

ORDINANCE NO. 2018-04

TOWN OF RIDGWAY, COLORADO

AN ORDINANCE OF THE TOWN OF RIDGWAY TOWN COUNCIL GRANTING A FRANCHISE BY THE TOWN OF RIDGWAY, COLORADO TO BLACK HILLS GAS DISTRIBUTION LLC D/B/A BLACK HILLS ENERGY, ITS SUCCESSORS AND ASSIGNS, TO LOCATE, BUILD, CONSTRUCT, ACQUIRE, PURCHASE, EXTEND, MAINTAIN AND OPERATE INTO, WITHIN AND THROUGH THE PRESENT AND FUTURE CORPORATE LIMITS OF THE TOWN OF RIDGWAY, OURAY COUNTY, COLORADO, A PLANT OR PLANTS, AND WORKS FOR THE PURCHASE, MANUFACTURE, TRANSMISSION AND DISTRIBUTION OF GAS, EITHER NATURAL, ARTIFICIAL, OR MIXED, AND TO FURNISH, SELL AND DISTRIBUTE SAID GAS TO THE TOWN OF RIDGWAY AND THE INHABITANTS THEREOF, FOR HEATING, COOKING OR OTHER PURPOSES BY MEANS OF PIPES, MAINS, OR OTHERWISE, OVER, UNDER, ALONG, ACROSS AND THROUGH ANY AND ALL STREETS, OTHER PUBLIC WAYS AND PLACES IN SAID TOWN OF RIDGWAY, FIXING THE TERMS AND CONDITIONS THEREOF AND REPEALING A 2003 ORDINANCE BY AND BETWEEN THE TOWN OF RIDGWAY AND BLACK HILLS ENERGY'S PREDECESSOR IN INTEREST, KINDER MORGAN, INC.

RECITALS

The Town Council of the Town of Ridgway, Colorado, makes the following findings to support the adoption of this Ordinance:

A. The Town of Ridgway (the "Town") is a legally created, established, organized and existing Colorado municipal corporation under the provisions of Article XX of the Constitution of the State of Colorado and the home rule charter of the Town (the "Charter").

B. The Town is governed by its Home Rule Charter ("Charter") as authorized by Article XX § 6 of the Colorado Constitution.

C. Article VIII of the Charter grants the Town the full authority, power and control over all streets, alleys, rights of way, easements and other Town owned property including but not limited to all power and authority to regulate, operate, use, maintain, establish, repair, replace, vacate, purchase, sell and lease such town Property, including the authority to regulate a public utility's use of such property.

NOW THEREFORE, BE IT ORDAINED BY THE TOWN COUNCIL OF THE TOWN OF RIDGWAY, COLORADO, THAT:

SECTION 1. SHORT TITLE. This Ordinance shall be known and may be cited as the Black Hills Gas Distribution, LLC d/b/a Black Hills Energy (f/k/a SourceGas Distribution LLC) Franchise Ordinance.

SECTION 2. DEFINITIONS. For the purpose of this Ordinance, the following terms shall have the meaning given herein:

"Town" is the Town of Ridgway, Ouray County, Colorado, the grantor of rights under this franchise.

"Grantee" is Black Hills Gas Distribution, LLC d/b/a Black Hills Energy, its successors and assigns, the grantee of rights under this franchise.

"Council" is the Town Council of the Town of Ridgway, Colorado.

"Person" is any person, firm, partnership, association, corporation, company or organization of any kind.

