



## Invitation to Bid

NOTICE INVITING BIDS FOR A FRANCHISE TO CONSTRUCT, MAINTAIN, AND USE PIPES AND APPURTENANCES FOR TRANSMITTING AND DISTRIBUTING GAS IN THE STREETS OF THE CITY OF SAN DIEGO.

NOTICE IS HEREBY GIVEN THAT PURSUANT TO SAN DIEGO CITY CHARTER SECTION 103, SEALED BIDS WILL BE RECEIVED FOR A FRANCHISE TO CONSTRUCT, MAINTAIN, AND USE PIPES AND APPURTENANCES FOR TRANSMITTING AND DISTRIBUTING GAS IN THE STREETS OF THE CITY OF SAN DIEGO.

After 50 years, the City of San Diego's gas and electric franchises are expiring on June 1, 2021. Through this Notice of Invitation to Bid (Notice), the City is seeking an energy partner who will help it achieve its climate goals outlined in the City's Climate Action Plan, and partner to create an energy future based on transparency, equity, and accountability. The City's goals are to provide equitable access to environmental benefits, prioritize environmental protection and affordability, increase accessibility to clean energy resources, and provide the flexibility needed to respond nimbly to market shifts and technological advances. These new franchises must also protect ratepayer interests, protect the City's rights to determine uses of the public right-of-way, ensure resiliency in the grid, and ensure reliability of service.

Between January 23, 2021, and February 24, 2021, the City conducted 13 community forums and launched a public survey to collect input on the City's gas and electricity franchises, the results of which showed that City of San Diego residents value environmental protection, including reducing pollution and combatting climate change. The results of this public outreach have been compiled and published in a report available at: <https://www.sandiego.gov/sustainability/electric-and-gas-services>.

**TIME AND PLACE FOR FILING AND OPENING OF BIDS.** Each bid, together with the information required in this Notice, as set forth below, must be submitted in a sealed envelope, addressed to the Purchasing & Contracting Department of the City of San Diego, with the envelope and bid clearly marked "Bid for a franchise to construct, maintain, and use pipes and appurtenances for transmitting and distributing gas in the streets of the City of San Diego."

Bids must be submitted to the Purchasing & Contracting Department, up to but not later than **1:00 p.m. on April 16, 2021**, the Closing Date, by one of two options: (1) mailing the bid with proof of delivery to the Purchasing & Contracting Department, 1200 Third Avenue, Suite 200, San Diego, California, 92101, so it is received by the Closing Date; or (2) calling the Purchasing & Contracting Department at 619-236-5921 to request an in-person appointment to drop off the bid on a specific date and time before the Closing Date at the entrance to Civic Center Plaza, 1200 Third Avenue, Suite 200, San Diego, California, 92101. The phone call requesting an appointment must be received by a member of the Purchasing & Contracting staff at least seventy-two (72) hours prior to the Closing Date.

After the Closing Date, the bids shall remain sealed in the care of the Purchasing & Contracting Department until **April 16, 2021 at 1:01 p.m.**, at which point a City representative will open and publicly announce the bidding party and amount of all bids (Bid Opening). Bidders and the public may witness the Bid Opening through the following link:

Join ZoomGov Meeting

<https://sandiego.zoomgov.com/j/1615712710>

Meeting ID: 161 571 2710

One tap mobile

+16692545252,1615712710# US (San Jose)

+16692161590,1615712710# US (San Jose)

Dial by your location

+1 669 254 5252 US (San Jose)

+1 669 216 1590 US (San Jose)

+1 551 285 1373 US

+1 646 828 7666 US (New York)

833 568 8864 US Toll-free

Meeting ID: 161 571 2710

Find your local number: <https://sandiego.zoomgov.com/u/adYqz5ip7a>

After the Bid Opening, a City representative will upload the received documents to the City's website for public viewing.

The franchise may be awarded by introduction and adoption of an ordinance substantially in the form specified as either Exhibit A or Exhibit B attached hereto. The introduction of the ordinance shall occur at one City Council meeting. The adoption of the ordinance and award of the franchise shall occur at a second City Council meeting, pursuant to San Diego Charter section 275, after the City confirms that the apparent successful bidder has met all conditions of the award. Exhibit A is for bidders who possess a franchise to provide gas service for lighting acquired under Section 19 of Article XI of the California Constitution as the provision existed prior to its amendment on October 10, 1911, and Exhibit B is for bidders who do not possess such a "constitutional franchise" for lighting. The ordinance will, if adopted, name as Grantee the responsible person, firm, or corporation (collectively referred to as "Person") who shall make

the highest responsible bid for the franchise, which includes the highest value Cooperation Agreement proposal, in an amount equal to at least the required minimum bid of \$10,000,000 (ten million dollars) as structured and provided in this Notice.

The successful bidder shall pay the full Bid Amount, as defined in Exhibit A and Exhibit B, including the required minimum bid, to the City in one of two ways: (1) the entire Bid Amount shall be paid in United States dollars by wire transfer acceptable to the City; or (2) no less than ten percent (10%) of the Bid Amount, including the required minimum bid, shall be paid in United States dollars by wire transfer acceptable to the City, with the remaining balance of the Bid Amount delivered and structured as nine (9) interest-bearing promissory notes in a form acceptable to the City, as set forth in Section 4(d) of Exhibit A and Exhibit B, secured by an irrevocable letter of credit from a bank acceptable to the City. The promissory notes and irrevocable letter of credit must be delivered within five (5) business days after an ordinance is introduced to award the franchise. Any amount bid above the required minimum bid must be paid in full as part of the initial wire transfer. If Option 2 is chosen, the letter of credit required shall be for the entire promissory note total and must comply with the requirements in Section 4(d) of Exhibit A and Exhibit B.

The City shall provide wire transfer instructions to the successful bidder within forty-eight (48) business hours after an ordinance is introduced to award the franchise. The successful bidder shall wire the Bid Amount selected from the options above to the City within five (5) business days after an ordinance is introduced to award the franchise. The franchise shall not be scheduled for the second Council hearing or award unless such payment, together with promissory notes and letter of credit (if applicable), are received. If the successful bidder is not ultimately awarded the franchise, the payments and notes will be returned.

By submitting a bid under this Notice, the bidder acknowledges and agrees that the franchise and any previously paid portions of the Bid Amount shall be forfeited, and all future notes shall be due and payable, if the Grantee or any successor ever applies or requests that the California Public Utilities Commission allow recovery of all or any portion of the Bid Amount or any interest thereon in rates or surcharges charged to customers inside or outside the City.

All bidders shall provide documentation with the bid necessary to satisfy the mandatory requirements for disclosure of business interests in San Diego Charter section 225.

The successful bidder shall file and maintain a performance bond in favor of the City, to be approved by the Mayor, in the sum of \$30,000,000 (thirty million dollars) to guarantee that such bidder shall well and truly observe, fulfill, and perform each and every term and condition of such franchise. The bond shall be acknowledged by the successful bidder as principal and by a corporation licensed by the Insurance Commissioner of the State of California to transact the business of a fidelity and surety insurance company as surety. The bond shall be filed with the Mayor within five (5) business days after an ordinance is introduced to award the franchise.

Prior to the adoption of an ordinance to award the franchise, the City may confirm the responsibility of the bidder; the acceptability of the surety bond, promissory notes (if any), and letter of credit (if any), offered for the Bid Amount; payment of the initial or full Bid Amount;

inclusion of a detailed narrative proposal for a Cooperation Agreement as set forth in Section 10 of Exhibit A and Exhibit B; acceptability of the insurance required in Section 11 of Exhibit A and Exhibit B; and compliance with San Diego Charter section 225. If the apparent successful bidder fails to provide the required information or documents as provided in this Notice, the award of the franchise shall be set aside, any money paid therefor shall be forfeited, and the franchise shall, in the discretion of the Council, either be awarded to the second highest responsible bidder, if any, or re-advertised and offered for sale in the same manner provided in this Notice.

All bids shall include a detailed narrative proposal for a Cooperation Agreement as set forth in Section 10 of Exhibit A and Exhibit B. No bids will be considered without the required narrative proposal. The proposals for the Cooperation Agreement shall be subject to acceptance, rejection, or requests for modification by the Mayor. If the bidder is bidding on both the gas and electric franchises, only one detailed Cooperation Agreement proposal must be submitted, but must propose policies for both utilities that will align with and support the City's policies throughout the term of the franchises. The Cooperation Agreement proposals must describe any barriers to substantial alignment with City policy as stated in Section 10 of Exhibit A and Exhibit B, and what actions the bidder can and will take to assist the City's objectives, including meeting the City's climate equity goals and supporting its Climate Equity Fund. The bidder's consent to and approval of the Cooperation Agreement will be a condition for the Mayor's recommendation of award of the franchise. The Mayor may recommend that the franchise be awarded to the highest bidder who submits the highest value Cooperation Agreement proposal determined to be acceptable and meets the other terms in this Notice. The Cooperation Agreement shall be presented to the City Council at the time an ordinance granting a franchise is introduced pursuant to Charter section 275.

Subject to all applicable laws, the City's desired terms and commitments in the Cooperation Agreement include:

- Work collaboratively with San Diego Community Power to help the City achieve renewable energy goals by abiding with laws and rules relating to non-interference with community choice aggregation and the provision of all required grid services and information to San Diego Community Power
- Support the City's Climate Action Plan, including its emission reduction goals
- Support climate equity initiatives and identify resources for the Climate Equity Fund
- Share distribution level data on load, congestion, system capacity and integration of resources
- Allow for more and easier access to rooftop solar, energy storage, and other local distributed energy resources to make the City's electric system climate resilient
- Climate-proof the electric grid, including fire resiliency and prevention efforts
- Facilitate renewable energy integration and smart grid innovation in a safe, efficient and timely manner
- Develop a just transition to the green economy, develop a skilled and trained workforce that supports a decarbonized electric grid, and support efforts to increase workforce diversity



- Provide equitable access to environmental benefits for all our communities and accelerate/improve clean energy infrastructure in lower income communities
- Invest in electric infrastructure to support the City in achieving its transportation-related emission reduction goals, and support electrifying the transportation system
- Minimize service costs to City residents and businesses by providing opportunities to low- and moderate-income customers to reduce their energy bills through energy efficiency, minimizing cost volatility, and improving access to energy services that empower low- and moderate-income residents and disadvantaged businesses through efficiency, conservation, and renewable energy
- Provide billing transparency and efficient customer service
- Provide rate relief during the COVID-19 pandemic to ratepayers
- Conduct a thorough review of customer service in underserved communities followed by a plan to improve customer service in these areas

A responsible Person within the meaning of this Notice shall be financially capable and able to construct, maintain, and use pipes and appurtenances for transmitting and distributing gas in the streets of the City of San Diego, and fulfill all of the following criteria:

(a) Agrees in the bid to make payment of the required minimum bid as described above, or some greater amount, and states which of the two payment methods is elected;

(b) If the Person does not currently hold a gas franchise from the City, the Person shall demonstrate in the bid, to the reasonable satisfaction of the City Manager, the financial and operational capacity to furnish and maintain just and reasonable service, instrumentalities, equipment, and facilities as are necessary to promote the safety, health, comfort, and convenience of its employees, customers within the City, and the public within the City; and

(c) Agrees in the bid to commence franchise operations under one of the following two options, stating which option is elected:

(1) On June 2, 2021, or the thirtieth day from and after final passage of the ordinance granting the franchise, whichever is later, including a statement attached to the bid confirming that all necessary governmental approvals including, without limitation, a Certificate of Public Convenience and Necessity issued by the California Public Utilities Commission for the purposes of exercising rights granted by the franchise, will be obtained by that date; or

(2) The Person shall, within sixty (60) calendar days from the effective date of the franchise:

(A) diligently seek all necessary governmental approvals including, without limitation, a Certificate of Public Convenience and Necessity issued by the California Public Utilities Commission for the purposes of exercising rights granted by the franchise, and for approval of all surcharges upon customers in the City permitted by the franchise; and

(B) agree to negotiate in good faith a cooperative agreement acceptable to the City to be executed within sixty (60) calendar days to acquire, by condemnation or other lawful means, all or any part or portion of the existing property, facilities, equipment, or appurtenances located in, upon, over, along, across, and under any of the streets in the City, and elsewhere, which are used, useful, or necessary for operations in the transmission and distribution of gas, and for underground signal and communication facilities necessary for gas operations, to all customers inside and outside of the City, including real property interests in private or public property (collectively referred to as "Facilities"), and pay and indemnify the City for all costs of acquisition for the Facilities (without reservation or set-off of any kind), including, without limitation, attorneys' fees, consultant fees, expert fees, appraisal fees, mediation or alternative dispute resolution costs, appeal costs, and such other costs and compensation that may be determined by agreement with the owner of the Facilities, by order of the California Public Utilities Commission, or by the Courts of the State of California, without any right of refund after the monies have been spent, whether or not the Facilities are ultimately acquired; and deposit with the City the acquisition costs estimated by the City Manager, including additional increased estimated costs as determined necessary by the City Manager, who will work cooperatively and in good faith with the Grantee to acquire the Facilities and resolve any disputes over the acquisition costs, with any unspent deposit amount returned when the acquisition is complete, and with the ownership of the acquired Facilities to be transferred to the Grantee after acquisition and upon exhaustion of all rights of appeal. Failure to execute a cooperative agreement acceptable to the City within sixty (60) calendar days of the effective date of the franchise shall be grounds for rescission of the award, without recourse; and

(C) commence operations under the franchise within thirty (30) calendar days of obtaining the governmental approvals and acquisition of the Facilities;

Provided, however, if section (c)(2), above, is selected, and if governmental approvals described in (c)(2)(A) have not been obtained within two (2) years of the effective date of the franchise or if the Facilities described in (c)(2)(B) have not been acquired within three (3) years of the effective date of the franchise, then the City, in its sole discretion, may rescind the award of the franchise and the Person shall have no recourse.

(d) Agrees in the bid that, subject to applicable law and the terms of any collective bargaining agreement in force on the effective date of the franchise, the Person so bidding will, as a condition of being awarded the franchise, retain and employ for two (2) years after the effective date all employees who had been employed for the previous one hundred eighty (180) days by the electrical or gas corporation holding the franchise immediately prior, and provide and pay no less than the wages, benefits, hours, and other terms and conditions of employment provided to these employees in the one hundred eighty (180) days prior to the effective date of the new franchise. This provision shall apply regardless of the status of the new Grantee, subject to applicable law, including the labor provisions of California Assembly Bill 1054 (California Public Utilities Code sections 854 and 854.2). In the event the bidding results in a change of control of the electrical or gas corporation holding the immediately prior franchise, it is the intent of this requirement to provide utility workers more protection and stability than would be

afforded under Assembly Bill 1054, provided however, Assembly Bill 1054 shall apply in the event of a change in control if so determined by a court of competent jurisdiction or the California Public Utilities Commission.

Unless otherwise authorized herein, bidders who are considering submitting a bid in response to this Notice, or who submit a bid in response to this Notice, are prohibited from communicating with City staff directly, indirectly, or through an intermediary, about this Notice from the date this Notice is issued until after the bids are opened.

Written questions and comments must be submitted to Jessica Lawrence, Attn: Gas/Electric Franchise, at [jlawrence@sandiego.gov](mailto:jlawrence@sandiego.gov) no later than **5:00 p.m. on March 31, 2021**. Only written communications from potential bidders relative to the solicitation shall be considered. All questions will be answered in writing. The City will post questions and answers without identification of the inquirer(s) to the City's webpage. No oral communications can be relied upon for this Notice. Addenda will be issued addressing questions or comments that are determined by the City to cause a change to any part of this Notice.

The City may issue addenda to this Notice as necessary. All addenda are incorporated into the franchise. The bidder is responsible for determining whether addenda were issued prior to a bid submission. Failure to respond to or properly address addenda may result in rejection of a bid.

The City reserves the right to cancel this Notice at any time, and further reserves the right to reject submitted bids, without giving any reason for such action, at its sole discretion and without liability. Costs incurred by the bidder(s) as a result of preparing bids under this Notice shall be the sole responsibility of each bidder.

The Notice creates or imposes no obligation upon the City to grant a franchise. Any recommendation for a franchise award shall be based on the highest responsible bid that is determined by the City to be in its best interest. The City reserves the right to negotiate changes to the bid terms, or to negotiate with the current franchise holder to renew, extend, or amend and replace the current franchise.

The City reserves its right to explore all options for how energy is supplied and delivered in the future. At any time during the term of the franchise, the City may choose to pursue its right to municipalize gas services. If that occurs, the City reserves the right to terminate the franchise and acquire the property or facilities of the franchise holder through the exercise of the City's power of eminent domain or through voluntary agreement between the City and the franchise holder. The City may exercise its right of early termination at any time after the effective date of the franchise.

**EXHIBIT A**

**GAS FRANCHISE**



ORDINANCE NUMBER O-\_\_\_\_\_ (NEW SERIES)

DATE OF FINAL PASSAGE \_\_\_\_\_

AN ORDINANCE OF THE COUNCIL OF THE CITY OF SAN DIEGO GRANTING TO \_\_\_\_\_, THE FRANCHISE (1) TO USE, FOR TRANSMITTING AND DISTRIBUTING GAS SUITED FOR LIGHTING BUT FOR USE BY CONSUMERS FOR ANY AND ALL LAWFUL PURPOSES OTHER THAN LIGHTING, ALL PIPES AND APPURTENANCES WHICH ARE NOW OR MAY HEREAFTER BE LAWFULLY PLACED AND MAINTAINED IN THE STREETS WITHIN THE CITY OF SAN DIEGO UNDER THAT CERTAIN FRANCHISE OF GRANTEE ACQUIRED PURSUANT TO SECTION 19 OF ARTICLE XI OF THE CONSTITUTION OF THE STATE OF CALIFORNIA, AS THE SECTION EXISTED PRIOR TO ITS AMENDMENT ON OCTOBER 10, 1911; (2) TO CONSTRUCT, MAINTAIN, AND USE IN THE STREETS ALL PIPES AND APPURTENANCES WHENEVER AND WHEREVER SAID CONSTITUTIONAL FRANCHISE IS NOT NOW NOR SHALL HEREAFTER BE AVAILABLE THEREFOR, NECESSARY TO TRANSMIT AND DISTRIBUTE GAS SUITED FOR USE BY CONSUMERS FOR ANY AND ALL LAWFUL PURPOSES; (3) TO UTILIZE PIPES AND APPURTENANCES IN THE STREETS FOR TRANSMITTING GAS FOR USE OUTSIDE THE BOUNDARIES OF THE CITY FOR ANY AND ALL LAWFUL PURPOSES; AND (4) FOR COOPERATION WITH CITY CLIMATE ACTION AND CLIMATE JUSTICE GOALS; AND PROVIDING THE TERMS AND CONDITIONS OF THE FRANCHISE SO GRANTED.

BE IT ORDAINED, by the Council of the City of San Diego, as follows:

**Section 1. Definitions**

The following definitions apply in this Ordinance and are capitalized when they appear:

(a) "Grantee" means \_\_\_\_\_.

(b) "City" means the City of San Diego, a municipal corporation of the State of

California, in its present incorporated form or in any later reorganized, consolidated, enlarged or reincorporated form.

(c) “Applicable Law” means any law, rule, regulation, requirement, guideline, action, determination or order of, or legal entitlement issued by, any governmental body having jurisdiction, applicable from time to time to the operation and ownership of Grantee’s Gas facilities and to Grantee’s business operations, or any other transaction or matter contemplated by the Franchise (including any which concern health, safety, fire, environmental protection, transmission and distribution, metering, billing, quality and use, public records, labor relations, environmental plans, building codes, nondiscrimination, and the payment of minimum and prevailing wages), including without limitation applicable provisions of the California Constitution, the California Public Utilities Code, the California Labor Code, and orders and decisions of the California Public Utilities Commission (CPUC) and Federal Energy Regulatory Commission (FERC).

(d) “Bid Amount” means \$ \_\_\_\_\_ plus any interest as provided in Section 4(d).

(e) “Books and Records” means any and all of Grantee’s records, regardless of form, including physical, digital, and electronically stored information, including but not limited to records of income, expenditures, finance, charts, diagrams, ledgers, pictures, drawings, Geographic Information System (GIS) locational data, photographs, and notes, which relate to the placement, location, operation, and maintenance of Grantee’s facilities in City Streets, and any other records determined by the City to be relevant to enforcement of the Franchise.

(f) “City Manager” means the person defined in Sections 28, 260, and 265 of the Charter of the City of San Diego (San Diego Charter) as those provisions existed on the Effective Date or as those provisions may be hereafter amended, and the meaning shall include any person lawfully delegated rights or responsibilities by such person.

(g) “Commencement of Operations Date” means the date which is thirty (30) days after final passage of this Ordinance by the City Council if the Grantee already possesses a

Certificate of Public Convenience and Necessity pursuant to California Public Utilities Code Division 1, Part 1, Chapter 5, Article 1. If the Grantee does not yet possess a Certificate of Public Convenience and Necessity, the term means the date on which Grantee obtains approval from the CPUC to exercise the Franchise rights by grant of a Certificate of Public Convenience and Necessity.

(h) “Constitutional Franchise” means the right acquired through acceptance by Grantee or its predecessor in estate of the offer contained in the provisions of Section 19 of Article XI of the Constitution of the State of California, as the section existed prior to its amendment on October 10, 1911.

(i) “Construct, Maintain, and Use” means to construct, erect, install, operate, maintain, use, repair, relocate, or replace Pipes and Appurtenances thereto in, upon, along, across, under or over the Streets of the City.

(j) “CPUC” means the California Public Utilities Commission or any successor agency.

(k) “Effective Date” means the thirtieth day from and after the final passage of this Ordinance by the City Council pursuant to San Diego Charter section 295.

(l) “Franchise” means the Franchise granted by the City Council to \_\_\_\_\_ by Ordinance No. O-\_\_\_\_\_, pursuant to San Diego Charter sections 103, 103.1, 104, and 105.

(m) “Gas” means natural, bio, or artificial gas or a mixture of any of them

(n) “Gas Franchise Fee Surcharge” means the total amount of surcharges allowed by the Franchise and the CPUC to be levied solely on customers in the City as a consequence of the requirements of the Franchise, consisting prior to the Effective Date of those surcharges previously

authorized by CPUC Resolution No. E-3788 and Decision No. 80234, which total 1.03% of Grantee's Gross Receipts as of the Commencement of Operations Date.

(o) "Gross Receipts" means all gross operating revenues received by Grantee from the sale of gas to Grantee's customers with points of service within the corporate limits of the City (including, but not limited to, sales to military reservations with points of service within the City's corporate limits) which are credited in Account Nos. 480, 481, and 482 of the current Uniform System of Accounts of FERC as adopted by the CPUC or similar superseding accounts, plus all revenues collected from CPUC-authorized surcharges rendered solely upon the ratepayers within the City as a result of the Franchise accounted for in Account No. 488 (less any portion of such surcharges which may be approved by the CPUC to capture the franchise fee on these revenues), less uncollectible amounts, and less any refunds or rebates made by Grantee to such customers pursuant to CPUC orders or decisions.

(p) "Pipes and Appurtenances" means pipes, pipelines, mains, services, traps, vents, vaults, manholes, meters, communication circuits, appliances, attachments, appurtenances, and, without limitation to the foregoing, any other equipment or property located or to be located in, upon, along, across, under or over the streets of the City, and used or useful for the purpose of the transmission and distribution of Gas and for internal communication systems, sometimes otherwise referred to as "facilities."

(q) "Streets" means the public freeways, highways, streets, ways, alleys and places as they now or may hereafter exist within the City, but excludes easements or fees held by Grantee.

## **Section 2. Purpose**

(a) The Franchise (1) to use, for transmitting and distributing Gas suited for lighting but for use by consumers for any and all lawful purposes other than lighting, all Pipes and Appurtenances which are now or may hereafter be lawfully placed and maintained in the Streets



within the City under that certain franchise of Grantee acquired pursuant to section 19 of Article XI of the Constitution of the State of California, as the section existed prior to its amendment on October 10, 1911; (2) to Construct, Maintain, and Use in the Streets all Pipes and Appurtenances whenever and wherever said Constitutional franchise is not now nor shall hereafter be available therefor, necessary to transmit and distribute Gas suited for use by consumers for any and all lawful purposes; (3) to utilize Pipes and Appurtenances in the Streets for transmitting Gas for use outside the boundaries of the City for any and all lawful purposes; (4) to aid in the City's establishment of a Climate Equity Fund; and (5) subject to Applicable Law, to provide for Grantee's commitment to cooperate with the City in good faith on principles and policies for the attainment of the City's Climate Action Plan, local energy, energy justice, and climate equity objectives, including but not limited to the reduction of greenhouse gas emissions to the fullest extent practical through energy efficiency measures, cooperation with any community choice aggregation program, the increased use of renewable sources of electric generation, wider deployment of local distributed energy resources, and advancing the electrification of transportation; is hereby granted to \_\_\_\_\_, a corporation organized and existing under and by virtue of the laws of the State of \_\_\_\_\_.

(b) If gas and electric franchises are awarded to the same Grantee, the requirements of Sections 6, 9, and 10, need not be duplicated.

(c) Attached as Attachment 1 is a Table of Contents for the Franchise.

**Section 3. Term**

(a) The right, privilege, and Franchise, subject to each and all of the terms and conditions contained in this Ordinance, is hereby granted to \_\_\_\_\_,

a corporation organized and existing under and by virtue of the laws of the State of \_\_\_\_\_, for the primary term of (10) years from and after the Commencement of Operations Date.

(b) Subject to the conditions in Section 3(b), the primary term provided in Section 3(a) shall automatically be extended for a secondary term of ten (10) years if at the end of the primary term Grantee has faithfully performed all conditions agreed to in the Franchise and Section 10 herein. The Grantee's compliance with the terms of the Franchise and Cooperation Agreement shall be presumed unless the City Manager recommends against an extension and reasonably proves to the City Council by a preponderance of the evidence that Grantee has not complied with any term. In gathering such evidence, the City Manager shall confer with the Compliance Review Committee, described in Section 6, below. If the City Manager makes such a recommendation to the City Council, then a vote of at least six (6) members of the Council shall be required to establish Grantee's non-compliance with the Franchise or the Cooperation Agreement. Upon such a City Council vote of non-compliance, the second ten (10) year term provided in Section 3(b) shall be void and the Franchise shall terminate at the end of the primary term provided in Section 3(a). If the City Manager recommends to the City Council that Grantee has not qualified for the secondary ten (10) year term provided in Section 3(b), such recommendation shall be presented to the Council not more than two years or less than one year before the end of the primary term provided in Section 3(a).

(c) All associated agreements, rights, and obligations under the Franchise shall also expire at the expiration or earlier termination of the Franchise, except for the completion and discharge of obligations or payments required hereunder and accrued during the term. The bond and insurance requirements shall remain in effect until all obligations or payments required by

the Franchise or related documents are completed, and any disputes are resolved. The bond shall remain in effect until the City issues a letter to Grantee acknowledging discharge of all required obligations and payments.

**Section 4. Consideration**

(a) The rights and privileges herein granted are upon the express condition that Grantee, as consideration therefor and as compensation for the use of the Streets of the City as herein authorized and permitted, shall pay compensation to the City in the following amounts and manner: Grantee shall pay the Bid Amount, and shall pay each year in United States dollars, a sum equal to three percent (3%) of Grantee's Gross Receipts during the preceding calendar year, or fractional year, beginning on the Commencement of Operations Date. In addition, Grantee shall pay any applicable statutory surcharge, such as the Municipal Lands Use Surcharge required pursuant to California Public Utilities Code section 6350, *et seq.* Any City-imposed fees for right-of-way usage (Right-of-Way Fee) shall be credited with the consideration paid herein. Any revenues that remain after this credit of Right-of-Way Fees will be credited towards any additional fees the City imposes for inspection, trenching, cutting, or deterioration of the right-of-way. The three percent (3%) of Gross Receipts required to be paid to the City pursuant to Section 4(a) shall be deemed to be for Gas revenues for all lawful purposes except for lighting; there shall be no fee for Gas furnished for lighting.

(b) Grantee or any successors shall not at any time apply or request to the CPUC, by application, advice letter, or any other filing, to include in rates or surcharges all or any portion of the Bid Amount, or interest thereon, paid to the City for award of the Franchise. The Bid Amount, and any interest thereon, is for the purpose of acquiring the Franchise and shall be solely an obligation of the Grantee, and no part of it shall be paid by Gas ratepayers. The Bid Amount is separate from and additional to the consideration to be paid for exercise of the

Franchise under Sections 4(a) and 4(c), and shall be paid and accepted upon the express condition that Grantee shall not at any time apply to or otherwise request from the CPUC to recover any portion of the Bid Amount, or interest thereon, from Gas ratepayers in rates or surcharges. The Franchise and any previously paid portions of the Bid Amount shall be forfeited, and all future notes will be due and payable, if the Grantee or any successor ever applies to the CPUC or seeks or attempts to recover all or any portion of the Bid Amount or any interest thereon in rates or surcharges charged to customers inside or outside the City.

(c) During the term of the Franchise, Grantee covenants and agrees, that if Grantee agrees to pay another municipality more than three percent (3%) of Grantee's Gross Receipts (including receipts on CPUC authorized Gas surcharges) in a Gas franchise, Grantee shall notify the City of such agreement in writing within ten (10) calendar days and offer to amend the Franchise to increase the franchise fee to equal the percentage of Gross Receipts in such other franchise. If the City agrees to accept the offer, the City and Grantee will execute and adopt any documents necessary to amend the Franchise as soon as practicable given the need for regulatory approvals. To make such amendments effective, Grantee shall expeditiously file an application or request with the CPUC, as Grantee deems necessary, to gain approval of the amendments and the resulting increase in the franchise fee surcharge chargeable to the residents of the City. Grantee shall not be in violation of Section 4(c) if the CPUC fails to approve any such application or request.

(d) Section 4(d) applies only if Grantee elected to pay the Bid Amount in installments as consideration for the grant of the Franchise. If the structured promissory note method is selected by Grantee for paying the Bid Amount, then:

(1) Each of the nine (9) promissory notes taken together shall provide for a succession of nine (9) annual maturity dates beginning on the first anniversary of the term and



ending on the tenth anniversary, and shall not be due and payable to the City until the maturity date of each installment on the note, except as provided in Section 4(d)(7).

(2) The maturity dates of the irrevocably secured promissory note installments shall be the annual anniversary date after each successive year following the Effective Date of the Franchise.

(3) Each successive promissory note installment shall be provided in nine (9) equal principal amounts plus interest, calculated on an actual/actual basis at the annual rate of three and thirty-eight one hundredths of a percent (3.38%), so the Bid Amount is fully paid to the City by the first day of the eleventh year of the Franchise term so long as the Franchise remains effective to that date.

(4) The City requires a minimum credit rating for the issuing financial institutions providing the letter of credit submitted by Grantee to be and remain of the "A" category or better for its senior unsecured debt, or equivalent. If at any point during the term of the Franchise, none of the following Nationally Recognized Credit Rating Agencies (Moody's, Standard & Poor's, or Fitch) rate the financial institution with at least an "A" category, then Grantee must immediately replace the submitted letter of credit with one that is acceptable to the City, or pay the remaining notes in full with interest specified herein accrued to that date. All costs associated with replacing the letter of credit shall be the responsibility of Grantee. The letter of credit shall provide that the City may unilaterally draw on the letter of credit to fulfill any Bid Amount obligation not paid by Grantee when due.

(5) Grantee may pay cash in discharge of a promissory note at any time before its maturity date, in which event interest shall be adjusted for early payment. The submission of cash payment shall be upon appointment with the City Treasurer's office.

(6) If the Franchise is not in effect on any future note maturity date due to early termination of the Franchise by the City to acquire the Gas distribution system, the uncashed notes shall be void; however, the City shall not be required to refund any amounts of the Bid Amount already paid.

(7) If the Franchise is not in effect on any future note maturity date due to the Grantee's breach and forfeiture of the Franchise, the maturity dates on all the future notes shall be advanced to the date of forfeiture and the principal amount of all such notes shall be immediately due and payable to the City.

**Section 5. Reports, Dates of Payment to City, Audits**

(a) On or before the 15th day of February of each calendar year during the term of the Franchise, as defined in Section 3, and forty-five (45) calendar days after the expiration of the Franchise term, Grantee shall file with the City Clerk, the original, and with the Chief Financial Officer of the City, one copy, of a statement signed by its chief financial officer evidencing the Gross Receipts during the preceding calendar year or fractional calendar year.

(b) Within ten (10) calendar days after the filing of the statement of Gross Receipts required to be filed on or before the 15th day of February 2022, Grantee shall pay to the City Treasurer the money herein required to be paid by Grantee to the City upon the basis of the data set forth in said statement.

(c) Thereafter, no later than the 25th day of February, the 25th day of May, the 25th day of August, and the 25th day of November of each calendar year during the term of the Franchise, Grantee shall pay the City Treasurer one-fourth (1/4) of the money herein required to be paid by Grantee to the City upon the basis of the data set forth in the statement required by Section 5(a). If the first year is a fractional year, Grantee shall pay quarterly amounts not paid by the prior Grantee on the basis of the data in the prior Grantee's Gross Receipts for the preceding

year on the dates required herein. By this method of payment it is contemplated and understood that Grantee is in effect paying the money herein required to be paid by Grantee to the City under Section 5(c) on the basis of Gross Receipts for the preceding calendar year and that an adjustment shall be made as more fully set forth in Section 5(d).

(d) Within ten (10) calendar days after the filing of the statement required by Section 5(a), Grantee shall pay the City Treasurer, or receive as a refund from the City, as the case may be, a sum of money equal to the difference between the sum of the payments of money made in accordance with Section 5(c) and the annual payment of money herein required to be paid by Grantee to the City upon the basis of the data set forth in said statement.

(e) The City Manager, City Auditor, City Attorney, or any designees, at any reasonable time during business hours, may make examination at Grantee's office or offices, or through written electronic request and exchange of its Books and Records, germane to and for the purpose of verifying the data set forth in the statement required by Section 5(a). Grantee shall produce its Books and Records no later than five (5) business days after written request from the City.

(f) All Books and Records subject to examination in the Franchise shall be kept within the County of San Diego, or in such other place as the reasonable convenience of Grantee may require, until at least five (5) years following the termination of the Franchise; and if it becomes necessary for the City Manager, City Auditor, City Attorney, or any representative designated by the City, to make such examination at any place other than within the County, then all increased costs and expenses to the City necessary or incident to such examination and resulting from such Books and Records not being available within the County, shall be paid to the City by Grantee on demand.

(g) Grantee shall file with the City Manager a copy of its annual report to the CPUC as soon as practicable after the original report has been filed with the CPUC, or its successor in authority.

(h) Upon request of the City, Grantee shall provide the City with any publicly available reports filed by Grantee with the CPUC.

(i) In addition to the remedies provided in Section 13, if Grantee fails to make the payments for the Franchise on or before the due dates as required in Sections 5(b) through 5(d), Grantee shall pay as additional consideration both of the following amounts:

(1) A sum of money equal to two percent (2%) of the amount due. This amount is required in order to defray those additional expenses and costs incurred by the City by reason of the delinquent payment including, but not limited to, the cost of administering, accounting and collecting said delinquent payment and the cost to the City of postponing services and projects necessitated by the delay in receiving revenue; and

(2) A sum of money equal to one percent (1%) of the amount due per month or any portion thereof as interest and for loss of use of the money due.

#### **Section 6. Compliance Review Committee and Report**

(a) An audit of Grantee's performance of the conditions of the Franchise shall occur every two (2) years after the Commencement of Operations Date. The City shall establish a Franchise Compliance Review Committee (Review Committee) that will consist of five (5) members: three (3) appointees selected by the City Council and two (2) appointees selected by the Mayor. No nominee with a conflict of interest shall be appointed to the Review Committee. The Review Committee shall be a citizens' committee, formed pursuant to San Diego Charter section 43(b) and Council Policy 000-13. The Review Committee shall be created and established by City Council resolution every two (2) years only for the clearly defined purpose in the



resolution, which shall include the duties in Section 6(b), and shall be temporary in nature and dissolved upon the completion of the objectives for which it was created. The Review Committee shall be created, and appointments shall be made, before the end of the first year of each successive two-year period of the Franchise term. The Review Committee, which shall meet publicly and comply with the Ralph M. Brown Act, shall establish a mechanism by which members of the public may communicate with the Review Committee concerning the Franchise.

(b) The City shall use a competitive process to retain a qualified, independent, third-party auditor (independent auditor) every two (2) years. The independent auditor shall perform an audit of Grantee's conformance and compliance with all conditions of the Franchise and produce a written report documenting the work performed and the conclusions reached. The audit shall address Grantee's fulfillment of financial, operational, documentary, and cooperative requirements under the Franchise. The Grantee shall appoint an executive level representative to serve as the principal person responsible for coordinating with the independent auditor. The audit shall be completed and provided to the Review Committee no later than sixty (60) calendar days before the outside due date of the Review Committee's report. If Grantee fails to cooperate with the independent audit, the auditor's report shall document the refusal and any reason Grantee stated for failing to cooperate. The Review Committee shall review the independent auditor's report and shall provide the auditor's report and its own written report and recommendations to the City Council within one hundred eighty (180) calendar days of the end of each two-year period of the Franchise term.

(c) Within five (5) business days, Grantee shall comply and cooperate with all requests made by the City Manager, City Attorney, independent auditor, and City Auditor, or designees, which the requestors may deem germane to verifying Grantee's compliance with the Franchise conditions. Upon request, Grantee shall provide to the City Manager, City Attorney,

independent auditor, or City Auditor, or their designees, and at no cost to the City, all Books and Records required to be made available to the City under the Franchise, within five (5) business days. If Grantee contends that legal restrictions prevent compliance with any part of the request, Grantee shall provide in writing a specific legal basis that clearly establishes that the law, the CPUC, or other agency with jurisdiction requires or prohibits Grantee from releasing the requested Books and Records. General references to provisions of the law or Grantee business preferences will not suffice.

(d) The independent auditor shall be provided access to interview the City and employees of Grantee designated by Grantee regarding any subject which the auditor in its sole discretion deems relevant to confirming Grantee's compliance with the Franchise, within five (5) business days after any request.

(e) The procedures provided in Section 6 shall be in addition to, and not in lieu of, the City's right to audit under Section 5. Nothing in Section 6 shall limit or impair the right of the City Auditor to conduct its own audits of Grantee's Books and Records needed to verify compliance with the Franchise, pursuant to San Diego Charter section 39.2.

**Section 7. Compliance with Laws**

(a) All facilities or equipment of Grantee that Grantee shall construct, maintain and use or remove, pursuant to the provisions of the Franchise, shall be accomplished in accordance with Applicable Law and with the ordinances, rules, and regulations of the City now or as hereafter adopted or prescribed, and such rules or regulations as are promulgated under State law, or orders of the CPUC or other governmental authority having jurisdiction in the premises.

(b) Without limiting the general applicability of the foregoing paragraph, or diminishing in any way the significance and consequence of Grantee's duty to comply with all laws, Grantee shall specifically observe and fully comply with the ordinances and regulations of

the City as provided in Sections 8 and 9, and any effective Administrative Practices Memorandum of Understanding granted pursuant thereto.

**Section 8. City Reserved Powers**

(a) The City reserves the right for itself to lay, construct, erect, install, use, operate, repair, replace, remove, relocate, regrade, or maintain below surface or above surface improvements of any type or description in, upon, along, across, under or over the Streets of the City. The City further reserves the right to relocate, remove, vacate, or replace the Streets themselves. If the necessary exercise of the City's reserved rights conflicts with any Pipes and Appurtenances of Grantee Constructed, Maintained, and Used pursuant to the provisions of the Franchise, whether or not previously Constructed, Maintained, and Used, Grantee shall, without cost or expense to the City within ninety (90) calendar days after a request in writing by the City Manager, begin the physical field construction of changing the location of all conflicting facilities or equipment. Grantee shall proceed promptly to complete such required work.

(b) Irrespective of any other provision of the Franchise, Grantee's right to Construct, Maintain, and Use, or remove, Pipes and Appurtenances shall be subject at all times to the right of the City, in the exercise of its municipal authority and police power, to require the removal or relocation of Pipes and Appurtenances at the sole cost and expense of Grantee. On this absolute reservation, no exception of any kind shall pass to Grantee, including that there shall be no exception for preexisting Grantee construction, for City reconfiguration or vacation of Streets in a previously-served area, for such reconfigurations or vacations being related to development of adjoining property, for the City allegedly acting in a proprietary capacity with respect to water or wastewater service, or for any other contention of exception. If Grantee has no permanent easement and the conflicting Grantee facilities are in a City Street in a service area previously and continuously served by a gas corporation as defined in California Public Utilities Code

section 222, and if the City thereafter causes a Street to be used differently for any City uses (including water, wastewater, reclaimed water, storm water, thermal water, communication, or any other City facilities, whether or not previously existing), or causes such Streets to be removed, realigned, widened, narrowed, vacated, regraded, or replaced in such previously-served area, then without any exception and notwithstanding any doctrine of distinction, the cost of relocating or removing Grantee's facilities shall be at Grantee's sole expense.

(c) If Grantee shall ever assert any exception to its obligations with respect to the City-reserved rights provided in Section 8, the City shall not be required to pay any costs for resolving conflicts associated with the presence of Grantee's facilities while any dispute is pending. Notwithstanding any Grantee dispute under Section 8, Grantee shall proceed as provided in Section 8(a) to promptly perform and pay any and all costs of relocations required by Section 8, and the City shall not be required under any circumstances to contribute any amount under reservation of right or otherwise, toward the prompt resolution of such conflicts. It is the express intent of Section 8 that no exceptions shall be available to the duty of Grantee to pay all costs, and to promptly and without any conditions not provided herein perform relocation or removal of its facilities that conflict with the City's primary reserved rights to the uses of Streets. The City shall not be required to share Grantee facility relocation costs while any dispute is pending.

(d) If the City directs Grantee to relocate its conflicting facilities and Grantee believes it cannot meet the schedule required by Section 8(a), Grantee may apply in writing to the City Manager for a revised schedule. The application shall document the facts as to why Grantee is unable to meet the schedule as required by Section 8(a) and the date on which work would begin. The parties shall cooperate in good faith respecting such applications, and the City's denial of

relocation schedule adjustment requests shall not be unreasonable and shall consider the scope and complexity of any project or program. The City Manager may adjust the schedule provided in Section 8(a) by written instruction to Grantee, and Grantee shall meet the adjusted schedule.

**Section 9. Administrative Practices**

(a) Grantee's exercise of rights to install, maintain, and operate its facilities in the Streets of the City shall at all times be subject to obtaining and maintaining in force an Administrative Practices Memorandum of Understanding (Administrative MOU). The Administrative MOU shall define Grantee's administrative practices throughout the Streets while exercising the Franchise rights; however, the Administrative MOU shall not be in lieu of or relieve Grantee from complying with the Franchise terms or obtaining more particular permits required for Grantee's specific projects or activities. The Administrative MOU shall prescribe the categories of work that Grantee may perform without additional specific permits, and the categories of work that will require additional specific permits. The Administrative MOU shall be granted by the City Manager subject to the terms and procedures of the Franchise and on such other reasonable terms as may be established by the City Manager following consultation with Grantee and other utilities using the Streets. Grantee shall apply for an Administrative MOU within thirty (30) calendar days after the Commencement of Operations Date, and the initial Administrative MOU shall expire on the second anniversary after the Commencement of Operations Date. Each successive Administrative MOU shall have a term of two (2) years. Grantee shall not be charged a fee to obtain the Administrative MOU. The Administrative MOU shall be consistent with all terms in the Franchise, specifically including the terms of Sections 8 and 9. If there is any conflict between the provisions of the Franchise and the provisions of the Administrative MOU, the provisions of the Franchise shall control, and the conflicting provisions of the Administrative MOU shall be void.

(b) The Administrative MOU shall comply with the general terms attached as Attachment 2, and any additional terms established by the City Manager. Subject to Applicable Laws and the requirements of the Franchise, the City Manager may take due consideration of Grantee's requests regarding provisions of each biennial Administrative MOU, provided the requests are consistent with and do not conflict with the terms of the Franchise. The City Manager shall determine if the conditions of the Franchise are fulfilled upon any application for an Administrative MOU and if Grantee's application is complete. The City Manager shall grant an Administrative MOU within thirty (30) calendar days after Grantee's complete application. The application shall contain sufficient information for the City Manager to assure compliance with all the requirements in the Franchise and the general terms in Attachment 2. Grantee shall apply for each successive Administrative MOU not less than one hundred eighty (180) calendar days prior to expiration of the prior Administrative MOU. Any Administrative MOU granted by the City Manager shall be subject to the following conditions:

(1) Upon written request by the City Engineer or designee, Grantee shall provide to the City within ten (10) calendar days, and immediately in the case of a City Manager-declared emergency, GIS coordinate data, or other locational records as the City in its sole discretion may deem appropriate for the City's requirements. The records provided in response to the City's request shall describe Grantee's facilities in geographical areas of any size that the City determines necessary to coordinate with the City's uses or any other lawful uses of the Streets throughout the City.

(A) Grantee's contention that information is confidential shall not relieve Grantee from the duty to produce the information to City. Grantee acknowledges that any information required to be submitted or provided in fulfillment of the obligations of the Franchise is a public record subject to disclosure in response to a California Public Records Act

(California Government Code sections 6250 – 6276.48) (CPRA) request, unless the City or a court of competent jurisdiction determines that a specific exemption to the CPRA applies. If Grantee submits information clearly marked confidential or proprietary, the City shall protect such information and treat it with confidentiality to the extent permitted or required by law; provided however, that the City shall assume no liability for having access to Grantee's records for official City purposes except by a judgment in a court of competent jurisdiction upon a claim arising from the established sole negligence or willful misconduct of the City, its officers, agents, or employees. It shall be Grantee's responsibility to provide to the City the specific legal grounds on which the City can rely in withholding information from public disclosure should Grantee request that the City withhold such information. General references to sections of the law will not suffice. Rather, Grantee shall provide in writing a specific legal basis, including applicable case law or other law, that reasonably establishes the requested information is exempt from disclosure. Grantee agrees to defend and indemnify City if City is sued for withholding from disclosure information deemed confidential by Grantee. If, at the time the documents are provided to the City, Grantee does not provide in writing a specific legal basis for requesting the City to treat the information as confidential, to protect it from release, and to withhold alleged confidential or proprietary information from CPRA requests, the City is not required to treat the information as being confidential and may release the information as required by the CPRA. When reviewing any request by Grantee for confidentiality, the City will consider California Government Code section 6254(e), which provides a CPRA exemption for records concerning geological and geophysical data relating to utility systems development that are obtained in confidence from any person.

(B) The City shall not be required to execute any non-disclosure agreement with Grantee to obtain prompt confidential access to Grantee's records for its



facilities in City Streets except by order of a state or federal governmental agency or court having jurisdiction to impose such requirement. Absent such order, the City may, but shall not be required, to execute non-disclosure agreements with Grantee respecting the locations of Grantee's facilities.

(2) Grantee's rights to uses in the Streets exist subject to City uses of the Streets unless Grantee's rights are in easement or fee, in which case the Franchise does not control. At all times the City's superior reserved rights to uses of the Streets shall be preserved under Section 8. No provision of an Administrative MOU may be written or construed to modify that explicit reservation which shall be controlling at all times.

(3) With respect to any and all City work in the Streets, the costs of protecting Grantee's facilities shall be at Grantee's sole expense. The City and its contractors shall not be required to pay any amount for the services of any personnel, stand-by safety engineers, or similar service for the protection of Grantee's facilities which may be necessary for any City-controlled excavation or other work. Upon written request from the City or an authorized agent, Grantee shall within five (5) calendar days, or as soon as practicable in the case of emergency, arrange the on-site presence of any standby safety engineer that Grantee or City deem necessary for the protection of Grantee's facilities, and Grantee shall be solely responsible for all related costs.

(4) In its application for an Administrative MOU, Grantee shall submit to the City a list of projects and activities Grantee plans to perform in the two years covered by the Administrative MOU (Two-Year Plan). The Two-Year Plan shall catalog planned activities by level of disruption and by the amount of coordination with City staff the activity requires. The activities may be classified as: (A) regular maintenance for which no street disruptions or traffic control plans are expected; (B) minor repairs or construction which will require traffic permits

and control for less than thirty (30) calendar days; (C) major repairs or construction which are expected to require substantial permitting from the City, impacts to traffic or surrounding properties, or which may persist for more than thirty (30) calendar days; and (D) utilities undergrounding projects to be coordinated with the City. The Two-Year Plan shall constitute the understanding between the City and Grantee as to those activities anticipated to require coordination with the City and other utilities. If there are changed circumstances regarding the use of City Streets, the City Manager may require adjustments to Grantee's scheduled activities to account for such conditions or may allow deviations or changes to Grantee's Two-Year Plan at Grantee's request. Grantee shall promptly inform the City if its plans materially change under any Two-Year Plan.

(5) Grantee shall fully cooperate with the City's uses of the Streets, including for the City's construction, maintenance, and repair of City utilities. The City will establish or continue to operate a Joint Utilities Coordinating Committee (Coordinating Committee) or similar body in which Grantee shall be a member and active participant. The purpose of the Coordinating Committee shall be to review and make recommendations to all utilities and the City on matters regarding utility installations and operations within the public rights-of-way. The Coordinating Committee shall be chaired by the City Engineer or designee. The Coordinating Committee shall meet a minimum of four times each fiscal year. The Coordinating Committee shall give due consideration to Grantee's Two-Year Plan and to activities and projects the City has planned in the two-year cycle. The City will encourage the participation on the Coordinating Committee of other utility entities lawfully using the Streets, including telephone and cable service companies. Grantee shall recognize that other utilities may have rights of use in the Streets that are not granted by the City, and will endeavor to encourage participation of these entities in the Coordinating Committee so that the activities and projects of all entities using the

Streets may be efficiently communicated and scheduled to minimize interferences of utility work with the uses of the Streets and adjoining property, for the public welfare and for the benefit of all parties in the performance of their planned work. The Coordinating Committee may, by agreement of the City and Grantee, establish standing subcommittees and may assign tasks to, and receive recommendations from, such subcommittees as it may deem necessary.

**Section 10. Cooperation with City Climate Action, Local Energy, Energy Justice, and Purchasing of Local Materials**

(a) *Climate Action and Local Energy.* Subject to Applicable Law, Grantee shall cooperate in good faith with the City's desire to accomplish the goals set forth in its Climate Action Plan dated December 2015, and any revised or successive climate plan. Subject to Applicable Law, Grantee shall reasonably assist the City in achieving its goals of reducing carbon-based greenhouse gas emissions related to generation of the Gas used by customers in the City's corporate boundaries and reducing other greenhouse gas emissions in the City through increased electrification of transportation. Grantee's acceptance of the Franchise includes Grantee's understanding of the City's policy objectives, and, subject to Applicable Law, its willingness to assist in good faith the City's goal of having all electricity used in the City generated from renewable fuel sources by 2035, including to the greatest extent practical and lawful, through local customer-controlled distributed energy resources. Grantee shall cooperate, subject to Applicable Law, with all the City's efforts to have distributed energy resources located in the City more completely and increasingly integrated with the operation of Grantee's electrical distribution system. Subject to Applicable Law, Grantee shall permit distributed energy resources to deliver all practical excess amounts of electric energy and capacity not used at the sites of distributed energy resources located within the City to be made available to other customers of Grantee and/or to any operating CCA program established by the City. Grantee accepts that the City will support expansion of non-Gas resources, net energy metering, feed-in

tariffs, and other economic mechanisms to foster development of local renewable fueled electric distributed resources, electric storage, microgrids, electric transportation, and other technologies to be increasingly integrated with the design and operation of Grantee's electric distribution system, and Grantee will not unreasonably oppose or obstruct such efforts without good public cause, which shall be at Grantee's sole discretion. The City recognizes that transition of electric service delivery to these preferred resources, including necessary distribution system adaptations, requires that customers who do not or cannot adapt to these technologies, or are not required to do so, cannot be required to subsidize the cost of customers who do make these changes. Nonetheless, Grantee shall cooperate with the City in good faith toward fulfillment of these objectives in a Cooperation Agreement as provided in Section 10(c), on a timetable that meets the City's Climate Action Plan, and with the City's understanding that many of the objectives are or will be subject to factors controlled by State legislation and orders of the CPUC.

(b) *Energy Justice.* Grantee shall cooperate with the City toward attainment of environmental and social justice in the provision of Gas service. Grantee shall support the City's 2019 Climate Equity Index and any subsequent versions or revisions. Grantee shall use good faith efforts to assist the City in fulfillment of Climate Equity Index recommendations, including (1) to assist the City in seeking and providing grant funding opportunities to support community engagement and invest in areas with very low to moderate access to opportunity, or in programs and projects that receive funding from any City fund established to advance climate equity objectives; (2) to support the City in conducting public engagement efforts, in partnership with community-based organizations, in census tracts with very low access to opportunity; (3) to assist the City in exploring the feasibility of establishing a sustainability ambassador program in areas with very low to moderate access to opportunity; (4) to assist the City in the determination of mechanisms to incorporate climate equity into City programs and projects; and (5) to

cooperate with the City in periodically updating Climate Equity Index data. Grantee will use its best efforts to minimize service costs to City residents and businesses, to provide opportunities to low and moderate income customers for them to reduce energy bills through equitable access to energy efficiency, Gas alternative, and renewable distributed energy resources, to reduce cost volatility, and to improve access to energy services that empower low and moderate income residents and disadvantaged businesses through efficiency and conservation.

(c) *Cooperation Agreement.* Grantee agrees to comply with and fulfill the terms of the Cooperation Agreement, attached and incorporated as Attachment 3, regarding the subjects provided in Sections 10(a), (b), and (e) herein. The Cooperation Agreement has been signed by Grantee's responsible officer and adopted by the City Council together with this Franchise. The Cooperation Agreement shall be a binding document only with respect to the secondary term of ten (10) years provided in Section 3(b) and the continuing obligation in Section 10(d), and shall have no binding application to any other obligation of the Franchise. The Cooperation Agreement arises from Grantee's proposals in support of City's policies and has been agreed to by the parties to establish reasonable standards for purposes of Sections 3(b) and 10(d). The Cooperation Agreement is at all times subject to Applicable Law, and provides for Grantee's points of alignment and cooperation with the City's policy objectives provided in Sections 10(a), (b), and (e), including the identification of barriers and described measures that Grantee can and will take to support City policies. Grantee's cooperation with Section 10 shall be reported in the periodic compliance report provided in Section 6. The Cooperation Agreement shall give due consideration of any legal or practical impediments cited by Grantee, including legislation, orders, and considerations for all customers (and not only those located in the City or immediately interested in a subject), as to why any policy cannot be implemented. The Cooperation Agreement shall include discussion of opportunities for the City and its citizens, especially those citizens with low

or moderate income, to gain access to energy efficiency, distributed energy resources, evolving technology, and transportation electrification programs and grants that are made available by the CPUC and California Energy Commission. The Cooperation Agreement describes (1) Grantee's planned efforts to make opportunities available to City (and to other qualifying customers) to participate in Grantee's State-authorized energy efficiency, distributed energy, emerging technology (including Electric Program Investment Charge opportunities, as applicable), Gas alternative, and transportation electrification program funding; (2) efforts that Grantee may take to support City's Municipal Energy Strategy and to making building energy efficiency resources as accessible as possible for the City and other customer building owners; (3) available programs and approach to how Grantee's proposals will give due consideration to the City's climate action goals and to the City's position and ability to partner with Grantee toward fulfillment of those goals, including through building codes, building energy benchmarking, deployment of renewable and storage distributed energy resources, microgrids, and electric transportation on City Streets.

(d) *Modification and Continuation of Cooperation Agreement.* The Cooperation Agreement may be modified to adapt to evolving circumstances at the request of Grantee, provided that the request for modification is reasonable and any amendment is approved by the City Council, which modification shall not be unreasonably refused. Grantee shall cooperate in good faith with any reasonable request by City for modification to the Cooperation Agreement. The Cooperation Agreement shall remain effective during the secondary term provided in Section 3(b).

(e) *Climate Equity Fund.* City has established a Climate Equity Fund to respond to the climate justice element of general planning pursuant to California Government Code section 65302(h)(4)(A). Any payments or programs proposed by Grantee in the Cooperation Agreement that are in addition to the consideration paid as a Bid Amount for the grant of the

Franchise and the amounts paid pursuant to Section 4 of this Ordinance for exercise of the Franchise shall be paid or performed for the benefit of the Climate Equity Fund. Grantee agrees to support the objectives of the Climate Equity Fund in good faith. Grantee shall not apply to the CPUC to recover Climate Equity Fund contributions in rates or other charges from Gas customers.

(f) *Purchasing of Local Materials.* Grantee shall use reasonable efforts to operate its business in a manner that the majority of purchasing of materials and supplies used in connection with its business occurs at addresses located in the City of San Diego.

**Section 11. Indemnity, Defense, Insurance**

(a) Grantee, to the fullest extent permitted by law, shall defend with legal counsel reasonably acceptable to the City, indemnify, and hold harmless the City and its officers, agents, departments, officials, and employees (Indemnified Parties) from and against all claims, losses, costs, damages, injuries (including death) (including injury to or death of an employee of Grantee, any agent or subcontractor, anyone employed by them, or anyone that they control), expense and liability (collectively "Claims"), including court costs, litigation expenses and fees of expert consultants or expert witnesses incurred in connection therewith and costs of investigation, that arise out of, in whole or in part, any acts performed, rights exercised, or rights or privileges granted under the Franchise, to or by Grantee, any agent or subcontractor, anyone directly or indirectly employed by them, or anyone that they control. Grantee's duty to defend, indemnify, and hold harmless shall not include any Claims or liabilities arising from the active negligence, sole negligence, or willful misconduct of the Indemnified Parties.

(b) Concurrent with the acceptance of the Franchise by Grantee, and as a condition precedent to the effectiveness of the Franchise, and in partial performance of the obligations assumed herein, Grantee shall procure and maintain at Grantee's expense for the duration of the Franchise from an insurance company that is admitted to write insurance in California or that has



a rating of or equivalent to A:VIII by A.M. Best & Company the following insurance against Claims for injuries to persons or damage to property which may arise from or in connection with the Franchise by Grantee, its agents, representatives, employees or subcontractors:

(1) Commercial General Liability (CGL): Insurance Services Office

Form CG 00 01 covering CGL on an "occurrence" basis, including products and completed operations, property damage, bodily injury, and personal and advertising injury, with limits no less than twenty-five million dollars (\$25,000,000) per occurrence. If a general aggregate limit applies, either the general aggregate limit shall apply separately to this Franchise or the general aggregate limit shall be twice the required occurrence limit.

(2) Automobile Liability: ISO Form Number CA 00 01 covering any auto

(Code 1), or if Grantee has no owned autos, hired (Code 8) and non-owned autos (Code 9), with limits no less than five million dollars (\$5,000,000) per accident for bodily injury and property damage.

(3) Workers' Compensation: as required by the State of California, with

Statutory Limits, and Employer's Liability Insurance with limits no less than one million dollars (\$1,000,000) per accident for bodily injury or disease.

(c) Policies must be endorsed according to the following requirements:

(1) Additional Insured Status. The City, its officers, officials, employees, and

volunteers are to be covered as additional insureds on the CGL policy with respect to liability arising out of work or operations performed by or on behalf of Grantee including materials, parts, or equipment furnished in connection with such work or operations. General liability coverage can be provided in the form of an endorsement to Grantee's insurance (at least as broad as ISO Form CG 20 10 11 85 or if not available, through the addition of both CG 20 10, CG 20 26, CG 20 33, or CG 20 38; and CG 20 37 if a later edition is used).

(2) Primary Coverage. For any Claims related to the Franchise, Grantee's insurance coverage shall be primary coverage at least as broad as ISO CG 20 01 04 13 as respects the City, its officers, officials, employees, and volunteers. Any insurance or self-insurance maintained by the City, its officers, officials, employees, or volunteers shall be excess of Grantee's insurance and shall not contribute with it.

(3) Notice of Cancellation. Each insurance policy required above shall provide that coverage shall not be canceled, except with notice to the City.

(4) Waiver of Subrogation. Grantee hereby grants to City a waiver of any right to subrogation which any insurer of Grantee may acquire against the City by virtue of the payment of any loss under such insurance. Grantee agrees to obtain any endorsement that may be necessary to affect this waiver of subrogation, but this provision applies regardless of whether or not the City has received a waiver of subrogation endorsement from the insurer.

(d) Verification of Coverage. Grantee shall furnish the City with original Certificates of Insurance including all required amendatory endorsements (or copies of the applicable policy language effecting coverage required by this clause) and a copy of the Declarations and Endorsement Page of the CGL policy listing all policy endorsements to City before the Franchise is awarded. However, failure to obtain the required documents prior to the award of the Franchise shall not waive Grantee's obligation to provide them. The City reserves the right to require complete, certified copies of all required insurance policies, including endorsements required by these specifications, at any time.

(e) Not more frequently than every five (5) years, if in the opinion of the City Manager or of an insurance broker retained by the City, the amount of the foregoing insurance coverage is not adequate, Grantee shall increase the insurance coverage as required by the City. Grantee shall furnish the City with certificates of insurance and with endorsements provided in

Section 11(c) affecting coverage as required above. The certificates and endorsements for each insurance policy shall be signed by a person authorized by that insurer to bind coverage on its behalf. Any modification or waiver of the insurance requirements contained in the Franchise shall only be made with the written approval of the City's Risk Manager in accordance with established City policy.

(f) Grantee may fulfill the insurance obligations of Sections 11(b) through (d) by self-insurance. Grantee shall provide a certificate to the City evidencing the fulfillment of these requirements.

**Section 12. Repair Costs**

Grantee shall pay to City on demand the cost of all repairs to City property made necessary by any of the operations of Grantee under the franchise granted hereby, provided however that Grantee may make repairs to streets, sidewalks, curbs and gutters itself at its own cost in accordance with City specifications if the same can be done without undue inconvenience to the public use of the streets.

**Section 13. Forfeiture and Other Remedies**

(a) The Franchise is granted upon each and every condition herein contained and shall be strictly construed against Grantee. Nothing shall pass by the Franchise granted to Grantee unless granted in plain and unambiguous terms. Each of the Franchise conditions is a material and essential condition to the granting of the Franchise. If Grantee shall fail, neglect, or refuse to comply with any of the conditions of the Franchise, and if such failure, neglect, or refusal shall continue for more than thirty (30) calendar days after written demand by the City Manager for compliance, then the City, by the City Council, in addition to all rights and remedies allowed by law, including but not limited to breach of contract, declaratory relief, specific performance, and mandatory injunction, may terminate the right, privilege and franchise

granted in and by the Franchise, and all the rights, privileges and the Franchise of Grantee shall be at an end. Thereupon and immediately, Grantee shall surrender all rights and privileges in and to the Franchise. No Franchise provision made to secure the enforcement of the terms and conditions of the Franchise shall be deemed an exclusive remedy or to afford the exclusive procedure for the enforcement of the Franchise terms and conditions, but the remedies and procedure outlined or provided, including forfeiture, shall be deemed to be cumulative.

(b) Notwithstanding and without waiving the remedies reserved in Section 13(a), the parties recognize and agree that certain Grantee breaches of specified conditions in the Franchise will result in damages to the City, as cost of postponing services or projects, or other delay expenses, which for a temporary period may not practically warrant forfeiture of the Franchise by Grantee or require specific proof of damage by the City. For such specified conditions and limited periods of Grantee breach, at the City's sole discretion and election, as an alternative remedy to those provided in Section 13(a), provided that such liquidated damages shall be the sole remedy available to the City for any such breach if City elects to collect liquidated damages, but only for the temporary period provided in Section 13(c). Any failure of the City to not elect liquidated damages under Section 13(b) shall not be a waiver of the City's right to prove and recover actual damages under Section 13(a). The City-elected liquidated damage assessments shall be applicable only to Grantee breaches of the conditions specified in Section 13(e), and only for the maximum time periods provided in Section 13(c). All Franchise conditions not stated in Section 13(e) shall expressly and at all times remain reserved to the City to enforce and subject to the remedies provided in Section 13(a).

(c) If the City elects the remedy of liquidated damages for the breach of any of the specified conditions in Section 13(e), it shall deliver written notice to Grantee of the breach and the date on which the breach commenced, and the notice shall provide Grantee the same

thirty (30) calendar day right to cure provided in Section 13(a). If after the thirty (30) calendar days from notice of the breach, the condition has not been cured or justified to the satisfaction of the City Manager, at City's election the remedy of liquidated damages shall thereafter be a remedy that shall apply only to the condition of breach specified in the notice and only for a period not-to-exceed one hundred eighty (180) calendar days from the date that is thirty (30) calendar days after each such notice. After the one hundred eighty (180) calendar day period, the remedies in Section 13(a) shall remain available to the City. The liquidated damages provided in Section 13(e) shall accrue and be paid on each uncured incident notice even if multiple notices cite a common specified breached condition. For any breach that has not been cured within the notified cure period, Grantee shall be liable to the City for all accumulated assessed liquidated damages during the maximum period of applicability, and thereafter for all City's remedies provided in Section 13(a) for each such breach which extends beyond the maximum liquidated damage assessment period. The City Manager shall assess and bill Grantee for all such damages that shall be accrued during the liquidated damage assessment period and shall carry interest as provided by law from the date of assessment. All assessed liquidated damages and interest shall be payable to the City on the quarterly payment dates provided for fees and surcharge revenue in Section 5. During the pendency of any disputed liquidated damage assessment period, the parties shall engage in dispute resolution as provided in Section 14. Section 13 shall not be construed to impair the City's right to acquire Grantee's property or facilities at any time as provided by the California Constitution and the San Diego Charter.

(d) By entering the Franchise, Grantee and the City agree that the specified Franchise conditions and liquidated damage amounts provided in Section 13(e) represent a reasonable endeavor by the parties to estimate a fair compensation for any loss that may be sustained by the City as the result of that breach of the specified condition for the period. Jointly foreseeable and

reasonably estimable damages to the City of Grantee's breach of conditions in Section 13(e) include, but are not limited to, costs arising from Grantee's interference, disruptions, suspensions, obstructions, and delays to the City's programs, projects, contracts, and the cost to efficiencies in City-reserved uses of the Streets. The City's election of temporary liquidated damages under Section 13 is, if exercised under Sections 13(b) and (c), an alternative that shall be available to the City in lieu of the remedy of immediate Grantee forfeiture or other legal remedies reserved to the City under Section 13(a), and is not and shall not be construed as a penalty. Grantee acknowledges that amounts provided in Sections 13(b), (c), and (e) are capped and for the maximum period provided bear a reasonable relationship to the range of harm that the parties might reasonably have anticipated to follow from the specified breaches when they entered into the Franchise. As a temporary alternative to forfeiture of the Franchise by Grantee and other City remedies for the breach of any condition, said liquidated damages are not a penalty.

(e) *Liquidated Damages for Breach of Specified Conditions.*

If elected by the City pursuant to Sections 13(b) and (c), the following events of Grantee breach shall have the corresponding daily liquidated damage charges excepting weekends and holidays:

(1) Failure to deliver facility location records and Gas facility drawings and other engineering record information required by Section 9 without conditions not provided for in the Franchise: six thousand dollars (\$6,000) per calendar day for delay and disruption.

(2) Failure to timely coordinate, bear costs, and physically relocate facilities upon direction of the City Manager as required by Section 8: fifteen thousand dollars (\$15,000) per calendar day for delay and disruption. Actual cost of relocation shall be borne entirely by Grantee.

(3) Failure to provide and pay for standby safety engineers for protection of Grantee facilities within five (5) calendar days' notice from the City or its authorized agents as required by Section 9: Cost of standby engineers plus fifteen thousand dollars (\$15,000) per calendar day for delay impacts.

**Section 14. Dispute Resolution**

(a) If any dispute arises under the Franchise, including any alleged breach, the City and Grantee shall use reasonable efforts to resolve the dispute. The City and Grantee shall consult and negotiate with each other in good faith and, recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to the City and Grantee. If the City and Grantee do not agree on such a solution within fifteen (15) calendar days, then, upon written notice by either party to the other, such dispute shall be referred to the City Manager and a member of Grantee's executive staff for further consultation and negotiation.

(b) If the City Manager and the member of Grantee's executive staff are unable to agree on a solution within fifteen (15) calendar days of such referral, the City and Grantee shall attempt in good faith to settle the dispute by non-binding mediation administered by a mediator acceptable to both parties. The City and Grantee will cooperate in selecting a mediator. The City and Grantee will share equally in the mediation costs and each party will bear its own attorneys' fees and related costs, including any expert witness fees. The parties will use their best efforts to conclude the non-binding mediation within forty-five (45) calendar days after the City Manager and member of Grantee's executive team conclude their discussions. The parties may extend the dates in Section 14 by mutual agreement.

(c) If the City and Grantee do not agree on a solution through non-binding mediation, then either party may pursue litigation in any court with jurisdiction. Notwithstanding any other

provision of Section 14, the City or Grantee may proceed directly to litigation if there is an urgency that renders the preceding dispute resolution process impracticable.

**Section 15. Publication Expense**

Grantee shall reimburse the City for all publication expenses incurred in connection with granting the Franchise, within thirty (30) calendar days after the City provides Grantee a written statement of the expenses.

**Section 16. Authority for Grant**

Notwithstanding any other provisions, the Franchise is granted solely and exclusively under Sections 103, 103.1, 104, and 105 of the San Diego Charter.

**Section 17. No Transfer Without Consent**

Grantee shall not sell, transfer, or assign the Franchise or the rights and privileges granted thereby without the consent of the City Council, as set forth in San Diego Charter Section 103.

**Section 18. Right of City's Electors**

This grant of Franchise and authority shall be and is subject to the right of the majority of the electors of the City voting at any election at any time thereafter to repeal, change, or modify the grant, and such right is hereby expressly reserved to the electors; and it is expressly agreed that at any election held in the City, a majority of the electors of the City voting at the election shall have the right to repeal, change, or modify the terms of this Franchise and the authority granted hereunder.

**Section 19. Performance Bond**

Grantee shall file and maintain a faithful performance bond in favor of the City in the sum of thirty million dollars (\$30,000,000) to guarantee that Grantee shall well and truly observe, fulfill, and perform each and every term and condition of the Franchise. The bond shall be acknowledged by Grantee as principal and by a corporation licensed by the Insurance



Commissioner of the State of California to transact the business of a fidelity and surety insurance company as surety. In case of any breach of any condition of the Franchise, up to the whole amount of the sum named in the bond may be taken and shall be recoverable from the principal and sureties upon such bond.

**Section 20. Bankruptcy**

Grantee and the City acknowledge that if Grantee becomes a debtor in bankruptcy under the bankruptcy laws of the United States (Bankruptcy Code), the Franchise shall be treated as an executory contract pursuant to Bankruptcy Code section 365(c). Grantee and the City further acknowledge that, as a non-assignable contract pursuant to applicable law, including San Diego Charter section 103 and California Public Utilities Code section 6203, the Franchise may not be assumed or assigned by the trustee or the debtor-in-possession without the consent of the City. In the event that the debtor-in-possession assumes the Franchise and the Franchise is sold pursuant to the Bankruptcy Code, it is the intent of the parties that the City shall have the right of first refusal to match the price of any buyer for the purchase of Grantee's facilities and assets and may acquire Grantee's facilities by matching any bona fide offer of purchase made in bankruptcy. Grantee and City acknowledge that if the City files any petition for bankruptcy pursuant to Chapter 9 of the Bankruptcy Code, Grantee's claims shall be treated consistently with the applicable provisions of that Chapter.

**Section 21. Acquisition and Valuation**

Nothing in the Ordinance or the Franchise granted hereby shall be construed as in any way impairing the City's rights to acquire property of Grantee through the exercise of the City's power of eminent domain or through voluntary agreement between the City and Grantee. If the City chooses to exercise its power of eminent domain, it shall do so in accordance with the

procedures provided by the general law of the State of California. The valuation of such property for condemnation purposes shall be made in accordance with such general law.

**Section 22. Severability**

If any term, covenant, or condition of the Franchise or the application or effect of any such term, covenant, or condition is held invalid as to any person, entity, or circumstance, or is determined to be unjust, unreasonable, unlawful, imprudent, or otherwise not in the public interest, by any court or government agency of competent jurisdiction, then such term, covenant, or condition shall remain in force and effect to the maximum extent permitted by law, and all other terms, covenants, and conditions of the Franchise and their application shall not be affected thereby but shall remain in force and effect. The parties shall be relieved of their obligations only to the extent necessary to eliminate such regulatory or other determination, unless a court or governmental agency of competent jurisdiction holds that such provisions are not severable from all other provisions of the Franchise.

**Section 23. Effective Date**

This Ordinance shall take effect and be in force on the thirtieth day from and after the date of its final passage pursuant to San Diego Charter section 295.

APPROVED: MARA W. ELLIOTT, City Attorney

By \_\_\_\_\_  
Frederick M. Ortlieb  
Senior Deputy City Attorney

FMO:als:jvg

03/28/21

Or.Dept: Office of the Mayor

Doc. No.: 2614414

Attachments: 1 Table of Contents – Exhibit A - Gas Franchise  
2 Administrative MOU General Terms  
3 Cooperation Agreement

I hereby certify that the foregoing Ordinance was passed by the Council of the City of San Diego, at this meeting of \_\_\_\_\_.

ELIZABETH S. MALAND  
City Clerk

By \_\_\_\_\_  
Deputy City Clerk

Approved: \_\_\_\_\_  
(date)

\_\_\_\_\_  
TODD GLORIA, Mayor

Vetoed: \_\_\_\_\_  
(date)

\_\_\_\_\_  
TODD GLORIA, Mayor

ATTACHMENTS  
TO  
EXHIBIT A GAS FRANCHISE

# Attachment 1

## Table of Contents

Section 1:	Definitions .....	1
Section 2:	Purpose.....	4
Section 3:	Term.....	5
Section 4:	Consideration .....	7
Section 5:	Reports, Dates of Payment to City, Audits .....	10
Section 6:	Compliance Review Committee and Report .....	12
Section 7:	Compliance with Laws .....	14
Section 8:	City Reserved Powers .....	15
Section 9:	Administrative Practices .....	17
Section 10:	Cooperation with City Climate Action, Local Energy, Energy Justice, and Purchasing of Local Materials .....	22
Section 11:	Indemnity, Defense, Insurance .....	26
Section 12:	Repair Costs .....	29
Section 13:	Forfeiture and Other Remedies .....	29
Section 14:	Dispute Resolution .....	33
Section 15:	Publication Expense .....	34
Section 16:	Authority for Grant .....	34
Section 17:	No Transfer Without Consent .....	34
Section 18:	Right of City’s Electors .....	34
Section 19:	Performance Bond .....	34
Section 20:	Bankruptcy .....	35
Section 21:	Acquisition and Valuation .....	35
Section 22:	Severability .....	36
Section 23:	Effective Date .....	36

# Attachment 2

## CITY OF SAN DIEGO

### MEMORANDUM OF UNDERSTANDING

THIS MEMORANDUM OF UNDERSTANDING (“MOU”) is entered into by and between **THE CITY OF SAN DIEGO**, a California municipal corporation (“CITY”), and <UTILITY STATE FRANCHISE NAME> and/or its agent(s) (“GRANTEE”) (collectively referred to as the “PARTIES”), to be effective as <MONTH> \_\_\_\_, 2021 (the “Effective Date”), when signed by the PARTIES and approved as to form by the San Diego City Attorney.

On \_\_\_\_\_, the PARTIES entered into the Franchise Agreement, which provides the Grantee with the certain rights **for the transmission and distribution of gas and electricity**, as well as the right to install and maintain wires, poles, power lines and underground gas and electric lines within the city limits of San Diego.

CITY hereby grants GRANTEE the non-exclusive right to enter upon the MOU Area to perform Work, based upon the following terms and conditions:

- 1) **Definitions:** As used in this MOU, the following terms shall be defined as follows:
  - a) **“CITY Contact”** shall mean the CITY’s Development Services Department (DSD) during design/plan review and the City’s Engineering and Capital Projects Construction Management Field Engineering Division (CMFE) during construction implementation. For purposes of this MOU, the CITY Contact are as follows:  
Development Services Department, Engineering Division, Deputy Director  
  
Engineering & Capital Projects Department, Construction Management & Field Engineering, Deputy Director
  - b) **“Contiguous Locations”** shall mean a Work Area within one typical CITY street block, bounded by two street intersections.
  - c) **“GRANTEE”** shall mean <UTILITY/CONTACT NAME> which shall include GRANTEE’s agents, employees, and contractors. GRANTEE shall be responsible for all GRANTEE’s agents, employees, and contractors and ensure that they adhere to all conditions as stated in this MOU.
  - d) **“GRANTEE’s Address for Notices”** shall be:  
  
<UTILITY SIGNATORY/AGENT>  
<ADDRESS>  
<CITY>, <STATE>, <ZIP>
  - e) **“NPDES”** shall mean National Pollutant Discharge Elimination System.

- f) **“Facility”** shall mean an instrument such as a pipe or conduit used for the delivery of services by a utility company within the City Public right-of-way.
  - g) **“Emergency”** shall mean an unexpected situation or occurrence that has or may result in serious injury, property damage, or threat to reliability of the gas and electric systems due to work required on gas and/or electric facilities. Emergency Work includes work that is required to mitigate active gas leaks, energized downed power lines, work to restore service to street lighting and signaling, damaged poles and/or facilities, work to control, repair and restore energized facilities and for the restoration of the street to original condition.
  - h) **“Excavation”** shall mean the act, process, or result of earthen material or substance being removed, cut into, dug, quarried, uncovered, displaced, or relocated.
  - i) **“Work”** shall mean any activity required throughout the construction phase to implement, install, erect, excavate, access, maintain or test existing utility facilities within the Work Area by the GRANTEE.
  - j) **“Work Area”** shall mean the CITY Public right-of-way, which are public easements for streets, alleys, or other uses, as defined in the San Diego Municipal Code, Chapter 11, Section 113.0103, as may be amended.
- 2) Right to Enter: The use of the MOU by GRANTEE shall be limited to the scope for maintenance and operational needs as further described in Section 3 of this MOU. CITY reserves the right to enter upon the Work Area at all times to inspect and maintain the Work Area, as CITY deems necessary. This MOU only authorizes entry and construction activity in the Work Area and shall not impact easements or the rights of any third parties. Any proposed construction activities not contained in Section 3 of this MOU shall require additional authorization and permits from the CITY’s Development Services Department, which must be obtained before construction begins.
- 3) Scope of Work Allowed by this MOU. Work allowed under this MOU may include the following:
- a) Any facility testing, inspection, and/or maintenance of GRANTEE’s existing equipment and infrastructure.
  - b) Non-excavation and non-destructive maintenance/testing work, as understood in Section 3 of this MOU, within in the Work Area.
  - c) Minor repairs or modification of existing facilities, due to customer service failures, where there is no excavation, no expansion of the facility and the facility is not relocated, and:
    - i) Work which can be completed in five working days or less, including replacement and restoration of hardscape/landscape and removal of all utility markings.
    - ii) All work in Contiguous Locations shall be completed in 5 working days or less, including replacement and restoration of hardscaping/landscape and removal of all utility markings.

- d) Water Quality Requirements - All Work shall adhere to the current NPDES MOU, the CITY's Engineering Standards, and the San Diego Municipal Code.
  - e) For any Work where applicable Federal, State, or local requirements may conflict, the most stringent requirement shall control.
  - f) An Emergency requiring emergency Work.
- 4) Work NOT allowed under this MOU. The following work is not allowed under this MOU and may require a Development Permit, as defined in the San Diego Municipal Code, Chapter 11, Section 113.0103, as may be amended:
- a) Any excavations, beyond or not included in Section 3 of this MOU, within the street surface pavement area of any CITY Public right-of-way.
  - b) Any excavations on CITY Public right-of-way that is under a Street Paving Moratorium.
  - c) Installation of new utility facilities and relocation of existing utility facilities, including but not limited to, transformers, cabinets, poles, switches, and pull boxes.
  - d) Upsizing of any utility facility
  - e) Any Work requiring any type of CITY Public right-of-way closure.
  - f) Any Work requiring a traffic detour.
  - g) Any Work requiring the use of a crane.
  - h) Work that includes the replacement and/or removal of a utility pole and/or facility support structure.
  - i) Any Work that requires boring or micro-tunneling methods.
  - j) All Work related to the Utility Undergrounding Conversion projects (Rule 20A & Municipal Undergrounding Projects).
  - k) Work that includes any changes to American Disabilities Act (ADA) standard facilities (i.e. curb ramps, sidewalk).
- 5) Traffic Control Permits. Work and/or equipment within the CITY Public right-of-way shall require an approved Traffic Control Permit from DSD. The following must be completed prior to permit approval and commencement of Work:
- a) Preparation, coordination & finalization of a Traffic Control Plan in conformance with the latest edition of City of San Diego Standard Drawings; The Street Design Manual; The Manual of Uniform Traffic Control Devices and the California Supplement; and Standard Specifications for Public Works Construction, including Regional and City of San Diego Supplement Amendments through DSD.
  - b) Payment of fees related to the Street Preservation Ordinance, as applicable.
  - c) Payment of an Inspection Fee
  - d) Participating in a coordinated & scheduled Preconstruction Meeting between the GRANTEE and the Engineering & Capital Projects Department, Construction Management & Field Engineering Division (CMFE).



- 6) Conformance with San Diego Municipal Code Chapter 6, Article 2, Division 11. Work allowed and conducted pursuant to this MOU shall conform with the requirements in the San Diego Municipal Code Chapter 6, Article 2, Division 11: "Procedures for Work on Utility Installations in the Public Right-of-Way."
- 7) Term: This MOU shall be effective for Two (2) years from the effective date of the City Council approval of the Franchise Agreement. GRANTEE may apply for successive memorandum of understandings with the CITY. Each item detailed in Section 3 of this MOU (Scope of Work) shall obtain an approved DSD Traffic Control Permit prior to commencement of construction and all work shall be completed and inspected/approved by the CITY according to the terms in the Traffic Control Permit. Upon successful completion of each Work activity, GRANTEE shall obtain final sign off by CMFE. A reasonable extension of the Traffic Control Permit may be granted at the sole discretion of the CITY DSD, Engineering Division, Traffic Safety Section.
- 8) Work Hours. All Work under this MOU is subject to the following work hour restrictions and requirements, unless otherwise directed through an approved DSD Traffic Control Permit.
  - a) No Work or related activities shall occur:
    - i) Before 8:30 a.m. or after 3:30 p.m. Monday through Friday.
    - ii) Before 8:30 a.m. or after 3:30 p.m. on Saturday.
    - iii) Sundays and CITY and Federal Holidays.
    - iv) In a school zone, before 9:00 a.m. or after 2:00 p.m. Monday through Friday while school is in session. A school zone is any roadway within 500-feet of the school property.
  - b) Weekend and after-hours work must be requested at least 2 working days in advance and is subject to CITY approval; fees will be assessed per the City Council approved fee schedule.
  - c) A Construction Noise Permit is required for any construction Work between 7:00 p.m. and 7:00 a.m. Monday thru Saturday, or at any time on Sunday and holidays.
  - d) The CITY, in its sole discretion, may allow deviations or a change to the permitted Work hours.
- 9) Notification Requirements, Commencement of Emergency Work and Preconstruction Activities.
  - a) Public Safety Emergency Work.
    - i) Notification for emergency Work necessitated by an Emergency shall be made within 24 hours by calling Station 38 at (619) 527-7500. If the call is not answered, a voicemail shall be left.
    - ii) An email must be sent to the Private Utility Emergency Notifications at this link: [PrivateUtilityEmergencyNotifications@sandiego.gov](mailto:PrivateUtilityEmergencyNotifications@sandiego.gov).
    - iii) It is understood that the GRANTEE shall perform all emergency work necessary to stabilize the emergency site and to maximize public safety.

All remedial work required to restore impacted CITY Public right-of-way shall require a separate approved DSD Right-of-Way Permit.

- b) CPUC Compliance Emergency.
    - i) A California Public Utilities Commission (CPUC) emergency occurs when a mandatory CPUC equipment inspection or repair has not received the required approvals two weeks prior to the CPUC compliance date.
    - ii) The approvals required for this type of work are an approved Traffic Control Plan (TCP), an approved Sidewalk Blockage Form (SWBF) and an encroachment permit for minor chipping or trenching of a valve box due to recent pavement projects or minor trenching to energize a cathodic protection station as an example. Applications for these approved shall be submitted to DSD sixty days in advance of the compliance date.
  - c) Permit Application Requirements.
    - i) An application for an encroachment permit for Emergency Work shall be submitted to the Permitting Section of the Engineering Division within 10 days. A complete application should be submitted to include the General Application (DS-3179), Supplemental (DS-3037), Construction Plan DS-3179), TCP, and the SWBF for processing.
    - ii) The Scope of Work shall be primarily for small projects (trenching of the Public right-of-way is less than 150 feet).
  - d) Permitting Process.
    - i) An encroachment permit for Emergency Work shall be handled over the counter and will not be subject and excluded from the agreed upon weekly submittal limit.
    - ii) A TCP and SWBF shall be processed through the Traffic Safety Section to meet the goal of final paving within 30 days from date of the Emergency.
- 10) Non-Emergency Work.
- a) All other non-emergency notifications, in conformance with Work as set forth in Section 3 of this MOU shall be made to the Engineering & Capital Projects – Construction Management & Field Engineering Division at (858) 627-3200.
  - b) Notification is not required when the Work allowed and performed under this MOU, as set forth in Section 3 of this MOU, does not impede vehicle, bicycle, or pedestrian traffic and GRANTEE'S vehicles are parked legally within the hours stated under Section 8 of this MOU and not conflicting with ongoing work in the area.
  - c) Notification and an inspection fee is not required if the Work performed meets the following conditions:
    - i) Facility inspection and maintenance where vehicle, bicycle, and pedestrian traffic are not impeded, and GRANTEE'S vehicles are parked legally.
    - ii) Non-excavation/non-destructive maintenance Work where vehicle, bicycles, and pedestrian traffic are not impeded, and GRANTEE'S vehicles are parked legally.

- iii) Modification to existing facilities where there is no expansion of the facility or change in the facility location and where vehicle, bicycle, and pedestrian traffic are not impeded, and GRANTEE'S vehicles are parked legally.
  - d) GRANTEE must comply with any notice the City Engineer post that modifies existing standards or requirements.
- 11) Commencement of Work and Pre-Construction Activities.
  - a) For all Work requiring notification, GRANTEE shall contact CMFE a minimum of Five (5) working days prior to commencement of the construction. GRANTEE shall invite CMFE to a pre-construction meeting, which shall occur five (5) working days prior to commencement of construction. This meeting shall establish points of contact, define means and methods of the Project, and coordinate the GRANTEE's work schedule with scheduled activities and Transportation & Storm Water Department operations in and adjacent to the Work Area. At that time, GRANTEE shall submit a work schedule to CMFE that includes a description of the work to be performed, the specific location of such work within the Work Area, and the dates and times of such work. CITY reserves the right to impose reasonable restrictions and scheduling conditions for any activities related to the work, and no work shall commence pursuant to this Permit without the prior verbal approval of the CMFE as documented in the minutes of the pre-construction meeting.
  - b) Public Access Approval. GRANTEE shall notify the CITY Contact and any impacted businesses a minimum of ten (10) working days prior to start of any Work that may affect the use of any public access in the Work Area.
- 12) Compliance With Construction Standards. GRANTEE, and GRANTEE'S agents and contractors shall at all times comply with all applicable laws and standards, including, but not limited to, the California Building Code, ADA design standards and requirements for accessibility, CITY design requirements, standards, and permit requirements.
  - a) The GRANTEE is obligated to secure copies of all appropriate standards and conditions.
  - b) All work shall comply with the City Engineer Standards and Conditions to the extent that the Standards and Conditions do not conflict with federal and state standards.
  - c) The CITY shall inspect and approve all work requiring notification.
  - d) The GRANTEE is required to remove intact and relocate historical concrete stamps as understood through the CITY Standard Drawing Sheet SDG-115. Prior to final placement, the City Resident Engineer shall approve the location.
  - e) All Underground Service Alert (USA) markings shall be removed by completion of the work and without damaging existing hardscape and landscape. Painting over markings is not allowed. Use of emulsion on markings in the asphalt is allowed.

- 13) Cooperation & Coordination with CITY Projects.
- a) GRANTEE shall fully cooperate with coordination activities as they relate with CITY Capital Improvement Projects and GRANTEE Work. Coordination, either in design or construction, shall be conducted expediently to avoid CITY Capital Improvement Project delays and cost overruns.
  - b) In the event that CITY determines that GRANTEE's Standby Services are required for the monitoring of GRANTEE's infrastructure, GRANTEE shall within five (5) calendar days (or as soon as practicable in the case of emergency) arrange for the on-site presence of a Standby safety engineer and any other Standby Services. GRANTEE shall be responsible for all costs and staffing needed associated with the assignment. CITY shall not bear any costs associated with any Standby Service.
  - c) The GRANTEE and the CITY shall coordinate their Work and projects, future and present, during the design phase. For any facility determined during coordination of design as requiring construction Standby Services, CITY shall notify GRANTEE of the need for Standby Services during construction and to properly plan the coordination of that Standby Service.
  - d) With respect to any and all CITY work in the CITY Public right-of-way, the costs of protecting GRANTEE's facilities shall be at GRANTEE's sole expense. The CITY and its contractors shall not be required to pay any amount for the services of any personnel, Standby Service, or similar service for the protection of GRANTEE's facilities which may be necessary for any CITY-controlled excavation or other work.
- 14) Unauthorized Activities. GRANTEE shall not engage in any activity on CITY-owned property other than pre-approved aspects of Work allowed under this MOU. Any activity performed by GRANTEE that was not previously approved or otherwise authorized by this MOU, shall be removed by GRANTEE and the CITY-owned property shall be put back to its condition on the Effective Date at the GRANTEE's sole cost and expense, subject to the satisfaction of the CITY Contact.
- 15) Permanent Survey Markers. If any Work proposed by the GRANTEE will disturb a survey marker, the GRANTEE shall have a California Registered Land Surveyor (CRLS) locate and document all surveying monuments, lot stakes (tagged), centerline ties, and bench marks that shall be disturbed during construction at GRANTEE's own cost, PRIOR to any physical work commencing. Documentation shall be provided to the CITY that the surveying has been completed. If it is determined by the GRANTEE that no monuments will be disturbed, a CRLS must submit a stamped memo detailing such determination prior to obtaining a Traffic Control MOU for such Work.
- a) The GRANTEE shall be financially responsible for the CRLS to perform a Pre-Corner Record survey of all survey monuments identified to be disturbed, lot stakes (tagged), centerline ties and benchmarks to the Office of the County Surveyor prior to the start of construction, and also prior to the completion of construction.

Memorandum of Understanding

- b) The GRANTEE shall not disturb survey monuments, lot stakes (tagged), centerline ties, or benchmarks without notifying the CITY and providing to the CITY proof of submittal of the Pre-Corner Record forms to the Office of the County Surveyor. The GRANTEE shall bear the expense of replacing any that shall be disturbed without the permission from the CITY.
  - c) All surveying shall be done by a CRLS or a Registered Civil Engineer authorized to practice land surveying within the State of California.
  - d) The CRLS for GRANTEE shall tie out and reset all survey monuments, lot stakes (tagged), and/or centerline ties that are to be disturbed during construction in accordance with Section 8771 (Land Surveyors Act) of the Business and Professions Code of the State of California.
  - e) The CRLS for GRANTEE shall set new monuments or centerline ties to sufficiently enable the public right-of-way to be re-established in accordance with Section 8771 (Land Surveyors Act) of the Business and Professions Code of the State of California, to the satisfaction of the City Engineer.
- 16) Indemnification. GRANTEE shall protect, defend, indemnify, and hold CITY, its elected officials, officers, representatives, agents, and employees harmless from and against any and all claims asserted or liability established for damages or injuries to any person or property, including injury to GRANTEE's officers, employees, agents, contractors, invitees and guests, which arise out of or are in any manner directly or indirectly connected with this MOU, issuance of this MOU or GRANTEE's occupancy, use, development, maintenance, or restoration of the Work Area, including damages arising out of release of hazardous materials in the Work Area, and all expenses of investigating and defending against same, including without limitation reasonable attorney fees and costs. CITY may, at its election, conduct the defense or participate in the defense of any claim related in any way to this indemnification. If CITY chooses at its own election to conduct its own defense, participate in its own defense, or obtain independent legal counsel in defense of any claim related to this indemnification, GRANTEE shall pay all reasonable costs related thereto, including without limitation reasonable attorney fees and costs.
- 17) Revocable MOU. This MOU is not a lease and may be revoked at will by the CITY MANAGER, in his/her sole discretion: (a) immediately upon written notice delivered to GRANTEE if GRANTEE breaches or defaults on any of GRANTEE's obligations under this MOU or in case of an emergency; or (b) upon reasonable prior written notice, but not less than three (3) working days, delivered to GRANTEE if for CITY's convenience. CITY shall not be obligated for any burden or loss, financial or otherwise, which may be incurred by GRANTEE as a result of such revocation or the termination of this MOU.
- 18) Compliance with the Law. GRANTEE shall at all times in its use, occupancy, and maintenance of the Work Area comply with all applicable laws, rules, regulations and directives of competent governmental authorities, and at GRANTEE's sole cost and expense. GRANTEE shall annually deliver to CITY copies of all documentary evidence of such compliance received by or otherwise available to GRANTEE (e.g., validation of periodic inspections, if applicable).

- 19) Request for Records. Upon written request by the CITY, GRANTEE shall provide to the City within ten (10) calendar days, and immediately in the case of a CITY Manager-declared emergency, Geographic Information System (GIS) coordinate data or other locational records as the CITY in its sole discretion may deem appropriate for the CITY's requirements. The records provided in response to the CITY's request shall describe GRANTEE's facilities in geographical areas of any size that the CITY determines necessary to coordinate with the CITY's uses or any other lawful uses of the Streets throughout the CITY.
- a) GRANTEE's contention that information is confidential shall not relieve Grantee from the duty to produce the information to CITY. GRANTEE acknowledges that any information required to be submitted or provided in fulfillment of the obligations of the Franchise Agreement is a public record subject to disclosure in response to a California Public Records Act (California Government Code sections 6250 – 6276.48)(CPRA) request, unless the CITY or a court of competent jurisdiction determines that a specific exemption in the CPRA applies. If GRANTEE submits information clearly marked confidential or proprietary, the CITY shall protect such information and treat it with confidentiality to the extent permitted or required by law; provided however, that the CITY shall assume no liability for having access to GRANTEE's records for official CITY purposes except by a judgment in a court of competent jurisdiction upon a claim arising from the established sole negligence or willful misconduct of the CITY, its officers, agents, or employees. It shall be Grantee's responsibility to provide to the CITY the specific legal grounds on which the CITY can rely in withholding information from public disclosure should GRANTEE request that the CITY withhold such information. General references to sections of the law will not suffice. Rather, GRANTEE shall provide a specific and detailed legal basis, including applicable case law or other law that reasonably establishes the requested information is exempt from disclosure. If, at the time the documents are provided to the CITY, GRANTEE does not provide a specific and detailed legal basis for requesting the CITY to treat the information as confidential, to protect it from release, and to withhold alleged confidential or proprietary information from CPRA requests, the CITY is not required to treat the information as being confidential and may release the information as required by the CPRA. When reviewing any request by GRANTEE for confidentiality, the CITY will consider California Government Code section 6254(e), which provides a CPRA exemption for records concerning geological and geophysical data relating to utility systems development that are obtained in confidence from any person.
- b) The CITY shall not be required to execute any non-disclosure agreement with GRANTEE to obtain prompt confidential access to GRANTEE's records for its facilities in CITY Public right-of-way, except by order of a state or federal governmental agency or court having jurisdiction to impose such requirement. Absent such order, the CITY may, but shall not be required, to execute non-

disclosure agreements with GRANTEE respecting the locations of GRANTEE's facilities.

- 20) Security and Safety of MOU Area. GRANTEE shall bear sole responsibility for the security and safety of the Work Area relating to any Work performed as authorized by this MOU or under the direction of GRANTEE. GRANTEE shall be responsible for the maintenance, cleanup, and securing of the Work Area, as appropriate, immediately following each day's work to ensure security and safety. GRANTEE shall comply with all applicable laws, rules, regulations and directives of competent governmental authorities, at GRANTEE's sole cost and expense, with respect to maintaining the Work Area in a safe and secure manner during the Term. CITY has no obligation to provide oversight of the Project or staffing or resources for the maintenance of the Work Area related to the Work performed under this MOU.
  
- 21) Hazardous Materials. GRANTEE shall not allow the illegal installation, storage, utilization, generation, sale or release of any Hazardous Substance or otherwise regulated substances in, on, under or from the Work Area by any of GRANTEE's officers, employees, agents, contractors, invitees and guests. GRANTEE and GRANTEE's officers, employees, agents, contractors, invitees and guests shall not install, store, utilize, generate or sell any Hazardous Substance on the Work Area without CITY's prior written consent. GRANTEE shall, prior to initiating any operations, obtain all required MOUs from applicable regulatory agencies, including without limitation the San Diego County Department of Environmental Health, local fire agencies, the San Diego County Department of Weights and Measures, the San Diego County Air Pollution Control District, and the San Diego Regional Water Quality Control Board. Installing, utilizing, storing, or any other presence of a Hazardous Substance includes boxes, bags, bottles, drums, cylinders, above or below ground tanks, equipment with tanks, or any other type of container, equipment or device which holds or incorporates a Hazardous Substance or hazardous waste.
  - a) Release. For all purposes of this MOU, a "release" shall include without limitation any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or otherwise disposing of a Hazardous Substance.
  - b) Hazardous Substance. For all purposes of this MOU, "Hazardous Substance" shall mean any substance listed by the Environmental Protection Agency or the State of California as a hazardous substance, and all types of petroleum-related substances and their chemical constituents.
  - c) Remediation. If GRANTEE's occupancy, use, development, maintenance, or restoration of the Work Area results in a release of a Hazardous Substance, GRANTEE shall pay all costs of remediation and removal to the CITY's satisfaction for unrestricted reuse of the MOU Area, and in accordance with all applicable laws, rules, and regulations of governmental authorities.
  - d) Removal. If GRANTEE or GRANTEE's officers, employees, agents, contractors, invitees and guests has received approval and MOUs to store, utilize, generate or install, or otherwise bring Hazardous Substances to the MOU Area, GRANTEE shall remove all Hazardous Substances in any type of container, equipment or device from the Work Area immediately upon or prior to the expiration or earlier termination of this MOU. CITY reserves the right to conduct inspections of the

Work Area and/or request documentation demonstrating the legal removal and/or disposal of the hazardous materials, wastes or other containers, equipment or devices from the MOU Area. GRANTEE shall be responsible for any and all costs incurred by CITY to remove any container, equipment or device requiring disposal or removal as required by this provision.

- e) Indemnity. GRANTEE shall protect, defend, indemnify, and hold CITY harmless from any and all claims, costs, and expenses related to environmental liabilities resulting from GRANTEE's occupancy, use, development, maintenance, or restoration of the Work Area during the Term, including without limitation: (i) costs of environmental assessments; (ii) costs of regulatory remediation oversight; (iii) costs of remediation and removal; (iv) any necessary CITY response costs; (v) all fines, penalties or fees assessed by any regulatory agency; (vi) damages for injury to natural resources, GRANTEE's officers, employees, invitees, guests, agents or contractors, or the public; and (vii) all costs of any health assessments or health effect studies. This only applies to hazardous materials released by the Work covered under this MOU, and does not include any hazardous materials introduced by a separate project or party.
  - f) Notice of Release. If GRANTEE knows or has reasonable cause to believe that a Hazardous Substance has been released on, from or beneath the MOU Area, GRANTEE shall immediately notify CITY and any appropriate regulatory or reporting agency pursuant to California Code of Regulations Title 19 and any other applicable laws or regulations. GRANTEE shall deliver a written report thereof to CITY within three (3) days after receipt of the knowledge or cause for belief and submit any required written reports to regulatory or reporting agencies as required by regulation or law. If GRANTEE knows or has reasonable cause to believe that such substance is an imminent release or is an imminent substantial danger to public health and safety, GRANTEE shall take all actions necessary to alleviate the danger. GRANTEE shall immediately notify CITY in writing of any violation, notice to comply, or notice of violation received or the initiation of environmental actions or private suits related to the MOU Area.
- 22) Restoration of MOU Area. Except as otherwise provided in this MOU, in the event that there is damage or destruction to City facilities or improvements that are caused by GRANTEE, then prior to the expiration or as soon as practicable after termination of this MOU, GRANTEE shall restore such City facilities or improvements, subject to the satisfaction of CITY Contact. GRANTEE shall review and comply with all requirements for such restoration within in San Diego Municipal Code Article 2, Division 11 "Procedures for Work on Utility Installations in the Public Right-of-Way" and Division 12 "Excavations in the Public Right-of-Way."
- 23) Subcontractors. At permit issuance, GRANTEE shall provide a written list of any and all contractors and subcontractors to the CITY Contact, including name, address, email, fax and phone number. All construction work requiring a licensed contractor pursuant to the Contractors' State Licensing Laws (California Business & Professions Code sections 7000-7191) shall be done by contractors licensed within the State of California.



- 24) Water Quality Assurances. GRANTEE shall, at its sole cost and expense, comply with all laws, rules, regulations and direction of competent governmental authority (such as the San Diego Regional Water Quality Control Board) relating to water quality assurance and storm water management. GRANTEE acknowledges and agrees that such legal requirements may be amended as required by federal, state and City law.
- a) NPDES. GRANTEE shall comply with all applicable requirements of the National Pollutant Discharge Elimination System (“NPDES”) MOU in force on the Effective Date of this MOU (i.e., MOU No. R9-2013-0001), and any and all amendments thereto and all applicable succeeding NPDES MOUs.
- b) Storm Water Management. GRANTEE shall comply with all applicable requirements of the San Diego Municipal Code Chapter 4, Article 3, Division 3: Storm Water Management and Discharge Control (the “Stormwater Code”), and employ “Best Management Practices,” as that term is defined by the Stormwater Code, and as approved by CITY, in its governmental capacity, under its Stormwater Management Program. Failure to comply may subject the GRANTEE to administrative and/or judicial remedies.
- 25) Acceptance of MOU Area. By signing this MOU, GRANTEE represents and warrants that it has independently inspected the Work Area and made all tests, investigations and observations necessary to satisfy itself as to the condition of the Work Area and its suitability for the Project. GRANTEE further represents and warrants that it is not relying on any representation by CITY as to the condition of the Work Area or its suitability for the Work, and that GRANTEE is relying solely on its own and independent inspections, tests, investigations and observations of the Work Area in entering into this MOU. GRANTEE accepts the Work Area in its current condition. GRANTEE acknowledges and agrees that unless set forth in this MOU, CITY has no obligation to improve, modify, repair, replace, alter, secure, or otherwise develop the Work Area at any time. GRANTEE shall not hold CITY responsible for any defects in the Work Area at any time. During the Term of this MOU, GRANTEE accepts and assumes all risk of harm to all persons and property from any defects in the Work Area or any improvements thereon and shall be solely responsible, therefore.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed:

**CITY OF SAN DIEGO**

\_\_\_\_\_  
By:  
Its:

\_\_\_\_\_  
Date:

Approved as to form:

\_\_\_\_\_  
By:  
Its: Deputy City Attorney

\_\_\_\_\_  
Date:

**GRANTEE**

\_\_\_\_\_  
By:  
Its:

\_\_\_\_\_  
Date:

Approved as to form:

\_\_\_\_\_  
By:  
Its: Legal Counsel

\_\_\_\_\_  
Date:

## Attachment 3

[TO BE PROVIDED AT A FUTURE DATE]

**EXHIBIT B**

**GAS FRANCHISE**

ORDINANCE NUMBER O-\_\_\_\_\_ (NEW SERIES)

DATE OF FINAL PASSAGE \_\_\_\_\_

AN ORDINANCE OF THE COUNCIL OF THE CITY OF SAN DIEGO GRANTING TO \_\_\_\_\_, THE FRANCHISE (1) TO USE, FOR TRANSMITTING AND DISTRIBUTING GAS SUITED FOR ANY AND ALL LAWFUL PURPOSES, ALL PIPES AND APPURTENANCES WHICH ARE NOW OR MAY HEREAFTER BE LAWFULLY PLACED AND MAINTAINED IN THE STREETS WITHIN THE CITY OF SAN DIEGO; (2) TO CONSTRUCT, MAINTAIN, AND USE IN THE STREETS ALL PIPES AND APPURTENANCES, NECESSARY TO TRANSMIT AND DISTRIBUTE GAS SUITED FOR USE BY CONSUMERS FOR ANY AND ALL LAWFUL PURPOSES; (3) TO UTILIZE PIPES AND APPURTENANCES IN THE STREETS FOR TRANSMITTING GAS FOR USE OUTSIDE THE BOUNDARIES OF THE CITY FOR ANY AND ALL LAWFUL PURPOSES; AND (4) FOR COOPERATION WITH CITY CLIMATE ACTION AND CLIMATE JUSTICE GOALS; AND PROVIDING THE TERMS AND CONDITIONS OF THE FRANCHISE SO GRANTED.

BE IT ORDAINED, by the Council of the City of San Diego, as follows:

**Section 1. Definitions**

The following definitions apply in this Ordinance and are capitalized when they appear:

(a) "Grantee" means \_\_\_\_\_.

(b) "City" means the City of San Diego, a municipal corporation of the State of California, in its present incorporated form or in any later reorganized, consolidated, enlarged or reincorporated form.

(c) "Applicable Law" means any law, rule, regulation, requirement, guideline, action, determination or order of, or legal entitlement issued by, any governmental body having jurisdiction, applicable from time to time to the operation and ownership of Grantee's gas facilities and to Grantee's business operations, or any other transaction or matter contemplated by the Franchise (including any which concern health, safety, fire, environmental protection, transmission and distribution, metering, billing, quality and use, public records, labor relations, environmental

plans, building codes, nondiscrimination, and the payment of minimum and prevailing wages), including without limitation applicable provisions of the California Constitution, the California Public Utilities Code, the California Labor Code, and orders and decisions of the California Public Utilities Commission (CPUC) and Federal Energy Regulatory Commission (FERC).

(d) “Bid Amount” means \$\_\_\_\_\_ plus any interest as provided in Section 4(d).

(e) “Books and Records” means any and all of Grantee’s records, regardless of form, including physical, digital, and electronically stored information, including but not limited to records of income, expenditures, finance, charts, diagrams, ledgers, pictures, drawings, Geographic Information System (GIS) locational data, photographs, and notes, which relate to the placement, location, operation, and maintenance of Grantee’s facilities in City Streets, and any other records determined by the City to be relevant to enforcement of the Franchise.

(f) “City Manager” means the person defined in Sections 28, 260, and 265 of the Charter of the City of San Diego (San Diego Charter) as those provisions existed on the Effective Date or as those provisions may be hereafter amended, and the meaning shall include any person lawfully delegated rights or responsibilities by such person.

(g) “Commencement of Operations Date” means the date which is thirty (30) days after final passage of this Ordinance by the City Council if the Grantee already possesses a Certificate of Public Convenience and Necessity pursuant to California Public Utilities Code Division 1, Part 1, Chapter 5, Article 1. If the Grantee does not yet possess a Certificate of Public Convenience and Necessity, the term means the date on which Grantee obtains approval from the CPUC to exercise the Franchise rights by grant of a Certificate of Public Convenience and Necessity.

(h) “Construct, Maintain, and Use” means to construct, erect, install, operate, maintain, use, repair, relocate, or replace Pipes and Appurtenances thereto in, upon, along, across, under or over the Streets of the City.

(i) "CPUC" means the California Public Utilities Commission or any successor agency.

(j) "Effective Date" means the thirtieth day from and after the final passage of this Ordinance by the City Council pursuant to San Diego Charter section 295.

(k) "Franchise" means the Franchise granted by the City Council to \_\_\_\_\_ by Ordinance No. O-\_\_\_\_\_, pursuant to San Diego Charter sections 103, 103.1, 104, and 105.

(l) "Gas" means natural, bio, or artificial gas or a mixture of any of them

(m) "Gas Franchise Fee Surcharge" means the total amount of surcharges allowed by the Franchise and the CPUC to be levied solely on customers in the City as a consequence of the requirements of the Franchise, consisting prior to the Effective Date of those surcharges previously authorized by CPUC Resolution No. E-3788 and Decision No. 80234, which total 1.03% of Grantee's Gross Receipts as of the Commencement of Operations Date.

(n) "Gross Receipts" means all gross operating revenues received by Grantee from the sale of Gas to Grantee's customers with points of service within the corporate limits of the City (including, but not limited to, sales to military reservations with points of service within the City's corporate limits) which are credited in Account Nos. 480, 481, and 482 of the current Uniform System of Accounts of FERC as adopted by the CPUC or similar superseding accounts, plus all revenues collected from CPUC-authorized surcharges rendered solely upon the ratepayers within the City as a result of the Franchise accounted for in Account No. 488 (less any portion of such surcharges which may be approved by the CPUC to capture the franchise fee on these revenues), less uncollectible amounts, and less any refunds or rebates made by Grantee to such customers pursuant to CPUC orders or decisions.

(o) "Pipes and Appurtenances" means pipes, pipelines, mains, services, traps, vents, vaults, manholes, meters, communication circuits, appliances, attachments, appurtenances, and, without limitation to the foregoing, any other equipment or property located or to be located in,

upon, along, across, under or over the streets of the City, and used or useful for the purpose of the transmission and distribution of Gas and for internal communication systems, sometimes otherwise referred to as “facilities.”

(p) “Streets” means the public freeways, highways, streets, ways, alleys and places as they now or may hereafter exist within the City, but excludes easements or fees held by Grantee.

**Section 2. Purpose**

(a) The Franchise (1) to use, for transmitting and distributing Gas suited for any and all lawful purposes, all Pipes and Appurtenances which are now or may hereafter be lawfully placed and maintained in the Streets within the City; (2) to Construct, Maintain, and Use in the Streets all Pipes and Appurtenances, necessary to transmit and distribute Gas suited for use by consumers for any and all lawful purposes; (3) to utilize Pipes and Appurtenances in the Streets for transmitting Gas for use outside the boundaries of the City for any and all lawful purposes; (4) to aid in the City’s establishment of a Climate Equity Fund; and (5) subject to Applicable Law, to provide for Grantee’s commitment to cooperate with the City in good faith on principles and policies for the attainment of the City’s Climate Action Plan, local energy, energy justice, and climate equity objectives, including but not limited to the reduction of greenhouse gas emissions to the fullest extent practical through energy efficiency measures, cooperation with any community choice aggregation program, the increased use of renewable sources of electric generation, wider deployment of local distributed energy resources, and advancing the electrification of transportation; is hereby granted to \_\_\_\_\_, a corporation organized and existing under and by virtue of the laws of the State of \_\_\_\_\_.

(b) If Gas and electric franchises are awarded to the same Grantee, the requirements of Sections 6, 9, and 10, need not be duplicated.

(c) Attached as Attachment 1 is a Table of Contents for the Franchise.



**Section 3. Term**

(a) The right, privilege, and Franchise, subject to each and all of the terms and conditions contained in this Ordinance, is hereby granted to \_\_\_\_\_, a corporation organized and existing under and by virtue of the laws of the State of \_\_\_\_\_, for the primary term of (10) years from and after the Commencement of Operations Date.

(b) Subject to the conditions in Section 3(b), the primary term provided in Section 3(a) shall automatically be extended for a secondary term of ten (10) years if at the end of the primary term Grantee has faithfully performed all conditions agreed to in the Franchise and Section 10 herein. The Grantee's compliance with the terms of the Franchise and Cooperation Agreement shall be presumed unless the City Manager recommends against an extension and reasonably proves to the City Council by a preponderance of the evidence that Grantee has not complied with any term. In gathering such evidence, the City Manager shall confer with the Compliance Review Committee, described in Section 6, below. If the City Manager makes such a recommendation to the City Council, then a vote of at least six (6) members of the Council shall be required to establish Grantee's non-compliance with the Franchise or the Cooperation Agreement. Upon such a City Council vote of non-compliance, the second ten (10) year term provided in Section 3(b) shall be void and the Franchise shall terminate at the end of the primary term provided in Section 3(a). If the City Manager recommends to the City Council that Grantee has not qualified for the secondary ten (10) year term provided in Section 3(b), such recommendation shall be presented to the Council not more than two years or less than one year before the end of the primary term provided in Section 3(a).

(c) All associated agreements, rights, and obligations under the Franchise shall also expire at the expiration or earlier termination of the Franchise, except for the completion and

discharge of obligations or payments required hereunder and accrued during the term. The bond and insurance requirements shall remain in effect until all obligations or payments required by the Franchise or related documents are completed, and any disputes are resolved. The bond shall remain in effect until the City issues a letter to Grantee acknowledging discharge of all required obligations and payments.

**Section 4. Consideration**

(a) The rights and privileges herein granted are upon the express condition that Grantee, as consideration therefor and as compensation for the use of the Streets of the City as herein authorized and permitted, shall pay compensation to the City in the following amounts and manner: Grantee shall pay the Bid Amount, and shall pay each year in United States dollars, a sum equal to three percent (3%) of Grantee's Gross Receipts during the preceding calendar year, or fractional year, beginning on the Commencement of Operations Date. In addition, Grantee shall pay any applicable statutory surcharge, such as the Municipal Lands Use Surcharge required pursuant to California Public Utilities Code section 6350, *et seq.* Any City-imposed fees for right-of-way usage (Right-of-Way Fee) shall be credited with the consideration paid herein. Any revenues that remain after this credit of Right-of-Way Fees will be credited towards any additional fees the City imposes for inspection, trenching, cutting, or deterioration of the right-of-way. The three percent (3%) of Gross Receipts required to be paid to the City pursuant to Section 4(a) shall be deemed to be for Gas revenues for all lawful purposes except for lighting; there shall be no fee for Gas furnished for lighting.

(b) Grantee or any successors shall not at any time apply or request to the CPUC, by application, advice letter, or any other filing, to include in rates or surcharges all or any portion of the Bid Amount, or interest thereon, paid to the City for award of the Franchise. The Bid Amount, and any interest thereon, is for the purpose of acquiring the Franchise and shall be solely an

obligation of the Grantee, and no part of it shall be paid by Gas ratepayers. The Bid Amount is separate from and additional to the consideration to be paid for exercise of the Franchise under Sections 4(a) and 4(c), and shall be paid and accepted upon the express condition that Grantee shall not at any time apply to or otherwise request from the CPUC to recover any portion of the Bid Amount, or interest thereon, from Gas ratepayers in rates or surcharges. The Franchise and any previously paid portions of the Bid Amount shall be forfeited, and all future notes will be due and payable, if the Grantee or any successor ever applies to the CPUC or seeks or attempts to recover all or any portion of the Bid Amount or any interest thereon in rates or surcharges charged to customers inside or outside the City.

(c) During the term of the Franchise, Grantee covenants and agrees, that if Grantee agrees to pay another municipality more than three percent (3%) of Grantee's Gross Receipts (including receipts on CPUC authorized Gas surcharges) in a Gas franchise, Grantee shall notify the City of such agreement in writing within ten (10) calendar days and offer to amend the Franchise to increase the franchise fee to equal the percentage of Gross Receipts in such other franchise. If the City agrees to accept the offer, the City and Grantee will execute and adopt any documents necessary to amend the Franchise as soon as practicable given the need for regulatory approvals. To make such amendments effective, Grantee shall expeditiously file an application or request with the CPUC, as Grantee deems necessary, to gain approval of the amendments and the resulting increase in the franchise fee surcharge chargeable to the residents of the City. Grantee shall not be in violation of Section 4(c) if the CPUC fails to approve any such application or request.

(d) Section 4(d) applies only if Grantee elected to pay the Bid Amount in installments as consideration for the grant of the Franchise. If the structured promissory note method is selected by Grantee for paying the Bid Amount, then:

(1) Each of the nine (9) promissory notes taken together shall provide for a succession of nine (9) annual maturity dates beginning on the first anniversary of the term and ending on the tenth anniversary, and shall not be due and payable to the City until the maturity date of each installment on the note, except as provided in Section 4(d)(7).

(2) The maturity dates of the irrevocably secured promissory note installments shall be the annual anniversary date after each successive year following the Effective Date of the Franchise.

(3) Each successive promissory note installment shall be provided in nine (9) equal principal amounts plus interest, calculated on an actual/actual basis at the annual rate of three and thirty-eight one hundredths of a percent (3.38%), so the Bid Amount is fully paid to the City by the first day of the eleventh year of the Franchise term so long as the Franchise remains effective to that date.

(4) The City requires a minimum credit rating for the issuing financial institutions providing the letter of credit submitted by Grantee to be and remain of the "A" category or better for its senior unsecured debt, or equivalent. If at any point during the term of the Franchise, none of the following Nationally Recognized Credit Rating Agencies (Moody's, Standard & Poor's, or Fitch) rate the financial institution with at least an "A" category, then Grantee must immediately replace the submitted letter of credit with one that is acceptable to the City, or pay the remaining notes in full with interest specified herein accrued to that date. All costs associated with replacing the letter of credit shall be the responsibility of Grantee. The letter of credit shall provide that the City may unilaterally draw on the letter of credit to fulfill any Bid Amount obligation not paid by Grantee when due.

(5) Grantee may pay cash in discharge of a promissory note at any time before its maturity date, in which event interest shall be adjusted for early payment. The submission of cash payment shall be upon appointment with the City Treasurer's office.

(6) If the Franchise is not in effect on any future note maturity date due to early termination of the Franchise by the City to acquire the Gas distribution system, the uncashed notes shall be void; however, the City shall not be required to refund any amounts of the Bid Amount already paid.

(7) If the Franchise is not in effect on any future note maturity date due to the Grantee's breach and forfeiture of the Franchise, the maturity dates on all the future notes shall be advanced to the date of forfeiture and the principal amount of all such notes shall be immediately due and payable to the City.

**Section 5. Reports, Dates of Payment to City, Audits**

(a) On or before the 15th day of February of each calendar year during the term of the Franchise, as defined in Section 3, and forty-five (45) calendar days after the expiration of the Franchise term, Grantee shall file with the City Clerk, the original, and with the Chief Financial Officer of the City, one copy, of a statement signed by its chief financial officer evidencing the Gross Receipts during the preceding calendar year or fractional calendar year.

(b) Within ten (10) calendar days after the filing of the statement of Gross Receipts required to be filed on or before the 15th day of February 2022, Grantee shall pay to the City Treasurer the money herein required to be paid by Grantee to the City upon the basis of the data set forth in said statement.

(c) Thereafter, no later than the 25th day of February, the 25th day of May, the 25th day of August, and the 25th day of November of each calendar year during the term of the Franchise, Grantee shall pay the City Treasurer one-fourth (1/4) of the money herein required to be

paid by Grantee to the City upon the basis of the data set forth in the statement required by Section 5(a). If the first year is a fractional year, Grantee shall pay quarterly amounts not paid by the prior Grantee on the basis of the data in the prior Grantee's Gross Receipts for the preceding year on the dates required herein. By this method of payment it is contemplated and understood that Grantee is in effect paying the money herein required to be paid by Grantee to the City under Section 5(c) on the basis of Gross Receipts for the preceding calendar year and that an adjustment shall be made as more fully set forth in Section 5(d).

(d) Within ten (10) calendar days after the filing of the statement required by Section 5(a), Grantee shall pay the City Treasurer, or receive as a refund from the City, as the case may be, a sum of money equal to the difference between the sum of the payments of money made in accordance with Section 5(c) and the annual payment of money herein required to be paid by Grantee to the City upon the basis of the data set forth in said statement.

(e) The City Manager, City Auditor, City Attorney, or any designees, at any reasonable time during business hours, may make examination at Grantee's office or offices, or through written electronic request and exchange of its Books and Records, germane to and for the purpose of verifying the data set forth in the statement required by Section 5(a). Grantee shall produce its Books and Records no later than five (5) business days after written request from the City.

(f) All Books and Records subject to examination in the Franchise shall be kept within the County of San Diego, or in such other place as the reasonable convenience of Grantee may require, until at least five (5) years following the termination of the Franchise; and if it becomes necessary for the City Manager, City Auditor, City Attorney, or any representative designated by the City, to make such examination at any place other than within the County, then all increased

costs and expenses to the City necessary or incident to such examination and resulting from such Books and Records not being available within the County, shall be paid to the City by Grantee on demand.

(g) Grantee shall file with the City Manager a copy of its annual report to the CPUC as soon as practicable after the original report has been filed with the CPUC, or its successor in authority.

(h) Upon request of the City, Grantee shall provide the City with any publicly available reports filed by Grantee with the CPUC.

(i) In addition to the remedies provided in Section 13, if Grantee fails to make the payments for the Franchise on or before the due dates as required in Sections 5(b) through 5(d), Grantee shall pay as additional consideration both of the following amounts:

(1) A sum of money equal to two percent (2%) of the amount due. This amount is required in order to defray those additional expenses and costs incurred by the City by reason of the delinquent payment including, but not limited to, the cost of administering, accounting and collecting said delinquent payment and the cost to the City of postponing services and projects necessitated by the delay in receiving revenue; and

(2) A sum of money equal to one percent (1%) of the amount due per month or any portion thereof as interest and for loss of use of the money due.

**Section 6. Compliance Review Committee and Report**

(a) An audit of Grantee's performance of the conditions of the Franchise shall occur every two (2) years after the Commencement of Operations Date. The City shall establish a Franchise Compliance Review Committee (Review Committee) that will consist of five (5) members: three (3) appointees selected by the City Council and two (2) appointees selected by the Mayor. No nominee with a conflict of interest shall be appointed to the Review Committee. The

Review Committee shall be a citizens' committee formed pursuant to San Diego Charter section 43(b) and Council Policy 000-13. The Review Committee shall be created and established by City Council resolution every two (2) years only for the clearly defined purpose in the resolution, which shall include the duties in Section 6(b), and shall be temporary in nature and dissolved upon the completion of the objectives for which it was created. The Review Committee shall be created, and appointments shall be made, before the end of the first year of each successive two-year period of the Franchise term. The Review Committee, which shall meet publicly and comply with the Ralph M. Brown Act, shall establish a mechanism by which members of the public may communicate with the Review Committee concerning the Franchise.

(b) The City shall use a competitive process to retain a qualified, independent, third-party auditor (independent auditor) every two (2) years. The independent auditor shall perform an audit of Grantee's conformance and compliance with all conditions of the Franchise and produce a written report documenting the work performed and the conclusions reached. The audit shall address Grantee's fulfillment of financial, operational, documentary, and cooperative requirements under the Franchise. The Grantee shall appoint an executive level representative to serve as the principal person responsible for coordinating with the independent auditor. The audit shall be completed and provided to the Review Committee no later than sixty (60) calendar days before the outside due date of the Review Committee's report. If Grantee fails to cooperate with the independent audit, the auditor's report shall document the refusal and any reason Grantee stated for failing to cooperate. The Review Committee shall review the independent auditor's report and shall provide the auditor's report and its own written report and recommendations to the City Council within one hundred eighty (180) calendar days of the end of each two-year period of the Franchise term.



(c) Within five (5) business days, Grantee shall comply and cooperate with all requests made by the City Manager, City Attorney, independent auditor, and City Auditor, or designees, which the requestors may deem germane to verifying Grantee's compliance with the Franchise conditions. Upon request, Grantee shall provide to the City Manager, City Attorney, independent auditor, or City Auditor, or their designees, and at no cost to the City, all Books and Records required to be made available to the City under the Franchise, within five (5) business days. If Grantee contends that legal restrictions prevent compliance with any part of the request, Grantee shall provide in writing a specific legal basis that clearly establishes that the law, the CPUC, or other agency with jurisdiction requires or prohibits Grantee from releasing the requested Books and Records. General references to provisions of the law or Grantee business preferences will not suffice.

(d) The independent auditor shall be provided access to interview the City and employees of Grantee designated by Grantee regarding any subject which the auditor in its sole discretion deems relevant to confirming Grantee's compliance with the Franchise, within five (5) business days after any request.

(e) The procedures provided in Section 6 shall be in addition to, and not in lieu of, the City's right to audit under Section 5. Nothing in Section 6 shall limit or impair the right of the City Auditor to conduct its own audits of Grantee's Books and Records needed to verify compliance with the Franchise, pursuant to San Diego Charter section 39.2.

**Section 7. Compliance with Laws**

(a) All facilities or equipment of Grantee that Grantee shall construct, maintain and use or remove, pursuant to the provisions of the Franchise, shall be accomplished in accordance with Applicable Law and with the ordinances, rules, and regulations of the City now or as hereafter

adopted or prescribed, and such rules or regulations as are promulgated under State law, or orders of the CPUC or other governmental authority having jurisdiction in the premises.

(b) Without limiting the general applicability of the foregoing paragraph, or diminishing in any way the significance and consequence of Grantee's duty to comply with all laws, Grantee shall specifically observe and fully comply with the ordinances and regulations of the City as provided in Sections 8, and any effective Administrative Practices Memorandum of Understanding granted pursuant thereto.

**Section 8. City Reserved Powers**

(a) The City reserves the right for itself to lay, construct, erect, install, use, operate, repair, replace, remove, relocate, regrade, or maintain below surface or above surface improvements of any type or description in, upon, along, across, under or over the Streets of the City. The City further reserves the right to relocate, remove, vacate, or replace the Streets themselves. If the necessary exercise of the City's reserved rights conflicts with any Pipes and Appurtenances of Grantee Constructed, Maintained, and Used pursuant to the provisions of the Franchise, whether or not previously Constructed, Maintained, and Used, Grantee shall, without cost or expense to the City within ninety (90) calendar days after a request in writing by the City Manager, begin the physical field construction of changing the location of all conflicting facilities or equipment. Grantee shall proceed promptly to complete such required work.

(b) Irrespective of any other provision of the Franchise, Grantee's right to Construct, Maintain, and Use, or remove, Pipes and Appurtenances shall be subject at all times to the right of the City, in the exercise of its municipal authority and police power, to require the removal or relocation of Pipes and Appurtenances at the sole cost and expense of Grantee. On this absolute reservation, no exception of any kind shall pass to Grantee, including that there shall be no exception for preexisting Grantee construction, for City reconfiguration or vacation of Streets in a

previously-served area, for such reconfigurations or vacations being related to development of adjoining property, for the City allegedly acting in a proprietary capacity with respect to water or wastewater service, or for any other contention of exception. If Grantee has no permanent easement and the conflicting Grantee facilities are in a City Street in a service area previously and continuously served by a gas corporation as defined in California Public Utilities Code section 222, and if the City thereafter causes a Street to be used differently for any City uses (including water, wastewater, reclaimed water, storm water, thermal water, communication, or any other City facilities, whether or not previously existing), or causes such Streets to be removed, realigned, widened, narrowed, vacated, regraded, or replaced in such previously-served area, then without any exception and notwithstanding any doctrine of distinction, the cost of relocating or removing Grantee's facilities shall be at Grantee's sole expense.

(c) If Grantee shall ever assert any exception to its obligations with respect to the City-reserved rights provided in Section 8, the City shall not be required to pay any costs for resolving conflicts associated with the presence of Grantee's facilities while any dispute is pending. Notwithstanding any Grantee dispute under Section 8, Grantee shall proceed as provided in Section 8(a) to promptly perform and pay any and all costs of relocations required by Section 8, and the City shall not be required under any circumstances to contribute any amount under reservation of right or otherwise, toward the prompt resolution of such conflicts. It is the express intent of Section 8 that no exceptions shall be available to the duty of Grantee to pay all costs, and to promptly and without any conditions not provided herein perform relocation or removal of its facilities that conflict with the City's primary reserved rights to the uses of Streets. The City shall not be required to share Grantee facility relocation costs while any dispute is pending.

(d) If the City directs Grantee to relocate its conflicting facilities and Grantee believes it cannot meet the schedule required by Section 8(a), Grantee may apply in writing to the City

Manager for a revised schedule. The application shall document the facts as to why Grantee is unable to meet the schedule as required by Section 8(a) and the date on which work would begin. The parties shall cooperate in good faith respecting such applications, and the City's denial of relocation schedule adjustment requests shall not be unreasonable and shall consider the scope and complexity of any project or program. The City Manager may adjust the schedule provided in Section 8(a) by written instruction to Grantee, and Grantee shall meet the adjusted schedule.

**Section 9. Administrative Practices**

(a) Grantee's exercise of rights to install, maintain, and operate its facilities in the Streets of the City shall at all times be subject to obtaining and maintaining in force an Administrative Practices Memorandum of Understanding (Administrative MOU). The Administrative MOU shall define Grantee's administrative practices throughout the Streets while exercising the Franchise rights; however, the Administrative MOU shall not be in lieu of or relieve Grantee from complying with the Franchise terms or obtaining more particular permits required for Grantee's specific projects or activities. The Administrative MOU shall prescribe the categories of work that Grantee may perform without additional specific permits, and the categories of work that will require additional specific permits. The Administrative MOU shall be granted by the City Manager subject to the terms and procedures of the Franchise and on such other reasonable terms as may be established by the City Manager following consultation with Grantee and other utilities using the Streets. Grantee shall apply for an Administrative MOU within thirty (30) calendar days after the Commencement of Operations Date, and the initial Administrative MOU shall expire on the second anniversary after the Commencement of Operations Date. Each successive Administrative MOU shall have a term of two (2) years. Grantee shall not be charged a fee to obtain the Administrative MOU. The Administrative MOU shall be consistent with all terms in the Franchise, specifically including the terms of Sections 8 and 9. If there is any conflict between the

provisions of the Franchise and the provisions of the Administrative MOU, the provisions of the Franchise shall control, and the conflicting provisions of the Administrative MOU shall be void.

(b) The Administrative MOU shall comply with the general terms attached as Attachment 2, and any additional terms established by the City Manager. Subject to Applicable Laws and the requirements of the Franchise, the City Manager may take due consideration of Grantee's requests regarding provisions of each biennial Administrative MOU, provided the requests are consistent with and do not conflict with the terms of the Franchise. The City Manager shall determine if the conditions of the Franchise are fulfilled upon any application for an Administrative MOU and if Grantee's application is complete. The City Manager shall grant an Administrative MOU within thirty (30) calendar days after Grantee's complete application. The application shall contain sufficient information for the City Manager to assure compliance with all the requirements in the Franchise and the general terms in Attachment 2. Grantee shall apply for each successive Administrative MOU not less than one hundred eighty (180) calendar days prior to expiration of the prior Administrative MOU. Any Administrative MOU granted by the City Manager shall be subject to the following conditions:

(1) Upon written request by the City Engineer or designee, Grantee shall provide to the City within ten (10) calendar days, and immediately in the case of a City Manager-declared emergency, GIS coordinate data, or other locational records as the City in its sole discretion may deem appropriate for the City's requirements. The records provided in response to the City's request shall describe Grantee's facilities in geographical areas of any size that the City determines necessary to coordinate with the City's uses or any other lawful uses of the Streets throughout the City.

(A) Grantee's contention that information is confidential shall not relieve Grantee from the duty to produce the information to City. Grantee acknowledges that any

information required to be submitted or provided in fulfillment of the obligations of the Franchise is a public record subject to disclosure in response to a California Public Records Act (California Government Code sections 6250 – 6276.48) (CPRA) request, unless the City or a court of competent jurisdiction determines that a specific exemption to the CPRA applies. If Grantee submits information clearly marked confidential or proprietary, the City shall protect such information and treat it with confidentiality to the extent permitted or required by law; provided however, that the City shall assume no liability for having access to Grantee's records for official City purposes except by a judgment in a court of competent jurisdiction upon a claim arising from the established sole negligence or willful misconduct of the City, its officers, agents, or employees. It shall be Grantee's responsibility to provide to the City the specific legal grounds on which the City can rely in withholding information from public disclosure should Grantee request that the City withhold such information. General references to sections of the law will not suffice. Rather, Grantee shall provide in writing a specific legal basis, including applicable case law or other law, that reasonably establishes the requested information is exempt from disclosure. Grantee agrees to defend and indemnify City if City is sued for withholding from disclosure information deemed confidential by Grantee. If, at the time the documents are provided to the City, Grantee does not provide in writing a specific legal basis for requesting the City to treat the information as confidential, to protect it from release, and to withhold alleged confidential or proprietary information from CPRA requests, the City is not required to treat the information as being confidential and may release the information as required by the CPRA. When reviewing any request by Grantee for confidentiality, the City will consider California Government Code section 6254(e), which provides a CPRA exemption for records concerning geological and geophysical data relating to utility systems development that are obtained in confidence from any person.

(B) The City shall not be required to execute any non-disclosure agreement with Grantee to obtain prompt confidential access to Grantee's records for its facilities in City Streets except by order of a state or federal governmental agency or court having jurisdiction to impose such requirement. Absent such order, the City may, but shall not be required, to execute non-disclosure agreements with Grantee respecting the locations of Grantee's facilities.

(2) Grantee's rights to uses in the Streets exist subject to City uses of the Streets unless Grantee's rights are in easement or fee, in which case the Franchise does not control. At all times the City's superior reserved rights to uses of the Streets shall be preserved under Section 8. No provision of an Administrative MOU may be written or construed to modify that explicit reservation which shall be controlling at all times.

(3) With respect to any and all City work in the Streets, the costs of protecting Grantee's facilities shall be at Grantee's sole expense. The City and its contractors shall not be required to pay any amount for the services of any personnel, stand-by safety engineers, or similar service for the protection of Grantee's facilities which may be necessary for any City-controlled excavation or other work. Upon written request from the City or an authorized agent, Grantee shall within five (5) calendar days, or as soon as practicable in the case of emergency, arrange the on-site presence of any standby safety engineer that Grantee or City deem necessary for the protection of Grantee's facilities, and Grantee shall be solely responsible for all related costs.

(4) In its application for an Administrative MOU, Grantee shall submit to the City a list of projects and activities Grantee plans to perform in the two years covered by the Administrative MOU (Two-Year Plan). The Two-Year Plan shall catalog planned activities by level of disruption and by the amount of coordination with City staff the activity requires. The activities may be classified as: (A) regular maintenance for which no street disruptions or traffic control plans are expected; (B) minor repairs or construction which will require traffic permits and control for

less than thirty (30) calendar days; (C) major repairs or construction which are expected to require substantial permitting from the City, impacts to traffic or surrounding properties, or which may persist for more than thirty (30) calendar days; and (D) utilities undergrounding projects to be coordinated with the City. The Two-Year Plan shall constitute the understanding between the City and Grantee as to those activities anticipated to require coordination with the City and other utilities. If there are changed circumstances regarding the use of City Streets, the City Manager may require adjustments to Grantee's scheduled activities to account for such conditions or may allow deviations or changes to Grantee's Two-Year Plan at Grantee's request. Grantee shall promptly inform the City if its plans materially change under any Two-Year Plan.

(5) Grantee shall fully cooperate with the City's uses of the Streets, including for the City's construction, maintenance, and repair of City utilities. The City will establish or continue to operate a Joint Utilities Coordinating Committee (Coordinating Committee) or similar body in which Grantee shall be a member and active participant. The purpose of the Coordinating Committee shall be to review and make recommendations to all utilities and the City on matters regarding utility installations and operations within the public rights-of-way. The Coordinating Committee shall be chaired by the City Engineer or designee. The Coordinating Committee shall meet a minimum of four times each fiscal year. The Coordinating Committee shall give due consideration to Grantee's Two-Year Plan and to activities and projects the City has planned in the two-year cycle. The City will encourage the participation on the Coordinating Committee of other utility entities lawfully using the Streets, including telephone and cable service companies. Grantee shall recognize that other utilities may have rights of use in the Streets that are not granted by the City, and will endeavor to encourage participation of these entities in the Coordinating Committee so that the activities and projects of all entities using the Streets may be efficiently communicated and scheduled to minimize interferences of utility work with the uses of the Streets and adjoining



property, for the public welfare and for the benefit of all parties in the performance of their planned work. The Coordinating Committee may, by agreement of the City and Grantee, establish standing subcommittees and may assign tasks to, and receive recommendations from, such subcommittees as it may deem necessary.

**Section 10. Cooperation with City Climate Action, Local Energy, Energy Justice, and Purchasing of Local Materials**

(a) *Climate Action and Local Energy.* Subject to Applicable Law, Grantee shall cooperate in good faith with the City's desire to accomplish the goals set forth in its Climate Action Plan dated December 2015, and any revised or successive climate plan. Subject to Applicable Law, Grantee shall reasonably assist the City in achieving its goals of reducing carbon-based greenhouse gas emissions related to generation of the Gas used by customers in the City's corporate boundaries and reducing other greenhouse gas emissions in the City through increased electrification of transportation. Grantee's acceptance of the Franchise includes Grantee's understanding of the City's policy objectives, and, subject to Applicable Law, its willingness to assist in good faith the City's goal of having all electricity used in the City generated from renewable fuel sources by 2035, including to the greatest extent practical and lawful, through local customer-controlled distributed energy resources. Grantee shall cooperate, subject to Applicable Law, with all the City's efforts to have distributed energy resources located in the City more completely and increasingly integrated with the operation of Grantee's electrical distribution system. Subject to Applicable Law, Grantee shall permit distributed energy resources to deliver all practical excess amounts of electric energy and capacity not used at the sites of distributed energy resources located within the City to be made available to other customers of Grantee and/or to any operating CCA program established by the City. Grantee accepts that the City will support expansion of non-Gas resources, net energy metering, feed-in tariffs, and other economic mechanisms to foster development of local renewable fueled electric distributed resources, electric storage, microgrids, electric transportation, and other

technologies to be increasingly integrated with the design and operation of Grantee's electric distribution system, and Grantee will not unreasonably oppose or obstruct such efforts without good public cause, which shall be at Grantee's sole discretion. The City recognizes that transition of electric service delivery to these preferred resources, including necessary distribution system adaptations, requires that customers who do not or cannot adapt to these technologies, or are not required to do so, cannot be required to subsidize the cost of customers who do make these changes. Nonetheless, Grantee shall cooperate with the City in good faith toward fulfillment of these objectives in a Cooperation Agreement as provided in Section 10(c), on a timetable that meets the City's Climate Action Plan, and with the City's understanding that many of the objectives are or will be subject to factors controlled by State legislation and orders of the CPUC.

(b) *Energy Justice.* Grantee shall cooperate with the City toward attainment of environmental and social justice in the provision of Gas service. Grantee shall support the City's 2019 Climate Equity Index and any subsequent versions or revisions. Grantee shall use good faith efforts to assist the City in fulfillment of Climate Equity Index recommendations, including (1) to assist the City in seeking and providing grant funding opportunities to support community engagement and invest in areas with very low to moderate access to opportunity, or in programs and projects that receive funding from any City fund established to advance climate equity objectives; (2) to support the City in conducting public engagement efforts, in partnership with community-based organizations, in census tracts with very low access to opportunity; (3) to assist the City in exploring the feasibility of establishing a sustainability ambassador program in areas with very low to moderate access to opportunity; (4) to assist the City in the determination of mechanisms to incorporate climate equity into City programs and projects; and (5) to cooperate with the City in periodically updating Climate Equity Index data. Grantee will use its best efforts to minimize service costs to City residents and businesses, to provide opportunities to low and

moderate income customers for them to reduce energy bills through equitable access to energy efficiency, Gas alternative, and renewable distributed energy resources, to reduce cost volatility, and to improve access to energy services that empower low and moderate income residents and disadvantaged businesses through efficiency and conservation.

(c) *Cooperation Agreement.* Grantee agrees to comply with and fulfill the terms of the Cooperation Agreement, attached and incorporated as Attachment 3, regarding the subjects provided in Sections 10(a), (b), and (e) herein. The Cooperation Agreement has been signed by Grantee's responsible officer and adopted by the City Council together with this Franchise. The Cooperation Agreement shall be a binding document only with respect to the secondary term of ten (10) years provided in Section 3(b) and the continuing obligation in Section 10(d), and shall have no binding application to any other obligation of the Franchise. The Cooperation Agreement arises from Grantee's proposals in support of City's policies and has been agreed to by the parties to establish reasonable standards for purposes of Sections 3(b) and 10(d). The Cooperation Agreement is at all times subject to Applicable Law, and provides for Grantee's points of alignment and cooperation with the City's policy objectives provided in Sections 10(a), (b), and (e), including the identification of barriers and described measures that Grantee can and will take to support City policies. Grantee's cooperation with Section 10 shall be reported in the periodic compliance report provided in Section 6. The Cooperation Agreement shall give due consideration of any legal or practical impediments cited by Grantee, including legislation, orders, and considerations for all customers (and not only those located in the City or immediately interested in a subject), as to why any policy cannot be implemented. The Cooperation Agreement shall include discussion of opportunities for the City and its citizens, especially those citizens with low or moderate income, to gain access to energy efficiency, distributed energy resources, evolving technology, and transportation electrification programs and grants that are made available by the CPUC and

California Energy Commission. The Cooperation Agreement describes (1) Grantee's planned efforts to make opportunities available to City (and to other qualifying customers) to participate in Grantee's State-authorized energy efficiency, distributed energy, emerging technology (including Electric Program Investment Charge opportunities, as applicable), Gas alternative, and transportation electrification program funding; (2) efforts that Grantee may take to support City's Municipal Energy Strategy and to making building energy efficiency resources as accessible as possible for the City and other customer building owners; (3) available programs and approach to how Grantee's proposals will give due consideration to the City's climate action goals and to the City's position and ability to partner with Grantee toward fulfillment of those goals, including through building codes, building energy benchmarking, deployment of renewable and storage distributed energy resources, microgrids, and electric transportation on City Streets.

(d) *Modification and Continuation of Cooperation Agreement.* The Cooperation Agreement may be modified to adapt to evolving circumstances at the request of Grantee, provided that the request for modification is reasonable and any amendment is approved by the City Council, which modification shall not be unreasonably refused. Grantee shall cooperate in good faith with any reasonable request by City for modification to the Cooperation Agreement. The Cooperation Agreement shall remain effective during the secondary term provided in Section 3(b).

(e) *Climate Equity Fund.* City has established a Climate Equity Fund to respond to the climate justice element of general planning pursuant to California Government Code section 65302(h)(4)(A). Any payments or programs proposed by Grantee in the Cooperation Agreement that are in addition to the consideration paid as a Bid Amount for the grant of the Franchise and the amounts paid pursuant to Section 4 of this Ordinance for exercise of the

Franchise shall be paid or performed for the benefit of the Climate Equity Fund. Grantee agrees to support the objectives of the Climate Equity Fund in good faith. Grantee shall not apply to the CPUC to recover Climate Equity Fund contributions in rates or other charges from Gas customers.

(f) *Purchasing of Local Materials.* Grantee shall use reasonable efforts to operate its business in a manner that the majority of purchasing of materials and supplies used in connection with its business occurs at addresses located in the City of San Diego.

**Section 11. Indemnity, Defense, Insurance**

(a) Grantee, to the fullest extent permitted by law, shall defend with legal counsel reasonably acceptable to the City, indemnify, and hold harmless the City and its officers, agents, departments, officials, and employees (Indemnified Parties) from and against all claims, losses, costs, damages, injuries (including death) (including injury to or death of an employee of Grantee, any agent or subcontractor, anyone employed by them, or anyone that they control), expense and liability (collectively "Claims"), including court costs, litigation expenses and fees of expert consultants or expert witnesses incurred in connection therewith and costs of investigation, that arise out of, in whole or in part, any acts performed, rights exercised, or rights or privileges granted under the Franchise, to or by Grantee, any agent or subcontractor, anyone directly or indirectly employed by them, or anyone that they control. Grantee's duty to defend, indemnify, and hold harmless shall not include any Claims or liabilities arising from the active negligence, sole negligence, or willful misconduct of the Indemnified Parties.

(b) Concurrent with the acceptance of the Franchise by Grantee, and as a condition precedent to the effectiveness of the Franchise, and in partial performance of the obligations assumed herein, Grantee shall procure and maintain at Grantee's expense for the duration of the Franchise from an insurance company that is admitted to write insurance in California or that has

a rating of or equivalent to A:VIII by A.M. Best & Company the following insurance against Claims for injuries to persons or damage to property which may arise from or in connection with the Franchise by Grantee, its agents, representatives, employees or subcontractors:

(1) Commercial General Liability (CGL): Insurance Services Office Form CG 00 01 covering CGL on an "occurrence" basis, including products and completed operations, property damage, bodily injury, and personal and advertising injury, with limits no less than twenty-five million dollars (\$25,000,000) per occurrence. If a general aggregate limit applies, either the general aggregate limit shall apply separately to this Franchise or the general aggregate limit shall be twice the required occurrence limit.

(2) Automobile Liability: ISO Form Number CA 00 01 covering any auto (Code 1), or if Grantee has no owned autos, hired (Code 8) and non-owned autos (Code 9), with limits no less than five million dollars (\$5,000,000) per accident for bodily injury and property damage.

(3) Workers' Compensation: as required by the State of California, with Statutory Limits, and Employer's Liability Insurance with limits no less than one million dollars (\$1,000,000) per accident for bodily injury or disease.

(c) Policies must be endorsed according to the following requirements:

(1) Additional Insured Status. The City, its officers, officials, employees, and volunteers are to be covered as additional insureds on the CGL policy with respect to liability arising out of work or operations performed by or on behalf of Grantee including materials, parts, or equipment furnished in connection with such work or operations. General liability coverage can be provided in the form of an endorsement to Grantee's insurance (at least as broad as ISO Form CG 20 10 11 85 or if not available, through the addition of both CG 20 10, CG 20 26, CG 20 33, or CG 20 38; and CG 20 37 if a later edition is used).

(2) Primary Coverage. For any Claims related to the Franchise, Grantee's insurance coverage shall be primary coverage at least as broad as ISO CG 20 01 04 13 as respects the City, its officers, officials, employees, and volunteers. Any insurance or self-insurance maintained by the City, its officers, officials, employees, or volunteers shall be excess of Grantee's insurance and shall not contribute with it.

(3) Notice of Cancellation. Each insurance policy required above shall provide that coverage shall not be canceled, except with notice to the City.

(4) Waiver of Subrogation. Grantee hereby grants to City a waiver of any right to subrogation which any insurer of Grantee may acquire against the City by virtue of the payment of any loss under such insurance. Grantee agrees to obtain any endorsement that may be necessary to affect this waiver of subrogation, but this provision applies regardless of whether or not the City has received a waiver of subrogation endorsement from the insurer.

(d) Verification of Coverage. Grantee shall furnish the City with original Certificates of Insurance including all required amendatory endorsements (or copies of the applicable policy language effecting coverage required by this clause) and a copy of the Declarations and Endorsement Page of the CGL policy listing all policy endorsements to City before the Franchise is awarded. However, failure to obtain the required documents prior to the award of the Franchise shall not waive Grantee's obligation to provide them. The City reserves the right to require complete, certified copies of all required insurance policies, including endorsements required by these specifications, at any time.

(e) Not more frequently than every five (5) years, if in the opinion of the City Manager or of an insurance broker retained by the City, the amount of the foregoing insurance coverage is not adequate, Grantee shall increase the insurance coverage as required by the City. Grantee shall furnish the City with certificates of insurance and with endorsements provided in Section 11(c)

affecting coverage as required above. The certificates and endorsements for each insurance policy shall be signed by a person authorized by that insurer to bind coverage on its behalf. Any modification or waiver of the insurance requirements contained in the Franchise shall only be made with the written approval of the City's Risk Manager in accordance with established City policy.

(f) Grantee may fulfill the insurance obligations of Sections 11(b) through (d) by self-insurance. Grantee shall provide a certificate to the City evidencing the fulfillment of these requirements.

**Section 12. Repair Costs**

Grantee shall pay to City on demand the cost of all repairs to City property made necessary by any of the operations of Grantee under the franchise granted hereby, provided however that Grantee may make repairs to streets, sidewalks, curbs and gutters itself at its own cost in accordance with City specifications if the same can be done without undue inconvenience to the public use of the streets.

**Section 13. Forfeiture and Other Remedies**

(a) The Franchise is granted upon each and every condition herein contained and shall be strictly construed against Grantee. Nothing shall pass by the Franchise granted to Grantee unless granted in plain and unambiguous terms. Each of the Franchise conditions is a material and essential condition to the granting of the Franchise. If Grantee shall fail, neglect, or refuse to comply with any of the conditions of the Franchise, and if such failure, neglect, or refusal shall continue for more than thirty (30) calendar days after written demand by the City Manager for compliance, then the City, by the City Council, in addition to all rights and remedies allowed by law, including but not limited to breach of contract, declaratory relief, specific performance, and mandatory injunction, may terminate the right, privilege and franchise granted in and by the Franchise, and all the rights, privileges and the Franchise of Grantee shall be at an end. Thereupon



and immediately, Grantee shall surrender all rights and privileges in and to the Franchise. No Franchise provision made to secure the enforcement of the terms and conditions of the Franchise shall be deemed an exclusive remedy or to afford the exclusive procedure for the enforcement of the Franchise terms and conditions, but the remedies and procedure outlined or provided, including forfeiture, shall be deemed to be cumulative.

(b) Notwithstanding and without waiving the remedies reserved in Section 13(a), the parties recognize and agree that certain Grantee breaches of specified conditions in the Franchise will result in damages to the City, as cost of postponing services or projects, or other delay expenses, which for a temporary period may not practically warrant forfeiture of the Franchise by Grantee or require specific proof of damage by the City. For such specified conditions and limited periods of Grantee breach, at the City's sole discretion and election, as an alternative remedy to those provided in Section 13(a), provided that such liquidated damages shall be the sole remedy available to the City for any such breach if City elects to collect liquidated damages, but only for the temporary period provided in Section 13(c). Any failure of the City to not elect liquidated damages under Section 13(b) shall not be a waiver of the City's right to prove and recover actual damages under Section 13(a). The City-elected liquidated damage assessments shall be applicable only to Grantee breaches of the conditions specified in Section 13(e), and only for the maximum time periods provided in Section 13(c). All Franchise conditions not stated in Section 13(e) shall expressly and at all times remain reserved to the City to enforce and subject to the remedies provided in Section 13(a).

(c) If the City elects the remedy of liquidated damages for the breach of any of the specified conditions in Section 13(e), it shall deliver written notice to Grantee of the breach and the date on which the breach commenced, and the notice shall provide Grantee the same thirty (30) calendar day right to cure provided in Section 13(a). If after the thirty (30) calendar days from

notice of the breach, the condition has not been cured or justified to the satisfaction of the City Manager, at City's election the remedy of liquidated damages shall thereafter be a remedy that shall apply only to the condition of breach specified in the notice and only for a period not-to-exceed one hundred eighty (180) calendar days from the date that is thirty (30) calendar days after each such notice. After the one hundred eighty (180) calendar day period, the remedies in Section 13(a) shall remain available to the City. The liquidated damages provided in Section 13(e) shall accrue and be paid on each uncured incident notice even if multiple notices cite a common specified breached condition. For any breach that has not been cured within the notified cure period, Grantee shall be liable to the City for all accumulated assessed liquidated damages during the maximum period of applicability, and thereafter for all City's remedies provided in Section 13(a) for each such breach which extends beyond the maximum liquidated damage assessment period. The City Manager shall assess and bill Grantee for all such damages that shall be accrued during the liquidated damage assessment period and shall carry interest as provided by law from the date of assessment. All assessed liquidated damages and interest shall be payable to the City on the quarterly payment dates provided for fees and surcharge revenue in Section 5. During the pendency of any disputed liquidated damage assessment period, the parties shall engage in dispute resolution as provided in Section 14. Section 13 shall not be construed to impair the City's right to acquire Grantee's property or facilities at any time as provided by the California Constitution and the San Diego Charter.

(d) By entering the Franchise, Grantee and the City agree that the specified Franchise conditions and liquidated damage amounts provided in Section 13(e) represent a reasonable endeavor by the parties to estimate a fair compensation for any loss that may be sustained by the City as the result of that breach of the specified condition for the period. Jointly foreseeable and reasonably estimable damages to the City of Grantee's breach of conditions in Section 13(e)

include, but are not limited to, costs arising from Grantee's interference, disruptions, suspensions, obstructions, and delays to the City's programs, projects, contracts, and the cost to efficiencies in City-reserved uses of the Streets. The City's election of temporary liquidated damages under Section 13 is, if exercised under Sections 13(b) and (c), an alternative that shall be available to the City in lieu of the remedy of immediate Grantee forfeiture or other legal remedies reserved to the City under Section 13(a), and is not and shall not be construed as a penalty. Grantee acknowledges that amounts provided in Sections 13(b), (c), and (e) are capped and for the maximum period provided bear a reasonable relationship to the range of harm that the parties might reasonably have anticipated to follow from the specified breaches when they entered into the Franchise. As a temporary alternative to forfeiture of the Franchise by Grantee and other City remedies for the breach of any condition, said liquidated damages are not a penalty.

(e) *Liquidated Damages for Breach of Specified Conditions.*

If elected by the City pursuant to Sections 13(b) and (c), the following events of Grantee breach shall have the corresponding daily liquidated damage charges excepting weekends and holidays:

(1) Failure to deliver facility location records and Gas facility drawings and other engineering record information required by Section 9 without conditions not provided for in the Franchise: six thousand dollars (\$6,000) per calendar day for delay and disruption.

(2) Failure to timely coordinate, bear costs, and physically relocate facilities upon direction of the City Manager as required by Section 8: fifteen thousand dollars (\$15,000) per calendar day for delay and disruption. Actual cost of relocation shall be borne entirely by Grantee.

(3) Failure to provide and pay for standby safety engineers for protection of Grantee facilities within five (5) calendar days' notice from the City or its authorized agents as

required by Section 9: Cost of standby engineers plus fifteen thousand dollars (\$15,000) per calendar day for delay impacts.

**Section 14. Dispute Resolution**

(a) If any dispute arises under the Franchise, including any alleged breach, the City and Grantee shall use reasonable efforts to resolve the dispute. The City and Grantee shall consult and negotiate with each other in good faith and, recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to the City and Grantee. If the City and Grantee do not agree on such a solution within fifteen (15) calendar days, then, upon written notice by either party to the other, such dispute shall be referred to the City Manager and a member of Grantee's executive staff for further consultation and negotiation.

(b) If the City Manager and the member of Grantee's executive staff are unable to agree on a solution within fifteen (15) calendar days of such referral, the City and Grantee shall attempt in good faith to settle the dispute by non-binding mediation administered by a mediator acceptable to both parties. The City and Grantee will cooperate in selecting a mediator. The City and Grantee will share equally in the mediation costs and each party will bear its own attorneys' fees and related costs, including any expert witness fees. The parties will use their best efforts to conclude the non-binding mediation within forty-five (45) calendar days after the City Manager and member of Grantee's executive team conclude their discussions. The parties may extend the dates in Section 14 by mutual agreement.

(c) If the City and Grantee do not agree on a solution through non-binding mediation, then either party may pursue litigation in any court with jurisdiction. Notwithstanding any other provision of Section 14, the City or Grantee may proceed directly to litigation if there is an urgency that renders the preceding dispute resolution process impracticable.

**Section 15. Publication Expense**

Grantee shall reimburse the City for all publication expenses incurred in connection with granting the Franchise, within thirty (30) calendar days after the City provides Grantee a written statement of the expenses.

**Section 16. Authority for Grant**

Notwithstanding any other provisions, the Franchise is granted solely and exclusively under Sections 103, 103.1, 104, and 105 of the San Diego Charter.

**Section 17. No Transfer Without Consent**

Grantee shall not sell, transfer, or assign the Franchise or the rights and privileges granted thereby without the consent of the City Council, as set forth in San Diego Charter Section 103.

**Section 18. Right of City's Electors**

This grant of Franchise and authority shall be and is subject to the right of the majority of the electors of the City voting at any election at any time thereafter to repeal, change, or modify the grant, and such right is hereby expressly reserved to the electors; and it is expressly agreed that at any election held in the City, a majority of the electors of the City voting at the election shall have the right to repeal, change, or modify the terms of this Franchise and the authority granted hereunder.

**Section 19. Performance Bond**

Grantee shall file and maintain a faithful performance bond in favor of the City in the sum of thirty million dollars (\$30,000,000) to guarantee that Grantee shall well and truly observe, fulfill, and perform each and every term and condition of the Franchise. The bond shall be acknowledged by Grantee as principal and by a corporation licensed by the Insurance Commissioner of the State of California to transact the business of a fidelity and surety insurance company as surety. In case of

any breach of any condition of the Franchise, up to the whole amount of the sum named in the bond may be taken and shall be recoverable from the principal and sureties upon such bond.

**Section 20. Bankruptcy**

Grantee and the City acknowledge that if Grantee becomes a debtor in bankruptcy under the bankruptcy laws of the United States (Bankruptcy Code), the Franchise shall be treated as an executory contract pursuant to Bankruptcy Code section 365(c). Grantee and the City further acknowledge that, as a non-assignable contract pursuant to applicable law, including San Diego Charter section 103 and California Public Utilities Code section 6203, the Franchise may not be assumed or assigned by the trustee or the debtor-in-possession without the consent of the City. In the event that the debtor-in-possession assumes the Franchise and the Franchise is sold pursuant to the Bankruptcy Code, it is the intent of the parties that the City shall have the right of first refusal to match the price of any buyer for the purchase of Grantee's facilities and assets and may acquire Grantee's facilities by matching any bona fide offer of purchase made in bankruptcy. Grantee and City acknowledge that if the City files any petition for bankruptcy pursuant to Chapter 9 of the Bankruptcy Code, Grantee's claims shall be treated consistently with the applicable provisions of that Chapter.

**Section 21. Acquisition and Valuation**

Nothing in the Ordinance or the Franchise granted hereby shall be construed as in any way impairing the City's rights to acquire property of Grantee through the exercise of the City's power of eminent domain or through voluntary agreement between the City and Grantee. If the City chooses to exercise its power of eminent domain, it shall do so in accordance with the procedures provided by the general law of the State of California. The valuation of such property for condemnation purposes shall be made in accordance with such general law.

**Section 22. Severability**

If any term, covenant, or condition of the Franchise or the application or effect of any such term, covenant, or condition is held invalid as to any person, entity, or circumstance, or is determined to be unjust, unreasonable, unlawful, imprudent, or otherwise not in the public interest, by any court or government agency of competent jurisdiction, then such term, covenant, or condition shall remain in force and effect to the maximum extent permitted by law, and all other terms, covenants, and conditions of the Franchise and their application shall not be affected thereby but shall remain in force and effect. The parties shall be relieved of their obligations only to the extent necessary to eliminate such regulatory or other determination, unless a court or governmental agency of competent jurisdiction holds that such provisions are not severable from all other provisions of the Franchise.

**Section 23. Effective Date**

This Ordinance shall take effect and be in force on the thirtieth day from and after the date of its final passage pursuant to San Diego Charter section 295.

APPROVED: MARA W. ELLIOTT, City Attorney

By \_\_\_\_\_  
Frederick M. Ortlieb  
Senior Deputy City Attorney

FMO:als:jvg

03/28/21

Or.Dept: Office of the Mayor

Doc. No.: 2614475

Attachments: 1 Table of Contents – Exhibit B - Gas Franchise  
2 Administrative MOU General Terms  
3 Cooperation Agreement

I hereby certify that the foregoing Ordinance was passed by the Council of the City of San Diego, at this meeting of \_\_\_\_\_.

ELIZABETH S. MALAND  
City Clerk

By \_\_\_\_\_  
Deputy City Clerk

Approved: \_\_\_\_\_  
(date)

\_\_\_\_\_  
TODD GLORIA, Mayor

Vetoed: \_\_\_\_\_  
(date)

\_\_\_\_\_  
TODD GLORIA, Mayor



ATTACHMENTS  
TO  
EXHIBIT B GAS FRANCHISE

# Attachment 1

## Table of Contents

Section 1:	Definitions .....	1
Section 2:	Purpose.....	4
Section 3:	Term.....	5
Section 4:	Consideration .....	6
Section 5:	Reports, Dates of Payment to City, Audits .....	9
Section 6:	Compliance Review Committee and Report .....	11
Section 7:	Compliance with Laws .....	13
Section 8:	City Reserved Powers .....	14
Section 9:	Administrative Practices .....	16
Section 10:	Cooperation with City Climate Action, Local Energy, Energy Justice, and Purchasing of Local Materials .....	21
Section 11:	Indemnity, Defense, Insurance .....	25
Section 12:	Repair Costs .....	28
Section 13:	Forfeiture and Other Remedies .....	28
Section 14:	Dispute Resolution .....	32
Section 15:	Publication Expense .....	33
Section 16:	Authority for Grant .....	33
Section 17:	No Transfer Without Consent .....	33
Section 18:	Right of City's Electors .....	33
Section 19:	Performance Bond .....	33
Section 20:	Bankruptcy .....	34
Section 21:	Acquisition and Valuation .....	34
Section 22:	Severability .....	35
Section 23:	Effective Date .....	35

## Attachment 2

### CITY OF SAN DIEGO

#### MEMORANDUM OF UNDERSTANDING

THIS MEMORANDUM OF UNDERSTANDING (“MOU”) is entered into by and between **THE CITY OF SAN DIEGO**, a California municipal corporation (“CITY”), and **<UTILITY STATE FRANCHISE NAME> and/or its agent(s)** (“GRANTEE”) (collectively referred to as the “PARTIES”), to be effective as **<MONTH> \_\_**, 2021 (the “Effective Date”), when signed by the PARTIES and approved as to form by the San Diego City Attorney.

On \_\_\_\_\_, the PARTIES entered into the Franchise Agreement, which provides the Grantee with the certain rights **for the transmission and distribution of gas and electricity**, as well as the right to install and maintain wires, poles, power lines and underground gas and electric lines within the city limits of San Diego.

CITY hereby grants GRANTEE the non-exclusive right to enter upon the MOU Area to perform Work, based upon the following terms and conditions:

- 1) Definitions: As used in this MOU, the following terms shall be defined as follows:
  - a) **“CITY Contact”** shall mean the CITY’s Development Services Department (DSD) during design/plan review and the City’s Engineering and Capital Projects Construction Management Field Engineering Division (CMFE) during construction implementation. For purposes of this MOU, the CITY Contact are as follows:  
Development Services Department, Engineering Division, Deputy Director  
  
Engineering & Capital Projects Department, Construction Management & Field Engineering, Deputy Director
  - b) **“Contiguous Locations”** shall mean a Work Area within one typical CITY street block, bounded by two street intersections.
  - c) **“GRANTEE”** shall mean **<UTILITY/CONTACT NAME>** which shall include GRANTEE’s agents, employees, and contractors. GRANTEE shall be responsible for all GRANTEE’s agents, employees, and contractors and ensure that they adhere to all conditions as stated in this MOU.
  - d) **“GRANTEE’s Address for Notices”** shall be:  
  
<UTILITY SIGNATORY/AGENT>  
<ADDRESS>  
<CITY>, <STATE>, <ZIP>
  - e) **“NPDES”** shall mean National Pollutant Discharge Elimination System.

Memorandum of Understanding

- f) **“Facility”** shall mean an instrument such as a pipe or conduit used for the delivery of services by a utility company within the City Public right-of-way.
  - g) **“Emergency”** shall mean an unexpected situation or occurrence that has or may result in serious injury, property damage, or threat to reliability of the gas and electric systems due to work required on gas and/or electric facilities. Emergency Work includes work that is required to mitigate active gas leaks, energized downed power lines, work to restore service to street lighting and signaling, damaged poles and/or facilities, work to control, repair and restore energized facilities and for the restoration of the street to original condition.
  - h) **“Excavation”** shall mean the act, process, or result of earthen material or substance being removed, cut into, dug, quarried, uncovered, displaced, or relocated.
  - i) **“Work”** shall mean any activity required throughout the construction phase to implement, install, erect, excavate, access, maintain or test existing utility facilities within the Work Area by the GRANTEE.
  - j) **“Work Area”** shall mean the CITY Public right-of -way, which are public easements for streets, alleys, or other uses, as defined in the San Diego Municipal Code, Chapter 11, Section 113.0103, as may be amended.
- 2) Right to Enter: The use of the MOU by GRANTEE shall be limited to the scope for maintenance and operational needs as further described in Section 3 of this MOU. CITY reserves the right to enter upon the Work Area at all times to inspect and maintain the Work Area, as CITY deems necessary. This MOU only authorizes entry and construction activity in the Work Area and shall not impact easements or the rights of any third parties. Any proposed construction activities not contained in Section 3 of this MOU shall require additional authorization and permits from the CITY’s Development Services Department, which must be obtained before construction begins.
- 3) Scope of Work Allowed by this MOU. Work allowed under this MOU may include the following:
- a) Any facility testing, inspection, and/or maintenance of GRANTEE’s existing equipment and infrastructure.
  - b) Non-excavation and non-destructive maintenance/testing work, as understood in Section 3 of this MOU, within in the Work Area.
  - c) Minor repairs or modification of existing facilities, due to customer service failures, where there is no excavation, no expansion of the facility and the facility is not relocated, and:
    - i) Work which can be completed in five working days or less, including replacement and restoration of hardscape/landscape and removal of all utility markings.
    - ii) All work in Contiguous Locations shall be completed in 5 working days or less, including replacement and restoration of hardscaping/landscape and removal of all utility markings.

Memorandum of Understanding

- d) Water Quality Requirements - All Work shall adhere to the current NPDES MOU, the CITY's Engineering Standards, and the San Diego Municipal Code.
  - e) For any Work where applicable Federal, State, or local requirements may conflict, the most stringent requirement shall control.
  - f) An Emergency requiring emergency Work.
- 4) Work NOT allowed under this MOU. The following work is not allowed under this MOU and may require a Development Permit, as defined in the San Diego Municipal Code, Chapter 11, Section 113.0103, as may be amended:
- a) Any excavations, beyond or not included in Section 3 of this MOU, within the street surface pavement area of any CITY Public right-of-way.
  - b) Any excavations on CITY Public right-of-way that is under a Street Paving Moratorium.
  - c) Installation of new utility facilities and relocation of existing utility facilities, including but not limited to, transformers, cabinets, poles, switches, and pull boxes.
  - d) Upsizing of any utility facility
  - e) Any Work requiring any type of CITY Public right-of-way closure.
  - f) Any Work requiring a traffic detour.
  - g) Any Work requiring the use of a crane.
  - h) Work that includes the replacement and/or removal of a utility pole and/or facility support structure.
  - i) Any Work that requires boring or micro-tunneling methods.
  - j) All Work related to the Utility Undergrounding Conversion projects (Rule 20A & Municipal Undergrounding Projects).
  - k) Work that includes any changes to American Disabilities Act (ADA) standard facilities (i.e. curb ramps, sidewalk).
- 5) Traffic Control Permits. Work and/or equipment within the CITY Public right-of-way shall require an approved Traffic Control Permit from DSD. The following must be completed prior to permit approval and commencement of Work:
- a) Preparation, coordination & finalization of a Traffic Control Plan in conformance with the latest edition of City of San Diego Standard Drawings; The Street Design Manual; The Manual of Uniform Traffic Control Devices and the California Supplement; and Standard Specifications for Public Works Construction, including Regional and City of San Diego Supplement Amendments through DSD.
  - b) Payment of fees related to the Street Preservation Ordinance, as applicable.
  - c) Payment of an Inspection Fee
  - d) Participating in a coordinated & scheduled Preconstruction Meeting between the GRANTEE and the Engineering & Capital Projects Department, Construction Management & Field Engineering Division (CMFE).

Memorandum of Understanding

- 6) Conformance with San Diego Municipal Code Chapter 6, Article 2, Division 11. Work allowed and conducted pursuant to this MOU shall conform with the requirements in the San Diego Municipal Code Chapter 6, Article 2, Division 11: "Procedures for Work on Utility Installations in the Public Right-of-Way."
- 7) Term: This MOU shall be effective for Two (2) years from the effective date of the City Council approval of the Franchise Agreement. GRANTEE may apply for successive memorandum of understandings with the CITY. Each item detailed in Section 3 of this MOU (Scope of Work) shall obtain an approved DSD Traffic Control Permit prior to commencement of construction and all work shall be completed and inspected/approved by the CITY according to the terms in the Traffic Control Permit. Upon successful completion of each Work activity, GRANTEE shall obtain final sign off by CMFE. A reasonable extension of the Traffic Control Permit may be granted at the sole discretion of the CITY DSD, Engineering Division, Traffic Safety Section.
- 8) Work Hours. All Work under this MOU is subject to the following work hour restrictions and requirements, unless otherwise directed through an approved DSD Traffic Control Permit.
  - a) No Work or related activities shall occur:
    - i) Before 8:30 a.m. or after 3:30 p.m. Monday through Friday.
    - ii) Before 8:30 a.m. or after 3:30 p.m. on Saturday.
    - iii) Sundays and CITY and Federal Holidays.
    - iv) In a school zone, before 9:00 a.m. or after 2:00 p.m. Monday through Friday while school is in session. A school zone is any roadway within 500-feet of the school property.
  - b) Weekend and after-hours work must be requested at least 2 working days in advance and is subject to CITY approval; fees will be assessed per the City Council approved fee schedule.
  - c) A Construction Noise Permit is required for any construction Work between 7:00 p.m. and 7:00 a.m. Monday thru Saturday, or at any time on Sunday and holidays.
  - d) The CITY, in its sole discretion, may allow deviations or a change to the permitted Work hours.
- 9) Notification Requirements, Commencement of Emergency Work and Preconstruction Activities.
  - a) Public Safety Emergency Work.
    - i) Notification for emergency Work necessitated by an Emergency shall be made within 24 hours by calling Station 38 at (619) 527-7500. If the call is not answered, a voicemail shall be left.
    - ii) An email must be sent to the Private Utility Emergency Notifications at this link: [PrivateUtilityEmergencyNotifications@san Diego.gov](mailto:PrivateUtilityEmergencyNotifications@san Diego.gov).
    - iii) It is understood that the GRANTEE shall perform all emergency work necessary to stabilize the emergency site and to maximize public safety.

All remedial work required to restore impacted CITY Public right-of-way shall require a separate approved DSD Right-of-Way Permit.

- b) CPUC Compliance Emergency.
    - i) A California Public Utilities Commission (CPUC) emergency occurs when a mandatory CPUC equipment inspection or repair has not received the required approvals two weeks prior to the CPUC compliance date.
    - ii) The approvals required for this type of work are an approved Traffic Control Plan (TCP), an approved Sidewalk Blockage Form (SWBF) and an encroachment permit for minor chipping or trenching of a valve box due to recent pavement projects or minor trenching to energize a cathodic protection station as an example. Applications for these approved shall be submitted to DSD sixty days in advance of the compliance date.
  - c) Permit Application Requirements.
    - i) An application for an encroachment permit for Emergency Work shall be submitted to the Permitting Section of the Engineering Division within 10 days. A complete application should be submitted to include the General Application (DS-3179), Supplemental (DS-3037), Construction Plan DS-3179), TCP, and the SWBF for processing.
    - ii) The Scope of Work shall be primarily for small projects (trenching of the Public right-of-way is less than 150 feet).
  - d) Permitting Process.
    - i) An encroachment permit for Emergency Work shall be handled over the counter and will not be subject and excluded from the agreed upon weekly submittal limit.
    - ii) A TCP and SWBF shall be processed through the Traffic Safety Section to meet the goal of final paving within 30 days from date of the Emergency.
- 10) Non-Emergency Work.
- a) All other non-emergency notifications, in conformance with Work as set forth in Section 3 of this MOU shall be made to the Engineering & Capital Projects – Construction Management & Field Engineering Division at (858) 627-3200.
  - b) Notification is not required when the Work allowed and performed under this MOU, as set forth in Section 3 of this MOU, does not impede vehicle, bicycle, or pedestrian traffic and GRANTEE'S vehicles are parked legally within the hours stated under Section 8 of this MOU and not conflicting with ongoing work in the area.
  - c) Notification and an inspection fee is not required if the Work performed meets the following conditions:
    - i) Facility inspection and maintenance where vehicle, bicycle, and pedestrian traffic are not impeded, and GRANTEE'S vehicles are parked legally.
    - ii) Non-excavation/non-destructive maintenance Work where vehicle, bicycles, and pedestrian traffic are not impeded, and GRANTEE'S vehicles are parked legally.

Memorandum of Understanding

- iii) Modification to existing facilities where there is no expansion of the facility or change in the facility location and where vehicle, bicycle, and pedestrian traffic are not impeded, and GRANTEE'S vehicles are parked legally.
  - d) GRANTEE must comply with any notice the City Engineer post that modifies existing standards or requirements.
- 11) Commencement of Work and Pre-Construction Activities.
  - a) For all Work requiring notification, GRANTEE shall contact CMFE a minimum of Five (5) working days prior to commencement of the construction. GRANTEE shall invite CMFE to a pre-construction meeting, which shall occur five (5) working days prior to commencement of construction. This meeting shall establish points of contact, define means and methods of the Project, and coordinate the GRANTEE's work schedule with scheduled activities and Transportation & Storm Water Department operations in and adjacent to the Work Area. At that time, GRANTEE shall submit a work schedule to CMFE that includes a description of the work to be performed, the specific location of such work within the Work Area, and the dates and times of such work.

CITY reserves the right to impose reasonable restrictions and scheduling conditions for any activities related to the work, and no work shall commence pursuant to this Permit without the prior verbal approval of the CMFE as documented in the minutes of the pre-construction meeting.
  - b) Public Access Approval. GRANTEE shall notify the CITY Contact and any impacted businesses a minimum of ten (10) working days prior to start of any Work that may affect the use of any public access in the Work Area.
- 12) Compliance With Construction Standards. GRANTEE, and GRANTEE'S agents and contractors shall at all times comply with all applicable laws and standards, including, but not limited to, the California Building Code, ADA design standards and requirements for accessibility, CITY design requirements, standards, and permit requirements.
  - a) The GRANTEE is obligated to secure copies of all appropriate standards and conditions.
  - b) All work shall comply with the City Engineer Standards and Conditions to the extent that the Standards and Conditions do not conflict with federal and state standards.
  - c) The CITY shall inspect and approve all work requiring notification.
  - d) The GRANTEE is required to remove intact and relocate historical concrete stamps as understood through the CITY Standard Drawing Sheet SDG-115. Prior to final placement, the City Resident Engineer shall approve the location.
  - e) All Underground Service Alert (USA) markings shall be removed by completion of the work and without damaging existing hardscape and landscape. Painting over markings is not allowed. Use of emulsion on markings in the asphalt is allowed.



Memorandum of Understanding

- 13) Cooperation & Coordination with CITY Projects.
  - a) GRANTEE shall fully cooperate with coordination activities as they relate with CITY Capital Improvement Projects and GRANTEE Work. Coordination, either in design or construction, shall be conducted expediently to avoid CITY Capital Improvement Project delays and cost overruns.
  - b) In the event that CITY determines that GRANTEE's Standby Services are required for the monitoring of GRANTEE's infrastructure, GRANTEE shall within five (5) calendar days (or as soon as practicable in the case of emergency) arrange for the on-site presence of a Standby safety engineer and any other Standby Services. GRANTEE shall be responsible for all costs and staffing needed associated with the assignment. CITY shall not bear any costs associated with any Standby Service.
  - c) The GRANTEE and the CITY shall coordinate their Work and projects, future and present, during the design phase. For any facility determined during coordination of design as requiring construction Standby Services, CITY shall notify GRANTEE of the need for Standby Services during construction and to properly plan the coordination of that Standby Service.
  - d) With respect to any and all CITY work in the CITY Public right-of-way, the costs of protecting GRANTEE's facilities shall be at GRANTEE's sole expense. The CITY and its contractors shall not be required to pay any amount for the services of any personnel, Standby Service, or similar service for the protection of GRANTEE's facilities which may be necessary for any CITY-controlled excavation or other work.
  
- 14) Unauthorized Activities. GRANTEE shall not engage in any activity on CITY-owned property other than pre-approved aspects of Work allowed under this MOU. Any activity performed by GRANTEE that was not previously approved or otherwise authorized by this MOU, shall be removed by GRANTEE and the CITY-owned property shall be put back to its condition on the Effective Date at the GRANTEE's sole cost and expense, subject to the satisfaction of the CITY Contact.
  
- 15) Permanent Survey Markers. If any Work proposed by the GRANTEE will disturb a survey marker, the GRANTEE shall have a California Registered Land Surveyor (CRLS) locate and document all surveying monuments, lot stakes (tagged), centerline ties, and bench marks that shall be disturbed during construction at GRANTEE's own cost, PRIOR to any physical work commencing. Documentation shall be provided to the CITY that the surveying has been completed. If it is determined by the GRANTEE that no monuments will be disturbed, a CRLS must submit a stamped memo detailing such determination prior to obtaining a Traffic Control MOU for such Work.
  - a) The GRANTEE shall be financially responsible for the CRLS to perform a Pre-Corner Record survey of all survey monuments identified to be disturbed, lot stakes (tagged), centerline ties and benchmarks to the Office of the County Surveyor prior to the start of construction, and also prior to the completion of construction.

Memorandum of Understanding

- b) The GRANTEE shall not disturb survey monuments, lot stakes (tagged), centerline ties, or benchmarks without notifying the CITY and providing to the CITY proof of submittal of the Pre-Corner Record forms to the Office of the County Surveyor. The GRANTEE shall bear the expense of replacing any that shall be disturbed without the permission from the CITY.
  - c) All surveying shall be done by a CRLS or a Registered Civil Engineer authorized to practice land surveying within the State of California.
  - d) The CRLS for GRANTEE shall tie out and reset all survey monuments, lot stakes (tagged), and/or centerline ties that are to be disturbed during construction in accordance with Section 8771 (Land Surveyors Act) of the Business and Professions Code of the State of California.
  - e) The CRLS for GRANTEE shall set new monuments or centerline ties to sufficiently enable the public right-of-way to be re-established in accordance with Section 8771 (Land Surveyors Act) of the Business and Professions Code of the State of California, to the satisfaction of the City Engineer.
- 16) Indemnification. GRANTEE shall protect, defend, indemnify, and hold CITY, its elected officials, officers, representatives, agents, and employees harmless from and against any and all claims asserted or liability established for damages or injuries to any person or property, including injury to GRANTEE's officers, employees, agents, contractors, invitees and guests, which arise out of or are in any manner directly or indirectly connected with this MOU, issuance of this MOU or GRANTEE's occupancy, use, development, maintenance, or restoration of the Work Area, including damages arising out of release of hazardous materials in the Work Area, and all expenses of investigating and defending against same, including without limitation reasonable attorney fees and costs. CITY may, at its election, conduct the defense or participate in the defense of any claim related in any way to this indemnification. If CITY chooses at its own election to conduct its own defense, participate in its own defense, or obtain independent legal counsel in defense of any claim related to this indemnification, GRANTEE shall pay all reasonable costs related thereto, including without limitation reasonable attorney fees and costs.
- 17) Revocable MOU. This MOU is not a lease and may be revoked at will by the CITY MANAGER, in his/her sole discretion: (a) immediately upon written notice delivered to GRANTEE if GRANTEE breaches or defaults on any of GRANTEE's obligations under this MOU or in case of an emergency; or (b) upon reasonable prior written notice, but not less than three (3) working days, delivered to GRANTEE if for CITY's convenience. CITY shall not be obligated for any burden or loss, financial or otherwise, which may be incurred by GRANTEE as a result of such revocation or the termination of this MOU.
- 18) Compliance with the Law. GRANTEE shall at all times in its use, occupancy, and maintenance of the Work Area comply with all applicable laws, rules, regulations and directives of competent governmental authorities, and at GRANTEE's sole cost and expense. GRANTEE shall annually deliver to CITY copies of all documentary evidence of such compliance received by or otherwise available to GRANTEE (e.g., validation of periodic inspections, if applicable).

Memorandum of Understanding

19) Request for Records. Upon written request by the CITY, GRANTEE shall provide to the City within ten (10) calendar days, and immediately in the case of a CITY Manager-declared emergency, Geographic Information System (GIS) coordinate data or other locational records as the CITY in its sole discretion may deem appropriate for the CITY's requirements. The records provided in response to the CITY's request shall describe GRANTEE's facilities in geographical areas of any size that the CITY determines necessary to coordinate with the CITY's uses or any other lawful uses of the Streets throughout the CITY.

a) GRANTEE's contention that information is confidential shall not relieve Grantee from the duty to produce the information to CITY. GRANTEE acknowledges that any information required to be submitted or provided in fulfillment of the obligations of the Franchise Agreement is a public record subject to disclosure in response to a California Public Records Act (California Government Code sections 6250 – 6276.48)(CPRA) request, unless the CITY or a court of competent jurisdiction determines that a specific exemption in the CPRA applies. If GRANTEE submits information clearly marked confidential or proprietary, the CITY shall protect such information and treat it with confidentiality to the extent permitted or required by law; provided however, that the CITY shall assume no liability for having access to GRANTEE's records for official CITY purposes except by a judgment in a court of competent jurisdiction upon a claim arising from the established sole negligence or willful misconduct of the CITY, its officers, agents, or employees. It shall be Grantee's responsibility to provide to the CITY the specific legal grounds on which the CITY can rely in withholding information from public disclosure should GRANTEE request that the CITY withhold such information. General references to sections of the law will not suffice. Rather, GRANTEE shall provide a specific and detailed legal basis, including applicable case law or other law that reasonably establishes the requested information is exempt from disclosure. If, at the time the documents are provided to the CITY, GRANTEE does not provide a specific and detailed legal basis for requesting the CITY to treat the information as confidential, to protect it from release, and to withhold alleged confidential or proprietary information from CPRA requests, the CITY is not required to treat the information as being confidential and may release the information as required by the CPRA. When reviewing any request by GRANTEE for confidentiality, the CITY will consider California Government Code section 6254(e), which provides a CPRA exemption for records concerning geological and geophysical data relating to utility systems development that are obtained in confidence from any person.

b) The CITY shall not be required to execute any non-disclosure agreement with GRANTEE to obtain prompt confidential access to GRANTEE's records for its facilities in CITY Public right-of-way, except by order of a state or federal governmental agency or court having jurisdiction to impose such requirement. Absent such order, the CITY may, but shall not be required, to execute non-disclosure agreements with GRANTEE respecting the locations of GRANTEE's facilities.

Memorandum of Understanding

- 20) Security and Safety of MOU Area. GRANTEE shall bear sole responsibility for the security and safety of the Work Area relating to any Work performed as authorized by this MOU or under the direction of GRANTEE. GRANTEE shall be responsible for the maintenance, cleanup, and securing of the Work Area, as appropriate, immediately following each day's work to ensure security and safety. GRANTEE shall comply with all applicable laws, rules, regulations and directives of competent governmental authorities, at GRANTEE's sole cost and expense, with respect to maintaining the Work Area in a safe and secure manner during the Term. CITY has no obligation to provide oversight of the Project or staffing or resources for the maintenance of the Work Area related to the Work performed under this MOU.
- 21) Hazardous Materials. GRANTEE shall not allow the illegal installation, storage, utilization, generation, sale or release of any Hazardous Substance or otherwise regulated substances in, on, under or from the Work Area by any of GRANTEE's officers, employees, agents, contractors, invitees and guests. GRANTEE and GRANTEE's officers, employees, agents, contractors, invitees and guests shall not install, store, utilize, generate or sell any Hazardous Substance on the Work Area without CITY's prior written consent. GRANTEE shall, prior to initiating any operations, obtain all required MOUs from applicable regulatory agencies, including without limitation the San Diego County Department of Environmental Health, local fire agencies, the San Diego County Department of Weights and Measures, the San Diego County Air Pollution Control District, and the San Diego Regional Water Quality Control Board. Installing, utilizing, storing, or any other presence of a Hazardous Substance includes boxes, bags, bottles, drums, cylinders, above or below ground tanks, equipment with tanks, or any other type of container, equipment or device which holds or incorporates a Hazardous Substance or hazardous waste.
- a) Release. For all purposes of this MOU, a "release" shall include without limitation any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or otherwise disposing of a Hazardous Substance.
  - b) Hazardous Substance. For all purposes of this MOU, "Hazardous Substance" shall mean any substance listed by the Environmental Protection Agency or the State of California as a hazardous substance, and all types of petroleum-related substances and their chemical constituents.
  - c) Remediation. If GRANTEE's occupancy, use, development, maintenance, or restoration of the Work Area results in a release of a Hazardous Substance, GRANTEE shall pay all costs of remediation and removal to the CITY's satisfaction for unrestricted reuse of the MOU Area, and in accordance with all applicable laws, rules, and regulations of governmental authorities.
  - d) Removal. If GRANTEE or GRANTEE's officers, employees, agents, contractors, invitees and guests has received approval and MOUs to store, utilize, generate or install, or otherwise bring Hazardous Substances to the MOU Area, GRANTEE shall remove all Hazardous Substances in any type of container, equipment or device from the Work Area immediately upon or prior to the expiration or earlier termination of this MOU. CITY reserves the right to conduct inspections of the Work Area and/or request documentation demonstrating the legal removal and/or disposal of the hazardous materials, wastes or other containers, equipment or

devices from the MOU Area. GRANTEE shall be responsible for any and all costs incurred by CITY to remove any container, equipment or device requiring disposal or removal as required by this provision.

- e) Indemnity. GRANTEE shall protect, defend, indemnify, and hold CITY harmless from any and all claims, costs, and expenses related to environmental liabilities resulting from GRANTEE's occupancy, use, development, maintenance, or restoration of the Work Area during the Term, including without limitation: (i) costs of environmental assessments; (ii) costs of regulatory remediation oversight; (iii) costs of remediation and removal; (iv) any necessary CITY response costs; (v) all fines, penalties or fees assessed by any regulatory agency; (vi) damages for injury to natural resources, GRANTEE's officers, employees, invitees, guests, agents or contractors, or the public; and (vii) all costs of any health assessments or health effect studies. This only applies to hazardous materials released by the Work covered under this MOU, and does not include any hazardous materials introduced by a separate project or party.
  - f) Notice of Release. If GRANTEE knows or has reasonable cause to believe that a Hazardous Substance has been released on, from or beneath the MOU Area, GRANTEE shall immediately notify CITY and any appropriate regulatory or reporting agency pursuant to California Code of Regulations Title 19 and any other applicable laws or regulations. GRANTEE shall deliver a written report thereof to CITY within three (3) days after receipt of the knowledge or cause for belief and submit any required written reports to regulatory or reporting agencies as required by regulation or law. If GRANTEE knows or has reasonable cause to believe that such substance is an imminent release or is an imminent substantial danger to public health and safety, GRANTEE shall take all actions necessary to alleviate the danger. GRANTEE shall immediately notify CITY in writing of any violation, notice to comply, or notice of violation received or the initiation of environmental actions or private suits related to the MOU Area.
- 22) Restoration of MOU Area. Except as otherwise provided in this MOU, in the event that there is damage or destruction to City facilities or improvements that are caused by GRANTEE, then prior to the expiration or as soon as practicable after termination of this MOU, GRANTEE shall restore such City facilities or improvements, subject to the satisfaction of CITY Contact. GRANTEE shall review and comply with all requirements for such restoration within in San Diego Municipal Code Article 2, Division 11 "Procedures for Work on Utility Installations in the Public Right-of-Way" and Division 12 "Excavations in the Public Right-of-Way."
- 23) Subcontractors. At permit issuance, GRANTEE shall provide a written list of any and all contractors and subcontractors to the CITY Contact, including name, address, email, fax and phone number. All construction work requiring a licensed contractor pursuant to the Contractors' State Licensing Laws (California Business & Professions Code sections 7000-7191) shall be done by contractors licensed within the State of California.

Memorandum of Understanding

- 24) Water Quality Assurances. GRANTEE shall, at its sole cost and expense, comply with all laws, rules, regulations and direction of competent governmental authority (such as the San Diego Regional Water Quality Control Board) relating to water quality assurance and storm water management. GRANTEE acknowledges and agrees that such legal requirements may be amended as required by federal, state and City law.
- a) NPDES. GRANTEE shall comply with all applicable requirements of the National Pollutant Discharge Elimination System (“NPDES”) MOU in force on the Effective Date of this MOU (i.e., MOU No. R9-2013-0001), and any and all amendments thereto and all applicable succeeding NPDES MOUs.
  - b) Storm Water Management. GRANTEE shall comply with all applicable requirements of the San Diego Municipal Code Chapter 4, Article 3, Division 3: Storm Water Management and Discharge Control (the “Stormwater Code”), and employ “Best Management Practices,” as that term is defined by the Stormwater Code, and as approved by CITY, in its governmental capacity, under its Stormwater Management Program. Failure to comply may subject the GRANTEE to administrative and/or judicial remedies.
- 25) Acceptance of MOU Area. By signing this MOU, GRANTEE represents and warrants that it has independently inspected the Work Area and made all tests, investigations and observations necessary to satisfy itself as to the condition of the Work Area and its suitability for the Project. GRANTEE further represents and warrants that it is not relying on any representation by CITY as to the condition of the Work Area or its suitability for the Work, and that GRANTEE is relying solely on its own and independent inspections, tests, investigations and observations of the Work Area in entering into this MOU. GRANTEE accepts the Work Area in its current condition. GRANTEE acknowledges and agrees that unless set forth in this MOU, CITY has no obligation to improve, modify, repair, replace, alter, secure, or otherwise develop the Work Area at any time. GRANTEE shall not hold CITY responsible for any defects in the Work Area at any time. During the Term of this MOU, GRANTEE accepts and assumes all risk of harm to all persons and property from any defects in the Work Area or any improvements thereon and shall be solely responsible, therefore.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed:

**CITY OF SAN DIEGO**

\_\_\_\_\_  
By:  
Its:

\_\_\_\_\_  
Date:

Approved as to form:

\_\_\_\_\_  
By:  
Its: Deputy City Attorney

\_\_\_\_\_  
Date:

**GRANTEE**

\_\_\_\_\_  
By:  
Its:

\_\_\_\_\_  
Date:

Approved as to form:

\_\_\_\_\_  
By:  
Its: Legal Counsel

\_\_\_\_\_  
Date:

## Attachment 3

[TO BE PROVIDED AT A FUTURE DATE]