



CITY OF NORMAN, OK STAFF REPORT

MEETING DATE: June 27, 2023

REQUESTER: Oklahoma Natural Gas

PRESENTER: Kathryn Walker, City Attorney

ITEM TITLE:

CONSIDERATION OF ADOPTION, REJECTION, AMENDMENT AND/OR POSTPONEMENT OF ORDINANCE O-2223-53 UPON FIRST READING BY TITLE: AN ORDINANCE GRANTING TO ONE GAS, INC., ACTING BY AND THROUGH ITS OKLAHOMA NATURAL GAS COMPANY DIVISION, AND ITS SUCCESSORS AND ASSIGNS, FOR A PERIOD OF TWENTY-FIVE (25) YEARS FROM APPROVAL AND ACCEPTANCE OF THIS ORDINANCE, A NON-EXCLUSIVE FRANCHISE AND RIGHT TO ENTER THE PUBLIC WAYS TO INSTALL, OPERATE AND MAINTAIN A DISTRIBUTION SYSTEM WITHIN, ALONG, ACROSS, OVER AND UNDER THE PUBLIC WAYS OF THE CITY OF NORMAN, OKLAHOMA FOR THE TRANSPORTATION, DISTRIBUTION AND/OR SALE OF GAS TO CONSUMERS AND THE PUBLIC GENERALLY IN THE CITY; DEFINING THE WORDS AND PHRASES THEREIN; PROVIDING FOR ASSIGNMENT, SALE OR LEASE OF THE FRANCHISE; PROVIDING THAT THE CITY MAY ENACT AN ORDINANCE CHARGING PERSONS TRANSPORTING GAS THROUGH GRANTEE'S DISTRIBUTION SYSTEM A FEE ON THE CALCULATED VALUE OF SUCH TRANSPORTED GAS; PROVIDING FOR USE AND REPAIR OF THE PUBLIC WAYS; PROVIDING FOR REGULATION OF SERVICE; ESTABLISHING DEPTH OF PIPELINES; ESTABLISHING RIGHTS AND DUTIES IN THE MOVEMENT AND ALTERATION OF PIPELINES; PROVIDING FOR INDEMNIFICATION OF THE CITY OF NORMAN; PROVIDING FOR GRANTEE'S RULES AND REGULATIONS; PROVIDING FOR INSPECTION OF GRANTEE'S RECORDS; REQUIRING GRANTEE TO PAY A FRANCHISE FEE; ESTABLISHING GRANTOR'S OPTION TO PURCHASE; PROVIDING FOR CONDITIONS OF THE FRANCHISE; PROVIDING FOR CONSTRUCTION OF THIS ORDINANCE UPON THE INVALIDITY OF ANY PART THEREOF; PROVIDING FOR THE SUBMISSION OF THIS ORDINANCE TO AN ELECTION OF THE QUALIFIED VOTERS OF THE CITY; PROVIDING FOR ACCEPTANCE OF THIS FRANCHISE BY GRANTEE AND BOTH AN EFFECTIVE AND AN OPERATIVE DATE THEREOF AND DECLARING

AN EMERGENCY; REPEALING ALL OTHER ORDINANCES DIRECTLY
IN CONFLICT HERewith; AND PROVIDING FOR SEVERABILITY.

BACKGROUND:

Oklahoma Natural Gas (ONG) recently approached the City about the upcoming expiration of its current franchise and a desire to propose a new franchise agreement to the voters of Norman for approval. The purpose of this memorandum is to provide a basic review about the law regarding franchises in Oklahoma and a review of the proposed franchise agreement.

