

# ORDINANCE RECORD

No. 728—REDFIELD & COMPANY INC., OMAHA

## ORDINANCE NO. 974

AN ORDINANCE GRANTING AQUILA, INC., D/B/A AQUILA NETWORKS, A DELAWARE CORPORATION, ITS SUCCESSORS AND ASSIGNS, A NATURAL GAS FRANCHISE AND THE AUTHORITY TO CONSTRUCT, OPERATE, MAINTAIN, AND EXTEND A NATURAL GAS DISTRIBUTION PLANT AND SYSTEM, AND GRANTING THE RIGHT TO USE THE STREETS, ALLEYS, AND OTHER PUBLIC PLACES WITHIN THE PRESENT OR FUTURE CORPORATE LIMITS OF THE CITY OF LA VISTA, NEBRASKA; TO PROVIDE FOR SEVERABILITY, REPEAL OF ORDINANCES OR PARTS OF ORDINANCES IN CONFLICT HEREWITH AND AN EFFECTIVE DATE.

NOW THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF LA VISTA, SARPY COUNTY, NEBRASKA:

SECTION 1. AMENDMENT OF CODE OF ORDINANCES. The Code of Ordinances of the City of La Vista, Nebraska, be and hereby is amended by adding a new Chapter to be numbered Chapter 118, which shall be as follows:

### CHAPTER 118: NATURAL GAS FRANCHISE

#### SECTION 118.01 FRANCHISE GRANTED.

The City of La Vista, Nebraska, (hereinafter referred to as "City") hereby grants a non-exclusive franchise to Aquila, inc, d/b/a Aquila Networks, a Delaware corporation, (hereinafter called "Grantee"), its lessees, successors and assigns. Grantee is hereby granted the right, privilege, franchise, permission and authority to lay, construct, install, maintain, operate and extend in, along, over or across the present and future streets, alleys, avenues, bridges, public rights-of-way and public places as are now within the present or future limits of said City, a natural gas distribution system and all facilities necessary for the purpose of supplying natural gas or processed gas for all purposes to the inhabitants of said City and consumers in the vicinity thereof, and for the distribution of natural gas from or through said City to points beyond the limits thereof. Such facilities shall include, but not be limited to, all mains, services, pipes, conduits and appliances necessary or convenient for transmitting, transporting, distributing and supplying natural gas for all purposes for which it may be used, and to do all other things necessary and proper in providing natural gas service to the inhabitants of City and in carrying on such business. The laying or installation of additional pipe within the City and its extraterritorial zoning jurisdiction shall require a right-of-way permit for that purpose.

#### SECTION 118.02. TERM.

The franchise granted hereunder shall remain in effect for a period of twenty-five (25) years from the effective date of this Ordinance, as determined pursuant to state law; provided, however, that City or Grantee may terminate this Ordinance on the tenth (10th) anniversary of the effective date of this Ordinance, and every five (5) years thereafter until the franchise term expires. City or Grantee shall notify the other party in writing, no later than one hundred and eighty (180) days before the end of the initial term or each five (5) year anniversary thereafter that City desires not to renew the franchise.

#### SECTION 118.03 GOVERNING RULES AND REGULATIONS.

The franchise granted under this Ordinance is subject to all conditions, limitations and immunities now provided for, or as hereafter amended, and applicable to the operations of a public utility, by State or Federal law, The rates to be charged by Grantee for service within the present or future corporate limits of City and the rules and regulations regarding the character, quality and standards of service to be furnished by Grantee shall be under the jurisdiction and control of such regulatory body or bodies as may, from time to time, be vested by law with authority and jurisdiction over the rates, regulations and quality and standards of service to be supplied by Grantee. Provided however, should any judicial, regulatory or legislative body, having proper jurisdiction, take any action that precludes Grantee from recovering from its customers any cost associated with services provided hereunder, then Grantee and City shall renegotiate the terms of this Ordinance in accordance with the action taken, so as to allow Grantee to be made whole economically.

In determining the rights and duties of the Grantee, the terms of this franchise Ordinance shall take precedence over any conflicting terms or requirements contained in any other Ordinance enacted by the City. The foregoing notwithstanding, Grantee shall be and remain subject to all ordinances, rules, and regulations of the City now in effect, or which City might subsequently adopt, for the regulation of land uses or the protection of the health, safety, and general welfare of

# ORDINANCE RECORD

No. 72 B—REDFIELD & COMPANY INC., OMAHA

the public; provided, however, that Grantee hereby reserves the right to challenge the validity of any ordinance, rule or regulation City passes subsequent to the date of this ordinance, and to terminate this Ordinance upon Ninety (90) days advance written notification, if such subsequent ordinance, rule or regulation imposes any material new costs and/or burdens upon the Grantee, and provided that nothing herein shall be construed as a waiver by Grantee of any of its existing or future rights under state or federal law or a limitation upon the existing or future powers of the City under state or federal law.

