

COMMONWEALTH OF KENTUCKY
CITY OF LONDON
ORDINANCE NO. 2020-02

AN ORDINANCE CREATING AND ESTABLISHING FOR BID A NON-EXCLUSIVE GAS FRANCHISE FOR THE PLACEMENT OF FACILITIES FOR THE TRANSMISSION, DISTRIBUTION AND SALE OF GAS FOR HEATING AND OTHER PURPOSES WITHIN THE PUBLIC RIGHTS OF WAY OF THE CITY OF LONDON FOR AN INITIAL TEN (10) YEAR PERIOD WITH UP TO TWO (2) ADDITIONAL EXTENSIONS OF TIME OF FIVE (5) YEARS EACH, IN RETURN FOR PAYMENT TO THE CITY OF LONDON OF THE SUM OF THREE PERCENT (3%) OF EACH FRANCHISEE'S GROSS ANNUAL REVENUES RECEIVED FROM THE SALE, DISTRIBUTION, AND/OR DELIVERY OF GAS WITHIN THE CITY OF LONDON, WITH THE ABILITY TO BE RAISED TO FIVE PERCENT (5%); AND FURTHER PROVIDING FOR COMPLIANCE WITH RELEVANT LAWS, REGULATIONS, AND STANDARDS; A PERFORMANCE BOND; INDEMNIFICATION; INSURANCE; ACCESS TO PROPERTY AND INSPECTIONS; REPORTING; AUDITS; NOTICE OF FILINGS WITH THE PUBLIC SERVICE COMMISSION; CANCELLATION OR TERMINATION; PENALTIES FOR VIOLATIONS; AND BID REQUIREMENTS; ALL EFFECTIVE ON DATE OF PASSAGE.

BE IT ORDAINED BY THE LONDON CITY COUNCIL:

Section 1 - There is hereby created a non-exclusive franchise to acquire, lay, maintain and operate in the public streets, alleys, avenues, public roads, highways, sidewalks and other public ways of the City of London (hereinafter the "Rights-of-way"), a system of mains, pipes, fixtures and appliances for the transmission, distribution and sale of gas for heating and other purposes, subject to all the provisions of this Ordinance and any franchise agreement entered into pursuant to the terms of this Ordinance. This Ordinance does not excuse the franchisee from complying with any and all existing and future local laws and ordinances, as may be amended, including but not limited to the terms and provisions of the Code of Ordinances, City of London (the "Code"), and any applicable provisions of its Zoning Ordinance as may be amended (the "Zoning Ordinance"), which are incorporated herein by reference, and shall apply as if fully set forth herein to the extent that there is no express conflict with the terms or provisions of this Ordinance.

Section 2 - The person, firm or corporation that shall become the purchaser of said franchise, or any successor or assignee of such person, shall hereinafter be referred to as the "Company" herein. The City of London shall hereinafter be referred to as the "Government". The pertinent definitions and terminology contained in the provisions of the Code, and/or the Zoning Ordinance are hereby incorporated herein by reference.

Section 3 - The Company acquiring this franchise shall have the right and privilege of laying, maintaining and operating gas mains and pipes, equipment and apparatus, and appurtenances necessary or appropriate in connection therewith, in, along and under the Rights-of-way within the corporate boundaries of the Government as they now exist or may hereafter be extended (referred to herein as "System" or "Facilities"); subject to the provisions hereof and to all powers (including police power) inherent in, conferred upon, or reserved to said Government, including but not limited to those contained in the Code.

