

ORDINANCE NO. 24-07

AN ORDINANCE OF THE TOWN OF FORT MYERS BEACH, FLORIDA GRANTING TO PEOPLES GAS SYSTEM, INC., 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; PROVIDING FOR FINDINGS; SEVERABILITY AND PROVIDING AN EFFECTIVE DATE.

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 purposes, except when expressly prohibited by law; and

WHEREAS, Article X of the Town Charter of the Town of Fort Myers Beach 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, Peoples Gas System and the Town of Fort Myers Beach desire to enter into a franchise agreement for a period of thirty (30) years commencing from the date provided herein; and

WHEREAS, on the 18th day of March 2024, the Town Council held a first reading of the Ordinance and gave full and complete consideration to the request of a proposed ordinance containing the terms and conditions of a franchise agreement with People's Gas System, and provided an opportunity for public comment; and

WHEREAS, a Business Impact Estimate was prepared and posted on the Town's website on the 15th day of March 2024, as required by Section 166.041(4), Florida Statutes; and

WHEREAS, an advertisement of the public hearing for adoption of the Ordinance was published in the The News-Press on the 23rd day of March 2024, which is 10 days prior to the second reading of the proposed Ordinance as required by Section 166.041, Florida Statutes; and

WHEREAS, on the 1st day of April 2024, the Town Council held a second reading of the Ordinance and provided an opportunity for public comment; and

WHEREAS, the Town Council determined by a vote of 5 to 0 that it is in the public interest to enter into a new franchise agreement with Peoples Gas System for the health, safety and welfare of the town.

NOW THEREFORE, BE IT ORDAINED BY THE TOWN COUNCIL OF THE TOWN OF FORT MYERS BEACH, FLORIDA AS FOLLOWS:

SECTION 1. That 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. DEFINITIONS

For the purposes of this Ordinance, the following terms shall have the meanings given herein.

- A. "Customer" shall mean any Person served by the Company within the corporate limits of the Town.
- B. "Town" shall mean the Town of Fort Myers Beach, Lee County, Florida, its successors and assigns.
- C. "Company" shall mean Peoples Gas System, Inc., a Florida corporation, its successors and assigns.
- D. "Distribution System" shall mean any and all transmission pipelines, 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.
- E. "Effective Date" shall mean the date this Franchise becomes effective as described in Section 19 below.
- F. "Franchise" or "Franchise Agreement" shall mean this agreement as passed and adopted by the Town and accepted by the Company as provided in Section 19 below.
- G. "FPSC" shall mean the Florida Public Service Council or any successor agency.
- H. "Gross Revenues" shall mean all revenues (as defined by the Florida Public Service Commission) received by the Company from any Customer from the sale of Gas.

- I. “Natural Gas” or “Gas” shall mean natural gas and/or manufactured gas and/or a mixture of gases which is 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”).
- J. “Person” shall mean any individual, firm, partnership, estate, corporation, company or other entity, including, but not limited to, any government entity.
- K. “Right-of-way” means any Town street, road, lane, highway, avenue, boulevard, alley, waterway, bridge, easement, public place, or other right-of-way that is owned or under the control of the Town.

SECTION 3: GRANT

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 Town 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: TERM

Except as provided in Section 15, the Franchise hereby granted shall be for a period of thirty (30) years from the Effective Date of this ordinance.

SECTION 5: ASSIGNMENT

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: TOWN COVENANT

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: USE OF TOWN STREETS

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 Town's Rights-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 Rights-of-way, it shall make application for a permit to the Town. The Town shall issue or, if applicable, deny permits within ten (10) business days of application by the Company. In consideration of the franchise fees contemplated in this Franchise 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 to the rights or obligations of the Company under the Franchise Agreement.

SECTION 8: MAINTENANCE

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: LAYING OF PIPE

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, specifications contained in Town permits.

SECTION 10: CONSTRUCTION WORK

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 Rights-of-way, or in the location or manner of construction of any water pipes, electric conduits, sewers, or other underground structure located within the Rights-of-way, it shall be deemed necessary by the Town

to remove, relocate, or disconnect any portion of the Distribution System of the Company hereto 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 said Rights-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 or negligently interfere with, change, or injure any water pipes, drains, or sewers of said Town unless it has provided reasonable notice to the Town and has received specific permission from the Town or its duly authorized representative to engage in specific work.

SECTION 11: FRANCHISE FEE

Subject to Section 11 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 pay 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, transportation and delivery of Natural Gas to Customers within the corporate limits of the Town. 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.

