

CHAPTER 17 NATURAL GAS FRANCHISE

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2-17-1 GRANT OF FRANCHISE. There is hereby granted to Black Hills/Iowa Gas Utility Company, LLC d/b/a Black Hills Energy, a Delaware corporation, its successors and assigns ("Company"), the right, franchise and privilege to acquire, construct, operate and maintain in the City of Maquoketa, Iowa ("City"), as provided herein, the necessary facilities for the distribution, transportation, supplying and sale of natural gas for public and private use and to construct and maintain over, upon, across and under the streets, highways, avenues, alleys, bridges and public places the necessary facilities, fixtures and equipment for such purposes.

2-17-2 TERM. The franchise granted hereunder shall remain in effect for a period of ten (10) years from the effective date of this ordinance (the "Initial Term"); provided, however, that the franchise shall be automatically renewed for an additional ten (10) year period after the expiration of the Initial Ten (the "First Renewal Ten"), if: (a) not more than one (1) year or less than one hundred eighty (180) days prior to the expiration of the Initial Ten, the Company notifies the City, in writing, that the franchise will automatically renew for an additional ten (10) year period unless the Company receives written notice from the City, at least sixty (60) days prior to the expiration of the Initial Term, that the City desires to terminate the franchise at the expiration of the Initial Term; and (b) the Company does not receive written notice from the City, at least sixty (60) days prior to the expiration of the Initial Term that the City desires to terminate the franchise at the expiration of the Initial Term. The effective date of this ordinance shall be determined pursuant to state law.

2-17-3 GOVERNING RULES AND REGULATIONS. This ordinance is granted subject to all conditions, limitations and immunities now provided for, or as hereafter amended, and applicable to the operations of a public utility, by local, state, or federal law. The rates to be charged by the Company for service within the present or future corporate limits of the City and the rules and regulations regarding the character, quality and standards of service to be furnished by the Company 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 the Company. Provided however, should any judicial, regulatory or legislative body, having proper jurisdiction, take any action that precludes the Company from recovering from its customers any cost associated with services provided hereunder or has a material negative economic impact on the Company or the City, or a provision of this franchise is declared illegal, unconstitutional or void by a court or other property authority, then the Company and the City shall attempt to renegotiate this franchise in good faith in accordance with the action taken in order to comply with the action taken and to attempt to restore the respective benefits of this bargain. In determining the rights and duties of the Company, the terms of this franchise ordinance shall take precedence over any conflicting terms or requirements contained in any other ordinance enacted by the City.

2-17-4 NON-EXCLUSIVE GRANT. This franchise shall not be exclusive and shall not restrict in any manner the right of the City Council or any other governing body of the City in the exercise of any governmental power which it may have or hereafter be authorized or permitted by laws of the State of Iowa.

2-17-5 REGULATION BY CITY. The City reserves to itself the right to make reasonable regulation of the Company's use of streets or other public property. The Company agrees, for and on behalf of itself, its lessees, successors and assigns, that all authority and rights under this ordinance shall at all times be subject to all rights, power and authority now or hereafter possessed by the City to regulate the manner in which the Company shall use the streets, alleys, bridge and public places of the City and concerning the manner in which the Company shall use and enjoy the franchise granted herein.

2-17-6 HOME RULE. This ordinance is intended to be and shall be construed as consistent with the reservation of local authority contained in Article III Section 38A of the Iowa Constitution granting cities municipalities home rule powers. To such end any limitation on the power of the City contained herein is to be strictly construed and the City reserves to itself the right to exercise all power and authority to regulate and control its local affairs and all ordinances and regulations of the City shall be enforceable against the Company unless, and only to the extent, they are irreconcilable with any rights granted the Company under this ordinance or conflict with applicable state law.

2-17-7 EMINENT DOMAIN. The City is granted the right to exercise powers of eminent domain and may, in appropriate circumstances for the purposes of distribution, transportation, or supply of natural gas by Company, delegate such authority to the Company, by resolution; provided, however, that nothing contained herein shall prohibit the Company from acting independently to appropriate and condemn private property, as necessary, for the purposes of distribution, transportation, supplying and sale of natural gas by Company, if permitted to do so under state law.