Section 4 - In the operation of its gas System as it relates to the rights conferred by this franchise, the Company shall conform to at least the minimum standards or requirements contained in federal or state law or regulation related to transportation of gas and liquids by pipeline. In addition to complying with all of the requirements contained in federal or state law or regulation, and the Code, the Company agrees that:

- (a) all working facilities and conditions used during construction, installation and maintenance of Facilities under this franchise shall comply with the standards of the Occupational Safety and Health Administration;
- (b) it shall construct and operate the System and Facilities under this franchise in accordance with all generally accepted related industry codes and standards that are applicable;
- (c) All construction, materials and equipment used or installed under this franchise shall be of first class quality. In case of any defect in the work, materials or equipment, whether

latent or patent, the Company will forthwith remedy such defects without cost to Government; and

(d) in the construction or reconstruction or maintenance or removal of any of said Facilities, the Company shall have due regard for the rights of the Government and others, and shall not interfere with, or in any way injure the property of the Government or others lawfully under, on, or above the Right-of-way. The Company shall comply with all the laws of the Commonwealth of Kentucky and the Code as to placing lights, danger signals or warning signs and shall be liable for any and all damage that may arise by reason of its failure or neglect to comply with the Code and laws. Work by the Company hereunder shall be done in a workmanlike manner and so as not to unnecessarily interfere with public use of the Rights-of-way.

Section 5 - The Company shall be required to provide a performance guarantee for significant projects with construction costs of one hundred thousand dollars (\$100,000) or more involving the Rights-of-way. This performance guarantee shall be set in an amount and duration to be determined by the Mayor or his designee upon discussing and verifying the scope of such a project with the Company, and shall be in favor of the Government to be issued by an entity subject to jurisdiction and venue in the City of London. In no event shall the total cumulative amount of such performance guarantee exceed two million dollars (\$2,000,000), unless otherwise provided in this Ordinance.

Section 6 - As a condition of being granted this franchise, the Company agrees to defend, indemnify, keep and save the Government, its officials, boards, members, agents, and employees free and harmless against any and all claims, suits, causes of action, proceedings, judgments for damages or equitable relief, and costs and expenses, including reasonable attorney's fees arising from liability or claims of liability on account of injuries or damage to persons or property growing out of the construction, maintenance, repair and operation of its gas system. In the event that suit shall be brought against the Government either independently or jointly with the Company on account hereof, the said Company, upon notice by the Government, shall defend the Government in any such suit at the cost of the Company and in the event of final judgment being obtained against the Government either independently or jointly with the Company, the Company shall pay such judgment with all costs and hold the Government harmless therefrom except where such claims, suits, causes of action proceedings, damages, liabilities or judgments were caused by the act or omission of the Government, its officials, boards, members, agents, or employees.

Section 7 - The Company shall comply with all applicable federal, state or local non-discrimination and affirmative action requirements of any laws, regulations and executive directives, and shall not discriminate in its employment practices against any employee or applicant for employment because of race, color, religion, national origin, sexual orientation, gender identity, protected veteran status age or physical handicap.

Section 8 - The Company agrees to procure and maintain throughout the term of any franchise agreement awarded pursuant to this Ordinance and any extension thereof, commercial general liability insurance in the principal amount of at least One Million dollars (\$1,000,000) per occurrence with a Five Million Dollar (\$5,000,000.00) aggregate, with an insurance company authorized to do business in the Commonwealth of Kentucky with the provision that it is agreed and understood that the City of London, its agents, employees, officers and elected officials, as their interests may appear, are additional insureds, in the same manner as if a separate policy had been issued, under the provision of the policies required to be issued during the term of this franchise or as otherwise required by this Ordinance. All insurance policies shall be broad form in nature and shall be through a company with an A.M. Best Rating of "A" or better, admitted to do business in Kentucky, and the contract shall be non-cancelable without at least thirty (30) days advance written notice by registered mail to the Government from the insurance company.

Section 9 - (a) The Government, through its Mayor or his designee, or through such assistants as the Government may employ or designate, may, at all reasonable times and under reasonable conditions with prior notice, have access to all or any of the property owned or used in part or in whole by the Company in its operating and maintaining the System under this franchise and located within the Government's Right-of-way. In like manner, the Government's above-mentioned officers and assistants may at all reasonable times and under reasonable conditions with prior notice, inspect, examine or verify all or any of the accounts, books, records, contracts, documents

or papers of the Company relating to gross revenues in the City of London in order to audit and recompute any amounts determined to be payable under this Ordinance consistent with the provisions of Section 19(b) of this Ordinance. In the event that the Government determines that it desires an audit of this franchise, the Company agrees to comply with all reasonable requests of the Government pertaining to obtaining any necessary information or documentation from the Company reasonably necessary to the administration of this franchise.

(b) The Company agrees further to furnish the Mayor or his designee timely written notice of its filing an application with the Public Service Commission for an increase in general rates or change in its billing practices concurrent with said filing. Should the Government choose to intervene in the Commission action, the Company shall not oppose such intervention, and the Government shall be given access to records related to said application, as required by the Commission.

(c) The Company agrees to provide Government and/or the City Council with information pertaining to its provision of services pursuant to this franchise upon reasonable request. This may include, but is not necessarily limited to attending public meeting(s) involving some or all of the City Council in order to provide such information upon reasonable advance notice and providing an annual update to the City Council upon its request.

Section 10 - (a) The franchise hereby shall be for a period of ten (10) years from the date of acceptance by the London City Council. This franchise may be renewed for up to two (2) additional terms not to exceed five (5) years each upon the request of the Company and the approval of the request by the Government. The request shall be made in writing to the Government at least one hundred eighty (180) days, but no earlier than one (1) year, in advance of the termination date of the Company's franchise agreement. The ultimate decision of whether to grant an additional franchise term shall solely be that of the Government. This franchise is not exclusive, and the Government reserves the right to grant similar franchises to more than one Company.

(b) This franchise creates no vested rights in the Company and any installation or emplacement of Facilities by the Company in the Rights-of-way is at the Company's risk. If the Company is not granted a new or extended franchise upon the expiration of the term for which the franchise is granted, or if the Company's franchise is terminated or cancelled, as provided for herein, the Government shall have the right to require the Company to remove at its own expense all portions of the system from all Rights-of-way within the confines of the City of London. The Company shall be provided a reasonable time within which to remove its facilities.

(c) No assignment of this franchise or the gas distribution System subject to this franchise shall take place without at least thirty (30) days advance written notice to the Government, and consent by the Government, which consent shall not be unreasonably withheld.

(d) The Company shall not object to the Government's intervention in any action before the Public Service Commission involving the transfer of control of the Company.

(e) In the event that the Company, or its parent entity, announces through a public filing with the Securities and Exchange Commission, or other public agency filing, that a majority, or more, of the assets of the Company, are available for sale to the public separate and apart from the sale or transfer involving additional companies or assets owned by a parent entity and that such sale involves the seeking of publicly solicited bids for such Company's assets, the Company shall notify the Government in writing within ten (10) business days of such filing. The Government shall then be provided a period of time not less than the period of time allowed by any other potential bidder, and in accordance with the procedure set forth by the Company, to determine whether it wishes to make an offer on the assets that become available for sale and submit its offer. However, such right to make an offer shall not preclude other parties from making offers, nor does such an offer create an obligation on the Company to accept such offer or delay a sale or transfer of the assets nor is this provision intended to prevent the Company, its Board of Directors and its officers from exercising their regulatory and fiduciary duties in the decision to accept, reject, modify or alter any offer submitted by any bidder or to amend or withdraw the procedure established for the solicitation of such bids. The Government recognizes that the terms of this section are applicable only in the event that bids are publicly solicited according to this section.

Section 11 - (a) If, after the Company is provided the opportunity to appear and present evidence before the City Council, the Government finds that the Company has violated any of the following

provisions of this Ordinance, the following penalties shall be recoverable. The decision of the Mayor or his designee shall be the final administrative decision and shall be in writing and provide the basis for the decision. The decision may be appealed to a court of competent jurisdiction.