SECTION 3. GRANT OF AUTHORITY. There is hereby granted for the period specified herein and subject to the conditions, terms and provisions contained herein to the Grantee the non-exclusive right, privilege and authority to locate, build, construct, acquire, purchase, extend, maintain and operate into, within and through the Town as the same now exists or may hereafter be extended, a plant or plants and works, for the purchase, manufacture, transmission and distribution of gas, either natural, artificial or mixed, with the right and privilege for the period and upon the terms and conditions hereinafter specified to furnish, sell and distribute gas to the Town and the inhabitants thereof, for heating, cooking or other purposes, by means of pipes, mains or otherwise, over, under, along, across and through any and all streets, alleys, viaducts, bridges, roads, lanes and gas easements in said Town and over, under, along, across and through any extension, connection with or continuation of the same and/or over, under, along, across and through any and all such new streets, alleys, viaducts, bridges, roads, lanes and gas easements as may be hereafter laid out, opened, located or constructed within the territory now or hereafter included in the boundaries of the Town.

This franchise and the right to use and occupy said streets, alleys, public ways and places shall not be exclusive, and the Town reserves the right to grant the use of said streets, alleys, public ways and places, to any person during the period of this franchise.

SECTION 4. GENERAL CONDITIONS. The Grantee is further granted the right, privilege and authority to excavate in, occupy and use any and all streets, alleys, viaducts, bridges, roads, lanes, and other public ways and places under the supervision of the properly constituted authority for the purpose of bringing gas into, within and through the Town, and supplying gas to the 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 the 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, alleys and other public ways and places and to cause minimum interference with the rights or reasonable convenience of property owners whose property adjoins any of the said streets, alleys, or other public ways and places. Should it become necessary for the Grantee, in exercising

its rights and performing its duties hereunder, to interfere with any sidewalk, 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's Municipal Code, such sidewalk, graveled or paved street, road, alley, or other improvement shall be restored to Town specifications and are subject to Town approval and receipt after the installation of its pipes or other structures. 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 Code, any such water mains, sewers, or other structures which are damaged through the action of Grantee, provided, however, that the Town may make such repairs and charge the reasonable cost thereof to the Grantee. Except as otherwise specifically provided herein, the Town retains the right to use, control, and regulate, through the exercise of its police power, the use of streets, and other public ways and places, and the Town retains the right to impose such other regulations as may be determined by the Town to be necessary in the exercise of the police power to protect the health, safety and welfare of the public.

SECTION 5. INDEMNIFICATION. General Indemnification. The Grantee agrees to indemnify, save and hold harmless, and defend the Town, its officers, elected or appointed officials, employees, agents, boards and employees, from any action or claim for injury, damage, loss, liability, cost or expense, including court and appeal costs and attorneys' and expert witness fees and expenses, arising from any casualty, accident, injury or loss to Person or property, including, without limitation, copyright infringement and defamation, and all other damages in any way arising out of, or by reason of, any construction, excavation, operation, maintenance, reconstruction of the natural gas delivery systems or any act done under or in connection with this Ordinance by or for the Grantee its agents or its employees by reason of any negligence or other fault of the Grantee.

Neither the Town nor the Grantee waives any rights under the statutes and constitution of the State of Colorado or the United States except as otherwise specifically set forth herein. This franchise constitutes a valid and binding contract between the Grantee and the Town. In the event the franchise fees specified herein are declared illegal, unconstitutional, or void for any reason by any court or other proper authority, the Grantee and Town shall negotiate in good faith any fees that lawfully may be paid to the Town hereunder as consideration for use of the Town's streets.

SECTION 6. INSURANCE. The Grantee shall save the Town harmless from all liability or damage and all reasonable expenses necessarily accruing against the Town arising out of the negligent exercise by the Grantee of the rights and privileges hereby granted. Grantee agrees to procure and maintain, at its own cost, a policy or policies of insurance sufficient to insure against all liability, claims, demands, and other obligations assumed by the Grantee pursuant to Section 6 (Indemnification). Such insurance shall be in addition to any other insurance requirements imposed by this agreement or by law. The Grantee shall not be relieved of any liability, claims, demands, or other obligations assumed pursuant to Section 6 by reason of its failure to procure

or maintain insurance, or by reason of its failure to procure or maintain insurance in sufficient amounts, duration, or types. Grantee shall procure and maintain the minimum insurance coverages listed below. All coverages shall be continuously maintained to cover all liability, claims, demands, and other obligations assumed by the Grantee pursuant to Section 6. In the case of any claims-made policy, the necessary retroactive dates and extended reporting periods shall be procured to maintain such continuous coverage:

