

Ordinance No. 171496

Grant a franchise to Portland LFG Joint Venture for a period of 20 years.
(Ordinance)

The City of Portland ordains:

Section 1. The Council finds:

- a. The City of Portland transferred operation of the St. Johns Landfill to Metro in 1980. In 1990 the City sold the St. Johns Landfill to Metro. Metro began closure of the St. Johns landfill in 1991. The closure was substantially complete in 1996 at a total cost exceeding \$30 million.
- b. St Johns Landfill produces methane gas as a byproduct of decomposition. Currently the methane gas is collected and flared.
- c. Metro has transferred the rights to the gas generated by the landfill to Portland LFG Joint Venture in order to mitigate the environmental impacts of the landfill, to beneficially use an energy resource and to offset some of the post closure costs of the landfill.
- d. Portland LFG Joint Venture has applied to the City for a franchise to use the public right of way to transport the landfill gas from the St Johns site to a location approximately 9,400 feet away for use at an industrial manufacturing site. Approximately 5,800 feet are in the City right-of-way.
- e. In 1990, City Council adopted City of Portland Energy Policy, committing to a goal of increasing energy efficiency (Ordinance No. 148251). As part of this goal, the City identified use of environmentally acceptable, sustainable resources. This goal would be served by using the methane produced at St. Johns landfill.
- f. In 1993, City Council adopted Carbon Dioxide Reduction Strategy (Resolution No. 35207), committing to a goal of reducing Portland's carbon dioxide emissions by 20 percent below 1988 levels by the year 2010. The strategy specifically identified a goal of increased use of methane gas produced at landfills such as St. Johns.
- g. In 1994, City Council adopted the Sustainable City Principles (Resolution No. 35228), including efficient use of resources, rather than increased consumption.

NOW, THEREFORE, the Council directs:

Section 2. NATURE AND TERM OF GRANT.

2.1 Grant of Franchise.

(A) The City of Portland, Oregon does hereby grant to Portland LFG Joint Venture, an Oregon general partnership, and to its successors and assigns as approved by the City under Section 12 of this Franchise, the right and Franchise to construct, operate and maintain pipe

line facilities, together with pump stations and other facilities, for the transportation of landfill gas in and under the Streets, as shown in red on the map attached hereto and incorporated by reference.

At any point during the term of this Franchise, Grantee may seek to amend, alter or add to its Pipeline System by filing a map showing such proposed changes with the City's Office of Cable Communications and Franchise Management and with the City Engineer. The City shall respond with its approval, modifications, or denial within 45 days from receiving Grantee's proposal. However, the total length of Grantee's pipe line facilities in Street shall not exceed 5800 feet unless separately authorized by the City Council by ordinance.

(B) Throughout this Franchise, the City of Portland, Oregon, shall be referred to as the "City" and Portland LFG Joint Venture shall be referred to as the "Grantee".

2.2 Term of Franchise. The term of this Franchise, and all the rights and obligations pertaining hereto, shall be twenty (20) years from the effective date of this Franchise, unless terminated sooner as provided herein.

2.3 Effective Date. The effective date of this Franchise shall be 60 days after passage of the Franchise by the City Council unless Grantee fails to file an unconditional written acceptance of this Franchise in accordance with Section 19 herein, in which event this Franchise shall be null and void. The passage date of this Franchise is set forth on the last page of the original hereof, as stamped by the Council Clerk.

2.4 Franchise Not Exclusive. This Franchise is not exclusive. The City expressly reserves the right to grant rights or franchises to other Persons, as well as the right in its own name as a municipality, to use the Streets for similar or different purposes allowed Grantee hereunder, by franchise, permit or otherwise.

2.5 Charter and General Ordinances To Apply. To the extent authorized by law, this Franchise is subject to the Charter of the City of Portland and general ordinance provisions passed pursuant thereto, affecting matters of general City concern and not merely existing contractual rights of Grantee, now in effect or hereafter made effective. Section 10-201 through 10-218, inclusive, of the Charter of the City of Portland, (1942 compilation, as revised in part by subsequent amendments), are hereby incorporated by reference and made a part of this Franchise, to the extent authorized by law. Nothing in this Franchise shall be deemed to waive the requirements of the various codes and ordinances of the City regarding permits, fees to be paid or the manner of construction.

Section 3. DEFINITIONS.

3.1 (A) Captions. Throughout this Franchise, captions to sections are intended solely to facilitate reading and to reference the sections and provisions of this Franchise. The captions shall not affect the meaning and interpretation of this Franchise.

(B) Definitions. For the purpose of this Franchise, the following terms, phrases, and their derivations shall have the meanings given below unless the context

indicates otherwise. When not inconsistent with the context, words used in the present tense include the future tense, words in the plural number include the singular number, and words in the singular include the plural number. The word "shall" is always mandatory and not merely directory.

3.2 "City" means the City of Portland, Oregon, a municipal corporation, and all of the territory within its corporate boundaries, as such may change from time to time.

3.3 "City Council" means the Council of the City of Portland.

3.4 "Facility" means any tangible component of Grantee's Pipeline System.

3.5 "Franchise" means this Franchise agreement, as approved by the City Council and accepted by the Grantee, according to the terms of Section 19 of this Franchise.

3.6 "Penalties" means any and all monetary penalties provided for in this Franchise.

3.7 "Person" means any individual, sole proprietorship, partnership, association, corporation or other form of organization authorized to do business in the State of Oregon, and includes any natural person.

3.8 "Pipeline System" means all of Grantee's pipe line facilities, together with its pump stations, gathering lines and distribution facilities for the transportation of landfill gas from the St. Johns landfill, located in, above or below Streets.

3.9 "Streets" means the surface of, and the space above and below, any public street, road, alley or highway, within the City, used or intended to be used by the general public, to the extent the City has the right to allow the Grantee to use them.

3.10 "Year", "Annual", or "Annually" means the period consisting of a full calendar year, beginning January 1 and ending December 31, unless otherwise provided in this Franchise.

Section 4. COMPENSATION.

4.1. During the term of this Franchise, Grantee agrees to pay as compensation to the City for the use of the Streets a Franchise fee calculated by the following formula:

$$F = C \times R$$

(A) "F" shall mean the Franchise fee.

(B) "C" shall mean the total length of the trench through the Streets occupied by Grantee's pipes, structures, and other facilities, measured in linear feet along the major axis. The total number of linear feet of Grantee's Pipeline System located in the Streets shall be determined by the as-built maps submitted by the Grantee, and approved by the City Engineer, as provided in Section 5.

(C) "R" shall mean the rate per linear foot. The initial rate shall be \$2.63 per linear foot of Grantee's Pipeline System in the Streets.

4.2 Adjustments for Inflation.

(A) Initially, the total length of the trench through the Streets occupied by Grantee's lines, pipes, and facilities, measured in linear feet along the major axis, will be 5,800 linear feet. $\$2.63 \times 5,800 = \$15,254$. Therefore, the initial total amount of the annual Franchise fee in the first year shall equal \$15,254.

(B) (1) The amount of the rate per linear foot specified in Subsection 4.1(C) shall be increased annually by a percentage equal to the change in the Consumer Price Index (CPI) for urban wage earners and clerical workers for the Portland, Oregon metropolitan region for the prior year, unadjusted for seasonal variations, as determined by the Bureau of Labor Statistics of the Department of Labor and as published in such Bureau of Labor Statistics' Detailed Report during the time period immediately prior to the due date of the Franchise fee payment.

(2) As an example of the calculation of the CPI adjustment, for 1998 the calculation would be as follows:

Percentage change in CPI from 1996 to 1997	3.00%
multiplied by the initial linear foot fee	x \$2.63
Annual adjustment	\$.08
Add Annual Adjustment to the Linear foot fee: \$2.63	
	+ \$.08
CPI Revised linear foot fee	\$2.71
CPI Revised linear foot fee	\$2.71
Multiplied by the total linear feet	x 5,800 feet
Adjusted linear foot Franchise fee	\$15,718

4.3 Payments.

(A) Grantee's Franchise fee payment to the City shall be made upon the effective date of this Franchise, and thereafter, upon the annual anniversary of the effective date. Payment not received by the City within forty-five (45) days from the due date shall be assessed interest equal to the rate of one percent (1%) over the existing prime rate as set by the Wells Fargo Bank, National Association, its successors and assigns, compounded daily. Interest shall be due on the entire late payment from the date on which the payment was due until the date on which the City receives the payment.

(B) No acceptance of any payment shall be construed as an accord that the amount paid is, in fact, the correct amount, nor shall any acceptance of payments be construed as a release of any claim the City may have for further or additional sums payable.

