

ORDINANCE NO.

AN ORDINANCE GRANTING TO BLACK HILLS WYOMING GAS, LLC d/b/a BLACK HILLS ENERGY, ITS SUCCESSORS AND ASSIGNS, THE RIGHT, PERMISSION AND AUTHORITY TO CONSTRUCT, MAINTAIN AND OPERATE A GAS TRANSMISSION AND DISTRIBUTION SYSTEM, INCLUDING MAINS, PIPES, CONDUITS, SERVICES AND OTHER STRUCTURES, IN, UNDER, UPON, OVER, ACROSS AND ALONG THE STREETS, ALLEYS, BRIDGES AND PUBLIC PLACES WITHIN THE PRESENT AND FUTURE CORPORATE LIMITS OF THE TOWN OF SARATOGA, WYOMING FOR THE FURNISHING, TRANSMISSION, DISTRIBUTION AND SALE OF GAS WHETHER ARTIFICIAL, NATURAL, MIXED OR OTHERWISE FOR LIGHTING, HEATING, DOMESTIC, INDUSTRIAL AND OTHER USES IN SAID CITY, LIMITING THE TERM OF SAID GRANT, PRESCRIBING THE TERMS AND CONDITIONS UNDER WHICH SAID COMPANY MAY OPERATE, AND REPEALING ORDINANCE NO. 733.

SECTION 1. DEFINITION OF TERMS

- 1.1 Terms.** For the purpose of this Franchise, the following terms, phrases, words, and abbreviations shall have the meanings ascribed to them below. When not inconsistent with the context, words used in the present tense include the future tense, words in the plural number include the singular number, and words in the singular number include the plural number:
- a) "Affiliate" means an entity that owns or controls, is owned or controlled by, or is under common ownership with Grantee.
 - b) "Gas Utility Service" means the receipt of natural gas from a transporting pipeline at any receipt point and/or distribution of Customers of natural gas service.
 - c) "Gas Utility System" or "System" means, the facility consisting of a set of transportation and distribution pipelines and control equipment or other equipment that is used to permit Grantee to provide Gas Utility Service to Customers in Town. The term includes the Gas Utility System as a whole, or any part of the Gas Utility System, including but not limited to any electronic devices, pipelines, valves, anchors, wires, cable, conduit, vaults, gas compressors, meters, laterals, manholes and other appliance fixtures and property necessary and pertinent to the operation of the Gas Utility System.
 - d) "Town" shall mean the Town of Saratoga, Wyoming, or the lawful successor, transferee, or assignee thereof.
 - e) "Franchise" shall mean this document, all exhibits thereto, all matters incorporated by reference and all amendments thereto, issued by the Town, which collectively authorize construction, operation and

maintenance of the Gas Utility System for the purpose of offering Gas Utility Service to Customers.

- f) "Grantee means Black Hills Wyoming Gas, LLC, d/b/a Black Hills Energy or the lawful successor, transferee, or assignee thereof.
- g) "Gas" means any mixture of hydrocarbons or of hydrocarbons and non-combustible gases, in a gaseous state, consisting essentially of methane.
- h) "Person" means an individual, partnership, association, joint stock company, trust corporation, or governmental entity.
- i) "Public Service Commission (PSC)" means the public service commission of Wyoming, created and established by Wyoming State statute to regulate and supervise public utilities within the state.
- j) "Public Ways" shall mean the surface of, and the space above and below, any public street, highway, bridge, alley, sidewalk, parkway, or other public right-of-way, including, but not limited to public easement, dedicated strip, or public right-of-way now or hereafter held by the Town and dedicated for compatible uses that, within its proper use and meaning, and consistent with the terms, conditions and provisions pursuant to which the same was created or dedicated, properly is used by Grantee for the purpose of installing, maintaining and operating the Gas Utility System.
- k) "Service Area" means the present municipal boundaries of the Town and shall include any future additions thereto by annexation or other legal means.
- l) "Therms" shall mean one hundred thousand (100,000) British thermal units.
- m) "Customer" means a person or user of the Gas Utility System who lawfully receives Gas Utility Service therefrom.

SECTION 2. GRANT OF FRANCHISE

- 2.1 Grant** In consideration of the benefits to be derived by the Town and the public thereof from the construction and operation of a gas transmission and distribution system the Town hereby grants a non-exclusive franchise to Grantee which authorizes the right, permission and authority to construct, maintain and operate a gas distribution system within the Service Area and for said purpose there are hereby further granted to Grantee the right, permission and authority to lay, install, construct, maintain and operate in, under, upon, over, across and along all of the public ways within the Service Area all mains, pipes, services, conduits and structures necessary or convenient for the furnishing, distribution and sale of gas whether artificial, natural, mixed or otherwise for lighting, heating, domestic,

commercial, industrial and other uses, and for transmitting such gas into, through or beyond the limits of said Town to other towns, cities and Customers.

