

# CITY OF RIO COMMUNITIES

## ORDINANCE NO. 2016-51

### Chapter 16: Franchises

#### Article 2: New Mexico Gas Company, Inc.

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#### 16-2-1 SCOPE OF 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 CITY OF RIO COMMUNITIES, NEW MEXICO, AS NOW OR HEREAFTER CONSTITUTED, WORKS, SYSTEMS AND PLANTS FOR THE HANDLING, PRODUCTION, MANUFACTURING, TRANSPORTING, STORING, SALE AND DISTRIBUTION OF NATURAL GAS INTO, OUT OF AND THROUGH SAID CITY TO ITS INHABITANTS, AND OTHERS, INCLUDING CUSTOMERS INSIDE, BEYOND AND OUTSIDE THE LIMITS OF SAID CITY; 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 CITY FOR A PERIOD OF TWENTY-FIVE (25) YEARS; AND PRESCRIBING CERTAIN RIGHTS, DUTIES, TERMS AND CONDITIONS HEREIN MENTIONED, AND PROVIDING FOR THE PAYMENT TO SAID CITY OF A PERCENTAGE OF CERTAIN REVENUES OF GRANTEE FROM ITS OPERATIONS HEREIN.

#### 16-2-2 SHORT TITLE

This Ordinance shall be known and may be cited as the New Mexico Gas Company Franchise Ordinance.

#### 16-2-3 GRANT OF FRANCHISE

**16-2-3A Grant of Franchise:** That the City of Rio Communities, New Mexico (hereinafter called "City"), which term includes all areas within the boundaries of said City, 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 Delaware, 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 City, works, systems, plants, pipes and all related facilities (including those now in service) as may be necessary or reasonably convenient, to sell, manufacture, store, distribute, convey or otherwise conduct, serve, supply and furnish the inhabitants of the City and others, and to the City, whenever the City or its inhabitants may desire to contract therefor, natural 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 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 City, 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 City 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, pertaining to the conditions and terms of this franchise.

**16-2-3B** 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 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 City by the Company shall be done diligently and in accordance with good engineering practices. The Company shall, within a reasonable time, restore as nearly as practicable all places excavated by it to the condition existing immediately prior to excavation.

**16-2-3C** The rates to be charged by the Company for furnishing natural gas shall be those rates effective by tariffs filed with the New Mexico Public Regulation Commission, as the same may be amended from time to time, in accordance with the rules and regulations of the New Mexico Public Regulation Commission and the Statutes of the State of New Mexico.

**16-2-4 RIGHT OF TRANSFER**

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 City as a public utility. Whenever the word "Company" appears herein, it shall be construed as including its successors, assigns and lessees.

## **16-2-5 PAYMENTS TO CITY**

**16-2-5A Franchise fee:** 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 City, 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 City 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 City under the Company’s approved residential, commercial and industrial rate schedules as in effect from time to time, excepting therefrom, 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 third-party marketer, including an affiliate of Company, the payment of sales or gross receipts taxes and franchise fees, and gas sold to the City for its own use. The Company shall make such payments monthly on or before the last day of the month following the end of each preceding calendar month while this provision shall remain in force and effect.

**16-2-5B** 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 City, 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 City 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 City 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 City during the term of this franchise.

## **16-2-6 REMOVAL OF SERVICE**

**16-2-6A** When reasonably required by the City 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 City application, specific monies can be and are obtained from Federal or State sources for Relocation Costs, provided that no City matching funds would be required, the scope of the City project would not be diminished and the City would not be required to spend additional monies;

- (2) if the specific street excavation, street construction, or street relocation is done to accommodate the actions or plans of private individuals or entities who are developing or intend to develop property within the City, then such private individuals or entities shall be responsible for the Relocation Costs, provided that in no event shall the City be liable for such Relocation Costs;
- (3) if the specific street excavation, construction or relocation is done to accommodate the facilities or plans of another utility, then such utility shall be responsible for the Relocation Costs, provided that in no event shall the City be liable for such Relocation Costs; and
- (4) that State or Federal law requires the City to pay the Relocation Costs.

**16-2-6B** It is specifically agreed and understood, however, that before the City shall authorize any such change requiring the relocation or removal of the Company's facilities, the City 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 City 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.