(C) Accompanying each payment of its Franchise fee to the City, Grantee shall file with the City a report of its calculation of the Franchise fee payment, setting forth the total length of the trench through the Streets occupied by Grantee's lines, pipes, and facilities, measured in linear feet along the major axis, the amount per linear foot, together with any adjustments for inflation, and the total amount due.

(D) Grantee shall prepare and furnish to the City, at the times prescribed by the City and in the form prescribed by the City after consultation with Grantee, such reports with respect to its operation, affairs, or property, as the City may deem reasonably necessary or appropriate. All other reports required by the Charter and ordinances of the City shall be made by Grantee from time to time as required.

(E)(1) All amounts payable shall be subject to audit, confirmation and recomputation by the City. The Grantee agrees to reimburse the City for the reasonable costs of such confirmation as provided in Section E(2) below, provided that such audit and computation is completed within two (2) years of the date any audited and recomputed payment is due. If no such audit is conducted within the two (2) year period, then any claim that the City might have had for additional compensation shall be forever waived and relinquished. If the Grantee timely notifies the City that it disputes the City's determination of underpayment, the Grantee shall place the disputed amount in an escrow account until final resolution.

(2) The Grantee agrees to reimburse the City for:

(a) The reasonable costs of such confirmation if the City's recomputation discloses that the Grantee has paid 95% or less of the Franchise fees owing for the period at issue, upon receipt of a reasonably detailed invoice from the City showing such costs were actually incurred and directly related to the review; or

(b) One-half of the reasonable costs of such confirmation if the City's recomputation discloses that the Grantee had paid more than 95% but less than 98% of the Franchise fees owing for the period at issue.

(c) The City's costs which may be reimbursed under this subsection shall not exceed Five Thousand Dollars (\$5,000.00).

(F) Grantee shall pay the cost of publication of this Franchise and any amendments hereto, as such publication is required by law. Grantee shall also pay the City for such reasonable pre-franchising costs as the City may incur in entering into this Franchise agreement with the City.

(G) Payment of the Franchise fee under this Agreement shall not exempt Grantee from the payment of any other license, tax or charge on the business, occupation, property or income of Grantee that may be imposed by the City, except as may otherwise be provided in the ordinance or ordinances imposing such other license, fee, tax or charge.

Section 5. CONSTRUCTION AND RELOCATION.

5.1. Subject to applicable regulations of the City, Grantee may perform all construction and maintenance necessary for the operation of its Pipeline System. All such construction and maintenance of any and all pipes, structures and other facilities within the Streets shall, regardless of who performs such construction or maintenance, be and remain the responsibility of Grantee. Grantee shall apply for and obtain all permits necessary for construction of any such pipes, structures or other facilities, and for excavation and laying of any pipes, structures or other facilities within the Streets. Grantee shall pay all applicable fees upon the issuance of the requisite permits by the City to Grantee.

5.2. Prior to beginning construction, Grantee shall provide the City with an initial construction schedule for work in the Streets and the estimated total cost of such work. When Grantee's construction in the Streets is completed, Grantee shall provide the City with the total amount of Streets, measured linearly, occupied by Grantee's pipe line, with a map showing the location of its installed Facilities in the Streets, as built. Such "as-built" maps shall be in a form acceptable to the City Engineer.

5.3. Grantee may make all needed excavations in Streets for any pipes, structures or other facilities needed for the maintenance of Grantee's system. Prior to doing such work, Grantee shall apply for, and obtain, appropriate permits from the City and give appropriate notices to other franchisees, licensees or permittee of the City, bureaus of the City, and other units of government owning or maintaining facilities which may be affected by the proposed excavation.

5.4. In the event that emergency repairs are necessary, Grantee shall immediately notify the City of the need for such repairs. Grantee may initiate such emergency repairs, and shall apply for appropriate permits within 48 hours after discovery of the emergency. Grantee must comply with all Charter and ordinance provisions relating to such excavations or construction, including the payment of permit or license fees.

5.5. Locates. Grantee is responsible for becoming familiar with, and understanding, the provisions of Oregon Revised Statutes, ("ORS"), 757.541 through 757.571 (1995) (the "One- Call statutes"), pertaining to **locating of underground facilities** prior to excavation. By act of the Oregon legislature, ORS 757.541 through 757.571 shall sunset as of June 30, 1997. Thereafter, the governing law regarding the location of underground facilities shall be determined by Sections 1 to 5 and 7, Chapter 691, Oregon Laws 1995, (the "Oregon Utility Notification law"). While applicable, Grantee shall comply with the terms and conditions set forth in the One-Call statutes. Thereafter, Grantee shall comply with the requirements of the Oregon Utility Notification law, and the rules and regulations promulgated thereunder.

5.6. The City shall have the right to require Grantee to change the location of any pipes, structures or other facilities within the Streets when the public convenience requires such change, and the expense of the relocation or removal shall be paid by Grantee. Should Grantee fail to remove or relocate any such pipes, structures or other facilities by the date established by the City, the City may effect such removal or relocation, and the expense thereof shall be paid by Grantee, including all costs and expenses incurred by the City due to Grantee's delay.

5.7 Grantee's pipes, structures and other facilities shall be constructed and maintained in such manner so as not to interfere with the City's sewers, water pipes, or

any other property, or with any other pipes, wires, conduits, or other structures or facilities that may have been laid in the Streets by or under the City's authority. The system of pipes, structures and other facilities constructed by Grantee shall be of good quality and workmanship and shall be maintained in good repair and efficiency.

5.8. Upon Grantee's acquisition of any pipes, structures or other facilities in any Street, or upon the annexation to the City of any area in which Grantee owns or controls any such pipes, structures or other facilities in any street, the Grantee shall submit to the City a statement describing all the properties involved, whether or not authorized by Franchise or prior right, and specifying the location of all such properties. Such pipes, structures and other facilities shall immediately become subject to the terms of this Franchise.

Section 6. RESTORATION OF STREETS.

6.1. Whenever Grantee disturbs the surface of any unimproved Street for any purpose, Grantee shall promptly restore the Street to at least its prior condition, to the satisfaction of the City Engineer to the extent reasonably practicable. When any opening is made by Grantee in a hard surface pavement in any Street, Grantee shall promptly refill the opening and restore the surface to a condition satisfactory to the City Engineer, in accordance with standards developed and adopted by the City Engineer.

6.2 If Grantee excavates the surface of any Street, Grantee shall be responsible for restoration of the Street and its surface within the area affected by the excavation. The City may, after providing notice to Grantee, refill and/or repave any opening made by Grantee in the Street, and the expense thereof shall be paid by Grantee. The City reserves the right, after providing notice to Grantee, to remove and/or repair any work done by Grantee which, in the determination of the City Engineer, is inadequate. The cost thereof, including the cost of inspection and supervision, shall be paid by the Grantee. All excavations made by Grantee in the Streets shall be properly safeguarded for the prevention of accidents. All of Grantee's work under Section 6 shall be done in strict compliance with all applicable rules, regulations and ordinances of the City.

Section 7. RESERVATION OF CITY STREET RIGHTS. Nothing in this Franchise shall be construed to prevent the City from constructing sewers, grading, paving, repairing and/or altering any Street or laying down, repairing or removing water mains or constructing or establishing any other public work or improvement. All such work shall be done, insofar as is practicable, so as not to obstruct, injure or prevent the free use and operation of Grantee's pipes, structures and other facilities. However, if any of the pipes, structures, or other facilities of Grantee interfere with the construction or repair of any Street or public improvement, including, but not limited to, construction, repair or removal of a sewer or water main, all such pipes, structures, or other facilities shall be removed, replaced and relocated in the manner the City shall direct. Any and all such removal, replacement and relocation shall be at the expense of the Grantee. Should Grantee fail to remove, adjust or relocate its pipes, structures, or other facilities by the date established by the City Engineer's written notice to Grantee, the City may effect such removal, adjustment or relocation, and the expense thereof shall be paid by Grantee, including all costs and expenses incurred by the City due to Grantee's delay. If the City requires Grantee to remove its pipes, structures, or other facilities from the

Streets for any Street or public improvement, Grantee shall be permitted to relocate such facilities, insofar as is practicable, in the Streets.

Section 8. COVENANT TO INDEMNIFY AND HOLD CITY HARMLESS.

