

ORDINANCE NO. 2019-

AN ORDINANCE GRANTING TO SIENERGY, LP, DBA SIENERGY, THE RIGHT, PRIVILEGE AND FRANCHISE TO CONSTRUCT, INSTALL, EXTEND, REMOVE, REPLACE, ABANDON, OPERATE AND MAINTAIN ITS FACILITIES WITHIN THE PUBLIC RIGHTS-OF-WAY OF THE CITY OF SAN MARCOS, TEXAS FOR THE TRANSPORTATION, DELIVERY, SALE AND DISTRIBUTION OF NATURAL GAS; CONTAINING OTHER PROVISIONS RELATING TO THE FOREGOING SUBJECT; PROVIDING FOR SEVERABILITY; INCLUDING PROCEDURAL PROVISIONS; PROVIDING FOR APPROVAL ON THREE READINGS OF THE ORDINANCE; AND PROVIDING AN EFFECTIVE DATE.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF SAN MARCOS, TEXAS:

SECTION 1. GRANT OF AUTHORITY. Subject to the terms, conditions and provisions of this ordinance, the right, privilege and franchise is hereby granted to SiEnergy, LP, DBA SiEnergy, to construct, install, extend, remove, replace, abandon, operate and maintain its facilities within the Public Rights-of-Way of the City of San Marcos, Texas for the transportation, delivery, sale and distribution of natural gas within the corporate limits of the City of San Marcos, as the same are now and as the same may from time to time be extended. This ordinance may be referred to hereinafter as “this ordinance” or “this “Franchise.”

SECTION 2. DEFINITIONS.

2.1 “*City*” shall mean the City of San Marcos, Texas, a home-rule municipal corporation.

2.2 “*Company*” shall mean SiEnergy, LP, DBA SiEnergy, and its affiliates and subsidiaries under common ownership or control with SiEnergy, LP, provided no such affiliate or subsidiary may operate pursuant to this Franchise until a duly authorized representative has executed and delivered, in a form acceptable to the City Attorney of the City, an agreement to be fully bound by the terms, conditions and obligations under this Franchise. Company does not mean any other assignee, business organization, entity or person, any of which shall have no right, privilege or franchise granted hereunder.

2.3 “*Emergency Operations*” means operations or repairs of facilities to prevent imminent harm to the health, safety, or welfare of persons or property.

2.4 “*Facilities*” shall mean pipes, pipelines, natural gas mains, laterals, feeders, regulators, meters, fixtures, connections and attachments and other instrumentalities and appurtenances, used in or incident to providing transportation, distribution, supply and sales of natural gas for heating, lighting, power and any other purposes for which natural gas may now or hereafter be used.

2.5 “*Gross Receipts*” shall mean all amounts received by the Company from the sale of gas to its customers within the corporate limits of City that correspond to the Company's tariff charges for: (a) customer charge: (b) commodity charge: (c) tax adjustment; and (d) gas cost adjustment.

2.6 “*Routine Maintenance*” shall mean, non-emergency repairs, not taking longer than 6 hours on City designated major thoroughfares and in public school zones between 9 a.m. and 3 p.m., and not taking longer than 10 hours on other Public Rights-of-Way between 8 a.m. and 6 p.m. where the paved surface of the rights-of-way, including the sidewalk and curbs, is not broken and there is no trenching in the unpaved surfaces of the Public Rights-of-Way beyond 24 inches.

2.7 “*Public Rights-of-Way*” shall mean the areas in, under, upon, over, across, and along any and all of the present and future Streets or streams now or hereafter owned or controlled by City.

2.8 “*Street*” shall mean the surface and the space above and below any public street, road, highway, alley, bridge, sidewalk, or other public place or way.

2.9 “*Transport Customer*” means any person or entity for whom Company transports gas through the distribution system of Company within the corporate limits of the City for consumption within the corporate limits of the City.

SECTION 3. TERM OF FRANCHISE. This Franchise shall become effective on the Effective Date described in Section 22 and shall be in full force and effect for a term of five (5) years.

SECTION 4. CONSTRUCTION AND MAINTENANCE OF NATURAL GAS DISTRIBUTION SYSTEM.

4.1 All Facilities installed by Company in a Public Right-of-Way shall be of sound material and good quality, and shall be laid so that they will cause the least interference with traffic over the Public Rights-of-Way, the artificial drainage of the City or its underground or overhead fixtures and public utilities, or with navigation in or the natural drainage of any stream. All Facilities shall be installed, maintained, and repaired in accordance with applicable Federal, State and City laws, codes and regulations and in accordance with accepted industry standards in effect at the time the Company performs construction, maintenance, and repair activities.

4.2 Company shall conduct its maintenance, repair, construction and similar activity in a manner that will cause the least interference with the use of public or private property.

4.3 Within the Public Rights-of-Way, the location, relocation, and route of the Facilities by the Company shall be subject to the reasonable and proper regulation, direction and control of the City or the City official to whom such duties have been delegated.

4.4 At least annually, the Company will provide current maps detailing the location of

the Company's Facilities in the corporate limits of the City. In addition, when the City is undertaking any installation or maintenance of public improvements that may involve excavation, upon written request from the City, the Company will promptly provide detailed maps of the Company's Facilities, if any, within the limits of the City's undertaking.

4.5 Unless otherwise stated herein, the Company shall comply with all applicable laws and provisions of ordinances of the City regarding construction within or on a Public Right-of-Way including but not limited to Chapter 74, Article 4 of the San Marcos City Code regarding Right-of-Way Construction, as amended.

SECTION 5. PERMITS.

5.1 Permit Applications. Except as indicated below, Company and its contractors shall file an application for a permit indicating the dates, location, and nature of all work to be performed on its Facilities within the Public Rights-of-Way. Unless otherwise stated herein, the City shall approve or deny the permit application within ten (10) days of Company's submission of its application or be deemed granted. Company and contractors performing work for Company shall not be required to pay any fee to perform work on Company's Facilities, or park within the Streets and other Public Rights-of-Way, other than the fees set forth in Section 8 of this Franchise.

5.2 Major Construction. Company shall not engage in the removal, retirement, abandonment, replacement, extension or installation of Facilities involving open trenching, excavating, boring, cutting, and the like in, under, upon, over, across, or along paved Streets, alleys, public way or place or any Public Rights-of-Way without first filing an application for a permit at least thirty (30) days prior to the start date of construction. Such permit shall include the scope and duration of the work, necessary maps, site and civil drawings, and traffic control plans, if applicable. The City shall approve or deny the permit application within thirty (30) days of Company's submission of its application or be deemed granted.

5.3 Emergency Operations. In the event Company determines there is a need to initiate Emergency Operations, Company may act without any prior notice or permit, but shall provide notice on the first working day following Company's completion of Emergency Operations. Such notice shall include the required permit information provided herein that corresponds to the type of work performed during the emergency. The notification of police or fire departments when initiating such Emergency Operations shall be at Company's sole discretion and judgment.

5.4 Routine Maintenance. No permit shall be required to perform any Routine Maintenance.

5.5 City Requested Relocations. Company and contractors performing work for Company shall not be required to obtain any permits for relocations of Facilities requested by the City, provided that the relocated Facilities are placed in the location designated by the City and the relocation is otherwise in accordance with the City's request to relocate.

SECTION 6. STREETS TO BE RESTORED TO GOOD CONDITION.

6.1 Following completion of work in the Public Rights-of-Way, Company shall repair the affected Public Rights-of-Way as soon as possible and shall comply with all City ordinances governing time periods and standards relating to excavating in the Public Rights-of-Way. No Street, alley, highway or public place shall be encumbered for a longer period than shall be necessary to execute the work.

6.2 Company shall ensure the quality of the restoration workmanship for one (1) year following the completion of the restoration. During the one-year maintenance period, the Company shall remedy any area repaired by the Company when directed to do so by City in the event of a pavement failure.

6.3 During the Company's installation of its Facilities in a Public Right-of-Way, the City may, at its cost, place its facilities in the trenches in the Right of Way occupied by the Company's Facilities, provided the City pays any incremental increase in cost incurred by the Company for trenching necessary to accommodate such City facilities. Such activity must be technically, commercially, and economically feasible and not in violation of state or federal regulations or industry safety standards.

6.4 The City expressly reserves the right to change grades, construct, widen or relocate Streets and other public facilities as provided in Section 14.

6.5 Company, in constructing, maintaining or repairing its Facilities, shall not interfere with any public utility facilities in any public property except with the consent and direction of the City Manager or his designee. The right of the Company to use any area of public property shall in no way affect the right of the City or its agents to maintain, construct, repair, or operate any pavement, curbs, gutters, wires, cables, water or sewer pipes, or electric distribution facilities owned by the City and located within or near the public property.

SECTION 7. QUALITY OF SERVICE. The service furnished hereunder to the City and its inhabitants shall be in accordance with the quality of service rules of the Railroad Commission of Texas and all other applicable local, state and federal regulations. Company shall furnish the grade of service to its customers as provided by its rate schedules and shall maintain its system in reasonable operating condition during the continuance of this Franchise. An exception to this requirement is automatically in effect, but only for so long as is necessary, when caused by a shortage in materials, supplies and equipment beyond the control of the Company as a result of fires, strikes, riots, storms, floods and other casualties, governmental regulations, limitations and restrictions as to the use and availability of materials, supplies and equipment and as to the use of the services, and unforeseeable and unusual demands for service. In any of such events, the Company shall do all things reasonably within its power to restore normal service as quickly as practicable.

SECTION 8. PAYMENT TO THE CITY.

8.1 In consideration of the rights and privileges herein granted, the administration of the Franchise by the City, the temporary interference with the use of Public Rights-of-Way and cost and obligations undertaken by the city in relation thereto and in lieu of any license, charge, fee, street or alley rental or other character of charge for use and occupancy of the Streets, alleys, and public places of the City, and in lieu of any inspection fee, the Company agrees to pay to the City franchise fees in the amount and manner described herein.

8.2 Company agrees to pay to the City quarterly during the continuance of this Franchise a sum of money equal to five percent (5%) of the Company's gross receipts for the preceding calendar quarter received by the Company from the sale of gas within the corporate limits of the City plus seven cents (7¢) per Mcf for natural gas transported by Company for its Transport Customers during such quarter. "Transport Customer" means any person or entity for whom Company transports gas through the distribution system of Company within the corporate limits of City for consumption within the corporate limits of City. The franchise fees hereunder shall be calculated for the calendar quarters ending March 31, June 30, September 30, and December 31 and shall be payable on or before the fifteenth day of May, August, November, and February following the quarter for which payment is made, beginning with the first such date following the Effective Date of this Franchise and each August 15th, November 15th, February 15th, and May 15th thereafter; provided, however, the first such payment shall be prorated as necessary to reflect only those gross receipts received and transportation volumes delivered by Company after the Effective Date of this Franchise. In no event shall the Company be required to remit to the City franchise fee amounts that for any reason whatsoever are not fully recoverable from its customers. Upon receipt of the above amount of money, the City Clerk shall deliver to the Company a receipt for such amount. If any payment due date required herein falls on a weekend or bank holiday, payment shall be made on or before the close of business of the first working day after the payment due date.

SECTION 9. ANNEXATIONS BY CITY. This Franchise shall extend to and include any and all territory that is annexed by the City during the term of this Franchise. Within sixty (60) days from the receipt of notice from the City of any such annexation, the Company shall assure that any and all customers within such annexed territory are included and shown on its accounting system as being within the corporate limits of the City of San Marcos. After such sixty (60) day period the payment provisions specified in Section 8 of this Franchise shall apply to gross receipts and transport fees received by the Company from customers located within such annexed territory. Company shall true-up its map of City boundaries to the City's map on an annual basis.

SECTION 10. NON-EXCLUSIVE FRANCHISE. Nothing contained in this Franchise shall ever be construed as conferring upon the Company any exclusive rights or privileges of any nature whatsoever.

SECTION 11. COMPLIANCE AND REMEDIES.

11.1 In the event the Company by act or omission violates any material term, condition or provision of this Franchise, the City shall notify the Company in writing of such violation.

Should the Company fail or refuse to correct any such violation within thirty days from the date of City's notice, the City shall, upon written notification to the Company, have the right to terminate this agreement. Any such termination and cancellation shall be by ordinance adopted by City Council; provided, however, before any such ordinance is adopted, the Company must be given at least sixty (60) days' advance written notice. Such notice shall set forth the causes and reasons for the proposed termination and cancellation, shall advise the Company that it will be provided an opportunity to be heard by City Council regarding such proposed action before any such action is taken and shall set forth the time, date and place of the hearing.

11.2 Other than its failure, refusal or inability to pay its debts and obligations, including, specifically, the payments to the City required by this Franchise, the Company shall not be declared in default or be subject to any sanction under any provision of this Franchise in those cases in which performance of such provision is prevented by reasons beyond its control.

11.3 The rights and remedies of the City and the Company set forth herein shall be in addition to, and not in limitation of, any other rights and remedies provided at law or in equity and City's exercise of any particular remedy shall not constitute a waiver of its rights to exercise any other remedy.

SECTION 12. RESERVATION OF POWERS. Except as otherwise provided in this Franchise, the City by the granting of this Franchise does not surrender or to any extent lose, waive, impair or lessen the lawful powers, claims and rights, now or hereafter vested in the City under the Constitution and statutes of the State of Texas and under the Charter and Ordinances of the City of San Marcos or other applicable law, to regulate public utilities within the City and to regulate the use of the Streets by the Company; and the Company by its acceptance of this Franchise agrees that, except as otherwise provided in this Franchise, all lawful powers and rights, whether regulatory or otherwise, as are or as may be from time to time vested in or reserved to the City, shall be in full force and effect and subject to the exercise thereof by the City at any time and from time to time.

SECTION 13. INDEMNITY. THE COMPANY, ITS SUCCESSORS AND ASSIGNS, SHALL PROTECT AND HOLD THE CITY AND ITS OFFICERS, AGENTS, AND EMPLOYEES (COLLECTIVELY REFERRED TO IN THIS SECTION AS "THE CITY") HARMLESS AGAINST ANY AND ALL CLAIMS OR DEMANDS FOR DAMAGES TO ANY PERSON OR PROPERTY BY REASON OF THE CONSTRUCTION AND MAINTENANCE OF THE COMPANY'S NATURAL GAS DISTRIBUTION SYSTEM, OR IN ANY WAY GROWING OUT OF THE RIGHTS GRANTED BY THIS FRANCHISE, EITHER DIRECTLY OR INDIRECTLY, OR BY REASON OF ANY ACT, NEGLIGENCE OR NONFEASANCE OF THE COMPANY OR THE CONTRACTORS, AGENTS OR EMPLOYEES OF THE COMPANY OR ITS SUCCESSORS AND ASSIGNS, AND SHALL REFUND TO THE CITY ALL SUMS WHICH THE CITY MAY BE ADJUDGED TO PAY ON ANY SUCH CLAIM, OR WHICH MAY ARISE OR GROW OUT OF THE EXERCISE OF THE RIGHTS AND PRIVILEGES HEREBY GRANTED OR BY THE ABUSE THEREOF, AND THE COMPANY OR ITS SUCCESSORS AND ASSIGNS SHALL INDEMNIFY AND HOLD THE CITY HARMLESS FROM AND ON ACCOUNT OF ALL DAMAGES, COSTS, EXPENSES, ACTIONS, AND CAUSES OF ACTION THAT MAY

ACCRUE TO OR BE BROUGHT BY, A PERSON, PERSONS, COMPANY OR COMPANIES AT ANY TIME HEREAFTER BY REASON OF THE EXERCISE OF THE RIGHTS AND PRIVILEGES HEREBY GRANTED, OR OF THE ABUSE THEREOF.

