

ORDINANCE NO: 59-12

**AN ORDINANCE GRANTING TO ATMOS ENERGY CORPORATION, A TEXAS AND VIRGINIA CORPORATION, ITS SUCCESSORS AND ASSIGNS, A FRANCHISE TO CONSTRUCT, MAINTAIN, AND OPERATE PIPELINES AND EQUIPMENT IN THE TOWN OF FLOWER MOUND, DENTON COUNTY, TEXAS, FOR THE TRANSPORTATION, DELIVERY, SALE, AND DISTRIBUTION OF GAS IN, OUT OF, AND THROUGH SAID TOWN FOR ALL PURPOSES; PROVIDING FOR THE PAYMENT OF A FEE OR CHARGE FOR THE USE OF THE PUBLIC RIGHTS-OF-WAYS; AND PROVIDING THAT SUCH FEE SHALL BE IN LIEU OF OTHER FEES AND CHARGES, EXCEPTING AD VALOREM TAXES; AND REPEALING ALL PREVIOUS GAS FRANCHISE ORDINANCES.**

BE IT ORDAINED BY THE TOWN COUNCIL OF THE TOWN OF FLOWER MOUND, TEXAS:

SECTION 1. GRANT OF AUTHORITY: The Town of Flower Mound, Texas, hereinafter called "Town," hereby grants to Atmos Energy Corporation, Mid-Tex Division, hereinafter called "Atmos Energy," its successors and assigns, consent to use and occupy the present and future streets, alleys, highways, public utility easements, public ways and other public places ("Public Rights-of-Way"), for the purpose of laying, maintaining, constructing, protecting, operating, and replacing therein and thereon pipelines and all other appurtenant equipment (the "System") to deliver, transport, and distribute gas in, out of, and through Town for persons, firms, and corporations, including all the general public, and to sell gas to persons, firms, and corporations, including all the general public, within the Town corporate limits, as such limits may be amended from time to time during the term of this franchise, said consent being granted for a term ending December 31, 2032.

SECTION 2. CONSTRUCTION, MAINTENANCE, OPERATION & RELOCATION OF ATMOS ENERGY FACILITIES:

- A. Atmos Energy shall lay, maintain, construct, operate, and replace its pipes, mains, laterals, and other equipment in a manner to minimize interference with traffic, place or cause to be placed appropriate barriers to mark excavations or obstructions, and restore to approximate original condition all Public Rights-of-Way that it may disturb, at Atmos Energy's sole cost unless Atmos Energy is entitled to reimbursement pursuant to this agreement. In determining the location of the facilities of the Town and other users of Public Right-of-Way within Town, Town shall strive to minimize interference with then existing facilities of Atmos Energy and will require that other users of Public Rights-of-Way minimize interference with existing facilities of Atmos Energy. In the event of a conflict between the location of the proposed facilities of Atmos Energy and the location of the existing facilities of Town or other users of Public Rights-of-Way within Public

Rights-of-Way that cannot otherwise be resolved, Town or an authorized agent of Town shall resolve the conflict and determine the location of the respective facilities within the Public Rights-of-Way.

Atmos Energy or contractors working on behalf of Atmos Energy shall not be required to pay for street cutting permits, street excavation permits or other special permits related to excavations in Public Rights-of-Way in connection with Atmos Energy's operations in Public Rights-of-Way. If Town's annual capital improvement plan ("Plan") includes projects that will affect Atmos Energy's facilities located in the Public Rights-of-Way, Town shall notify Atmos Energy of the Plan's availability online, as well as the availability of any updates or changes as soon as the Plan, update, or change becomes accessible. Town will endeavor to notify Atmos Energy as soon as reasonably possible of any Town projects that will affect Atmos Energy's facilities located in the Public Rights-of-Way. When required by Town to remove or relocate its mains, laterals, and/or other facilities lying within Public Rights-of-Way, Atmos Energy shall do so as soon as practically possible with respect to the scope of the project. In no event shall Atmos Energy be required to remove or relocate its facilities in less than thirty (30) days from the time notice is given to Atmos Energy by Town, unless Town agrees to pay for the removal or relocation at a cost agreed to by both parties and the relocation may be practically accomplished in less than thirty (30) days.

- B. If Town, in constructing its sewers, drainage, water lines, streets, or utilities, should request that Atmos Energy remove or relocate its mains, laterals, and other facilities lying within Public Rights-of-Way, Atmos Energy shall do so at its own expense for facilities that are in conflict, unless such work is for the primary purpose of beautification or accommodating a private developer. Facilities are deemed to be in conflict to the extent that the proposed Town facilities are determined by either the Town or Atmos Energy to be inconsistent with gas distribution industry standard safe operating practices for existing facilities. Unless Atmos Energy provides agreement in advance, Atmos Energy shall not be required to relocate facilities to a depth greater than the original depth of the facilities or four (4) feet, whichever is deeper, as measured below the new surface elevation.

When Atmos Energy is required by Town to remove or relocate its mains, laterals, and other facilities lying within Public Rights-of-Way to accommodate a request by Town, and costs of utility removals or relocations are eligible under federal, state, county, local or other programs for

reimbursement of costs and expenses incurred by Atmos Energy as a result of such removal or relocation, and such reimbursement is required to be handled through Town, Town shall include Atmos Energy's costs and expenses in any application by Town for reimbursement if Atmos Energy submits its cost and expense documentation to Town prior to the filing of the application. In the event the Town has actual knowledge that such proposal provides reimbursement for utility relocation, the Town shall provide reasonable written notice to Atmos Energy of the deadline for Atmos Energy to submit documentation of the costs and expenses of such relocation to Town in order for Town to submit its application for reimbursement to such program in a timely manner. In the event that the Town submits an application resulting in funding and does not provide sufficient written notice to Atmos Energy as set forth in this paragraph, and, as a result, the opportunity for Company to receive reimbursement through Town from such program of costs and expenses incurred by Company as a result of such removal or relocation is lost or forfeited, then the Town shall be responsible for fifty percent (50%) of the cost of the removal or relocation of Atmos Energy's facilities. Notwithstanding the foregoing, the Town is under no obligation to make application to any program.

If Atmos Energy is required by Town to remove or relocate its mains, laterals, or other facilities lying within Public Rights-of-Way for any reason other than the construction or reconstruction of sewers, drainage, water lines, streets, or utilities by Town, Atmos Energy shall be entitled to reimbursement from Town or others of the cost and expense of such removal or relocation.

- C. When Atmos Energy is required to remove or relocate its mains, laterals or other facilities to accommodate construction by Town, without reimbursement from Town, Atmos Energy shall have the right to seek recovery of relocation costs as provided for in applicable state and/or federal law. Nothing herein shall be construed to prohibit, alter, or modify in any way the right of Atmos Energy to seek or recover a surcharge from customers for the cost of relocation pursuant to applicable state and/or federal law. Town shall not oppose recovery of relocation costs when Atmos Energy is required by Town to perform relocation. Town shall not require that Atmos Energy document request for reimbursement as a pre-condition to recovery of such relocation costs. Notwithstanding any provision of this agreement, the Town shall have the right to participate and challenge any other capital costs or expenses of Atmos Energy and request full documentation to the full extent provided by state law.

- D. If Town abandons any Public Right-of-Way in which Atmos Energy has facilities, such abandonment shall be conditioned on Atmos Energy's right to maintain its use of the former Public Right-of-Way and on the obligation of the party to whom the Public Right-of-Way is abandoned to reimburse Atmos Energy for all removal or relocation expenses if Atmos Energy is requested and agrees to remove or relocate its facilities following abandonment of the Public Right-of-Way. If the party to whom the Town has abandoned Public Right-of-Way requests Atmos Energy to remove or relocate its facilities and Atmos Energy agrees to such removal or relocation, such removal or relocation shall be done within a reasonable time at the expense of the party requesting the removal or relocation at the expense of the party requesting the removal or relocation. If relocation cannot practically be made to another Public Right-of-Way, the expense of any right-of-way acquisition shall be considered a relocation expense to be reimbursed by the party requesting the relocation.
- E. If Atmos Energy employees damage the facilities owned by Town within the Public Rights-of-Way which are properly located by the Town, Atmos Energy shall reimburse such expenses as are necessary to repair Town facilities. Atmos Energy agrees to notify the appropriate Town official as soon as reasonably possible after the occurrence of such damage. If Town employees damage facilities owned by Atmos Energy within the Public Rights-of-Way which are properly located by Atmos Energy, Town shall reimburse such expenses as are necessary to repair Atmos Energy facilities. Town agrees to notify the appropriate personnel of Atmos Energy as soon as reasonably possible after the occurrence of such damage.
- F. Atmos Energy shall be required to extend distribution mains in any Public Rights-of-Way up to fifty feet (50') for any one residential customer only if such customer, at a minimum, uses gas for unsupplemented space heating and water heating. Atmos Energy shall not be required to extend transmission mains in any Public Right-of-Way within Town or to make a tap on any transmission main within Town unless Atmos Energy agrees to such extension by a written agreement between Atmos Energy and a customer.

### SECTION 3. INDEMNITY & INSURANCE:

- A. In consideration of the granting of this franchise, Atmos Energy agrees to indemnify, defend, and hold harmless the Town, its officers, agents and employees (the "Indemnitees") from and against all suits, actions or claims of injury to any person or persons, or damages to any property brought

or made for or on account of any death, injuries to, or damages received or sustained by any person or persons or for damage to or loss of property arising out of, or occasioned by Atmos Energy's intentional and/or negligent acts or omissions in connection with Atmos Energy's operations; except that the indemnity provided for in this paragraph shall not apply to any liability determined by a court of competent jurisdiction to have resulted from the negligent or intentional acts or omissions of the Indemnitees. It is understood that it is not the intention of the parties hereto to create liability for the benefit of third parties, but that this section shall be solely for the benefit of the parties hereto and shall not create or grant any rights, contractual or otherwise, to any person or entity.

B. Atmos Energy's insurance of its obligations and risks undertaken pursuant to this franchise may be in the form of self-insurance to the extent permitted by applicable law, under an Atmos Energy plan of self-insurance maintained in accordance with sound accounting and risk-management practices or by obtaining insurance as follows:

- (1) Commercial general or excess liability on a claims-made basis with minimum limits of five million dollars (\$5,000,000) per occurrence and ten million dollars (\$10,000,000) aggregate. This coverage shall include the following:
  - (a) Completed operations to be maintained for one (1) year.
  - (b) Personal and advertising injury.
  - (c) Contractual liability.
  - (d) Explosion, collapse, or underground (XCU) hazards.
- (2) Automobile liability coverage with a minimum policy limit of one million dollars (\$1,000,000) combined single limit. This coverage shall include all owned, hired and non-owned automobiles.

- C. Atmos Energy will provide proof of insurance in accordance with this franchise within thirty (30) days of the effective date of the franchise. Atmos Energy will not be required to furnish separate proof when applying for permits.

SECTION 4. NON-EXCLUSIVE FRANCHISE: The rights, privileges, and franchises granted by this ordinance are not to be considered exclusive, and Town hereby expressly reserves the right to grant, at any time, like privileges, rights, and franchises as it may see fit to any other person or corporation for the purpose of transporting, delivering, distributing, or selling gas to and for Town and the inhabitants thereof.

SECTION 5. REASONABLE CHARGES, RULES AND REGULATIONS: In addition to the rates charged for gas supplied, Atmos Energy may make and enforce reasonable charges, rules, and regulations for service rendered in the conduct of its business including a charge for services rendered in the inauguration of natural gas service, and may require, before furnishing service, the execution of a contract therefore. Atmos Energy shall have the right to contract with each customer with reference to the installation of, and payment for, any and all of the gas piping from the connection thereof with Atmos Energy's main in the streets or alleys to and throughout the consumer's premises. Atmos Energy shall own, operate and maintain all service lines, which are defined as the supply lines extending from Atmos Energy's main to the customer's meter where gas is measured by Atmos Energy. The consumer shall own, operate, and maintain all yard lines and house piping. Yard lines are defined as the underground supply lines extending from the point of connection with Atmos Energy's customer meter to the point of connection with consumer's house piping.

SECTION 6. RELIABILITY OF SERVICE: Atmos Energy shall furnish reasonably adequate service to the public at reasonable rates and charges therefore; and Atmos Energy shall maintain its property, equipment and appliances in good order and condition.

SECTION 7. PAYMENTS TO TOWN:

- A. Atmos Energy, its successors and assigns, agrees to pay and Town agrees to accept, on or before April 1, 2013 ("Initial Payment"), and on or before the same day of each succeeding year ("Succeeding Payments") during the term of this franchise, the last payment being made on the 1<sup>st</sup> day of April, 2032 a sum of money which shall be equivalent to five percent (5%) of the Gross Revenues, as defined in 7.B below, received by Atmos Energy during the preceding calendar year.

B. "Gross Revenues" shall mean:

- (1) all revenues received by Atmos Energy from the sale of gas to all classes of customers (excluding gas sold to governmental customers or gas sold to another gas utility in the Town for resale to its customers within Town) within the Town;
- (2) all revenues received by Atmos Energy from the transportation of gas through the System of Atmos Energy within the Town to customers located within the Town (excluding any gas transported to another gas utility in Town for resale to its customers within Town);
- (3) the value of gas transported by Atmos Energy for Transport Customers through the System of Atmos Energy within the Town ("Third Party Sales")(excluding the value of any gas transported to another gas utility in Town for resale to its customers within Town), with the value of such gas to be established by utilizing Atmos Energy's monthly Weighted Average Cost of Gas charged to industrial customers in the Mid-Tex division, as reasonably near the time as the transportation service is performed; and
- (4) "Gross Revenues" shall also include fees collected pursuant to this ordinance and the following "miscellaneous charges": charges to connect, disconnect, or reconnect gas; charges to handle returned checks from consumers within the Town; and contributions in aid of construction (CIAC). Calculation and payment of franchise fees based on CIAC shall be (1) calculated on an annual calendar year basis, i.e., from January 1 through December 31 of each calendar year; and (2) paid at least once annually on or before April 30 each year based on the total CIAC recorded during the preceding calendar year. The last payment of franchise fees based on CIAC shall be on or before April 30, 2033 for the period January 1 through December 31, 2032.
- (5) "Gross Revenues" shall not include:
  - (a) revenues billed but not ultimately collected or received by Atmos Energy;
  - (b) the revenue of any affiliate or subsidiary of Atmos Energy;
  - (c) sales tax;

- (d) interest or investment income earned by Atmos Energy; and
- (e) monies received from the lease or sale of real or personal property, provided, however, that this exclusion does not apply to the lease of facilities within the Public Rights-of-Way.

- C. The Initial Payment for the rights and privileges herein provided shall be for the privilege period January 1 through December 31, 2013, and each Succeeding Payment shall be for the privilege period of the calendar year in which the payment is made.

It is also expressly agreed that the aforesaid payments shall be in lieu of any and all other and additional occupation taxes, franchise taxes or charges (whether levied as an ad valorem, special, or other character of tax or charge), municipal license, permit, and inspection fees, bonds, street taxes, and street or alley rentals or charges, and all other and additional municipal taxes, charges, levies, fees, and rentals of whatsoever kind and character that Town may now impose or hereafter levy and collect from Atmos Energy or Atmos Energy's agents, excepting only the usual general or special ad valorem taxes that Town is authorized to levy and impose upon real and personal property. If the Town does not have the legal power to agree that the payment of the foregoing sums of money shall be in lieu of taxes, licenses, fees, street or alley rentals or charges, easement or franchise taxes or charges aforesaid, then Town agrees that it will apply so much of said sums of money paid as may be necessary to satisfy Atmos Energy's obligations, if any, to pay any such taxes, licenses, charges, fees, rentals, easement or franchise taxes or charges aforesaid.

- D. Effect of Other Municipal Franchise Ordinance Fees Accepted and Paid by Atmos Energy

If Atmos Energy should at any time after the effective date of this Ordinance agree to a new municipal franchise ordinance, or renew an existing municipal franchise ordinance, with another municipality in Atmos Energy's Mid-Tex Division, which municipal franchise ordinance determines the franchise fee owed to that municipality for the use of its public rights-of-way in a manner that, if applied to the Town, would result in a franchise fee greater than the amount otherwise due Town under this Ordinance, then the franchise fee to be paid by Atmos Energy to Town pursuant to this Ordinance may, at the election of the Town, be increased so that the amount due and to be paid is equal to the amount that would be due and payable to Town were the franchise fee provisions of that other franchise ordinance applied to Town. The Town acknowledges that the exercise of this right is conditioned upon the Town's acceptance of all



terms and conditions of the other municipal franchise *in toto*. The Town may request waiver of certain terms and Company may grant, in its sole reasonable discretion, such waiver.

E. Atmos Energy Franchise Fee Recovery Tariff

- (1) Atmos Energy may file with the Town a tariff or tariff amendment(s) to provide for the recovery of the franchise fees under this agreement.
- (2) Town agrees that (i) as regulatory authority, it will adopt and approve the ordinance, rates or tariff which provide for 100% recovery of such franchise fees as part of Atmos Energy's rates; (ii) if the Town intervenes in any regulatory proceeding before a federal or state agency in which the recovery of Atmos Energy's franchise fees is an issue, the Town will take an affirmative position supporting 100% recovery of such franchise fees by Atmos Energy and; (iii) in the event of an appeal of any such regulatory proceeding in which the Town has intervened, the Town will take an affirmative position in any such appeals in support of the 100% recovery of such franchise fees by Atmos Energy.
- (3) Town agrees that it will take no action, nor cause any other person or entity to take any action, to prohibit the recovery of such franchise fees by Atmos Energy.

F. Lease of Facilities Within Public Rights-of-Way. Atmos Energy shall have the right to lease, license or otherwise grant to a party other than Atmos Energy the use of its facilities within the Town's Public Rights-of-Way provided: (i) Atmos Energy first notifies the Town of the name of the lessee, licensee or user; the type of service(s) intended to be provided through the facilities; and the name and telephone number of a contact person associated with such lessee, licensee or user and (ii) Atmos Energy makes the franchise fee payment due on the revenues from such lease pursuant to Section 7 of this Ordinance. This authority to lease facilities within Public Rights-of-Way shall not affect any such lessee, licensee or user's obligation, if any, to pay franchise fees.

SECTION 8. ACCEPTANCE OF FRANCHISE: In order to accept this franchise, Atmos Energy must file with the Town Secretary its written acceptance of this franchise ordinance within sixty (60) days after its final passage and approval by Town. If such written acceptance of this franchise ordinance is not filed by Atmos Energy, the franchise ordinance shall be rendered null and void.

When this franchise ordinance becomes effective, all previous ordinances of Town granting franchises for gas delivery purposes that were held by Atmos Energy shall be automatically canceled and annulled, and shall be of no further force and effect.

SECTION 9. PARAGRAPH HEADINGS. CONSTRUCTION: The paragraph headings contained in this ordinance are for convenience only and shall in no way enlarge or limit the scope or meaning of the various and several paragraphs hereof. Both parties have participated in the preparation of this ordinance and this ordinance shall not be construed either more or less strongly against or for either party.

SECTION 10. EFFECTIVE DATE: If Atmos Energy accepts this ordinance, it becomes effective as of January 1, 2013.

PASSED, APPROVED, AND ADOPTED ON FIRST READING THE 15th DAY OF October, 2012.

PASSED, APPROVED, AND ADOPTED ON SECOND READING THE 5th DAY OF November, 2012.

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Thomas E. Hayden, Mayor

ATTEST:

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Theresa Scott, Town Secretary

APPROVED AS TO FORM:

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Terrence S. Welch, Town Attorney

STATE OF TEXAS  
COUNTY OF DENTON  
TOWN OF FLOWER MOUND

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I, \_\_\_\_\_, Town Secretary of the Town of Flower Mound, Denton County, Texas, do hereby certify that the above and foregoing is a true and correct copy of an ordinance passed by the Town Council of the Town of Flower Mound, Texas, at a \_\_\_\_\_ session, held on the \_\_\_\_\_ day of \_\_\_\_\_, 2012, as it appears of record in the Minutes in Book \_\_\_\_\_, page \_\_\_\_\_.

WITNESS MY HAND AND SEAL OF SAID TOWN, this the \_\_\_\_ day of \_\_\_\_\_, 2012.

\_\_\_\_\_  
Town Secretary  
Town of Flower Mound, Texas