

**CITY OF EL PASO, TEXAS**  
**AGENDA ITEM DEPARTMENT HEAD'S SUMMARY FORM**

**DEPARTMENT:** City Manager

**AGENDA DATE:** November 09, 2010

**CONTACT PERSON/PHONE:** William F. Studer, Jr., Deputy City Manager, 541-4252

**DISTRICT(S) AFFECTED:** All Districts

**SUBJECT:** An Ordinance granting to ONEOK WesTex Transmission, L.L.C., the right, privilege and franchise to construct, acquire, operate and maintain in certain portions of the City of El Paso, Texas, mains, systems and facilities for the purpose of transporting, delivering and selling natural gas within and through said municipality to customers inside, beyond and outside the limits of said municipality, and for such purposes to use the highways, streets, avenues, alleys, easements, bridges, parks and drainage facilities of said municipality for a period of twenty (20) years.

**BACKGROUND / DISCUSSION:**

ONEOK WesTex Transmission LLC owns the pipeline previously owned by Meridian Oil Transportation Corporation and was the assignee to the 20 year franchise agreement that expired November 26, 2008. Earlier this year, the Council was briefed by City staff on the status of the pipeline franchise negotiations. The City has negotiated two major changes to the franchise fee: a) increasing the franchise fee on transportation of gas by the company from 2.5% to 4%; and b) applying the 4% franchise fee to the value or imputed value of gas delivered to a few major customers in El Paso that purchase large quantities of gas (3.2 Bcf). The new franchise fee will apply for gas pipeline service provided after November 30, 2010.

It is anticipated that the new fee will generate approximately \$1.5 million to \$2.5 million in additional revenues to the City each fiscal year, depending on the cost of gas.

**PRIOR COUNCIL ACTION:**

The City granted the previous franchise for this pipeline in 1990.

**AMOUNT AND SOURCE OF FUNDING:**

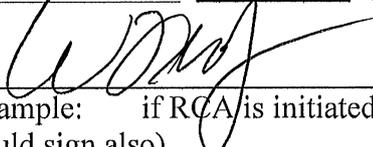
N/A

**BOARD / COMMISSION ACTION:**

N/A

\*\*\*\*\*REQUIRED AUTHORIZATION\*\*\*\*\*

**LEGAL:** (if required) \_\_\_\_\_ **FINANCE:** (if required) \_\_\_\_\_

**DEPARTMENT HEAD:**  \_\_\_\_\_  
(Example: if RCA is initiated by Purchasing, client department should sign also)  
*Information copy to appropriate Deputy City Manager*

**APPROVED FOR AGENDA:**

**CITY MANAGER:** \_\_\_\_\_ **DATE:** \_\_\_\_\_

**ORDINANCE NO. \_\_\_\_\_**

**AN ORDINANCE GRANTING TO ONEOK WESTEX TRANSMISSION, L.L.C., THE RIGHT, PRIVILEGE AND FRANCHISE TO CONSTRUCT, ACQUIRE, OPERATE AND MAINTAIN IN CERTAIN PORTIONS OF THE CITY OF EL PASO, TEXAS, MAINS, SYSTEMS AND FACILITIES FOR THE PURPOSE OF TRANSPORTING, DELIVERING AND SELLING NATURAL GAS WITHIN AND THROUGH SAID MUNICIPALITY TO CUSTOMERS INSIDE, BEYOND AND OUTSIDE THE LIMITS OF SAID MUNICIPALITY, AND FOR SUCH PURPOSES TO USE THE HIGHWAYS, STREETS, AVENUES, ALLEYS, EASEMENTS, BRIDGES, PARKS AND DRAINAGE FACILITIES OF SAID MUNICIPALITY FOR A PERIOD OF TWENTY (20) YEARS.**

**BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF EL PASO:**

**SECTION 1. GRANTING OF FRANCHISE**

That the right and privilege be and the same are hereby granted to ONEOK WESTEX TRANSMISSION, L.L.C., a Delaware limited liability company, its successors and assigns, herein called the "Grantee" (subject to the provisions and territorial limits hereof) to lay, construct, acquire, operate and maintain from time to time and continuously in any of the present or future public highways, streets, avenues, parks, bridges, alleys, easements, drainage facilities, or any other public right-of-way (hereafter call the "public ways") of the City of El Paso, Texas ("City") and its successors and assigns, a system of gas mains, pipes, conduits and feeders upon, beneath, across and along said public ways in the City of El Paso for the purpose of transporting, delivering and selling natural gas to customers within the city limits as now established or hereafter extended and transporting gas through the City to points beyond the city limits; provided, however, that any sales of gas by Grantee within the City limits shall be subject to the regulatory authority of the City except to the extent such sales are subject to the original jurisdiction of the Railroad Commission of Texas.

