

**TOWN OF KIOWA
ORDINANCE NO. 2019-06**

TITLE: AN ORDINANCE REPEALING AND REENACTING CHAPTER 5, ARTICLE II, OF THE TOWN OF KIOWA MUNICIPAL CODE AND GRANTING BLACK HILLS COLORADO GAS, INC. D/B/A BLACK HILLS ENERGY, ITS LESSEES, SUCCESSORS AND ASSIGNS, A NATURAL GAS FRANCHISE AND THE AUTHORITY TO CONSTRUCT, OPERATE, MAINTAIN, AND EXTEND A NATURAL GAS DISTRIBUTION PLANT AND SYSTEM, AND GRANTING THE RIGHT TO USE THE STREETS, ALLEYS, AND OTHER PUBLIC PLACES WITHIN THE PRESENT OR FUTURE CORPORATE LIMITS OF THE TOWN OF KIOWA, COLORADO

WHEREAS, pursuant to Article IX of the Kiowa Home Rule Charter, grants of utility franchises and all extensions and amendments thereto shall be granted by ordinance; and

WHEREAS, the Town's prior franchise agreement with Aquila Networks, whose successor in interest is Black Hills Energy, has expired and the Board of Trustees and Black Hills Energy wish to enact a new agreement.

NOW, BE IT ORDAINED BY THE BOARD OF TRUSTEES FOR THE TOWN OF KIOWA, COLORADO, THAT:

Section 1. Chapter 5, Article II, of the Town of Kiowa Municipal Code, and Ordinance No. 2003-20 enacting it are hereby repealed.

Section 2. Chapter 5, Article II, of the Town of Kiowa Municipal Code is reenacted as set forth below:

**ARTICLE II
Gas Franchise**

Sec. 5-41. Franchise granted.

The Town of Kiowa, Colorado (hereinafter referred to as "Grantor"), hereby grants a non-exclusive franchise to Black Hills Colorado Gas Inc. d/b/a Black Hills Energy, (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.

Sec. 5-42. Term.

This franchise shall take effect on the first day of the month following the date this Ordinance is finally approved by the Colorado Public Utilities Commission (the "Effective Date"), at which time Grantee will begin to collect the franchise fee set forth herein, and this franchise shall remain in effect for a period of fifteen (15) years from the Effective Date of this Ordinance.

Sec. 5-43. Franchise fees.

(a) In exchange for the franchise granted herein, Grantee shall collect from all customers, but not from the Town of Kiowa, located within the corporate limits of Grantor and pay to Grantor an amount equal to three percent (3%) of gross receipts Grantee derives from the sale, distribution or transportation of gas delivered within the present or future limits of Grantor. 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 Grantee shall be in lieu of, and Grantee shall be exempt from, all other occupation, license, excise or right-of-way permit fees or taxes which the Town may impose for the rights and privileges herein granted or for the privilege of doing business within the Town and in the event the Grantor imposes any such fee, charge, tax or assessment, the payment to be made by Grantee in accordance with this section shall be reduced in an amount equal to any such fee, charge, tax or assessment imposed upon the Grantee. Ad valorem property taxes imposed generally upon all real and personal property within the present or future corporate limits of Grantor shall not be deemed to affect Grantee's obligations under this section.

(b) Grantee 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 Colorado Public Utilities Commission or other authority having proper jurisdiction prohibits such recovery, then Grantee will no longer be obligated to collect and pay the franchise fee. Any customer refunds ordered by the Commission or other authority due to an unlawful or prohibited collection of the franchise fee collected by Grantee and remitted to Grantor shall be refunded by Grantor.

(c) Within ten (10) days of the date of this ordinance, Grantor shall provide Grantee with a map of its corporate limits (the "Map"). The Map shall be of sufficient detail to assist Grantee in determining whether their customers reside within Grantor's corporate limits. The Map along with Grantee's Geographic Information System ("GIS") mapping information shall serve as the basis for determining Grantee's obligation hereunder to collect and pay the franchise fee from customers; provided, however, that if the Grantor's corporate limits are changed by annexation or otherwise, it shall be the Grantor's sole responsibility to (a) update the Map so that the changes are included therein, and (b) provide the updated Map to the Grantee.

(d) Grantee's obligation to collect and pay the franchise fee from customers within an annexed area shall not commence until the later: (a) of sixty (60) days after Grantee's receipt from the Grantor of an updated Map including the annexed area, or (b) after Grantee's receipt

from the Grantor of an updated Map including the annexed area as is reasonably necessary for Grantee to identify the customers in the annexed area obligated to pay the franchise fee; provided, further that neither party shall have the obligation to correct a mistake, including but not limited to collection of the fee by Grantee from its customers or remittance of that fee by Grantee to Grantor, that is discovered more than one (1) year after the occurrence thereof. Grantor shall indemnify Grantee from claims of any nature, including attorney fees, arising out of or related to the imposition and collection of the franchise fee. In addition, Grantee shall not be liable for paying franchise fees from or to any customer originally or subsequently identified, or incorrectly identified, by Grantor or by Grantee, as being subject to the franchise fee or being subject to a different level of franchise fees or being exempt from the imposition of franchise fees.

(e) Grantor shall have access to and the right to examine, during normal business hours, such of Grantee'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, the mistake shall be corrected promptly upon discovery such that any under-payment by Grantee shall be paid within thirty (30) days of recalculation of the amount due, and any over-payment by Grantee shall be deducted from the next payment of such franchise fee due by Grantee to Grantor.

Sec. 5-44. Periodic review.

Five (5) years from the date of enactment of this Ordinance, and every five years thereafter until the end of the term as defined herein, Grantor may review the terms of this Ordinance. Grantor shall notify Grantee in writing, no later than one hundred and eighty (180) days before each five (5) year anniversary of the Effective Date if it desires to amend this Ordinance. Any amendment adopted must occur through mutual agreement of Grantor and Grantee.

Sec. 5-45. Police power reserved.

The right is hereby reserved to Grantor to adopt, from time to time, in addition to the provisions herein contained, such ordinance as may be deemed necessary in the exercise of its police power, provided that such regulation shall be reasonable and not destructive of the rights herein granted and not in conflict with the laws of the State or with orders of other authorities having jurisdiction in the premises.

Sec. 5-46. Governing rules and regulations.

The franchise granted hereunder is subject to all conditions, limitations and immunities now provided for, or as hereafter amended, and applicable to the operations of a public utility, by state or federal law. 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. In determining the rights and duties of the Grantee, the terms of this Ordinance shall take precedence over any conflicting terms or requirements contained in any other ordinance enacted by the Grantor.

Sec. 5-47. Provisions 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.

Sec. 5-48. Construction and maintenance of Grantee's facilities.

(a) 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.

(b) Grantee agrees that for the term of this franchise, it will use its best 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 shall fix its excavations as required by Grantor's municipal code, 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 any permits or authorizations required by Grantor for the actions conducted by Grantee during the emergency situation.

(c) 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 seasonable working conditions, to permit the Grantee to make any additions, alterations, or repairs to its facilities.



Sec. 5-49. 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 Colorado Public Utilities Commission make reasonable extensions of its distribution facilities to serve customers located within the current or future corporate limits of Grantor.

Sec. 5-50. Relocation of Grantee's facilities.

(a) 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, as determined at the sole legislative discretion of the Board of Trustees of the Grantor, 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 sole cost and expense of Grantee.

(b) If Grantor orders or requests Grantee to relocate its facilities or equipment for what Grantor and Grantee reasonably agree is 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 that is lacking in public purpose, and such removal is necessary to prevent interference, then Grantee may seek payment for the cost of such relocation from the commercial or private developer or other non-public entity as a precondition to relocating its facilities or equipment.

