

ORDINANCE NO. 2509

AN ORDINANCE OF THE CITY OF GARDNER GRANTING TO ATMOS ENERGY CORPORATION, AND ITS SUCCESSORS AND ASSIGNS, A CONTRACT FRANCHISE TO FURNISH, SELL AND DISTRIBUTE GAS TO THE CITY AND TO ALL PERSONS, BUSINESSES AND INDUSTRIES WITHIN THE CITY AND THE RIGHT TO ACQUIRE, CONSTRUCT, INSTALL, LOCATE, MAINTAIN, OPERATE AND EXTEND INTO, WITHIN AND THROUGH SAID CITY ALL FACILITIES REASONABLY NECESSARY TO FURNISH, SELL AND DISTRIBUTE GAS TO THE CITY AND TO ALL PERSONS, BUSINESSES AND INDUSTRIES WITHIN THE CITY; AND PRESCRIBING THE TERMS OF SAID CONTRACT FRANCHISE.

NOW THEREFORE, BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF GARDNER, KANSAS:

SECTION 1. DEFINITIONS.

For the purposes of this Ordinance the following words and phrases shall have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future tense, words in the plural number include the singular number and words in the singular number include the plural number. The word "shall" is always mandatory, and not merely directory. Words not defined in this Article shall be given their common and ordinary meaning.

- a. "City" – means the City of Gardner, Johnson County, Kansas.
- b. "Contract Franchise" – means this Ordinance granting the right, privilege and franchise to Grantee to provide Natural Gas services within the City.
- c. "Distribution" – shall mean all sales, supply, or transportation of Gas to any consumer for uses within the City by the Grantee or by others through the Facilities of the Grantee in the Right-of-way.
- d. "Distribution Facilities" – refer to and are only those facilities reasonably necessary to provide Gas within the City which shall include a pipeline or system of pipelines, including without limitation, mains, pipes, boxes, reducing and regulating stations, laterals, conduits and services extensions, together with all necessary appurtenances thereto, or any part thereof located within the Public Right-of-way, for the purpose of distribution or supplying Gas.
- e. "Facilities" – means all facilities reasonably necessary to provide Gas into, within and through the City and includes plants, works, systems, lines, equipment, pipes, mains, underground links, Gas compressors and meters.
- f. "Gas" or "Natural Gas" – refers to and is such gaseous fuels as natural, artificial, synthetic, liquefied natural, liquefied petroleum, manufactured or any mixture thereof.

- g. “Grantee” – means Atmos Energy Corporation and its successors and assigns.
- h. “Gross Receipts” – shall mean any and all compensation and other consideration derived directly or indirectly by the Grantee from any distribution of Gas to a consumer for any use, including domestic, commercial and industrial purposes, and shall include, but not be limited to, revenues from any operation or use of any or all Distribution Facilities in the Public Right-of-way by the Grantee or others, including without limitation, charges as provided in tariffs filed and approved, and shall also include all fees or rentals received by the Grantee for the lease or use of pipeline capacity within the corporate limits of the City for the transport Gas services outside the City; but such term shall not include revenue from certain miscellaneous charges and accounts, including but not limited to delayed or late payment charges, connection and disconnection fees, reconnection fees, customer project contributions, returned check charges, and temporary service charges.
- i. “Kansas Corporation Commission” and/or “KCC” refers to and is the State Corporation Commission of the State of Kansas or other authority succeeding to the regulatory powers of the KCC.
- j. “Public Right-of-way” – means only the area of real property in which the City has a dedicated or acquired right-of-way interest in the real property. It shall include the area on, below or above the present and future streets, alleys, avenues, roads, highways, parkways or boulevards dedicated or acquired as right-of-way. The term does not include the airwaves above a right-of-way with regard to wireless telecommunications or other non-wire telecommunications or broadcast service, easements obtained by utilities or private easements in platted subdivisions or tracts.

SECTION 2. GRANT OF CONTRACT FRANCHISE.

- a. There is hereby granted to Grantee this nonexclusive Contract Franchise to construct, maintain, extend and operate its Facilities along, across, upon or under any Public right-of-way for the purpose of the Distribution of Gas and related services, including but not limited to furnishing, selling and distributing Gas to the consumers or recipients of such located within the corporate boundaries of the City, for the term of this Contract Franchise, subject to the terms and conditions set forth herein.
- b. The grant of this Contract Franchise by the City shall not convey title, equitable or legal, in the Public right-of-way, and shall give only the right to occupy the Public right-of-way, for the purposes and for the period stated in this Contract Franchise. This Contract Franchise does not:
 - 1) Grant the right to use Facilities or any other property, Gas related or otherwise, owned or controlled by the City or a third-party, without the consent of such party;
 - 2) Grant the authority to construct, maintain or operate any Facility or related appurtenance on property owned by the City outside of the Public right-of-way; or

- 3) Excuse Grantee from obtaining appropriate access or attachment agreements before locating its Facilities on the Facilities owned or controlled by the City or a third-party.
- c. As a condition of this grant, Grantee is required to obtain and is responsible for any necessary permit, license, certification, grant, registration or any other authorization required by any appropriate governmental entity, including, but not limited to, the City or the Kansas Corporation Commission (KCC). Grantee shall also comply with all applicable laws, statutes and/or city regulations (including, but not limited to those relating to the construction and use of the Public right-of-way or other public property).
- d. Grantee shall not provide any additional services for which a franchise is required by the City without first obtaining a separate franchise from the City or amending this Contract Franchise, and Grantee shall not knowingly allow the use of its Facilities by any third party in violation of any federal, state or local law.
- e. This authority to occupy the Public right-of-way shall be granted in a competitively neutral and nondiscriminatory basis and not in conflict with state or federal law.

SECTION 3. USE OF PUBLIC RIGHT-OF-WAY.

- a. Grantee's Facilities shall be so constructed and maintained as not to obstruct or hinder the usual travel or public safety on such public ways or obstruct the legal use by other utilities.
- b. Grantee's use of the Public right-of-way shall always be subject and subordinate to the reasonable public health, safety and welfare requirements and regulations of the City. The City may exercise its home rule powers in its administration and regulation related to the management of the Public right-of-way; provided that any such exercise must be competitively neutral and may not be unreasonable or discriminatory. Grantee shall be subject to all applicable laws and statutes, and/or rules, regulations, policies, resolutions and ordinances adopted by the City, relating to the construction and use of the Public right-of-way, including, but not limited to, any applicable City Ordinance or provisions of the Code of the City of Gardner.
- c. Grantee shall participate in the Kansas One Call utility location program.

SECTION 4. COMPENSATION TO THE CITY/FRANCHISE FEE.

- a. In consideration of this Contract Franchise, Grantee agrees to remit to the City a franchise fee of three percent (3%) of Gross Receipts from Grantee's Distribution of Gas to consumers. To determine the franchise fee, Grantee shall calculate the Gross Receipts and multiply such receipts by 3%. Payments at the beginning and end of the franchise shall be prorated. The City shall have the right to reopen the compensation provisions at any time as deemed necessary within ninety (90) days' notice to adjust the rate of the franchise.

- b. Grantee shall pay on a quarterly basis without requirement for invoice or reminder from the City, and within 30 days of the last day of the quarter for which the payment applies franchise fees due and payable to the City. If any franchise fee, or any portion thereof, is not postmarked or delivered on or before the due date, interest thereon shall accrue from the due date until received, at the applicable statutory interest rate.
- c. Upon written request by the City, but no more than once per quarter, Grantee shall submit to the City a certified statement showing the manner in which the franchise fee was calculated.
- d. No acceptance by the City of any franchise fee shall be construed as an accord that the amount paid is in fact the correct amount, nor shall acceptance of any franchise fee payment be construed as a release of any claim of the City. Any dispute concerning the amount due under this Section shall be resolved in the manner set forth in K.S.A. 12-2001, and amendments thereto.
- e. The City shall have the right to examine, upon written notice to Grantee no more often than once per calendar year, those records necessary to verify the correctness of the franchise fees paid by Grantee.
- f. The franchise fee required herein shall be in addition to, not in lieu of, all taxes, charges, assessments, licenses, fees and impositions otherwise applicable that are or may be imposed by the City under K.S.A. 12-2001 *et seq.*, and amendments thereto. The franchise fee is compensation for use of the Public right-of-way and shall in no way be deemed a tax of any kind.
- g. Grantee shall remit a gross receipts franchise fee to the City on those Gas services that have been resold to another Gas provider, but in such case the City shall not collect a franchise fee from the reseller service provider and shall not require the reseller service provider to enter a Contract Franchise ordinance. Such gross receipts franchise fee shall be in the same amount or percentage as the franchise fee set forth in subsection 4(a) hereinabove.

SECTION 5. INDEMNITY AND HOLD HARMLESS.

