

**Council Meeting: December 7, 2010****SUBJECT: Ordinance to Renew a Franchise Agreement for Conveyance of Nitrogen Gas — Air Products and Chemicals Incorporated and Air Products Manufacturing Corporation****REPORT IN BRIEF**

Air Products and Chemicals Incorporated and Air Products Manufacturing Corporation (Air Products) has requested a renewal of their non-exclusive franchise to transmit nitrogen gas within City limits. The attached ordinance would grant such a renewal for fifteen years. Air Products has had a nitrogen gas franchise with the City since 1978. Nitrogen Gas is used by many of the major electronics companies in the area in the production of electronic components and in the packaging process. Nitrogen is an inert, non-combustible gas. Nitrogen gas pipeline within the City is made of carbon steel and is pressurized to no more than 150 lbs per square inch. Council amended the Nitrogen Gas Ordinance in 1983, 1991 and again in 1995 to reflect internal reorganizations within Air Products. The new franchise agreement reflects rates that are similar to those charged by other local municipalities.

EXISTING POLICY

Socio-Economic Subelement Goal 5.1B Maintain and establish policies that promote a strong economy which provides economic opportunities for all Sunnyvale residents within existing environmental, social, fiscal and land use constraints.

BACKGROUND

On September 12, 1978, the City Council passed and adopted Ordinance No. 1906-78 granting to Air Products and Chemicals, Inc., a 15-year non-exclusive franchise for conveyance of nitrogen through pipelines under, along and across public streets in the City of Sunnyvale.

Ordinance No. 2090-83, passed and adopted on December 20, 1983, allowed the assignment of the franchise to Air Products Manufacturing Corporation, a wholly-owned subsidiary of Air Products and Chemicals, Inc.

Ordinance No. 2373-91 was passed and adopted on September 3, 1991, granting an amendment to the franchise agreement to allow both Air Products

Manufacturing Corporation and Air Products and Chemicals, Inc. to be listed as franchisees.

On July 11, 1995, City Council approved Ordinance No. 2507-95 granting a 15 year franchise renewal to Air Products which would expire on December 31, 2010.

Transmission through pipelines is the preferred method of delivering Nitrogen, versus shipping the product with tanker trucks. Air Products has consistently submitted their franchise estimates and final payments on time and has provided the City with the appropriate bonding documents.

The current franchise agreement reflects a rate charged per lineal foot and by location which is similar to other local municipalities. For example, the cities of Milpitas and Fremont, who have comparable Nitrogen transmission systems, charge rates of \$.124 per lineal foot of pipeline in service and \$125 per connection annually, versus the proposed Sunnyvale rates of \$.125 per lineal foot and \$125 per connection. There is a built in escalator in the franchise agreement which is based on changes in the Index of Wholesale Prices of Industrial Commodities for the San Francisco Bay Area. The franchise is for a 15 year period. Additions to the existing pipeline system will still need to go through the appropriate environmental, design and inspection requirements of the City.

FISCAL IMPACT

The new franchise fee remains the same at \$.125 per lineal foot and \$125 per connection annually. Franchise fees are not being recommended for increase in order to remain competitive with other local agencies. General Fund revenues from this franchise totaled \$31,326 during fiscal year 2009-10.

PUBLIC CONTACT

Public contact was made by posting the Council agenda on the City's official-notice bulletin board outside City Hall, in the Council Chambers lobby, in the Office of the City Clerk, at the Library, Senior Center, Community Center, and Department of Public Safety; posting the agenda and report on the City's Web site; and making the report available at the Library and the Office of the City Clerk.

ALTERNATIVES

1. City Council adopt the ordinance granting Air Products and Chemicals, Incorporated and Air Products Manufacturing Corporation a 15-year non-exclusive franchise for nitrogen gas transmission throughout the City.
2. City Council rejects the ordinance.

RECOMMENDATION

Staff recommends Alternative No. 1: City Council adopt the ordinance granting Air Products and Chemicals, Incorporated and Air Products Manufacturing Corporation a 15-year non-exclusive franchise for nitrogen gas transmission throughout the City.