- A. Worker's Compensation insurance to cover obligations imposed by applicable laws for any employee engaged in the performance of work under this franchise, and Employers' liability coverage with minimum limits of FIVE HUNDRED THOUSAND DOLLARS (\$500,000 each accident, FIVE HUNDRED THOUSAND DOLLARS (\$500,000) disease - policy limit, and FIVE HUNDRED THOUSAND DOLLARS (\$500,000) disease - each employee. Evidence for qualified self-insured status may be substituted for the Worker's Compensation requirements stated herein.
- B. General Liability insurance with minimum combined single limits of TWO MILLION DOLLARS (\$2,000,000) each occurrence and FIVE MILLION DOLLARS (\$5,000,000) aggregate. The policy shall be applicable to all premises and operations. The policy shall include coverage for bodily injury, broad form property damage (including completed operations), personal injury (including coverage for contractual and employee acts), blanket contractual, products, and completed operations. The policy shall include coverage for explosion, collapse, and underground hazards. The policy shall contain a severability of interests provisions. The coverage requirement may be satisfied with a combination of general and excess liability policies, or self-insurance.
- C. Comprehensive Automobile Liability insurance with minimum combined single limits for bodily injury and property damage of not less than ONE MILLION DOLLARS (\$1,000,000) each occurrence and ONE MILLION DOLLARS (\$1,000,000) aggregate with respect to each of Grantee's owned, hired and nonowned vehicles assigned to or used in performance of the services provided in accordance with this franchise. The policy shall contain a severability of interests provision. If the Grantee has no owned automobiles, the requirements as set forth herein shall be met by each employee of the Grantee providing services to the Town under this franchise

The policies required above, except for the Workers' Compensation insurance, shall include the Town's officers and employees as additional insureds. Every policy required above shall be primary insurance and any insurance carried by the Town, its officers, or its employees, or carried by or provided through any insurance pool of the Town, shall be excess and not contributory insurance to that provided by Grantee. No additional insured endorsement to any policy shall contain any exclusion for bodily injury or property damage arising from completed operations. The Grantee shall be solely responsible for any deductible losses under any policy required above.

The certificate of insurance shall be provided to the Town upon request using the "Accord Form" and shall be completed by the Grantee's insurance agent as evidence that policies providing the required coverages, conditions, and minimum limits are in full force and effect. No other form of certificate shall be used. Failure on the part of the Grantee to procure or maintain policies providing the required coverages, conditions, and minimum limits shall constitute a material breach of the franchise after the Town has provided Grantee written notice of the failure, and upon sixty days thereafter, to cure any failure as so noticed. Thereafter, if Grantee has failed to cure, the Town may terminate this franchise, or at its discretion, the Town may procure or renew any such policy or any extended reporting period thereto and may pay any and all premiums in connection therewith, and all monies so paid by the Town shall be repaid by the Grantee to the Town upon demand, or the Town may offset the cost of the premiums against any monies due to Grantee from the Town.

The parties hereto understand and agree that the Town is relying on, and does not waive or intend to waive by any provision of this franchise, the monetary limitations or any other rights, immunities, and protections provided by the Colorado Governmental Immunity Act, 24-10-101 *et seq.*, as from time to time amended.

