

ORDINANCE NO. 2321

AN ORDINANCE GRANTING TO CASCADE NATURAL GAS CORPORATION A NON-EXCLUSIVE RIGHT TO USE AND OCCUPY STREETS WITHIN THE CITY OF HERMISTON TO CONSTRUCT, OPERATE AND MAINTAIN A SYSTEM FOR THE SALE AND DISTRIBUTION OF NATURAL GAS.

WHEREAS, the City of Hermiston (“City”) is authorized to prescribe by Ordinance the terms and conditions of one or more non-exclusive grants of authority allowing persons to use and occupy Streets for the purpose of constructing, operating and maintaining a system for the sale and distribution of natural gas; and

WHEREAS, the City Council previously adopted Ordinance No. 2157 granting to Cascade a ten (10) year franchise to use and occupy Streets to construct, operate and maintain its Facilities; and

WHEREAS, the franchise rights granted to Cascade by and through Ordinance No. 2157 expired as of July 23, 2019; and

WHEREAS, the City has allowed Cascade to continue to use the Streets under the terms and conditions of Ordinance No. 2157 while the City and Cascade have negotiated the terms of a new franchise; and

WHEREAS, Cascade wishes to continue using and occupying the Streets to construct, operate and maintain its Facilities.

NOW, THEREFORE, the City does hereby ordain as follows:

Section 1. DEFINITIONS

For the purpose of this Ordinance, the following terms, phrases, and their derivations shall have the meanings given below unless context indicates otherwise. When not inconsistent with the context: words used in the present tense include the future tense; words in the plural number include the singular number; and words in the singular number include the plural number. The word “shall” is always mandatory and not merely directory.

1.1 “Applicable Law” shall mean any provision of federal, state or local law, including without limitation statutes, regulations, ordinances and judicial or administrative orders, that is directly applicable to the Facilities in the Streets, Cascade’s provision of natural gas services in the City, or any other action authorized or required to be undertaken by Cascade pursuant to the terms of this Ordinance.

1.2 “City” means the City of Hermiston, Oregon, a municipal corporation, and all of the territory within its corporate boundaries, as such may change from time to time.

1.3 “City Council” means the governing body of the City of Hermiston, Oregon.

1.4 “Effective Date” shall mean the date of Cascade’s acceptance of this Ordinance as recorded on the signature page.

1.5 “Facility” or “Facilities” means any tangible component of Cascade’s gas distribution and transmission system including, but not limited to, pipelines, conduit, valves, meters, or other physical assets used for the delivery of natural gas.

1.6 “Gross Revenue” shall mean gross revenue received by Cascade for the provision of natural gas services to retail customers located in the City. “Gross Revenues” shall not be net of: (1) any operating expense; (2) any accrual, including, without limitation, any accrual for commissions; or (3) any other expenditure, regardless of whether such expense, accrual, or expenditure reflects a cash payment. “Gross Revenues” shall not include: (1) any taxes, fees or assessments collected by Cascade from customers for pass-through to a government agency, including the Franchise Fee set forth herein; (2) bad debt; (3) credits, refunds and deposits paid to customers; and (4) any other exclusions available under Applicable Law.

1.7 “Hazardous Substances” has the meaning given by ORS 465.200(16).

1.8 “Person” means any individual, sole proprietorship, partnership, association, corporation, cooperative, governmental entity, or other form of business organization, and includes any natural person.

1.9 “Prudent Utility Practice” means any of the practices, methods and acts engaged in or approved by a significant portion of the natural gas distribution industry during the relevant time period, or any of the practices, methods and acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety and expedition. Prudent Utility Practice is not intended to be limited to the optimum practice, method, or act to the exclusion of all others, but rather to be acceptable practices, methods, or acts generally accepted within the industry.

1.10 “Qualified Worker” means one who is knowledgeable about the construction and operation of the natural gas generation, transmission, and distribution system as it relates to his or her work, along with the associated hazards, as demonstrated by satisfying the qualifying requirements for the qualification of pipeline personnel with regard to the work in question and in accordance with 49 CFR Part 192 Subpart N. The Parties acknowledge that for purposes of this Ordinance, a Qualified Worker need not be an employee of the City or Cascade.