If an energy supplier is unable to furnish an adequate supply of energy due to an emergency, an order or decision of a public regulatory body, or other acts beyond the control of the Grantee, then, the Grantee shall have the right and authority to adopt reasonable rules and regulations limiting, curtailing or allocating extensions of service or supply of energy to any customers or prospective customers, and withholding the supply of energy to new customers, provided that such rules and regulations shall be uniform as applied to each class of customers or prospective customers, and shall be non-discriminatory as between communities receiving service from the Grantee.

## SECTION 118.04 LOCATION, CONSTRUCTION AND MAINTENANCE OF COMPANY FACILITIES.

All mains, services and pipes which shall be hereafter laid or installed under this grant shall be located in public right-of-way and shall be located and laid so as not to obstruct or interfere with any existing or planned water pipes, drains, sewers, paving or other structures, and all such mains, services and pipes shall be laid in place subject to the reasonable approval of the City or subject to the reasonable approval of such representative as City may from time to time provide. Any pavements, sidewalks or curbing taken up and any and all excavations made shall be done in such a manner as to cause only such inconvenience to the inhabitants of City and to the general public as is reasonably necessary; and repairs and replacements shall be made promptly by Grantee, leaving such properties in as good as condition as existed immediately prior to excavation. If Grantee does not promptly perform and complete the necessary work to restore the public right-of-way of other public property, and fails to properly restore the public right-of-way within thirty (30) days after receipt of written notice by the City to Grantee of the condition, then the City may restore the public right-of-way or other public property. The City may seek reimbursement from Grantee for the reasonable expense of restoration for the work performed by the City or its agents.

Grantee agrees that for the term of this grant, it will maintain facilities and equipment sufficient to meet the current and future energy requirements of City, its inhabitants and industries. While constructing and maintaining its facilities and equipment, Grantee shall obtain permits as required by ordinance, except that in emergency situations, Grantee shall take immediate unilateral actions as it determines are necessary to protect the public health, safety, and welfare; in which case, Grantee shall notify City as soon as reasonably possible.

City will give Grantee reasonable notice of plans for Street improvements where paving or resurfacing of a permanent nature is involved that affect Grantee's facilities. The notice shall contain the nature and character of the improvements, the rights-of-way upon which the improvements are to be made, the extent of the improvements and the time when the City will start the work, and, if more than one right-of-way is involved, the order in which this work is to proceed. The notice shall be given to the Grantee a sufficient length of time, considering seasonable working conditions, in advance of the actual commencement of the work to permit the Grantee to make any additions, alterations, or repairs to its facilities.

## SECTION 118.05. STANDARD EQUIPMENT.

Grantee, in the construction, operation, and maintenance of the gas system in the City, shall use only pipes, material, and equipment that meet applicable federal, state, and local construction and safety codes. Grantee shall also use reasonably and legally required safety devices to protect the City and its residents from injury as required by federal, state, and local laws and regulations.

## SECTION 118.06. ODORIZING OF GAS.

Grantee shall odorize, as necessary, the gas provided within the City in accordance with applicable law and regulation.

## SECTION 118.07. EXTENSION OF COMPANY FACILITIES.

Upon receipt and acceptance of a valid application for service, Grantee shall, subject to its own

# ORDINANCE RECORD

No. 728—REDFIELD & COMPANY INC., OMAHA

economic feasibility criteria, make reasonable extensions of its distribution facilities to serve customers located within the current corporate limits of City; provided, that the Grantee shall not be obligated to construct or extend its mains or furnish gas or gas service within the City if Grantee, through no fault of its own, is unable to obtain delivery of an adequate supply of natural gas at or near the corporate limits of City to warrant the construction or extension of its mains; provided, further, that when the amount of natural gas supplied to Grantee at or near the City limits is insufficient to meet the additional firm requirements of connected or new customers, Grantee shall have the right to prescribe reasonable rules and regulations for allocating the available supply of natural gas for such additional firm requirements to domestic, commercial, and industrial consumers, in that order of priority.

