

AGENDA REQUEST FORM

FOR: Council Meeting of March 2, 2021

FROM: Paul Becker and Kit Williams

ORDINANCE OR RESOLUTION TITLE AND SUBJECT:

AN ORDINANCE TO AMEND ORDINANCE NO. 2740 TO ENSURE THAT TRANSPORTATION CUSTOMERS ARE TREATED EQUALLY TO CUSTOMERS OF NATURAL GAS FOR THE FEES THEY PAY TO BLACK HILLS ENERGY

APPROVED FOR AGENDA:

Paul a. Becker
Paul Becker

FEB. 8, 2021
Date

Kit Williams
City Attorney Kit Williams

February 8, 2021
Date



OFFICE OF THE
CITY ATTORNEY

DEPARTMENTAL CORRESPONDENCE



Kit Williams
City Attorney

Blake Pennington
Assistant City Attorney

Jodi Batker
Paralegal

TO: **Mayor Jordan**
City Council

CC: **Susan Norton**, Chief of Staff

FROM: **Kit Williams**, City Attorney

DATE: **February 8, 2021**

RE: **Natural Gas Franchise Fee Should be Expanded to Cover Transportation Costs if Customer Purchases the Natural Gas from another Supplier**

Black Hills Energy sent the City a letter we received on February 5, 2021 which I have attached. It described a fairly new situation in the natural gas distribution system that I had not previously heard about. Apparently, some of their customers purchase natural gas from a source other than Black Hills Energy, but use and pay for the transportation of their gas through Black Hills Energy's pipes to deliver their gas to them. Since our franchise for the natural gas utility only assesses a franchise fee for the sale of natural gas to customers and no such actual sale of gas occurs when Black Hills Energy only transports a client's gas to the client's facility, these entities are unfairly receiving favored treatment.

The Mayor and Paul have authorized me to draft and present to the City Council an ordinance to make Black Hill Energy transportation charges to be subject to the franchise fee. I believe that only major customers such as industries or maybe the University would try to reduce their costs by buying natural gas from an outside source and then pay Black Hills Energy to transport it for them to their facilities. Regardless, the City should endeavor not to treat its traditional businesses and consumers less well than those which buy their natural gas from another supplier. They should have to pay a franchise fee through Black Hills Energy to the City for the transportation costs just like everyone else pays our franchise fees.



Jeff Dangeau
Associate General Counsel
Jeff.Dangeau@blackhillscorp.com

RECEIVED
FEB 05 2021
CITY ATTORNEY'S OFFICE

655 E Millsap Rd.,
Fayetteville, AR 72703
P: 479-601-8174
C: 479-409-7265

December 18, 2020

Mr. Kit Williams
113 W. Mountain St
Suite 302
Fayetteville, AR 72701

Dear Mr. Williams:

Periodically, Black Hills Energy audits the utility franchise agreements with cities across our service area to make sure the franchise fees we're collecting on behalf of our communities are accurate.

In a recent audit of the City of Fayetteville's franchise agreement we discovered a clause that requires clarification based on current interpretation of the language.

The franchise agreement, which was last updated in 1981 states:

"During the life of this franchise, the Grantee shall pay to Grantor each year a franchise tax in an amount equal to three percent (3%) of its sales, before taxes, of natural gas to residential and commercial consumers within the corporate limits of the City of Fayetteville and one percent (1%) of its sales, before taxes, of natural gas to industrial consumers withing the City of Fayetteville."

This language lists the customer classifications that were active at the time the agreement was executed. Since this agreement was last updated, the transportation customer class has been added.

Transportation customers do not purchase gas from Black Hills Energy. They independently purchase their own natural gas from a third party and then pay Black Hills Energy to deliver (transport) this gas to their premise using the Black Hills Energy natural gas distribution system. Therefore, they would not be charged a franchise fee on the sale of natural gas as defined in the City's agreement.

If it was the City's intent for all customer types to be included in the franchise fee collection, we are asking that the City provide official clarification of this or amend the franchise agreement language to reflect all customer types.

Included is a copy of the City's current franchise agreement with Black Hills Energy. We are happy to answer any questions you might have regarding the franchise language interpretation and clarification. Please contact Amiee York at 479-263-4224 should you have questions.