- a) Any other use of Gas Utility System requires written authorization of the Town and amendment of this Franchise.

2.2 Term. The Franchise granted pursuant to this Ordinance shall be an initial term of twenty-five (25) years from the effective date of the Franchise as set forth in Section 2.3, unless otherwise lawfully terminated in accordance with the terms of this Franchise; provided, however, the Town reserves the right at the end of each ten (10) year period from and after the effective date of the Franchise, to renegotiate the provisions of this ordinance with the Grantee, its successors or assigns.

2.3 Acceptance; Effective Date. Grantee shall accept the Franchise granted pursuant hereto by signing this ordinance and filing same with the Town Clerk within sixty (60) days after the passage and final adoption of this Franchise by the Town. Subject to the acceptance by Grantee, and subject to all conditions precedent being satisfied, the effective date of this Franchise shall be January 1, 2025.

2.4 Rights Reserved. The Town reserves its rights under its lawful police powers. The Town, among other things, does not waive any rights it may have under any requirements of local law or regulations as amended, including zoning codes, codes regarding building permits and fees, or time or manner of construction in accordance with the standard specifications for street construction, and all other applicable codes.

2.5 Effect on Prior Franchise. Ordinance No. 733 shall be of no further force and effect as of the effective date of this Franchise, but except as otherwise agreed, shall remain in effect for purposes of matters or claims relating to acts or omissions occurring prior to the effective date of this Franchise.

2.6 Public Service Commission Rules and Regulations. If any section, subsection, phrase, provision or language of this Franchise is found in conflict with the rules and regulations or requirements of the Public Service Commission, only the specific section, subsection, phrase, provision or language in conflict shall be null and void, and all other sections, subsections, phrases, provisions and language of this Franchise shall remain in full force and effect.

SECTION 3. FRANCHISE FEE

3.1 Franchise Fee.

- a) As compensation for the use of valuable Public Ways, Grantee shall pay the Town \$0.0085 per therm for gas delivered to residential and commercial customers within the service area. The franchise fee payment shall be due and payable quarterly on or before the fifteenth day of January, April, July and October and shall be computed upon the total volume in therms during the previous quarter. The Town may on each five (5) year

anniversary of this franchise adjust or modify the fee per therm; provided however, the Town will be limited to a total annual franchise fee of up to an imputed 3% of revenue, based on the preceding five (5) year average annual imputed revenue for all volumes transported on Grantee's distribution system within the Town, with each 5 year review period limited to an imputed 1% of revenue increase, based on the preceding five (5) year average annual imputed revenue for all volumes transported on Grantee's distribution system within the Town.

- b) The Town must provide 60 days written notice to the Grantee prior to any such anniversary of such adjustment or modification. If 60-days written notice is not provided by Town to Grantee, the franchise fee in effect shall continue.
- c) Such payment shall be in lieu of any and all other fees, charges, licenses, taxes or assessments which the Town may impose for the rights and privileges herein granted or for the privilege of doing business within the Service Area and, in the event any such fee, charge, license, tax or assessment shall be imposed by the Town, the payment to be made in accordance with the provisions of this section shall be refunded in an amount equal to the annual burden of such fee, charge, license, tax or assessment imposed upon the Grantee. Ad Valorem property taxes imposed generally upon all real and personal property within the Service Area shall not be deemed to affect the obligation of the Grantee under this section.

3.2 No Accord or Satisfaction. Acceptance of any franchise fee payment shall not operate as an accord or satisfaction, or waiver of any right under the Franchise or law, provided, however, unless the Town shall commence an action within five years of the due date of the payment or Town's right to recovery on any payment, the collection of such franchise fee shall be deemed barred.

3.3 Reporting. Each franchise fee payment shall be accompanied by a report reflecting total volumes in therms by category of customer class applicable to payment and attested to by the person principally responsible for the financial operations of Grantee. Grantee shall at all times keep and maintain a full, true, and correct account of volumes transported on Grantee's distribution system within the Town. Grantor reserves the right to audit and recompute any and all amounts paid under and pursuant to the franchise. No acceptance of any payment made shall be construed as a release, waiver or as an accord and satisfaction of any claim grantor may have for further or additional sums payable under the franchise, or for the performance of any other obligation under the franchise.

