

**ORDINANCE NO. 912**

**AN ORDINANCE GRANTING TO PEOPLES GAS SYSTEM, A DIVISION OF TAMPA ELECTRIC COMPANY, ITS SUCCESSORS AND ASSIGNS, A NON-EXCLUSIVE NATURAL GAS FRANCHISE AGREEMENT TO USE THE PUBLIC RIGHTS OF WAY OF THE TOWN OF BAY HARBOR ISLANDS, FLORIDA, AND PRESCRIBING THE TERMS AND CONDITIONS UNDER WHICH SAID FRANCHISE MAY BE EXERCISED; MAKING FINDINGS; PROVIDING FOR CODIFICATION, PROVIDING AN EFFECTIVE DATE; AND REPEALING PRIOR GAS FRANCHISE ORDINANCE.**

**WHEREAS**, Peoples Gas System and the Town of Bay Harbor Islands desire to enter into a franchise agreement for a period of thirty (30) years commencing from the date provided herein; and

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

**NOW THEREFORE, BE IT ENACTED BY THE TOWN COUNCIL OF THE TOWN OF BAY HARBOR ISLANDS, FLORIDA, THAT:**

**SECTION 1:            DEFINITIONS**

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

- A. "Customer" shall mean any Person served by the Company within the corporate limits of the Town.
- B. "Town" shall mean the Town of Bay Harbor Islands, Miami-Dade County, Florida, its successor and assigns.
- C. "Company" shall mean Peoples Gas System, a division of Tampa Electric Company, a Florida corporation, its successors and assigns.
- D. "Distribution System" shall mean any and all transmission pipe lines, main pipe lines and service lines, together with all tubes, traps, vents, vaults, manholes, meters, gauges, regulators, valves, conduits, attachments, structures and other appurtenances, as are used or useful in the sale, distribution, transportation or delivery of Natural Gas and as are situated within the corporate limits of the Town.
- E. "Effective Date" shall mean the date this Franchise becomes Effective as described in Section 20 below.
- F. "Franchise" or "Franchise Agreement" shall mean this agreement, as passed and adopted by the Town and accepted by the Company, as provided in Section 21 below.
- G. "FPSC" shall mean the Florida Public Service Commission or any successor agency.
- H. "Gross Revenues" shall mean all revenues (as defined by the Florida Public Service Commission) received by the Company from any Customer from the sale, transportation, distribution or delivery of Gas.
- I. "Person" shall mean any individual, firm, partnership, estate, corporation, company or other entity, including, but not limited to, any government entity.

- J. "Natural Gas" or "Gas" shall mean natural gas and/or manufactured gas and/or a mixture of gases which is distributed in pipes and measured by meter on the Customer's premise. It shall not mean propane gas or liquefied petroleum gas (commonly referred to as "bottled gas").
- K. "Right-of-way" means any street, road, lane, highway, avenue, boulevard, alley, waterway, bridge, easement, public place or other right-of-way that is owned by the Town.

**SECTION 2:**            **GRANT**

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

**SECTION 3:**            **TERM**

Except as provided in Section 15, the Franchise hereby granted shall be for a period of thirty (30) years from the effective date of this ordinance.

**SECTION 4:**            **ASSIGNMENT**

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

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

**SECTION 5:**            **TOWN COVENANT**

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

**SECTION 6:**            **USE OF STREETS**

The Distribution System shall be erected, placed, or laid in such manner as will, consistent with necessity, least interfere with other public uses of the Rights-of-way, and said Rights-of-way shall not be

unnecessarily obstructed, and before, except in an emergency situation, the Company makes any excavation or disturbs the surface of any of the Rights-of-way, it shall make application for a permit to the appropriate Town authority. The Town shall issue, or if applicable deny, permits within ten (10) business days of application by the Company. In consideration of the franchise fees contemplated in this agreement, the Town shall NOT charge the Company a permit fee for the issuance of said permits. The Company shall, with due diligence and dispatch, place such Rights-of-way in as good a condition as before such excavation or disturbance was made; provided, however, that should the Company fail, within ten (10) days of its receipt of written notice from the Town, to restore such Rights-of-way, then the Town may undertake such restoration (other than any restoration work on the Distribution System) and charge the reasonable cost thereof to the Company.