Sincerely,

Jeff Dangeau
Associate General Counsel
Black Hills Energy

Enclosure

CC: City Mayor
City Clerk/Treasurer

CF

ORDINANCE NO. 2740

AN ORDINANCE AMENDING ORDINANCE NUMBER 2663 TO LOWER THE FRANCHISE TAX PAYABLE BY ARKANSAS WESTERN GAS COMPANY.

BE IT ORDAINED BY THE BOARD OF DIRECTORS OF THE CITY OF FAYETTEVILLE, ARKANSAS:

Section 1. That the first sentence in paragraph (7) of Sec. I of Ordinance No. 2663 is hereby amended to read as follows:

(7) During the life of this franchise, the Grantee shall pay to Grantor each year a franchise tax in an amount equal to three percent (3%) of its sales, before taxes, of natural gas to residential and commercial consumers within the corporate limits of the City of Fayetteville and one percent (1%) of its sales, before taxes, of natural gas, to industrial consumers within the City of Fayetteville.

Section 2. That this ordinance shall be effective thirty (30) days after the date of publication by the Washington County Court of the proclamation declaring the results of the election on a county sales tax held July 28, 1981; provided, in the event of an election challenge the effective date of this ordinance shall be the first day of the first calendar month subsequent to the final judicial determination of the challenge.

PASSED AND APPROVED this 4 day of August, 1981.

APPROVED:

John Todd
MAYOR

ATTEST:

Dorian Koettel
CITY CLERK

ORDINANCE NO. 21663

AN ORDINANCE AMENDING ORDINANCE NO. 703 TO AMEND THE FRANCHISE ASSIGNED TO AND UNDER WHICH ARKANSAS WESTERN GAS COMPANY HAS THE RIGHT, PRIVILEGE AND FRANCHISE TO CONSTRUCT, MAINTAIN AND OPERATE A NATURAL GAS SYSTEM AND TO LAY GAS MAINS ALONG THE STREETS, AVENUES, ALLEYS, ROADS AND HIGHWAYS AND OTHER PUBLIC PLACES IN THE CITY OF FAYETTEVILLE FOR THE PURPOSE OF DISTRIBUTING AND SELLING NATURAL GAS.

BE IT ORDAINED BY THE BOARD OF DIRECTORS OF THE CITY OF FAYETTEVILLE, ARKANSAS:

Section 1. That Ordinance No. 703 is hereby amended to read as follows:

(1) Subject to the terms, conditions and stipulations specified herein, the City of Fayetteville hereby grants to Arkansas Western Gas Company, a corporation organized and existing pursuant to the laws of the State of Arkansas, Grantee, and to its successors, lessees, and assigns the right, privilege and authority within the present and all future expansions of the corporate limits of the City of Fayetteville, (a) to sell, furnish, transmit and distribute natural gas to all inhabitants and consumers within the said corporate limits; (b) to lay, construct, equip, operate, repair and maintain a system of gas mains, pipes, conduits, feeders and appurtenances for the purpose of supplying and distributing natural gas for light, fuel, power and heat and for any other purpose to the residents or inhabitants of the said City; and (c) to lay, construct, operate and maintain a system of gas mains, pipelines, conduits and feeders and the necessary attachments, connections, fixtures and appurtenances for the purpose of conveying, conducting or distributing natural gas from any point within said city limits in order to enable the said Grantee to distribute and sell natural gas to the said City and to the residents or inhabitants thereof, and to others. As used in this ordinance the terms "natural gas" and "gas" shall be defined as including, in addition to natural gas, such alternate substitute or supplemental fuels as, but not limited to, liquified natural gas, liquified petroleum gas, synthetic natural gas and propane-air. This franchise shall be exclusive insofar as it pertains to natural gas but shall be non-exclusive insofar as it pertains to such alternate, substitute or supplemental fuels as, but not limited to, liquified natural gas, liquified petroleum gas, synthetic natural gas, and propane-air.

(2) The Grantee herein is expressly given the permit (subject to the proviso hereinafter contained) to use the streets, avenues, roads, highways, alleys, sidewalks and other public places, as now laid out, or hereafter to be established, for the purpose of laying gas mains, pipelines, conduits and feeders, and the necessary attachments, fixtures, connections and appurtenances for the purpose of conveying or conducting natural gas from any point within the said City or to any point beyond the City limits of the said City, or to any other point, through and beyond the City limits of said City; and to operate and maintain a system of pipelines, pipes, conduits, feeders and the necessary attachments, connections, fixtures and appurtenances for the distribution of natural gas within said City to serve the said City and the residents and inhabitants thereof, and others; provided, however, that where alleys are accessible for laying mains and pipes, the City shall have the right to require that the mains and pipes shall be laid in

the alleys instead of the streets, so long as this is economically feasible (does not create an economic hardship); and, provided further, the streets, avenues, roads, highways, alleys, sidewalks and other public places as now laid out or as hereafter established, shall not be unnecessarily and unreasonably impaired or obstructed thereby.

(3) No fees or charges of any kind shall be imposed by Grantor upon the Grantee or upon any successors, or upon any consumer of natural gas for the breaking or opening of any highway, street, road, avenue, alley, or other public places, or for the laying of any main, service pipe or other connections therein, except as would be generally imposed on others performing similar work under similar circumstances and conditions.

Nothing in this franchise shall be construed in such manner as to in any manner abridge the right of the City to pass and enforce the necessary police regulations for the purpose of protecting the citizens of said City and their property and the property of the Grantee.

Grantee shall at all times keep and display the necessary danger signals and property guards around all excavations and obstructions and shall keep sufficient space in good condition for the travel of vehicles on at least one side of all excavations and obstructions, and shall as soon as practicable restore all openings on the highway, road, street, avenue, alley and other public places to condition equally as good as before said openings or obstructions were made. Anything to the contrary notwithstanding, when in the judgment of Grantee it is necessary for the safety of the citizens, to divert or detour traffic from the area of excavations it shall have the power to so do upon notice to said City.

(4) The Grantee shall do no injury to any highway, road, street, avenue, alley, lane, bridge, stream or water course, park or public place, except as specifically allowed, nor with any public or private sewer or drainage system, or water lines, now or hereafter laid or constructed by the said City or by any authorized person or corporation, but no sewer or water pipes, electric conduits, telephone or TV cables shall be so laid as to interfere unnecessarily with any gas main or pipes which shall have been laid prior to the time of laying such electric conduits, telephone and TV cables, sewer or water pipes. The Grantee shall fully indemnify and save harmless the City from any and all claims for damage for which said City shall or might be made or become liable by reason of the granting of this franchise, or any negligence or carelessness on the part of said Grantee, or because of any act or omission of the Grantee in the construction and operation of its system of mains and pipes.

(5) Natural gas service shall be provided under the terms and conditions herein specified and pursuant to the rules and regulations of the Arkansas Public Service Commission governing utility service, as well as Grantee's rules and regulations governing natural gas service on file with the Arkansas Public Service Commission and as interpreted and enforced by Grantee. All utility

services shall conform with these rules and regulations, as well as any other applicable rules and regulations, federal or state laws, including but not limited to the Arkansas Plumbing Code.

The rates which are to be charged by Grantee for natural gas service hereunder shall be those which are now lawfully approved or prescribed, and as said rates may, from time to time, be lawfully approved or prescribed by the Arkansas Public Service Commission or any successor regulatory authority having jurisdiction thereof.

The Grantee shall have the right to make and enforce as a part of the conditions under which it will supply natural gas for heat, power, light, fuel or other purposes as herein provided, all needful rules and regulations not inconsistent with law and the provisions of this franchise.

(6) The Grantee shall furnish promptly to the proper authorities any and all information which may be asked for by them in regard to the size, location or depths of any of the pipes, mains, conduits, or service pipes, in any form whatsoever, and any other information in regard to its occupation of roads, highways, streets, avenues, or public grounds of said City, which they may demand. Whenever the word Grantee occurs in this ordinance, it shall mean and it shall be understood to be the Arkansas Western Gas Company, its successors, lessees, or assigns, and whenever the words "authorities" or "proper authorities" occur in this franchise they shall mean and shall be understood to mean the authorized officer or officers, committee or board representing the City of Fayetteville, Arkansas, or Grantor.

(7) During the life of this franchise the Grantee shall pay to Grantor each year a franchise tax in an amount equal to four percent (4%) of its sales before taxes, of natural gas to residential and commercial consumers within the corporate limits of the City of Fayetteville and one percent (1%) of its sales, before taxes, of natural gas to industrial consumers within the City of Fayetteville; provided, said franchise tax may be increased after June 30, 1986, by the City of Fayetteville. Payments shall be made by the Grantee to the Grantor in quarterly installments and Grantee shall have thirty (30) days after the end of each calendar quarter within which to make such payment. Residential, commercial and industrial gas revenues are those revenues so classified pursuant to Grantee's uniform classification standards. Grantor shall have the right to examine and verify, from the records of the Grantee, any data relating to the gross revenues of Grantee from customers on which said franchise tax is due. In the event of a controversy between the Grantor and Grantee as to the amount of gross revenues received by Grantee in the City of Fayetteville upon which said tax is due, such controversy shall be referred to the Arkansas Public Service Commission, or such successor regulatory agency which may have jurisdiction over the Grantee, for final determination, and the decision of said Commission shall be binding upon both parties hereto.