1.11 “Street” shall include each of the following: public streets, roadways, highways, bridges, land paths, boulevards, avenues, lanes, alleys, sidewalks, circles, drives, rights of way and similar public ways and extensions and additions thereto, including but not limited to rights-of-way dedicated for compatible uses now or hereafter held by the City within its corporate boundaries.

Section 2. Right to Use and Occupy Streets

2.1 Grant of Franchise.

(A) The City hereby grants to Cascade the non-exclusive right to use and occupy the Streets to construct, operate, repair and maintain its Facilities for the sole purpose of supplying natural gas to retail customers located within the City (including the City), subject to the terms and conditions of this Ordinance.

(B) Cascade shall not use, or permit any other Person to use, its Facilities located in the Streets for any purpose other than supplying natural gas to retail customers.

2.2 **Term.** All rights conferred upon Cascade by this Ordinance to use and occupy the Streets shall expire ten (10) years from the Effective Date, unless terminated earlier as provided herein and subject to renewal as provided herein.

2.3 **Rights Not Exclusive.** The rights granted by this Ordinance allowing Cascade to use and occupy the Streets is not exclusive. The City expressly reserves the right to use and occupy the Streets. The City further reserves the right to grant to other persons permission to use and occupy the Streets for any purpose, including without limitation the sale and distribution of natural gas to retail customers within the City. Nothing in this Ordinance shall preclude the City from exercising its legal right to own and operate a natural gas distribution system or from offering natural gas service to any retail customers.

2.4 **After-Acquired Facilities Subject to Ordinance.** Within thirty (30) days of Cascade's acquisition of any Facilities located in the Streets, or upon any addition or annexation to the City of any area in which Cascade owns and operates any such Facilities in the Streets, Cascade shall submit to the City a written statement specifying the location of all Facilities involved. Such acquired or annexed Facilities shall be subject to the terms of this Ordinance. Cascade shall have a reasonable period of time in which to bring such acquired or annexed Facilities into compliance with this Ordinance, including without limitation the payment of appropriate Franchise Fees with respect to such Facilities in accordance with Section 3.

Section 3. PAYMENT OF FRANCHISE FEES

3.1 **Amount of Compensation.** Cascade shall pay the City a fee equal to five percent (5%) of Cascade's Gross Revenues ("Franchise Fee"). Notwithstanding the forgoing, the City may, in its sole discretion and any time during the Term hereof, increase the Franchise Fee payable by Cascade provided that: (1) any such increased Franchise Fee shall be consistent with Applicable Law; and (2) any such increased Franchise Fee shall become effective not less than ninety (90) days after the City provides Cascade with written notice of the increase.

3.2 Payment of Franchise Fees.

(A) Franchise Fees paid to the City under Section 3.1 shall be computed based on Cascade's Gross Revenues from each calendar year quarter period (January 1 through March 31, April 1 through June 30, July 1 through September 30, and October 1 through December 31) and paid on or before the forty-fifth (45th) day following each calendar quarter. Payments shall be transmitted by electronic funds transfer to a bank account designated by Grantor.

(B) Any Franchise Fees not received by the City by the due date set forth above shall be assessed interest computed from such due date at the monthly rate equal to the lesser of one percent (1%) or the maximum rate allowed by law.

(C) Accompanying each payment to the City under Section 3.1, Cascade shall file with the City a written report containing an accurate statement of its calculation of the amount of the payment. Such written report shall specifically set forth Cascade's Gross Revenues for the payment period, as verified by an authorized representative of Cascade. Cascade shall keep and preserve, for not less than three (3) years following the submittal of each report, accurate documents and records supporting the information submitted in its written report to this City.

3.3 Other City Fees and Charges. Payment of the Franchise Fee as described in Section 3.1 shall not exempt Cascade from the payment of any other license fee, tax, or charge on the business, occupation, Facilities, or income of Cascade that may be imposed by the City.

