



**Roll Call Number**

**Agenda Item Number**

58A

**Date** May 9, 2022

An Ordinance entitled, "AN ORDINANCE extending and amending the franchise heretofore granted to Midwest Gas Company, predecessor in interest to MidAmerican Energy Company, and granting until MidAmerican Energy Company, its successors and assigns, the right, franchise and privilege for a period of thirteen years from and after the effective date hereof, to acquire, construct, operate and maintain in the City of Des Moines, Iowa, the necessary facilities for the production, distribution, transmission and sale of gas for public and private use; to use and occupy the public streets, highways, avenues, alleys, bridges and public places for such purposes; and providing for the imposition and collection of a franchise fee",

presented.

Moved by \_\_\_\_\_ that this ordinance be considered and given first vote for passage. Seconded by

\_\_\_\_\_.

FORM APPROVED:

(First of three required readings)

Thomas G. Fisher, Jr.  
Deputy City Attorney

COUNCIL ACTION	YEAS	NAYS	PASS	ABSENT
COWNIE				
BOESEN				
GATTO				
SHEUMAKER				
MANDELBAUM				
VOSS				
WESTERGAARD				
TOTAL				
MOTION CARRIED	APPROVED			

**CERTIFICATE**

I, P. Kay Cmelik, City Clerk of said City hereby certify that at a meeting of the City Council of said City of Des Moines, held on the above date, among other proceedings the above was adopted.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal the day and year first above written.

\_\_\_\_\_ Mayor

\_\_\_\_\_ City Clerk

58A

ORDINANCE NO. \_\_\_\_\_

AN ORDINANCE extending and amending the franchise heretofore granted to Midwest Gas Company, predecessor in interest to MidAmerican Energy Company, and granting until MidAmerican Energy Company, its successors and assigns, the right, franchise and privilege for a period of thirteen years from and after the effective date hereof, to acquire, construct, operate and maintain in the City of Des Moines, Iowa, the necessary facilities for the production, distribution, transmission and sale of gas for public and private use; and to use and occupy the public streets, highways, avenues, alleys, bridges and public places for such purposes; providing for the imposition and collection of a franchise fee in consideration thereof; and prescribing the terms and conditions thereof.

WITNESSETH:

WHEREAS, pursuant to Ordinance No. 6281 adopted by the city council on May 4, 1987 and ratified by the voters at a special election on June 9, 1987, the City of Des Moines did grant unto Midwest Gas Company for a period of 25 years from and after the effective date thereof, a franchise to acquire, construct, operate and maintain in the City of Des Moines, Iowa, the necessary facilities for the production, distribution, transmission and sale of gas for public and private use; and to use and occupy the public streets, highways, avenues, alleys, bridges and public places for such purposes; providing for the imposition and collection of a franchise fee from its customers in consideration thereof; and prescribing the terms and conditions thereof; and

WHEREAS, pursuant to Ordinance No. 14-342 adopted by the city council on July 12, 2004, the City of Des Moines did extend the franchise previously granted to MidAmerican Energy Company, the successor to Midwest Gas Company, for a period of 10 years from June 15, 2012 the right, franchise and privilege to acquire, construct, operate and maintain in the City of Des Moines, Iowa, the necessary facilities for the production, distribution, transmission and sale of gas for public and private use; and to use and occupy the public streets, highways, avenues, alleys, bridges and public places for such purposes; providing for the imposition and collection of a franchise fee from its customers in consideration thereof; and prescribing the terms and conditions thereof; and,

WHEREAS, this City Council has determined that it would be in the best interests of the City of Des Moines and its residents to amend said franchise and to extend the term thereof for a period of ten years, all as hereinafter provided.

Now, Therefore, Be It Ordained by the City Council of the City of Des Moines, Iowa:

**Section 1. Franchise extended.**

That the franchise heretofore granted to Midwest Gas Company, to acquire, construct, operate and maintain in the City of Des Moines, Iowa (the "City"), the necessary facilities for the production, distribution, transmission, and sale of gas for public and private use and to construct and maintain along, upon, across, and under the streets, highways, avenues, alleys, bridges, and public places the necessary fixtures and equipment for such purposes, be and the same is hereby extended in the name of MidAmerican Energy Company (hereinafter "the Company") for a

period of thirteen years, such that said amended franchise shall continue in effect until June 15, 2035, at which time said franchise shall terminate and expire. This franchise shall be effective for a thirteen-year period from and after the effective date of this ordinance; provided, however, that either the City or the Company may, during the first ninety (90) days following the fifth anniversary of the effective date of the franchise (hereinafter referred to as the “amendment period”), provide written notice to the other party of its desire to amend the franchise. If either party provides notice to the other, the parties shall engage in good-faith negotiations to discuss possible amendments and the status of the existing franchise. If the parties fail to amend the franchise during the amendment period, it will continue until June 15, 2035.