- a. It shall be the responsibility of Grantee to take adequate measures to protect and defend its Facilities in the Public right-of-way from harm or damage. If Grantee fails to accurately or timely locate Facilities when requested, in accordance with the Kansas Underground Utility Damage Prevention Act, K.S.A. 66-1801 *et seq.*, it has no claim for costs or damages against the City and its authorized contractors unless such parties are responsible for the harm or damage by its negligence or intentional conduct. The City and its authorized contractors shall be responsible to take reasonable precautionary measures including calling for utility locations and observing marker posts when working near Grantee's Facilities.
- b. Grantee shall indemnify and hold the City and its officers and employees harmless against any and all claims, lawsuits, judgments, costs, liens, losses, expenses, fees (including

reasonable attorney fees and costs of defense), proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including personal or bodily injury (including death), property damage or other harm for which recovery of damages is sought, to the extent that it is found by a court of competent jurisdiction to be caused by the negligence of Grantee, any agent, officer, director, representative, employee, affiliate or subcontractor of Grantee, or its respective officers, agents, employees, directors or representatives, while installing, repairing or maintaining Facilities in the Public right-of-way.

- c. The indemnity provided by this subsection does not apply to any liability resulting from the negligence of the City, its officers, employees, contractors or subcontractors. If Grantee and the City are found jointly liable by a court of competent jurisdiction, liability shall be apportioned comparatively in accordance with the laws of this state without, however, waiving any governmental immunity available to the City under state law and without waiving any defenses of the parties under state or federal law. This section is solely for the benefit of the City and Grantee and does not create or grant any rights, contractual or otherwise, to any other person or entity.
- d. Grantee or City shall promptly advise the other in writing of any known claim or demand against Grantee or the City related to or arising out of Grantee's activities in the Public right-of-way.

SECTION 6. INSURANCE REQUIREMENT AND PERFORMANCE BOND.

- a. During the term of this Contract Franchise, Grantee shall obtain and maintain insurance coverage at its sole expense, with financially reputable insurers that are licensed to do business in the state of Kansas. Should Grantee elect to use the services of an affiliated captive insurance company for this purpose, that company shall possess a certificate of authority from the Kansas Insurance Commissioner. Grantee shall provide not less than the following insurance:
 - 1) Workers' compensation as provided for under any worker's compensation or similar law in the jurisdiction where any work is performed with an employers' liability limit equal to the amount required by law.
 - 2) Commercial general liability, including coverage for contractual liability and products completed operations liability on an occurrence basis and not a claims made basis, with a limit of not less than Two Million Dollars (\$2,000,000) combined single limit per occurrence for bodily injury, personal injury, and property damage liability. The City shall be included as an additional insured with respect to liability arising from Grantee's operations under this Contract Franchise.
- b. As an alternative to the requirements of subsection (a), Grantee may demonstrate to the satisfaction of the City that it is self-insured and as such Grantee has the ability to provide coverage in an amount not less than one million dollars (\$1,000,000) per occurrence and two million dollars (\$2,000,000) in aggregate, to protect the City from and against all claims by any person whatsoever for loss or damage from personal injury, bodily injury,

death or property damage occasioned by Grantee, or alleged to so have been caused or occurred.

- c. Grantee shall, as a material condition of this Contract Franchise, prior to the commencement of any work and prior to any renewal thereof, deliver to the City a certificate of insurance or evidence of self-insurance, satisfactory in form and content to the City, evidencing that the above insurance is in force and will not be cancelled or materially changed with respect to areas and entities covered without first giving the City thirty (30) days prior written notice.

SECTION 7. REVOCATION AND TERMINATION.

- a. In case of failure on the part of Grantee to comply with any of the provisions of this Contract Franchise, or if Grantee should do or cause to be done any act or thing prohibited by or in violation of the terms of this Contract Franchise, Grantee shall forfeit all rights, privileges and franchise granted herein, and all such rights, privileges and franchise hereunder shall cease, terminate and become null and void, and this Contract Franchise shall be deemed revoked or terminated, provided that said revocation or termination, shall not take effect until the City has completed the following procedures:
 - 1) Before the City proceeds to revoke and terminate this Contract Franchise, it shall first serve a written notice upon Grantee, setting forth in detail the neglect or failure complained of, and Grantee shall have sixty (60) days thereafter in which to comply with the conditions and requirements of this Contract Franchise.
 - 2) If at the end of such sixty (60) day period the City deems that the conditions have not been complied with, the City shall take action to revoke and terminate this Contract Franchise by an affirmative vote of the City Council present at the meeting and voting, setting out the grounds upon which this Contract Franchise is to be revoked and terminated; provided, to afford Grantee due process, Grantee shall first be provided reasonable notice of the date, time and location of the City Council's consideration, and shall have the right to address the City Council regarding such matter; and further provided, if the nature of the default is such that it cannot be reasonably cured within the above said sixty (60) day period, and the City Council believes the Grantee has in good faith timely commenced its cure and is diligently pursuing the completion of the same, Grantee shall be given a reasonable additional period of time to complete its cure.
- b. Upon any determination by the City Council to revoke and terminate this Contract Franchise, Grantee shall have thirty (30) days to appeal such decision to the District Court of Johnson County, Kansas.
- c. This Contract Franchise shall be deemed revoked and terminated at the end of this thirty (30) day period, unless Grantee has instituted such an appeal.

- d. If Grantee does timely institute such an appeal, such revocation and termination shall remain pending and subject to the court's final judgment. Provided, however, that the failure of Grantee to comply with any of the provisions of this Contract Franchise or the doing or causing to be done by Grantee of anything prohibited by or in violation of the terms of this Contract Franchise shall not be a ground for the revocation or termination thereof when such act or omission on the part of Grantee is due to any cause or delay beyond the control of Grantee or to bona fide legal proceedings.
- e. Nothing herein shall prevent either party from invoking any other remedy that may otherwise exist at law.

SECTION 8. RESERVATION OF RIGHTS.

- a. In granting its consent hereunder, the City does not in any manner waive its regulatory or other rights and powers under and by virtue of the laws of the State of Kansas as the same may be amended, its Home Rule powers under the Constitution of the State of Kansas, nor any of its rights and powers under or by virtue of present or future ordinances of the City.
- b. In granting its consent hereunder, Grantee does not in any manner waive its regulatory or other rights and powers under and by virtue of the laws of the State of Kansas or applicable Federal laws or regulations as the same may be amended, or under the Constitution of the State of Kansas, nor any of its rights and powers under or by virtue of present or future ordinances of the City.
- c. In entering into this Contract Franchise, neither the City's nor Grantee's present or future legal rights, positions, claims, assertions or arguments before any administrative agency or court of law are in any way prejudiced or waived. By entering into this Contract Franchise, neither the City nor Grantee waive any rights, but instead expressly reserve any and all rights, remedies, and arguments the City or Grantee may have at law or equity, without limitation, to argue, assert, and/or take any position as to the legality or appropriateness of any present or future laws, non-franchise ordinances (e.g. the City's right-of-way ordinance referenced in Section 3 of this Contract Franchise), and/or rulings.

SECTION 9. FAILURE TO ENFORCE.

The failure of either the City or the Grantee to insist in any one or more instances upon the strict performance of any one or more of the terms or provisions of this Contract Franchise shall not be construed as a waiver or relinquishment for the future of any such term or provision, and the same shall continue in full force and effect. No waiver or relinquishment shall be deemed to have been made by the City or the Grantee unless said waiver or relinquishment is in writing and signed by both the City and the Grantee.

SECTION 10. TERM AND TERMINATION DATE.

- a. This Contract Franchise shall be effective for a term of 15 years, beginning on the effective date of this Contract Franchise.
- b. Upon written request of either the City or Grantee, this Contract Franchise shall be renegotiated at any time in accordance with the requirements of state law upon any of the following events: changes in federal, state, or local laws, regulations, or orders that materially affect any rights or obligations of either the City or Grantee, including but not limited to the scope of the Contract Franchise granted to Grantee or the compensation to be received by the City hereunder.
- c. If any clause, sentence, section, or provision of law cited to or applicable herein, and amendments thereto, shall be held to be invalid by a court or administrative agency of competent jurisdiction, provided such order is not stayed, either the City or Grantee may elect to request amendment of the Contract Franchise or to terminate the entire Contract Franchise as appropriate. In the event of such invalidity, if Grantee is required by law to enter into a Contract Franchise with the City, the parties agree to act in good faith in promptly negotiating a new Contract Franchise.
- d. Amendments under this Section, if any, shall be made by Contract Franchise ordinance as prescribed by statute. This Contract Franchise shall remain in effect according to its terms, pending completion of any review or renegotiation provided by this section.
- e. In the event the parties are actively negotiating in good faith a new Contract Franchise ordinance or an amendment to this Contract Franchise upon the termination date of this Contract Franchise, the parties by written mutual agreement may extend the termination date of this Contract Franchise to allow for further negotiations. Such extension period shall be deemed a continuation of this Contract Franchise and not as a new Contract Franchise ordinance or amendment.

SECTION 11. POINT OF CONTACT AND NOTICES.

Grantee shall at all times maintain with the City a local point of contact who shall be available at all times to act on behalf of Grantee in the event of an emergency. Grantee shall provide the City with said local contact's name, address, telephone number and e-mail address. Emergency notice by Grantee to the City may be made by telephone to the City Clerk or the Public Works Director. All other notices between the parties shall be in writing and shall be made by personal delivery, depositing such notice in the U.S. Mail, Certified Mail, return receipt requested, or by overnight delivery through a nationally recognized carrier. All written notices shall be deemed delivered upon receipt or refusal of delivery.

The City:

City of Gardner, Kansas
 120 E. Main Street
 Gardner, Kansas 66030
 Attn: City Clerk

Grantee:

Atmos Energy Corporation

or to replacement addresses that may be later designed in writing.

SECTION 12. TRANSFER AND ASSIGNMENT.

- a. This Contract Franchise is granted solely to the Grantee and shall not be transferred or assigned without the prior written approval of the City; provided that such transfer or assignment of this Contract Franchise may occur without written consent of the City any entity controlling, controlled by or under common control with Grantee. The parties acknowledge that said City consent shall only be with regard to the transfer or assignment of this Contract Franchise, and that, in accordance with Kansas Statute, the City does not have the authority to require City approval of transfers of ownership or control of the business or assets of Grantee.
- b. In the event of any transfer or assignment of either this Contract Franchise or Grantee's business or assets, Grantee shall: timely notify the City of the successor entity; provide a point of contact for the successor entity; and advise the City of the effective date of the transfer or assignment. Additionally, Grantee's obligations under this Contract Franchise with regard to indemnity, bonding and insurance shall continue until the transferee or assignee has taken the appropriate measures necessary to assume and replace the same, the intent being that there shall be no lapse in any coverage as a result of the transfer or assignment.
- c. In the event an entity acquires substantially all of the assets of Grantee, said successor entity shall be allowed to operate under this Contract Franchise for up to one hundred and eighty (180) days from the date of transfer; provided, within thirty (30) days from the date of transfer said successor entity makes application with the City for either a new ordinance or the transfer of this Contract Franchise, and provides the City with written evidence satisfying the obligations under this Contract Franchise with regard to indemnity, bonding and insurance.

SECTION 13. CONFIDENTIALITY.

Information provided to the City under K.S.A. 12-2001 shall be governed by confidentiality procedures in compliance with K.S.A. 45-215 and 66-1220a, et seq., and amendments thereto. Grantee agrees to indemnify and hold the City harmless from any and all penalties or costs, including reasonable attorney's fees, arising from the actions of Grantee, or of the City at the written request of Grantee, in seeking to safeguard the confidentiality of information provided by Grantee to the City under this Contract Franchise.

SECTION 14. ACCEPTANCE OF TERMS.

Grantee shall have sixty (60) days after the final passage and approval of this Contract Franchise to file with the City Clerk its acceptance in writing of the provisions, terms and conditions of this Contract Franchise, which acceptance shall be duly acknowledged before some officer authorized by law to administer oaths; and when so accepted, this Contract Franchise and acceptance shall

constitute a contract between the City and Grantee subject to the provisions of the laws of the state of Kansas, and shall be deemed effective on the late of the date Grantee files acceptance with the City or publication of this Contract Franchise.

SECTION 15. PAYMENT OF PUBLICATION COSTS.

In accordance with statute, Grantee shall be responsible for payment of all costs and expense of publishing this Contract Franchise, and any amendments thereof.

SECTION 16. SEVERABILITY.

If any clause, sentence, or section of this Contract Franchise, or any portion thereof, shall be held to be invalid by a court of competent jurisdiction, such decision shall not affect the validity of the remainder, as a whole or any part thereof, other than the part declared invalid; provided, however, the City or Grantee may elect to declare the entire Contract Franchise is invalidated if the portion declared invalid is, in the judgment of the City or Grantee, an essential part of the Contract Franchise; provided, however, if Grantee is required by law to enter into a Contract Franchise with the City, the parties agree to act in good faith in promptly negotiating a new Contract Franchise, and this Contract Franchise shall remain in effect according to its terms pending completion of any renegotiation provided by this section.

SECTION 17. FORCE MAJEURE.

Each and every provision hereof shall be reasonably subject to acts of God, fires, strikes, riots, floods, war and other disasters beyond Grantee's or the City's control.

PASSED by the Governing Body this 19th day of January, 2016.

APPROVED by the Mayor this 19th day of January, 2016.

/s/ Chris Morrow
Chris Morrow, Mayor

ATTEST:

APPROVED AS TO FORM:

/s/ Jeanne Koontz
Jeanne Koontz, City Clerk

/s/ Ryan Denk
Ryan Denk, City Attorney