3.4 Acceptance of Payment and Recomputation. No acceptance by the City of any payment of Franchise Fees by Cascade shall be construed as an accord that the amount paid is, in fact, the correct amount, nor shall any acceptance of payments be construed as a release of any claim the City may have for further or additional sums payable.

3.5 Right to Audit or Financial Review. The City and its agents and representatives shall have authority to conduct audits or financial reviews of Cascade's payments of Franchise Fees under Section 3 upon no less than thirty (30) days' prior written notice. The scope of audit or financial review in each instance shall be limited to the extent necessary to verify the amount of compensation payable to the City, as specified in Section 3.1.

Section 4. CONSTRUCTION AND RELOCATION

4.1 Construction. Subject to applicable regulations of the City, Cascade may perform all of the construction, repair, and maintenance of its Facilities within the Streets and other points as may be required to provide natural gas service. Cascade shall place its Facilities in the Streets so that they do not interfere with the use by the City and the public of such Streets, including any facilities previously located therein by any other Person, and in accordance with any applicable regulations or technical specifications adopted by the City. Cascade shall apply for and obtain all permits, and pay all fees, necessary for construction of any such Facilities.

Cascade may make excavations in the Streets for the purpose of construction, maintaining or removing any Facility, provided that prior to doing such work Cascade applies for and obtains appropriate permits from the City and gives appropriate written notices to the City and any other

Person owning or maintaining facilities that may be affected by the excavation.

Notwithstanding the forgoing, if Cascade determines that emergency conditions require excavation or other activities in Streets, Cascade may immediately perform all such activities to alleviate the emergency condition. Cascade shall apply for the appropriate permits within forty-eight (48) hours of discovery of the emergency.

4.2 Maps. Within thirty (30) days following the Effective Date, Cascade shall provide the City with a map showing the location of all its Facilities in the Streets. Cascade shall update such map whenever it adds, removes or relocates Facilities in the Streets. Such “as-built” maps shall be provided to the City by Cascade through its Geographic Information System database upon execution of its Data Exchange License Agreement.

4.3 Relocation for the City. The City shall have the right to require Cascade to change the location of its Facilities within the Streets for reasons of public health and safety or when the public convenience reasonably requires such change for the improvement, maintenance, installation, or relocation of any public works or facilities, including without limitation water and sewer lines, electric facilities, or roads and sidewalks. The City shall provide Cascade and all other affected Persons written notice of the requirement to relocate Facilities, which written notice shall establish a reasonable deadline to complete such relocation that is not less than thirty (30) days from the date of the notice. The expense of such relocation shall be paid by Cascade. In ordering relocation, the City may impose additional specifications regarding materials or design for Cascade’s Facilities. Should Cascade fail to remove or relocate any such Facilities by the deadline established by the City, the City may remove or relocate Cascade’s Facilities and the expense thereof incurred by the City shall be reimbursed by Cascade (including any additional costs and expenses incurred by the City due to Cascade’s delay). If the City requires a subsequent, non-emergency relocation of the same Facilities within five (5) years of its initial relocation, the City shall bear the reasonable expense of its subsequent relocation. The City will use commercially reasonable efforts to seek funding from Federal and State resources, where available, to off-set part or all of Cascade’s relocation costs. Such monies recovered shall be paid to Cascade to reimburse it for its relocation expenses.

4.4 Relocation for a Person other than the City. Cascade shall, on the reasonable, advance written request of any other Person having permission to use the Streets, temporarily or permanently relocate its Facilities located in the Streets. Cascade may condition the relocation of its Facilities on the payment of its relocation expenses by the Person requesting the relocation. Cascade may require such payment in advance. For purposes of this subsection, reasonable advance written notice shall be no less than thirty (30) days.

4.5 Standard of Care. Cascade shall construct, operate and maintain its Facilities in the Streets consistent with Prudent Utility Practices using only Qualified Workers. All construction and maintenance of Facilities shall, regardless of who performs construction, be and remain the responsibility of Cascade.

