

**ORDINANCE NO. 21-05**

**AN ORDINANCE OF THE TOWN OF FORT MYERS BEACH, FLORIDA GRANTING TO PEOPLES GAS SYSTEM, A DIVISION OF TAMPA ELECTRIC COMPANY, ITS SUCCESSORS AND ASSIGNS, A NON-EXCLUSIVE NATURAL GAS FRANCHISE AGREEMENT TO USE THE PUBLIC RIGHTS OF WAY OF THE TOWN OF FORT MYERS BEACH FLORIDA, AND PRESCRIBING THE TERMS AND CONDITIONS UNDER WHICH SAID FRANCHISE MAY BE EXERCISED; MAKING FINDINGS; PROVIDING AN EFFECTIVE DATE; AND REPEALING PRIOR ORDINANCE.**

**WHEREAS**, Florida Statutes provide that municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal service, and exercise any power for municipal purpose, except when expressly prohibited by law; and

**WHEREAS**, Article X of the Town Charter of the Town of Fort Myers Beach (“Town”) empowers the Town to adopt, amend, or repeal such ordinances and resolutions as may be required for the proper governing of the Town; and

**WHEREAS**, there is currently in effect a franchise agreement between the Town and Peoples Gas System, a division of Tampa Electric Company (“Company”), granting the Company, its successors, and assigns a natural gas distribution franchise; and

**WHEREAS**, Peoples Gas System and the Town desire to enter into a new natural gas distribution franchise agreement for a period of ten (10) years commencing from the date provided herein, with the ability to extend the franchise agreement for an additional two (2)-five (5) year periods with the written consent of the Town; and

**WHEREAS**, the Town Council finds that it is in the public interest of its residents, business owners and visitors to enter into a new natural gas distribution franchise agreement with Peoples Gas System.

**NOW THEREFORE, BE IT ENACTED BY THE TOWN COUNCIL OF THE TOWN OF FORT MYERS BEACH, FLORIDA, THAT:<sup>1</sup>**

Section 1. The above recitals are true and correct, and incorporated herein by this reference and are hereby adopted as the legislative and administrative findings of the Town Council.

Section 2. For the purposes of this Ordinance, the following terms, phrases, words and their derivations shall have the meaning given herein. Where not inconsistent with the context, words used in the present tense include the future tense, words in the plural number

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<sup>1</sup> Additions to existing text are shown by underline, changes to existing text on second reading are shown by double underline, and deletions are shown as ~~strikethrough~~.

include the singular number, and words in the singular number include the plural number. The words "shall" and "will" are mandatory, and "may" is permissive. Words not otherwise defined shall be construed to have their common and ordinary meaning.

*Customer* means any person served by the Company within the corporate limits of the Town.

*Company* means Peoples Gas System, a division of Tampa Electric Company, a Florida corporation, its successors and assigns.

*Distribution System* means any and all transmission pipe lines, main pipe lines and service lines, together with all tubes, traps, vents, vaults, manholes, meters, gauges, regulators, valves, conduits, attachments, structures and other appurtenances, as are used or useful in the sale, distribution, transportation or delivery of Natural Gas and as are situated within the corporate limits of the Town.

*Effective Date* means the date this Franchise becomes effective as described in Section 19 below.

*Franchise* or *Franchise Agreement* means this Ordinance as adopted by the Town and accepted by the Company in accordance with Section 19 below.

*FPSC* means the Florida Public Service Commission or any successor agency.

*Gross Revenues* means all revenues (as defined by the Florida Public Service Commission) received by the Company from any customer from the sale of Gas.

*Person* means any individual, firm, partnership, estate, corporation, company or other entity, including, but not limited to, any government entity.

*Natural Gas* or *Gas* means natural gas and/or manufactured gas and/or a mixture of gases, distributed in pipes and measured by meter on the Customer's premises. It shall not mean propane gas or liquefied petroleum gas (commonly referred to as "bottled gas").

*Right-of-way* means any street, road, lane, highway, avenue, boulevard, alley, waterway, bridge, easement, public place, or other right-of-way owned by the Town.

*Town* means the Town of Fort Myers Beach, Lee County Florida, its successor and assigns.

Section 3. The Town hereby grants to the Company the non-exclusive right, privilege, and franchise to lay, erect, construct, operate and maintain in, on or under any and all Rights-of-Way, 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, a Distribution System subject to the terms and conditions herein contained.

Section 4. Except as provided in Section 16, the Franchise hereby granted shall be for an initial period of ten (10) years from the effective date of this Ordinance, and may be renewed at the sole discretion of the Town for two (2)-five (5) year terms in accordance with Section 17.

Section 5.

A. The Franchise hereby granted shall not be leased, assigned or otherwise alienated or disposed of except with the prior express written consent of the Town, which shall not be unreasonably withheld or unduly delayed. No assignment shall be allowed without the assignee assuming the terms of the Franchise Agreement with the Town.