SECTION 4. GENERAL INSTALLATION AND OPERATIONAL STANDARDS

4.1 General Conditions on Use.

The Grantee is further granted the right, privilege and authority to excavate in, occupy and use any and all streets, alleys, viaducts, bridges, roads and lanes under the supervision of the properly constituted authority for the purpose of bringing gas into, within and through the Town, and supplying gas to said Town and the

inhabitants thereof and in the territory adjacent thereto, provided however, that the Grantee shall so locate its plants, works, transmission and distribution structures, equipment, mains and pipes within said Town in a manner to meet with the approval of the Town and further in locating said facilities shall do so in such manner as to cause minimum interference with the proper use of streets and alleys and to cause minimum interference with the rights or reasonable convenience of property owners whose property adjoins any of the said streets, and alleys. Should it become necessary for the Grantee, in exercising its rights and performing its duties hereunder, to interfere with any graveled or paved streets, roads or alleys, or any other public or private improvement, the Grantee shall repair at its own expense in a workmanlike manner subject to the approval by the Town and in accordance with the provisions of the Town Municipal Code, such graveled or paved street, road, alley, or other improvement after the installation of its pipes or other structures. In the event such repair and associated clean up is not made within a reasonable period of time, which in no event shall be longer than thirty (30) days, unless weather or other causes beyond the parties' control prevent the replacement of the paving or surface, of notice to Grantee, the Town may at its option, replace such paving or surface and associated clean up at its costs and Grantee agrees to pay said costs immediately upon receipt. Grantee shall be responsible for ensuring that the work of contractors and subcontractors is performed consistent with the Franchise and applicable law. The Grantee shall use due care not to interfere with or damage any water mains, sewers, or other structures now in place or which may hereafter be placed in said streets, alleys, or other public places, and said Grantee shall, at its own expense, repair in a workmanlike manner subject to the approval of the Town and in accordance with the provisions of "the Town Municipal Code, any such water mains, sewers, or other structures which are damaged through the action of the Grantee, provided, however, that the Town may make such repairs and charge the reasonable cost thereof to the Grantee.

- a) Grantee shall, at its cost, install, construct, operate and maintain its Gas Utility System according to Town codes and regulations so as to permit the Town to install, construct, maintain, or operate any public works, public improvements, or other publicly-owned facilities or systems
- b) Grantee may not endanger nor unreasonably interfere with the lives or property of persons; unreasonably interfere with property of the Town or any public utility; or unnecessarily hinder or obstruct use of the Public Ways. The Franchise does not establish priority for use of Public Ways over holders of other permits or franchises. The Town shall control distribution of space in the Public Ways as per Chapter 12.08 in its entirety of the Saratoga Municipal Code but may not exercise that authority unreasonably.
- c) The Gas Utility System shall be installed in Public Ways and other places within the limits of the Town after coordinating said installation with the Town's designee.
- d) Without obtaining the prior written approval of the Town, Grantee shall not install

or erect its Gas Utility System in or on public property, rights-of-way or in any privately- owned area within the Town that has not yet become a Public Way but is designated or delineated as a proposed Public Way on any subdivision plat submitted for approval by the Town.

- e) In addition to requirements of local law and conditions established by the utilities whose facilities are used by the Gas Utility System, all construction, operation and maintenance shall be performed in substantial accordance with good engineering practices, and without limitation, in substantial accordance with the rules and regulations of the PSC and the terms and conditions of Town codes and State statutes as revised from time to time.

4.2 Accuracy of Maps. The Town does not guarantee the accuracy of any maps showing the horizontal and vertical location of existing infrastructures. In Public Ways, where necessary, the location of Town public utilities (water and sewer), shall be verified by excavation according to the provisions of the Wyoming Underground Facilities Notification Act, Wyoming State Statute 37-12-301 through 37-12-302, 2004 Edition.

4.3 Maps and Plats. Upon request, the Company must promptly and confidentially provide the Town complete and accurate mapping information for any of its Gas Facilities.

4.4 Gas Utility Locates. Grantee will locate gas facilities in accordance with Wyoming statute, to include locates for planning and design projects.

4.5 Relocation at Request of Town. If the Town elects to change or alter the grade of any public way or to construct new or additional water or sewer lines, Grantee, upon being directed by the Town's designee, shall, where the same becomes necessary by reason of change of grade or construction of water or sewer lines, move or relay its mains or service pipes; provided, Grantee shall be compensated by Town for costs incurred by Grantee in relocating lines or facilities.