Town

SECTION 7. BONDS OR OTHER SURETY. Except as expressly provided herein, the Grantee shall not be required to obtain or maintain bonds or other surety as a condition of being awarded the franchise or continuing its existence. The Town acknowledges that the legal, financial, and technical qualifications of the Grantee are currently sufficient to afford compliance with the terms of the franchise and the enforcement thereof. The Grantee and the Town recognize that the costs associated with bonds and other surety may ultimately be borne by the subscribers in the form of increased rates for natural gas delivery systems. In order to minimize such costs, the Town agrees to require bonds and other surety only in such amounts and during such times as there is a reasonably demonstrated need therefore. Initially, no bond or other surety will be required. In the event that one is required in the future, the Town agrees to give the Grantee at least sixty (60) days prior written notice thereof stating the reason for the requirement. Such reason must demonstrate a change in technical, legal or financial qualifications which would materially prohibit or impair Grantee's ability to comply with the terms of the franchise or afford compliance therewith, or may be based upon the Grantee's demonstrated failure to comply with the terms of this franchise in a timely manner.

SECTION 8. RELOCATION OF FACILITIES. If at any time it shall be necessary to change the position of any gas main or service connection of the Grantee to permit the Town to lay, make or change street grades, pavements, sanitary or storm sewers, water mains or other Town works, such changes shall be made by the Grantee at its own expense; provided, however, the Town shall confer with the Grantee and seek the Grantee's input during the preliminary stages of planning and engineering of any Town project which may require the Grantee to relocate its facilities in order to explore means of reducing the costs to the Grantee, and the Town shall make reasonable efforts to mitigate the financial impact of any such project on the Grantee.

The Grantee shall complete such relocations as soon as practicable from the date when the Town makes its request, except that the Grantee may be granted an extension of time for completion equivalent to any delay caused by conditions not under its control. Following the relocation, all property shall be restored substantially to its former condition by the Grantee at Grantee's sole cost and expense.

If the Town and Grantee confer and do not agree on a facilities relocation plan, the Grantee may request, and Town representatives shall participate in, good faith mediation before a mutually agreeable third party in an effort to resolve their differences.

The Town will not oppose just and reasonable recovery of substantial costs the Grantee incurs in complying herewith that the Grantee requests from the Public Utilities Commission of the State of Colorado (PUC).

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.

SECTION 9. SERVICE STANDARDS.

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 PUC and the terms and conditions of Town codes and state statutes as revised from time to time.

B. Maps. The Grantee shall prepare and submit to the Town a map showing the location of its distribution system, showing location and size, as applicable, of lines, valves, gates and all appurtenances incident to the distribution system, so far as such facilities can reasonably be projected. The map shall be kept current and filed with the Town Clerk's office by May 1 of each year, when necessary.

The Town shall (if and to the extent available) provide Grantee annually a map showing the location of the following features and attributes: parcels, structures, boundaries,

utilities, transportation, natural features, community development planning, hazards, parks and recreation, public safety, topography and imagery.

Before commencement of installation of pipes in Town streets and alleys, the Grantee shall prepare and submit to the Town a map showing the location and size, as applicable, of lines, valves, gates and all appurtenances incident to the distribution system, so far as such facilities can reasonably be projected. In addition, the Grantee shall submit a construction plan indicating a construction schedule, showing the streets and alleys where excavations will be simultaneously open at any given time, making provision for traffic routing in the event of interruption, setting forth the places where pavement cuts are expected, and where underground boring will occur for pipe installation. Prior to beginning construction on Town Property, or within a Town right of way, Grantee, its subcontractors and or assigns, shall obtain an encroachment permit from the Town. Such permit shall be issued in a reasonable and timely manner, and not unreasonably withheld. Construction may then proceed upon approval of said map and plan by the Town.

C. Access to Premises. To the extent allowed by law, Grantee shall have the right to enter the premises of consumers at reasonable times for the purpose of reading meters, inspecting gas appliances, pipes and equipment and for the purpose of ascertaining loads, making necessary tests and installing, disconnecting or removing meters.

SECTION 10. SUPPLY OF GAS. If during the term of this franchise, there occurs a failure or partial failure of the supply of natural gas available to the Grantee because of depletion of such supply, the Grantee shall take all reasonable steps to obtain an additional natural gas supply from other sources to be delivered to the Grantee, and if unable to procure same, it is hereby authorized to supply artificial or mixed gas for the unexpired term of this franchise. If Grantee, within a reasonable period after failure of the supply of natural gas, shall fail to supply to its customers artificial and/or mixed gas, the franchise rights granted herein shall terminate.