Approving this franchise will allow a number of electronics and packaging companies in the City to maintain efficient operations.

Reviewed by:

Marvin Rose, Director of Public Works
Prepared by: Michael Chan, City Property Administrator

Approved by:

Gary M. Luebbers
City Manager

Attachments

A. Ordinance

ORDINANCE NO. _____

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF SUNNYVALE AWARING NON-EXCLUSIVE FRANCHISE TO AIR PRODUCTS MANUFACTURING CORPORATION AND AIR PRODUCTS AND CHEMICALS, INC.

WHEREAS, on September 12, 1978, by Ordinance No. 1906-78, Air Products and Chemicals, Inc., was granted a 15-year non-exclusive franchise for the conveyance of nitrogen gas through pipelines under, along and across public streets within the City of Sunnyvale; and

WHEREAS, by Ordinance No. 2090-83, adopted December 20, 1983, this franchise was assigned to Air Products Manufacturing Corporation; and

WHEREAS, by Ordinance No. 2373-91, adopted September 3, 1991, this franchise was amended to name both Air Products Manufacturing Corporation and Air Products and Chemicals, Inc. as "Grantees"; and

WHEREAS, by Ordinance 2507-95, adopted July 25, 1995, Grantees were granted a 15-year non-exclusive franchise for the conveyance of nitrogen gas through pipelines under, along and across public streets within the City of Sunnyvale; and

WHEREAS, the Grantees have abided by all of the terms of its franchise and the 15-year franchise granted on July 25, 1995, will terminate at 12:00 midnight on December 31, 2010; and

WHEREAS, Grantees have applied for a renewed 15-year extension of their franchise with the City; and

WHEREAS, pursuant to Section 1602 of the Charter and Chapter 15.12 of the Sunnyvale Municipal code ("SMC"), the City Council, after notice duly given, held a hearing at which any protest could be made to the award of a franchise to Grantees, in accordance with their application and the recommendations of the City Manager;

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF SUNNYVALE DOES HEREBY ORDAIN AS FOLLOWS:

SECTION 1. FRANCHISE GRANTED. The City of Sunnyvale hereby grants to Air Products Manufacturing Corporation and Air Products and Chemicals, Inc., a non-exclusive franchise for the purpose of installing, maintaining and using pipes and related appurtenances under, along and across public streets and places within the City of Sunnyvale for transmitting and distributing nitrogen gas for any and all purposes. This franchise is limited to the transmission and distribution of nitrogen gas only.

SECTION 2. TERM. The term for which this franchise is granted is fifteen (15) years, commencing January 1, 2011, and terminating at 12:00 midnight on December 31, 2025.

SECTION 3. CONSIDERATION. The Grantees shall pay to the City of Sunnyvale, as consideration for the granting of this franchise, the amounts set forth in the "Franchise

Agreement," a copy of which is attached hereto as Exhibit "A," and incorporated herein.

SECTION 4. GENERAL CONDITIONS. This franchise is granted subject to the terms and conditions set forth in the Franchise Agreement attached hereto as Exhibit "A."

SECTION 5. ACCEPTANCE OF FRANCHISE TERMS AND CONDITIONS. This franchise shall not become effective until the Grantees accept the franchise by executing the Franchise Agreement within ten (10) days after adoption of this ordinance.

SECTION 6. APPROVAL AND EXECUTION OF FRANCHISE AGREEMENT. The Franchise Agreement is hereby approved, and the City Manager is authorized to execute it on behalf of the City of Sunnyvale.

SECTION 7. CEQA EXEMPTION. The City Council finds, pursuant to Title 14 of the California Code of Regulations, Section 15061(b)(3), that this ordinance is exempt from the requirements of the California Environmental Quality Act (CEQA) in that it is not a Project which has the potential for causing a significant effect on the environment.

SECTION 8. SEVERABILITY. If any section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be invalid, such decision or decisions shall not affect the validity of the remaining portions of this ordinance. The City Council hereby declares that it would have passed this ordinance, and each section, subsection, sentence, clause and phrase thereof irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases be declared invalid.

SECTION 9. EFFECTIVE DATE. This ordinance shall be in full force and effect thirty (30) days from and after the date of its adoption.

SECTION 10. POSTING AND PUBLICATION. The City Clerk is directed to cause copies of this ordinance to be posted in three (3) prominent places in the City of Sunnyvale and to cause publication once in The Sun, the official publication of legal notices of the City of Sunnyvale, of a notice setting forth the date of adoption, the title of this ordinance, and a list of places where copies of this ordinance are posted, within fifteen (15) days after adoption of this ordinance.

Introduced at a regular meeting of the City Council held on _____, 2010, and adopted as an ordinance of the City of Sunnyvale at a regular meeting of the City Council held on _____, by the following vote:

- AYES:
- NOES:
- ABSTAIN:
- ABSENT:

ATTEST:

APPROVED:

City Clerk

Mayor

Date of Attestation: _____

(SEAL)

APPROVED AS TO FORM AND LEGALITY:

David Kahn, City Attorney

FRANCHISE AGREEMENT

THIS FRANCHISE AND AGREEMENT, dated December 1, 2010, is between the City of Sunnyvale, a municipal corporation of the State of California ("CITY"), and AIR PRODUCTS MANUFACTURING CORPORATION and AIR PRODUCTS AND CHEMICALS, INC., corporations organized under the State of Delaware ("GRANTEES").

RECITALS

WHEREAS, GRANTEES have filed a verified application for a nonexclusive Franchise to transmit and distribute nitrogen gas through pipelines under, along, and across public streets within the CITY; and

WHEREAS, on July 25, 1995, the City Council passed and adopted Ordinance No. 2507-95 after Notice and Public Hearing, approving issuance of such Franchise;

WHEREAS, the Air Products Franchise has been in operation since 1978;

NOW, THEREFORE, in consideration of the award of a nonexclusive Franchise and of the mutual covenants and conditions as set forth herein, it is agreed as follows:

SECTION 1. FRANCHISE GRANTED. CITY grants to GRANTEES a nonexclusive franchise for the purpose of installing, maintaining and using pipes and related appurtenances under, along and across public streets and places within the CITY for transmitting and distributing nitrogen gas for any and all purposes. This franchise shall extend to such pipelines as are presently existing and shown on Exhibit A, attached to this Agreement and incorporated into it by reference, as well as to any future extensions of such lines or new lines for which GRANTEES apply for and receive an encroachment permit, pursuant to the provisions of Sunnyvale Municipal Code ("SMC") Chapter 13.08, or as the same shall be later amended. GRANTEES shall conduct their operations under the franchise in strict compliance with the Sunnyvale City Charter and Chapters 13.08 and 15.12 of the SMC, and any amendments thereto, together with all applicable laws and regulations of the State of California, the United States, or any regulatory agency having jurisdiction, as well as with all other applicable requirements of the SMC.

SECTION 2. TERM. The term for which this franchise is granted is fifteen years, commencing January 1, 2011, and terminating at 12 midnight on December 31, 2025.

SECTION 3. CONSIDERATION. The GRANTEES shall pay to CITY as consideration for the granting of this franchise a sum or sums computed as follows:

- (a) An annual fee equal to \$0.125 per lineal foot of each gas carrying

pipe now and hereinafter to be installed within the public streets, ways, alleys, and other public places within the CITY. No gas carrying pipe over eight (8) inches nominal inside diameter shall be installed under this franchise.

(b) An additional annual fee per customer location within the CITY having a connection to this franchise system equal to the product of One Hundred Twenty-five Dollars and No Cents (\$125.00) and the nominal inside diameter of the pipe, expressed in inches, at the property line of each customer location connected to each gas carrying pipe. In calculating the annual fee per customer location connection, GRANTEES will include in calculating this fee any customer who has a connection for service during any part of the calendar year or portion thereof for which the fee is payable. Each separate location receiving nitrogen gas shall occasion payment of the above annual fee.

(c) In no event will GRANTEES pay CITY pursuant to this Section 3 an amount less than Two Thousand Dollars (\$2,000.00) per calendar year, or portion thereof, for the term of the franchise. This Two Thousand Dollars (\$2,000.00) payment shall be made each year in advance for each calendar year or portion thereof commencing January 1, 2011, and for the term of the franchise. In addition to the Two Thousand Dollars (\$2,000.00) advance payment, any balance of said fees not paid by the advance will be paid concurrent with the filing with the City Clerk of a verified statement showing in detail the lineal feet of gas pipe installed, and a list of customers having connections during the prior calendar year or portion thereof under this franchise. Filing with the City Clerk shall be done for the prior calendar year or portion thereof on the 10th day of January of each succeeding calendar year or portion thereof, or by the 10th day after franchise termination, whichever occurs first.

SECTION 4. FEE ADJUSTMENTS. The franchise payments provided for herein shall be subject to prospective adjustment every two (2) years to reflect changes in the Index of Wholesale Prices of Industrial Commodities for the San Francisco Area ("Index") as compiled and published by the United States Bureau of Labor Statistics, from the Base Index for the month of January 1977, with the first adjustment to take place as of January 1, 1997. Reference shall be made to the latest Index figure published (preliminary or final) and available during the month of December. Any adjustment hereunder shall be effective as of January 1 and shall continue to apply until a change in accordance with this paragraph. In no event, however, will the amount payable by GRANTEES under the franchise be less than the amount payable as prescribed in Section 3 above, without adjustment.

SECTION 5. DESIGN REVIEW AND INSPECTION FEES. The CITY shall have the right of prior review and approval of vertical and horizontal location of the pipe proposed to be installed under, along, and across public streets and places of the CITY, under the provisions of Chapter 13.08 of the SMC. For the review of the engineering documents and inspection of pipes installed, and other required services, the CITY shall be paid a fee as provided by the latest fee resolution adopted by the city council for right of way encroachments. The fee

charged herein is in addition to the cost of any permit, license, or approval required by existing federal, state, or local laws.

SECTION 6. GRANTEES' DUTIES UPON CUSTOMER SERVICE DISCONTINUANCE. The line of any customer whose service is discontinued shall be suitably capped off by GRANTEES.

SECTION 7. INSTALLATION OF PIPELINES IN STREET RIGHTS OF WAY AND CITY CONTROLLED EASEMENTS. Before anything is done on a street right of way or in a CITY controlled easement, GRANTEES shall comply with the provisions of Chapter 13.08 of the SMC or as the same shall be later amended, and the imposition of any requirements in any permits issued pursuant to such chapter.

All transmission crossings of a street by a pipeline shall be bored or jacked rather than laid in an open trench, unless otherwise approved by the city engineer.

Wherever possible, pipelines shall be installed behind curb and gutter rather than in the street pavement. GRANTEES shall restore the area behind and adjacent to the curb and gutter as nearly as practicable to the condition before such installation. If it is not possible to lay the pipe behind the curb and gutter or to bore a crossing, the city may require a structural overlay as specified by the city engineer to restore the lane in which the trench lies, or if the trench lies between lanes, up to 12 feet on each side of the trench when completed. A parking lane shall be considered a lane for the purposes of this section. Where the structural overlay extends to the lip of a gutter, a triangular wedge of the existing adjacent pavement shall be removed from alongside the lip in order that a smooth jointer will be formed between pavement and gutter.

SECTION 8. GRANTEES' ABANDONMENT OF PIPELINES. If GRANTEES abandon use of any or all of the pipelines installed under or pursuant to the franchise, then title to such pipelines shall vest in the CITY, unless, at CITY's option, it orders GRANTEES to remove such pipelines and restore the property to its original condition.

SECTION 9. PERFORMANCE GUARANTEE. GRANTEES shall submit to the CITY an appropriate surety or other bond in the amount of One Hundred Thousand Dollars (\$100,000.00) guaranteeing performance by GRANTEES of their obligations under the franchise. This performance bond shall be in addition to any other bonds required pursuant to the city's Encroachment Ordinance contained in Chapter 13.08 of the SMC, or imposed as a condition of any encroachment permit issued to GRANTEES.

SECTION 10. INSURANCE. GRANTEES shall procure and maintain during the term of the Franchise insurance against claims for injuries to persons or damages to property which may arise from or in connection with the

Franchise.

Minimum Scope and Limits of Insurance GRANTEES shall maintain limits no less than Commercial General Liability of \$1,000,000 per occurrence and \$2,000,000 annual aggregate for bodily injury, personal injury and property damage. ISO Occurrence Form CG 0001 or equivalent is required.

Deductibles and Self-Insured Retentions

Any deductibles or self-insured retentions must be declared and approved by the City of Sunnyvale. The GRANTEES shall guarantee payment of any losses and related investigations, claim administration and defense expenses within the deductible or self-insured retention.

Other Insurance Provisions

The Commercial General Liability policy shall contain, or be endorsed to contain, the following provisions:

1. The City of Sunnyvale, its officials, employees, agents and volunteers are to be covered as additional insureds with respects to liability arising out of activities performed by or on behalf of the GRANTEES; products and completed operations of the GRANTEES; or premises owned, occupied or used by the GRANTEES. The coverage shall contain no special limitations on the scope of protection afforded to the City of Sunnyvale, its officers, employees, agents or volunteers.
2. For any claims related to this Franchise, the GRANTEES' insurance shall be primary. Any insurance or self-insurance maintained by the City of Sunnyvale, its officers, officials, employees, agents and volunteers shall be excess of the GRANTEES' insurance and shall not contribute with it.
3. Any failure to comply with reporting or other provisions of the policies including breaches of warranties shall not affect coverage provided to the City of Sunnyvale, its officers, officials, employees, agents or volunteers.
4. The GRANTEES' insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.
5. Each insurance policy required by this clause shall be endorsed to state that coverage shall not be suspended, voided, cancelled by either party, reduced in coverage or in limits except after thirty (30) days' prior written notice by certified mail, return receipt requested, has been given to the City of Sunnyvale.

Acceptability of Insurers

Insurance is to be placed with insurers with a current A.M. Best's rating of no less than A:VII, unless otherwise acceptable to the City of Sunnyvale.

Verification of Coverage

GRANTEES shall furnish the City of Sunnyvale with an original Certificate of Insurance affecting the coverage required. The certificates are to be signed by a person authorized by that insurer to bind coverage on its behalf.

SECTION 11. INDEMNIFICATION. GRANTEES shall appear and defend all actions against the CITY arising out of the exercise of the Franchise, and this Agreement, and shall indemnify and save CITY, its officers, employees and agents, harmless of and from all claims, demands, actions or causes of action of every kind and description resulting directly or indirectly, arising out of, or in any way connected with the exercise of the Franchise.

SECTION 12. CITY AUDIT OF FISCAL RECORDS. GRANTEES shall permit such examinations of their records by CITY as are necessary and material to the determination of the performance of the franchise obligations.

SECTION 13. PURCHASE OR CONDEMNATION BY CITY. There is hereby reserved to the CITY the right to acquire the property of the GRANTEES utilized in the performance of this franchise, by purchase or through the exercise of the right of eminent domain, in accordance with the conditions set forth in Section 1605 of the Charter, and applicable state law.

SECTION 14. ACCEPTANCE OF FRANCHISE TERMS AND CONDITIONS. This franchise shall not become effective until the GRANTEES execute the acceptance of franchise set forth at the end hereof within ten (10) days after passage of this ordinance. By accepting this franchise, the GRANTEES covenant and agree to perform and be bound by each and all of the terms and conditions imposed by the Charter, all applicable requirements of the SMC, including, but not limited to Chapter 15.12, and Chapter 13.08, all applicable state, federal, and local laws, and the Franchise.

IN WITNESS WHEREOF, the parties hereto have caused this Franchise and Agreement to be executed: By CITY this ____ day of _____, 2010; and by GRANTEES this ____ day of _____, 2010.

ATTEST:
City Clerk

By _____
Deputy City Clerk
(SEAL)

By _____
City Manager
CITY OF SUNNYVALE

APPROVED AS TO FORM:

City Attorney

By _____
Title:

AIR PRODUCTS AND
MANUFACTURING CORPORATION

By _____
Title:

AIR PRODUCTS AND CHEMICALS,
INC.