

NATURAL GAS
FRANCHISE AGREEMENT
ORDINANCE NO. 01- 01

AN ORDINANCE GRANTING TO PEOPLES GAS SYSTEM, A DIVISION OF TAMPA ELECTRIC COMPANY, ITS SUCCESSORS AND ASSIGNS, A FRANCHISE TO USE THE PUBLIC PLACES OF THE TOWN OF FORT MYERS BEACH, FLORIDA, PROVIDING AUTHORITY; DEFINITIONS; GRANT; TERM; ABANDONMENT; ASSIGNMENT; TOWN COVENANT; USE OF STREETS; MAINTENANCE; LAYING OF PIPE; CONSTRUCTION WORK; CUSTOMER COMPLAINTS; COMPLIANCE WITH TOWN REQUESTS; FRANCHISE FEE; FRANCHISE PARITY; ACCOUNTS AND RECORDS; INSURANCE; INDEMNIFICATION; FORFEITURE OR REVOCATION OF GRANT; MINOR CHANGES IN PROVISIONS HEREOF; SEVERABILITY AND PROVIDING AN EFFECTIVE DATE.

IT IS HEREBY ORDAINED BY THE TOWN OF FORT MYERS BEACH AS FOLLOWS:

SECTION 1: AUTHORITY: This Ordinance is enacted pursuant to the provisions of Chapter 95-494, Laws of Florida, Chapter 166, Florida Statutes, and other applicable provisions of law.

SECTION 2: 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 TOWN.
- B. "TOWN" shall mean the TOWN of FORT MYERS BEACH, Lee 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 or delivery or transportation 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, within, across, or under the public streets, alleys, waterways, easements and other public places of the TOWN.

G. "Franchise Agreement" shall mean the document executed by the TOWN and Company giving the Company the authority to operate the non-exclusive franchise within the TOWN, under the terms of this ordinance, and containing such other terms as are necessary to place the franchise into effect.

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 as may be reasonably necessary for the sale and distribution of Natural Gas for the public and private use of Customers within the corporate limits of the TOWN.

SECTION 3: GRANT: The TOWN ("grantor") hereby grants to the Company ("grantee") 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, waterways, easements and other public places of the TOWN, as they now exist or may be hereafter constructed, opened, laid out or extended within the present incorporated limits of the TOWN, or in such territory as may be hereafter added or annexed to, or consolidated with, the TOWN, any all such transmission line pipes, main line pipes and Customer service line pipes, together with all necessary and desirable appurtenances as may be reasonably necessary for the sale and distribution of Natural Gas for the public and private use of Customers within the corporate limits of the TOWN, subject to the terms and conditions herein contained.

SECTION 4: TERM: The Franchise hereby granted shall be for a period of twenty (20) years from the effective date of this ordinance, provided that at the end of said twenty (20) year period this Franchise Agreement shall be automatically renewed for a six (6) month period during which time the Town and Company shall negotiate in good faith to develop a mutually agreeable new franchise agreement. The Town reserves the right to terminate, at any time, any franchise granted herein, and to rescind all rights and privileges pursuant to the procedures set out in Section 19, in the event that:

A. The grantee has not fully complied in some material respect with any provision of this agreement, or any supplemental written agreement entered into by and between the Town and the Grantee,

B. The grantee has made a material, false statement in the application for the franchise, knowing it to be false,

C. The grantee becomes insolvent, enters into receivership or liquidation, files for bankruptcy, is unable or unwilling to pay its debts as they mature, or is in financial difficulty of sufficient consequence so as to jeopardize, by order of the FPSC, the continued operation of the natural gas system, unless the grantee is in due process of contesting such debt.

D. The grantee knowingly or intentionally violates any FPSC order or ruling, or the order or ruling of any other governmental body having jurisdiction over the grantee.

SECTION 5: ABANDONMENT: In the event that the natural gas system service is abandoned and all negotiations to settle the differences between the parties have failed, the Town Council may advertise and seek another grantee to operate the system. Upon abandonment, at the option of the Town, the grantee shall transfer ownership of all such abandoned property to the Town and submit to the Town an instrument in writing, subject to the approval of the Town Attorney, effecting such transfer. It shall be the sole responsibility of the grantee to purge the unused gas or natural gas product from any and all services, mains, or transmission lines used in the conveyance of natural gas.

SECTION 6: ASSIGNMENT: The Company, upon prior notice to the TOWN, shall have the right and authority at its option, to assign lease, or otherwise alienate and transfer this Franchise Agreement in connection with the lease or sale of the Distribution

System all rights conferred upon it by this Franchise Agreement to any entity after first submitting a request to transfer to the Town and paying a nonrefundable transfer fee of twenty five hundred dollars (\$2,500) to the TOWN. The assignee of such rights, by accepting such assignment, shall become subject to the terms and provisions of this franchise. Notwithstanding the foregoing, and without payment of a transfer fee, the Company may, at its option alienate and transfer this Franchise Agreement in connection with the Company's merger and consolidation with any other entity or pledge or mortgage such Franchise in connection with the physical property owned and used by the Company in the operation of the Distribution System for the purpose of securing payment of monies borrowed by the Company, provided that any successor-in-interest to the Distribution System agrees to be bound by the terms of the Franchise Agreement.