It is expressly agreed and understood by the Grantor and Grantee that the aforesaid payment shall constitute and be considered as complete payment and discharge by the Grantee, its successors and assigns, of all licenses, fees, charges, impositions or taxes of any kind (other than automobile license fees, improvement districts, special millage taxes, and general ad valorem taxes) which are now or might in the future be imposed by the Grantor under authority conferred upon the Grantor by law. In the event such other tax or taxes are imposed by Grantor, the obligation of the Grantee set forth in Section 7 hereof, to pay the franchise taxes annually shall immediately terminate.

(8) This franchise shall take effect and continue and remain in force perpetually as provided in Section 44 of Acts of 1935, No. 324, Acts of the State of Arkansas, as same may be amended from time to time, and upon the written acceptance by the Grantee of the terms and conditions of this franchise.

Section 2. 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 or provision, other than the part so decided to be invalid or unconstitutional.

Section 3. All ordinances and resolutions or parts thereof in conflict herewith are hereby repealed.

PASSED AND APPROVED the 7th day of October, 1980.

APPROVED:

John Todd
MAYOR

ATTEST:

Helean Kottel
CITY CLERK

The Arkansas Western Gas Company, a corporation, Grantee, hereby accepts the above franchise subject to the terms and conditions therein this 5 day of October, 1980.

ARKANSAS WESTERN GAS COMPANY

By: Paul E. Schaefer
PRESIDENT

ATTEST:

William V. ...
SECRETARY

ORDINANCE NO. 2236

AN ORDINANCE INCREASING THE FRANCHISE TAXES PAYABLE TO THE CITY OF FAYETTEVILLE BY ARKANSAS WESTERN GAS COMPANY.

WHEREAS, the Board of Directors has determined that an increase in local franchise taxes is necessary on an interim basis to supplement existing general fund revenues until such time as statewide local enabling legislation, state legislation, or constitutional amendments are adopted which increase the ability of municipalities to support themselves; and

WHEREAS, the Fayetteville Board of Directors has proposed an increase in the franchise taxes payable to the city by Arkansas Western Gas Company; and

WHEREAS, Arkansas Western Gas Company has consented to the aforesaid proposed increase in franchise taxes, if said increase is authorized by a majority vote of the electors of the city voting on the question of said increase; and

WHEREAS, at a special election held May 25, 1976, a majority of the electors voting on the question approved a proposed ordinance increasing the franchise taxes payable by Arkansas Western Gas Company to the amount proposed by the Fayetteville Board of Directors.

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF DIRECTORS OF THE CITY OF FAYETTEVILLE, ARKANSAS:

Section 1. That the first paragraph of the agreement entered into by and between the City of Fayetteville, Arkansas and Arkansas Western Gas Company on October 24, 1955 is hereby amended to read as follows:

That the company agrees to pay to the city commencing July 1, 1976, for a period of ten years certain, a sum equal to 4% of its sales of natural gas to domestic and commercial consumers within the corporate limits of the City of Fayetteville and 1% of its sales of natural gas to industrial consumers within the City of Fayetteville. The company shall have thirty (30) days from the end of each quarter to compute and make the payments provided herein.

Section 2. That this ordinance shall be in full force and effect from and after June 24, 1976 upon execution hereof by the Mayor and City Clerk and approval of this ordinance by authorized representatives of Arkansas Western Gas Company.

REFERRED TO A VOTE OF THE ELECTORS PURSUANT TO ARK. STAT. 19-2429 BY RESOLUTION NUMBER 20-76 ADOPTED APRIL 20, 1976.

APPROVED BY ELECTORS AT SPECIAL ELECTION HELD MAY 25, 1976.

Marion R. Octor
MAYOR

ATTEST:
Silene Westraak
CITY CLERK

ARKANSAS WESTERN GAS COMPANY
BY: Paul E. Schaller

ATTEST:

J. M. Sprunger