B. Notwithstanding the foregoing, the company may, without the consent of the Town, lease, assign or otherwise alienate and transfer this Franchise in connection with the lease or sale of the Distribution System or upon its merger or consolidation with, or transfer to, a corporation engaged in similar business (including an affiliate or subsidiary of the Company), or pledge or mortgage of such Franchise in connection with the physical property owned and used by it in the operation of the Distribution System for the purpose of securing payment of monies borrowed by the Company.

Section 6. As a further consideration for 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 7. The Distribution System shall be erected, placed, or laid in such manner as will, consistent with necessity, least interfere with other public uses of the right-of-way, and said right-of-way 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 right-of-way, it shall make application for a permit to the appropriate Town authority. The Town shall issue or, if applicable, deny permits within fourteen (14) business days of application by the Town. In consideration of the franchise fees contemplated in this agreement, the Town shall not charge the Company any fees for the issuance of such permits. The Company shall, with due diligence and dispatch, place such right-of-way in as good a condition as before such excavation or disturbance was made; provided, however, that should the Company fail, within ten (10) days of its receipt of written notice from the Town, to restore such right-of-way, then the Town may undertake such restoration (other than any restoration work on the Distribution System) and charge the reasonable cost thereof to the Company.

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, in the exercise of its police power, provided, however, that the Town shall not pass any ordinance or regulation that results in a material change the rights or obligations of the Company under the Franchise Agreement.

Section 8. 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.

Section 9. All components of the Distribution System shall be laid consistent with all applicable codes, rules, regulations, and laws, including, to the extent consistent with all applicable codes, rules, regulations and laws, and conditions and specifications contained in Town permits.

Section 10. 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 in, across, along, or under any right-of-way. Whenever, by reason of establishing a grade or by reason of changes in the grade of any right-of-way, or by reason of the widening, grading, paving, or otherwise improving present or future right-of-way, or in the location or manner of construction of any water pipes, electric conduits, sewers, or other underground structure located within the right-of-way, it shall be deemed necessary by the Town to remove, relocate, or disconnect any portion of the Distribution System of the Company for such public purpose, such removal, relocation, or disconnection shall be made by the Company as ordered in writing by the Town without claim for reimbursement. If the Town shall require the Company to remove, relocate, or disconnect any portion of its Distribution System or in any way to alter the placement or location of the Distribution System to enable any other person to use the right-of-way of the Town, as part of its permitting or approval process, the Town shall require the person desiring or occasioning such removal, relocation, disconnection, or alteration to reimburse the Company for any loss, cost, or expense caused by or arising out of such removal, relocation, disconnection, or alteration of any portion of the Distribution System. The Company further agrees that it will not intentionally interfere with, change, or injure any water pipes, drains, or sewers of the Town unless it has received specific permission from the Town or its duly authorized representative.

Section 11. Subject to Section 12 below, within thirty(30) days after the close of the first full billing month following the effective date of this Franchise Agreement, and each month thereafter during the term of this Franchise Agreement, the Company, its successors, or assigns, shall apply to the Town or its successors, a sum of money equal to six percent (6%) of the Company's Gross Revenue, less any adjustments for uncollectable accounts, from the sale of Natural Gas to Customers within the corporate limits of the City. The Franchise fee payment shall be deemed paid on time if post-marked within thirty (30) days of the close of the preceding billing month.

In the event that Company, or any company which is a subsidiary, affiliate, or other related company to Company, pays a fee, charge or other payment of any kind on a periodic basis (such as monthly, quarterly, annually) to any county or municipality within the State of Florida as a condition, or in consideration for, the right to transact a local utility business in that municipality, grantee shall notify the Town in writing of the details of the fee or periodic charge within 60 days of the effective date of the fee or periodic charge, at which time any Franchise granted in accordance with this Ordinance shall be automatically amended to include the requirement that Company make such periodic payments to Town, unless grantee, within 30 days after such notice, notifies the Town in writing that it will not make the payments, in

which case any Franchise granted in accordance with this Ordinance shall be automatically revoked. Any new Franchise granted to Company by Town shall require payment by Company of a similar fee or periodic charge, or a payment substantially equivalent thereto, as a condition of the new Franchise.

Section 12. No less than thirty (30) days prior to the Effective Date, the City shall deliver to the Company such information (including City limit streets and block numbers) as is needed by the Company to determine which of its customer 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 Company's request. The Company 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. 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 City are consistently declared separately from all other revenues, and such records shall be maintained within the State of Florida. Upon request by the City, or its designated representative, and execution of a confidentiality agreement reasonably satisfactory to the Company, the Company shall make available said records within thirty (30) days to the City for the determination of the accuracy of the Gross Revenues upon which the Company's franchise fee is based. 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 14. During the term of this Franchise, the Company shall file with the City 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 issued by an insurance carrier licensed to do business in the state of Florida or evidence of self-insurance within the corporate limits of the City as they currently exist or may exist in the future. Each such policy shall provide for the minimum sum of \$1,000,000.00 for injury or death to any one person, and for 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 incident or accident, and for 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 Agreement. The coverage requirements set forth in this Section 13 may be satisfied, in whole or in part, with self-insurance.

Company shall notify the Clerk of the City in writing, promptly upon any material alteration, modification, or cancellation of such policy.

Section 15. In consideration of the permissions granted to the Company by this Franchise Agreement, the Company hereby agrees to indemnify and hold harmless the City, its officers, agents and employees from and against claims, suits, actions, and causes of action, caused by the Company's negligent operation of the Distribution System within the City 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 City in connection with any such claim, suit, 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; provided, however, that neither the Company nor any of its employees, agents, contractor, licensees, or sub lessees shall be liable under this section for any claims, demands, suits, actions, losses, damages, or expenses, including attorney's fees, arising out of the negligence, strict liability, intentional torts, criminal acts, or error of the City, its officers, agents, or employees. The provisions of this section shall survive the expiration or earlier termination of this Franchise Agreement. Notwithstanding any provision herein to the contrary, the Company's liability under this Agreement shall be limited to the assets and business of Peoples Gas System, a division of Tampa Electric Company, as if Peoples were incorporated separate and apart from Tampa Electric Company.

Section 16. 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 City to declare a termination of this Franchise Agreement; provided, however, that before such action by the City shall become operative and effective, the Company shall have been served by the City with a written notice setting forth all matters pertinent to such violation or default, and describing the action of the City with respect thereto, and the Company shall have had a period of sixty (60) days after service by certified U.S. mail of such notice, or, in the event such cure reasonably requires a period of more than sixty (60) days, then sixty (60) days to present a plan reasonably satisfactory to the City to effect 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 termination.

Section 17. Changes in the terms and conditions hereof may be made by written agreement between the City and the Company.

Section 18.

(A) If any section, part of a section, paragraph, sentence, or clause of this Agreement 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; provided, however, that should elimination of the specific portion of the Franchise Agreement adjudged to be invalid result in significant adverse consequences to a party, then that party may terminate this Franchise Agreement by providing thirty (30) days written notice to the other party.

(B) Upon the issuance by a court of competent jurisdiction of an order, ruling, or decision, or the enactment or adoption by the Florida Legislature, the City, or any other governmental or regulatory body of a law, rule, regulation, or ordinance, that materially diminishes a municipality's ability to exact franchise fees from a utility, or that effectively does away with the ability of a municipality to grant a franchise altogether, then the Company

or City may terminate this Franchise Agreement by providing ninety (90) days written notice to the other party.

Section 19. This Franchise shall be governed by the laws of the State of Florida and applicable federal law.

Section 20. Whenever the requirements or provisions of this Ordinance are in conflict with the requirements or provisions of any other lawfully adopted ordinance or statute, the most restrictive shall apply.

Section 21. If any section, subsection, sentence, clause or phrase of this ordinance is for any reason, declared by a court of competent jurisdiction to be unconstitutional or invalid, such decision will not affect the validity of the ordinance as a whole, or any part thereof, other than the part so declared.

Section 21. This Ordinance, and the Franchise Agreement between the Town and Company, shall become effective upon its acceptance by the Company, which acceptance must be evidenced in writing within sixty (60) days of the adoption of this Ordinance by the Town Council.

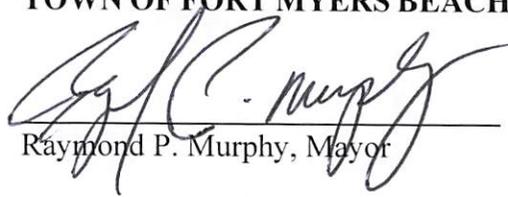
The forgoing Ordinance was adopted by the Town Council upon a motion by Vice Mayor Hosafros and seconded by Council Member Allers, and upon being put on a roll call vote, the results was as follows:

Raymond P. Murphy, Mayor	aye
Rexann Hosafros, Vice Mayor	aye
Dan Allers, Council Member	aye
Jim Atterholt, Council Member	aye
Bill Veach, Council Member	aye

ADOPTED this 2<sup>nd</sup> day of August, 2021 by the Town Council of the Town of Fort Myers Beach, Florida

[SIGNATURES ON FOLLOWING PAGE]

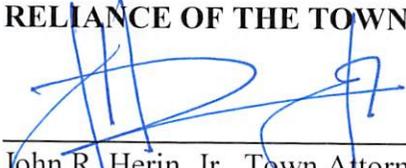
**TOWN OF FORT MYERS BEACH**

  
Raymond P. Murphy, Mayor

**ATTEST:**

  
Amy Baker, Town Clerk

**APPROVED AS TO FORM AND LEGAL SUFFICIENCY FOR THE USE AND RELIANCE OF THE TOWN OF FORT MYERS BEACH ONLY:**

  
John R. Herin, Jr., Town Attorney

This Ordinance was filed in the Office of the Town Clerk on this 14 day of Sept., 2021

Accepted this \_\_\_ day of \_\_\_\_\_, 2021

**PEOPLES GAS SYSTEM, A  
DIVISION OF TAMPA ELECTRIC  
COMPANY**

By: \_\_\_\_\_  
Title: \_\_\_\_\_