**Section 2. Representation of Company.**

The Company agrees to provide and maintain its entire system pursuant to Iowa Utilities Board rules in such condition that it will furnish safe, adequate, efficient and continuous service. All gas service shall be supplied through a meter or other means which shall accurately measure the amount of gas supplied to a consumer. There is no constitutional or other legal impediment to the enforceability of this franchise agreement.

**Section 3. Rates.**

The Company shall supply gas to consumers within the city at just and reasonable rates. It is recognized that under the statutes of the State of Iowa, the Iowa Utilities Board of the Iowa Department of Commerce is vested with legal authority to supervise, fix, or change rates and charges authorized to be charged by the Company to gas consumers. In the event rates or charges in general, or any class or type of rate or charge shall, during the term of this franchise, cease to be regulated by any state or federal agency, the City Council reserves the right to regulate such rates within the City with the costs of such regulation to be borne by the Company as a part of its cost of doing business, and reflected in its rates.

**Section 4. Annual report.**

The Company shall file with the City Council a true copy of the annual report of the Company pertaining to the operation or conduct of the business of the Company under this franchise. The report may be the same as the Company shall have prepared for such year in the ordinary course of business of the Company and filed with the Iowa Utilities Board. In the event the City Council undertakes to regulate rates for service within the city, the Company shall provide all information necessary to permit the City Council to set just and reasonable rates.

**Section 5. Compliance with city ordinances.**

The Company shall at all times during the term of this franchise conform with, submit to, and carry out the provisions of any and all valid ordinances (a) relating to any person, firm or corporation supplying and distributing gas to the city or its inhabitants now in force or that hereafter may be lawfully enacted; (b) relating to the use of city right-of-way, including but not limited to the City's Right-of-Way Management Ordinance, now codified in Chapter 102, Article

IX of the Des Moines City Code, 2014, entitled "Right-of-Way Occupancy", as same may hereafter be amended; or (c) relating to the city's exercise of its police powers.

**Section 6. Franchise fee.**

In consideration of the right to construct and maintain such facilities and equipment along, upon, across and under the streets, highways, avenues, alleys, bridges and public places of the city there is hereby imposed upon the Company a franchise fee in an amount equal to five percent (5%) of the gross revenue of the Company, minus uncollectible accounts, derived from the distribution, transmission and retail sale of gas by the Company to customers within the current or future corporate limits of the city (excluding, however, the sale of gas to the city) commencing with gross receipts received on or after June 16, 2022.

With respect to the distribution of gas other than by sale thereof to a purchaser from the Company, the percentage of gross revenue stated above shall be applied to the full cost of gas delivered within the City, including all costs of acquisition, ownership and transmission thereof, wherever incurred. In determining the amount of the fee, the Company may presume that the cost of gas is the same as if the gas were sold by the Company, unless a different cost is provided. The obligation to pay the fee imposed by this section is modified if:

1. The City permits any other person to sell gas to City consumers and pay a franchise fee or its lawful equivalent at a lesser rate than provided in this section, in which case the Company shall pay at the lesser rate; or
2. If the City adds additional territory by annexation or consolidation and is unable to lawfully impose the franchise fee upon any person selling gas to consumers within the additional territory, in which case the franchise fee on the revenue from sales by the Company in the additional territory shall be equal to that of the lowest fee being paid by any other person selling gas within the additional area.

**Section 7. Exemption from payment of franchise fee.**

The Company shall be relieved of its obligation to collect from its customers and remit to the city the franchise fee if the franchise fee or the manner in which it is collected from customers is ruled to be unlawful by the Supreme Court of Iowa in a final non-appealable decision. If a refund to customers is ordered by the Supreme Court in a final non-appealable decision, the City agrees to repay to the Company such fees as are ordered to be repaid.

**Section 8. Remittance of franchise fee.**

The Company shall remit the sum collected from customers to the city treasurer quarterly on May 1, August 1, November 1 and February 1 of each year for the three-month periods ending respectively March 31, June 30, September 30 and December 31.

**Section 9. Preservation of city's rights.**

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 regulatory power (but not including the power to acquire by condemnation all or part of the Company's facilities) which it may now have, or hereafter be authorized or permitted, by the laws of the State of Iowa.

#### **Section 10. Forfeiture of Franchise; Cure of Defaults.**

The violation of any material portion of this franchise by the Company or its successors or assigns, or its failure to promptly perform any of the provisions of this franchise shall be cause for forfeiture of this franchise and the termination of all rights under this franchise. Such forfeiture shall be accomplished after written notice to the Company by the city, and a continuation of the violation, failure or default specified in the notice for at least sixty days from the date the notice was served upon the Company.

If either party determines that there is a default under this franchise, the other party shall be given a written notice describing the default, stating whether a forfeiture or termination of the franchise will be sought, and where the default is curable, providing a reasonable time to cure the default, which shall be not less than thirty nor more than one hundred eighty days.

#### **Section 11. Reservation of Home Rule Powers.**

This ordinance is intended to be and shall be construed as consistent with the reservation of local authority contained in the Twenty Fifth Amendment to the Iowa Constitution granting municipalities home rule powers. To such end any limitation on the power of the city 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 to the Company under this ordinance.

#### **Section 12. Maps of Distribution System.**

The Company shall furnish to the city such mapping data regarding its distribution system as the city shall hereafter require pursuant to its right-of-way management program and Section 102-663 of the Des Moines City Code, 2014, or successor provision thereto. At the request of the Company, any information requested with respect to the location or type of equipment which the Company maintains or plans to install in the right-of-way, which qualifies as trade-secret information under Iowa Code section 550.1 et seq., shall be treated as trade-secret information in accordance with Iowa Code section 22.1 et seq., pertaining to examination of public records, or which qualifies to be kept confidential under any provision of Iowa Code 22.1 et seq.

#### **Section 13. Use of Eminent Domain Powers.**

The Company shall have the power to condemn private property for the purpose of providing gas to the extent necessary to serve a public use and in a reasonable relationship to an overall plan of transmitting and/or distributing gas in the public interest upon approval of the City

Council. The Company must establish the necessity for each taking of private property, and when so established, the City Council may approve the condemnation of the private property by resolution. Any such exercise of the eminent domain powers shall be conducted in accordance with the Des Moines Municipal Code.

**Section 14. Severability; effect of regulatory actions.**

Provisions of this franchise shall be deemed severable and if either party is prevented from fulfilling its obligations hereunder by final, non-appealable regulatory or judicial action or by legislative action, the provision of the franchise deemed illegal or void shall be deemed of no further force and effect as of the date of the agency order imposing such regulatory action or such other date required by such judicial or legislative action. The remaining provisions of the franchise shall be and remain in full force and effect.

**Section 15. Publication of Ordinance and Notice; Election upon submission of valid petition; effective date.**

The City Clerk shall publish this ordinance, together with a notice as hereafter provided, in a newspaper of general circulation in Polk County, all as required by Section 380.7 of the Iowa Code. If at any time within twenty days after publication of notice of hearing on this ordinance a petition is filed with the clerk of the city in the manner provided by Iowa Code Section 362.4, asking that the question of passage of this ordinance be submitted to the registered voters of the city, then the council shall submit the proposal at the next regular city election or at a special election called for that purpose, in accordance with Iowa Code Section 364.2.

**NOTICE**

Under the provisions of Section 364.2 of the Iowa Code, Des Moines City Council Ordinance No. 04-14,342, extending the gas franchise heretofore granted to Midwest Gas Company, predecessor in interest to MidAmerican Energy Company, shall take effect upon June 15, 2022, provided that MidAmerican Energy Company shall have filed with the city clerk a written acceptance of the franchise extension granted pursuant to said Ordinance. Provided, however, if prior to June 15, 2022, a valid petition under Section 362.4 of the Iowa Code requesting submission to the voters of the proposal to extend said franchise is submitted to the City Clerk, said Ordinance shall not take effect unless it is approved by an affirmative majority vote of the electors. Upon the county election commissioner's certification of an affirmative majority vote of the electors with respect to the proposal to extend the gas franchise as provided in said Ordinance, said Ordinance shall take effect.

Passed: May \_\_\_\_, 2022

Signed: May \_\_\_\_, 2022

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T.M. FRANKLIN COWNIE, Mayor

Attest:

I, P. Kay Cmelik, City Clerk of the City of Des Moines, Iowa, hereby certify that the above and foregoing is a true copy of an ordinance (Roll Call No. 22-\_\_\_\_), passed by the city council of said city at a meeting held May \_\_\_\_, 2022, and signed by the mayor May \_\_\_\_, 2022, and published as provided by law in the Des Moines Register on May \_\_\_\_, 2022.

P. KAY CMELIK, City Clerk