2-17-8 PLACEMENT OF FACILITIES. The facilities, fixtures and equipment for the distribution, transportation, supplying and sale of natural gas within the City shall be placed and maintained so as not to unnecessarily or unreasonably interfere with the travel on the streets, highways, avenues, alleys, bridges and public places in the City, nor shall such facilities, fixtures and equipment unnecessarily or unreasonably interfere with the proper use of the same, including ordinary drainage, or with the sewers, underground pipe or other property of the City. In the event that facilities, fixtures and equipment of the Company located within a public right-of-way must be relocated because of paving, road construction, or road reconstruction, sewer construction or sewer reconstruction, or the construction or reconstruction of public drainage systems or similar public works or the construction or reconstruction

of the facilities of any City owned utility, such relocation, at the written request of and upon reasonable notice from the City, shall be completed by the Company at its cost in a manner so as to conform to the established grade of the line of the street or public place and so as not to interfere with the public improvement so constructed or reconstructed; provided, however, that the Company shall not be obligated to undertake such relocation unless and until the City provides an alternative location for the Company's facilities, fixtures or equipment. If the City requests the Company to relocate its facilities, fixtures 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, the Company shall not be obligated to comply with such request until it receives payment for the cost of such relocation as a precondition to relocating its facilities, fixtures or equipment. The City shall upon request of the Company: review any plans for the construction of facilities, fixtures and equipment within the public right-of-way and advise the Company of any conflict such construction may have with planned or anticipated public improvements, but failure of the City to so advise the Company will not relieve the Company of its obligations under this Section. In placing, constructing, or installing its facilities, fixtures and equipment - for the distribution, supplying and sale of natural gas within the City, the Company shall observe sound engineering practices, and its engineering designs and facility placements, construction an installation shall comply with applicable industry standards, including industry safety standards, generally accepted at the time of placement.

2-17-9 CONSTRUCTION AND EXCAVATION BY COMPANY.

1. In accordance with requirements of complying with local, state or federal law set forth in Section 3, "Governing Rules and Regulations," a written permit will be obtained from the City Manager whenever it becomes necessary for the Company to excavate in streets or public grounds of the City. An exception to a requirement for a permit shall be made in cases of emergency involving public safety, in which case a permit will be obtained at the earliest opportunity after the work has started.
2. In making excavations in the streets the Company shall proceed with such work as to cause the least possible inconvenience to the public. The Company shall properly protect, according to safety standards generally accepted at the time of placement, all excavations and obstructions by proper shoring, surface plates, barricades, warning lights and such other or additional devices as circumstances may warrant.
3. Immediately after use any trenches for excavations which the Company has opened shall be filled. Temporary street surfacing will be placed in such excavations as soon as the same has been backfilled. Pavements, sidewalks, curb and gutters or other portions of streets and public places opened, disturbed or damaged by Company shall be promptly restored and replaced with like materials by the Company at its own expense and left in as good condition as before. In such cases, any sidewalk or other replacement will be replaced so as to comply with current requirements of the Americans with Disabilities Act and other applicable laws. In the event that the Company fails to comply with the provisions of this section, after having been given reasonable notice, the City may do such works as may be needed to properly repair such pavements, sidewalks, curb and, gutters or other portions of streets and public places and the reasonable cost thereof shall be repaid to the City by the Company. In cases where a cut or disturbance is made in a section of street paving or sidewalks, but causes greater disturbance than to simply the area cut, rather than replace only the area cut, the

Company shall replace that area stipulated by the City Manager which in no event shall exceed the panel or panels disturbed.

4. The City may, at its discretion and at its own expense, assign personnel for inspection of excavation and related work being performed by the Company. Should the Company fail or refuse to do and perform the things provided in this ordinance, the City may, after reasonable notice to the Company, perform the work and charge the reasonable expense thereof to the Company, and the Company shall promptly pay said charges.

2-17-10 TECHNOLOGICAL AND REGULATORY CHANGES. The parties recognize that over the duration of this franchise both technological and regulatory changes will take place which will impact the enforceability of this ordinance or parts of it. In recognition of such factors the parties agree that in the event portions of this ordinance which are now, or in the future, are found or declared inapplicable or unenforceable, become through a subsequent change in law or technology again to be applicable or enforceable, such provisions shall be revived and again form a portion of this ordinance.

2-17-11 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 Company, then, in accordance with procedures promulgated by the Iowa Utilities Board and/or the Natural Gas Policy Act of 1978, 15 U.S.C. 3301 et seq. the Company 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 Company.

2-17-12 COMPLAINT RECORDS. Upon the Company's receipt of written and lawful request therefor from the City, but in no event more than once annually, the Company shall provide the City with a copy of the Company's public record of complaints relating to the franchise made to the Iowa Utilities Board by the Company's customers within the City. If any confidential customer information is requested pursuant to this section, then the City shall comply with all applicable due process and confidentiality protections afforded the Company or Customer.

