

ORDINANCE NUMBER 2013 - 25

AN ORDINANCE BY THE TOWN OF LAGUNA VISTA TOWN COUNCIL GRANTING TO TEXAS GAS SERVICE COMPANY THE RIGHT, PRIVILEGE AND FRANCHISE TO USE STREETS, ALLEYS, THOROUGHFARES AND OTHER PUBLIC WAYS TO OPERATE AND MAINTAIN A NATURAL GAS DISTRIBUTION SYSTEM IN THE TOWN OF LAGUNA VISTA, CAMERON COUNTY, TEXAS; PROVIDING REGULATIONS FOR THE CONDUCT OF THE SYSTEM BY THE GRANTEE, AND REPEALING THE PRESENT FRANCHISE ORDINANCE.

SECTION 1. - Grant of Franchise

A. Subject to the terms and conditions of this Franchise Ordinance, the right, privilege and franchise is hereby granted to Texas Gas Service Company, a division of ONEOK, Inc., and to its successors, lessees and assigns (hereinafter “**Company**” or “**Grantee**”), to have, own, acquire, install, construct, reconstruct, operate, maintain, use, and extend a system of mains, pipelines, conduits, valves, feeders, regulator stations, laterals, service lines, measuring devices, and all other necessary plants, attachments, land, structures, facilities and appurtenances (hereinafter the “**System**”) for the purpose of selling, storing, supplying, conveying, transmitting, distributing, and/or transporting natural gas, including the equivalent substitutes, for all other lawful purposes in, through, upon, under, and along the present and future streets, avenues, alleys, bridges, sidewalks, parks, easements, highways, and any other public places including any streams, water courses or water ways (hereinafter collectively referred to as “**public ways**”) within the Town limits of the Town of Laguna Vista, Cameron County, Texas (the “**Town**”), and including any territory that the Town may hereafter annex, acquire or purchase; and to distribute, sell, store, supply, transport, carry and/or convey natural gas through Grantee’s System in the Town to other cities, towns, communities and areas outside the Town and to inhabitants thereof, for the full term of this Franchise Ordinance. The Franchise Ordinance shall in no way affect or impair the present or future rights, obligations, or remedies of the Town or Grantee under the Gas Utility Regulatory Act, as amended.

B. For purposes of this Franchise Ordinance, “**Transport Gas**” or “**Transported Gas**” shall mean gas owned or controlled by a user or its designee (i.e., gas

that is purchased or otherwise acquired by a user from someone other than Grantee) and delivered by such user or its designee to Grantee at a point on Grantee's distribution system, such point of delivery to be defined by Grantee, and carried, delivered or transported through Grantee's System at a point of redelivery in the Town by Grantee to the user for a fee. The terms and conditions of the transportation arrangement, including but not limited to the point(s) of delivery, point(s) of redelivery, measurement and location of title transfer, shall be as set forth in the contract entered into between Grantee and the transportation customer and/or Grantee's transportation tariffs on file with the Railroad Commission of Texas or other appropriate regulatory authority.

SECTION 2. – Location of Facilities and Use of Public Ways

A. The mainlines and service pipes of the Company shall be laid in alleys, streets, and avenues, and other public ways, and when in streets and avenues, shall be laid parallel with the curb line thereof, or in such locations as shall be most practical, provided, however, that in no case shall any main be laid less than 18 inches below the established street grade, or if not within a street right-of-way at least 18 inches below the grade of the nearest street, without permission of the Town Engineer.

B. 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 privilege granted by this Franchise Ordinance, provided the same do not conflict with existing infrastructure in the public ways. However, the Company agrees to give the Town reasonable notice except in case of emergency of the dates, location and nature of all work to be performed on the Company's facilities or System within the public ways or rights of way. This Franchise Ordinance shall constitute a permit to perform all work on existing Company facilities or the System within the public ways or rights of way.

C. Except in the case of an emergency, within the Town's full purpose jurisdiction, when the Company desires to lay any new mains hereunder, and before commencing its new construction work, it shall submit to the Town Engineer, or other

proper authority, a map or plan showing the streets, avenues, alleys, and other public places and the locations thereon wherein it proposes to construct such new pipes and mains. The Town Engineer, or other proper authority, shall by written notice, either issue or deny the permit to Company within a reasonable period of time (not to exceed thirty (30) calendar days) of submission of required information by Grantee. Approval by the Town Engineer, or other proper authority, shall constitute a permit to the Company for the opening of the streets, avenues, alleys and other public places shown on the map or plan, and for the new construction or laying of the new mains and pipes by the Company (the "**Permit**") as shown on the plan. If the Town Engineer, or other proper authority, does not respond within thirty (30) calendar days, the Permit shall be deemed approved and accepted. In the event that the Permit is denied, the Town Engineer, or other proper authority, shall advise Grantee in writing of the reasons for the denial and all necessary steps to secure approval of the permit. Company shall have the right to immediately appeal the issuance of the Permit to the Town Manager, and if not determined within ten (10) calendar days by the Town Manager the Company may appeal to the Town Council and be heard at a public meeting held in compliance with applicable law. If the Council fails to act on the appeal within thirty (30) days, the appeal will be deemed to be denied unless agreed otherwise in writing by the Company and the Town. Appeal of any decision made by the Town Council shall be made to the District Court of Cameron County, Texas, and an appeal from any decision of the District Court shall be as in all other civil actions. It shall not be necessary for Company to secure a permit for the laying of service pipes from the mainline pipes of the Company to its customers. This Section 2C. shall also apply to all other facilities and equipment of the Company to be constructed or installed on public property within the Town's full purpose jurisdiction; provided that Company shall not construct, install or erect any facilities or equipment above ground on any such public property without specific written permission of the Town Engineer, or other proper public authority.

D. In the refilling of all openings made by the Company, it shall restore the Town public rights-of-way to a condition equal to or better than the original condition, and when the Company shall open any ground in the Town rights-of-way, the Company shall open no

more space nor keep the space open any longer than is reasonably necessary to properly execute the work for which such space shall have been opened. The Company shall at all times display and keep the necessary danger signals and barricades around all excavations and obstructions, and shall keep sufficient space in good condition for the travel of automobiles, trucks, and other motor vehicles, on at least one side of all excavations and obstructions. The Company shall comply with all applicable Town ordinances, rules and regulations for the repair of cuts and excavations, as are applicable to all other franchisees of the Town.

E. The Company shall not install any pipe, line or facility within any park or recreational land, and shall not install any above ground facility on Town property, without specific written permission. The Company may petition the Town Council for permission to cross park lands, and any such permission shall be in the sole discretion of the Town Council.

F. When the Company is required by Town to remove or relocate its mains, laterals, and other facilities to accommodate construction of streets and alleys by Town, and Company is eligible under federal, state, county, local or other programs for reimbursement of costs and expenses incurred by Company as a result of such removal or relocation, and such reimbursement is required to be handled through Town, Company costs and expenses shall be included in any application by Town for reimbursement, if Company submits its cost and expense documentation to Town prior to the filing of the application. Town shall provide reasonable notice to Company of the deadline for Company to submit documentation of the costs and expenses of such relocation to Town. If the Company is required by Town to remove or relocate its mains, laterals, or other facilities for any reason other than the construction of streets and alleys by Town, Company shall be entitled to reimbursement from Town or others of the cost and expense of such removal or relocation. When Company is required to remove or relocate its mains, laterals or other facilities to accommodate construction of streets or alleys by Town without reimbursement from Town,

Company shall have the right to seek a surcharge to recover relocation costs pursuant to Section 104.112 et al, of the Texas Utilities Code.

SECTION 3. Effect of Other Ordinances and Agreements

Except as provided in Section 11, Grantee, its successors, lessees or assigns, shall at all times be subject to any Ordinances now in existence, or which may hereafter be passed, not inconsistent herewith. No fee or other charges of any kind shall be imposed upon Grantee, or upon any consumer of gas, for the breaking or opening of any streets or other public ways or for the laying, construction, or maintenance of mainlines, service pipes or other facilities therein except as provided for hereunder. Nothing in this Franchise Ordinance shall be construed in such manner as to in any way abridge the right of the Town to pass the necessary police ordinances for the protection of the citizens of the Town and their property, and the property of Grantee, as long as such ordinances are not inconsistent with this Franchise Ordinance.

SECTION 4. – Damage to Town Properties

Grantee shall use reasonable efforts to avoid permanent damage to any street, avenue, alley, lane, bridge, stream, watercourse, park or public place. Grantee and Town shall exercise reasonable efforts to ensure that any future installations of utilities in Town public ways by Grantee, Town or other utility providers authorized by Town do not unreasonably interfere with any facilities of Grantee, Town or other utility providers.