8.1. Grantee hereby agrees and covenants to indemnify, defend and hold the City, its officers, agents and employees, harmless from any claim for injury, damage, loss, liability, cost or expense, including court and appeal costs and attorney fees or expenses, arising from any casualty or accident to person or property by reason of any construction, excavation or any other act done under this Franchise by or for Grantee, its agents or employees, or by reason of any neglect or omission of Grantee to keep its pipes, structures, or other facilities in a safe condition. Grantee shall consult and cooperate with the City while conducting its defense of the City.

8.2. Grantee also hereby agrees to indemnify the City for any damages, claims, additional costs or expenses assessed against or payable by the City arising out of or resulting, directly or indirectly, from Grantee's failure to remove, adjust or relocate any of its pipes, structures or other facilities in a timely manner in accordance with a relocation schedule furnished Grantee by the City Engineer in writing.

8.3. Grantee agrees to forever indemnify the City against any claims, costs and expenses of any kind, whether direct or indirect, incurred voluntarily or pursuant to any state or federal law statute, regulation or order, for the clean up, extraction, detoxification or neutralization of any leaks, spills, contamination or residues of any toxic or hazardous substances, associated with, arising from or due to Grantee's pipes, structures or other facilities in the Streets.

Section 9. GENERAL FINANCIAL AND INSURANCE PROVISIONS.

9.1. Insurance. The Grantee shall maintain public liability and property damage insurance that protects the Grantee and the City and its officers, agents, and employees from the claims referred to in Section 8. The insurance shall provide coverage at all times for not less than \$200,000 for personal injury to each person, \$500,000 for each occurrence, and \$500,000 for each occurrence involving property damages plus costs of defense; or a single limit policy of not less than \$500,000 covering all claims per occurrence, plus costs of defense. The limits of the insurance shall be subject to statutory changes as to maximum limits of liability imposed on municipalities of the State of Oregon during the term of the Franchise. The insurance shall be without prejudice to coverage otherwise existing and shall name as additional insureds the City and its officers, agents, and employees. Notwithstanding the naming of additional insureds, the insurance shall protect each insured in the same manner as though a separate policy had been issued to each, but nothing herein shall operate to increase the insurer's liability as set forth elsewhere in the policy beyond the amount or amounts for which the insurer would have been liable if only one person or interest had been named as insured. The coverage must apply as to claims between insureds on the policy. The insurance shall provide that the insurance shall not be canceled or materially altered without thirty (30) days written notice first being given to the City Auditor. If the insurance is canceled or materially altered within the term of this Franchise, Grantee shall provide a new policy with the same terms. Grantee agrees to maintain continuous

uninterrupted coverage, in the amounts required, for the duration of the Franchise.

9.2. The Grantee shall maintain on file with the City Auditor a certificate of insurance certifying the coverage required above. The adequacy of the insurance shall be subject to the approval of the City Attorney. Failure to maintain liability insurance shall be cause for immediate termination of this Franchise by the City.

Section 10. STREET VACATION. If any Street or portion thereof used by Grantee is vacated by the City during the term of this Franchise, unless City Council specifically reserves to Grantee the right to continue its installation in the vacated street area, Grantee shall, without expense to the City, promptly remove its facilities from such street, and restore, repair or reconstruct the street area where such removal has occurred, and place the street area in such condition as may be required by the Council. In the event of failure, neglect or refusal of Grantee, after thirty days' written notice by City Council, to repair, improve or maintain such street portions, the City may do such work or cause it to be done, and the cost thereof, as found and declared by City Council, shall be entered in the Docket of City Liens against any property of Grantee which City may choose, and such lien shall be enforced in like manner and with like effect as other liens entered in such docket.

Section 11. MAINTENANCE OF FACILITIES. Grantee shall provide and put in use equipment and appliances necessary for the operation of its Pipeline System in the Streets so as to prevent injury to the City's property or to any property within the City belonging to any person, firm or corporation. Grantee, at its own expense, shall repair, renew, change and improve said facilities and appliances from time to time as may be necessary to accomplish this purpose. Grantee shall not connect its pipes, structures or other facilities in a manner that requires its customers to install any pipe, structure or other facility, within, under or over a Street.

Section 12. CITY'S CONSENT REQUIRED FOR ASSIGNMENT,
TRANSFER, MERGER, LEASE OR MORTGAGE.

12.1. Neither this Franchise nor any property owned and operated by Grantee by authority hereof shall be assigned, transferred, merged, leased or mortgaged without the prior consent of the City as expressed by ordinance, except to entities that control, are controlled by, or are under common control with, the Grantee or its constituent partners. Grantee shall notify the City of any transfers to such entities within ten (10) days of such transfers. The City's granting of consent in one instance shall not render unnecessary any subsequent consent in any instance. Notwithstanding the foregoing, nothing contained in this section shall be deemed to prohibit the mortgage, pledge, or assignment of Grantee's pipes, structures or other facilities or other tangible assets for purposes of financing the acquisition of equipment, or the construction and operation of Grantee's Pipeline System, without the City's consent, but any such mortgage, pledge, or assignment shall be subject to the City's other rights contained in this Franchise.

12.2. Within ten days after execution and delivery of any instrument consented to by the City under the terms of this Section, Grantee shall file with the Auditor an executed counterpart or certified copy thereof.

Section 13. REGULATION. The City Council shall at all times be vested with the power and right to reasonably regulate in the public interest the exercise of the privileges permitted by this Franchise. Grantee shall not be relieved of its obligation to comply with any provision of this Franchise by any failure of the City to promptly enforce compliance with this Franchise. Services furnished by Grantee under this Franchise shall be rendered using the best practicable commercial methods and practices, insuring the least danger to life and property compatible with good engineering practice.

Section 14. HAZARDOUS SUBSTANCES.

14.1. Grantee shall comply with all applicable state and federal laws, statutes, regulations and orders concerning the transportation, release, testing, monitoring, cleaning up, removal, extraction, containment, treatment, detoxification or neutralization of Hazardous Substances, relating to its pipes, structures or other facilities in the Streets. For purposes of this Section 14, "Hazardous Substances" shall have the meaning given by ORS 465.200(15) (1995).

14.2 Grantee shall maintain and inspect its pipes, structures or other facilities located in the Streets. If Grantee discovers any leaks, spills, releases or other contamination associated with, arising from or due to its pipes, structures or other facilities in the Streets, Grantee shall report the discovery to the City within 48 hours. Grantee shall immediately proceed to repair, contain, extract, detoxify and neutralize any Hazardous Substances in the Streets associated with, resulting from or due to any leaks, spills, releases or other contamination from its pipes, structures or other facilities.

14.3. In doing any construction, modification or removal of any of its pipes, structures or other facilities in the Streets, Grantee shall inspect and test for any Hazardous Substances contamination or residue. Grantee shall remove all contamination or residue of Hazardous Substances in compliance with applicable environmental clean-up standards related thereto. If Grantee fails to remove all such contamination or residue, in compliance with standards set by federal, state and local laws, statutes, regulations and orders, the City may arrange for the clean up, extraction, detoxification or neutralization of the Hazardous Substances and the costs of such clean up, extraction, detoxification or neutralization shall be charged to the Grantee and the Grantee shall promptly pay such charges.

14.4. Grantee agrees to forever indemnify the City against any claims, costs, and expenses, of any kind, whether direct or indirect, incurred by the City arising out of the release or threat of release of Hazardous Substances caused by Grantee's ownership or operation of its Facilities in the Streets.

Section 15. DISCONTINUING USE OF FACILITIES. Whenever Grantee intends to discontinue using any pipes, structures or other facilities within the Streets, Grantee shall submit to the City Engineer for the City Engineer's approval a completed application describing the pipes, structures or other facilities and the date on which the Grantee intends to discontinue using such pipes, structures or other facilities. Grantee may elect to remove the pipes, structures or other facilities or request that the City

permit the pipes, structures or other facilities to remain in place. Notwithstanding the Grantee's request that any such pipes, structures or other facilities remain in place, the City Engineer may require the Grantee to remove the pipes, structures or other facilities from the street area or modify the pipes, structures or other facilities in order to protect the public health and safety or otherwise serve the public interest. The City Engineer may require the Grantee to perform a combination of modification and removal of the pipes, structures or other facilities. Grantee shall complete such removal or modification in accordance with a schedule set by the City Engineer. Until such time as Grantee removes or modifies the affected pipes, structures or other facilities as directed by the City Engineer, or until the rights to and responsibility for the affected pipes, structures or other facilities are accepted by another person or entity having authority to construct and maintain such pipes, structures or other facilities, Grantee shall be responsible for all necessary repairs, relocations of the pipes, structures or other facilities, and maintenance of the street area in the same manner and degree as if the pipes, structures or other facilities were in active use, and shall retain all liability for such pipes, structures or other facilities.

Section 16. FORFEITURE.

16.1. In addition to any other rights set out elsewhere in this Franchise, the City may declare a forfeiture of the Franchise, and all of Grantee's rights arising under the Franchise, in the event that:

- (A) The Grantee violates any material provision of the Franchise; or
- (B) The Grantee becomes insolvent or unable or unwilling to pay its debts, or it files for bankruptcy and it is unwilling to assume and perform the terms of this Franchise; or
- (C) The Grantee is found by any court of competent jurisdiction to have practiced any fraud or deceit upon the City; or
- (D) The Grantee fails to obtain and/or maintain any permit required by any federal or state regulatory body with jurisdiction over Grantee's activities.

16.2. In addition to any other rights set out elsewhere in this Franchise, the City reserves the right at its sole option to apply any of the following remedies, alone or in combination, in the event that Grantee violates any of the material provisions contained in this Franchise.

- (A) The City may impose a financial penalty of up to \$1,000.00 for each material violation of the Franchise by the Grantee; or
- (B) The City may suspend any or all of the Grantee's rights under the Franchise until the Grantee corrects or otherwise cures its Franchise violation.

16.3. (A) In determining which remedy or remedies are appropriate, the City shall reasonably consider the nature of the Franchise violation, the person or persons affected

by the violation, the nature of the remedy required in order to prevent the reoccurrence of such violation and any other matters the City deems appropriate.

(B) The City shall give Grantee thirty days prior written notice of its intent to exercise its rights under this Section, stating its reasons for determining that a violation had occurred. If the Grantee cures the stated violation within the thirty day notice period, or if the Grantee initiates efforts which are satisfactory to the City to remedy the violation and those efforts are continued by the Grantee in good faith, the City shall not exercise its remedy rights. If Grantee fails to cure the stated violation within the thirty day notice period, or if the Grantee fails to undertake efforts which are reasonably satisfactory to the City to cure the violation, then the City Council may exercise any or all of the remedy rights available under this Section.

Section 17. EXPIRATION.

17.1. Upon the expiration of this Franchise, the City shall have the right, at its election, to do any of the following:

(A) Renew or extend the Franchise, in accordance with the Charter of the City of Portland and applicable law, although nothing in this Franchise shall be construed to require such renewal or extension; or

(B) Terminate the Franchise without further action; or

(C) Take such action as the City may deem appropriate in its reasonable discretion.

Until such time as the City exercises its rights under this Section, the Grantee's rights and responsibilities within the City shall be controlled by the terms of this Franchise.

Section 18 MISCELLANEOUS PROVISIONS.

18.1 Compliance With Laws.

(A) Both Grantee and the City shall comply with all applicable federal and state laws.

(B) Grantee shall comply with all applicable City ordinances, resolutions, rules and regulations adopted or established pursuant to the City's lawful authority.

18.2 Severability. If any Section, provision or clause of this Franchise is held by a court of competent jurisdiction to be invalid or unenforceable, or is preempted by federal or state laws or regulations, the remainder of this Franchise shall not be affected, unless the City Council determines such Section, provision, or clause was material to the City's agreement to issue a Franchise to the Grantee.

18.3 Force Majeure.

(A) For the purposes of this Section 18.3, the term "Force Majeure" shall mean acts of God, landslides, earthquakes, lightning, fires, hurricanes, volcanic activity, storms, floods,

washouts, droughts, civil disturbances, acts of terrorism or of the public enemy, partial or entire failure of utilities, strikes, explosions, lockouts or other industrial disturbances, insurrections, public riots or other similar events which are not reasonably within the control of the parties hereto.

(B) If the Grantee is wholly or partially unable to carry out its obligations under this Franchise as a result of Force Majeure, the Grantee shall give the City prompt notice of such Force Majeure, describing the same in reasonable detail, and Grantee's obligations under this Franchise, other than for the payment of monies due, shall not be deemed in violation or default for the duration of the Force Majeure. Grantee agrees to use its best efforts to remedy as soon as possible, under the circumstances, Grantee's inability, by reason of Force Majeure, to carry out its responsibility and duties under this Franchise.

18.4 Choice of Forum. Any litigation between the City and the Grantee arising under or regarding this Franchise shall occur, if in the state courts, in the Multnomah County Court having jurisdiction thereof, and if in the federal courts, in the United States District Court for the District of Oregon.

18.5 Notice. Any notice provided for under this Franchise shall be sufficient if in writing and (1) delivered personally to the following addressee or deposited in the United States Mail, postage prepaid, certified mail, return receipt requested, (2) sent by overnight or commercial air courier (such as Federal Express), or (3) sent by facsimile transmission addressed as follows, or to such other address as the receiving party hereafter shall specify in writing:

(A) If to the City: Office of Cable Communications and Franchise Management
City of Portland, Oregon
1211 SW 5th Avenue, Room 1160
Portland, Oregon 97204
FAX# (503) 823-5370

With a copy to: City Attorney's Office, Room 315, City Hall
1220 SW 5th Avenue
Portland, Oregon 97204
FAX: (503) 823-3089

(B) If to the Grantee: Portland LFG Joint Venture
c/o Palmer Management Corporation
Attn: Gordon Deane
13 Elm Street, Suite 200
Cohasset, MA 02025
(Voice) 617-383-3200
(Fax) 617-383-3205

With a copy to: Jeffrey Bernstein
Bernstein, Cushner & Kimmell, P.C.
One Court Street, Suite 200
Boston, MA 02108
(Voice) 617-742-4340

(Fax) 617-742-0170

With a copy to: Ash Grove Cement
Attn: Jack Ross
8900 Indian Creek Parkway, Suite 600
Overland Park, KS 66210
(Fax) 913-451-8324

(C) Any such notice, communication or delivery shall be deemed effective and delivered upon the earliest to occur of actual delivery, three (3) business days after depositing in the United States mail as aforesaid, one (1) business day after shipment by commercial air courier as aforesaid or the same day as facsimile transmission (or the first business day thereafter if faxed on a Saturday, Sunday or legal holiday).

18.6 Confidentiality. Grantee may identify information submitted to the City as confidential. Prior to submitting such information to the City, Grantee shall prominently mark any such information with the mark "Confidential" in letters at least one-half (½) inch in height. The City shall treat any information so marked as confidential and not subject to public disclosure, until the City receives any public records request for disclosure of such information. Within five (5) working days of receiving any such request, the City shall provide the Grantee with written notice of the request, including a copy of the request. Grantee shall have five (5) working days within which to provide a written response to the City, before the City may release any of the requested confidential information. Whether the Grantee submits any written response to the City, the City shall retain final discretion to determine whether to release the requested confidential information, provided that the City shall give the Grantee at least five days written notice after receipt of any response from Grantee, prior to releasing such information.

18.7 Public Records.

(A) Some information submitted by the Grantee to the City may be relevant to the Grantee's obligation to pay franchise fees. Requiring such information to be submitted to the City in order to determine fees payable or paid to the City may qualify such information as being exempt from public disclosure under ORS 192.501(5) (1995) of the Oregon Public Records Law.

(B) Some information submitted by the Grantee to the City may otherwise be used to conduct its business and known to certain individuals within the organization, with actual or potential commercial value, and giving Grantee a business advantage over its competitors. Such information may constitute trade secrets and be exempt from public disclosure under ORS 192.501(2) (1995) of the Oregon Public Record Law.

(C) Identification of these exemptions under the Oregon Public Records Law, which may apply to information submitted by the Grantee to the City, is not an exhaustive list of those possibly applicable to such information.

18.8 Mutual Duty of Cooperation and Good Faith. In performing their various duties and obligations as set out in this Franchise, both parties agree to act reasonably and in good

faith.

Section 19. WRITTEN ACCEPTANCE. Within thirty days after this ordinance becomes effective, Grantee shall file in the Office of the Auditor of the City of Portland a written acceptance of this ordinance on such form as shall be provided by the City Auditor, executed by authorized officers of the Grantee, meeting the approval of the City Attorney. A failure on the part of Grantee to file such written acceptance within such time shall be deemed an abandonment and rejection of the rights and privileges conferred by this ordinance and this Franchise shall thereupon be null and void. Such acceptance shall be unqualified and shall be construed to be an acceptance of all the terms, conditions and restrictions contained in this ordinance.

Section 20. OTHER AUTHORITY SUPERSEDED. Upon the date this Franchise becomes effective, any and all authority to operate previously granted to Grantee by the City shall be superseded by this Franchise.

Passed by Council: Aug 13, 1997
Commissioner Erik Sten
Henry/Walters
June 3, 1997