2-17-13 FRANCHISE FEE. In exchange for the franchise granted herein, the Company shall collect from its gas customers located within the corporate limits of the City (but not from the City) and pay to the City an amount equal to zero percent (0%) of gross receipts the Company derives from the sale, distribution or transportation of gas delivered within the present or future limits of the City. Gross receipts as used herein are revenues received from the sale, distribution, or transportation of gas, after adjustment for the net write-off of uncollectible accounts and corrections of bills theretofore rendered. The amount paid by the Company shall be in lieu of, and the Company shall be exempt from, all other fees, charges, taxes or assessments which the City may impose for the privilege of doing business within the City, including without limitation excise taxes, occupation taxes, licensing fees, or right-of-way permit fees, and in the event the City imposes any such fee, charge, tax or assessment, the payment to be made by the Company in accordance with this section shall be reduced in an amount equal to any such fee, charge, tax or assessment imposed upon the Company. Ad valorem property taxes imposed generally upon all real and personal property within the City shall not be deemed to affect Company's obligations under this section. The company shall report and pay any amount payable under this section

on a monthly basis. Such payment shall be made no more than thirty (30) days following the close of the period for which payment is due. Initial and final payments shall be prorated for the portions of the periods at the beginning and end of the term of this ordinance.

1. The Company shall list the franchise fee collected from customers as a separate item on bills for utility service issued to its customers. If at any time the Iowa Utility Board or other authority having proper jurisdiction prohibits such recovery, the Company will no longer be obligated to collect and pay the franchise fee. In addition, the Company may reduce the franchise payable for gas delivered to a specific customer when such reduction is required to attract or retain the business of that customer.
2. If at any time the Iowa Utility Board or other authority having proper jurisdiction allows the Company to choose whether to collect the franchise fee from its customers, the Company will nevertheless continue to collect the franchise fee and may pay same to the City, as provided for herein.
3. The City shall provide copies of annexation ordinances to the Company on a timely basis to ensure appropriate franchise fee collection from customers within the City's corporate limits. The Company's obligation to collect and pay the franchise fee from customers within an annexed area shall not commence until the later of: (a) sixty (60) days after the Company's receipt of the annexation ordinance pertaining to such area; or (b) such time as is reasonably necessary for the Company to identify the customers in the annexed area obligated to pay the franchise fee.
4. The City shall have access to and the right to examine, during normal business hours, such of the Company's books, receipts, files, records, and documents as is necessary to verify the accuracy of payments due hereunder. If it is determined that a mistake was made in the payment of any franchise fee required hereunder, such mistake shall be corrected promptly upon discovery such that any under-payment by the Company shall be paid within thirty (30) days of recalculation of the amount due and any over-payment by the Company shall be deducted from the next payment of such franchise fee due by the Company to the City. Upon giving sixty (60) days' notice to the Company, the City may increase the amount of the franchise fee to be collected from the Company's customers; provided, however, that: (a) the City shall not increase the franchise fee more than four (4) times during the initial and any renewal term of the franchise; and (b) the City shall not increase the franchise fee to more than five percent (5%) of gross receipts the Company derives from the sale, distribution or transportation of gas delivered within the present or future limits of the City.
5. No franchise fee shall be assessed to the City as a customer, per IA Code Section 364.2 (4) (f).

2-17-14 EVIDENCE OF INSURANCE AND BOND. The Company agrees to maintain insurance throughout the term of this franchise in the following amounts to protect itself and others to whom the Company may be held legally liable in the performance of its duties hereunder:

1. Worker's Compensation and Employer's Liability insurance providing statutory coverage and Employer's Liability limits of \$1,000,000 bodily injury by accident/ \$1,000,000 bodily injury by disease each employee/ \$1,000,000 bodily injury by disease, policy limit, in compliance with the laws of the State where all or any portion of the Work is being performed.

2. Commercial General Liability insurance, with minimum limits of \$2,000,000 per occurrence and \$4,000,000 general aggregate for bodily injury and property damage.
3. Automobile Liability insurance covering liability arising out of any auto (including owned, non-owned and hired automobiles), with a combined limit for bodily injury and property damage of not less than \$2,000,000 per occurrence.
4. Umbrella coverage in the amount of \$3,000,000, covering excess of Employer's Liability, Commercial General Liability and Comprehensive Automobile Liability.
5. Any of the above coverages may be self-insured at the Company's sole discretion.
6. In addition, the Company agrees to maintain a right-of-way permit bond throughout the term of this franchise in the amount of \$1,000.
7. Upon request therefor from the City, but in no event less than annually, the Company shall supply the City with: (a) a current certificate of insurance evidencing the coverages required hereunder, and (b) a current right-of-way permit bond in the amount of \$1000.00.

2-17-15 ASSIGNMENT. No sale, assignment or lease of this franchise shall be effective until it is approved by the City Council and until the Company has filed in the office of the City Clerk written notice of the proposed sale, transfer, disposition or assignment, such notice to clearly summarize the proposed procedure and the terms and conditions thereof. Such approval by the City shall not be unreasonably withheld. The proposed vendor, assignee or lessee shall similarly file an instrument, duly executed, reciting such proposal, accepting the terms of this franchise, and agreeing to perform all the conditions thereof. Notwithstanding the foregoing, the City's consent shall not be required whenever: (a) Company has assigned its rights, duties or obligations hereunder to an affiliate of the Company, which affiliate has agreed to assume (pursuant to a writing delivered to the City evidencing its ability to do so) such rights, duties or obligations, and the Company has agreed to remain liable for the performance of its duties and obligations hereunder; or (b) the Company has assigned or pledged its rights, duties or obligations hereunder for a mortgage or as security for an indebtedness.

2-17-16 INDEMNIFICATION. The Company shall hold the City harmless from any and all claims and actions, litigation or damage, arising out of the passage of this ordinance, out of the construction, erection, installation, maintenance and operation of its properties operated by authority of this ordinance within the corporate limits of the City, or the negligence of its employees in the operation thereof, including the court costs and reasonable attorney fees in making defense against such claims; provided, however, that the Company shall not be liable for the negligence of the City, its employees or agents. A copy of any process served upon the City shall be served by the City upon the Company. The Company shall have the right to defend in the name of the City and to employ counsel for such purpose. No provision of this ordinance is intended, or shall be construed, to be a waiver for any purpose of any applicable state limits in liability.

2-17-17 DEFAULT. In case of failure by the Company to comply with any of the provisions in this ordinance, or if the Company should do or cause to be done any act or thing prohibited by or in violation of the terms of this ordinance, the Company shall forfeit all rights and privileges granted by this ordinance and all rights hereunder shall terminate, provided that said termination shall not take effect

until the City shall carry out proceedings in accordance with the following. Before the City proceeds to cancel this ordinance, it shall first serve a written notice upon the Company setting forth in detail in such notice the alleged neglect or failure complained of, and the Company shall have thirty (30) days thereafter in which to comply with the conditions of this grant and privilege. If at the end of such period the City deems that the conditions have not been complied with and that this ordinance is subject to repeal by reasons thereof, the City shall enact a repealing ordinance setting out the grounds upon which said grant and privilege is to be canceled or terminated. If within thirty (30) days after the effective date of said repealing ordinance the Company shall not have instituted an action - in any court of competent jurisdiction to determine whether the Company has violated the terms of this ordinance, this ordinance shall be canceled. If within such thirty (30) day period the Company does institute an action, as above provided, to determine whether or not the Company has violated the terms of this ordinance, and prosecutes such action to final judgment with due diligence, then, in that event, if the court finds that this ordinance is subject to cancellation by reason of the violation of its terms, this ordinance shall terminate thirty (30) days after such final judgment is rendered.

2-17-18 VIOLATIONS AND PENALTIES. If the Company fails to comply with the requirements of this franchise, then the City may invoke and secure compliance in accordance with Title III, Chapter 17, of the Code of Ordinances of the City and as authorized by Section 364.2 of the Iowa Code.

2-17-19 FORCE MAJEURE. It shall not be a breach or default under this franchise if either party fails to perform its obligations hereunder due to Force Majeure. Force Majeure shall include, but not be limited to, the following: (a) 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; (b) acts of others such as strikes, work-force stoppages, riots, sabotage, insurrections or wars; (c) governmental actions such as necessity for compliance with any court order, law, statute, ordinance, executive order, or regulation promulgated by a governmental authority having jurisdiction; and any other causes, whether of the kind herein enumerated or otherwise not reasonably within the control of the affected party to prevent or overcome. Each party shall make reasonable efforts to avoid Force Majeure and to resolve such event as promptly as reasonably possible once it occurs in order to resume performance; provided, however, that this provision shall not obligate a party to settle any labor strike.

2-17-20 SEVERABILITY. If any such section or provision of this ordinance is held invalid by a court of competent jurisdiction, such holding shall not affect the validity of any other provisions of this ordinance which can be given effect without the invalid portion or portions and to this end each section and provision of this ordinance is severable.

2-17-21 CONFIDENTIALITY. 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.

2-17-22 NOTICES. All notices required or permitted under the terms of this franchise shall be in writing and evidenced by receipt. Service of a notice may be accomplished by facsimile, personal services, registered or certified mail (postage prepaid) or reputable daytime or overnight delivery service. Notices shall be sent to the parties at the following addresses:

City:
City of Maquoketa
Attn: City Manager
201 E. Pleasant St.
Maquoketa, IA 52061
Fax: 563-652-2485

Company:
Black Hills Energy
Attn: Community Affairs Manager
1015 Cedar Cross Rd.
Dubuque, IA 52003
Fax: 563-583-0850

The Company or the City may designate a new address for itself by written notice to the other duly given as provided herein.

2-17-23 ENACTMENT. Subject to Iowa Code § 364.2, this ordinance following its passage by the City Council and its publication as provided by law, shall become effective upon its written acceptance by the Company delivered to the City Clerk and shall effectively supersede and cancel Ordinance No. 567, being the prior franchise held by the Company.

The Company shall pay all costs of the election and preparation of this franchise ordinance.

TITLE II POLICY AND ADMINISTRATION

