

ORDINANCE NO. 2022-XX

AN ORDINANCE OF THE CITY OF NORTH MIAMI BEACH, FLORIDA, GRANTING TO PIVOTAL UTILITY HOLDINGS, INC. D/B/A FLORIDA CITY GAS, ITS SUCCESSORS AND ASSIGNS, A NON-EXCLUSIVE GAS FRANCHISE, IMPOSING PROVISIONS AND CONDITIONS RELATING THERETO; PROVIDING FOR MONTHLY PAYMENT OF A FRANCHISE FEE TO THE CITY; PROVIDING FOR ADOPTION OF REPRESENTATIONS; REPEALING ALL ORDINANCES IN CONFLICT; PROVIDING A SEVERABILITY CLAUSE; PROVIDING AN EFFECTIVE DATE.

WHEREAS, the City of North Miami Beach (“City”) desires to grant a non-exclusive franchise to permit the construction, maintenance and operation of natural gas facilities within the City; and

WHEREAS, the provision of such service requires substantial investments of capital and other resources in order to construct, maintain and operate facilities essential to the provision of such service in addition to costly administrative functions, and the City does not desire to undertake to provide such services; and

WHEREAS, Pivotal Utility Holdings, Inc. d/b/a Florida City Gas (“FCG”) is a public utility which has the demonstrated ability to supply such services; and

WHEREAS, FCG and the City desire to enter into a franchise agreement providing for the payment of fees to the City in exchange for the nonexclusive right and privilege of supplying natural gas and other services within the City free from competition from the City, pursuant to certain terms and conditions;

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COMMISSION OF THE CITY OF NORTH MIAMI BEACH, FLORIDA, AS FOLLOWS:

Section 1. Incorporation of Recitals. The above-stated recitals are true and correct and are incorporated herein by this reference.

Section 2. Definitions.

- (a) “City shall mean City of North Miami Beach, a political subdivision of the State of Florida.
- (b) “Franchise” shall mean this Agreement and the rights granted to Franchisee hereunder.

(c) “Franchisee” shall mean Pivotal Utility Holdings, Inc., a New Jersey corporation d/b/a Florida City Gas, and its successors and approved assigns.

(d) “Gas System Facilities” or “Facilities” shall mean and include, but not be limited to, gas mains, pipes, supply pipes, conduits, ducts, service connections, manholes, regulators, drip pots, control devices and any other hardware or other appurtenances used as a means of conveying, distributing or selling natural gas for the purpose of supplying natural gas to the meter of the Customer, constructed both prior to and during the term of this Agreement.

(e) “Customers” shall mean all residences, businesses, governmental entities and industrial establishments located within the City purchasing natural gas from Franchisee.

(f) “FPSC” shall mean the Florida Public Service Commission or its successor agency or agencies.

(g) “Franchise Fee” shall mean the fees described in Section 8 of this agreement.

(h) “Gross Revenues” shall mean any revenues recognized in accordance with General Accepted Accounting Procedures (GAAP) derived from the services charges, customer charges, energy charges (including ECCR factor charges, CRA factor charges and margins and/or surcharges and any other energy based charges approved for billing Customers by the FPSC) and, for customers who purchase gas from Franchisee, gas charges, and any applicable minimum charges or discount, as such charges and discounts are defined in Franchisee’s tariffs for both transportation Customers of Franchisee and Consumers purchasing gas from Franchisee. Gross Revenues shall not include any taxes, or other governmental fees and charges which are paid to tax authorities. Gross Revenues shall not include bad debt, uncollectable accounts, interest, returned check charges, late fees, connection, re-connection, disconnection, convenient fees and any other miscellaneous charges related to account changes and updates as well as any revenue derived from appliance leasing and any warrantee and repair plan activity derived from appliance leasing.

(i) “Natural Gas” shall mean natural gas in a gaseous state unmixed or a mixture of natural and artificial gas, whether manufactured, “landfill” or otherwise.

(j) “Uncollectible Accounts” shall mean any account which has been closed.

Section 3. Franchise. The City hereby grants to the Franchisee, and the Franchisee hereby accepts, the non-exclusive right, privilege and franchise, for the period of thirty (30) years from the effective date hereof, to construct, maintain and operate only Gas System Facilities in, under, upon, over and across the present and future streets, alleys, bridges, easements and other public rights-of-way within the City. The Franchisee shall construct, maintain and operate Gas System Facilities in accordance with established industry practices, and applicable federal, state

and local law, including the orders, rules and regulations of the FPSC or any other regulatory body having jurisdiction over the Franchisee and, to the extent permitted by law, the City's installation, maintenance and operation standards in respect of natural gas.

The City acknowledges that the rates, fees, and charges that Franchisee charges its Customers are determined by the FPSC.

This grant of authority to Franchisee is strictly limited to the provision of natural gas service only. It is explicitly recognized that this Franchise does not limit the Franchisee's ability to operate a liquefied petroleum (commonly referred to as LP gas, bottled gas, or propane) business within the City, similar to any other liquefied petroleum business, nor does it limit the City's ability to assess a franchise fee upon the liquefied petroleum business within the limits permitted under Florida law.

Franchisee may, without obtaining the City's consent, pledge this Franchise and/or the facilities as security.

Section 4. Use and Maintenance of Public Rights-of-Way. Franchisee's Gas System Facilities shall be located or relocated and so constructed as not to interfere with, including but not limited to, sanitary sewers, drainage systems, water pipes, electrical conduits, communication cables or other public utility service facilities, existing at the time of such location, relocation or construction. The Franchisee's Facilities shall not obstruct or interfere with the public uses of streets, roads, highways or alleys, or create any conditions which are or may become dangerous to the traveling public. Franchisee shall attempt to minimize above grade facilities, and such facilities shall be installed near the outer boundaries of the public rights-of-way when appropriate. The location or relocation of all Facilities shall be made after Franchisee has received all applicable permits, approvals and permissions from the City and such other governmental entities as may be necessary, and the location(s) or relocation(s) shall be subject to the City's approval. In consideration for the Franchise Fee paid under this Agreement, the Franchisee will not be assessed any permit fees associated with the installation, construction, repair or maintenance of any Gas System Facilities within the public rights-of-way. In the event that Franchisee is acting in its proprietary function as a retail provider of gas equipment or appliances, Franchisee shall seek the appropriate permits from the City. Franchisee shall cooperate with the City at all times by providing timely and complete information regarding the location of its Facilities. Franchisees and City shall cooperate and coordinate their efforts to make the most efficient and economical use of the public rights-of-way and the Gas System Facilities.

If any street, highway or avenue is to be paved by the City, the City shall give written notice to the Franchisee not less than ninety (90) days prior to the commencement of paving. Provided the Franchisee does not already have a main in the street, highway or avenue to provide natural gas service to the surrounding houses and other structures, Franchisee shall survey the surrounding houses and other structures to determine whether, in its sole discretion, construction of Gas System Facilities in the street, highway or avenue in question is economically feasible. Where such construction is determined to be economically feasible, the Franchisee shall construct such Gas System Facilities in the street, highway, or avenue in question prior to paving by the City. However, in the event the Franchisee believes that such construction may not be completed prior to City's planned paving schedule, the Parties will attempt to negotiate a revised paving schedule satisfactory to both Parties; provided, however, that if a delay in paving will cause additional expense to the City, or substantial inconvenience to the residents of the City, the City may proceed with its original paving schedule.

The Franchisee shall, at its own expense, replace, repair and restore in a timely manner any sidewalk, street, alley, pavement, water, sewer or other utility line or appurtenance, soil, landscaping, dirt or other improvement, property or structure of any nature, that may be damaged or displaced by the Franchisee in the conduct of its operations, and shall, at a minimum, restore all property to a condition equivalent to the condition immediately prior to the work and/or changes made by the Franchisee. Franchisee shall take safety precautions to alert the public of work, which may include, but is not limited to, the use of barricades and signs.

This City shall not require the relocation of any of the Franchisee's Facilities installed before or after the effective date hereof in public rights-of-way unless or until widening or otherwise changing the configuration of the paved portion of any public right-of-way used by motor vehicles causes such installed facilities to unreasonably interfere with motor vehicular traffic.

