

MEMORANDUM

TO: Honorable Mayor & City Council Members

FROM: William E. Reischmann, Jr., City Attorney

DATE: July 14, 2009

SUBJECT: **Ordinance No. 396 Authorizing Non-Exclusive Franchise Agreement To Florida Public Utilities**

City Staff and Counsel have negotiated with Florida Public Utilities Company to prepare the attached proposed franchise agreement between the City of Orange City and Florida Public Utilities to continue to allow Florida Public Utilities to maintain, repair, use and operate its gas pipes and gas mains within City right-of-ways (present and future public streets, avenues, etc).

The City has and continues to receive franchise payments from Florida Public Utilities associated with its use of Public right-of-ways.

Staff requests Council to approve Ordinance No. 396 authorizing the execution of this franchise agreement.

ORDINANCE NO. 396

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF ORANGE CITY, FLORIDA AUTHORIZING THE GRANTING TO FLORIDA PUBLIC UTILITIES COMPANY, ITS SUCCESSORS AND ASSIGNS, A NON-EXCLUSIVE ARTIFICIAL, NATURAL, AND/OR MIXED GAS FRANCHISE TO USE THE PUBLIC RIGHTS OF WAY OF THE CITY OF ORANGE CITY, FLORIDA, AND PRESCRIBING THE TERMS AND CONDITIONS UNDER WHICH SAID FRANCHISE MAY BE EXERCISED; MAKING FINDINGS; PROVIDING FOR NON-CODIFICATION, CONFLICTS, SEVERABILITY AND EFFECTIVE DATE; AND REPEALING PRIOR ORDINANCE.

WHEREAS, Florida Public Utilities Company and the City of Orange City, Florida (City) desire to enter into a franchise agreement (the Agreement) for a period of thirty (30) years commencing from the date provided in the Agreement; and

WHEREAS, the City Council finds that it is in the public interest of its citizens to enter into the Agreement with Florida Public Utilities Company; and

WHEREAS, the City is authorized to grant one or more non-exclusive franchises to construct, reconstruct, operate, and maintain an artificial, natural, and/or mixed gas system within the City; and

WHEREAS, the City finds it in the public interest to make available within its corporate limits high-quality and reliable artificial, natural, and/or mixed gas service; and

WHEREAS, the City finds it in the public interest to retain control over the use of public rights-of-way by providers of artificial, natural, and/or mixed gas to prohibit interference with the public convenience, to promote aesthetic considerations, to promote planned and efficient use of limited right-of-way space, and to protect the public investment in right-of-way property; and

WHEREAS, the City Council of the City of Orange City finds that the granting of a non-exclusive artificial, natural, and/or mixed gas franchise is the best means of assuring that the above-described interests of the City are promoted and maintained; and

WHEREAS, the City, after public hearings and due evaluations, has determined that it is in the best interests of the public health, safety and welfare of the City and its residents to approve this Agreement with Florida Public Utilities Company.

NOW THEREFORE, BE IT ENACTED BY THE CITY COUNCIL OF THE CITY OF ORANGE CITY, FLORIDA, AS FOLLOWS:

SECTION 1. The City Council of the City of Orange City, Florida hereby approves the Artificial, Natural, and/or Mixed Gas Franchise Agreement with Florida Public Utilities Company, which is attached hereto as Exhibit "A", and authorizes its execution by the Interim City Manager, Chester Murray.

SECTION 2. Non-Codification. It is the intention of the City Council of the City of Orange City, Florida, given the temporary nature and effect of this Ordinance, that this Ordinance not be codified.

SECTION 3. Conflicts: All ordinances or parts of ordinances and all resolutions or parts of resolutions in conflict herewith be and the same are hereby repealed.

SECTION 4. Severability: If any section, part of a section, paragraph, clause, phrase or word of this ordinance is declared invalid, the remaining provisions of this ordinance shall not be affected.

SECTION 4. Effective Date: This ordinance shall take effect immediately upon its adoption by the City Council of the City of Orange City, Florida, and approval as provided by law.

ROLL CALL VOTE AS FOLLOWS:

First Reading this _____ day of _____, 2009.