## SECTION 118.08. RELOCATION OF COMPANY FACILITIES.

If City elects to change the grade of or otherwise alter any street, alley, avenue, bridge, public right-of-way or public place for a public purpose, Grantee, upon reasonable notice from City, shall remove and relocate its facilities or equipment situated in the public rights-of-way, if such removal is necessary to prevent interference and not merely for the convenience of the City, at the cost and expense of Grantee. If City orders or requests Grantee to relocate its facilities or equipment for the primary benefit of a commercial or private project, or as a result of the initial request of a commercial or private developer or other non-public entity, and such removal is necessary to prevent interference and not merely for the convenience of the City or other right-of-way user, Grantee shall receive payment for the cost of such relocation as a precondition to relocating its facilities or equipment. City shall consider reasonable alternatives in designing its public works projects so as not arbitrarily to cause Grantee unreasonable additional expense in exercising its authority under this section. City shall also provide a reasonable alternative location for Grantee's facilities. City shall give Grantee written notice of vacating of a public right-of-way. Vacating of a public right-of-way shall not deprive the Grantee of its right to operate and maintain existing facilities, until the reasonable cost of relocating the same are first paid to the Grantee.

Any person or corporation desiring to move a building or other structure along, or to make any unusual use of any Street, alley, avenue, bridge, public right-of-way or public place which shall interfere with the facilities or equipment of the Grantee, shall first give notice to the City and the Grantee and pay a sum sufficient to cover the expense and damage incident to the moving of Grantee's facilities and equipment.

## SECTION 118.09 INSURANCE.

Grantee shall maintain insurance at all times during the term of this Franchise in an amount not less than the City's maximum liability under the Nebraska Political Subdivisions Tort Claim Act, as amended from time to time, to cover and protect itself and the City as an additional insured from and against all claims, demands, losses, actions, judgments, costs, expenses, and liabilities which may arise or result, directly or indirectly, from or by reason of loss, injury, or damage to the City, its property, employees or agents, or to other persons or their property on account of or arising from the grant or exercise of this Franchise.

In addition to and not in limitation of the foregoing, Grantee shall be insured to provide coverage for all foreseeable and unforeseeable risks, injuries and damages, on account of or arising from this Franchise and such coverage shall include, but not be limited to the following types: (1) insurance which will protect the City from claims arising under workers' compensation law and any similar employee benefit law in such amounts as are required by state and federal statute, and with respect to an employer's liability for workers' compensation; (2) bodily injury and property insurance for comprehensive general liability (including explosion, collapse and underground), contractual liability (including that arising from this Franchise), personal injury (with employment exclusion deleted), and comprehensive automobile liability (including hired and non-owned vehicles). It is a condition of this Franchise that all policies waive governmental immunity as a defense in any action brought against the insured or any other party to this Franchise. Upon request by City, Grantee shall furnish proof of the insurance required under this Section.

## SECTION 118.10 ACCEPTANCE OF FRANCHISE.

Within sixty (60) days after the passage of this Ordinance, Grantee shall prepare and file a written acceptance of the franchise granted under this Ordinance with the Clerk of City. Failure of Grantee to so accept the franchise granted by this Ordinance within said period of time shall be deemed a rejection thereof by Grantee and the rights and privileges herein granted shall after the expiration of said period of sixty (60) days, if not so accepted, absolutely cease and terminate, unless said period of time shall be extended by further Ordinance duly passed for that purpose.

# ORDINANCE RECORD

No. 728—REDFIELD & COMPANY INC., OMAHA

## SECTION 118.11 FRANCHISE FEE.

Grantee shall pay to the City Treasurer a franchise fee based on a percentage of Grantee's gross revenues derived from sales or transportation of natural gas delivered within the City excluding sales or transportation to governmental agencies, departments, or other governmental bodies whether they be federal, state or local. The franchise fee shall be five (5) percent of gross revenues but may be amended by City from time to time to provide for such different rate as City's governing body may determine appropriate. Such franchise fee shall be in lieu of any and all fees and impositions of City based on gross revenues or license fees for the privilege of conducting a gas business within the City. Nothing herein shall be construed to exempt Grantee from payment of *ad valorem* property taxes or taxes in lieu thereof.

Grantee shall pay to the City on or before the 15th day of each month that portion of the fee applicable to gross receipts derived from sales or transportation of natural gas delivered within the City during the previous month. Any amount due which is not paid on or before the prescribed date shall draw interest at one percent (1%) per month, and after payment has been in default six (6) months, a penalty of five percent (5%) of the amount due, including interest, shall be added thereto in addition to the monthly interest charge.