SECTION 5. GAS UTILITY SYSTEM FACILITIES, EQUIPMENT, AND SERVICES

5.1 Gas Utility System Design Review Process. Grantee shall meet with Town when upgrades to the Gas Utility System are anticipated for the upcoming year or upon the Town's request.

5.2 Gas Utility System Maintenance.

- a) The Grantee shall maintain and operate its structures, apparatus, mains, pipe and other equipment and render efficient service in accordance with the rules and regulations of the PSC and the terms and conditions of Town codes and State statutes as revised from time to time.
- b) Whenever the delivery or supply capability of Grantee's Gas Utility System, due to any cause whatsoever not limited to force majeure, is such that Grantee is unable

to deliver to Customers served by Grantee the quantity of gas which the Customers require, Grantee shall have the right to prescribe reasonable rules and regulations for allocating the available quantities of gas among such Customers.

- c) Grantee shall have the right, when properly identified, to enter the premises of Customers at reasonable hours for the purpose of reading meters, to examine the piping, appliances and other equipment relating to Grantee's service and to ascertain loads and make necessary tests.

SECTION 6. LIABILITY AND INDEMNITY

6.1 Indemnity. Grantee shall indemnify, defend, and save the Town harmless from all loss or damages sustained by the Town on account of any suit, judgment, execution, claim, or demand (including reasonable legal fees incurred) resulting from or arising out of Grantee's negligent or willful acts or omissions whether authorized or unauthorized under the Franchise that (1) arise out of Grantee's use or attempted use of the Public Ways; and (2) arising out of any claim as a result of Grantee's operation of the System; or for Grantee's invasion of the right of privacy, libel, slander, copyright violation or patent infringement; provided, however, Grantee's obligation to indemnify and hold harmless the Town under this Franchise shall not apply with respect to any negligent or willful acts or omissions of the Town or its agents or contractors. Town shall notify Grantee promptly after the presentation of any claim or demand, either by suit or otherwise, made against the Town on account of any action or omission by Grantee which is subject to indemnification under this Provision. The duty to indemnify shall include the duty to pay all necessary costs the Town incurs in connection with defending against action of claim, including its reasonable attorney's fees. Grantee's compliance with these indemnity provisions shall in no way limit any other remedies available to the Town under this Franchise or at law or equity. The obligations under this paragraph shall not extend to any injury, loss, or damages to the extent it is caused by the act, omission, error, professional error, mistake, negligence, or other fault of the Town, elected or appointed officials, its officers, agents, boards or its employees.

6.2 No Waiver of Immunities. Notwithstanding the above, nothing in this Franchise shall be read to constitute or to require a waiver of any rights of the Town under the doctrine of sovereign immunity.

SECTION 7. FORFEITURE

The franchise may be forfeited, at the option of the Town or Grantee for failure to observe the material terms and conditions set forth in this ordinance. Forfeiture may be exercised by written notice to the Town or Grantee of the failure to observe the terms and conditions of this ordinance. Provided however, the defaulting party shall

have a reasonable amount of time to cure such failure or refusal. In the event of any failure or violation, the Town may sue in its own name in the manner provided by law for the forfeiture of the franchise without the necessity of resorting to procedures in quo warranto. Further, in the event of any such action, the party (Town or Grantee) which obtains a judgment entered in its favor shall be entitled to payment of all reasonable attorneys' fees and costs incurred by the other party. The exercise of the remedy of forfeiture shall not preclude exercise of any other right or remedy given to the Town by law, whether exercised concurrently or subsequently.

SECTION 8. SUPPLY OF GAS

In the event the available supply of gas shall at any time fail or become insufficient to supply the needs of the public of said Town, or should Grantee for any reason be unable to furnish the service herein contemplated, or upon the termination of this franchise for any reason whatsoever, Grantee shall have the right to remove any and all of its pipe and other equipment or property from said Town, but in such event Grantee shall restore the streets, alleys and other public places to as good condition as before such removal, and will hold said Town harmless from damage and expense incident to such removal. In the event Grantee elects to exercise this right of removal, Grantee shall provide security in an amount sufficient to cover costs of restoring and repairing said streets, alleys and other public places prior to removal of any lines.

SECTION 9. TRANSFER

- 9.1 **Transfer.** Grantee shall notify Town forty-five (45) days prior to assignment of this Franchise to any non-affiliated entity.

