

ORDINANCE NO. 2727-07

NATURAL GAS FRANCHISE AGREEMENT

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 CITY OF WINTER PARK, FLORIDA, AND PRESCRIBING THE TERMS AND CONDITIONS UNDER WHICH SAID FRANCHISE MAY BE EXERCISED; MAKING FINDINGS; PROVIDING AN EFFECTIVE DATE; AND REPEALING PRIOR ORDINANCE.

WHEREAS, Peoples Gas System and the City of Winter Park desire to enter into a franchise agreement for a period of ten (10) years commencing from the date provided herein; and

WHEREAS, the City Commission 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 CITY COMMISSION OF THE CITY OF WINTER PARK, 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, firm, public or private corporation or governmental agency served by the Company within the corporate limits of the City.
- B. "City" shall mean the City of Winter Park, Orange 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. "Gas" or "Natural 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") or any other fuel that is typically delivered by truck and stored in tanks.

- E. "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.
- F. "Facilities" or "equipment" shall mean pipe, pipe line, tube, main, service, trap, vent, vault, manhole, meter, gauge, regulator, valve, conduit, appliance, attachment, structure or structures, and appurtenances used or useful in the distribution of gas, located or to be located in, upon, along, across, or under the streets or within the public rights of way.
- G. "Franchise" or "Franchise Agreement" shall mean this agreement, as passed and adopted by the City and accepted by the Company, as provided in Section 19 below.
- H. "FPSC" shall mean the Florida Public Service Commission or any successor agency.
- I. "Distribution System" shall mean any and all transmission pipe lines, main pipe lines and Customer pipe lines, together with all necessary and desirable appurtenances, that are situated within the corporate limits of the City and are reasonably necessary for the sale, transportation, distribution or delivery of Natural Gas for the public and private use of Customers.

SECTION 2: GRANT

The City 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 of the public streets, alleys, highways, waterways, bridges, easements and other public places of the City, as they now exist or may be hereafter constructed, opened, laid out or extended within the present incorporated limits of the City, or in such territory as may be hereafter added or annexed to, or consolidated with, the City, a Distribution System subject to the terms and conditions herein contained.

SECTION 3: TERM

Except as provided in Section 21, the Franchise hereby granted shall be for a period of ten (10) years from the effective date of this ordinance.

SECTION 4: ASSIGNMENT

A. This franchise shall not be sold, assigned or transferred, either in whole or in part, or leased or sublet, nor shall title thereto, either legal or equitable or any right, interest or

property therein, pass to or vest in any person (other than a parent corporation of company, a wholly-owned subsidiary of company, a corporation under common control with company, or an entity that receives substantially all of company's natural gas utility assets, by merger, sale or other acquisition) without the prior written consent of the city, which consent shall not be unreasonably withheld or conditioned, nor unduly delayed. No such consent shall be required for a mortgage, or other hypothecation as a whole or in part to secure an indebtedness.

B. Any successor-in-interest to the system and/or the rights under this franchise shall have agreed in writing to be bound by the terms and conditions of this franchise agreement, with a copy thereof provided to the city.

SECTION 5: CITY COVENANT

As a further consideration for this Franchise Agreement, the City 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 City, 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 said streets, alleys, avenues, easements, and public rights of way, and said streets 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 streets, alleys, or other public rights of way, it shall make application for a permit to the appropriate City authority. The City shall issue, or if applicable deny, permits within thirty (30) business days of application by the Company. The Company shall, at its own cost and expense, replace and repair without delay any sidewalk, public way, alley, highway, waterway, bridge or any other public place that has been excavated, broken, removed, displaced or disarranged by the company in the conduct of its construction, maintenance and operation of any portion of the system, or as a result of the deterioration of any portion of the system, and restore the same to as good a condition as it existed prior to the company commencing its work. Upon failure of the company to do so after 30 days written notice by the director of public works of the city, the city may make such repairs and replacements as it deems reasonably necessary, and the company shall pay the city upon demand all costs of such repairs and replacements. If within one hundred eighty days (180) of Company's restoration work, the City notifies the Company in writing of a defect directly attributable to Company's faulty workmanship, then the Company shall re-perform such restoration work.

To the extent consistent with Florida law, the Company hereby agrees to abide by all the rules and regulations and ordinances which the City has passed or might pass in the future, and further agrees to abide by any established policy which the City or its duly authorized representative has passed, established, or will establish; provided, however, the City 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 City 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 Company.

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 City permits.

SECTION 9: CONSTRUCTION WORK

The City 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 City or other governmental body having jurisdiction in, across, along, or under any street, alley, public way, easement, place, or other public rights of way. Whenever, by reason of establishing a grade or by reason of changes in the grade of any street, or by reason of the widening, grading, paving, or otherwise improving present or future streets, alleys, or other public rights of way, or in the location or manner of construction of any water pipes, electric conduits, sewers, or other underground structure, it shall be deemed necessary by the City or other governmental body to alter, change, adapt, or conform any portion of the Distribution System of the Company hereto, such alterations, or changes, shall be made by the Company as ordered in writing by the City or other governing body, without claim for reimbursement. If the City shall require the Company to adapt or conform any portion of its Distribution System or in any way to alter, relocate or change its property to enable any other person or entity to use said street, alley, easement, highway or public rights-of-way of the City, as part of its permitting or approval process, the City shall require the person or entity desiring or occasioning such alteration, relocation or change to reimburse the Company for any loss, cost or expense caused by or arising out of such change, alteration or relocation of any portion of the Company's facilities. The Company further agrees that it will not intentionally interfere with, change, or injure any water pipes, drains, or sewers of said City unless it has received specific permission from the City or its duly authorized representative.

SECTION 10: FRANCHISE FEE

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 City, or its successors, a sum of money which, when added to the amount of all taxes, licenses, permits, or other impositions levied or assessed by the City and actually paid by Company, is 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 City. 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. Any franchise fees which remain unpaid after the dates specified above shall be delinquent and shall thereafter accrue interest at an annual percentage rate of twelve percent (12%) until paid.

SECTION 11: FRANCHISE PARITY

If, during the term of this Franchise Agreement, the City, 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 City, for the purpose of supplying or delivering Natural Gas to customers located within the corporate limits of the City 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 City 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 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 City are consistently declared separately from all other revenues, and such records shall be maintained within the State of Florida, and be open at all reasonable times for inspection by the duly authorized representatives of the City pursuant to an appropriate confidentiality agreement. Upon request by the City, or its designated representative, the Company shall make available said records within thirty (30) days to the City 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.

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 City shall deliver to the Company written notice of such occurrence, and include in such notice a description of the affected territory.

SECTION 13: INSURANCE

(a) As a part of the indemnification provided by section 14, but without limiting the foregoing, each franchise company shall file with the application, and at all times thereafter maintain in full force and effect at its sole expense, an acceptable policy or policies, or evidence of self insurance of liability insurance, including comprehensive general liability insurance, products/completed operations liability, personal injury liability, broad form property damage, contractual liability, automobile liability (owned, non-owned and hired automobiles), workers' compensation and employer liability. The company and such city and city officers, agents and employees shall be named as an additional insured and the policy or policies shall contain cross-liability endorsements. Policies of liability insurance shall be in the minimum single limit of \$1,000,000 per occurrence and in the minimum sum of \$5,000,000 per occurrence and the minimum sum of \$1,000,000 for damage to property resulting from any one accident. The insurance policy or policies shall contain contractual liability insurance naming the company, and shall insure against the types of liabilities covered by the indemnification and hold harmless provisions of section 14.

(b) The insurer shall be authorized to write the required insurance, approved by the state insurance commissioner and subject to the reasonable approval of the city.

(c) The policies of insurance shall be maintained by the company in full force and effect during the entire term of the franchise. Each policy of insurance shall contain a statement on its face that the insurer will not cancel the policy or fail to renew the policy, whether for non-payment of premium, or otherwise, and whether at the request of the company or for other reasons, except after 30 calendar days' advance written notice mailed by the insurer to the city clerk.

SECTION 14: INDEMNIFICATION

(a) The company shall, at the company's sole cost and expense, fully indemnify, defend and hold harmless the city, and in their capacity as such, the officers, agents, boards, commissioners, consultants and employees thereof, from and against any and all claims, suits, actions, proceedings, liability and judgments for damages:

(1) For actual or alleged injury to persons or property to the extent arising out of or through or alleged to have arisen out of or through the negligent acts or omissions of the company or its agents, employees, or contractors.

(2) To the extent arising out of or alleged to have arisen out of company's failure to comply with the provisions of any statute, regulation or ordinance of any federal, state or any local agency applicable to the company in its business.

(b) Indemnification expenses shall include, but not be limited to, all out-of pocket expenses, such as reasonable attorneys' fees. Indemnification is conditioned upon reasonably prompt notice to the Company from when the indemnified party knows or should have known of

the claim. The Company shall have the right to control the defense; provided, however, that nothing herein shall be deemed to prevent the parties indemnified and held harmless herein from participating in the defense of any litigation by their own counsel at the city's sole expense.

SECTION 15: ALTERNATIVE REMEDIES.

No provision of this ordinance or the franchise granted hereunder shall be deemed to bar the right of either party to seek or obtain judicial relief from a violation of any provision of this ordinance, the franchise or any rule, regulation, requirement or directive promulgated under the franchise, whether administratively, judicially or both. Neither the existence of other remedies identified in this ordinance nor the exercise thereof shall be deemed to bar or otherwise limit the right of either party to recover fines, penalties or monetary damages for such violation by the company or judicial enforcement of the company's obligations by means of specific performance, injunction relief or mandate or any other administrative remedy or judicial remedy at law or in equity.

SECTION 16 ENTIRE AGREEMENT

(a) The company acknowledges that upon its acceptance of the franchise it does so relying upon its own investigation and understanding of the power and authority of a municipality generally to enter into a franchise agreement.

(b) Each party, by making this agreement, acknowledges that it has not been induced to accept same by any promise, verbal or written, by or on behalf of the other party or by any third person regarding the franchise not expressed herein. The company further pledges that no promise or inducement, oral or written, has been made to any city employee or official regarding receipt of the franchise.

(c) Each party further acknowledges that it has carefully read the terms and conditions of this ordinance and the franchise agreement and accepts without reservation the obligations imposed by the terms and conditions herein and in the franchise agreement.

(d) The Company shall provide timely written notice to the city for any waivers, exceptions or declaratory rulings, filed with the FPSC or any other state or federal regulatory agency, directly affecting the franchise agreement with the City.

SECTION 17 ADMINISTRATIVE REVIEW SESSION

(a) If at any time the company is not performing its material obligations in accordance with this franchise agreement, an administrative review session may be held at the request of the city manager, the city commission or the company. The city shall be responsible for notifying the company in writing, at least 60 days in advance, of each of the specified review sessions.

(b) All review sessions may be open to the public and announced by the city manager.

(c) Topics which may be discussed at any scheduled or special evaluation session may include but not be limited to proper payment of franchise fees, location in the right-of-way, permit compliance, and compliance with this franchise agreement; but shall not include any matter which is subject to the jurisdiction of the Public Service Commission or other federal or state body.

(d) During a review session by the city, the company shall cooperate in good faith with the city manager and shall provide such reasonable information and documents as the city manager may need to reasonably perform his review. To the extent permitted by law, a "non-disclosure" agreement, if requested by the company, shall be executed by the city manager prior to reviewing the company's confidential or proprietary information. Any pertinent, confidential or proprietary information shall be available for inspection by the city manager at the offices of the company, provided arrangements are made to prevent the publication or public access to customer-specific details.

(e) If at any time during his review the city manager determines that reasonable evidence exists that the company is in material breach of the franchise agreement, then the city manager may notify the company of the city's intent to terminate the franchise under Section 21 if the breach is not cured.

(f) In the event the subject of the alleged noncompliance with the franchise agreement falls under the jurisdiction of the Public Service Commission or other federal or state body, the company agrees to address the matter in a timely matter and to copy the city on any correspondence with the government body regarding the ultimate resolution of the problem..

SECTION 18

INSPECTION, CORRECTION OF LOCATION OF SYSTEM

(a) The city shall have and maintain the right upon 48 hours notice to company (which notice shall not be required in the event of an emergency) to inspect the location of the system by the company to insure the proper compliance with the terms of this franchise agreement. At company's option, representatives of company may accompany city personnel during any such inspection.

(b) If the company should, with respect to the location or permitted use of the System in the right-of-way, violate any of the terms of this ordinance or any federal, state or local law or regulation, or any of the rules and regulations as may hereafter be from time to time lawfully adopted, or any provision of the franchise agreement, the city shall promptly give the company written notice of the violation, breach, default or noncompliance. The company shall within 30 days of the date of written notice from the city substantially undertake and promptly correct such default, breach, violation or noncompliance in accordance with Section 9 above and certify the same to the city. In the event that the company fails to substantially undertake such corrective action within 30 days of the date of such written notice and promptly complete the corrective action, the city may, notwithstanding any other remedies provided for in this ordinance or otherwise available under law:

(1) Make such correction itself and charge the cost of the same to the company; and/or

(2) For a material breach of this ordinance or the franchise agreement, notify the company of the city's intent under Section 21 to terminate the franchise and rights granted under the franchise if the breach is not cured.

SECTION 19 COMMUNICATION WITH REGULATORY AGENCIES

Copies of all petitions, applications, communications and reports submitted by a company to the FPSC or any other state or federal regulatory commission or agency having jurisdiction in respect to any matters affecting construction or operation of the system or services provided through the system shall, if requested by the city, be filed with the city. Copies of responses or any other communications from the regulatory agencies to a company likewise shall, if requested, be filed with the city immediately on receipt.

SECTION 20 ACCOUNTING STANDARDS

Not less than annually, the company shall provide the city a financial statement signed by a corporate officer of the company, or his or her designee, showing in detail the company's gross revenues earned in the city during such fiscal year.

SECTION 21: TERMINATION BY CITY

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 City to declare a termination this Franchise Agreement; provided, however, that before such action by the City shall become operative and effective, the Company shall have been served by the City with a written notice setting forth all matters pertinent to such violation or default, and describing the action of the Commission with respect thereto, and the Company shall have had a period of sixty (60) days after service of such notice or, in the event such cure reasonably requires a period of more than sixty (60) days, to present a plan, satisfactory to the City, acting reasonably, 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 22: CHANGES IN PROVISIONS HEREOF

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

SECTION 23: 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 City 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 City may terminate this Franchise Agreement by providing ninety (90) days written notice to the other party.

SECTION 24: GOVERNING LAW

This franchise shall be governed by the laws of the State of Florida and applicable federal law.

SECTION 25: 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 City's passage and adoption hereof.

PASSED AND CERTIFIED AS TO PASSAGE this 26th day of November, 2007.



MAYOR DAVID C. STRONG

ATTEST: 

CITY CLERK


Accepted this 7 day of December, 2007

PEOPLES GAS SYSTEM, A DIVISION OF
TAMPA ELECTRIC COMPANY

William Cantrell

By: William Cantrell

Title: President Peoples Gas

NOTARY PUBLIC-STATE OF FLORIDA
 Alease E. Lawson
Commission # DD732885
Expires: DEC. 03, 2011
BONDED THRU ATLANTIC BONDING CO., INC.

Alease E. Lawson