For purposes hereof, gross revenues shall include all revenues derived from delivery of gas within the City of La Vista which utilize, in whole or in part, any pipes, containers or other equipment or form of delivery or storage over which Grantee has any ownership or control. Gross revenues shall include revenues derived in third party marketing arrangements, such as "Energy Option Programs" or other arrangements whereby the marketer or seller of the gas is a third party who utilizes Grantee's lines, containers, or other method, in whole or in part, to deliver gas within the City. In respect to any such third party arrangements, Grantee shall determine the sale price of the gas at the franchise rate and shall remit to City as part of its franchise fee an amount equal to the amount that would have been payable to City had the gas been sold to the consumer directly by Grantee.

## SECTION 118.12 FINANCIAL AND OPERATIONAL RECORD REQUIREMENTS.

Upon five days' notice, subject to confidential protection, and to the extent permitted by Nebraska law, the books, records, contracts, and other documents directly related to the Grantee's franchise and its public right-of-way use shall be open to reasonable inspection by the City, or by any person designated by the City, and Grantee shall provide within 30 days following request by the City, or any person designated by the City, all additional relevant information requested by the City or by any person designated by the City. To the extent permitted under Nebraska law, the City shall maintain the confidentiality of all information provided by the Grantee that is not in the public domain.

## SECTION 118.13 TRANSFER.

The Franchise granted under this Ordinance shall not be sold, leased, granted, conveyed, transferred, hypothecated or assigned to any person or exercised by any person other than Grantee without consent from the City, which consent may not be unreasonably withheld, and which consent is subject to the requirements of Nebraska Revised Statutes sections 66-1820 and 66-1821.

Notwithstanding the restrictions on transfers set forth above, no such consent shall be required whenever (a) Grantee has assigned the rights, and obligations under this Franchise Agreement to an affiliate of Grantee; provided that such affiliate has expressly assumed, in a writing delivered to City evidencing its ability to so assume, Grantee's obligations and responsibilities under the Franchise Agreement; provided, further, that Grantee shall remain fully liable for and shall not be relieved from the full performance of all obligations under this Agreement; or (b) Grantee has assigned all of Grantee's rights and obligations under this Franchise Agreement to any entity that has acquired, directly or indirectly, (i) control of Grantee, (ii) an entity into which Grantee has merged, (iii) an entity that has acquired all or substantially all of the assets of Grantee's Nebraska properties; or (iv) an entity to which Grantee has assigned, transferred, or pledged the rights and privileges under the Franchise Agreement, for mortgage or otherwise assigned its rights hereunder as security for indebtedness.

The provisions of this Section shall be equally applicable to any subsequent assignment or transfer by an assignee or transferee of Grantee. No approval or deemed approval of a transfer or assignment of this Franchise shall operate as a waiver or release of the City's right to condemn the System or any part thereof pursuant to Nebraska law.

# ORDINANCE RECORD

No. 728—REDFIELD & COMPANY INC., OMAHA

## SECTION 118.14 REGULATORY AUTHORITY.

The City expressly reserves, subject to Grantees express right to challenge the adoption or enforceability of such ordinances, rules, or regulations, the City's right and duty to adopt, in addition to the provisions in this Ordinance, ordinances, rules, and regulations as the City deems necessary to exercise its police power for the protection of the health, safety, and welfare of its citizens and their properties.

## SECTION 118.15. CONFIDENTIAL INFORMATION.

City acknowledges that certain information it might request pursuant to this franchise may be of a proprietary and confidential nature. If Grantee requests that any information provided by Grantee to City be kept confidential due to such proprietary or commercial value, City and its employees, agents, and representatives shall maintain the confidentiality of that information, to the extent allowed by law. If City is requested or required by legal or administrative process to disclose any such confidential information, City shall promptly notify Grantee of such request or requirement so that Grantee may seek an appropriate protective order or other relief. City shall use all reasonable efforts to ensure that the confidentiality of Grantee's confidential information is maintained.