SECTION 11. FRANCHISE FEE. In consideration of the rights and privileges herein granted, the Grantee shall assess, effective the first billing cycle after this franchise becomes effective, to residential and commercial customers of Grantee within the Town of Ridgway, Colorado, a franchise tax or fee equivalent to three percent (3%) of annual gross revenue derived from gas service within the corporate limits of the Town that is billed by the Grantee, including the revenue received from the sale of industrial gas, and excluding the amount received from the Town itself for gas service furnished it and after adjustment for the net write-off of uncollectable amounts and corrections of bills theretofore rendered. Grantee shall pay to the Town Treasurer an annual payment, for each year of the duration of this franchise, in an amount equal to the franchise fee or tax funds collected by Grantee hereunder. Payment shall be made on or before April 1 of each year for the preceding year and each such payment shall be accompanied by a statement supporting the payment.

Such payment shall be in lieu of any and all other fees, charges, licenses, taxes or assessments which said Town may impose for the rights and privileges herein granted or for the

privilege of doing business within said Town and, for the use of the rights of way, 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 said Town shall not be deemed to affect the obligation of the Grantee under this section.

If at any time during the term of this franchise the manner in which the franchise fee is calculated, collected or paid is changed, whether by action of the Grantee, the PUC, or any entity having jurisdiction thereof, the Grantee agrees to cooperate with the Town in modifying the franchise to assure that the Grantee collects and the Town receives an amount in franchise fees or some other form that is the same amount of franchise fees collected by the Grantee and paid to the Town as of the date of such change and required modification, to the extent permitted by law.

SECTION 12. PURCHASE OF SYSTEM. The Town's rights and privilege of purchasing the Grantee's system subject to this franchise shall be governed by the laws of the State of Colorado.

SECTION 13. TERM. This Ordinance and the rights, privileges, and franchises hereby granted shall be and remain in full force and effect for a period of fifteen (15) years from the final passage date of this Ordinance. Within sixty (60) days from and after final passage of this Ordinance, the Grantee shall have filed with the Clerk of said Town its written acceptance of this Ordinance.

SECTION 14. TERMINATION OF FRANCHISE. Upon the termination of this franchise if the Grantee shall not have acquired an extension or renewal thereof and accepted same, Grantee may have and is hereby granted the right to enter upon the streets, alleys, bridges, viaducts, roads, lanes and other public places of the Town, for the purpose of removing there from any or all of its plants, structures, pipes, mains or equipment pertaining thereto, at any time after the Town has had ample time and opportunity to purchase, condemn or replace them. In so removing said pipes, mains or other property, the Grantee shall, at its own expense and in a workmanlike manner, refill any excavations that shall be made by it in the graveled or paved streets, alleys, bridges, viaducts, roads, lanes and other public places after the removal of its mains, pipes or other structures, and repair all surfaces to the condition prior to such removal.

SECTION 15. ASSIGNMENT. The Grantee may assign this franchise, or the rights granted hereunder without first obtaining the written consent of the Town, provided the Town receives notice of consideration of any assignment before approval by the PUC.

SECTION 16. FORFEITURE. The Town reserves the right to declare a forfeiture of this franchise for the breach of a substantial and material provision thereof. In the event that the Town believes that the Grantee has not complied with any term of the franchise, it shall notify the Grantee in writing in reasonable detail of the nature of the alleged noncompliance. No forfeiture

shall be declared until the Grantee shall have had an opportunity to be heard and to correct the alleged breach. Upon failure of the Grantee to exercise reasonable diligence to correct such condition, or to demonstrate that remedying the breach is legally proscribed, the Town may declare this franchise forfeited and notify Grantee in writing.