- (1) For failure to complete any construction project by no later than the ending term of any franchise awarded pursuant to this Ordinance or any extension thereof, the Company shall forfeit five hundred dollars (\$500.00) per day or part thereof that the violation continues; in lieu of a penalty, the Company may post a performance bond, letter of credit or other surety acceptable to the Government in an amount sufficient to complete such construction projects. This section shall not apply to any projects for which performance bonds or other surety is already pledged.
 - (2) For failure to provide data and reports requested by the Government and as required by this Ordinance the Company shall forfeit one hundred dollars (\$100.00) per day or part thereof that the violation continues.
 - (3) For failure to pay the franchise fee when due pursuant to Section 18 of this Ordinance, or any itemized bill presented by the Government pursuant to Section 4 of this Ordinance or this section, the Company shall forfeit one hundred dollars (\$100.00) per day or part thereof that the violation continues. However, this provision shall not apply if interest is assessed pursuant by the Government pursuant to Section 19(c).
- (b) If the Company fails to comply within thirty (30) days of any City Council resolution directing compliance with any other provisions of this Ordinance, the Company shall forfeit one hundred dollars (\$100.00) per day or part thereof that the violation continues. The decision of the City Council may be appealed to a court of competent jurisdiction.
- (c) The Company shall not be excused from complying with any of the terms and conditions of this Ordinance by any failure of the Government, upon any one or more occasions, to insist upon the Company's performance or to seek the Company's compliance with any one or more of such terms or conditions. Payment of penalties shall not excuse non-performance under this Ordinance. The right of the Government to seek and collect penalties as set forth in this section is in addition to its right to terminate and cancel as set forth in Section 13 of this Ordinance.

Section 12 - At all times and under all circumstances the Company shall be obligated to do everything reasonably within its power to ensure that its customers in the City of London receive uninterrupted service, unless such customer has elected interruptible service. The Company agrees that staff located in or near the City shall operate the gas system and will provide for the receipt of payments, response to emergencies and general customer service.

Section 13 - (a) In addition to all other rights and powers pertaining to the Government by virtue of the franchise or otherwise, the Government, by and through its City Council, reserves the right to terminate and cancel any franchise awarded pursuant to this Ordinance and all rights and privileges of the Company hereunder in the event that the Company:

- (1) Willfully violates any material provision of the franchise or any material rule, order, or determination of the Government made pursuant to the franchise, except where such violation is without fault or through excusable neglect, including but not limited to cases of force majeure;
- (2) Willfully attempts to evade any material provision of the franchise or practices any fraud or deceit upon the Government;
- (3) Knowingly makes a material misrepresentation of any fact in the application, proposal for renewal, or negotiation of the franchise; or
- (4) Fails to begin service restoration following seventy-two (72) consecutive hours of interrupted service, except when approval of such interruption is obtained from the Government. Such approval shall not be unreasonably withheld. In cases of force majeure or acts beyond the Company's control approval shall be granted. The Company shall provide, at a minimum, daily restoration status reports.

(b) The Mayor or his designee, or the City Council may make a written demand that the Company do or comply with any such provision, rule, order or determination. If the violation, found in Section 13(a) of this Ordinance, by the Company continues for a period of thirty (30) days following such written demand without written proof that the corrective action has been taken or is being actively and expeditiously pursued, the Government may place its request for termination of the franchise as early as the next regular City Council meeting agenda. The Government shall cause to be served upon Company, at least ten (10) days prior to the date of such City Council meeting, a written notice of intent to request such termination and the time and place of the meeting, legal notice of which shall be published in the newspaper of general circulation published in London, Kentucky.

- (1) The City Council shall consider the request of the Government and shall hear any person interested therein, and shall determine in its discretion, whether or not any violation by the Company occurred and, if so, was with just cause.
- (2) If such violation by the Company is found to have been with just cause, the City Council shall direct the Company to comply therewith within such time and manner and upon such terms and conditions as are just and reasonable.
- (3) If the City Council determines such violation by the Company was without just cause, then the City Council may, by resolution or ordinance, declare that the franchise of the Company shall be terminated and forfeited unless there is compliance by the Company within such period as the City Council may fix.

Section 14 - The Company shall provide the Government at least sixty (60) days advance written notice of the foreclosure or other judicial sale of all or a substantial part of the Company's Facilities, or upon the termination of any lease covering all or a substantial part of its Facilities, and such notification shall be treated as a notification that a change in control of the Company has taken place, and the provisions of Section 10(c) of this Ordinance, governing the consent of the Government to such change in control of the Company, shall apply.