Jim Mahoney	_____	Donald C. Sherrill	_____
R. Paul Rasch	_____	Tom Abraham	_____
Tom Laputka	_____	Jeff H. Allebach, Vice Mayor	_____
Harley Strickland, Mayor	_____		

ROLL CALL VOTE AS FOLLOWS:

Second Reading this _____ day of _____, 2009.

Jim Mahoney	_____	Donald C. Sherrill	_____
R. Paul Rasch	_____	Tom Abraham	_____
Tom Laputka	_____	Jeff H. Allebach, Vice Mayor	_____
Harley Strickland, Mayor	_____		

PASSED and ADOPTED this _____ day of _____, 2009.

ATTEST:

AUTHENTICATED:

Deborah J. Renner, CMC, City Clerk

Harley Strickland, Mayor

Approved as to form and legal sufficiency:

W. E. Reischmann, City Attorney

**EXHIBIT A
ORDINANCE NO. 396**

**Non-Exclusive Franchise to Florida Public Utilities Company
for the Manufacture, Purchase, Transmission and Distribution of
Artificial, Natural and/or Mixed Gas within the City Limits of Orange City**

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**NON-EXCLUSIVE FRANCHISE TO FLORIDA PUBLIC
UTILITIES COMPANY FOR THE MANUFACTURE, PURCHASE,
TRANSMISSION AND DISTRIBUTION OF ARTIFICIAL, NATURAL
AND/OR MIXED GAS WITHIN THE CITY LIMITS OF
THE CITY OF ORANGE CITY, FLORIDA**

_____ **THIS AGREEMENT** (“Franchise Agreement” or “Agreement”) is made this ____ day of _____, 2009, by and between the **CITY OF ORANGE CITY**, a Florida municipal corporation, (hereinafter referred to as the “GRANTOR”), whose address is 205 E. Graves Avenue, Orange City, Florida 32763, and **FLORIDA PUBLIC UTILITIES COMPANY**, a Florida corporation (hereinafter referred to as the “GRANTEE”), whose address is 401 South Dixie Highway, West Palm Beach, Florida 33401-5807.

WITNESSETH:

SECTION 1. Term of Franchise

GRANTOR hereby grants to GRANTEE, its successors and assigns, for the term of thirty (30) years, beginning the first day of the first full calendar month following the date of filing by the GRANTEE of its acceptance of this franchise grant, the right, privilege and authority or franchise to construct or otherwise acquire and to own, maintain, equip and operate plants and works, and all necessary or desirable appurtenances thereto, for the manufacture, purchase, transmission and distribution of artificial, natural and/or mixed gas (hereinafter referred to generally as “gas”), including the right without the payment by GRANTEE of any special tax, assessment or charges therefore to construct, lay, extend, maintain, renew, remove, replace, repair, use and operate gas pipes and gas mains, and all appurtenances and appendages thereto, in, under, on or across the present and future public streets, avenues, alleys, highways, bridges, easements and other public places within the present or any future corporate limits of the GRANTOR or its successors, for the purpose of distributing, supplying and selling gas to GRANTOR or its successors, and to persons and corporations inhabitants thereof, as well as to persons or corporations beyond the present or future corporate limits thereof, but nothing herein contained shall relieve GRANTEE from meeting all applicable requirements of the GRANTOR’s Code of Ordinances including but not limited to, the City of Orange City Building and Zoning Codes (which are not in conflict with the Florida Administrative Code and/or the Code of Federal Regulations requirements) and the payment of any fees, licenses or ad valorem taxes ordinarily imposed by GRANTOR on similar business activities.

SECTION 2. Interference with Public Right-of-Way

GRANTEE’s facilities shall be so located or relocated and so erected as to interfere as little as possible with traffic over said streets, avenues, alleys, highways, bridges, easements and other public places, and with reasonable egress from and ingress to abutting property. The location or relocation of all facilities shall be made under the supervision and with the approval of such representatives as the governing body of GRANTOR may designate for the purpose, but

not so as unreasonably to interfere with the proper operation of GRANTEE's facilities and service. When any portion of the GRANTOR's property is excavated or disturbed by GRANTEE in the location or relocation of any of its facilities, GRANTEE shall make application for a permit, and the portion of the GRANTOR's property so excavated or disturbed shall, within a reasonable time and as early as practicable after such excavation, or disturbance be restored by the GRANTEE at its sole expense and in as good condition as it was at the time of such excavation or disturbance. In addition, such work shall be done only in the manner and pursuant to the regulations established by the Ordinances of the GRANTOR. Upon failure of GRANTEE to do so after twenty (20) days notice in writing shall have been given to said GRANTEE by GRANTOR, the GRANTOR may repair such portion of the GRANTOR's property that may have been excavated or disturbed by GRANTEE, and the cost of same shall be paid by GRANTEE. Nothing in this section shall be construed to make the GRANTOR liable to the GRANTEE for any cost or expense in connection with the construction, reconstruction or relocation of the GRANTEE's facilities in streets, avenues, alleys, highways, bridges, easements and other public places of the GRANTOR made necessary by widening, paving or otherwise improving such streets, avenues, alleys, highways, bridges, easements and other public places, except that the GRANTEE shall be entitled to seek reimbursement of such costs and expenses from funds available from sources other than the GRANTOR as may be provided by law. Should the Natural Gas Distribution System interfere with the construction, maintenance, or repair of the GRANTOR's public works or public improvements, GRANTEE shall, at its own cost or expense, protect or relocate its Natural Gas Distribution System, or part thereof, as reasonably directed by GRANTOR.

SECTION 3. Prompt Delivery of Service

At all times during the term of this franchise GRANTEE shall promptly and without discrimination furnish an adequate supply of gas of standard quality and pressure to GRANTOR and its successors, and to persons, corporations and inhabitants thereof who request the same and agree to abide by GRANTEE's reasonable rules and regulations, and shall acquire, construct, maintain, equip and operate all necessary facilities for the manufacture, purchase, transmission, supply and distribution of gas for the benefit and convenience of GRANTOR and its inhabitants. In any case where there is interruption or impairment of service, or failure to supply gas or pressure, GRANTEE shall promptly remedy such condition; provided that any interruption or impairment of service resulting from a strike, accident, an act of God or other cause beyond the control of the GRANTEE shall, if remedied within a reasonable time period agreed to by the parties hereto, not constitute grounds for revoking and canceling any rights hereunder.

SECTION 4. Grantee's Right to Adopt and Enforce Rules and Regulations

GRANTEE shall have the right to adopt and enforce rules and regulations with respect to the extension, initiation and rendering of gas service, including rules providing for the discontinuance of service to any customer for nonpayment of bills when due, or for failure to comply with the GRANTEE's other rules and regulations. All rates for gas and rules and regulations established by GRANTEE from time to time shall be those prescribed and approved by the Florida Public Service Commission.

All components of the GRANTEE's Distribution System located within the GRANTOR's jurisdiction 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 or other regulatory body having jurisdiction over the GRANTEE.

SECTION 5. Indemnification

GRANTOR, and its officers, employees and agents shall not be liable or responsible for any accident or damage that may occur in the construction, operation, conduct or maintenance by the GRANTEE of its facilities or services hereunder, and the acceptance of this franchise grant shall be deemed an agreement on the part of the GRANTEE to protect, defend and indemnify the GRANTOR, and its officers, employees and agents and hold it harmless against any and all liability, claims, demands, expenses, fees, fines, penalties, suits, proceedings, actions and costs of actions, of whatsoever kind or nature arising out of the negligence, default, misconduct or otherwise of the GRANTEE in the construction, operation, conduct or maintenance of its facilities or services hereunder, except where the liability, claims, demands are caused by the gross negligence of the GRANTOR. The provisions of this Section survive the expiration or earlier termination of this Franchise Agreement.

SECTION 6. Insurance Requirements

GRANTEE shall carry in full force and effect during the entire term of this Agreement, and any extension period thereof, the following insurance coverages: (a) Comprehensive General Liability Insurance, including bodily injury liability, property damage liability and product liability insurance, with a minimum combined single limit of Five Million Dollars (\$5,000,000), and (b) \$500,000.00 per accident, \$500,000.00 per employee Workers Compensation Insurance and (c) Five Million Dollars (\$5,000,000.00) Comprehensive Automobile Liability Insurance as required by the insurance carrier for the City of Orange City. The GRANTOR shall be named as additional insured for the foregoing policies (except Workmen's Compensation) for liability arising out of this Franchise Agreement. To offset the effects of inflation, the GRANTOR may, at the five (5) year anniversary of the Effective Date, request in writing the GRANTEE adjust the coverage limitations contained in this Section 6 to reflect amounts typically provided in franchises by similarly situated natural gas utilities, but not to exceed the percentage increase in the Consumer Price Index over the same period. Every such insurance policy shall contain a provision whereby every insurer shall obligate itself to notify the City Clerk, in writing, at least thirty (30) days before any material alteration, modification, or cancellation of such policy is to become effective.

SECTION 7. Franchise Fee

Effective the first day of the first month beginning after the effective date of this Franchise Agreement, GRANTOR shall be entitled to receive from GRANTEE a quarterly franchise fee in an amount equal to six percent (6%) of Grantee's gross revenues (gross revenues being the amount billed any customer for the sale, distribution of transportation of gas less charge-off for uncollected accounts and adjustments) from the sale and service of gas to residential and general service customers within the corporate limits for the preceding quarter,

which amount shall be the total compensation due GRANTOR for the rights, authority and privileges granted by this Franchise.

Payment of the Franchise Fee made by the GRANTEE to the GRANTOR shall be made quarterly, payment being made no later than January 1st, April 1st, July 1st, and October 1st of each year during the term of this Agreement. The quarterly payment may be made by wire transfer. Any quarterly payment or any portion thereof received twenty (20) days after the due date shall be subject to interest at the rate of ten percent (10%) per annum until all payments are paid in full.

SECTION 8. Right of Grantor to Purchase Property of Grantee

As a condition precedent to the taking effect of this grant, GRANTOR hereby reserves and GRANTEE hereby gives and grants to GRANTOR, the right at and after the expiration of this grant to purchase the property of GRANTEE used under this franchise grant at a valuation to be determined by negotiation between the parties.

SECTION 9. Agreement Not to Engage in Competition with Grantee

In consideration of the GRANTEE's undertakings hereunder as evidenced by its acceptance hereof, the GRANTOR agrees not to engage in the business of distributing and selling gas during the life of this Franchise or any extension thereof in competition with the GRANTEE, its successors and assigns.

SECTION 10. Failure to Comply

Failure on the part of GRANTEE to comply with any of the material provisions, covenants, terms or conditions of this Franchise Agreement, shall be grounds for a forfeiture of this grant, but no such forfeiture shall take effect if the reasonableness or propriety thereof is protested by GRANTEE until a court of competent jurisdiction (with right of appeal in either party) shall have found that GRANTEE has failed to comply with any of the material provisions of this franchise, and the GRANTEE shall have six (6) months after the Grantor's notice to GRANTEE of the default, to make good the default before a forfeiture shall result, with the right in GRANTOR at its discretion to grant such additional time to GRANTEE for compliance as necessities in the case require.

SECTION 11. Performance

GRANTEE by its acceptance hereof, which shall be filed with the GRANTOR's City Clerk within thirty (30) days after the final passage of this Franchise Agreement, agrees to observe, perform and keep all of the agreements, covenants, terms and conditions hereof to be observed, performed and kept by GRANTEE. All of the terms, covenants, and conditions hereof

shall inure to and be binding upon the respective successors and assigns of the GRANTOR and the GRANTEE.

SECTION 12. Assignment

No assignment or transfer of the franchise rights granted hereby, shall be effective unless the GRANTEE shall have notified the GRANTOR in writing prior to the scheduled date of said assignment or transfer, and unless, after the filing of said notice, the GRANTOR shall have by Ordinance approved and consented to such assignment or transfer, such approval and consent not to be unreasonably withheld. The assignment or transfer of the franchise rights shall be subject to any additional provisions and conditions, as agreed to between the parties, and as set forth in the Ordinance approving the assignment or transfer.

SECTION 13. Right to Terminate, Revoke or Cancel

In the event of a final adjudication of bankruptcy of the GRANTEE resulting in liquidation, the GRANTOR shall have full power and authority to terminate, revoke and cancel any and all rights granted under the provisions of this Franchise.

