



**City Council
Special Meeting**

Agenda

**February 2, 2022
6:00 PM**

CALL TO ORDER

RESOLUTIONS FOR THIRD READING

RESOLUTION NO. 2022-02

A RESOLUTION AUTHORIZING THE SAFETY-SERVICE DIRECTOR TO
ENTER INTO AN AGREEMENT WITH CONSTELLATION NEWENERGY-
GAS DIVISION, LLC, AND DECLARING AN EMERGENCY.

Utilities: Woods, Keener

ADJOURN AT THE CALL OF THE PRESIDENT



City Council
City of Mount Vernon
Mount Vernon, OH 43050

SCHEDULED

RESOLUTION 2022-02

Meeting: 02/02/22 6:00 PM
Dept: Utilities
Woods, Keener
Category: Agreement
Prepared By: Todd Hill
Initiator: Todd Hill
DOC ID: 3479 C

A RESOLUTION AUTHORIZING THE SAFETY-SERVICE DIRECTOR TO ENTER INTO AN AGREEMENT WITH CONSTELLATION NEWENERGY-GAS DIVISION, LLC, AND DECLARING AN EMERGENCY.

WHEREAS, a governmental natural gas aggregation program provides an opportunity for residential and small business customers collectively to participate in the potential benefits of natural gas deregulation through lower natural gas rates which they would not otherwise have access to individually; and

WHEREAS, participation in such programs is authorized under Section 4929.26, Ohio Revised Code; and

WHEREAS, this Council seeks to continue the program for the residents, businesses and other natural gas consumers in the City, as permitted by law.

NOW, THEREFORE, BE IT ORDAINED by the Council of the City of Mount Vernon, State of Ohio:

SECTION I: That the Safety-Service Director is hereby authorized to enter into an agreement with ~~Volunteer Energy Services, Inc.~~ [Constellation NewEnergy-Gas Division, LLC](#).

SECTION II: This Council finds and determines that it is in the best interest of the City, its residents, businesses and other natural gas consumers located within the corporate limits of the City to establish such “opt-out” programs in the City. Eligible persons purchasing natural gas from any utility service operating within the City of Mount Vernon may participate in such opt-out programs through agreement with such approved suppliers.

SECTION III: It is found and determined that all formal actions of this Council concerning and relating to the adoption of this Ordinance were taken in an open meeting or meetings of this Council and any of its committees that resulted in such formal action, were in meetings open to the public and in full compliance with all legal requirements, including without limitation, those set forth in section 121.22 of the Ohio Revised Code.

SECTION IV: That this Ordinance is hereby declared to be an emergency measure, necessary for the immediate preservation of the public peace, health, safety, welfare and convenience of the citizens of the City of Mount Vernon, and for the additional reason that this Ordinance is required to be immediately effective in order to file a certified copy of this Ordinance, and provided it receives the affirmative vote of five or more members of Council, it shall take effect and be in force immediately upon its passage and approval of the Mayor; otherwise, it shall take effect and be in force at the earliest period allowed by law.

HISTORY:

01/24/22 City Council FIRST READING

Resolution No. 2022-02 was given a first reading.

01/31/22 City Council SECOND READING

Resolution No. 2022-02 was given a second reading. A special Council meeting was scheduled for 6:00 p.m. on Feb. 2, 2022 for further consideration of the resolution.

Natural Gas Aggregation Agreement

City of Mount Vernon (“**City**”), and Constellation NewEnergy – Gas Division, LLC (“**Constellation**”), entered into this Natural Gas Aggregation Agreement (the “**Agreement**”) as of April 1, 2022 (the “**Effective Date**”). Constellation and City are sometimes referred to individually as a “**Party**” and collectively as the “**Parties**.”

Recitals:

- A. City has obtained the required approvals and has enacted the necessary legislation in order to establish a natural gas aggregation program (the “Governmental Aggregation Program”) to offer negotiated rates to the City’s residents and businesses.
- B. Constellation is in the business of selling natural gas and related services to residential, commercial and industrial customers and other organizations and is a PUCO approved competitive natural gas supplier.
- C. City has chosen Constellation to be the natural gas supplier for the Governmental Aggregation Program during the Term and in return Constellation agrees to supply natural gas to at the Aggregation Group.
- D. City is or will be authorized to act on behalf of the Aggregation Group to purchase retail natural gas services.
- E. The Parties are familiar with governmental aggregation programs and recognize there are certain time constraints and limitations inherent with the enrollment process, and as such, are prepared to take commercially reasonable actions to secure prices for the Aggregation Group as the City desires.

Now, therefore, in consideration of the mutual premises and promises of the parties, the adequacy and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. DEFINED TERMS. Capitalized terms not otherwise defined in this Agreement will have the meanings set forth below. In this Agreement, unless the context otherwise indicates a contrary intention, the singular includes the plural and vice versa, and where any word or phrase is given a defined meaning any other part of speech or other grammatical form in respect of the word or phrase has a corresponding meaning.

“**Aggregation Group**” means all Aggregation Members.

“**Aggregation Member**” means an Eligible Consumer that participates in the Governmental Aggregation Program.

“**COH**” means Columbia Gas of Ohio, the local distribution company owning and/or controlling and maintaining the distribution system required for delivery of natural gas to Eligible Consumers.

“**Delivery Point**” means any existing and future points of interconnection between COH’s transmission and/or distribution system and those of a third party pipeline supplying natural gas to COH.

“**Eligible Consumers**” means City residents and businesses that are approved to participate in the COH choice program.

“**Law**” means any law, rule, regulation, ordinance, statute, judicial decision, administrative order, rule of the public utilities commission, public service commission, independent system operator, regional transmission organization, or similar state commission, agency or body having jurisdiction over the Parties, natural gas transactions, or natural gas distribution systems.

“**NYMEX**” means the New York Mercantile Exchange, or its successor.

“**PUCO**” means the Public Utilities Commission of Ohio.

“**Trigger**” means the request by City for Constellation to financially set/lock-in the value of the NYMEX component of the Customers’ price for the remainder of the term of the Customer Agreements.

“**Utility**” means Columbia Gas of Ohio, the local distribution company owning and/or controlling and maintaining the distribution system required for delivery of natural gas to Eligible Consumers.

2. CONSTELLATION AS THE EXCLUSIVE SUPPLIER FOR NATURAL GAS. City is a PUCO certified governmental aggregator and is authorized to arrange for the supply of retail natural gas services on behalf of the Aggregation Group. City agrees that Constellation will be the exclusive provider of retail natural gas supply services for the Aggregation Group during the Term.

3. TERM. This Agreement shall commence on the Effective Date and, unless terminated earlier as otherwise provided in this Agreement, will continue for a period of twelve (12) months (the “**Term**”). Upon expiration of the Term, this Agreement may be extended upon the mutual agreement of the Parties. City shall have the right to begin negotiations with Constellation and other natural gas suppliers during the Term to ensure a seamless transition and continuation of the Governmental Aggregation Program at the end of the Term. If City chooses a new supplier during the Term as the gas supplier for a following term, Constellation shall cooperate with City and the new supplier in a timely manner to provide a list of Customers, who according to Constellation’s records are participating in the Governmental Aggregation Program at

the time such request is made. The City will have the right to contract with a new supplier during the Term, but only for natural gas flow following the Term.

4. CONSTELLATION SCOPE OF WORK.

(a) Constellation is responsible for obtaining an Eligible Consumer list from the Utility and/or any other source Constellation deems appropriate. City will cooperate with Constellation to assemble and verify the Eligible Consumer list. City will share its resources to help mitigate the cost of assembling and verifying the Eligible Consumer list, including giving notice to the previous supplier of its intent to retain Constellation for the Governmental Aggregation Program and obtaining the list of Eligible Consumers who, according to the previous supplier's records, are participating in the Governmental Aggregation Program at the time such request is made. Both the City and Constellation must approve any Eligible Consumer list to be used for any mailing.

(b) Constellation will implement the initial and ongoing opt-out enrollment procedures for Eligible Consumers and will develop and mail all program announcements and materials at its expense.

(c) Constellation shall send one (1) opt-out mailing to Eligible Consumers regarding participation in the Governmental Aggregation Program. Constellation and City may mutually agree to send additional mailings.

(d) The addition of Aggregation Members after the initial opt-out period established by Constellation shall be in the sole discretion of Constellation. Aggregation Members that move from one physical address or meter location to another within the City may continue to participate in the Governmental Aggregation Program by contacting Constellation and providing reasonable notice of move and other relevant information needed by Constellation to verify such move.

(e) Constellation shall be responsible for the payment of any switching fee imposed by the Utility resulting from an Aggregation Member's switch to Constellation in connection with participation in the Governmental Aggregation Program.

(f) In the event PUCO requires information or documents from the City regarding the Governmental Aggregation Program, Constellation agrees to assist in compiling such information to the extent Constellation has access to such information.

(g) If at any time during this agreement City approves opt-in aggregation, the Parties will work together to implement a mutually agreeable opt-in program for all Eligible Consumers within the City. If City and Constellation agree to implement an opt-in aggregation program, City will exclusively endorse Constellation for such opt-in aggregation program.

5. CONSTELLATION NATURAL GAS SUPPLY OFFER(S). Constellation shall make the following offer available to Eligible Consumers during the Initial Enrollment Period.

During the Term, in order to determine the monthly rate per Ccf for Aggregation Members, Constellation shall use the NYMEX close on the 19th day of the month for the applicable gas flow month plus a fixed adder of \$0. per Ccf unless the City Triggers a fixed NYMEX price. City hereby represents and warrants that it is authorized to act as agent regarding natural gas pricing decisions for all Aggregation Members. As authorized agent, City can request to Trigger the NYMEX price for the remaining months of the Term at any time; provided, however that City may only Trigger a NYMEX price once for each month of the Term (e.g., multiple Triggers may not be executed for one month, but City may choose to Trigger at different times for different months). If the NYMEX price is fixed at any time pursuant to such a request by City, Constellation shall determine the monthly rate per Ccf by using such fixed NYMEX price for the applicable gas flow month plus a fixed adder of \$0. per Ccf. Aggregation Members will not be charged an early termination fee by Constellation for leaving the program prior to the end of the Term.

6. NATURAL GAS SUPPLY SERVICE. Constellation will supply natural gas to the Aggregation Group in accordance with the General Terms and Conditions of service (that will be substantially in the form attached hereto as Exhibit A) and all applicable rules and regulations, including applicable PUCO and Utility rules. Constellation will deliver natural gas to the Delivery Point. Title and risk of loss related to the natural gas transfer to the Aggregation Member at the Delivery Point, and the Aggregation Member is responsible for all transmission, distribution, and other costs (including taxes and other fees) related to the final delivery to the facilities to which the natural gas account(s) relate as well as the Aggregation Member's use of the natural gas. While Constellation will arrange for the delivery of natural gas to the Aggregation Member by the Utility, Constellation will have no liability or responsibility for matters within the control of the Utility, which include maintenance of pipelines and systems, service interruptions, loss of service, quality of the natural gas, deterioration of services, or meter readings.

7. ELIGIBLE CONSUMER INFORMATION. City will provide authorization and documentation in order for the Utility to release to Constellation any necessary load forecast information and Eligible Consumer information.

8. USE OF CITY'S NAME AND LOGO. City hereby agrees to allow Constellation to use City's name and logo (if any) in any and all enrollment materials (including electronic media and Internet) and press releases for publicity and/or marketing purposes. The City will have the right to review and approve all such materials that utilize the City's name and/or logo prior to distribution. Additionally, City authorizes Constellation to represent that Constellation is the City's

exclusive provider of retail natural gas supply for the term of this Agreement. City shall not release any promotional material referencing Constellation (including press releases) without Constellation's prior approval.

9. TERMINATION. Upon the occurrence of a Regulatory Event, the adversely affected Party shall give notice to the other Party that a Regulatory Event has occurred. Upon such notice, the Parties shall enter into negotiations to amend or replace this Agreement so that the adversely affected Party is restored as nearly as possible to the economic positions it would have been in but for the occurrence of the Regulatory Event. If the Parties are unable to agree upon an amendment to the Agreement within sixty (60) days, the adversely affected Party shall have the right, upon fifteen (15) days written notice, to terminate this Agreement. The following events constitute a "Regulatory Event":

(i) Illegality. If, due to the adoption of, or change in, any applicable law, or in the interpretation of any applicable law by any judicial or governmental authority with competent jurisdiction, it becomes unlawful for a Party to perform any obligation under this Agreement.

(ii) Adverse Government Action. If (a) any regulatory agency or court having jurisdiction over the Agreement requires a material change to the terms of the Agreement that adversely and materially affects a Party, or (b) there is any regulatory or judicial action that adversely impacts a Party's performance of any of its obligations under the Agreement.

10. FORCE MAJEURE. "Force Majeure" means an event that is not within the reasonable control of the Party claiming Force Majeure ("Claiming Party"), and that by the exercise of due diligence, the Claiming Party is unable to overcome in a commercially reasonable manner, and such event will not be deemed a breach or default under this Agreement. Force Majeure includes, but is not limited to, acts of God; fire; war; terrorism; flood; earthquake; civil disturbance; sabotage; facility failure; curtailment, disruption or interruption of firm transportation service by the transporter (including without limitation as the result of an operational flow order) or supply into Constellation's supply pools; declaration of emergency by the Utility; regulatory, administrative, or legislative action, or action or restraint by court order or governmental authority; or any act or omission of a third party not under the control of the Claiming Party (including without limitation the Utility). Notwithstanding any other provision of this Agreement, where a Party is unable to carry out any obligation under this Agreement due to a Force Majeure event (other than a payment obligation, which will not be excused for Force Majeure), this Agreement will remain in effect but such obligation will be suspended for the period necessary as a result of the Force Majeure, provided that: (i) to the extent reasonably possible, the Claiming Party gives the other Party prompt written notice describing the particulars of the Force Majeure, including but not limited to, the nature and date of the occurrence and the expected duration of the Force Majeure; (ii) the suspension of performance is of no greater scope and of no longer duration than is required by the Force Majeure; and (iii) the Claiming Party uses commercially reasonable efforts to remedy its inability to perform.

11. CHOICE OF LAW; ATTORNEY FEES AND EXPENSES. The validity, performance, and construction of this Agreement will be governed and interpreted in accordance with the laws of Ohio, without giving effect to conflict of law principles. EACH PARTY HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVES ANY RIGHT SUCH PARTY MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY ACTION, SUIT OR PROCEEDING DIRECTLY OR INDIRECTLY ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED BY THIS AGREEMENT. If either Party pursues court action to enforce its rights under this Agreement, the non-prevailing Party shall promptly reimburse the prevailing Party for all its reasonable attorney fees, expenses and costs.

12. ASSIGNMENT. Neither Party may assign its rights or obligations under this Agreement without written consent from the other party; provided, however, Constellation may assign any of its rights and obligations under this Agreement without consent to an Affiliate or to any person or entity succeeding to all or substantially all of Constellation's assets or business or the division or region of Constellation to which this Agreement relates or into which Constellation is merged or otherwise combined or reorganized; provided the succeeding entity agrees to be bound to this Agreement.

13. ENTIRE AGREEMENT; AMENDMENT. This Agreement embodies the Parties' entire agreement and understanding, supersedes all prior agreements and understandings (whether written or oral) regarding the subject matter of this Agreement, and may not be contradicted by any prior or contemporaneous oral or written agreement. A facsimile copy of either Party's signature will be considered an original for all purposes under this Agreement, and each Party will provide its original signature upon request. No amendment to this Agreement will be valid or given any effect unless signed by both Parties. Any alteration, addition, or modification made by Association to the preprinted terms of this Agreement shall be void and without any effect. The section headings used in this Agreement are for reference purposes only and will in no way affect the meaning of the provisions of this Agreement.

14. WAIVER AND SEVERABILITY. Failure to provide notice of, or object to, any default under this Agreement will not operate or be construed as a waiver of any future default, whether like or different in character. If any portion of this Agreement, or application thereof to any person or circumstance, is held legally invalid, the remainder will not be affected and will be valid and enforced to the fullest extent permitted by law and equity, and there will be deemed substituted for the invalid provisions such provisions as will most nearly carry out the mutual intent of the Parties as expressed in this Agreement to the fullest extent permitted by applicable Law.

15. NOTICES. To be effective, all notices must be in writing delivered by hand, by first class mail, postage prepaid, by electronic facsimile transmission (with verification of delivery), or by express carrier to the addresses provided below. A Party may change its address by providing notice of such change in accordance herewith.

Constellation:

Constellation NewEnergy – Gas Division, LLC
Attn: Contract Administration
9400 Bunsen Parkway, Suite 100
Louisville, KY 40220
Phone: (502) 426-4500
Fax: (502) 214-6381

City:

City of Mount Vernon
Attn:
Address
City, State, Zip
Phone:
Fax:

16. MUTUAL REPRESENTATIONS AND WARRANTIES. Each Party warrants and represents to the other the following: (a) it is duly organized, validly operating and in good standing under the laws of the jurisdiction of its formation; (b) it is authorized and qualified to do business in the jurisdictions necessary to perform under this Agreement; (c) the execution, delivery and performance of this Agreement are duly authorized and do not violate any governing documents, contracts to which it is a party or applicable Law; (d) there is no material event(s) or other agreement(s) which would impair that Party's right, authority or ability to execute this Agreement and otherwise consummate the transactions contemplated by this Agreement, or which would represent any conflict of interest with the City, any Eligible Consumer or Constellation and (e) all governmental and other authorizations, approvals, consents, notices and filings that are required with respect to this Agreement have been obtained or submitted and it has complied with all terms and conditions of such authorizations, approvals, consents, notices and filings.

17. ADDITIONAL REPRESENTATIONS, WARRANTIES AND COVENANTS OF EACH PARTY. Constellation warrants and represents that it is a PUCO approved competitive retail natural gas supplier. City warrants, represents and covenants, as of the Effective Date, that: (a) City's execution and delivery of this Agreement, and its performance of its obligations hereunder, are in furtherance, and not in violation, of the municipal purposes for which the City is organized pursuant to its authorizing statutes and regulations; (b) City has obtained all approvals needed and has complied with all applicable rules, regulations and ordinances in order to lawfully execute this Agreement; and (c) City is a PUCO certified governmental aggregator and will maintain such certification throughout the Term.

18. DEFAULT; TERMINATION FOR DEFAULT. An "Event of Default" means any one of the following: (a) any representation or warranty made by a Party in this Agreement proves to have been incorrect, false or misleading when made or ceases to remain true during the term of this Agreement, if not cured within five business days after written notice from the other Party; or (b) a Party's breach of this Agreement or the failure by a Party to perform any obligation set forth in this Agreement and where within five (5) business days after receipt of written notice from the other Party it is not cured in circumstances where such failure or breach is curable (if the failure or breach is not curable no cure notice need be provided). If an Event of Default occurs, the non-defaulting Party may, in its sole discretion, terminate this Agreement effective upon written notice to the defaulting Party. EXCEPT AS OTHERWISE EXPRESSLY PROVIDED HEREIN, CITY'S RIGHT TO TERMINATE THIS AGREEMENT SHALL BE THE SOLE REMEDY AVAILABLE TO CITY FOR ANY BREACH OF THIS AGREEMENT BY CONSTELLATION.

19. INDEMNIFICATION. Each Party shall hold harmless, as well as defend and indemnify, the other Party and its affiliates, and all of their respective officers, directors, members, shareholders, associates, employees, agents, representatives, successors and assigns from and against any and all liabilities, damages, claims, charges, fees or taxes, penalties, fines, costs and expenses (including attorneys' fees) incurred or claimed and resulting from or related to: (a) any breach or default of the indemnifying Party's obligations under this Agreement; or (b) any of the indemnifying Party's negligent acts or omissions or willful misconduct, or any such act, omission or misconduct on the part of its employees or agents. These indemnification obligations shall survive any termination of this Agreement.

20. LIMITATION OF LIABILITY. Notwithstanding any other provision of this Agreement to the contrary, the entire liability of either Party for any and all claims of any kind arising from or relating to this Agreement will be limited to direct actual damages only, subject in all cases to an affirmative obligation on the part of the claiming Party to mitigate its damages. NEITHER PARTY SHALL BE LIABLE TO THE OTHER FOR ANY SPECIAL, INDIRECT, INCIDENTAL, EXEMPLARY, CONSEQUENTIAL OR PUNITIVE DAMAGES OF ANY CHARACTER, IRRESPECTIVE OF WHETHER CLAIMS OR ACTIONS FOR SUCH DAMAGES ARE BASED UPON CONTRACT, WARRANTY, NEGLIGENCE, STRICT LIABILITY OR ANY OTHER REMEDY AT LAW OR EQUITY. The provisions of this Section 20 shall survive the expiration or termination of this Agreement for any reason.

21. NO WARRANTY. CITY ACKNOWLEDGES AND AGREES THAT NO WARRANTY, DUTY, OR REMEDY, WHETHER EXPRESSED, IMPLIED, OR STATUTORY, IS GIVEN OR INTENDED TO ARISE OUT OF THIS AGREEMENT EXCEPT AS OTHERWISE EXPRESSLY STATED HEREIN, AND CONSTELLATION SPECIFICALLY DISCLAIMS ALL OTHER WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING ANY WARRANTY OF

MERCHANTABILITY OR FITNESS FOR A GENERAL OR PARTICULAR PURPOSE OR USE.

22. NO THIRD PARTY BENEFICIARIES. This Agreement is for the sole and exclusive benefit of the Parties hereto, and no third party will have any rights under this Agreement whatsoever.

23. RELATIONSHIP OF THE PARTIES. Constellation is an independent contractor under this Agreement, and nothing contained herein shall be construed as creating a relationship of employer and employee or principal and agent between the Parties.

24. ACCEPTANCE. *This Agreement shall not be binding or enforceable against Constellation unless and until signed by an authorized representative of Constellation.*

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed by their duly authorized representatives as of the Effective Date.

Constellation NewEnergy – Gas Division, LLC

City of Mount Vernon

By: _____

By: _____

Name: _____

Name: _____

Title: _____

Title: _____

Attachment: CityofMountVernon_GA(Opt-out)_04-01-22 (1) (2022-02 : Gas Aggregation Contract)