGY MAY BE USED.”

A true and correct copy of the original ordinance is attached.

Dated this 5th day of September, 2012.




Kristin Banfield
City Clerk for the City of Arlington