

ORDINANCE NO. 77

AN ORDINANCE GRANTING ARKANSAS WESTERN GAS COMPANY OR ITS ASSIGNEES THE RIGHT AND 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, FOR THE PURPOSE OF DISTRIBUTING AND SELLING NATURAL GAS AND PROVIDING THE REGULATION FOR THE CONDUCT OF SAID GAS DISTRIBUTION SYSTEM, TO DECLARE AN EMERGENCY, AND FOR OTHER PURPOSES

WHEREAS, in the State of Arkansas, municipalities are granted jurisdiction and authority over the use and control of the public rights-of-way within the corporate limits of the municipality, to the extent that such jurisdiction does not conflict with state or federal statutes or regulations; and

WHEREAS, this historic authority has included the right to assess franchise fees for the privilege of the use of such rights-of-way and of providing utility service to the public; and

WHEREAS, on numerous occasions, the courts of the State of Arkansas have referred to this right to assess franchise fees against public utilities; for example, in *Hot Springs Electric Light Co. v. Hot Springs*, 70 Ark. 300 (1902), the Arkansas Supreme Court expressly stated that cities may assess a franchise fee as a condition for the use of public rights-of-way; and

WHEREAS, the Legislature has pronounced public policy in Identical Acts 1994 (1st Ex. Sess.) Nos. 6 and 7, §§ 2, which provided, as follows: "STATEMENT OF POLICY. It is, and historically has been, the policy of the State of Arkansas to permit municipalities, as one means of raising revenues, to assess municipal franchise fees against public utilities for the privilege of providing utility services to the public and of using public rights-of-way, including streets, highways, or other public places of any kind whatsoever within municipal boundaries and such franchise fees have not been considered to be within the scope of A.C.A. §§26-73-103 so as to require a vote of the electorate;"

WHEREAS, there is anticipated a shortfall in revenues as contrasted with expenses, creating an urgent need for the adoption of this ordinance; and

WHEREAS, it is in the interest of the City of Goshen and its citizens to establish a franchise with Arkansas Western Gas and collect a franchise fee therefrom.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL FOR THE CITY OF GOSHEN, ARKANSAS:

SECTION 1. That the City of Goshen, hereby grants to the Arkansas Western Gas Company the exclusive right, privilege and authority within the present and all future expansions of the corporate limits of the City of Goshen (1) to sell, furnish, transmit and distribute natural gas to all inhabitants and consumers within the said limits; and (2) subject to the terms, conditions and stipulations mentioned in this ordinance, consents and the right, permission and franchise is hereby given to the 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 to lay, construct, equip, operate, repair, and maintain a system of gas mains, pipes, conduits, feeders and the appurtenances for the purpose of supplying and distributing natural gas for light, fuel, power, and heat and for any other related purpose, to the residents or inhabitants of the said City; and further, the right to lay, construct, operate and maintain a system of gas mains, pipe lines, pipe conduits and feeders and the necessary attachments, connections, fixtures and appurtenances for the purpose of conveying, conducting or distributing natural gas from any point beyond 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 (without necessarily limited to) liquefied natural gas, liquified petroleum gas, synthetic natural gas and propane - air.

SECTION 2. So long as Grantee complies with Ordinance 69 and any amendments thereto or any similar ordinance enacted to protect city streets and rights of way, 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, pipe lines, 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 pipe lines, 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).

SECTION 3. Except as provided in Ordinance 69, and any amendments thereto, or any similar ordinance enacted to protect city streets and rights of way, 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 ordinance and its grant of a 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 proper 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 they have the power to so do upon notice to said City.

SECTION 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.

SECTION 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.

SECTION 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, service pipes, or other facilities 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 Goshen, Arkansas, or Grantor.

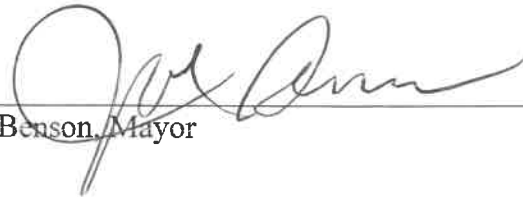
SECTION 7. During the life of this franchise the Grantee shall pay to Grantor each year a franchise tax in an amount equal to: three percent (3 %) of the Grantee's revenues before taxes for residential and commercial revenues as paid to the Grantee by residential and commercial customers located within the corporate limits of the City of Goshen. 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 and commercial 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 Goshen 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 the 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.

SECTION 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 (presently codified as Ark. Code Ann. §14-200-103), 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 9. 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 10. EMERGENCY CLAUSE: Because the issue of revenue is important, because without additional revenue the City will not be able to provide certain services which are expected by the citizenry, it is viewed that an immediate solution is necessary thereby creating an emergency. It is hereby declared that based on the conditions set forth herein, an emergency exists and this Ordinance, being necessary for the immediate protection of the health, safety, and welfare of the citizens of Goshen, Arkansas, shall be in effect immediately upon its passage, approval, and publication.



Joe Benson, Mayor

ATTEST:



Cheryl Whillock, City Recorder

APPROVED AS TO FORM:



Charles Harwell, City Attorney

ROLL CALL VOTE ADOPTING THE ORDINANCE

Names Of Those Voting YEA

Paula Anderson
Andy Bethell
Dr. Brian Buell
Max Poye

Names Of Those Voting NAY

Absent

J.J. Lockhart

Abstained

Jamie Boyd

ROLL CALL VOTE ADOPTING THE EMERGENCY CLAUSE

Names Of Those Voting YEA

Paula Anderson
Andy Bethell
Dr. Brian Buell
Max Poye

Names Of Those Voting NAY

Absent

J.J. Lockhart

Abstained

Jamie Boyd

The Arkansas Western Gas Company, a corporation, grantee, hereby accepts the above franchise subject to the terms and conditions therein this 28th day of February, 2008.

ARKANSAS WESTERN GAS COMPANY

By Chad V. [Signature]
Vice-President

CERTIFICATION

I, Charles L. Harwell, certify that I am the City Attorney for the City of Goshen; that I am the person authorized to certify documents from the official records of the City of Goshen; that on February 12, 2008, at the regularly scheduled meeting of the City Council of Goshen, the attached Ordinance No. 77 was first read as required by statute; that the second and third reading was, by separate motion, adopted by a vote of four alderman in favor, with none opposed and one abstaining, waived on February 12, 2008; that the ordinance was adopted on February 12, 2008, by motion made and duly seconded, by a vote of four alderman in favor, none opposed and one abstaining; and that upon separate motion made, seconded and passed by vote of four alderman in favor, none opposed and one abstaining, on February 12, 2008, the emergency clause was adopted; that subsequently, the ordinance was posted in five public places within the City of Goshen and, therefore is, by law, considered effective; and that said ordinance, having properly adopted and now effective, is officially part of the records of the City of Goshen.



Charles L. Harwell