SECTION 7: TOWN COVENANT: As a further consideration of this Franchise Agreement, the TOWN 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 TOWN, as modified, during the term of this Franchise Agreement.

SECTION 8: 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 public streets, alleys, waterways, easements and other public places of the TOWN, and said public streets, alleys, waterways, easements and other public places of the TOWN 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 public streets, alleys, waterways, easements and other public places of the TOWN, it shall make application for a permit to the appropriate TOWN authority and shall, with due diligence and dispatch, place such public streets, alleys, waterways, easements and other public places of the TOWN in as good condition and repair as before such excavation or disturbance was made, and in default thereof the TOWN may make such repairs and charge the reasonable cost thereof to the Company and collect the same from it. To the extent consistent with Florida Law, the Company hereby agrees to abide by all the rules and regulations and ordinances which the TOWN has passed or might pass in the future, and further agrees to abide by any established policy which the TOWN or its duly

authorized representative has passed, established, or will establish; provided, however, it is not intended hereby that the TOWN shall have the right of breaching the terms of this Franchise Agreement other than as herein provided.

SECTION 9: MAINTENANCE: All such components of the Distribution System of the Company located within the TOWN 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 10: LAYING OF PIPE: All components of the Distribution System shall be laid consistent with all applicable codes, rules, regulations and laws, regulations and laws, specifications contained in TOWN permits.

SECTION 11: CONSTRUCTION WORK: The TOWN 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 TOWN or other governmental body having jurisdiction in, across, along, or under any of the public streets, alleys, waterways, easements and other public places of the TOWN. 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 public streets, alleys, waterways, easements and other public places of the TOWN, 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 TOWN 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 TOWN or other governing body, without claim for reimbursement. The Company shall, to the best extent possible, conform to and comply with the efforts of the Town to maximize the use of the Town property and to minimize the impact of construction projects by merging projects. If the TOWN 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 corporation to use said public streets, alleys, waterways, easements and other public places of the TOWN, as part of its permitting or approval process, the TOWN shall require the Person 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 TOWN unless it has received specific permission from the TOWN or its duly authorized representative.

SECTION 12: CUSTOMER COMPLAINTS: The Grantee shall provide gas service within the limits of this franchise area under the rules and regulations of the FPSC. All complaints shall be resolved by the grantee in accordance with said rules and regulations. The Company shall maintain a toll free telephone number 24 hours a day to accept service calls and complaints from customers. The Company shall render efficient service, make repairs promptly, and interrupt service only for good cause. Any complaints shall be investigated and acted upon as soon as possible.

SECTION 13: COMPLIANCE WITH TOWN REQUESTS: If, at any time, in case of fire or other disaster in the Town, it shall become necessary, in the judgment of the Mayor or Fire Chief of the Fort Myers Beach Fire Control District or the Captain of the West District office of the Sheriff's Office, to stop the flow of natural gas such function shall be done by the grantee and any repairs rendered necessary thereby shall be made by the grantee at no expense to the Town.

SECTION 14: FRANCHISE FEE: Within thirty (30) days after the close of each month following the effective date of this Franchise Agreement, the Company, its successors or assigns, shall pay to the TOWN, or its successors, a sum of money which is equal to five percent (5%) of the Company's Gross Revenue, less any adjustments for uncollectable accounts, from the sale or delivery of Natural Gas to Customers within the corporate limits of the TOWN (excluding (a) the TOWN and each agency, board, commission or department thereof, and (b) Those Customers for whom the TOWN has waived, in whole or in part, the obligation to pay a franchise fee). For failure to pay an undisputed franchise fee on time the grantee shall pay to the Town on the amount unpaid at a rate equal to one percent (1%) per month from the date the amount was due to the date it is finally paid. The franchise fee payment shall be deemed paid on time if post-marked within thirty (30) days of the close of the preceding month. The grantee shall file with

the Town, within four months after the expiration of the grantee's fiscal year, a financial statement signed and attested to by a corporate officer of the franchise showing in detail the company's gross revenues earned in the franchise area during each such fiscal year.

SECTION 15: FRANCHISE PARITY: If, during the term of this Franchise Agreement, the TOWN, 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 public streets, alleys, waterways, easements and other public places of the TOWN, for the purpose of supplying or delivering Natural Gas to customers located within the corporate limits of the TOWN 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 TOWN 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 16: 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 TOWN 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 TOWN pursuant to an appropriate confidentiality agreement. 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.