SECTION 10. MISCELLANEOUS

- 10.1 **Effect of Preemption: Federal and State Law.** Grantee and Town must comply with all applicable provisions of federal and state law. If the Town's ability to enforce any Franchise provision is preempted, then the provision shall be deemed preempted but only to the extent and for the period the preemption is required by law. If, as a result of a change in law or otherwise, the provision would again be enforceable, it shall be enforceable without the requirement of further action on the Town's part.
- 10.2 **Severability.** If any section, subsection, sentence, clause or phrase of this Franchise is for any reason held illegal, invalid, or unconstitutional by the decision of any court of competent jurisdiction, or by any state or federal regulatory authority having jurisdiction thereof, such decision shall not affect the validity of the remaining portion hereof.

- 10.3 Acts of God.** Grantee shall not be deemed in default or violation of provisions of this Franchise where performance was rendered impossible by war or riots, civil disturbance, tornadoes, floods or other natural catastrophes, or other events beyond Grantee's control, and the Franchise shall not be revoked or Grantee penalized for such violation, provided Grantee takes immediate and diligent steps to bring itself back into compliance and to comply as soon as possible with the Franchise under the circumstances without endangering the health, safety, and integrity of Grantee's employees or property, or the health, safety, and integrity of the public or public or public or private property.
- 10.4 Other Matters.** If, for any other reason beyond its control, Grantee is unable to comply with the terms and conditions of this Franchise, or if the Town determines that there are issues that may be beyond its control to address and which ought to be addressed by amendments to this Franchise, then the parties shall meet to discuss these issues in good faith and to establish such reasonable amendments, extensions and other changes to the Franchise requirements as they agree are appropriate.
- 10.5 Notice.** Unless otherwise expressly agreed to by the parties, every notice or response to be served upon the Town or Grantee shall be in writing, and shall be deemed to have been duly given to the required party five (5) business days after having been posted in a properly sealed and correctly addressed envelope, postage prepaid, at a Post Office or branch thereof regularly maintained by the U.S. Postal Service.

The notices or responses to Grantee shall be addresses as

follows:

Black Hills Energy
7001 Mt. Rushmore Rd.
Rapid City, SD 57702

The notices or responses to the Town shall be addressed as follows:

Town of
Saratoga
Attention: Mayor
P.O. Box 486
Saratoga, Wyoming 82331

- 10.6 No Waiver.** The failure of either party, upon one or more occasions, to exercise a right or to require compliance or performance under the Franchise or any other applicable law shall not be deemed to constitute a waiver of such right or a waiver of compliance or performance for any other occasion, unless such right has been specifically waived in writing. Nothing in this franchise shall be read to constitute or require a waiver of any rights of the Town under the doctrine of sovereign immunity or as provided in the Wyoming Governmental Claims Act.
- 10.7 Remedies Cumulative.** Except as otherwise expressly provided herein, remedies

provided herein are cumulative and in addition to other rights either party may have at law or equity or under the Franchise; the exercise of one remedy shall not foreclose the exercise of others, nor shall it relieve either party of its obligation to comply with any provision of the Franchise.

- 10.8 Compliance with Applicable Law.** The parties shall at all times be subject to and shall comply with all applicable Federal and State laws and regulations.
- 10.9 Time is of the Essence.** In determining whether Grantee has substantially complied with the Franchise, the parties agree that time is of the essence to the Franchise.
- 10.10 Descriptive Headings.** The headings set forth herein are descriptive only.
- 10.11 Choice of Law, Venue.** This Franchise shall be governed by the laws of the State of Wyoming. Any action regarding the Franchise, its terms, or the rights and responsibilities of the parties shall be brought only in the State or Federal District Courts of Wyoming. If any legal action is instituted to enforce any of the terms of this agreement, the prevailing party's reasonable attorney's fees and all costs of the action including court costs, expert witness fees and all other actual expense incurred in the prosecution or defense of the action shall be paid by the other party.
- 10.12 Effective Date.** This Franchise shall be in full force and effect from and after its final passage and publication as required by law. Upon acceptance by Grantee, this Franchise shall be held to constitute a binding contract between the Town and Grantee, subject to its terms and conditions.

BE IT FURTHER ORDAINED: That Ordinance No. 733 is hereby repealed.

Passed, adopted and approved this _____ day of _____, 20____.

TOWN OF SARATOGA, WYOMING
A Municipal Corporation

CHUCK DAVIS, MAYOR

ATTEST:

CITY CLERK

(SEAL)

BLACK HILLS WYOMING GAS LLC
dba BLACK HILLS ENERGY

Name:

Title:

Date:

1st Reading:

2nd Reading:

3rd Reading:

Publish: