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VILLAGE OF ESTERO, FLORIDA

ORDINANCE NO. 2021 - 09

AN ORDINANCE OF THE VILLAGE COUNCIL OF THE VILLAGE OF ESTERO, FLORIDA, GRANTING TO PEOPLES GAS SYSTEM, A DIVISION OF TAMPA ELECTRIC COMPANY, ITS SUCCESSORS AND ASSIGNS, A NON-EXCLUSIVE NATURAL GAS FRANCHISE AGREEMENT TO USE THE PUBLIC RIGHTS OF WAY OF THE VILLAGE OF ESTERO, FLORIDA, AND PRESCRIBING THE TERMS AND CONDITIONS UNDER WHICH SAID FRANCHISE MAY BE EXERCISED; MAKING FINDINGS; PROVIDING FOR CONFLICTS; AND PROVIDING AN EFFECTIVE DATE.

WHEREAS, Peoples Gas System and the Village of Estero desire to enter into a franchise agreement for up to twenty (20) years commencing from the date provided herein; and

WHEREAS, the Village Council finds that it is in the public interest of its citizens to enter into a new franchise agreement with Peoples Gas System.

NOW THEREFORE, BE IT ENACTED BY THE VILLAGE COUNCIL OF THE VILLAGE OF ESTERO, FLORIDA, THAT:

Section 1. DEFINITIONS

For the purposes of this Ordinance, the following terms shall have the meaning given herein.

- A. "Customer" shall mean any person served by the Company within the corporate limits of the municipality.
- B. "Village" shall mean the Village of Estero, Lee County, Florida, its successor and assigns.
- C. "Company" shall mean Peoples Gas System, a division of Tampa Electric Company, a Florida corporation, its successors and assigns.
- D. "Distribution System" shall mean any and all transmission pipe lines, main pipe lines and service lines, together with all tubes, traps, vents, vaults, manholes, meters, gauges, regulators, valves, conduits, attachments, structures and other appurtenances, as are used or useful in the sale, distribution, transportation or delivery of Natural Gas and as are situated within the corporate limits of the Village.

- 44 E. "Effective Date" shall mean the date this Franchise becomes effective as
45 described in Section 19 below.
- 46 F. "Franchise" or "Franchise Agreement" shall mean this agreement as passed
47 and adopted by the Village and accepted by the Company as provided in
48 Section 19 below.
- 49 G. "FPSC" shall mean the Florida Public Service Commission or any successor
50 agency.
- 51 H. "Gross Revenues" shall mean all revenues (as defined by the Florida Public
52 Service Commission) received by the Company from any customer from the
53 sale of Gas.
- 54 I. "Person" shall mean any individual, firm, partnership, estate, corporation,
55 company or other entity, including, but not limited to, any government entity.
- 56 J. "Natural Gas" or "Gas" shall mean natural gas and/or manufactured gas
57 and/or a mixture of gases which is distributed in pipes and measured by meter
58 on the Customer's premises. It shall not mean propane gas or liquefied
59 petroleum gas (commonly referred to as "bottled gas").
- 60 K. "Right-of-way" means any street, road, lane, highway, avenue, boulevard,
61 alley, waterway, bridge, easement, public place, or other right-of-way that is
62 owned by the Village.

63
64 **Section 2.** GRANT

65
66 The Village hereby grants to the Company the non-exclusive right, privilege, and
67 franchise to lay, erect, construct, operate and maintain in, on or under any and all Rights-of-
68 way, as they now exist or may be hereafter constructed, opened, laid out or extended within
69 the present incorporated limits of the Village, or in such territory as may be hereafter added or
70 annexed to, or consolidated with the Village, a Distribution System subject to the terms and
71 conditions herein contained.

72
73 **Section 3.** TERM

74
75 Except as provided in Section 15, the Franchise hereby granted shall be for an initial
76 period of ten (10) years from the effective date of this ordinance. The Franchise will
77 automatically renew for up to two (2) successive five (5) year periods unless either party
78 provides the other with written notice of its desire not to renew at least ninety (90) days prior
79 to the commencement of each new period.

80
81 **Section 4.** ASSIGNMENT

82
83 A. The Franchise hereby granted shall not be leased, assigned or otherwise
84 alienated or disposed of except with the prior express written consent of the Village, which
85 shall not be unreasonably withheld or unduly delayed. No assignment shall be allowed without
86 the assignee assuming the terms of the Franchise Agreement with the Village.

87 B. Notwithstanding the foregoing, the Company may, without the consent of the
88 Village, lease, assign or otherwise alienate and transfer this Franchise in connection with the
89 lease or sale of the Distribution System or upon its merger or consolidation with, or transfer
90 to, a corporation engaged in similar business (including an affiliate or subsidiary of the
91 Company), or pledge or mortgage of such Franchise in connection with the physical property
92 owned and used by it in the operation of the Distribution System for the purpose of securing
93 payment of monies borrowed by the Company.

94 **Section 5.** VILLAGE COVENANT

95
96 As a further consideration for this Franchise Agreement, the Village covenants and
97 agrees that it will not, during the term of this Franchise Agreement or any extension thereof,
98 engage in the business of distributing or selling Natural Gas within the corporate limits of the
99 Village, as modified, during the term of this Franchise Agreement.

100
101 **Section 6.** USE OF STREETS

102
103 The Distribution System shall be erected, placed, or laid in such manner as will,
104 consistent with necessity, least interfere with other public uses of the Rights-of-way, and said
105 Right-of-way shall not be unnecessarily obstructed, and before, except in an emergency
106 situation, the Company makes any excavation or disturbs the surface of any of the Rights-of-
107 way, it shall make application for a permit to the appropriate Village authority. The Village
108 shall issue or, if applicable, deny permits within ten (10) business days of application by the
109 Company. In consideration of the franchise fees contemplated in this agreement, the Village
110 shall not charge the Company any fees for the issuance of such permits. The Company shall,
111 with due diligence and dispatch, place such Right-of-way in as good a condition as before such
112 excavation or disturbance was made; provided, however, that should the Company fail, within
113 ten (10) days of its receipt of written notice from the Village, to restore such Right-of-way,
114 then the Village may undertake such restoration (other than any restoration work on the
115 Distribution System) and charge the reasonable cost thereof to the Company.

116 To the extent consistent with Florida law, the Company hereby agrees to abide by all
117 the rules and regulations and ordinances which the Village has passed or might pass in the
118 future, in the exercise of its police power, provided, however, that the Village shall not pass
119 any ordinance or regulation that results in a material change to the rights or obligations of the
120 Company under the Franchise Agreement.

121
122 **Section 7.** MAINTENANCE

123
124 All such components of the Distribution System of the Company located within the
125 Village shall be installed and maintained in accordance with accepted good practice and in
126 accordance with the orders, rules, and regulations of the Florida Public Service Commission.

127
128 **Section 8.** LAYING OF PIPE

130 All components of the Distribution System shall be laid consistent with all applicable
131 codes, rules, regulations and laws, including, to the extent consistent with all applicable codes,
132 rules, regulations and laws, specifications contained in Village permits.
133

134 **Section 9.** **CONSTRUCTION WORK**

135 The Village reserves the right to permit to be laid electric conduits, water and gas pipes
136 and lines, cables, sewers, and to do and permit to be done any underground work that may be
137 deemed necessary or proper by the Village in, across, along, or under any Right-of-way.
138 Whenever, by reason of establishing a grade or by reason of changes in the grade of any Right-
139 of-way, or by reason of the widening, grading, paving, or otherwise improving present or future
140 Rights-of-way, or in the location or manner of construction of any water pipes, electric
141 conduits, sewers, or other underground structure located within the Rights-of-way, it shall be
142 deemed necessary by the Village to remove, relocate, or disconnect any portion of the
143 Distribution System of the Company hereto for such public purpose, such removal, relocation,
144 or disconnection shall be made by the Company as ordered in writing by the Village without
145 claim for reimbursement. If the Village shall require the Company to remove, relocate, or
146 disconnect any portion of its Distribution System or in any way to alter the placement or
147 location of the Distribution System to enable any other person to use said Rights-of-way of the
148 Village, as part of its permitting or approval process, the Village shall require the person
149 desiring or occasioning such removal, relocation, disconnection, or alteration to reimburse the
150 Company for any loss, cost, or expense caused by or arising out of such removal, relocation,
151 disconnection, or alteration of any portion of the Distribution System. The Company further
152 agrees that it will not intentionally interfere with, change, or injure any water pipes, drains, or
153 sewers of said Village unless it has received specific permission from the Village or its duly
154 authorized representative.
155

156 **Section 10.** **FRANCHISE FEE**

157 Subject to Section 11 below, within thirty(30) days after the close of the first full billing
158 month following the effective date of this Franchise Agreement, and each month thereafter
159 during the term of this Franchise Agreement, the Company, its successors, or assigns, shall
160 apply to the Village or its successors, a sum of money equal to six percent (6%) of the
161 Company's Gross Revenue, less any adjustments for uncollectable accounts, from the sale of
162 Natural Gas to Customers within the corporate limits of the Village. The Franchise fee
163 payment shall be deemed paid on time if post-marked within thirty (30) days of the close of
164 the preceding billing month.
165

166 **Section 11.** **IDENTIFICATION OF VILLAGE RESIDENTS**

167
168 No less than thirty (30) days prior to the Effective Date, the Village shall deliver to the
169 Company such information (including Village limit streets and block numbers) as is needed
170 by the Company to determine which of its customer are located within the Village limits. The
171 Village shall also provide such information no less than thirty (30) days prior to the
172 effectiveness of any change in said limits, whether by addition, annexation, or consolidation,
173 or upon the Company's request. The Company shall be relieved of any obligation to pay

174 franchise fees to the extent the Village has failed to provide information in accordance with
175 this Section 11.

176
177 **Section 12.** **ACCOUNTS AND RECORDS**

178
179 The Company shall maintain accounting, maintenance, and construction records as
180 prescribed by the FPSC. The Company shall establish and maintain appropriate accounts and
181 records in such detail that revenues within the corporate limits of the Village are consistently
182 declared separately from all other revenues, and such records shall be maintained within the
183 State of Florida. Upon request by the Village, or its designated representative, and execution
184 of a confidentiality agreement reasonably satisfactory to the Company, the Company shall
185 make available said records within thirty (30) days to the Village for the determination of the
186 accuracy of the Gross Revenues upon which the Company’s franchise fee is based. The
187 Company shall maintain its billing records only for the period of time required by the FPSC
188 and any examination conducted after such period shall be confined to the billing records then
189 available.

190
191 **Section 13.** **INSURANCE**

192
193 During the term of this Franchise, the Company shall file with the Village Clerk and
194 shall keep in full force and effect at all times during the effective period hereof, insurance
195 certificates evidencing a general liability insurance policy or policies issued by an insurance
196 carrier licensed to do business in the state of Florida or evidence of self-insurance within the
197 corporate limits of the Village as they currently exist or may exist in the future. Each such
198 policy shall provide for the minimum sum of \$1,000,000.00 for injury or death to any one
199 person, and for the minimum sum of \$5,000,000.00 for injury or death to all persons where
200 there is more than one person involved in any one incident or accident, and for the minimum
201 sum of \$1,000,000.00 for damage to property, resulting from any one accident, and each of the
202 said minimum sums shall remain in full force and shall be undiminished during the effective
203 period of this Agreement. The coverage requirements set forth in this Section 13 may be
204 satisfied, in whole or in part, with self-insurance.

205 Company shall notify the Clerk of the Village in writing, promptly upon any material
206 alteration, modification, or cancellation of such policy.

207
208 **Section 14.** **INDEMNIFICATION:**

209
210 In consideration of the permissions granted to the Company by this Franchise
211 Agreement, the Company hereby agrees to indemnify and hold harmless the Village, its
212 officers, agents and employees from and against claims, suits, actions, and causes of action,
213 caused by the Company’s negligent operation of the Distribution System within the Village
214 during the term of this Franchise and resulting in personal injury, loss of life or damage to
215 property sustained by any person or entity, through or as a result of the doing of any work
216 herein authorized or the failure to do work herein required, and including all reasonable costs,
217 attorney’s fees, expenses, and liabilities incurred by the Village in connection with any such
218 claim, suit, or cause of action, including the investigation thereof, and the defense of any action

