

ORDINANCE NO. 10465
(NEW SERIES)

ORDINANCE GRANTING TO SAN DIEGO GAS & ELECTRIC COMPANY, ITS SUCCESSORS AND ASSIGNS, THE FRANCHISE (1) TO USE FOR TRANSMITTING AND DISTRIBUTING GAS SUITED FOR LIGHTING BUT FOR USE BY CONSUMERS FOR ANY AND ALL LAWFUL PURPOSES OTHER THAN LIGHTING, ALL PIPES AND APPURTENANCES WHICH ARE NOW OR MAY HEREAFTER BE LAWFULLY PLACED AND MAINTAINED IN THE STREETS WITHIN THE CITY OF SAN DIEGO UNDER THAT CERTAIN FRANCHISE OF GRANTEE ACQUIRED PURSUANT TO SECTION 19 OF ARTICLE XI OF THE CONSTITUTION OF THE STATE OF CALIFORNIA, AS SAID SECTION EXISTED PRIOR TO ITS AMENDMENT ON OCTOBER 10, 1911, (2) TO CONSTRUCT, MAINTAIN AND USE IN SAID STREETS ALL PIPES AND APPURTENANCES WHENEVER AND WHEREVER SAID CONSTITUTIONAL FRANCHISE IS NOT NOW NOR SHALL HEREAFTER BE AVAILABLE THEREFOR, NECESSARY TO TRANSMIT AND DISTRIBUTE GAS SUITED FOR, AND FOR USE BY CONSUMERS FOR, ANY AND ALL LAWFUL PURPOSES, AND (3) TO UTILIZE SAID PIPES AND APPURTENANCES IN SAID STREETS FOR TRANSMITTING GAS FOR USE OUTSIDE THE BOUNDARIES OF THE CITY FOR ANY AND ALL LAWFUL PURPOSES, AND PROVIDING THE TERMS AND CONDITIONS OF THE FRANCHISE SO GRANTED.

BE IT ORDAINED, by the Council of The City of San Diego, as follows:
Section 1. DEFINITIONS

Whenever in this ordinance the words or phrases hereinafter in this section defined are used, they shall have the respective meanings assigned to them in the following definitions:

(a) The word "Grantee" shall mean San Diego Gas & Electric Company, its lawful successors and assigns;

(b) The word "City" shall mean The City of San Diego, a municipal corporation of the State of California, in its present incorporated form or in any later reorganized, consolidated, enlarged or reincorporated form;

(c) The word "streets" shall mean the public freeways, highways, streets, ways, alleys and places as the same now or may hereafter exist within the City;

(d) The word "gas" shall mean natural or artificial gas, or a mixture of natural and artificial gas;

(e) The phrase "pipes and appurtenances" shall mean pipes, pipelines, mains, services, traps, vents, vaults, manholes, meters, gauges, regulators, valves, conduits, appliances, attachments, appurtenances

and, without limitation to the foregoing, any other property located in, upon, along, across, under or over the streets of the City and used or useful in transmitting or distributing gas, sometimes otherwise referred to as "facilities";

(f) The phrase "construct, maintain and use" shall mean to construct, erect, install, operate, maintain, use, repair, relocate or replace pipes and appurtenances thereto in, upon, along, across, under or over the streets of the City;

(g) The phrase "constitutional franchise" shall mean the right acquired through acceptance by Grantee or its predecessor in estate of the offer contained in the provisions of Section 19 of Article XI of the Constitution of the State of California, as said Section existed prior to its amendment on October 10, 1911;

(h) The phrase "gross receipts" shall mean all gross operating revenues received by Grantee from the sale of gas to Grantee's customers with points of service within the corporate limits of the City (including, but not limited to, sales to military reservations with points of service within the City's corporate limits) which are credited in Account Numbers 480, 481 and 482 of the current Uniform System of Accounts of the Federal Power Commission as adopted by the California Public Utilities Commission, or similar superseding accounts, less uncollectible amounts and less any refunds or rebates made by Grantee to such customers pursuant to orders or decisions of the California Public Utilities Commission.

