

## CHAPTER 110

# NATURAL GAS FRANCHISE

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**110.01 FRANCHISE GRANTED.** The City of Okoboji, Iowa (hereinafter referred to as “Grantor” or “City”), hereby grants a nonexclusive franchise to Black Hills/Iowa Gas Utility Company, LLC d/b/a Black Hills Energy, a Delaware limited liability 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 easements as are now within the present or future limits of said Grantor, a natural gas distribution system and all facilities necessary for the purpose of supplying natural gas or processed gas and other operations connected therewith or incident thereto for all purposes to the inhabitants of said Grantor and consumers in the vicinity thereof, and for the distribution of natural gas from or through said Grantor to points beyond the limits thereof. Such facilities shall include, but not be limited to, all mains, services, pipes, conduits and all other apparatus and appliances necessary or convenient for 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 Grantor and in carrying on such business.

Grantee agrees for and on behalf of itself, its lessees, successors and assigns that all authority and rights in this chapter contained shall at all times be subject to all rights, power and authority now or hereafter possessed by the Grantor to regulate the manner in which Grantee shall use the streets, alleys, bridges and public places of the Grantor and concerning the manner in which Grantee shall use and enjoy the franchise herein granted.

**110.02 TERM.** The rights and privileges granted hereunder are not exclusive and shall remain in effect for a period of Twenty-Five (25) years from the effective date of the ordinance codified by this chapter<sup>†</sup>. The City may cancel this franchise on the fifteenth (15<sup>th</sup>) or twentieth (20<sup>th</sup>) anniversary of this agreement by notifying Grantee in writing of its desire to do so, said notification to be given not more than thirty (30) days before the fifteenth (15<sup>th</sup>) or twentieth (20<sup>th</sup>) anniversary, respectively, of this agreement. If Grantee is not notified of the cancellation by the fifteenth (15<sup>th</sup>) or twentieth (20<sup>th</sup>) anniversary, then the franchise shall continue without cancellation until the twenty-fifth (25<sup>th</sup>) year. The anniversary date shall be the date this franchise is accepted by Grantee or otherwise effective by operation of law.

**110.03 GOVERNING RULES AND REGULATIONS.** The franchise granted hereunder is subject to all conditions, limitations and immunities now provided for, or as

<sup>†</sup> **EDITOR’S NOTE:** Ordinance No. 223, awarding a gas franchise for the City, was passed and adopted on December 9, 2014.

hereafter amended, and applicable to the operations of a public utility, by state or federal law. Grantee agrees for and in behalf of itself, its lessees, successors and assigns, that all authority and rights in this ordinance contained shall at all times be subject to all rights, power and authority now or hereafter possessed by Grantor, to regulate the manner in which Grantee shall use the streets, alleys, bridges, and public places of said Grantor and concerning the manner in which Grantee shall use and enjoy the franchise rights and privileges contained herein.

Grantee agrees for and on behalf of itself, its lessees, successors and assigns, that for and during the term and period of this grant, it will maintain in the Grantor an adequate, modern, standard and sufficient gas system and equipment and to maintain and operate the same in a modern and adequate fashion. The Grantee shall, at all times, maintain an adequate pressure and supply of clean, standard gas of the British Thermal Unit heating value of not less than that prescribed in its rules and regulations relating thereto in effect and on file from time to time with the State Utilities Board or other competent authority having jurisdiction in the premises. Should the British Thermal Units fall below the limitation set forth in its appropriate rules and regulations, the rate then in effect shall be automatically and correspondingly lowered and reduced during any period or periods of time in which such lower British Thermal Unit value shall be furnished. The Grantor shall have the privilege of requesting Grantee to furnish satisfactory proof of British Thermal Unit content of the gas.

The rates to be charged by Grantee for service within the present or future corporate limits of Grantor 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 Grantor shall renegotiate the terms of this Ordinance in accordance with the action taken. The Grantor may intervene or take such other reasonable lawful actions on matters before the Iowa Utilities Board which are related to Grantee's regulated natural gas service provided within Grantor's corporate boundaries.

**110.04 PROVISION FOR INADEQUATE ENERGY SUPPLIES.** 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, and are in compliance with rules and regulations established by the Iowa Utilities Board.

**110.05 CONSTRUCTION AND MAINTENANCE OF GRANTEE'S FACILITIES.** 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 Grantor and 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. The Grantee shall use such safeguards as may be necessary to prevent injury to persons or property during such

construction work and upon its completion, all pavement shall be replaced and all obstruction shall be removed at the expense of the Grantee and to the satisfaction of the Grantor. In the event that the Grantee shall fail to comply with the provision of this section after having been given reasonable notice, the Grantor may do such work as needed to properly repair said thoroughfare and the cost thereof shall be repaid to the Grantor by the Grantee.

The Grantee in constructing and maintaining said gas distribution system, and in entering and using said streets, highways, avenues, alleys and public places within Grantor's corporate boundaries and in laying and installing its mains, services, piping, and related appurtenances and equipment, shall not in any manner interfere with or injure any improvement which Grantor now has or may hereafter have upon any of its streets, alleys, highways or public places.

Grantee agrees that for the term of this franchise, it will use commercially reasonable efforts to maintain its facilities and equipment in a condition sufficient to meet the current and future energy requirements of Grantor, its inhabitants and industries. While maintaining its facilities and equipment, Grantee shall obtain permits as required by ordinance and will fix its excavations within a commercially reasonable time period, except that in emergency situations Grantee shall take such immediate unilateral actions as it determines are necessary to protect the public health, safety, and welfare; in which case, Grantee shall notify Grantor as soon as reasonably possible. Within a reasonable time thereafter, Grantee shall request that Grantor issue any permits or authorizations required by Grantor for the actions conducted by Grantee during the emergency situation.