Section 15 - The City Council shall have the right to cancel this franchise thirty (30) days after the appointment of a receiver, or trustee, to take over and conduct the business of the Company, whether in receivership, reorganization, bankruptcy, or other action or proceeding, unless such receivership or trusteeship shall have been vacated prior to the expiration of said thirty (30) days, unless:

- (a) Within thirty (30) days after his election or appointment, such receiver or trustee shall have fully complied with all the provisions of this Ordinance and remedied all defaults thereunder; and,
- (b) Such receiver or trustee, within said thirty (30) days shall have executed an agreement, duly approved by the court having jurisdiction in the premises, whereby such receiver or trustee assumes and agrees to be bound by each and every provision of this Ordinance and the franchise granted to the Company.

Section 16 - It shall be the duty of the Mayor or his designee to offer for sale at public auction said franchise and privilege. Said franchise and privilege shall be sold to the highest and best bidder or bidders at a time and place fixed by the Mayor after he or she has given due notice thereof by advertisement or publication as required by law.

Section 17 - Bids and proposals for the purchase and acquisition of the franchise and privileges hereby created shall be in writing and shall be delivered to the Mayor or his designee upon the date(s) and at the time(s) fixed by him or her in said advertisement(s) or publication(s) for receiving same. Thereafter, the Mayor shall report and submit to the City Council, at the time of its next regular meeting or as soon as practicable thereafter, said bids and proposals for its approval. The City Council reserves the right, for and on behalf of the Government, to reject any and all bids for said franchise and privileges; and, in case the bids reported by the Mayor shall be rejected by the City Council, it may direct, by resolution or ordinance, said franchise and privilege to be again offered for sale, from time to time, until a satisfactory bid therefore shall be received and approved. Each bid shall be accompanied by cash or a certified check drawn on a bank of the Commonwealth of Kentucky, or a national bank, equal to five percent (5%) of the fair estimated cost of the System required to render the service, which check or cash shall be forfeited to the Government in case

the bid should be accepted and the bidder should fail, for thirty (30) days after the confirmation of the sale, to pay the price and to give a good and sufficient bond in a sum equal to one fourth (1/4) of the fair estimated cost of the system to be erected, conditioned that it shall be enforceable in case the purchaser should fail, within sixty (60) days, to establish and begin rendering the service in the manner set forth in this Ordinance. Bids shall include such documentation as is necessary to support the bidder's determination of the fair estimated cost of the System required to render the service. Government reserves the right to review any of bidder's supporting documentation which justifies bidder's determination of said estimated cost. Such deposit need not be made by a corporation or person already owning within the territorial limits of the City of London a plant, equipment, and/or Facilities sufficient to render the service required by this Ordinance. In addition, each bid shall be accompanied by a non-refundable payment to the Government in the amount of one thousand dollars (\$1,000.00) to cover the Government's cost of advertising and other administrative expenses incurred. In the event that the total amount submitted by all bidders exceeds the Government's actual costs, it will refund the overcharge to each Company on a pro rata basis within thirty (30) days.

Section 18 - (a) In consideration of the granting of the franchise for sale, distribution, and/or delivery of gas within the City of London, the Company agrees to pay to the Government a sum equal to three percent (3%) of the gross annual revenues received by the Company from the sale, distribution, and/or delivery of gas rendered on its bills within the City of London. The City of London reserves the right at any time, and upon at least ninety (90) days' notice, during the effective period of the franchise to be awarded hereby to impose upon the Company a franchise fee in an amount not to exceed five percent (5%). Calculations of amounts payable hereunder and payments shall commence with the first billing period following execution of any franchise agreement authorized by this Ordinance.

(b) The Company may also be required to pay the Government an additional amount intended to adequately compensate the Government for its permitting and inspection of the Company's construction activities in the Rights-of-way. This amount is to be paid separately to the Government at the time and under the terms as may be set forth by the Government. These permitting fees shall be in addition to the above franchise fee.