Section 5. RESTORATION OF STREETS

If Cascade disturbs, opens or excavates any Street for any purpose, Cascade shall be responsible for the prompt restoration of the Street to its prior condition. If Cascade fails to adequately restore any Streets that it disturbs, opens or excavates, the City may restore the Street at Cascade's sole cost and expense. All opening and excavations made by Cascade in the Streets shall be properly safeguarded by Cascade for the prevention of accidents. All of Cascade's work under this Section shall be done in strict compliance with all applicable regulations and specifications of the City. Cascade's responsibility for repairs to any Streets disturbed by Cascade's work shall end upon the occurrence of either: (1) reconstruction of the Street in an approved manner by the City; or (2) subsequent work at the same location by any other Person.

Section 6. RESERVATION OF CITY STREET RIGHTS

Nothing in this Ordinance shall be construed to prevent the City from constructing sewers, grading, paving, repairing, or altering any Street or laying down, repairing, or removing water mains or constructing or establishing any other public work or improvement. All such work shall be done by the City, insofar as practicable, so as not to damage or unreasonably interfere with Cascade's Facilities. If any of Cascade's Facilities would impede the City's use, construction, maintenance or repair of any Street or public improvement in the Street, the City may direct Cascade to relocate its Facilities as provided in Section 4.3 of this Ordinance.

Section 7. PROVISION OF NATURAL GAS SERVICE

7.1 Provision of Natural Gas Service. At all times during the Term hereof, Cascade shall offer and provide natural gas service to Persons located within the City consistent with Applicable Law and its tariffs and terms and conditions of service as approved by the Oregon Public Utilities Commission.

7.2 Bill Paying Station. Cascade shall maintain at least one readily accessible bill paying station within the City at all times during the Term hereof.

Section 8. INSURANCE

Cascade shall have in effect and keep in force for the Term hereof the insurance coverage set forth below. Cascade's insurance shall be primary and non-contributory as to any insurance maintained by the City. Cascade's insurance shall be provided by companies eligible to do business in Oregon and maintaining an A.M. Best rating of A- or better. Upon request, Cascade shall furnish a certificate of insurance to the City. The City shall be named as an additional insured on all such policies, except regarding Worker's Compensation Insurance, and only to the extent of Cascade's obligations included herein. All insurance shall also include waiver of any subrogation rights against City.

Workers' Compensation

Statutory Limits

Commercial General Liability	\$2,000,000 per occurrence, Combined Single Limit (C.S.L.) \$4,000,000 General Aggregate
Auto Liability including coverage on all owned, non-owned hired autos	\$1,000,000 per occurrence C.S.L.
Umbrella Liability	\$1,000,000 per occurrence C.S.L.

Section 9. COVENANT TO INDEMNIFY AND HOLD CITY HARMLESS

Cascade shall indemnify, defend, and hold the City (including without limitation its councilors, agents, and employees) harmless from and against any third-party claim arising out of this Ordinance, Cascade's business operations within the City, Cascade's Facilities, or Cascade's use of the Streets. The City shall provide Cascade with prompt notice of any such third-party claim, which Cascade shall defend at its sole cost and expense with counsel of its own choosing. Neither Party shall agree to any settlement or compromise of any such third-party claim without the prior written approval of the other Party. The Parties shall reasonably consult and cooperate with each other with respect to any such defense of third-party claims. Notwithstanding anything to the contrary in this Section 9, Cascade is not required to indemnify the City for any judgment, loss or liability to the extent of any negligence or willful misconduct by the City or other parties not under the direction or control of Cascade.

Section 10. CONTROL OF NATURAL GAS

Cascade shall provide and put in use equipment and appliances necessary to control and distribute natural gas to the point of Cascade's delivery to its customers consistent with applicable pipeline safety rules and regulations. Cascade, at its own expense, shall repair, renew, change, and improve its Facilities from time to time as may be necessary to accomplish this purpose. Cascade shall not connect natural gas service in a manner that requires the customer to install a natural gas line, conduit, or other facility, under or over a Street.

Section 11. HAZARDOUS SUBSTANCES

11.1 Compliance with Applicable Law. Cascade shall comply with all applicable state and federal laws, statutes, regulations, and orders concerning Hazardous Substances.