Section 2. PURPOSE

The franchise (1) to use for transmitting and distributing gas suited for lighting but for use by consumers for any and all lawful purposes other than lighting, all pipes and appurtenances which are now or may hereafter be lawfully placed and maintained in the streets within the City of San Diego under that certain franchise of Grantee acquired pursuant to Section 19 of Article XI of the Constitution of the State of California, as said Section existed prior to its amendment on October 10, 1911, (2) to construct, maintain and use in said streets all pipes and appurtenances whenever and wherever said constitutional franchise is not now nor shall hereafter be available therefor, necessary to transmit and distribute gas suited for, and for use by consumers for, any and all lawful purposes, and (3) to utilize said pipes and appurtenances in said streets for transmitting gas and for use outside the boundaries of the City for any and all lawful purposes is hereby granted to San Diego Gas & Electric Company, its successors and assigns.

Section 3. TERM

The right, privilege and franchise, subject to each and all of the terms and conditions contained in this ordinance hereby is granted to San Diego

Gas & Electric Company, a corporation organized and existing under and by virtue of the laws of the State of California, for the term of fifty (50) years from and after the effective date hereof.

Section 4. CONSIDERATION

(a) The rights and privileges herein granted are upon the express condition that Grantee, as consideration therefor and as compensation for the use of the streets of the City as herein authorized and permitted, shall pay each year to City in lawful money of the United States, a sum equal to three percent (3%) of Grantee's gross receipts during the preceding calendar year, or a fractional year, commencing with the date of adoption of this ordinance by the City Council, for the first thirty (30) years of the term of this franchise by the dates, in the manner, and on the conditions as set forth in Section 5 hereof.

(b) For the last twenty (20) years of the term of this franchise Grantee, as consideration and compensation for the rights and privileges herein granted and for the use of the streets of the City as herein authorized and permitted, shall pay each year to City in lawful money of the United States a sum equal to an amount to be determined as set forth below of Grantee's gross receipts during the preceding calendar year, or a fractional year, for the remainder of the term of this franchise by the dates, in the manner and on the conditions as set forth in Section 5 hereof.

(c) Determination of the amount to be paid as set forth in Section 4(b) above shall be made by good faith negotiation between City and Grantee commencing not less than six (6) months prior to the expiration of the first thirty (30) year period. In the event that at the conclusion of the first thirty (30) year period said good faith negotiation does not result in a determination of the amount to be paid by Grantee during the last twenty (20) years (or 19 years, 6 months, as the case may be) of the term of this franchise, then this question (and no other) shall be submitted to binding arbitration as hereinafter set forth; provided however that no later than fifteen (15) days prior to the end of the first thirty (30) year period the parties may mutually agree to extend the time for said good faith negotiation for an additional six (6) months if they so desire, during which time Grantee shall continue to pay a sum equal to three percent (3%) of Grantee's gross receipts as consideration for the rights and privileges herein granted. Unless City and Grantee mutually agree in writing to a modification prior to the conclusion of the first thirty (30) year period (or at the conclusion of the additional six (6) month period as provided for above) then the determination of the number of arbitrators, the

time and mode of their selection, and the rules of practice and procedure to be followed shall be as set forth herein.

(d) Within thirty (30) days after the end of the first thirty (30) year period or within thirty (30) days after the six (6) month extension provided for above, as the case may be, Grantee and City shall each appoint a third arbitrator. If the third arbitrator and shall give written notice to the other party of such appointment.

(e) The two persons so appointed shall then agree upon and secure a third arbitrator. If the third arbitrator should not be secured within thirty (30) days from the selection of the arbitrators by Grantee and City respectively, then upon application in writing by either City or Grantee to the Chief Justice of the California State Supreme Court, said Chief Justice shall be empowered to appoint a third arbitrator. No person shall be eligible for appointment by said Chief Justice who is an officer or employee of City or Grantee, or a shareholder of Grantee.

(f) The arbitrators so appointed shall hear evidence submitted by both City and Grantee and may call for additional information, which additional information City or Grantee shall furnish to the extent feasible. An award, decision or determination in writing and signed by a majority of the arbitrators shall be made within sixty (60) days after the selection of the third arbitrator and shall be conclusive with respect to the issue submitted and shall be binding upon both City and Grantee.

(g) Except as otherwise provided in this section, the arbitration shall be governed by the rules of practice and procedure of the American Arbitration Association from time to time in force, except that, if such rules and practice as herein modified shall conflict with the California Code of Civil Procedure or any other provision of California law then in force, such California rules and provisions shall govern. This submission and agreement to arbitrate shall be specifically enforceable. The award of the arbitrators or a majority of them upon the question submitted to them hereunder shall be final and binding upon the parties to the extent and in the manner provided by the California Code of Civil Procedure.

(h) Each party shall bear the fee and personal expenses of the arbitrator appointed by it together with the fees and expenses of its own counsel and of its own witnesses. All other costs and expenses of the arbitration, including the cost and expense incurred by reason of selection of the third arbitrator as hereinabove provided, shall be borne equally by City and Grantee.

Section 5. REPORTS, DATES OF PAYMENT TO CITY, AUDITS

(a) On or before the 15th day of February of each calendar year dur-

ing the term of this franchise and forty-five (45) days after the expiration of the term of this franchise, Grantee shall file with the City Clerk of City, the original, and with the Auditor of City, one copy of a statement showing the gross receipts during the preceding calendar year or fractional calendar year.

(b) Within ten (10) days after the filing of the statement required to be filed on or before the 15th day of February 1971, Grantee shall pay to the City Treasurer the money herein required to be paid by Grantee to City upon the basis of the data set forth in said statement.

(c) Thereafter, no later than the 25th day of May, the 25th day of August and the 25th day of November of each calendar year during the term of this franchise Grantee shall pay to the said City Treasurer one-fourth ($\frac{1}{4}$) of the money herein required to be paid by Grantee to City upon the basis of the data set forth in the statement required by Section 5(a) hereof. By this method of payment it is contemplated and understood that Grantee is in effect paying the money herein required to be paid by Grantee to City under this sub-section on the basis of gross receipts for the preceding calendar year and that an adjustment shall be made as more fully set forth in Section 5(d) hereof.

(d) Within ten (10) days after the filing of the statement required by Section 5(a) hereof, Grantee shall pay to the said City Treasurer, or receive as a refund from the City, as the case may be, a sum of money equal to the difference between the sum of the payments of money made in accordance with Section 5(c) hereof and the annual payment of money herein required to be paid by Grantee to City upon the basis of the data set forth in said statement.

(e) The City Auditor, or any qualified person designated by the City, at any reasonable time during business hours, may make examination at Grantee's office or offices, of its books and records, germane to and for the purpose of verifying the data set forth in the statement required by Section 5(a) hereof.

(f) All books and records subject to examination by City Auditor, or qualified person designated by City, shall be kept within the County of San Diego, or in such other place as the reasonable convenience of Grantee may require; and in the event that it becomes necessary for said City Auditor, or any representative designated by the City to make such examination at any place other than within the County, then, in that event, all increased costs and expenses to City necessary or incident to such examination and resulting from such books and records not being available within the County, shall be paid City by Grantee on demand.

(g) Grantee shall file with the

City Manager a copy of its annual report to the California Public Utilities Commission, or its successor in authority, as soon as practicable after the original of said report has been filed with said Commission, or its successor in authority.

(h) In the event Grantee fails to make the payments for this franchise on or before the dates due as hereinabove provided, Grantee shall pay as additional consideration both of the following amounts:

(1) A sum of money equal to two percent (2%) of the amount due. This amount is required in order to defray those additional expenses and costs incurred by City by reason of the delinquent payment including, but not limited to, the cost of administering, accounting and collecting said delinquent payment and the cost to City of postponing services and projects necessitated by the delay in receiving revenue.

(2) A sum of money equal to one percent (1%) of the amount due per month as interest and for loss of use of the money due.

Section 6. COMPLIANCE WITH LAWS

All facilities or equipment of Grantee that Grantee shall construct, maintain and use or remove, pursuant to the provisions of the franchise granted herein shall be accomplished in accordance with the ordinances, rules and regulations of City now or as hereafter adopted or prescribed, and such rules or regulations as are promulgated under State law, or orders of the Public Utilities Commission or other governmental authority having jurisdiction in the premises.

Section 7. ADMINISTRATIVE PRACTICES

Grantee is herewith charged with the responsibility of cooperating with City in preparing a manual of administrative practices which shall govern the installation and removal of Grantee's facilities in the streets of City which shall include, but not be limited to, cathodic protection practices. Once each year, commencing with the first full calendar year of the franchise granted herein, it is to be the joint responsibility of Grantee and City to review and update such administrative practices. Both Grantee and City are charged with the duty to prepare, review and update such administrative practices by a method of mutual cooperation which shall take into consideration the reasonable needs and convenience of each party; provided that said administrative practices and the terms and conditions thereof shall be at all times subject to approval of the City Council as expressed by appropriate legislative action.

Following the preparation of said manual, and its approval by the City Council, it shall govern the practices of the Grantee in its installation and removal of Grantee's facilities in the streets of City.

Section 8. CITY RESERVED

POWER

(a) City reserves the right for itself to lay, construct, erect, install, use, operate, repair, replace, remove, relocate, regrade or maintain below surface or above surface improvements of any type or description in, upon, along, across, under or over the streets of the City. City further reserves the right to relocate, remove, vacate or replace the streets themselves. If the necessary exercise of the aforementioned reserve rights conflicts with any pipes and appurtenances of Grantee constructed, maintained and used pursuant to the provisions of the franchise granted hereby, whether previously constructed, maintained and used or not, Grantee shall, without cost or expense to City within ninety (90) days after written notice from the City Manager, or his designated representative, and request so to do, begin the physical field construction of changing the location of all facilities or equipment so conflicting. Grantee shall proceed promptly to complete such required work.

(b) Irrespective of any other provision of this ordinance, Grantee's right to construct, maintain and use, or remove pipes and appurtenances shall be subject at all times to the right of the City, in the exercise of its police power, to require the removal or relocation, of said pipes and appurtenances thereto at the sole cost and expense of Grantee.

Section 9. HOLD HARMLESS

Grantee of the franchise granted hereby shall indemnify, save and hold harmless, City and any officers and employees thereof against and from all damages, judgments, decrees, costs and expenditures which City, or such officer or employee, may suffer, or which may be recovered from, or obtainable against City, or such officer or employee, for, or by reason of, or growing out of or resulting from the exercising by Grantee of any or all of the rights or privileges granted hereby, or by reason of any act or acts of Grantee or its servants or agents in exercising the franchise granted hereby, and Grantee shall defend any suit that may be instituted against City, or any officer or employee thereof, by reason of or growing out of or resulting from the exercise by Grantee of any or all of the rights or privileges granted hereby, or by reason of any act or acts of Grantee, or its servants or agents, in exercising the franchise granted hereby.

Section 10. REPAIR COSTS

Grantee shall pay to City on demand the cost of all repairs to City property made necessary by any of the operations of Grantee under the franchise granted hereby, provided however that Grantee may make repairs to streets, sidewalks, curbs and gutters itself at its own cost in accordance with City specifications if the same can be done without undue incon-

venience to the public use of the streets.

Section 11. FORFEITURE

This franchise is granted upon each and every condition herein contained, and shall ever be strictly construed against Grantee. Nothing shall pass by the franchise granted hereby to Grantee unless it be granted in plain and unambiguous terms. Each of said conditions is a material and essential condition to the granting of the franchise. If Grantee shall fail, neglect or refuse to comply with any of the conditions of the franchise granted hereby, and if such failure, neglect or refusal shall continue for more than thirty (30) days after written demand by the City Manager for compliance therewith, then City, by the City Council, in addition to all rights and remedies allowed by law, thereupon may terminate the right, privilege and franchise granted in and by this ordinance, and all the rights, privileges and the franchise of Grantee granted hereby shall thereupon be at an end. Thereupon and immediately, Grantee shall surrender all rights and privileges in and to the franchise granted hereby. No provision herein made for the purpose of securing the enforcement of the terms and conditions of the franchise granted hereby shall be deemed an exclusive remedy or to afford the exclusive procedure for the enforcement of said terms and conditions, but the remedies and procedure outlined herein or provided, including forfeiture, shall be deemed to be cumulative.

Section 12. ACQUISITION AND VALUATION

Nothing in this ordinance or in the franchise granted hereby shall be construed as in any way impairing City's rights to acquire property of Grantee through the exercise of City's power of eminent domain or through voluntary agreement between City and Grantee. In the event that City chooses to exercise its power of eminent domain, it shall do so in accordance with the procedures provided by the general law of the State of California for the condemnation of public utility property. The valuation of such property for condemnation purposes shall be made in accordance with such general law.

Section 13. PUBLICATION EXPENSE

Grantee of said franchise shall pay to City a sum of money sufficient to reimburse it for all publication expenses incurred by it in connection with the granting thereof; such payment to be made within thirty (30) days after City shall have furnished Grantee with a written statement of such expenses.

Section 14. AUTHORITY FOR GRANT

Notwithstanding any other provisions contained herein, this franchise is granted solely and exclusively under Sections 103, 103.1, 104 and 105 of the Charter of The City of San Diego and under no other authority.

Section 15. NO TRANSFER
WITHOUT CONSENT

Grantee shall not sell, transfer, or assign this franchise or the rights and privileges granted thereby without the consent of the City Council of The City of San Diego, as set forth in Section 103 of the Charter of The City of San Diego.

Section 16. RIGHT OF CITY'S
ELECTORS

This grant of franchise and authority shall be and is subject to the right of the majority of the electors of City voting at any election at any time thereafter to repeal, change or modify the grant, and such right is hereby expressly reserved to said electors; and it is expressly agreed that at any election held in City a majority of the electors of City voting at said election shall have the right to repeal, change or modify the terms of this franchise and the authority granted hereunder.

Section 17. PERFORMANCE BOND

Grantee shall file and maintain a faithful performance bond in favor of the City in the sum of Five Hundred Thousand Dollars (\$500,000) to guarantee that Grantee shall well and truly observe, fulfill and perform each and every term and condition of the franchise herein granted. In case of any breach of any condition of the franchise, any amount of the sum made in the bond up to the whole thereof may be receivable from the principal and sureties upon said bond to compensate City for any damages it may suffer by reason of such breach. Said bond shall be acknowledged by Grantee as principal and by a corporation licensed by the Insurance Commissioner of the State of California to transact the business of a fidelity and surety insurance company as surety.

Section 18. EFFECTIVE DATE

This ordinance shall take effect and

be in force on the thirty-first day from and after its passage.

APPROVED:

JOHN W. WITT,

City Attorney

By C. M. FITZPATRICK,
Chief Deputy

Passed and adopted by the Council of The City of San Diego on December 17, 1970, by the following vote:

YEAS: Cobb, Loftin, Landt, Hitch,
Schaefer, Curran.

NAYS: Williams, Morrow.

EXCUSED: Martinet.

ABSENT: None.

AUTHENTICATED BY:

FRANK CURRAN,

Mayor of The City of
San Diego, California.

JOHN LOCKWOOD,

City Clerk of The City of
San Diego, California.

By ELFA F. HAMEL,
Deputy.

(Seal)

I HEREBY CERTIFY that the foregoing ordinance was not finally passed until twelve calendar days had elapsed between the day of its introduction and the day of its final passage, to wit, on December 3, 1970, and on December 17, 1970.

I FURTHER CERTIFY that the reading of said ordinance in full was dispensed with by a vote of not less than a majority of the members elected to the Council, and that there was available for the consideration of each member of the Council and the public prior to the day of its passage a written or printed copy of said ordinance.

JOHN LOCKWOOD,

City Clerk of The City of
San Diego, California.

By ELFA F. HAMEL,
Deputy.

(Seal)

Published Dec. 25, 1970

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