

ORDINANCE NO. 731

AN ORDINANCE OF THE CITY OF GIG HARBOR, WASHINGTON, GRANTING TO WASHINGTON NATURAL GAS COMPANY, A WASHINGTON CORPORATION, AND A PUBLIC UTILITY SELLING AND DISTRIBUTING GAS WITHIN THE STATE OF WASHINGTON, THE RIGHT AND FRANCHISE TO USE AND OCCUPY THE STREETS, AVENUES, ROADS, ALLEYS, LANES AND OTHER PUBLIC RIGHTS-OF-WAY IN THE CITY OF GIG HARBOR, WASHINGTON, FOR A PERIOD OF TWENTY-FIVE YEARS, FOR CONSTRUCTING, MAINTAINING, REPAIRING, RENEWING AND OPERATING A GAS DISTRIBUTION SYSTEM AND ACCESSORIES WITHIN AND THROUGH THE CITY OF GIG HARBOR, WASHINGTON.

WHEREAS, RCW 35A.47.040 authorizes code cities to issue non-exclusive franchises for use of public street and rights-of-way, and

WHEREAS, this ordinance has been introduced more than five (5) days prior to its passage by the City Council, and

WHEREAS, this ordinance has been submitted to the City Attorney and has received at least a majority vote of the entire City Council at a regular meeting, now, therefore

THE CITY COUNCIL OF THE CITY OF GIG HARBOR, WASHINGTON, DO
ORDAIN AS FOLLOWS:

Section .1. Rights Granted. The right is hereby granted to WASHINGTON NATURAL GAS COMPANY (hereinafter referred to as the "Grantee") to lay, construct, extend, maintain, repair, renew and replace gas pipes, gas mains and accessories under, along and/or across any and all streets, avenues, roads, alleys and other rights-of-way in the City for the purpose of therein laying, constructing, extending, maintaining, renewing, replacing and repairing mains and pipes and all appurtenances thereto and accessories used and/or useful for the transmission, sale and distribution of gas within and through the present or future territorial limits of the City of Gig Harbor, Washington (hereinafter referred to as the "City"), for the term of twenty-five years from and after the effective date of this ordinance, except as hereinafter provided.

Section 2. City's Reservation of Rights. Nothing herein shall be deemed to direct or restrict the City's ability to adopt and enforce all necessary and appropriate ordinances regulating the performance of the conditions of this franchise, including any valid ordinance made in the exercise of its police powers in the interest of public safety and for the welfare of the public. The City shall have the authority at all times to control by appropriate regulations the location, elevation, manner of construction and maintenance of any gas facilities of the Grantee, and the Grantee shall promptly

conform with all such regulations, unless compliance would cause the Grantee to violate other requirements of law.

In the event that franchise, state or other applicable laws should change during the franchise term, which permit the City to impose franchise fees or exercise other regulatory authority over the Grantee, then Grantee agrees to negotiate with the City, upon the City's request, for an amendment of this franchise to provide for the inclusion of a franchise fee or the City's exercise of such regulatory authority. If the parties fail to reach agreement in these negotiations after one month, the City may elect to terminate this franchise.

Section 3. Requirement for Work in Public Rights-of-Way. Whenever the Grantee shall excavate in any public right-of-way for the purpose of installation, construction, repair, maintenance or relocation of its gas facilities, it shall apply to the City for a permit to do so and, in addition, shall give the City at least ten (10) working days notice of intent to commence work on main lines in the right-of-way, and five (5) working days notice of intent to commence work on all other lines in the right-of-way, unless such notice is waived by the Public Works Director. In no case shall any work commence within any public right-of-way without a permit, except as otherwise provided in this franchise ordinance.

During any period of relocation, installation, construction or maintenance, all surface structures, if any, shall be erected and used in such places and positions within said public right-of-ways and other public properties so as to interfere as little as possible with the free passage of traffic and the free use of adjoining property, and the Grantee shall at all times post and maintain proper barricades and comply with all applicable safety regulations during such period of construction as required by the ordinances of the City or the laws of the State of Washington, including RCW 39.04.180 for the construction of trench safety systems.