In the event that this franchise is forfeited, then the Grantee agrees to continue to render service as theretofore for a period of six (6) months to give the Town time to decide upon its course of action.

SECTION 17. ORDINANCE REPEALED. Ordinance No. 2003 ____, passed _____, is hereby repealed and of no further force or effect.

SECTION 18. SEVERABILITY. If any clause, sentence or section of this Ordinance shall be held invalid or unconstitutional by any court of competent jurisdiction, such holding shall not affect the validity of the remainder of this Ordinance.

SECTION 19. RESERVED RIGHTS. The right is hereby reserved by the Town to adopt, from time to time, in addition to the provisions herein contained, such ordinances as may be deemed necessary in the exercise of its police power, provided that such regulations shall be reasonable and not destructive of the rights and benefits herein granted, and not in conflict with the laws of the State of Colorado, or with orders of other authorities having jurisdiction in the premises, except, if applicable, as permitted in the exercise of the Town's home rule powers granted by Article XX of the Colorado Constitution. This franchise shall be subject to all valid and effective provisions of the Municipal Code for the Town of Ridgway, Town whether enumerated herein or not.

SECTION 20 MISCELLANEOUS PROVISIONS.

A. Nothing herein shall be in any way construed as a waiver on behalf of the Town of any of the protections or provisions of the Colorado Governmental Immunity Act.

B. In any action by the Town or authorized representative thereof mandated or permitted under the terms hereof, such party shall act in a reasonable, expeditious, and timely manner. Furthermore, in any instance where approval or consent is required under the terms hereof, such approval or consent shall not be unreasonably withheld.

C. The captions to Sections contained herein are intended solely to facilitate the reading hereof. Such captions shall not affect the meaning or interpretation of the text herein.

D. This Ordinance and the respective rights and obligations of the parties hereunder are subject to all present and future valid governmental legislation or regulation, whether federal or state, of duly constituted authorities which have jurisdiction over this Ordinance, one or both of the parties, or any transaction hereunder.

SECTION 21. NO WAIVER. Neither the Town nor the Grantee shall be excused from complying with any of the terms and conditions of this franchise by any failure of the other, or any of its officers, employees, or agents, upon any one or more occasions to insist upon or to seek compliance with any such terms and conditions.

SECTION 22. AUTHORITIES. This Ordinance and the respective rights and obligations of the parties hereunder are subject to all present and future valid governmental legislation or regulation, whether federal or state, of duly constituted authorities which have jurisdiction over this Ordinance, one or both of the parties, or any transaction hereunder.

SECTION 23. EFFECTIVE DATE. This Ordinance shall take effect thirty days after passage.

SECTION 24. PUBLIC HEARING. A public hearing on this Ordinance was held on the 11th day of July, 2018, in the Town Council Chambers, 201 N. Railroad Street, Ridgway, CO 81432.

INTRODUCED, READ AND REFERRED to public hearing before the Town Council of the Town of Ridgway, Colorado, on the 13th day of June.

**TOWN OF RIDGWAY, COLORADO, A HOME-
RULE MUNICIPALITY**

By: _____
JOHN CLARK, Mayor

ATTEST:

PAM KRAFT, Town Clerk

HEARD AND FINALLY ADOPTED by the Town Council of the Town of Ridgway, Colorado, this 11^h day of July, 2018.

TOWN OF RIDGWAY, COLORADO, A HOME-RULE MUNICIPALITY

By: _____
JOHN CLARK, Mayor

ATTEST:

PAM KRAFT, Town Clerk

Approved As To Form:

BO JAMES NERLIN, Town Attorney

ACCEPTED AND EXECUTED by Black Hills Gas Distribution, LLC d/b/a Black Hills Energy this ____ day of _____, 2018.

BLACK HILLS GAS DISTRIBUTION, LLC D/B/A BLACK HILLS ENERGY

Vice President – Operations – CO Gas