11.2 Maintenance, Inspection, and Remediation. If Cascade discovers any Hazardous Substances in the course of Cascade's work on its Facilities in the Streets, Cascade shall provide a written report of the discovery to the City within two (2) business days. As required by applicable law, Cascade shall immediately remove and remediate any such Hazardous Substances that it has released or caused to be released. Nothing herein shall require Cascade to remove or remediate any existing contamination not related to or caused by Cascade. Nothing in this Ordinance transfers or is intended to transfer any liability to the City for the removal or

remediation of any Hazardous Substances released or caused to be released by Cascade whether in the Streets or otherwise.

Section 12. ASSIGNMENT

Cascade may not assign or otherwise transfer any of its rights or obligations conferred by this Ordinance, including, without limitation, the right to construct and maintain its Facilities in the Streets, without the prior written consent of the City, which consent shall not be unreasonably withheld. Notwithstanding the forgoing, nothing in this Ordinance is intended, or shall be deemed, to prohibit Cascade from pledging or assigning to one or more lenders a security interest in its Facilities for the purpose of financing the construction or maintenance of such Facilities.

Section 13. NO IMPLIED WAIVER

The City's waiver of any breach by Cascade of an obligation contained in this Ordinance shall not be deemed to be a waiver by the City of any subsequent breach of the same or any other obligation.

Section 14. REMOVAL OF FACILITIES

Within one (1) year following termination of this Ordinance or termination of negotiations following the expiration of this Ordinance pursuant to Section 18, Cascade shall remove from the Streets all of its Facilities unless the City agrees otherwise. During the term of this Franchise, Cascade shall notify the City in writing of any specific Facilities that Cascade intends to permanently stop using or abandon. The City may, within its reasonable discretion, direct Cascade to remove from the Streets any such abandoned Facilities. Within ninety (90) days of its receipt of written notice, the City shall advise Cascade in writing whether the City requires Cascade to remove such abandoned Facilities from the Streets. Cascade shall thereafter remove the abandoned Facility as soon as practicable and in a manner that is otherwise consistent with the requirements of this Ordinance and any applicable law or code.

Section 15. DISPUTE RESOLUTION

Any dispute between the City and Cascade concerning the interpretation or enforcement of this Ordinance, or Cascade's use of the Streets, shall be referred to a senior executive of each party with authority to decide or resolve the matter. Such senior executives shall meet and in good faith attempt to resolve the dispute within thirty (30) days. If the parties are unable to resolve a dispute, either party may elect to initiate judicial action in state court in Umatilla County, Oregon. The prevailing party in any such judicial action shall be entitled hereunder to recover from the other party its reasonable costs and attorney fees.

Section 16. DEFAULT AND REMEDIES

16.1 Notice of Violation. If the City believes that Cascade has not complied with the terms of this Ordinance, the City shall notify Cascade in writing of the exact nature of the alleged noncompliance (the "Violation Notice"). Such notice shall be served by registered mail upon the

region director and upon the registered agent for receipt of service in the State of Oregon of Cascade.

16.2 Right to Cure or Respond. Except in the case of the non-payment of any Franchise Fees when due, Cascade shall have ninety (90) days from receipt of the Violation Notice to cure such default. If such default cannot be cured within the ninety (90) day period, Cascade shall initiate reasonable steps within the ninety (90) day period to remedy such default and notify the City of the steps being taken and the projected date that they will be completed. If Cascade disputes in good faith the non-compliance alleged by the City, Cascade may initiate the Dispute Resolution process set forth in Section 15.

16.3 Enforcement. If Cascade fails to timely cure or to dispute in good faith the non-compliance set forth in the Violation Notice, the City may commence enforcement of the Ordinance pursuant to Section 15. Should it be necessary for the City to initiate judicial action to enforce the Ordinance, the City may seek specific performance of any provision that reasonably lends itself to such remedy in addition to the recovery of monetary damages or other equitable relief. In lieu of or in addition to seeking judicial enforcement of the Ordinance, the City may terminate the rights granted to Cascade under this Ordinance at any time following the ninety (90) day cure period required by Section 16.2. Upon receipt from the City of written notice of such termination of rights, Cascade shall remove all of its Facilities from the Street within one hundred and eighty (180) days.