**SECTION 2. LOCATION OF FACILITIES**

A. The Grantee shall have the right to extend, replace and repair its piping system now in use and hereafter constructed in the City ("System") but shall restore the public ways in and upon which pipes are extended, replaced, repaired or constructed in accordance with the provisions of Section 8 and the reasonable regulations and valid ordinances of the City. The Grantee, and any sub-contractor working on behalf of Grantee, before excavating the public ways of the City, shall notify and obtain a permit from the City of its intention so to do. Any

excavations made in any of the public ways shall be done in such manner as to give the least inconvenience to the public and all excavations and openings shall be restored to their original condition as nearly as practicable at the cost and expense of the Grantee.

B. If the City shall give the Grantee reasonable written notice of the intention of the City to perform work in any public ways or relocate any public ways or part thereof, it may require the Grantee, at its own expense, to raise, lower, relocate or relay its pipelines or other installations as may be reasonably necessary because of the change in the public ways; provided, however, that where Grantee had acquired the right to install its facilities, whether by condemnation, private right-of-way, or utility easement by dedication or grant, prior to the City's acquisition of such location as a public way, the issue of whether Grantee must relocate at its own expense will be determined based upon the specific facts and the law applicable thereto.

C. Upon notification by the City Engineer of proposed City public works improvements, the Grantee shall submit to the City Engineer for review and approval a construction schedule for the relocation of its gas lines that are in conflict with the City proposed improvements. Such construction schedule shall be submitted to the City Engineer within twenty-one (21) days of notification. If Grantee fails to relocate its gas lines within the approved construction schedule or causes any unreasonable delays in construction that result in added costs to the City, the City Council shall have the authority to charge the Grantee all costs due to delay of construction.

D. All gas pipes hereafter laid shall be placed at least thirty-six (36) inches below the surface of the public ways except across bridges, ditches or where not otherwise practicable.

E. In laying mains and pipes, the Grantee shall not, except with the consent of the City, interrupt the lawful use of water lines, storm or sanitary sewer lines, natural gas lines or mains, telephone, telegraph, cable television, fiber optic or electric conduit, public or private drains or any other permitted use of the public way. If the Grantee, in laying its mains and pipes, shall come in conflict with existing lines or property of any other person having a franchise from the City, or if the use of the public ways by any other person or entity comes into conflict with Grantee's mains and pipes, the City Manager shall decide all questions concerning the conflicting rights of the respective parties and what changes, if any, shall be made and at whose cost and shall reconcile their differences.

F. If the City shall lay water, or sewer, or any other utility lines in any public ways and, because of the character of such lines, the pressure or lack of pressure under which they are operated, or other engineering or practical reasons, or reasons of economy of the need to comply with any law as to the location or character of such water or sewer lines, it shall become reasonably necessary to move, relay or reconstruct the Grantee's mains and pipes at such location, the Grantee will do such work upon demand of the City Manager with reasonable promptness and at its own expense.

G. If the City shall give the Grantee reasonable written notice under this paragraph of the intention of the City to do work in the public ways in which lines of the Grantee are already laid or in which the Grantee proposes to lay its lines the Grantee may be required in advance of such work to renew its lines if defective or inadequate or to relocate them if they are in conflict with the proposed work.

### **SECTION 3. SYSTEM MAPS**

Grantee shall furnish the City with a map in printed and electronic format, with the type of electronic format to be agreed upon from time to time by Grantee and the City, showing the highways, streets, and avenues and all territory occupied by its mains and pipes and the diameter of all such mains and pipes in the City, and, as further extension of mains or pipes are made from time to time, the Grantee shall file annually with the City Engineer additional maps or plans in printed and electronic format showing the extensions.

### **SECTION 4. ANNEXATIONS BY CITY**

In an effort to ensure both that Grantee's system maps are kept up to date and that it can identify those customers that are located within the corporate limits of the City, Grantee may periodically request from Grantor a description of areas that have been annexed into, or de-annexed from, the corporate limits, and Grantor will provide such information in the form most readily available to it.

### **SECTION 5. USE OF STREETS**

A. When the Grantee shall be ready to commence the laying of any extension to its existing mains and pipes and before commencing said work, Grantee shall submit to the City Engineer a map or plan showing the public ways wherein it proposes to lay its pipe and, when said plan shall have been approved by the City Engineer, it shall then constitute a permit for the Grantee for the opening of all said public ways shown on said map and plan and for the laying of said mains and pipes and installation of other equipment by the Grantee as rapidly as work can be conveniently conducted by it. No public ways shall be opened or work done under such map and plan until same shall have been approved by the City Engineer. If the City Engineer disapproves such work, he/she shall give notice thereof and the reasons for disapproval to Grantee.

B. The Grantee shall also supply the City Engineer with a sufficient number of maps of proposed work for distribution to all other public utilities (including the Public Service Board), for the purpose of coordinating the work with any work contemplated by the other utilities, and thereby minimizing the digging-up of the streets.

C. If the City shall by ordinance or general application regulate the making or restoration of cuts and excavations in streets, alleys, or other public grounds, the Grantee will comply with such regulations.

D. If Grantee is permitted by the City Engineer to use its own contractor for the restoration of asphalt, concrete, or other existing materials, the Grantee shall pay the City the cost of inspection for compliance to City construction standards and regulations at a rate established by the City Council, which is currently Sixty-five dollars and 80 cents (\$65.80) per hour. Inspections shall be made by the City on a daily basis as necessary to assure compliance with City standards.

## **SECTION 6. MAINS AND PIPELINES**

The size, material and character of construction of the mains and pipelines hereafter constructed shall be as reasonably necessary to insure safety and service to the public and shall meet all requirements of established standards for gas transmission lines.

## **SECTION 7. EXCAVATION**

The Grantee, at all times when it has opened public ways, shall submit to the City Engineer or the City Engineer's designee, a traffic control plan for the area under construction and shall provide access for the travel of vehicles on at least one side of all excavations and obstructions. The Grantee shall be responsible for the costs associated with maintaining traffic control pursuant to City ordinances. No permit fee or other City fee shall be imposed upon the Grantee for the breaking or opening of any public ways for the laying of mains and pipes, except as provided for hereunder.

## **SECTION 8. RESTORATION**

A. As soon as practical after completion of any excavation in the public ways, Grantee shall remove all dirt, rubbish and material and restore all openings to a condition that is, as nearly as practicable, equally as good as before said openings and obstructions were made. If, after such restoration, the places excavated and refilled become depressed or sink because of the work done by the Grantee and are not in as good condition as before the excavation was made, then the Grantee upon written notices from the City Engineer shall again, from time to time, restore said public ways so that the same shall be, as nearly as practicable, in as good condition as before the excavations were made.

B. If there is, in the opinion of the City Engineer, any unreasonable delay by the Grantee in restoring, maintaining or repairing of public ways after excavations or repairs have been made, the City shall have the right to restore, maintain or repair same and to require the Grantee to pay the reasonable cost of such restoration, maintenance or repair.

## SECTION 9. INDEMNITY

The Grantee shall hold the City harmless against all liability for damages to persons or property arising out of the construction, maintenance or operation of its Systems. The City will promptly notify the Grantee of any claim or suit against the City to which the City may claim indemnity from the Grantee, and the Grantee shall have the right to conduct the defense of any such suit.

## SECTION 10. CONSIDERATION

A. For and in consideration of the granting of this Franchise and the exercise thereof and of all rights permitted thereby and as rentals for the occupation and use or easement over, upon and beneath the public ways in the City for all of Grantee's facilities, Grantee shall pay to the City while this Franchise is in force and effect, a fee for transportation and delivery of gas within the corporate limits of the City, as set forth below:

(1) For service provided between November 30, 2008 and November 30, 2010, Grantee shall collect from customers and pay the City a franchise fee pursuant to the terms of Franchise Ordinance No. 09931; and

(2) For service provided after November 30, 2010, Grantee shall collect from customers and pay the City as follows:

(a) Four percent (4%) of Grantee's gross receipts from transportation charges made by Grantee for transportation and delivery of gas to customers and to the interconnect between Grantee and an interstate pipeline within the City, but not less than the sum of Thirty-five Thousand Dollars (\$35,000.00) in the aggregate per annum; and

(b) Four percent (4%) of the value or imputed value of gas at the point of delivery in the City for gas transported by Grantee but not sold by Grantee (hereinafter referred to as "Transport Gas") for use or consumption by any customer within the City that uses or consumes at least 3.2 Bcf of gas per year, as averaged over the previous three (3) calendar years ("Transportation Customer").

B. Each month, within forty-five (45) days following the last day of the month of delivery of Transport Gas to the Transportation Customer, the Customer shall disclose to Grantee the total aggregate price paid for all Transport Gas delivered or consumed by the Customer ("Purchase Price") for said month. If a Transportation Customer fails or refuses to disclose the Purchase Price for the Transport Gas within said forty-five (45), then Grantee shall establish the Purchase Price of the gas by utilizing a price equal to the WAHA Index price of gas published each month in Inside FERC's Gas Market Report (or a successor publication mutually agreed upon by the City and Grantee) ("Index Price"), for the month of delivery to the Transportation Customer. The Purchase Price of the Transport Gas for gas transported during any month will then be determined by multiplying the Index Price for such month by the MCF (or equivalent

MMBtu if price is per MMBtu) actually transported during such month to the Customer. Grantee shall use reasonable due diligence in collecting from Transportation Customers the franchise fee imposed on the value of the Transport Gas transported to said Customers, but shall not be responsible for paying same to City if the Transportation Customer refuses to pay the fee imposed on the value of the Transport Gas transported.

C. The franchise fees due hereunder shall be paid only once with respect to the same gas, and should the City of El Paso receive or be entitled to receive from any other company, firm, corporation or person a payment measured by gross receipts from transportation of the same gas, the aggregate amounts which the City has received or is entitled to receive with respect to the same gas transported by Grantee shall be deducted from the annual payments to be made to the City by Grantee hereunder.

D. The first payment to Grantor under this Franchise shall be made on or before November 30, 2010, and shall be for the period of December 1, 2008 through November 30, 2009. The next payment shall be made on or before January 31, 2011 and shall be for the period December 1, 2009 through November 30, 2010. Thereafter, Grantee shall make quarterly payments no later than the last day of April, July, October, and January for the quarter ending the last day of February, May, August, and November, respectively. Each payment shall be accompanied by a sworn affidavit showing such gross receipts and, if such information be available to it, also showing with reasonable detail any and all payments on gross receipts from transportation and/sales of gas within the city made by or to be made by any other company, firm, corporation or person with respect to the same gas so transported and/or sold by Grantee. Grantee will make such payments by wire transfer as directed by the City Manager. The aforesaid payment shall be in lieu of any and all other rentals and franchise, license, permit, privilege, instrument, occupation, inspection, excise or revenue taxes or fees and all other exactions or charges without limitation (except general ad valorem property taxes and special assessments for local improvements, fees for building, plumbing, electrical and similar permits and other normal fees which are charged generally) upon the business, revenue, franchises, gas lines, installations, gas systems, conduits, storage tanks, pipes, fixtures or other facilities of the Grantee and all other property of the Grantee or its activities hereunder or any part thereof in said City during the term of this franchise. The sums above provided in this section to be paid shall be and the same are hereby determined to be adequate compensation to the City for the franchise and rights granted to the Grantee.

## **SECTION 11. COMPETITION**

Beginning six (6) months from the effective date of this Franchise, if an entity not affiliated with Grantee provides gas transportation service to customers located within the City limits that either has no franchise from the City or currently has or is hereinafter granted a franchise from the City that provides for payment of a lower franchise fee than provided for in this Franchise and both the other entity and Grantee are, or are capable of, providing service to the same customer(s), Grantee's Franchise fee obligations hereunder for service to said customer(s) will be reduced to an equivalent level during such period as such entity has a lower obligation for franchise fee payments. If requested by Grantee, Grantor shall disclose to Grantee the franchise fee obligation of such other entity in competition with Grantee for customers.

## **SECTION 12. ASSIGNMENT.**

A. This grant shall not be assignable without the express consent of the governing body of the City, which consent shall not be unreasonably withheld. Said consent shall be evidenced by an ordinance that fully recites the terms and conditions, if any, upon which such consent is given. In the context of this Agreement, consent is required in the event of any merger or acquisition of the Grantee, sale of substantially all of the assets of Grantee or change in control of Grantee. Provided, however, that consent of Grantee's assignment is not required in the event of a corporate restructuring or if Grantee's System is acquired by an affiliate of Grantee, but Grantee shall provide notice to the City Manager within thirty (30) days of the occurrence of any such event and the acquiring party shall comply with all of the requirements of Section 12.B. below.

B. If the Grantee shall assign this Franchise to any other person or corporation (the "Assignee") acquiring and duly authorized to acquire, own and operate the Grantee's property and carry on the Grantee's business as then conducted, the Assignee shall execute and deliver to the City an agreement in writing to be bound by all the Grantee's obligations, liabilities and undertakings under this Franchise, and upon such execution and granting of the consent in Section 12.A. shall be thereupon be deemed to be substituted for the Grantee, and the Grantee shall stand released from all obligations under this Franchise except as such as have already accrued at the time of the Assignment. If Assignee fails to file such agreement within thirty (30) days after said assignment, this Franchise shall terminate.

## **SECTION 13. OPTION TO PURCHASE**

A. Upon the termination of this grant of Franchise, the grant, as well as the property, if any, of the Grantee in the public highways, streets, avenues, alleys, bridges, parks and other public places within the corporate limits of the City of El Paso shall, at the election of the City, and upon payment by said City to the Grantee of the fair value therefor, be and become the property of the City of El Paso as provided in Section 3.18 of the Charter of the City of El Paso.

B. If at the termination of this Franchise the City shall elect to take over the property of the Grantee, the value of said property shall be determined by three (3) disinterested appraisers, one to be appointed by the City within thirty (30) days after such termination, one to be appointed by the Grantee within thirty (30) days after the appointment by the City of an appraiser, and the third to be appointed by the other two within thirty (30) days after the appointment by the Grantee of an appraiser. In determining the fair value of said property, the appraisers shall take into consideration all facts making value, except that Grantee shall never be entitled to any payment or valuation because of any value derived from the franchise or the fact that there is or may be going concern duly installed and operated.

## **SECTION 14. SEVERABILITY**

If any section, paragraph, subdivision, clause, phrase or provision of this ordinance shall be adjudged invalid or unconstitutional, the same shall not affect the validity of this ordinance as a whole, or any part of provision other than the part so decided to be invalid or unconstitutional. Nothing herein contained shall be construed as granting any exclusive franchise.

**SECTION 15. WAIVER OF APPLICATION.**

Since the Grantee is currently providing service under the franchise granted to Meridian Oil Transportation Company under Ordinance No. 09931 and has been providing such service in compliance with the franchise since April 2000, all relevant facts about the applicant are known to City Council and the requirements of Section 15.08.012 of the El Paso Municipal Code are waived.

**SECTION 16. PRIOR FRANCHISE SUPERSEDED**

This Franchise supersedes the franchises granted to Meridian Oil Transportation Corporation and its assignees (which includes the Grantee) by Ordinance No. 09931 passed and approved March 6, 1990, which Ordinance is, except as to rights already accrued thereunder, hereby repealed.

**SECTION 17. EFFECTIVE DATE AND TERM**

This Franchise shall not become effective unless and until Grantee shall, within thirty (30) days after the passage and approval of this Ordinance, file with the City Clerk a written acceptance hereof. Upon such acceptance, and notwithstanding the execution date of this Ordinance granting a franchise, the rights, powers and franchise herein contained are and shall be effective as of November 27, 2008 and shall continue to be in force and effect for a period of twenty (20) years from such effective date.

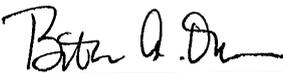
PASSED AND APPROVED this \_\_\_\_ day of November, 2010.

\_\_\_\_\_  
John F. Cook, Mayor

ATTEST:

\_\_\_\_\_  
Richarda Momsen  
City Clerk

APPROVED AS TO FORM:

  
\_\_\_\_\_  
Bertha A. Ontiveros  
Assistant City Attorney

APPROVED AS TO CONTENT:

  
\_\_\_\_\_  
William F. Studer, Deputy City Manager  
Finance and Management Support