Franchises: The Basics

A franchise is a right or privilege conferred by law to one or more parties to do some act which cannot be exercised by private individuals at their mere will and pleasure.¹ A franchise allows the holder a right to occupy or burden the streets or public grounds.² A franchise is required before a utility can use the streets, alleys or public grounds to construct and operate its utility.³ More than one franchise can be granted for the same use and purpose.⁴

In *City of Okmulgee v. Okmulgee Gas Co.*,⁵ the Oklahoma Supreme Court detailed the history of franchises in Oklahoma. When the framers were developing the Oklahoma Constitution, they had for their consideration the Constitutions of 45 states and the construction by the courts in those states of those constitutions.⁶ Some delegates to the convention were from the Indian Territory and some were from the Oklahoma Territory.⁷ Each territory dealt with utility franchises differently.⁸ In the Oklahoma Territory, municipalities had the power to grant charters for up to twenty one years in duration.⁹ Municipalities in Indian Territory were empowered to contract, through its mayor and council, with any person or company to construct and operate water and gas systems, as well as to construct street railroads.¹⁰ Some states had laws in place to grant exclusive privileges and franchises, and others had laws that granted a perpetual franchise while reserving in the legislature the right to alter, amend, annul, revoke, or repeal any charter of corporations or franchises when the legislature determined it to be injurious to the citizenry.¹¹ Other states had laws that granted limited franchises for a set number of years.¹² After reviewing the history, the Court said that “[F]rom the historical events and conditions existing about the

¹ *State of California v. Central Pac. R. Co.*, 127 U.S. 1 (1888); *Oklahoma Gas & Electric Company v. Wilson & Company*, 288 P. 316 (1930).

² *Overholser v. Oklahoma Interurban Traction Co.*, 119 P. 127 (Okla. 1911).

³ *Bartlesville Elec. Light & Power Co. v. Bartlesville Interurban Ry. Co.*, 109 P. 228 (Okla. 1910).

⁴ OKLA. CONST. XVIII, §7.

⁵ *City of Okmulgee v. Okmulgee Gas Co.*, 282 P. 640 (Okla. 1929).

⁶ *Id.* at 644.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

time the framers of the Constitution assembled and prepared and submitted to the people for their ratification the Constitution, they had in mind the reservation of power in our Constitution by the people to themselves. They also had in mind that the surest way of securing franchises satisfactory to the people was for the people to vote such franchises".¹³

Ultimately, the adopted provision in the Oklahoma Constitution reserves the decision of granting a franchise to the voters. It says:

No municipal corporation shall ever grant, extend, or renew a franchise, without the approval of a majority of the qualified electors residing within its corporate limits, who shall vote thereon at a general or special election; and the legislative body of any such corporation may submit any such matter for approval or disapproval to such electors at any general municipal election, or call a special election for such purpose at any time upon thirty days' notice; and no franchise shall be granted, extended, or renewed for a longer term than twenty-five years.¹⁴

The qualified voters of a municipal corporation can also bring the issue of granting a franchise forward for a vote through the initiative process. An initiative is an electoral process by which a percentage of voters can propose legislation and compel a vote by the electorate.¹⁵ It is one of the few methods of direct democracy in an otherwise representative system.¹⁶ If a petition, signed by a number of qualified voters equal to twenty-five percent (25%) of the total number cast at the most recent general municipal election, is presented to the City, demanding that a franchise be granted, extended or renewed, a special election must be called.¹⁷ The right of the voters to authorize a franchise cannot be taken away by the Legislature.¹⁸

Franchised Utilities in Norman

There are a number of utilities operating in Norman. Companies providing telephone service are granted statewide access to public rights of way by the Oklahoma Constitution.¹⁹ As new technologies have developed, the Oklahoma Attorney General has opined that telephone companies don't need a separate municipal franchise to provide additional services, like video programming, over its telephone lines.²⁰ Thus, the only municipal franchises currently in place are with OG&E, Oklahoma Electric Cooperative (OEC), and Oklahoma Natural Gas (ONG). Although there are two electric providers in Norman, their territories do not overlap.

Oklahoma Natural Gas Franchise

The ONG franchise was first granted by the voters in 1949. The franchise was renewed in the 1970's and again most recently in 1999. During the late 1990's, the State Legislature was considering deregulating utilities. At the time, the City was considering the possibility of buying

¹³ *Id.* at 645.

¹⁴ OKLA. CONST. XVIII, § 5(a).

¹⁵ BLACK'S LAW DICTIONARY 788 (7th ed. 1999).

¹⁶ *Id.*

¹⁷ OKLA. CONST. XVIII, §5(b).

¹⁸ *City of Okmulgee v. Okmulgee Gas Company*, 282 P. 640 (Okla. 1929).

¹⁹ OKLA. CONST. IX, §2.

²⁰ 2006 OK AG 15, §14.

out the natural gas facilities and becoming a natural gas provider in Norman. Ultimately, Ordinance No. O-9899-22 granting a franchise to ONG was submitted to the voters and approved. ONG pays a franchise fee to the City equal to 4.25% of its Gross Receipts received from the distribution of natural gas in Norman.²¹ The franchise agreement allows the City the option to purchase all of the gas facilities, including office buildings, distribution system, machinery, real and personal property, etc. owned by ONG during certain defined time periods and provides for payment of fair market value. The agreement will expire March 2, 2024.

DISCUSSION:

The proposed franchise agreement is substantially similar to the current agreement. Additional definitions for “calculated value”, “dekatherm”, “franchise fee”, “pipeline capacity lease agreement”, “transportation tariff arrangement”, and “transport gas consumer”. Some definitions have been revised. The definition of “gross receipts”, on which the franchise fee is charged, has been revised to explicitly exclude revenues received by ONG from customers as a franchise fee reimbursements and volumetric rate fees that are already remitted to the City. Gross receipts also do not include revenues from incidental charges or miscellaneous fees not directly generated from the distribution of natural gas to consumers. The definition of “Volumetric Rate” has been revised to set an initial rate of 4.25%. A volumetric rate would be the basis for a fee charged by the City for use of public ways to transport gas, should the City adopt an ordinance imposing such a fee.

The proposed term of the franchise is 25 years. The approval of the franchise would grant ONG the right to enter upon the public ways to install, operate, and maintain a distribution system along, across, over and under the public ways for the purpose of transporting, distributing, and/or selling gas to consumers and the public generally within the limits of Norman. As with other franchises, the grant of a franchise would not be exclusive, meaning other franchisees can also occupy the public ways to provide similar services to the extent it is allowed by State law.

ONG must install its distribution system in such a manner as will, consistent with reasonable necessity, cause the least interference with other public uses in the public ways. Before ONG can excavate or disturb the surface of a public way, except in the case of an emergency, 48 hours notice must be given to the City Engineer or the Public Works Director. When the work is completed, ONG, with diligence and dispatch, must restore the public way to a condition in compliance with the City’s reasonable standards or specifications.

If ONG fails to commence or complete any construction, maintenance or restoration work with due diligence and dispatch, the City may cause the work to be done after written notice to ONG, at ONG’s cost. The City is empowered to make reasonable regulations concerning the construction of ONG’s system so long as the regulations are consistent with the franchise agreement, the laws of the State of Oklahoma, federal laws, and the orders, rules and regulations of the Oklahoma Corporation Commission. Any such regulations must also be reasonable.

If the City constructs, or allows someone else to construct or lay cables, conduits, water, sewer, gas or other pipelines in the public ways, it shall not be liable to ONG for any damage to its

²¹ The franchise agreement initially set the fee at 3%; however, a favored nations clause resulted in an increase to 4.25% when another municipality approved a franchise agreement with a 4.25% franchise fee.

pipeline in doing such work unless the City or its agents or contractors are negligent. If the City requires ONG to alter, change or adapt its system in the public ways, it shall be done without reimbursement or compensation from the City.

Finally, the franchise agreement includes the City's option to purchase, take over and acquire ONG's system, including pipes, pipelines, meters and connected apparatus. If the City desired to purchase the system, there are provisions in the agreement for the timing of such a purchase, the basis for value (fair market value) and appraisal.

Ordinance O-2223-53 sets an election date for the franchise of September 12, 2023. In order to meet deadlines set by the Oklahoma Election Board, the ordinance must be approved on July 11, 2023 for a September 12, 2023 election date. The ordinance declares an emergency and will require approval by 2/3 of Council, or 6 votes.

RECOMMENDATION:

Adoption of Ordinance O-2223-53 allows the voters to determine the question of whether a franchise should be granted to Oklahoma Natural Gas. Staff forwards this ordinance to Council for consideration.