16.4 Minor Violations. Notwithstanding the forgoing, the City and Cascade hereby agree that it is not the City's intention to terminate the rights conferred upon Cascade under this Ordinance for violations of the Ordinance resulting from a good faith error by Cascade or that have resulted in no material adverse impact on the City or its inhabitants.

Section 17. MISCELLANEOUS PROVISIONS

17.1 Compliance with Applicable Laws. In exercising its rights under this Ordinance, Cascade agrees to comply with all provisions of Applicable Law. If any generally applicable ordinance provision adopted by the City, whether before or after the Effective Date, is in conflict with the express terms of this Ordinance, this Ordinance shall be controlling. Except as may be expressly allowed herein, the City may not take any unilateral action that materially changes the rights granted to Cascade herein.

17.2 Severability. If any section, provision, or clause of this Ordinance is held by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this Ordinance shall not be affected.

17.3 Force Majeure. If Cascade's timely performance of any obligation under this Ordinance (other than the payment of money when due) is delayed due to circumstances beyond its reasonable control, then Cascade shall provide prompt notice to the City, and Cascade's delay in the performance of such obligation shall be excused until the circumstances causing such delay have resolved.

17.4 Choice of Law. This Ordinance shall be governed by and construed in accordance with

the laws of the State of Oregon.

17.5 Notices. Unless otherwise provided herein, any notice provided for under this Ordinance shall be sufficient if in writing and: (i) delivered personally to the following addressee; (ii) deposited in the United States mail, postage prepaid, certified mail, return receipt requested; or (iii) sent by commercial courier such as Federal Express:

(A) If to the City:

City of Hermiston
180 NE 2nd Street
Hermiston, OR 97838

(B) If to Cascade:

Cascade Natural Gas Corporation
Attn: Region Director
64500 O. B. Riley Rd
Bend, OR 97703

Registered Agent:

C T Corporation System
780 Commercial St SE Ste 100
Salem, OR 97301

Any such notice shall be deemed delivered upon the earliest to occur of: (i) actual personal delivery; (ii) three (3) business days after depositing in the United States mail; or (iii) two (2) business days after shipment by commercial courier.

17.6 Confidentiality. Cascade may identify information submitted to the City pursuant to this Ordinance as confidential. Cascade shall prominently mark any such information with the mark "Confidential." The City shall treat any information so marked as confidential and not subject to public disclosure, until the City receives any public records request for disclosure of such information. Within five (5) business days of receiving any such request, the City shall provide Cascade with written notice of the request, including a copy of the request. Cascade shall have right, at its sole cost and expense, to contest the City's legal obligation to disclose such information or to otherwise seek an appropriate protective order with respect to such information. Notwithstanding the forgoing, the City shall retain final discretion to determine whether it is legally obligated to release the requested information.

Section 18. FRANCHISE RENEWAL

At least one year before the expiration of this Ordinance, either party may request renewal of the Ordinance. Upon such request, the parties shall enter into good faith negotiations with regard to renewal of the Ordinance and the terms and conditions thereof. If such negotiations continue in good faith beyond the expiration date of this Ordinance, Cascade's rights and responsibilities

within the City shall be controlled by the terms of this Ordinance during the period of such negotiations. If at any time during the negotiations, either party determines that negotiations have deadlocked and no future progress is possible, the party may terminate negotiations by providing written notice of termination of negotiations.

Section 19. WRITTEN ACCEPTANCE

On or before the thirtieth (30th) day after this Ordinance becomes effective, Cascade shall execute and deliver to the City an unqualified written acceptance of this Ordinance. Cascade’s failure or refusal to timely deliver such written acceptance shall be deemed a rejection of the rights and privileges conferred hereby and this Ordinance shall thereupon be null and void.

Considered and approved this ____ day of _____, 2021.

City of Hermiston, Oregon

Signature:_____

Name/Title:_____

Accepted this ____ day of _____, 2021, subject to applicable federal, State and local law.

By:

Signature:_____

Name/Title:_____