

ORDINANCE NO. 2023-__

CITY OF TONTITOWN, WASHINGTON COUNTY, ARKANSAS

AN ORDINANCE GRANTING BLACK HILLS ENERGY ARKANSAS, INC., OR ITS SUCCESSORS, THE RIGHT, PRIVILEGE, AND FRANCHISE TO CONSTRUCT, MAINTAIN AND OPERATE A NATURAL GAS SYSTEM, AND TO LAY GAS MAINS, ALONG, OVER AND ACROSS AND UNDER STREETS, AVENUES, ALLEYS, ROADS, HIGHWAYS, AND OTHER PUBLIC WAYS FOR THE PURPOSE OF DISTRIBUTING AND SELLING NATURAL GAS; PROVIDING FOR THE REGULATION OF THE CONDUCT OF SAID GAS DISTRIBUTION SYSTEM; REPEALING ALL ORDINANCE IN CONFLICT THEREOF; PROVIDING FOR THE EMERGENCY CLAUSE AND FOR OTHER PURPOSES.

WHEREAS, Black Hills Energy Arkansas, Inc. (“Grantee”) has statewide authority to construct, operated and maintain a natural gas system in the public rights of way thought the State of Arkansas; and

WHEREAS, the City of Tontitown has the power and authority under Ark. Code. Ann. § 14-54-302 to sell, convey, lease, rent or let any real estate of personal property owned or controlled by the City of Tontitown; and

WHEREAS, pursuant to Ark. Code Ann. § 14-54-704, the City of Tontitown is authorized to enter into contracts for any public utility necessities for itself and for the inhabitants of the City on such rates, charges, and terms as may be agreed upon; and

WHEREAS, pursuant to Ark. Code Ann. § 14-200-101, the City of Tontitown is permitted to impose reasonable terms and conditions on the use and occupation of the City's rights-of-way and to collect a reasonable franchise fee for such use and occupation of its rights-of-way; and

WHEREAS, the City Council of the City of Tontitown finds that it is in best interests of the citizens of the City of Tontitown desires to repeal Ordinance Nos. 1941-03-031 and 03-05-2002, 75 of 1980, and any ordinances in conflict thereof, and adopt this new Ordinance.

NOW, THEREFORE, BE IT ENACTED, by the City Council of the City of Tontitown, Arkansas:

Section 1. *Grant of Authority.* The City of Tontitown, Arkansas, hereby grants to Black Hills Energy Arkansas, Inc., and to its successors, lessees and assigns, the exclusive right, privilege

and authority within the present and all future expansions of the corporate limits of the City of Tontitown.

- (a) To sell, furnish, transmit and distribute natural gas to all inhabitants and consumers within the corporate limits; and
- (b) Subject to the terms, conditions and stipulations set forth in this ordinance, to construct, equip, operate, repair and maintain a natural gas transmission and distribution system on, over, under and through Public Ways and Public Ground; and
- (c) To construct, equip, operate, repair and maintain a natural gas transmission and distribution system on, over, under and through Public Ways and Public Ground for the purpose of conveying and distributing natural gas to any point beyond the City limits in order to enable Grantee to distribute and sell natural gas to the City and to its residents and inhabitants thereof, and to others.

Section 2. Definitions and construction. For the purposes of this ordinance:

City or city shall be construed to mean the City of Tontitown, Arkansas.

Gas distribution system shall mean a system of gas mains, pipes, conduits, feeders, connections, fixtures and appurtenances thereto constructed for the purpose of supplying and distributing natural gas for light, fuel, power, and heat and for other purposes.

Grantee or grantee shall be construed to mean Black Hills Energy Arkansas, Inc. or its successors, lessees, and assigns, the franchisee under this ordinance.

Natural gas and *gas* shall be defined as including, in addition to natural gas, such alternate substitutes or supplemental fuels, including but not limited to liquefied natural gas, liquefied petroleum gas, synthetic natural gas, renewable natural gas, hydrogen, propane – air, and any mixture thereof.

Gross receipts shall be defined to include all 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.

Public way shall be defined as including streets, avenues, alleys, roads, highways, rights-of-way, easements and other public places and ways within the jurisdiction of the city.

Public ground shall be defined as city parks and other public places and public property within the jurisdiction of the city.

Section 3. Location, other regulations.

- (a) *Location of facilities.* Natural gas distribution systems shall be located, constructed and maintained so as not to interfere with the safety and convenience of ordinary travel along and over public ways and so as not to disrupt normal operation of any city utility system previously installed therein. Natural gas systems, when located on public grounds, shall be located as reasonably determined by the city. Grantee's construction, reconstruction, operation, repair, maintenance and location of natural gas distribution facilities shall be subject to permits if required by separate ordinance and to other reasonable regulations of the city to the extent not inconsistent with the terms of this franchise agreement. Grantee may abandon underground natural gas distribution facilities in place, provided

at the city's request, grantee will remove abandoned metal or concrete encased conduit interfering with a city improvement project, but only to the extent such conduit is uncovered by excavation as part of the city improvement project.

- (b) *Field locations.* Grantee shall provide horizontal field locations for its underground utility distribution facilities within the city within 2 working days of a formal request by the City or within such time as required by state law if state law affords more time. If vertical field locations are requested, grantee shall provide the information within 14 days or within such time as required by state law if state law affords more time.
- (c) *Street openings.* Grantee shall not open or disturb any public way or public ground for any purpose without first having obtained a permit from the City, if required by a separate ordinance, for which the City may require a surety bond. Permit conditions imposed on grantee shall not be more burdensome than those imposed on other utilities for similar facilities or work. Grantee may, however, open and disturb any public way or public ground without permission from the city where an emergency exists requiring the immediate repair of natural gas distribution facilities. In such event grantee shall notify the city by email or telephone to the office designated by the City as soon as practicable. Not later than the second working day thereafter, grantee shall obtain any required permits.
- (d) *Restoration.* After completing any work requiring the opening of any public way or public ground, Grantee shall restore the same, including paving and its foundation, to as good a condition as formerly existed. Work outside the paved area must be fine graded and seeded, hydro-mulch, or sod placed so that adjacent property owners or the City can mow without damage to machinery or people. The work shall be completed as promptly as weather permits, and if Grantee shall not promptly perform and complete the work, remove all dirt, rubbish, equipment and material, and put the public way or public ground in the said condition, the city shall have, after demand to grantee to cure and the passage of a reasonable period of time following the demand, but not to exceed five days, the right to make the restoration at the expense of grantee. Grantee shall pay to the City the cost of such work done for or performed by the City. The remedy shall be in addition to any other remedy available to the city for noncompliance.
- (e) *Notice of improvements.* The City must give grantee reasonable notice of plans for improvements to public ways or public ground where the city has reason to believe that natural gas distribution facilities may affect or be affected by the improvement. The notice must contain; (i) the nature and character of the improvements, (ii) the public ways and public ground upon which the improvements are to be made, (iii) the extent of the improvements, (iv) the time when the city will start the work, and (v) if more than one public way or public ground is involved, the order in which the work is to proceed. The notice must give grantee a sufficient length of time in advance of the actual commencement of the work to permit grantee to make any necessary additions, alterations or repairs to its natural gas distribution facilities.

Grantee shall be required to submit any large project or new expansion. Grantee shall provide reasonable notice to the City of their long-range plan, including copies of any such plans along with a work schedule inside the city.

- (f) *Utility corridors.* The City will provide Grantee space within a utility corridor in which to locate on all major street projects. Grantee must locate within the assigned area of the corridor so as to not interfere with other utilities. Any utility that locates outside the corridor will be required to move into their assigned location or the city may move the utility and charge the utility for the relocation.

Section 4. Relocations.

- (a) *Relocation of natural gas distribution facilities in public ways.* If the City determines to vacate a public way for a City improvement project, or at City's cost to grade, regrade, or change the line of any public way, or construct or reconstruct any City utility system in any public way, it may order grantee to relocate its natural gas distribution facilities located therein if relocation is reasonably necessary to accomplish the City's proposed public improvement. Grantee shall relocate its natural gas distribution facilities at its own expense unless they are in a private easement or right-of-way obtained by the grantee. If they are in an easement obtained by the city or as part of a city project the Grantee must relocate at their own expense. The City shall give Grantee reasonable notice of plans to vacate for a city improvement project, or to grade, regrade, or change the line of any public way or to construct or reconstruct any city utility system. If relocation is ordered within five years of a prior relocation of the same natural gas distribution facilities, which was made at Grantee expense, the City shall reimburse grantee for non-betterment costs on a time and material basis, provided that if a subsequent relocation is required because of the extension of a city utility system to a previously unserved area, Grantee may be required to make the subsequent relocation at its expense. Nothing in this Ordinance requires Grantee to relocate, remove, replace or reconstruct at its own expense its natural gas distribution facilities where such relocation, removal, replacement or reconstruction is solely for the convenience of the city and is not reasonably necessary for the construction or reconstruction of a public way or city utility system or other city improvement.
- (b) *Relocation of natural gas distribution facilities in public ground.* City may require grantee at Grantee's expense to relocate or remove its gas distribution facilities from public ground upon finding by city that the natural gas distribution facilities have become or will become a substantial impairment to the existing or proposed public use of the public ground.
- (c) *Relocation of natural gas distribution facilities for Commercial or Private Project.* If City 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, then Grantee shall be entitled to require payment for the cost of such relocation as a precondition to relocating its facilities or equipment.