SECTION 12: IDENTIFICATION OF TOWN RESIDENTS

No less than thirty (30) days prior to the Effective Date, the Town shall deliver to the Company such information (including Town limit streets and block numbers) as is needed by the Company to determine which of its customers are located within the Town. The Town shall also provide such information no less than thirty (30) days prior to the effectiveness of any change in said limits, whether by annexation, deannexation or consolidation, or upon the Company's request. Company shall be relieved from the obligation to pay franchise fees for those customers if the Town's failure to provide information under this Section has resulted in the Company's inability to collect such fees.

SECTION 13: ACCOUNTS AND RECORDS

The Company shall maintain accounting, maintenance, and construction records as prescribed by the Florida Public Service Commission. The Company shall establish and maintain appropriate accounts and records in such detail that revenues within the corporate limits of the Town are consistently declared separately from all other revenues, and such records shall be maintained within the State of Florida. Upon request by the Town, or its designated representative, and execution of a confidentiality agreement consistent with Florida public records law and reasonably satisfactory to the Company, the Company shall make available said records within thirty (30) days to the Town 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 Florida Public Service Commission and any examination conducted after such period shall be confined to the billing records then available in accordance with Florida law.

SECTION 14: INSURANCE

During the term of this Franchise, the Company shall file with the Town 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 or evidence of self-insurance, the terms and conditions whereof shall provide that the Town of Fort Myers Beach is an additional insured as to the Company's negligent operation of a Natural Gas distribution system within the corporate limits of the Town as they currently exist or may exist in the future. Each such policy shall provide for the minimum sum of \$2,000,000.00 for injury or death to any one person, and for the minimum sum of \$10,000,000.00 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 \$2,000,000.00 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 Franchise 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 Town in writing, promptly upon any material alteration, modification, or cancellation of such policy is to become effective.

SECTION 15: INDEMNIFICATION:

In consideration of the permissions granted to the Company by this Franchise Agreement, the Company hereby agrees to indemnify and hold harmless the Town, its officers, agents and employees from and against claims, suits, actions, and causes of action, to the extent caused by the Company's negligent operation of the Distribution System within the Town 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 Town 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 sublessees 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 Town, its officers, agents, or employees. The provisions of this section shall survive the expiration or earlier termination of this Franchise Agreement.

SECTION 16: TERMINATION BY TOWN

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 Town to declare a termination of this Franchise Agreement; provided, however, that before such action by the Town shall become operative and effective, the Company shall have been served by the Town with a written notice setting forth all matters pertinent to such violation or default, and describing the action of the Town 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 Town 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 PROVISIONS HEREOF

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

SECTION 18: SEVERABILITY; CHANGE IN LAW

(A) If any section, part of a section, paragraph, sentence, or clause of this Franchise 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 results 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 Town, 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 Town may terminate this Franchise Agreement by providing ninety (90) days written notice to the other party.

SECTION 19: GOVERNING LAW

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

SECTION 20: EFFECTIVE DATE

This Franchise Agreement shall become effective upon its acceptance by the Company, which acceptance must be evidenced in writing within sixty (60) days of the Town's passage and adoption hereof.

SECTION 21.

That the town council intends that the provisions of this ordinance be made a part of the Fort Myers Beach Land Development Code, and that sections herein may be renumbered or re-lettered and the words or phrases herein may be changed to accomplish codification; regardless, typographical errors that do not affect intent may be corrected with notice to and authorization of the town manager without further process.

SECTION 22.

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

SECTION 23.

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 24.

This Ordinance shall become effective upon adoption by the Town Council.

The foregoing Ordinance was adopted by the Town Council upon a motion by Council Member King and seconded by Vice Mayor Atterholt, and upon being put to a roll call vote, the results was as follows:

Dan Allers, Mayor	Aye
Jim Atterholt, Vice Mayor	Aye
John R. King, Council Member	Aye
Karen Woodson, Council Member	Aye
Scott Stafford, Council Member	Aye

ADOPTED this 1st day of April 2024 by the Town Council of the Town of Fort Myers Beach, Florida.

TOWN OF FORT MYERS BEACH


Dan Allers (Apr 12, 2024 14:30 EDT)

Dan Allers, Mayor

ATTEST:


Amy Baker (Apr 24, 2024 15:46 EDT)

Amy Baker, Town Clerk

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


Natus Kupatich (Apr 23, 2024 21:53 EDT)

Vose Law Firm, Town Attorney

This Ordinance was filed in the Office of the Town Clerk on this 12th day of April 2024.