(c) Grantor will consider reasonable alternatives in designing its public works projects and exercising its authority under this section so as not to arbitrarily cause Grantee 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.

Sec. 5-51. 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.

Sec. 5-52. 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. 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 of its obligations hereunder; provided, however, that this provision shall not obligate a party to settle any labor strike.

Sec. 5-53. 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.

Sec. 5-54. Successors and assigns.

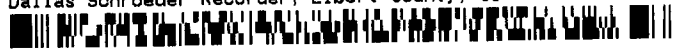
Upon written approval of Grantor, which shall not be unreasonably withheld, all rights, privileges and authority granted to Grantee hereunder shall inure to the benefit of Grantee's lessees, successors and assigns, subject to the terms, provisions and conditions herein contained, and, when so approved, all obligations imposed upon Grantee hereunder shall be binding upon Grantee's lessees, successors and assigns.

Sec. 5-55. 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.

Sec. 5-56. Severability.

If any clause, sentence or section of this Ordinance is deemed invalid by any judicial, regulatory or legislative body having proper jurisdiction, the remaining provisions shall not be affected.



Sec. 5-57. 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.

Sec. 5-58. Repeal conflicting ordinances.

This Ordinance, when accepted by Grantee as provided below, 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.

Sec. 5-59. Effect and interpretation.

The captions that precede each section of this Ordinance are for convenience or reference only and shall not be taken into consideration in the interpretation of any of the provisions of this Ordinance.

Sec. 5-60. Acceptance.

Upon final passage and approval of this Ordinance by Grantor, in accordance with applicable laws and regulations, Grantee shall file its acceptance by written instrument, within sixty (60) days of passage by the Board of Trustees, with the Clerk of the Town of Kiowa, Colorado. The Clerk of the Town of Kiowa, Colorado shall sign and affix the community seal to acknowledge receipt of such acceptance and return one copy to Grantee. If Grantee does not, within sixty (60) days following passage of this Ordinance, either express in writing its objections to any terms or provisions contained therein, or reject this Ordinance in its entirety, Grantee shall be deemed to have accepted this Ordinance and all of its terms and conditions.

Secs. 5-61 - 5-70. Reserved.

Section 3. Safety Clause. The Town Board of Trustees hereby finds, determines, and declares that this Ordinance is promulgated under the general police power of the Town of Kiowa, that it is promulgated for the health, safety, and welfare of the public, and that this Ordinance is necessary for the preservation of health and safety and for the protection of public convenience and welfare. The Board of Trustees further determines that the ordinance bears a rational relation to the proper legislative object sought to be attained.

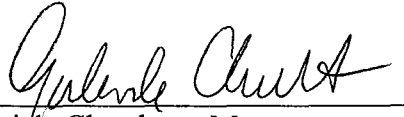
Section 4. Severability. If any clause, sentence, paragraph, or part of this Ordinance or the application thereof to any person or circumstances shall for any reason be adjudged by a court of competent jurisdiction invalid, such judgment shall not affect application to other persons or circumstances.



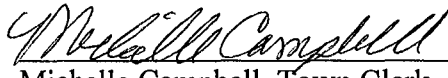
Section 5. Effective Date. This Ordinance shall become effective ten (10) days after publication by title.

INTRODUCED, and ADOPTED by a vote of 6 for and 0 against and ORDERED PUBLISHED BY TITLE this 9th day of April, 2019.

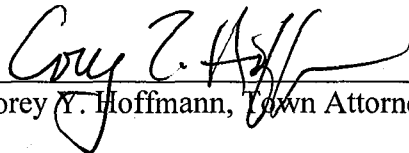
TOWN OF KIOWA, COLORADO


Gabriele Cheatham, Mayor

ATTEST:


Michelle Campbell, Town Clerk

APPROVED AS TO FORM:


Corey Y. Hoffmann, Town Attorney