SECTION 17: INSURANCE: During the term of this Franchise, the Company shall file with the TOWN Clerk and shall keep in full force and effect at all times during the effective period hereof, insurance certificates evidencing a general liability insurance policy or policies or evidence of self-insurance, the terms and conditions whereof shall provide that the TOWN is an additional insured as to the Company's construction or operation of a Natural Gas distribution system within the corporate limits of the TOWN, as they currently exist or may exist in the future. Each such policy shall be in the minimum sum of \$1,000,000.00 for injury or death to any one person, and in the minimum sum of \$5,000,000.00 for injury or death to all persons where there is more than one person involved in any one accident, and in the minimum sum of \$1,000,000.00 for damage to property, resulting from any one accident, and each of the said minimum sums shall remain in full force and shall be undiminished during the effective period of this Ordinance. Every such insurance policy shall contain a provision whereby every company executing the same shall obligate itself to notify the clerk of the TOWN, in writing, at least thirty (30) days before any material alteration, modification, or cancellation of such policy is to become effective.

SECTION 18: INDEMNIFICATION: In consideration of the permissions granted to the Company by this Franchise Agreement, the Company hereby agrees to indemnify and hold harmless the TOWN, its officers, agents and employees from and against claims, suits, actions, and causes of action, caused by or arising out of the Company's negligent operation of the Distribution System within the TOWN during the term of this franchise and resulting in personal injury, loss of life or damage to property sustained by any person or entity, through or as a result of the doing of any work herein authorized or the failure to do work herein required, and including all reasonable costs, attorney's fees, expenses and liabilities incurred by the TOWN in connection with any such claim, suit, action or cause of action including the investigation thereof, and the defense of any action or proceeding brought thereon and any order, judgment or decree which may be entered in any such action or proceeding or as a result thereof, except that neither the Company

nor any of its employees, agents, contractor, licensees, or sub-lessees shall be liable under this section for any claims, suits, actions, damages, expenditures, including attorney's fees, or causes of action arising out of injury, loss of life or damage to persons or property caused by or arising out of the negligence, strict liability, intentional torts, criminal acts, or error of the TOWN, its officers, agents, or employees. Nothing in this Agreement shall be construed to affect in any way the TOWN's rights, privileges, and immunities under the doctrine of "sovereign immunity" and as set forth in Section 768.28, Florida Statutes. The provisions of this section shall survive the expiration or earlier termination of this Franchise Agreement.

SECTION 19: FORFEITURE OR REVOCATION OF GRANT: 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 TOWN to declare a forfeiture of and to revoke and cancel all rights granted hereunder, provided, however, that before such action by the TOWN shall become operative and effective, the Company shall have been served by the TOWN with a written notice setting forth all matters pertinent to such violation or default, and describing the action of the Council with respect thereto, and the Company shall have had a period of sixty (60) days after service of such notice within which to cure such violation or within which to present a plan, satisfactory to the TOWN, acting reasonably, to affect 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 revoking and canceling any rights hereunder. In the event of forfeiture, the Company shall have the right to assign, sell or transfer, to any entity of its choice, the rights conferred by this Franchise Agreement subject to the terms in Section 5.

SECTION 20: MINOR CHANGES IN PROVISIONS HEREOF: Minor changes in the terms and conditions hereof may be made by written agreement between the TOWN and the Company.

SECTION 21: SEVERABILITY: If any section, part of 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. If either party to this Franchise Agreement feels that elimination of the specific portion of the Franchise Agreement adjudged to be invalid results in significant adverse consequences to itself, then that party may terminate this Franchise Agreement by providing thirty (30) days written notice to the other party.

SECTION 22: EFFECTIVE DATE: This Ordinance shall become effective immediately upon its passage and adoption, provided the Company shall have signified its acceptance of the franchise hereby granted, in writing, within thirty (30) days from the date this Ordinance is duly adopted, the Company's acceptance of said franchise being a condition precedent to the effectiveness of the provisions of this Ordinance.

The foregoing ordinance was enacted by the Town Council upon a motion by Council Member Rynearson and seconded by Council Member Reynolds and, upon being put to a vote, the result was as follows:

Daniel Hughes	<u>aye</u>
Garr Reynolds	<u>aye</u>
Ray Murphy	<u>aye</u>
Terry Cain	<u>aye</u>
Howard Rynearson	<u>aye</u>

DULY PASSED AND ENACTED this 5 day of February, 2001.

ATTEST:

TOWN OF FORT MYERS BEACH

By: Marsha Segal-George
Marsha Segal-George, Town Clerk

By: Daniel Hughes
Daniel Hughes, Mayor

Approved as to form by:

Richard V.S. Roosa
Richard V.S. Roosa, Town Attorney