

**ORDINANCE NO. 1161  
GAS FRANCHISE**

**AN ORDINANCE GRANTING TO NEW MEXICO GAS COMPANY, INC., A DELAWARE CORPORATION, ITS LEGAL REPRESENTATIVES, SUCCESSORS, LESSEES AND ASSIGNS, GRANTEE HEREIN, CERTAIN POWERS, LICENSES, RIGHTS-OF-WAY, PRIVILEGES AND FRANCHISE TO CONSTRUCT, OPERATE, AND MAINTAIN IN THE TOWN OF SILVER CITY, NEW MEXICO, AS NOW OR HEREAFTER CONSTITUTED, WORKS, SYSTEMS AND PLANTS FOR THE HANDLING, TRANSPORTING, STORING, SALE AND DISTRIBUTION OF NATURAL GAS INTO, OUT OF AND THROUGH SAID MUNICIPALITY TO ITS INHABITANTS, AND OTHERS, INCLUDING CUSTOMERS INSIDE, BEYOND AND OUTSIDE THE LIMITS OF SAID MUNICIPALITY; AND TO USE THE STREETS, AVENUES, EASEMENTS, RIGHTS-OF-WAY, ALLEYS, HIGHWAYS, SIDEWALKS, PATHS, BRIDGES AND OTHER STRUCTURES AND PUBLIC PLACES AND GROUNDS IN SAID MUNICIPALITY FOR A PERIOD OF TWENTY (20) YEARS AND PRESCRIBING CERTAIN RIGHTS, DUTIES, TERMS AND CONDITIONS HEREIN MENTIONED, AND PROVIDING FOR THE PAYMENT TO SAID MUNICIPALITY OF A PERCENTAGE OF CERTAIN REVENUES OF GRANTEE FROM ITS OPERATIONS HEREIN.**

**BE IT ORDAINED BY THE GOVERNING BODY OF THE TOWN OF SILVER CITY, GRANT COUNTY, NEW MEXICO:**

**SECTION I.**

That the Town of Silver City, New Mexico (hereinafter called "Municipality"), which term includes all areas within the boundaries of said Municipality, as now existing or hereafter extended), hereby grants to and vests in New Mexico Gas Company, Inc., a corporation organized and existing under the laws of the State of New Mexico, and duly qualified to do business in the State of New Mexico (hereinafter called the "Company"), its legal representatives, successors, lessees and assigns, a franchise and the authority, license, right, power and privilege to maintain, construct, equip, extend, alter, install, remove, change, improve and otherwise establish and operate in the Municipality, works, systems, plants, pipes and all related facilities (including those now in service) as may be necessary or reasonably convenient, to sell, store, distribute, convey or otherwise conduct, serve, supply and furnish the inhabitants of the Municipality and others, and to the Municipality, whenever the Municipality or its inhabitants may desire to contract therefore, gas for light, fuel, power, heat and any and all other useful purposes, and the said Company is hereby granted passage and rights-of-way, under, in, upon, along and across, and the non-exclusive right to occupy and use in any lawful way during the life of this franchise any and all streets, avenues, easements, rights-of-way, alleys, highways, sidewalks, paths, bridges, structures and other public places of the Municipality, both above and beneath the surface of the same, as said streets, avenues, easements, rights-of-way, alleys, highways, sidewalks, paths, bridges, structures and other public places of the Municipality now or may hereafter exist, for every and any such service, use, effect and lawful purpose as herein

mentioned, provided the Company complies with all federal, state and local laws, ordinances and regulations, as otherwise may be applicable to the conduct of business within the Town of Silver City pertaining to the conditions and terms of this franchise.

## **SECTION II.**

The Company is hereby authorized, licensed and empowered to do any and all things as may be necessary or reasonably convenient to be done and performed in executing the powers and utilizing the rights, powers and privileges herein mentioned and granted by this franchise, provided the same do not unreasonably interfere with pre-existing, or planned, water, sewer and other authorized installations, and provided that all work done in said streets, avenues, easements, rights-of-way, alleys, highways, sidewalks, paths, bridges, structures and other public places of the Municipality by the Company shall be done diligently and in accordance with good engineering practices as well as in compliance with Town design and construction standards in effect at the time. All excavations shall be completed within fifteen (15) days and restored in accordance with Town design and construction standards.

It is specifically agreed and understood, however, that before the Company shall authorize any such change requiring the relocation or removal of the Municipality's facilities, the Company shall provide the Municipality with written notice at least sixty (60) days in advance of the commencement of the contemplated changes so that the Municipality may have sufficient time to make recommendations intended to minimize the cost of relocating or removing its facilities. The Company also agrees to submit any recommended changes to the Municipality's project within thirty (30) days after receipt of the Municipality's notice.

## **SECTION III.**

Conditioned upon the Town's written consent the Company shall have the right and privilege of transferring this franchise and all rights and privileges granted herein, so long as any successor, assign or lessee continues to serve the Municipality as a public utility and is properly licensed by the State of New Mexico. Consent to transfer under this Section shall not be unreasonably withheld, and consent to transfer under this Section shall not be withheld if transfer is to an entity which has been authorized by the New Mexico Public Regulation Commission to provide Natural Gas similar to that provided by the Company and as described in the first paragraph of this Ordinance. Whenever the word "Company" appears herein, it shall be construed as including its successors, assigns and lessees.

## **SECTION IV.**

The Company, for and in consideration of the granting of this franchise and as rental for the occupation and use or easement over, upon and beneath the streets, avenues, easements, rights-of-way, alleys, highways, sidewalks, paths, bridges, structures and other public places in the Municipality, and, except as set forth herein, in lieu of any and all "other Municipal taxes" as hereinafter defined, shall for the term of this franchise, pay to the Municipality each year a total aggregate sum of three percent (3%) of the Company's gross receipts (exclusive of sales or gross receipts taxes) collected during each year from end users and consumers on account of gas sold and consumed within the corporate limits of the Municipality under the Company's approved residential, commercial and industrial rate schedules as in effect from time to time, excepting there from, the gross receipts for gas sold to industrial consumers under special contract, gas sold

for the generation of electricity, the sale of gas by any independent third-party marketer, the payment of sales or gross receipts taxes and franchise fees, and gas sold to the Municipality for its own use. The Company shall make such payments quarterly on or before the last day of the month following the end of each calendar quarter of each year while this provision shall remain in force and effect.

For the purpose of determining said gross receipts, the books of the Company shall at reasonable times be subject to inspection by duly authorized officials of the Municipality, upon written request, giving reasonable notice. Notwithstanding anything herein to the contrary, the payments by the Company, provided for above, shall continue only so long as the Company is not prohibited from making the same by any lawful authority having jurisdiction. As used in this Section, the term, "other Municipal taxes" means and includes any and all other franchise, license, privilege, instrument, occupation, excise or revenue taxes and any and all other fees, charges or exactions (except excise taxes imposed by the Municipality and actually collected by the Company from its consumers, municipal occupation taxes lawfully assessed and collected on a non-utility business of the Company, general ad valorem taxes and special assessments for local improvements imposed by ordinance of the Municipality and uniformly imposed and collected from other persons engaging in the same or similar activities and except for such other compensatory service fees which may be agreed to by the parties, separately, and in writing) upon all or any portion of the business, revenue, property or activities of the Company located or conducted within the Municipality during the term of this franchise.

#### **SECTION V.**

When reasonably required by the Municipality for reasons of public safety, street construction (including rerouting, improving or widening), bridge repair or reconstruction, or change or establishment of street grade, the Company shall, at its own expense, protect, support, temporarily disconnect, relocate or remove its facilities along, under or over any Public Rights-of-Way ("Relocation Costs"); provided, however, that the Company shall not be responsible for Relocation Costs:

- (1) where by Municipality application, specific monies can be and are obtained from Federal or State sources for Relocation Costs, provided that no Municipality matching funds would be required, the scope of the Municipality project would not be diminished and the Municipality would not be required to spend additional monies;
- (2) if the specific street excavation, street construction, or street regarding is done to accommodate the actions or plans of private individuals or entities who are developing or intend to develop property within the Municipality, then such private individuals or entities shall be responsible for the Relocation Costs, provided that in no event shall the Municipality be liable for such Relocation Costs; and
- (3) that State or Federal law requires the County to pay.

It is specifically agreed and understood, however, that before the Municipality shall authorize any such change requiring the relocation or removal of the Company's facilities, the Municipality shall provide the Company with written notice at least sixty (60) days in advance of the commencement of the contemplated changes so that the Company may have sufficient time to make recommendations intended to minimize the cost of relocating or removing its facilities. The Municipality also agrees to submit any recommended changes to the Company's project within thirty (30) days after receipt of the Municipality's notice. The Municipality agrees that it will act in good faith and use its best efforts to cooperate with the Company in attempting to implement any recommendations offered by the Company.

#### **SECTION VI.**

The Company shall indemnify and save harmless the Municipality, its governing body officers, agents and employees from and against the pro-rata share of all claims, obligations, judgments, costs and expenses attributable to the negligence of the Company, its officers, agents or employees, contractors or subcontractors in connection with the installation, repair, operation or maintenance of any of the Company's facilities or in any work done as authorized for this franchise. The Municipality shall give prompt notice to the Company of any claim or suit arising under this indemnity agreement and the Company or its insurer shall have the option to compromise and defend the same to the extent of their own interests. Nothing in this indemnity agreement shall be construed to depart from the present or future law of New Mexico concerning contribution among or between joint tortfeasors.

#### **SECTION VII.**

(a) The Company shall, within thirty (30) days after the passage and approval of this ordinance, file in the office of the County Clerk of the County of Grant and the Municipal Clerk of the Municipality, a written statement of acceptance duly signed and acknowledged by the proper officer of the Company authorized to execute such acceptance.

(b) In the event such acceptance is not filed within said period, this ordinance and the rights, privileges, powers and obligations contained herein shall be terminated and void; PROVIDED, HOWEVER, the Municipality may by resolution extend the time herein for the filing of such acceptance for an additional period.

(c) This ordinance, if accepted by the Company as hereinbefore provided, as adopted pursuant to N.M.S.A. § 3-42-1 (1978), shall supersede, cancel and be in lieu of any and all other existing or prior grants of rights, permission and authority to the Company or any predecessor companies or assignors of the Company to construct, operate and maintain any system for the sale, storage, distribution, conveyance and supply of pipeline gas for light, fuel, power, heat or other purpose within the Municipality, including Ordinance No. 651, adopted and passed on March 10, 1980.

#### **SECTION VIII.**

Except as otherwise provided in paragraph (b) of Section VII, all grants and privileges herein granted and conferred upon the Company, its legal representatives, successors and assigns, shall continue in full force and effect for a period of twenty (20) years from the date of this ordinance.

**SECTION IX.**

If any section, paragraph, subdivision, clause, phrase, or provision of this ordinance shall be adjudged invalid or unconstitutional, the same shall not affect the validity of this ordinance as a whole or any part of the provisions hereof, other than the part so determined to be invalid or unconstitutional.

**SECTION X.**

The Municipality, in granting this franchise, surrenders no privileges or rights that it may have of owning or installing any system of light, heat, power, or communication and furnishing the same to the Municipality and its inhabitants.

**SECTION XI.**

In the event of breach of this agreement by either party hereto, the prevailing party shall enjoy all rights and remedies allowed in law or equity and shall recover reasonable attorneys' fees in any suit arising from the breach or enforcement of this agreement.

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**PASSED, ADOPTED AND APPROVED** by vote of the Council of the Town of Silver City, Grant County, New Mexico, this 12th day of January, 20 10.

(Seal)

TOWN OF SILVER CITY

/s/

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James R. Marshall, Mayor

Attest:

/s/

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Ann L. Mackie, Town Clerk