SECTION 14. RELOCATION OF FACILITIES. The Company shall, upon written request of the City, relocate its Facilities within Public Rights-of-Way at the Company's own expense, exclusive of Facilities installed for service directly to the City, whenever such shall be reasonably necessary on account of the widening, change of grade, or relocation by the City of Streets or Public Rights-of-Way, or construction or relocation by the City of City utility infrastructure or drainage facilities. The City shall bear the costs of all relocations of Facilities installed for service directly to the City and of any relocation of other Facilities requested by the City for reasons other than the widening, change of grade, or relocation by the City of Streets or Public Rights-of-Way, or construction or relocation by the City of City utility lines or drainage facilities.

SECTION 15. GOVERNMENTAL FUNCTION. All of the regulations and activities required by this Franchise are hereby declared to be governmental and for the health, safety and welfare of the general public.

SECTION 16. RECORDS AND REPORTS.

16.1 Books of Account. The Company shall keep complete and accurate books of accounts and records of its business and operations under and in connection with this Franchise. All such books of accounts and records shall be kept at the company's principal office in Houston, Texas.

16.2 Access by City. The City may conduct an audit or other inquiry or may pursue a cause of action in relation to the payment of the franchise fee. Each party shall bear its own costs of any such audit or inquiry. Upon receipt of a written request from the City, all books and records related to Company's operations under this Franchise shall be made available for inspection and copying no later than thirty (30) days from receipt of such request.

16.3 Interest on Underpayments and Overpayments.

16.3.1 Amounts due to City for late payments shall include interest, compounded daily equal to the return on equity plus three percent (3%) granted to the Company in its most recent proceeding fixing rates applicable to customers within the corporate limits of the City, provided such interest will not exceed the maximum interest rate allowed under applicable law.

16.3.2 If the City identifies, as a result of a franchise fee compliance review, amounts owed by the Company from prior periods or prior underpayments, then the Company shall pay simple interest on such amounts equal to the return on equity granted to the Company in its most recent proceeding fixing rates applicable to customers within the corporate limits of the City. Said interest shall be payable on such sums from the date the initial payment was due until it is paid and shall not be billed to customers.

16.3.3 Amounts due Company for past overpayments shall include simple interest equal to the return on equity granted to the Company in its most recent proceeding fixing rates applicable to customers within the corporate limits of the City; provided, however, if there is a change in the approved return on equity during the time period subject to the City's audit or inquiry, then for each time period during which there was an overpayment, the approved return on equity in effect during such time period shall be used in calculating interest under this subparagraph (c). Interest payable on such sums shall be credited to customers.

SECTION 17. EASEMENT. In consideration for the compensation set forth in Section 8, City agrees that if City sells, conveys, or surrenders possession of any portion of the Public Right-of-Way that is being used by Company pursuant to this Franchise, City, except where relocation is required under Section 14, to the extent of its right to do so, shall first grant Company an easement for such use and the sale, conveyance, or surrender of possession of the Public Right-of-Way shall be subject to the right and continued use of Company.

SECTION 18. ORIGINAL JURISDICTION OVER RATES AND SERVICES. Pursuant to Section 103.003 of the Gas Utility Regulatory Act, the City hereby elects to surrender to the Railroad Commission of Texas the City's exclusive original jurisdiction over the rates, operations and services of the Company effective as of the Effective Date of this Franchise and for the term of this Franchise. Notwithstanding the above surrender of the City's exclusive original jurisdiction over the rates, operations and services of the Company, such surrender shall not affect in any manner the City's rights and privileges pursuant to the provisions of the Gas Utility Regulatory Act as currently enacted, or as amended, or in any successor legislation, or as otherwise provided at law for the City to both participate in any ratemaking proceeding at the Railroad Commission of Texas which affects the City's gas rates, and to recover from the Company any reasonable expenses incurred by the City in its participation in such a ratemaking proceeding as provided for in law.