Section 5. Franchise Fee. Grantee shall pay to the city a municipal franchisee fee in an amount equal to 4.25% percent of grantee's annual gross receipts, including fuel adjustment charges, before taxes, derived from the sale, distribution or transportation of natural gas to residential and commercial consumers located within the corporate limits of the City. Payments shall be made to the City in quarterly installments payable within 30 days following conclusion of the period for which payment is made.

The amount paid by Grantee shall be in lieu of, and Grantee shall be exempt from, all other fees, charges, taxes or assessments which the City may impose for the privilege of doing business within the present or future corporate limits of 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 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 the City shall not be deemed to affect Grantee's obligations under this section.

Payments shall be made to the City in quarterly installments payable within 30 days following conclusion of the month for which payment is made.

Residential, commercial, and industrial revenues are those revenues so classified pursuant to grantee's uniform classification standards. Further:

- (a) The City shall have the right to examine and verify from the records of the Grantee any data relating to the gross receipts subject to the municipal franchise fee;
- (b) The Grantee shall make their records available to the City to demonstrate compliance with this section for a period of three (3) years preceding the request; and
- (c) 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 the City.

Section 6. Map

Within ten (10) days of the date of this Ordinance, City 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 City'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 City's corporate limits are changed by annexation or otherwise, it shall be the City's sole responsibility to (a) update the Map so that the changes are included therein, and (b) provide the updated Map to the Grantee.

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 City of an updated Map including the annexed area, or (b) after Grantee's receipt from the City 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 City, that is discovered more than one (1) year after the occurrence thereof. In addition, Grantee shall not be liable for paying franchise fees from or to any customer originally or subsequently identified, or incorrectly identified, by City 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.

Section 7. Term. This franchise fee shall take effect on the first day of the month following the date this Ordinance is passed and approved by the City and shall be unlimited as to time pursuant to Ark. Code Ann. § 14-200-103.

Section 8. Police Powers. No provision of this ordinance or grant of an exclusive franchise to Grantee shall be construed to limit or abridge the power and authority of the city to exercise its police powers and regulations necessary for the health, safety and welfare of the citizens of Tontitown and others.

Section 9. Indemnity. Grantee, during the period that this Ordinance is in effect, shall save and hold harmless the City 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 City harmless from claims, demands, losses and expenses arising out of the negligence of City or, its employees or agents.

Section 10. Conflicting ordinances repealed. All ordinances or parts of ordinances conflicting with any of the provisions of this ordinance, including Ordinance Nos. 1941-03-031, 75 of 1980, and 03-05-2002, are hereby repealed. If any clause, sentence, or section of this ordinance should be determined to be invalid, the invalidity of any clause, sentence, or section hereof shall not affect the validity of the remainder of this ordinance.

Section 11. Declaration of Emergency. It is hereby found and determined that an emergency is declared to exist due to the need to protect city rights-of-way and properties from damage and in order to provide for the orderly installation and transmission of utilities, and this act, being immediately necessary for the preservation and protection of the public peace, health, safety and welfare of the City and its citizens, shall become effective on the date of its passage and approval by the Mayor. If the Ordinance is neither approved nor vetoed by the Mayor, it shall become effective on the expiration of the period of time during which the Mayor may veto this Ordinance. If the Ordinance is vetoed by the Mayor and the veto is overridden by the City Council, it shall become effective on the date the City Council overrides the veto.

PASSED AND APPROVED this ___ day of _____ 2023.

APPROVED:

Angela Russell, Mayor

ATTEST:

Rhonda Ardemagni, City Clerk-Treasurer
(SEAL)