219 or proceeding brought thereon and any order, judgment or decree which may be entered in any
220 such action or proceeding or as a result thereof; **provided, however,** that neither the Company
221 nor any of its employees, agents, contractor, licensees, or sub lessees shall be liable under this
222 section for any claims, demands, suits, actions, losses, damages, or expenses, including
223 attorney’s fees, arising out of the negligence, strict liability, intentional torts, criminal acts, or
224 error of the Village, its officers, agents, or employees. The provisions of this section shall
225 survive the expiration or earlier termination of this Franchise Agreement. Notwithstanding
226 any provision herein to the contrary, the Company’s liability under this Agreement shall be
227 limited to the assets and business of Peoples Gas System, a division of Tampa Electric
228 Company, as if Peoples were incorporated separate and apart from Tampa Electric Company.
229

230 **Section 15. TERMINATION BY VILLAGE**

231 Violation by the Company of any of the covenants, terms, and conditions hereof, or
232 default by the Company in observing or carrying into effect any of said covenants, terms and
233 conditions, shall authorize and empower the Village to declare a termination of this Franchise
234 Agreement; provided, however, that before such action by the Village shall become operative
235 and effective, the Company shall have been served by the Village with a written notice setting
236 forth all matters pertinent to such violation or default, and describing the action of the Village
237 with respect thereto, and the Company shall have had a period of sixty (60) days after service
238 by certified U.S. mail of such notice, or, in the event such cure reasonably requires a period of
239 more than sixty (60) days, then sixty (60) days to present a plan reasonably satisfactory to the
240 Village to effect such cure; and provided further that any violation or default resulting from a
241 strike, a lockout, an act of God, or any other cause beyond the control of the Company shall
242 not constitute grounds for termination.
243

244 **Section 16: CHANGES IN PROVISIONS HEREOF**

245
246 Changes in the terms and conditions hereof may be made by written agreement between
247 the Village and the Company.
248

249 **Section 17. SEVERABILITY; CHANGE IN LAW**

250
251 (A) If any section, part of a section, paragraph, sentence, or clause of this
252 Agreement shall be adjudged by a court of competent jurisdiction to be invalid, such decision
253 shall not affect the validity of any other portion hereof, but shall be restricted and limited in its
254 operation and effect to that specific portion hereof involved in the controversy in which such
255 decision shall have been rendered; provided, however, that should elimination of the specific
256 portion of the Franchise Agreement adjudged to be invalid result in significant adverse
257 consequences to a party, then that party may terminate this Franchise Agreement by providing
258 thirty (30) days written notice to the other party.

259 (B) Upon the issuance by a court of competent jurisdiction of an order, ruling, or
260 decision, or the enactment or adoption by the Florida Legislature, the Village, or any other
261 governmental or regulatory body of a law, rule, regulation, or ordinance, that materially
262 diminishes a municipality’s ability to exact franchise fees from a utility, or that effectively

263 does away with the ability of a municipality to grant a franchise altogether, then the Company
264 or Village may terminate this Franchise Agreement by providing ninety (90) days written
265 notice to the other party.

266
267 **Section 18.** GOVERNING LAW

268
269 This Franchise shall be governed by the laws of the State of Florida and applicable
270 federal law.

271
272 **Section 19.** EFFECTIVE DATE

273
274 This Franchise Agreement shall become effective upon its acceptance by the Company,
275 which acceptance must be evidenced in writing within sixty (60) days of the Village’s passage
276 and adoption hereof.

277
278 This ordinance shall take effect immediately upon adoption.

279
280 **PASSED** on first reading this _____ day of _____, 2021.

281
282 **PASSED AND ADOPTED BY THE VILLAGE COUNCIL** of the Village of Estero,
283 Florida this _____ day of _____, 2021.

284
285 Attest: **VILLAGE OF ESTERO, FLORIDA**

286
287
288 By: _____ By: _____
289 Carol Sacco, Village Clerk Katy Errington, Mayor

290
291
292 Reviewed for legal sufficiency:
293 By: _____
294 Burt Saunders, Esq., Village Attorney

295
296 Vote: AYE NAY
297 Mayor Errington _____
298 Vice Mayor McLain _____
299 Councilmember Ribble _____
300 Councilmember Fiesel _____
301 Councilmember Boesch _____
302 Councilmember Ward _____
303 Councilmember Wilson _____