SECTION 19. ACCEPTANCE. The Company shall, within thirty (30) days following the final passage and approval of this Franchise, file with the City Clerk of the City of San Marcos a written statement signed in its name and behalf in substantially the following form:

"To the Honorable Mayor: and City Council of the City of San Marcos:

SiEnergy, LP, DBA SiEnergy, hereby accepts the attached franchise ordinance and agrees to be bound by all of its terms and provisions."

DBA _____

By: _____
[Name and Title]

Dated this _____ day of _____ 20____.

SECTION 20. SEVERABILITY. If any provision, section, subsection, sentence, clause or phrase of this Franchise is for any reason held to be unconstitutional, void, or invalid or for any reason unenforceable, the validity of the remaining portions of this Franchise shall not be affected thereby, it being the intent the City of San Marcos in adopting this Franchise that no portion hereof or provision hereof shall become inoperative or fail by reason of any unconstitutionality or invalidity of any other portion, provision or regulation and, to this end, all provisions of this ordinance are declared to be severable.

SECTION 21. NOTICES. Every notice, order, petition, documents or other direction or communication to be served upon the City or the Company shall be deemed sufficiently given if sent by registered or certified mail, return receipt requested.

Every such communication to the Company shall be sent to:

SiEnergy, LP
c/o Donald Dively
Vice President of Contracts and Risk Management
3 Lakeway Centre Court, Suite 110
Lakeway, Texas 78734

Every such communication to the City or the City Council shall be sent to:

City of San Marcos, Texas
Attn: Mayor
630 East Hopkins Street
San Marcos, Texas 78666

With a Copy to:

City of San Marcos, Texas
Attn: City Manager
630 East Hopkins Street
San Marcos, Texas 78666

SECTION 22. PUBLICATION, PASSAGE AND EFFECTIVE DATE. This Franchise, having been published once before first reading, shall take effect and be in force thirty (30) days after final passage and timely receipt of the Company's acceptance under Section 19 ("Effective Date"). In accordance with Section 11.04 of the City's Charter, the Company shall pay the cost of publication of this ordinance.

SECTION 23. PRIOR AGREEMENTS. This Franchise supersedes any agreements, oral or written, between the City and the Company.

SECTION 24. APPLICABLE LAW AND VENUE. This Franchise shall be construed and interpreted under the laws of the state of Texas. Venue for any legal proceedings arising under

this Franchise shall lie in the state courts located in Hays County, Texas having appropriate jurisdiction or, if in federal court, the United States District Court for the Western District of Texas, Austin Division.

SECTION 25. COMPLIANCE WITH CHARTER AND ORDINANCES. This Franchise, the rights granted hereby and the operations and activities performed by the Company pursuant hereto shall be subject to applicable provisions of the City's Charter. Except to the extent otherwise expressly provided herein, the franchise and rights granted hereby and the operations and activities performed by the Company pursuant hereto, shall be subject to all valid ordinances and regulations of the City insofar as such ordinances and regulations: (a) do not shorten the term hereof or terminate, abrogate, or materially and adversely affect the Franchise and right granted to the Company hereby; (b) do not conflict with or are not inconsistent with the terms and provisions contained in this ordinance; or (c) prevent or interfere with the Company's federal and state regulatory obligations. All such conflicting or inconsistent ordinances are hereby repealed to the extent of such conflict or inconsistency.

PASSED AND APPROVED on first reading on October 15, 2019.

PASSED AND APPROVED on second reading on November 6, 2019.

PASSED, APPROVED AND ADOPTED on November 19, 2019.

The Effective Date of this ordinance is _____.

Jane Hughson, Mayor

ATTEST:

Jamie Lee Case, City Clerk

APPROVED:

Michael J. Cosentino, City Attorney

Published before first reading in the San Marcos Daily Record on _____, 2019.

*[ATTACH COMPANY'S WRITTEN ACCEPTANCE AND INCLUDE
STATEMENT FROM CITY CLERK REGARDING DATE RECEIVED]*