SECTION 14. Right to Minor Changes in Terms and Conditions

Minor changes in the terms and conditions hereof may be made by written agreement between the GRANTOR and the GRANTEE, provided, however, that this section shall not be construed as conferring authority to make changes in or modification of the provisions of this Franchise Agreement which would be repugnant to or inconsistent with the basic grant, factors or principles underlying the terms and conditions hereof.

SECTION 15. Right to Examine Accounts and Records

The accounts and records of the GRANTEE pertaining to gas service rendered under this Franchise shall be maintained within the State of Florida, and GRANTOR may, at its option, upon reasonable notice to GRANTEE, at any time during the ninety (90) days after the close of each franchise fee year of this grant, or at such other times as mutually agreed to between the parties, examine said accounts and records and as such relate to the calculation of the franchise payment to the GRANTOR. Such examination of accounts and records of GRANTEE by GRANTOR shall be made during the regular business hours of the GRANTEE at the general office of the GRANTEE. The GRANTEE shall maintain its records in sufficient detail that revenues within the corporate limits of the GRANTOR are readily discernible from other revenues for auditing purposes. All examinations shall be at the sole expense of the GRANTOR. However, if the GRANTOR conducts an audit of the GRANTEE's books and records, and discrepancies of \$5,000 or more are discovered which result in sums which should have been paid to GRANTOR, then the cost of such audit will be paid by GRANTEE.

Access to the aforementioned records shall not be denied by the GRANTEE on the basis that said records contain "proprietary" information, unless GRANTEE takes appropriate steps to ensure applicable law exempts said records.

No less than thirty (30) days prior to the effective date of a change in the City limits, whether by addition, annexation, or consolidation, the GRANTOR shall deliver to the GRANTEE written notice of such occurrence, and include in such notice a description of the affected territory.

SECTION 16. Franchise Parity

If, during the term of this Franchise Agreement, the GRANTOR, by franchise agreement or ordinance, allows other gas providers, gas consumers or gas transporters (“Alternative 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 GRANTOR, for the purpose of supplying or delivering Natural Gas to customers located within the corporate limits of the GRANTOR or receiving such gas from a person other than the GRANTEE within such corporate limits, and imposes a franchise fee 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 GRANTOR determines not to impose any franchise compensation by agreement, ordinance or otherwise on any such Alternate Gas Provider, the GRANTEE’s obligation to pay a franchise fee under this Franchise Agreement with respect to revenues derived from the provision of service by the GRANTEE to the comparable class of customers served by such Alternate Gas Provider thereafter shall be extinguished.

SECTION 17. Miscellaneous Provisions

A. **No Joint Venture.** Nothing herein shall be deemed to create a joint venture or principal-agent relationship between the parties and neither party is authorized to, nor shall either party act toward third persons or the public in any manner, which would indicate any such relationship with the other.

B. **Notices.** All notices from the GRANTEE to the GRANTOR, pursuant to this Franchise Agreement, shall be sent to:

**City Manager
City of Orange City, Florida
205 E. Graves Avenue
Orange City, Florida 32763**

All notices from the GRANTOR to the GRANTEE, pursuant to this Franchise Agreement, shall be sent to:

Florida Public Utilities Company
Post Office Box 3395
West Palm Beach, Florida 33402-3395

The names and addresses in this Section may be unilaterally amended by either party at any time by giving written notice to the other party.

C. **Attorney's Fees.** In the event of any litigation or arbitration arising out of this Franchise Agreement, the prevailing party shall be entitled to an award of its reasonable attorney's fees and court costs incurred in such action.

SECTION 18. Severability; Change in Law

A. If any section, part of a section, paragraph, sentence, or clause of this Franchise Agreement 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 GRANTOR, 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 GRANTEE or GRANTOR 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.

SECTION 20. Effective Date

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

IN WITNESS WHEREOF, the parties have executed this Franchise Agreement on the date indicated below their signature.

CITY OF ORANGE CITY

By: _____
Chester Murray, Interim City Manager

ATTEST:

Deborah J. Renner, City Clerk

Date: _____

FLORIDA PUBLIC UTILITIES COMPANY

By: _____

Title: _____

Date: _____