If the Grantee shall at any time plan to make excavations in any area covered by this franchise and as described in this Section, the Grantee shall afford the City, upon receipt of a written request to do so, an opportunity to share such excavation, PROVIDED THAT:

- A. Installation of any lines is compatible with all federal, state and local regulations and Grantee's construction standards;
- B. Such joint use shall not unreasonably delay the Grantee's work;
- C. Such joint use shall be arranged and accomplished on terms and conditions satisfactory to both parties;
- D. The Grantee may deny such request for safety reasons.

Section 4. Emergency Work -- Permit Waiver. In the event of any emergency in which any of the Grantee's facilities located in or under any street breaks or is damaged, or if the Grantee's construction area is otherwise in such a condition as to immediately endanger the property,

life, health or safety of any individual, the Grantee shall immediately take the proper emergency measures to repair its facilities, to cure or remedy the dangerous conditions for the protection of property, life, health or safety of individuals without first applying for and obtaining a permit as required by this franchise. However, this shall not relieve the Grantee from the requirement of obtaining any permits necessary for this purpose, and the Grantee shall apply for all such permits not later than the next succeeding day during which the Gig Harbor City Hall is open for business.

Section 5. Records. the Grantee shall at all times keep complete records showing the relative location and size of all gas lines heretofore laid in the City, and showing the relative location of all gates, gauges, and other service construction. Such records shall be kept current by the Grantee, who shall provide as-builts to the City after construction is complete.

Upon the City's request for information on the location of Grantee's gas lines or other facilities prior to the designing of rights-of-way improvements or other City improvements, the Grantee shall respond with the information on both the horizontal and vertical depth location of the Grantee's facilities no later than two (2) business days after the receipt of the request, unless otherwise agreed by the parties in writing. The City, as excavator, shall have the right to receive compensation from the Grantee for all costs incurred if the Grantee does not accurately locate its facilities as required by this section and in accordance with RCW 19.122.030. Such compensation shall be paid by the Grantee to the City within thirty (30) days after receipt of an invoice.

Section 6. Recovery of Costs. The Grantee shall pay a filing fee for the City's administrative costs in drafting and processing this franchise agreement and all work related thereto. The Grantee shall further be responsible for all permit fees associated with activities undertaken through the authority granted in this franchise ordinance or under the laws of the City. When the City incurs costs and expenses for review, inspection or supervision of activities undertaken through the authority granted in this franchise or any ordinances relating to the subject for which a fee is not established, the Grantee shall pay such costs and expenses directly to the City.

In addition, the Grantee shall promptly reimburse the City for any and all extraordinary costs the City reasonably incurs in response to any emergency involving the Grantee's facilities, except to the extent that the emergency results from the negligence of the City. For the purpose of this section, "extraordinary costs" are those reasonable and necessary costs incurred by the City in the course of protecting life and property that exceed the normal and usual expenses anticipated for police and fire protection, emergency services and public works. These shall include, but not be limited to, overtime for public employees, unusual fuel consumption requirements, any loss or damage to publicly owned equipment, and the purchase or lease of any special equipment or services required to protect the public during the emergency. In the event that the City reasonably incurs extraordinary costs in response to any emergency involving the Grantee's facilities which results from the negligence of any third party and/or the Grantee, the Grantee shall promptly reimburse the City for such costs within thirty (30) days after receipt of an invoice from the City.

Section 7. Restoration. The Grantee shall, after installation, construction, relocation, maintenance or repair of its facilities within the franchise area, restore the surface of the right-of-way to at least the same condition the property was in immediately prior to any such installation,

construction, relocation, maintenance or repair. The Public Works Director shall have final approval of the condition of such streets after restoration or repair. All concrete encased monuments which have been disturbed or displaced by such work shall be restored pursuant to all federal, state and local standards and specifications. The Grantee agrees to promptly complete all restoration work and to promptly repair any damage caused by such work to the affected area at its sole cost and expense.

Section 8. Indemnification. The Grantee hereby releases, covenants not to bring suit and agrees to indemnify, defend and hold harmless the City, its officers, officials, employees, agents and representatives from any and all claims, costs, judgments, awards or liability to any person, including claims by the Grantee's own employees to which the Grantee might otherwise be immune under Title 51 RCW, arising from injury or death of any person or damage to property of which the negligent acts or omissions of the Grantee, its officers or employees in performing this franchise are the proximate cause.

The Grantee further releases, covenants not to bring suit and agrees to indemnify, defend and hold harmless the City, its officers, officials, employees, agents and representatives from any and all claims, costs, judgments, awards or liability to any person including claims by the Grantee's own employees, including those claims to which the Grantee might otherwise be immune under Title 51 RCW, arising against the City (1) solely by virtue of the City's ownership or control of the rights-of-way; (2) by virtue of the Grantee's exercise of the rights granted herein; or (3) by virtue of the City's permitting the Grantee's use of the City's rights-of-way; which claims are based upon the City's inspection or lack of inspection of work performed by the Grantee, its employees, agents officers or representatives, in connection with the work authorized on the City's property or property over which the City has control, pursuant to this franchise or pursuant to any other permit or approval issued in connection with this franchise.

This covenant of indemnification shall include, but not be limited by this reference, claims against the City arising as a result of negligent acts or omissions of the Grantee, its employees, officers, representatives or agents in barricading, instituting trench safety systems or providing other adequate warnings of any excavation, construction or work in any public right-of-way in the performance of the work or services permitted under this franchise.

Inspection or acceptance by the City of any work performed by the Grantee at the time of completion of construction shall not be grounds for avoidance of any of these covenants of indemnification. Said indemnification obligations shall extend to claims which are not reduced to a suit and any claims which may be compromised prior to the culmination of any litigation or the institution of any litigation.

In the event that the Grantee refuses the tender of defense in any suit or claim, said tender having been made pursuant to the indemnification clauses contained herein, and said refusal is subsequently determined by a court having jurisdiction (or such other tribunal that the parties shall agree to decide the matter) to have been a wrongful refusal on the part of the Grantee, then the Grantee shall pay all of the City's costs of defense of the action, including all reasonable expert

witness fees and reasonable attorneys' fees and the reasonable costs of the City, including reasonable attorneys' fee for recovering under this indemnification clause.

In the event of liability for damages arising out of bodily injury to persons or damages to property caused by or resulting from the concurrent negligence of the Grantee and the City, its officers, employees and agents, the Grantee's liability hereunder shall be only to the extent of the Grantee's negligence. It is further specifically and expressly understood that the indemnification provided herein covers claims by the Grantee's own employees from which the Grantee might otherwise be immune under Title 51 RCW, and this waiver has been mutually negotiated by the parties.

Section 9. Bond. Before undertaking any of the work, installation, improvements, construction, repair, relocation or maintenance authorized by this franchise, the Grantee shall, upon request of the City, furnish a bond executed by the Grantee and a corporate surety authorized to do surety business in the State of Washington, in a sum to be set and approved by the Director of Public Works as sufficient to ensure performance of the Grantee's obligations under this franchise. The bond shall be conditioned so that the Grantee shall observe all of the covenants, terms and conditions and faithfully perform all of the obligations of this franchise, and to erect or replace any defective work or materials discovered in the replacement of the City's streets or property within a period of two years from the date of the replacement and acceptance of such repaired streets by the City.

Section 10. Relocation. The Grantee agrees and covenants at its sole cost and expense, to protect, support, temporarily disconnect, relocate or remove from any street any of its installations, including abandoned facilities when so required by the City by reason of traffic conditions or public safety, dedications of new rights-of-way and the establishment and improvement thereof, widening and improvement of existing rights-of-way, street vacations, freeway construction, change or establishment of street grade, or the construction of any public improvement or structure by any governmental entity acting in a governmental capacity, provided that the Grantee shall in all cases have the privilege to temporarily bypass, in the authorized portion of the same street upon approval by the City, any section of pipeline required to be temporarily disconnected or removed. If the City determines that the project necessitates the relocation of the Grantee's then existing facilities, the City shall:

- A. At least sixty days (60) days prior to the commencement of such improvement project, provide the Grantee with written notice requiring such relocation;
- B. Provide the Grantee with copies of pertinent portions of the plans and specifications for such improvement project and a proposed location for the Grantee's facilities so that the Grantee may relocate its facilities in other City right-of-way in order to accommodate such improvement project; and
- C. After receipt of such notice and such plans and specifications, the Grantee shall complete relocation of its facilities at no charge or expense to the City

so as to accommodate the improvement project at least five (5) days prior to commencement of the project.

The Grantee may, after receipt of written notice requesting a relocation of its facilities, submit to the City written alternatives to such relocation. The City shall evaluate such alternatives and advise the Grantee in writing if one or more of the alternatives is suitable to accommodate the work which would otherwise necessitate relocation of the facilities. If so requested by the City, the Grantee shall submit additional information to assist the City in making such evaluation. The City shall give each alternative proposed by the Grantee full and fair consideration. In the event the City ultimately determines that there is no other reasonable alternative, the Grantee shall relocate its facilities as otherwise provided in this section.

The provisions of this section shall in no manner preclude or restrict the Grantee from making any arrangements it may deem appropriate when responding to a request for relocation of its facilities by any person or entity other than the City, where the facilities to be constructed by said person or entity are not or will not become City-owned, operated or maintained facilities, provided that such arrangements do not unduly delay a City construction project.

Section 11. Non-Exclusive Franchise Grant. This franchise is granted upon the express condition that it shall not in any manner prevent the City from granting other or further franchises in, along, over, through, under, below or across any of said streets, avenues, alleys or public rights-of-way of every type and description. Such franchise shall in no way prevent or prohibit the City from using any of said roads, streets or public rights-of-way, or affect the City's jurisdiction over them or any part of them, and the City shall retain power to make all necessary changes, relocations, repairs, maintenance, establishment, improvement, dedication of same as the City may deem fit, including the dedication, establishment, maintenance, and improvement of all new rights-of-way of every type and description.

Section 12. Forfeiture and Revocation. If the Grantee willfully violates or fails to comply with any of the provisions of this franchise, or through willful misconduct or gross negligence fails to heed or comply with any notice given the Grantee by the City under the provisions of this franchise, then the Grantee shall, at the election of the City Council, forfeit all rights conferred hereunder and this franchise may be revoked or annulled by the Council after a hearing held upon at least thirty (30) days notice to the Grantee. Prior to or at the hearing, the Grantee may request a reasonable time within which to remedy the default.

The City may elect, in lieu of the above and without any prejudice to any of its other legal rights and remedies, to obtain an order from the superior court having jurisdiction compelling the Grantee to comply with the provisions of this ordinance, and to recover damages and costs incurred by the City by reason of the Grantee's failure to comply.

In addition to any other remedy provided herein, the City reserves the right to pursue any legal remedy to compel or force the Grantee to comply with the terms of this franchise, and the pursuit of any right or remedy by the City shall not prevent the City from thereafter declaring a forfeiture or revocation for breach of the conditions herein.

Section 13. Insurance. The Grantee shall procure and maintain for the duration of this franchise, insurance against claims for injuries to persons or damages to property which may arise from or in connection with the exercise of the rights, privileges and authority granted hereunder to the Grantee, its officials, employees and representatives. The Grantee shall provide a copy of such insurance policy to the City for its inspection prior to the adoption of this franchise ordinance.

Any deductibles or self-insured retentions must be declared to and approved by the City. Payment of deductible or self-insured retentions shall be the sole responsibility of the Grantee.

The insurance policy obtained by the Grantee shall name the City, its officers, officials, employees, and volunteers, as additional insureds with regard to activities performed by or on behalf of the Grantee. The coverage shall contain no special limitations on the scope of protection afforded to the City, its officers, officials, employees, or volunteers. In addition, the insurance policy shall contain a clause stating that coverage shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability. The Grantee's insurance shall be primary insurance as respects the City, its officers, officials, employees or volunteers. Any insurance maintained by the City, its officers, officials, employees and volunteers shall be in excess of the Grantee's insurance and shall not contribute with it. The insurance policy or policies required by this clause shall be endorsed to state that coverage shall not be suspended, voided, canceled by either party, reduced in coverage or in limits except after thirty (30) days prior written notice, by certified mail, return receipt requested, has been given to the City. Any failure to comply with the reporting provisions of the policies required herein shall not affect coverage provided to the City, its officers, officials, employees or volunteers.

Section 14. Assignment. This agreement may not be assigned or transferred without the prior, written approval of the City. The Grantee shall provide prompt, written notice to the City of any such proposed assignment.

Section 15. Abandonment of Facilities. Any plan for abandonment of any of Grantee's gas lines or facilities installed under this franchise or any of its predecessors must be submitted to the City for its written consent. The City Public Works Director shall review the plan for abandonment prior to commencement of any work, and all necessary permits must be obtained prior to such work. The provisions of this Section shall survive the expiration, revocation or termination of this franchise ordinance.

Section 16. Modification. The City and the Grantee hereby reserve the right to alter, amend or modify the terms and conditions of this franchise upon written agreement of both parties to such alteration, amendment or modification.

Section 17. Integration. The written provisions and terms of this franchise ordinance shall supersede all prior verbal statements of either party, and any prior franchise ordinance between the parties. Such statements or prior franchise ordinances shall not be effective or be construed as entering into, forming a part of, or altering in any manner whatsoever, this Agreement.

Section 18. Notice. Any notice or information required or permitted to be given to the parties under this franchise agreement may be sent to the following addresses unless otherwise specified:

City of Gig Harbor
3105 Judson Street
Gig Harbor, WA 98335
Attn: City Administrator

Washington Natural Gas Company
815 Mercer Street
Seattle, WA 98109
Attn: _____

Section 19. Binding Effect. All of the provisions, conditions, regulations and requirements contained in this franchise ordinance shall further be binding upon the heirs, successors, executors, administrators, legal representatives and assigns of the Grantee and all privileges, as well as all obligations and liabilities of the Grantee shall inure to its heirs, successors and assigns equally as if they were specifically mentioned wherever the Grantee is mentioned herein.

Section 20. Severability. If any section, sentence, clause or phrase of this franchise ordinance should be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of any other section, sentence, clause or phrase of this franchise ordinance. In the event that any of the provisions of this franchise are held to be invalid by a court of competent jurisdiction, the parties reserve the right to renegotiate the grant of franchise and may amend, repeal, add, replace or modify any other provision of this franchise, or may terminate this franchise.

Section 21. Acceptance. This franchise is granted upon the express condition that the Grantee, within thirty (30) days after the adoption of this ordinance, shall file with the Clerk of the City a written acceptance of the same, and when so accepted by the Grantee shall constitute a contract between the City and Grantee for all of the uses, services and purposes herein set forth.

Section 22. Effective Date. This Ordinance shall take effect after at least one publication in the City's official newspaper, and after the _____ of _____, 1996, a period consisting of thirty days after the Franchise Agreement is approved by City Council, as long as the Grantee has submitted an acceptance as required by Section 21 above.

PASSED BY THE COUNCIL OF THE CITY OF GIG HARBOR, WASHINGTON,
AND APPROVED BY ITS MAYOR AT A REGULAR MEETING OF SAID COUNCIL HELD
ON THIS 22 DAY OF JULY, 1996.

APPROVED:

MAYOR, GRETCHEN WILBERT

ATTEST/AUTHENTICATED:

CITY ADMINISTRATOR, MARK HOPPEN

APPROVED AS TO FORM:
OFFICE OF THE CITY ATTORNEY:

BY _____

FILED WITH THE CITY CLERK: 7/1/96
PASSED BY THE CITY COUNCIL: 7/22/96
PUBLISHED: 7/24/96
EFFECTIVE DATE: 7/29/96
ORDINANCE NO. __731_____

SUMMARY OF ORDINANCE NO. _____

of the City of Gig Harbor, Washington

On the ____ day of _____, 1996, the City Council of the City of Gig Harbor, passed Ordinance No. _____. A summary of the content of said ordinance, consisting of the title, provides as follows:

AN ORDINANCE OF THE CITY OF GIG HARBOR, WASHINGTON, GRANTING TO WASHINGTON NATURAL GAS COMPANY, A WASHINGTON CORPORATION, AND A PUBLIC UTILITY SELLING AND DISTRIBUTING GAS WITHIN THE STATE OF WASHINGTON, THE RIGHT AND FRANCHISE TO USE AND OCCUPY THE STREETS, AVENUES, ROADS, ALLEYS, LANES AND OTHER PUBLIC RIGHTS-OF-WAY IN THE CITY OF GIG HARBOR, WASHINGTON, FOR A PERIOD OF TWENTY-FIVE YEARS, FOR CONSTRUCTING, MAINTAINING, REPAIRING, RENEWING AND OPERATING A GAS DISTRIBUTION SYSTEM AND ACCESSORIES WITHIN AND THROUGH THE CITY OF GIG HARBOR, WASHINGTON.

The full text of this Ordinance will be mailed upon request.

DATED this ____ day of _____, 1996.

CITY ADMINISTRATOR, MARK HOPPEN