SECTION 5. – Grantee's Rules of Service

Grantee, and its successors and assigns, shall have the right to adopt and enforce such reasonable Rules of Service as it deems necessary for the extension of its facilities, the sale of its natural gas and the prudent conduct of business, provided that such rules are not inconsistent with law or this Franchise Ordinance. Grantee shall supply natural gas and provide regulated services at the rates and under the terms and conditions specified by such rules, its tariffs filed with the Town and as provided herein.

SECTION 6. – Indemnification

Grantee shall indemnify, save and hold harmless the Town, its officers, agents and employees, from any and all liability, loss or damage, including costs of defense and attorney fees, for which the Town, its officers, agents or employees shall or might become liable as a result of any claim, demand, cost or judgment against them arising out of the activities of Grantee permitted by this ordinance or out of the construction or operation of the System; provided, however, that in the event of such claim, demand, cost or judgment being prosecuted against Town, its officers, agents or employees, Grantee shall have the duty to defend against the same, and the right to settle or discharge same in such manner as it may see fit, and further provided that the Town shall give prompt written notice to Grantee of the presentation or prosecution of such claim, demand, cost or judgment. The obligation imposed upon Grantee by this provision shall not apply to any liability, loss or damage resulting from the negligence or willful malfeasance of the Town, its officers, agents or employees.

SECTION 7. – Assignment

Grantee herein is expressly given the power and privilege to sell, transfer or assign this Franchise Ordinance, or any part of this Franchise Ordinance, to any person, entity or corporation.

SECTION 8. – Franchise Fees

A. As full consideration for the rights and privileges conferred by this Franchise Ordinance, the waiver of those fees waived by this Franchise Ordinance, and as a charge for the use of the streets, alleys and public ways, Company shall collect from its customers and pay to the Town a sum of money, known as the "**Franchise Fee**", equal to the sum of the following: (1) five percent (5%) of Company's actual Gross Receipts from Gas Sales (as defined herein) to Company's gas sales customers located in the Town; plus (2) five percent (5%) of Company's actual Gross Receipts from Gas Transportation (as defined herein) to Company's gas transportation customers with re-delivery points located in the Town; plus (3) five percent (5%) of Company's actual Gross Receipts from Utility Regulated Service Charges. When the Company pays the Franchise Fee to the Town each January and July, the Company shall file a statement with the Town showing its Gross Receipts from Gas Sales, Gas Transportation delivered in the Town and Utility Regulated Service Charges in the Town, including the calculation of the Franchise Fee for the subject time period.

B. Subject to the other provisions herein, **“Gross Receipts”** shall be and include: (1) the Company's total receipts from its gas sales to its customers located within the corporate limits of the Town; (2) Gross Receipts from Gas Transportation which shall be defined as the Company's total receipts from its transportation of third party gas for re-delivery to customers with re-delivery points located within the corporate limits of the Town, consisting of receipts from cost of service; provided that Company's Gross Receipts from Gas Sales and Gross Receipts from Gas Transportation subject to the Franchise Fee shall specifically exclude, without limitation: (1) receipts from non-regulated miscellaneous service charges (e.g. charges for appliance light-ups, returned checks, etc); (2) receipts from gas sales or gas transportation services to customers located at delivery points outside the corporate limits of the Town; (3) receipts from gas consumed or transported by Company for its own use; (4) bad debt or uncollected accounts; (5) receipts collected for gas utility taxes; (6) receipts for any taxes, assessments, charges or fees of any kind charged by governmental entity and collected by Company from the customer by pass through charge on the gas bill, other than Franchise Fees and gross receipts taxes; (7) receipts for construction advances or contributions in aid of construction; (8) receipts for maintenance of appliances, machinery or equipment; (9) receipts for compensation for damage to Company's property; (10) receipts from sales of materials, appliances or equipment, and (11) receipts from any non-regulated utility or non-regulated services or products.

C. **“Utility Regulated Service Charges”** are charges for services (but not for natural gas sales or transportation services) that (a) Company provides to its customers located within the corporate limits of the Town and (b) which are or may, from time to time, become subject to the rate regulation of the applicable regulatory authority. Such Utility Regulated Service Charges shall include receipts of Company from its customers in the Town for connections, disconnections and meter tests. Such Utility Regulated Service Charges shall not include receipts of Company from its customers in the Town for appliance sales, appliance light-ups, maintenance of customer equipment or facilities and any other receipts that are not legally subject to the rate regulation of the applicable regulatory authority. Gas delivered within the Town for or on behalf of an affiliate of the Company, and gas purchased

from an affiliate of the Company and delivered within the Town, shall be deemed to be sold and delivered by the Company, and the value paid for such gas by the customer shall be subject to the franchise fee.

D. Company shall collect from its customers and pay the Town under the terms of this Franchise Ordinance, the franchise fee and gross receipts above provided based upon meters read on or after the effective date of this Franchise Ordinance. During the term of this Franchise Ordinance, Company shall collect from its customers and pay the Town in January and July for the preceding six months, not including January and July. Company shall include with the Franchise Fee payment a statement showing its Gross Receipts from Gas Sales, Gas Transportation in the Town and Utility Regulated Service Charges in the Town, including the calculation of the Franchise Fee for the subject time period.

E. It is expressly agreed that the Franchise Fee payments shall be in lieu of any payments for the right to use the public rights-of-way of the Town, including expressly the charge permitted to be levied by V.T.C.A. Tax Code §§ 182.021-182.026 and 182.081-182.082, or any successor statute permitting such a charge, however designated. The Franchise Fee shall be in lieu of and accepted as payment of all of Company's obligations to pay all other franchise, license, easement or occupation taxes, levies, exactions, fees, rentals, street-cut fees, inspection fees, permit fees, franchise fees, easement taxes, or charges of any kind whatsoever which may be levied or attempted to be levied in general by the Town for the use of Town's rights -of -way, with the sole exception of sales taxes, ad valorem taxes and special assessments which are made without reference to or dependence upon Company's franchise or occupancy of the streets and public right of way, e.g. special assessment paving liens. It is specifically provided however that this subsection shall not release, waive or apply to the imposition of any fine, penalty or charge arising and imposed as a result of the violation of a rule, regulations or ordinance.

F. It is expressly agreed by the Town and the Company that the Franchise Fees defined in this Franchise Ordinance are reasonable, and are reasonable and necessary

operating expense of Company and shall be fully recovered by Company by collection from its customers in the Town, whether asserted retroactively or prospectively, by revising its rate schedules, assessing an additional charge to the monthly bills of its customers within the Town, adding an additional charge to the Company's purchased gas adjustment clause for the Town or in any legal manner determined in Company's discretion. The Town agrees that it will take an affirmative position supporting 100% recovery of Franchise Fees by Grantee in any regulatory proceeding before a federal or state agency, including appeals, in which recovery of Grantee's Franchise Fees is an issue.

G. The Town may, upon reasonable prior written notice and during reasonable business hours, inspect and review the books and records of Company to verify the amount of Franchise Fees due. It's understood and agreed that such representative may be an independent agent, assigned by the Town to conduct the inspection of Company's books and records for the reconciliation of Franchise Fee payments to determine the accuracy thereof.

H. The rights, privileges, and franchises granted by this Franchise Ordinance are not to be considered exclusive, and Town hereby expressly reserves the right to grant, at any time as it may see fit, like privileges, rights, and franchises to any other person or corporation for the purpose of furnishing gas in the Town. In the event any entity providing gas sales or gas transportation service to customers within the Town (other than Company) is not legally required to pay the same or an equivalent Franchise Fee as required to be collected and paid by Company in this Franchise Ordinance, then with respect to gas sales or transportation service to those specific customers, Company's Franchise Fee obligation resulting from sales or transportation service to those specific customers may be automatically reduced by Company to a level equivalent to the amount the Town legally requires to be paid by such other entity.

I. Consistent with Section 8(A), the Town shall be paid a franchise fee once with respect to the same gas sold and/or transported to delivery points within the Town; provided

that such fee shall include five percent (5%) of the actual cost of the gas and the transportation charges and all other related charges. Should the Town receive or be entitled to receive from any other company, firm, corporation or person a franchise fee or similar street rental fee payment from the transportation and/or sale of the same or equivalent gas, the aggregate amount which the Town has received or is entitled to receive with respect to the same or equivalent gas transported and/or sold by Company shall be deducted from, and reported with, the Franchise Fee payment to be made to the Town by Company hereunder. Among other things, this section is intended to apply to gas purchased by Company for resale to its customers within the Town and to Transport Gas redelivered by Company within the Town. Upon request of Company, the Town agrees to provide Company, within a reasonable time of its receipt, with written notice setting forth the amounts of any such franchise fee received for the use of its streets for the sale of gas in the Town that is ultimately delivered through Company's system in the Town.

J. Unless expressly set forth herein, or otherwise provided by law, by accepting this Franchise Ordinance, Grantee does not agree to be responsible for the payment of franchise fees other than as expressly set forth herein or owed to the Town by any other entity, corporation or firm.

SECTION 9. – Annexations by Town

The Town shall notify Grantee in writing of the annexation of any new territory into its town limits by providing the legal description, maps and any other relevant information such as the GPS/GIS information that highlight the newly annexed territory. Upon receipt of written notice of annexation from the Town, Grantee shall have ninety (90) days to begin collecting and paying the Franchise Fee for any revenues received from Grantee's customers residing in the newly annexed territories. Town shall assist Grantee in determining and classifying exemptions from Franchise Fees for Grantee's Customers, including providing or requiring written confirmation of the customer's claimed exemption.

SECTION 10. – Dispute Resolution

Resolution of any dispute arising under this Franchise Ordinance between the Town and the Grantee, or any of its affiliates (collectively the “Parties, or individually a Party”) shall first be attempted by submitting the dispute to mediation. The dispute shall be submitted to mediation upon the written demand of either party. The mediation shall be held in Cameron County, Texas at the location designated by the party demanding the mediation. The mediator shall be selected by agreement within forty-five (45) calendar days from the date the demand for mediation is received by the other party. If an agreement cannot be reached on a mediator within the time period stated herein, each party shall submit the name of a mediator and the selection will be made by chance drawing. The party not making the demand for mediation shall make the blind draw from the names submitted in the presence of the other party. Thereafter, the mediation shall be held at the selected designation within thirty (30) calendar days. Mediation of any dispute shall be a condition precedent to filing a lawsuit, except that nothing herein shall preclude a party from seeking a mandatory or prohibitive injunction, or equitable relief from any court of competent jurisdiction to enforce or maintain the status quo pending mediation of any dispute.

SECTION 11. – Conflicting Ordinances

To the extent that all or any part of another existing ordinance shall conflict with any provision of this Franchise Ordinance, this ordinance shall prevail upon passage, adoption, and acceptance of this Ordinance.

SECTION 12. – Effective Date and Term

This Franchise Ordinance shall take effect and be in full force from and after its final passage and approval by the Town Council of the Town of Laguna Vista and the acceptance hereof in writing by Grantee as herein provided. This Franchise Ordinance shall continue and remain in full force and effect for a period of fifteen (15) years from the effective date.

SECTION 13. – Acceptance by Grantee

Grantee shall, within sixty (60) days from the approval of this Franchise Ordinance signed by the Mayor, file in the office of the Town Secretary its consent to and written acceptance of provisions and conditions of this Franchise Ordinance.

FIRST READING - PASSED, APPROVED AND ADOPTED by the Town Council of the Town of Laguna Vista, Texas at the Special Meeting on the 7th day of October 20 13.

SECOND READING - PASSED, APPROVED AND ADOPTED by the Town Council of the Town of Laguna Vista, Texas at the Regular Meeting on the 12TH day of November 20 13.

Susie Houston, Mayor

ATTEST:

Alma Deckard, City Secretary

The above and forgoing Franchise Ordinance and the grants, franchise, powers, rights and privileges thereto were accepted by Texas Gas Service Company on and as of the date there under, _____, 2013.

TEXAS GAS SERVICE COMPANY

A division of ONEOK, Inc.

By: _____
Kari French
Vice President-
Commercial Natural Gas Distribution

STATE OF TEXAS §
§
COUNTY OF §

BEFORE ME, the undersigned authority, on this day personally appeared, Kari French, Vice President- Commercial Natural Gas Distribution for Texas Gas Service Company, a division of ONEOK, Inc., an Oklahoma corporation, known to me to be the person and officer whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed, in the caption herein stated and as the act and deed of said corporation.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this _____ day of _____, 2013.

Notary Public