Grantor will give Grantee reasonable notice of plans for street improvements where paving or resurfacing of a permanent nature is involved that affects 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 Grantor will start the work, and, if more than one right-of-way is involved, the order in which the work is to proceed. The notice shall be given to the Grantee as soon as practical in advance of the actual commencement of the work, considering reasonable working conditions, to permit the Grantee to make any additions, alterations, or repairs to its facilities.

**110.06 EXTENSION OF GRANTEE'S FACILITIES.** Upon receipt and acceptance of a valid application for service, Grantee shall, subject to its own economic feasibility criteria as approved by the Iowa Utilities Board make reasonable extensions of its distribution facilities to serve customers located within the current or future corporate limits of Grantor.

**110.07 RELOCATION OF GRANTEE'S FACILITIES.** If Grantor 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, unless otherwise reimbursed by federal, state or local legislative act or governmental agency, Grantee, upon reasonable notice from Grantor, shall remove and relocate its facilities or equipment situated in the public rights-of-way, at the cost and expense of Grantee, if such removal is necessary to prevent interference with Grantor's facilities

If Grantor 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 with such project, then Grantee shall receive payment for the cost of such relocation as a precondition to relocating its facilities or equipment.

Grantor shall consider reasonable alternatives in designing its public works projects and exercising its authority under this section so as not to arbitrarily cause Grantee unreasonable additional expense. If alternative public right-of-way space is available, Grantor shall also provide a reasonable alternative location for Grantee's facilities. Grantor shall give Grantee written notice of an order or request to vacate a public right-of-way; provided, however, that its receipt of such notice shall not deprive Grantee of its right to operate and maintain its existing facilities in such public right-of-way until it (a) if applicable, receives the reasonable cost of relocating the same and (b) obtains a reasonable public right-of-way, dedicated utility easement, or private easement alternative location for such facilities.

**110.08 CONFIDENTIAL INFORMATION.** Grantor acknowledges that certain information it might request from Grantee pursuant to this Ordinance may be of a proprietary and confidential nature, and that such requests may be subject to the Homeland Security Act or other confidentiality protections under state or federal law. If Grantee requests that any information provided by Grantee to Grantor be kept confidential due to its proprietary or commercial value, Grantor and its employees, agents and representatives shall maintain the confidentiality of such information, to the extent allowed by law. If Grantor is requested or required by legal or administrative process to disclose any such proprietary or confidential information, Grantor shall promptly notify Grantee of such request or requirement so that Grantee may seek an appropriate protective order or other relief.

**110.09 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 (4) any other causes, whether of the kind herein enumerated or otherwise not reasonably within the control of the affected party to prevent or overcome.

The affected party agrees to give the other party a written description of the event within [24] hours. The affected party agrees promptly and diligently to take such action as may be necessary and practical to remove the problem and resume performance under this agreement. These force majeure provisions shall not relieve a party from liability for any damage or expense that was caused or contributed to by: (1) its own negligence if that negligence was the proximate cause of the party's failure to perform; or (2) a result of that party's lack of funds.

**110.10 HOLD HARMLESS.** Grantee, during the term of this Ordinance, agrees to save harmless Grantor from and against all claims, demands, losses and expenses arising directly out of the negligence of Grantee, its employees or agents, in constructing, operating, and maintaining its distribution and transmission facilities or equipment; provided, however, that Grantee need not save Grantor harmless from claims, demands, losses and expenses arising out of the negligence of Grantor, its employees or agents. A copy of the process served upon the Grantor shall be served by the Grantor upon the Grantee. The Grantee shall have the right to defend in the name of the Grantor and to employ counsel for such purpose.

**110.11 SUCCESSORS AND ASSIGNS.** All rights, privileges and authority granted to Grantee hereunder shall inure to the benefit of Grantee's lessees, successors and assigns, subject to the terms, provisions and conditions herein contained, and all obligations imposed upon Grantee hereunder shall be binding upon Grantee's lessees, successors and assigns.

**110.12 NO THIRD PARTY BENEFICIARIES.** This Ordinance constitutes a franchise agreement between the Grantor and Grantee. No provision of this Ordinance shall inure to the benefit of any third person, including the public at large, so as to constitute any such person as a third party beneficiary of the agreement or of any one or more of the terms hereof, or otherwise give rise to any cause of action for any person not a party hereto.

**110.13 NON WAIVER.** Any waiver of any obligation or default under this Ordinance shall not be construed as a waiver of any future defaults, whether of like or different character. If Grantee shall be in default in the performance of any of the terms and conditions of this Ordinance and shall continue in default for more than thirty (30) days after receiving notice from the City of Okoboji, Iowa of such default, the said City may, by ordinance duly passed and adopted, terminate all rights granted under this Ordinance to the Grantee. The said notice of default shall specify the provisions or provisions in the performance of which it is claimed the Grantee is in default. Said notice shall be in writing and served in the manner provided by the laws of the State of Iowa for the service of original notices in civil actions.

**110.14 REPEAL CONFLICTING ORDINANCES.** This Ordinance, when accepted by Grantee, shall constitute the entire agreement between the Grantor and the Grantee relating to the franchise granted by Grantor hereunder, and the same shall supersede all prior ordinances relating thereto, and any terms and conditions of such prior ordinances or parts of ordinances in conflict herewith are hereby repealed.