To the extent consistent with Florida law, the Company hereby agrees to abide by all the rules and regulations and ordinances which the Town has passed or might pass in the future, in the exercise of its police power, and further agrees to abide by any established policy which the Town or its duly authorized representative has passed, established, or will establish, in the exercise of its police power; provided, however, that the Town shall not pass any ordinance or regulation that results in a material change in the rights or obligations of the Company under the Franchise Agreement.

**SECTION 7:**                    **MAINTENANCE**

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

**SECTION 8:**                    **LAYING OF PIPE**

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

**SECTION 9:**                    **CONSTRUCTION WORK**

The Town reserves the right to permit to be laid electric conduits, water and gas pipes and lines, cables, sewers, and to do and permit to be done any underground work that may be deemed necessary or proper by the Town in, across, along, or under any Right-of-way. Whenever, by reason of establishing a grade or by reason of changes in the grade of any Right-of-way, or by reason of the widening, grading, paving, or otherwise improving present or future Rights-of-way, or in the location or manner of construction of any water pipes, electric conduits, sewers, or other underground structure located within the Rights-of-way, it shall be deemed necessary by the Town to remove, relocate or disconnect any portion of the Distribution System of the Company hereto for such public purpose, such removal,

relocation or disconnection shall be made by the Company as ordered in writing by the Town without claim for reimbursement. If the Town shall require the Company to remove, relocate or disconnect any portion of its Distribution System or in any way to alter the placement or location of the Distribution System, to enable any other Person to use said Rights-of-way of the Town, as part of its permitting or approval process, the Town shall require the Person desiring or occasioning such removal, relocation, disconnection or alteration to reimburse the Company for any loss, cost or expense caused by or arising out of such removal, relocation, disconnection or alteration of any portion of the Distribution System. The Company further agrees that it will not intentionally interfere with, change, or injure any water pipes, drains, or sewers of said Town unless it has received specific permission from the Town or its duly authorized representative.

**SECTION 10:**            **FRANCHISE FEE**

Subject to Section 11 below, within thirty (30) days after the close of the first full billing month following the effective date of this Franchise Agreement, and each month thereafter during the term of this Franchise Agreement, the Company, its successors or assigns, shall pay to the Town, or its successors, a sum of money equal to six percent (6%) of the Company's Gross Revenue, less any adjustments for uncollectable accounts, from the sale, transportation, distribution or delivery of Natural Gas to Customers within the corporate limits of the Town. In consideration of the franchise fees contemplated in this Section, the Town shall NOT charge the Company a permit fee for the issuance of permits. The franchise fee payment shall be deemed paid on time if post-marked within thirty (30) days of the close of the preceding billing month.

**SECTION 11:**            **IDENTIFICATION OF TOWN RESIDENTS**

No less than thirty (30) days prior to the Effective Date, the Town shall deliver to the Company such information (including Town limit streets and block numbers) as is needed by the Company to determine which of its customer are located within the Town limits. The Town shall also provide such information no less than thirty (30) days prior to the effectiveness of any change in said limits, whether by addition, annexation or consolidation, or upon the Company's request. The Company shall be relieved of any obligation to pay franchise fees to the extent the Town has failed to provide information in accordance with this Section 11.

**SECTION 12:**            **ACCOUNTS AND RECORDS**

The Company shall maintain accounting, maintenance, and construction records as prescribed by the FPSC. The Company shall establish and maintain appropriate accounts and records in such detail that revenues within the corporate limits of the Town are consistently declared separately from all other revenues, and such records shall be maintained within the State of Florida. Upon request by the Town, or

its designated representative, and execution of a confidentiality agreement reasonably satisfactory to the Company, the Company shall make available said records within thirty (30) days to the Town for the determination of the accuracy of the Gross Revenues upon which the Company's franchise fee is based. The Company shall maintain its billing records only for the period of time required by the FPSC and any examination conducted after such period shall be confined to the billing records then available.

#### **SECTION 13:**            **INSURANCE**

During the term of this Franchise, the Company shall file with the Town Clerk and shall keep in full force and effect at all times during the effective period hereof, insurance certificates evidencing a general liability insurance policy or policies or evidence of self-insurance within the corporate limits of the Town, as they currently exist or may exist in the future. Each such policy shall be in the minimum sum of \$1,000,000.00 for injury or death to any one person, and in the minimum sum of \$5,000,000.00 for injury or death to all persons where there is more than one person involved in any one accident, and in the minimum sum of \$1,000,000.00 for damage to property, resulting from any one accident, and each of the said minimum sums shall remain in full force and shall be undiminished during the effective period of this Ordinance. The coverage requirements set forth in this Section 13 may be satisfied, in whole or in part, with self-insurance.

Every such insurance policy shall contain a provision whereby every company executing the same shall obligate itself to notify the clerk of the Town, in writing, at least thirty (30) days before any material alteration, modification, or cancellation of such policy is to become effective.

#### **SECTION 14:**            **INDEMNIFICATION**

In consideration of the permissions granted to the Company by this Franchise Agreement, the Company hereby agrees to defend, indemnify and hold harmless the Town, its officers, agents and employees from and against claims, suits, actions, and causes of action, caused by or arising out of and to the extent of the Company's willful misconduct, negligent act or omission and negligent operation of the Distribution System within the Town during the term of this Franchise and resulting in personal injury, loss of life or damage to property sustained by any Person, through or as a result of the doing of any work herein authorized or the failure to do work herein required, and including all reasonable costs, attorney's fees, expenses and liabilities incurred by the Town in connection with any such claim, suit or cause of action, including the investigation thereof, and the defense of any action or proceeding brought thereon and any order, judgment or decree which may be entered in any such action or proceeding or as a result thereof; **provided, however,** that neither the Company nor any of its employees, agents, contractor, licensees, or sub-lessees shall be liable under this section for any claims, demands, suits, actions, losses, damages, or expenses, including attorney's fees, to the extent they arise out of the negligence, strict

liability, intentional torts, criminal acts, or error of the Town, its officers, agents, or employees. The provisions of this section shall survive the expiration or earlier termination of this Franchise Agreement. Nothing in this Franchise Agreement shall be construed to affect in any way the Town's rights, privileges, and immunities under the doctrine of "sovereign immunity" and as set forth in Section 768.28, Florida Statutes.

**SECTION 15:**            **TERMINATION BY TOWN**

Violation by the Company of any of the covenants, terms, and conditions hereof, or default by the Company in observing or carrying into effect any of said covenants, terms and conditions, shall authorize and empower the Town to declare a termination this Franchise Agreement; provided, however, that before such action by the Town shall become operative and effective, the Company shall have been served by the Town with a written notice setting forth all matters pertinent to such violation or default, and describing the action of the Town with respect thereto, and the Company shall have had a period of forty five (45) days after service of such notice, or, in the event such cure reasonably requires a period of more than forty five (45) days, forty five (45) days to present a plan, reasonably satisfactory to the Town, to effect such cure; and provided further that any violation or default resulting from a strike, a lockout, an act of God, or any other cause beyond the control of the Company shall not constitute grounds for termination.

**SECTION 16:**            **CHANGES IN PROVISIONS HEREOF**

Changes in the terms and conditions hereof may be made by written agreement between the Town and the Company.

**SECTION 17:**            **PARITY**

In the event the Franchisee enters into a franchise agreement with another Florida governmental entity in Miami-Dade, Broward or Palm Beach Counties, under which franchise fees are based upon a percentage of gross revenue that is higher than six percent (6%) of Franchisee's sales, transportation, distribution or delivery of natural gas to customers under such franchise, then the percentage basis of the Franchise Fee used in this Franchise shall be adjusted to provide for a Franchise Fee that equals the value of franchise fees that would result in the event that the percentage used in such other franchise agreement were applied to the Gross Revenues less any adjustments for uncollectible accounts, from the sale, transportation, distribution or delivery of natural gas to customers in the Town and such adjustment shall be effective as of the first day of the month following the commencement date of the franchise for such other Florida governmental entity.

If, during the term of this Franchise Agreement, the Town by franchise agreement or ordinance, allows other gas providers, gas consumers or gas transporters ("Alternate Gas Providers") the right,

privilege or franchise to construct, maintain, operate or use gas facilities in, under, upon, over or across the present or future streets, alleys, bridges, easements or other public Rights-of-way of the Town for the purpose of supplying or delivering Natural Gas to customers located within the corporate limits of the Town or receiving such gas from a person other than the Company within such corporate limits, and imposes a franchise compensation obligation or an equivalent on such Alternate Gas Provider for any customer or class of customers that is less than that imposed with respect to the same Customer or class of Customers under this Franchise Agreement, the franchise compensation rate and/or base to which such rate is applied with respect to the same class of customers shall be reduced under this Franchise Agreement so that the franchise compensation paid hereunder for such Customer class is no greater than the franchise compensation payable by such Alternate Gas Provider under the franchise agreement or ordinance applicable to it, when compared on a dollars-per-therm basis. In the event that the Town determines not to impose any franchise compensation by agreement, ordinance or otherwise on any such Alternate Gas Provider, the Company's obligation to pay a franchise fee under this Franchise Agreement with respect to revenues derived from the provision of service by the Company to the comparable class of customers served by such Alternate Gas Provider thereafter shall be extinguished

**SECTION 18:**            **SEVERABILITY; CHANGE IN LAW**

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

(B) Upon the issuance by a court of competent jurisdiction of an order, ruling, or decision, or the enactment or adoption by the Florida Legislature, the Town or any other governmental or regulatory body, of a law, rule, regulation or ordinance, that materially diminishes a municipality's ability to exact franchise fees from a utility, or that effectively does away with the ability of a municipality to grant a franchise altogether, then the Company or Town may terminate this Franchise Agreement by providing ninety (90) days written notice to the other party.

**SECTION 19:**            **GOVERNING LAW**

This Franchise shall be governed by the laws of the State of Florida and applicable federal law. Jurisdiction and venue for all purposes shall be in Miami-Dade County, Florida.

**SECTION 20:            EFFECTIVE DATE**

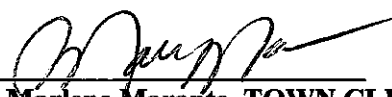
This Franchise Agreement shall become effective upon its acceptance by the Company, which acceptance must be evidenced in writing within sixty (60) days of the Town's passage and adoption hereof.

**SECTION 21:** Following passage of this ordinance by the Town Council of the Town of Bay Harbor Islands and acceptance of this ordinance by the Company, the provisions of this ordinance shall be codified within Chapter 8 of the Town of Bay Harbor Islands Code of Ordinances (FRANCHISES AND EASEMENTS) as Section 8-3, replacing the current Section 8-3 which shall be repealed and superseded at the time of the Company's acceptance of this ordinance.

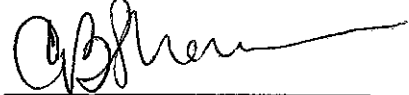
**PASSED on first reading this 9th day of May, 2011.**

**PASSED AND ADOPTED on second reading this 13th day of June, 2011.**

  
Heene S. Wallace, MAYOR

ATTEST:   
Marlene Marante, TOWN CLERK

**APPROVED AS TO FORM AND CORRECTNESS:**

  
Craig B. Sherman, TOWN ATTORNEY

Accepted this 13<sup>th</sup> day of June, A.D. 2011

**PEOPLES GAS SYSTEM, A DIVISION OF  
TAMPA ELECTRIC COMPANY**

By: \_\_\_\_\_  
Title: \_\_\_\_\_



**SECTION 20:**            **EFFECTIVE DATE**

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

**SECTION 21:** Following passage of this ordinance by the Town Council of the Town of Bay Harbor Islands and acceptance of this ordinance by the Company, the provisions of this ordinance shall be codified within Chapter 8 of the Town of Bay Harbor Islands Code of Ordinances (FRANCHISES AND EASEMENTS) as Section 8-3, replacing the current Section 8-3 which shall be repealed and superseded at the time of the Company's acceptance of this ordinance.

**PASSED on first reading this 9th day of May, 2011.**

**PASSED AND ADOPTED on second reading this 13th day of June, 2011.**

  
Heene S. Wallace, MAYOR


ATTEST:   
Marlene Marante, TOWN CLERK

**APPROVED AS TO FORM AND CORRECTNESS:**

  
Craig B. Sherman, TOWN ATTORNEY


Accepted this 13<sup>th</sup> day of June, A.D. 2011

**PEOPLES GAS SYSTEM, A DIVISION OF  
TAMPA ELECTRIC COMPANY**

  
By: Gordon L. Gifford  
Title: President

I, Marlene Marante Town Clerk of the Town of Bay Harbor Islands, Florida, do hereby certify that the above and foregoing is a true and correct copy of the original thereof on file in my office.

WITNESS my hand and the seal of said town this 17<sup>th</sup> day of June  
A.D. 2011

  
Town Clerk of the Town of  
Bay Harbor Islands, Florida