(c) No later than ten (10) working days after final acceptance of its bid by the Government, the Company shall file an application or have a tariff on file with the Kentucky Public Service Commission to provide for prompt and satisfactory cost recovery of the amount(s) payable under this Ordinance and any franchise awarded pursuant to its terms for any amounts for which it desires recovery. The Company shall provide Government with copies of any tariffs it files with the Kentucky Public Service Commission related to the franchise in order to satisfy the obligations created herein.

(d) If, after a period of sixty (60) days from the filing of the Company's above application, the Kentucky Public Service Commission shall have made no final determination concerning the prompt and satisfactory recovery of amounts payable by the Company under this Section of the Ordinance, then the Company's obligation to pay the amount specified in Section 19(a) of this Ordinance shall be suspended, provided the Company shall first give the Government ten (10) days written notice of its intention to suspend payment pending the decision of the said Commission. In the event of suspension of the Company's obligation as herein provided, the Government shall have the option to terminate this franchise within thirty (30) days of receipt of said written notification from the Company.

Section 19 - (a) Payment of any amount due under this Ordinance shall be made quarterly, within thirty (30) days of the end of the preceding calendar month. In the event of suspension of the Company's obligation pursuant to Section 18(d) herein, said suspension shall not have application to any amount due hereunder for the preceding calendar month, and the gross income received by the Company during any such suspension period shall be excluded from the Company's annual gross revenues for the purpose of calculating amounts due under Section 18 (a) herein.

(b) No acceptance of any franchise fee payment by the Government shall be construed as an accord and satisfaction that the amount paid is in fact the correct amount nor shall acceptance be deemed a release to any claim the Government may have for future or additional sums pursuant to this Ordinance. The Government shall have the right to inspect the Company's income, financial, and records relating to gross revenues in order to audit, and to re-compute any amounts determined to

be payable under this Ordinance. Any additional amount due to the Government as a result of the audit shall be paid within ten (10) days following written notice to the Company by the Government which notice shall include a copy of the audit report.

(c) In the event that any franchise payment or recomputed amount is not made on or before the applicable dates heretofore specified, interest shall be charged from such date at the annual rate of eight percent (8%). Overpayments discovered by the Government or the Company shall be an adjustment on the next quarterly payment without interest.

Section 20 - Bids offered for purchase of this franchise shall state the bidder's acceptance of the conditions set forth in this Ordinance. If any bid shall include an offer of payment over and above the terms of the franchise, then a certified check for said amount, payable to the Government, shall be deposited with the Government. This amount shall be in addition to the provision for payments contained in Sections 17 and 18 of this Ordinance, which shall be considered as a condition of this franchise. Any check deposited by an unsuccessful bidder shall be returned when the City Council shall have accepted the bid or bids, which in its judgment is or are the highest and best.

Section 21 - Any violation by the Company, its vendee, Lessee, or successor of the provisions of this franchise or any material portions thereof, or the failure promptly to perform any of the provisions thereof, shall be cause for the forfeiture of any franchise awarded pursuant to this Ordinance and all rights hereunder after written notice to the Company and continuation of such violations, failure or default, as set forth in Section 13 of this Ordinance.

Section 22 - This Ordinance and any franchise awarded pursuant to it shall be governed by the laws of the Commonwealth of Kentucky, both as to interpretation and performance. The venue for any litigation related to this Ordinance or a franchise shall be in the court of competent jurisdiction in Laurel County, Kentucky.

Section 23 - This Ordinance and any franchise awarded pursuant to it does not create a contractual relationship with or right of action in favor of a third party against either the Government or the Company.

Section 24 - If any section, sentence, clause or phrase of the Ordinance is held unconstitutional or otherwise invalid, such infirmity shall not affect the validity of the remaining Ordinance.

Section 27 - The franchise created by this Ordinance shall become effective when the City Council accepts the bid(s) for it.

Section 26 - This Ordinance shall become effective on the date of its publication.

FIRST READING: May 4, 2020
 SECOND READING: June 1, 2020
 PUBLICATION: June 10, 2020

ATTEST: Carolyn Adams
 CAROLYN ADAMS, CITY CLERK

Troy Rudder
 TROY RUDDER, MAYOR