Section 5. Insurance. The Franchisee, at all times during the exercise of its Franchise, shall carry general liability insurance in the amount of Five Million Dollars and No Cents (\$5,000,000.00) to indemnify any persons sustaining personal injury or property damage as a result of the actions of the Franchisee in the construction, operation or maintenance of its Facilities in accordance with the terms of Section 8. Indemnification hereof. The City shall be named as an additional insured. Notwithstanding the foregoing, the Franchisee may meet the insurance minimum using, in part or whole, any combination of self-insurance and captive insurance. In the event Franchisee elects to meet the insurance minimum using, in part or whole, any combination of self-insurance or captive insurance, the Franchisee shall provide the City with documentation attesting to its qualified status.

Section 6. Accidents or Damages; Emergencies. The City shall not be liable or

responsible in any manner whatsoever for any accident, personal injury, property damage or any claim or damage that may occur in the course of the construction, operation or maintenance of any of its Facilities by Franchisee, and its employees, agents, contractors, and any third parties hired by Franchisee to perform any aspect of Franchisee's responsibilities under this Agreement, except for damages specifically caused by or arising out of the negligence, strict liability, intentional torts or criminal acts of the City. Nothing in this Agreement shall be construed to affect in any way the City's rights, privileges, and immunities under the doctrine of "sovereign immunity" as set forth in Section 768.28, Florida Statutes.

Section 7. Non-Competition by City. While this franchise is non-exclusive, the City specifically agrees that it shall not, during the term of this grant, or any extensions thereof, engage in the business of distributing and selling gas in competition with the Franchisee, its successors or assigns.

Section 8. Indemnification. Franchisee shall indemnify, defend and hold harmless the City, its commissioners, officers, agents and employees from and against any and all claims, suits, actions, regulatory or administrative proceedings (including reasonable attorney's fees, including appeals), liabilities and expenses arising during the term of this Franchise and resulting in personal injury, loss of life or damage to property sustained by any person or entity (collectively "Claims") caused by or arising out of Franchisee's negligence, intentional torts, strict liability, or breach of applicable law in connection with the construction, operation or maintenance of its Gas System Facilities within the City, except for Claims caused by or arising out of the negligence, strict liability, intentional torts, breach of applicable law or breach of this Agreement by the City. Nothing in this Agreement shall be construed to affect in any way the City's rights, privileges, and immunities under the doctrine of "sovereign immunity" as set forth in Section 768.28, Florida Statutes. The provision of this Section shall survive the termination of this Agreement.

Section 9. Franchise Fee. Within sixty (60) days after the close of the first full billing month (payment for which shall include any prior partial month) following the effective date of this Franchise Agreement, and each month thereafter during the term of this Franchise Agreement, the Franchisee shall pay to the City a Franchise Fee equal to six percent (6%), less

actual write-offs, from the sale, transportation, distribution or delivery of natural gas to Customers within the City. For purposes of this section, the term “write-offs” refers to uncollectable billed revenues from the sale, transportation, distribution or delivery of natural gas to Customers within the City.

Within sixty (60) days after the close of the first full billing month (payment for which shall include any prior partial month) following the effective date of this Franchise Agreement, and each month thereafter during the term of this Franchise Agreement, the Franchisee shall pay to the City a Franchise Fee equal to six percent (6%), less actual write-offs, from the sale, transportation, distribution or delivery of natural gas to Customers within the City. For purposes of this section, the term “write-offs” refers to uncollectable billed revenues from the sale, transportation, distribution or delivery of natural gas to Customers within the City.

Section 10. Increased Benefits Clause. If during the term of this New Franchise Agreement, FCG enters into a new franchise agreement with any other municipality located in Miami-Dade County or Broward, County Florida, or with Miami-Dade County itself or with Broward County itself, each such municipality or county referred to herein as an "Other Governmental Entity," the terms of which provide for the payment of franchise fees by FCG at a rate greater than six (6.0%) percent, less actual write-offs, from the sale, transportation, distribution or delivery of natural gas, under the same terms and conditions as specified in Section 9 hereof, FCG, upon written request of the City, shall negotiate and enter into a new franchise agreement with the City in which the percentage to be used in calculating monthly payments under Section 9 hereof shall be no greater than that percentage which FCG has agreed to use as a basis for the calculation of payments to any such Other Governmental Entity, provided, however, that if the franchise with such Other Governmental Entity contains additional benefits given to FCG in exchange for the increased franchise rate, which such additional benefits are not contained in this New Franchise Agreement, such new franchise agreement shall include those additional or reasonably equivalent benefits to FCG. Subject to all limitations, terms and conditions specified in the preceding sentence, the City shall have the sole discretion to determine the percentage to be used in calculating monthly payments, and FCG shall have the sole discretion to determine those benefits to which it would be entitled, under any such new franchise agreement.

Section 11. Accounts and Records; Rights to Audit. The City may, at its own expense, upon reasonable notice and within ninety (90) days after each anniversary date of this

Franchise, examine the Franchisee's records relating to the calculation of the franchise payment for the year preceding such anniversary date. Such examination shall be during normal business hours at Franchisee's office where such records are maintained. Records not prepared by Franchisee in the ordinary course of business or as required herein may be provided at the City's expense and as the City and Franchisee may agree in writing. Information identifying Franchisee's customers by name or their gas consumption shall not be taken from Franchisee's premises. Such audit shall be impartial and all audit findings, whether they decrease or increase payment to the City, shall be reported to Franchisee. The City's examination of Franchisee's records in accordance with this Section shall not be conducted by any third party employed or retained by the City whose fee, in whole or part, for conducting such audit is contingent on findings of the audit. At the City's request no more than once annually, Franchisee will provide to the City an electronic version of a billing list of all Franchisee customer addresses within the incorporated areas of the City. The City will respect Franchisee's confidential documents. The City will be given access to confidential documents while on Franchisee premises, but shall not remove those confidential documents from Franchisee premises unless expressly authorized to do so by Franchisee. Information relative to this audit and likely to be deemed confidential by Franchisee includes, but is not limited to, nonpublic customer or customer account information, nonpublic policies and procedures, and any other nonpublic information that gives Franchisee an opportunity to gain an advantage over its competitors.

Section 12. Identification of City Boundaries. No less than thirty (30) days prior to the Effective Date, the City shall deliver to the Franchisee such information (including City limit streets and block numbers) as is needed by the Franchisee to determine which of its customers are located within the City limits. The City shall also provide such information no less than thirty (30) days prior to the effectiveness of any change in said limits, whether by addition, annexation or consolidation, or upon the Franchisee's request. The Franchisee shall be relieved of any obligation to pay franchise fees to the extent the City has failed to provide information in accordance with this Section 11.

Section 13. Forfeiture or Revocation of Franchise. The Franchisee's material failure to comply in any respect with any of the provisions of this Franchise after written notice from City and a reasonable opportunity, no less than one hundred and eighty (180) days, to cure shall be grounds for forfeiture of this Franchise pursuant to which the City shall have the right to

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Section 15. No Waiver. Nothing in this Agreement shall be construed as a surrender or waiver by the City of (a) its police powers or the authority to regulate the use of the public streets and/or other public places, provided no regulation contravenes the material terms of this Franchise, and (b) its right to sovereign immunity.

Section 16. Right to Enforce. Except as expressly provided herein, each Party shall have all rights and remedies available in law or in equity in the event of a material breach of any obligation set forth in this Agreement by the other Party.

Section 17. Entirety. This writing embodies the entire agreement and understanding between the Parties, and there are no other agreements and understandings, oral or written, with reference to this subject matter that are not merged and superseded.

Section 18. Governing Law. This Agreement shall be governed by and construed according to the laws of the State of Florida.

Section 19. Effective Date. As a condition precedent to the taking effect of this Franchise, the Franchisee shall file its acceptance hereof with the City's Clerk within thirty (30) days of adoption of this Franchise. The effective date of this Franchise shall be the date upon which the Franchisee files such acceptance.

[SIGNATURE PAGE TO FOLLOW]

APPROVED on this first reading this the **21st day of June, 2022.**

APPROVED AND ADOPTED on second reading this ____ day of _____, 2022.

ATTEST:

ANDRISE BERNARD, MMC
CITY CLERK

(CITY SEAL)

ANTHONY F. DEFILLIPO
MAYOR

APPROVED AS TO FORM, LANGUAGE
AND FOR EXECUTION

HANS OTTINOT
CITY ATTORNEY

Sponsored by: Mayor and City Commission