## SECTION 118.16 FORCE MAJEURE.

It shall not be a breach or default under this Ordinance if either party fails to perform its obligations hereunder due to Force Majeure. Force Majeure shall include, but not be limited to, the following: 1) physical events such as acts of God, landslides, lightning, earthquakes, fires, freezing, storms, floods, washouts, explosions, breakage or accident or necessity of repairs to machinery, equipment or distribution or transmission lines; 2) acts of others such as strikes, work-force stoppages, riots, sabotage, insurrections or wars; 3) governmental actions such as necessity for compliance with any court order, law, statute, ordinance, executive order, or regulation promulgated by a governmental authority having jurisdiction; and any other causes, whether of the kind herein enumerated or otherwise not reasonably within the control of the affected party to prevent or overcome. Each party shall make reasonable efforts to avoid Force Majeure and to resolve such event as promptly as reasonably possible once it occurs in order to resume performance; provided, however, that this provision shall not obligate a party to settle any labor strike.

## SECTION 118.17 HOLD HARMLESS.

Grantee, during the term of the Franchise granted under this Ordinance, agrees to save harmless City from and against all claims, demands, losses and expenses arising directly out of the negligence of Grantee, its employees or agents, in the constructing, operating, and maintaining of distribution and transmission facilities or appliances of Grantee; provided, however, that Grantee need not save harmless City from claims, demands, losses and expenses arising solely out of the negligence of City, its employees or agents.

## SECTION 118.18 SEVERABILITY.

If any clause, sentence or section of this Ordinance is deemed invalid by any judicial, regulatory or legislative body having proper jurisdiction, the remaining provisions shall not be affected.

## SECTION 118.19 NON WAIVER.

Any waiver of any obligation or default under this franchise shall not be construed as a waiver of any future defaults, whether of like or different character.

## SECTION 118.20 REPEAL CONFLICTING ORDINANCES.

This ordinance, when accepted by Grantee as provided below, shall constitute the entire agreement between the City and the Grantee relating to this franchise and the same shall supersede all prior ordinances pertaining to this franchise agreement, and any terms and conditions of such prior ordinances or parts of ordinances in conflict herewith are hereby repealed. Ordinance No. 651 of the City of LaVista, Nebraska, is hereby repealed as of the effective date hereof.

## SECTION 118.21 EFFECT AND INTERPRETATION OF ORDINANCE.

The captions which precede each section of this ordinance are for convenience in reference only and shall not be taken into consideration in the interpretation of any of the provisions of this

# ORDINANCE RECORD

NO. 728—REDFIELD & COMPANY INC., OMAHA

ordinance.

## SECTION 118. 22. EFFECTIVE DATE AND ACCEPTANCE.

This Ordinance shall become effective and be a binding contract between the City and Grantee, upon its final passage and approval by City, in accordance with applicable laws and regulations, and upon acceptance by Grantee by written instrument within sixty (60) days of passage by the governing body, and filed with the City Clerk of the City of La Vista, Nebraska. The City Clerk shall sign and affix the community seal to acknowledge receipt of such acceptance, and return one copy to Grantee.

## SECTION 118. 23. NOTICES.

Any notices required to be given hereunder shall be sent to the following:

If to Grantee: Steve Pella, Vice President  
Aquila, Inc., d/b/a Aquila Networks  
1600 Windhoek  
Lincoln, Nebraska 68512

If to City: City Clerk  
8116 Park View Boulevard  
La Vista, Nebraska 68128

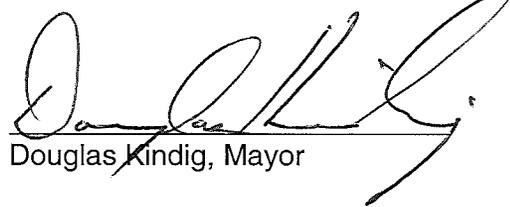
SECTION 2. SEVERABILITY. If any section, subsection, sentence, clause or phrase of this Ordinance is, for any reason, held to be unconstitutional, unenforceable or invalid, such unconstitutionality, unenforceability or invalidity shall not affect the constitutionality, enforceability or validity of the remaining portions of this Ordinance. The Mayor and City Council of the City of La Vista hereby declare that they would have passed this Ordinance and each section, subsection, sentence, clause and phrase hereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases be declared unconstitutional, unenforceable or invalid.

SECTION 3. REPEAL. All ordinances and parts of ordinances in conflict with this Ordinance are hereby repealed.

SECTION 4. EFFECTIVE DATE. This Ordinance shall take effect and be in force from and after its passage, approval and publication in pamphlet form, as provided by law.

PASSED AND APPROVED THIS 6TH DAY OF DECEMBER 2005.

CITY OF LA VISTA

  
Douglas Kindig, Mayor

ATTEST:

  
Rita M. Ramirez, CMC  
City Clerk

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