#### **16-2-7 INSURANCE AND INDEMNITY**

**16-2-7A Commercial General Liability Insurance:** Throughout the term of this Agreement, the Company shall, at its own cost and expense, maintain Commercial General Liability Insurance and, at the request of the City, provide the City certificates of insurance and demonstrating that the Company has obtained the insurance required. Such policy or policies shall be in the minimum amount of One Million Dollars (\$1,000,000.00) for bodily injury or death to any one person, and One Million Dollars (\$1,000,000.00) for property damage resulting from any one accident.

**16-2-7B Worker's Compensation Insurance:** The Company shall maintain Worker's Compensation Insurance in such amounts as required by law.

**16-2-7C INDEMNIFICATION:** The Company shall indemnify and save harmless the City, 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 City 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.

**16-2-8 LEGAL PARTIES**

This natural gas franchise ordinance constitutes a franchise agreement between the City and Company as the only parties and no provision of this franchise shall in any way inure to the benefit of any third person (including the public at large) so as to constitute any such person as a third party beneficiary of the agreement or of any one or more of the terms hereof, or otherwise give rise to any cause of action in any person not a party hereto.

**16-2-9 ACCEPTANCE**

**16-2-9A** The Company shall, within thirty (30) days after the passage and approval of this ordinance, file in the office of the Municipal Clerk of the City, a written statement of acceptance duly signed and acknowledged by the proper officer of the Company authorized to execute such acceptance.

**16-2-9B** 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 City may by resolution extend the time herein for the filing of such acceptance for an additional period.

**16-2-9C** 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, manufacture, storage, distribution, conveyance and supply of pipeline natural gas for light, fuel, power, heat or other purpose within the City.

**16-2-10 TERM OF FRANCHISE**

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-five (25) years from the date of this ordinance.

**16-2-11 CONDITIONS**

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.

**16-2-12 MUNICIPAL RIGHTS**

The City, 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 City and its inhabitants.

**16-2-13 NOTICES**

All notices and productions required of either party by this franchise shall be delivered to the other party by certified mail, return receipt requested, or such other means that include adequate means for acknowledging receipt, with the delivery to be

acknowledged by a signed and dated receipt, to the following officials at the designated address, unless another official or address has been designated in writing by the part to receive the delivery, to-wit:

City: City Manager  
City of Rio Communities  
360 Rio Communities Blvd  
Rio Communities, NM 87002

Company: Legal Department  
New Mexico Gas Company, Inc.  
7120 Wyoming Blvd NE, Suite 20, MS-AC02  
Albuquerque, New Mexico 87109

**16-2-15 BREACH OF AGREEMENT**

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.

**16-2-16 EFFECTIVE DATE**

This Ordinance shall, subject to the provisions of Section 7 herein, take effect October 20<sup>th</sup> 2016 in accordance with statute (NMSU 3-42-1 franchises; authorization).

**PASSED, APPROVED AND ADOPTED THIS 13<sup>th</sup> DAY OF September 2016.**

**City of Rio Communities Governing Body**

\_\_\_\_\_  
Mark Gwinn,  
Mayor

\_\_\_\_\_  
Margaret (Peggy) Gutjahr,  
Councilor Mayor Pro-tem

\_\_\_\_\_  
William (Bill) Brown,  
Councilor

\_\_\_\_\_  
Arturo R. Sais,  
Councilor

\_\_\_\_\_  
Thomas J. Scroggins,  
Councilor

ATTEST:

\_\_\_\_\_  
Elizabeth (Lisa) Adair,  
Municipal Clerk

**ACCEPTANCE OF FRANCHISE ORDINANCE**

KNOW ALL PERSONS BY THESE PRESENTS:

THAT, in compliance with Chapter 16 Article 2 of the City of Rio Communities municipal franchise approved and adopted by the governing body of the City as Ordinance No. 2016-51 on the 13<sup>th</sup> day of September 2016, New Mexico Gas Company, Inc., grantee of said franchise, does hereby accept same together with all terms and provisions therein contained.

This acceptance is signed and sealed this \_\_\_\_\_ day of \_\_\_\_\_, 2016, with the intent that it be filed with the Municipal Clerk of the City of Rio Communities, New Mexico, as required by the aforesaid franchise.

NEW MEXICO GAS COMPANY, INC.

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

STATE OF NEW MEXICO    )  
  ) ss.  
COUNTY OF \_\_\_\_\_ )

This instrument was acknowledged before me on \_\_\_\_\_, 2016, by \_\_\_\_\_  
\_\_\_\_\_.

\_\_\_\_\_  
Notary Public

My Commission Expires: