

Ordinance No. 32-12

An Ordinance authorizing Northwestern Corporation to provide, transmit or distribute Natural Gas upon and within city property and the streets and public rights-of-way in the City of Brookings, South Dakota, and establishing regulations pertaining thereto.

Be It Ordained by the Governing Body of the City of Brookings, South Dakota, as follows:

I.

Sec. 1. Purposes of this Ordinance.

To the extent permitted by law, the City Council of the City of Brookings is adopting this Ordinance to grant Northwestern Corporation (referred to herein as the "Company") the right of access to City real property and the public rights-of-way area for the construction, operation and maintenance of gas facilities. The right of access granted pursuant to this Ordinance is subject to the City's right to regulate the public rights-of-way area pursuant to SDCL § 9-35-1, subject to restrictions upon the City pursuant to SDCL Chapter 49-34A.

The City recognizes and agrees that pursuant to SDCL § 49-34A-5, municipal corporations have no authority or jurisdiction over rates and conditions of service of any public utility subject to the jurisdiction of the South Dakota Public Utilities Commission. To the extent of any conflict between this Ordinance and SDCL Chapter 49-34A, State law shall control.

Sec. 2. Definitions.

For the purposes of this Ordinance, the following words and terms shall have the meanings provided in this Section, except where the context clearly indicates a different meaning. Unless otherwise expressly stated or clearly contrary to the context, words and terms not defined herein shall be given the meaning set forth in the City code; if not defined in the City code, the meaning set forth in any State law of general applicability; and if not defined either in the City code or in a State law, their common and ordinary meaning.

When not inconsistent with the context, words used in the present tense include the future tense and vice versa; words in the plural number include the singular number and vice versa; and the masculine gender includes the feminine gender and vice versa. The words "shall" and "will" are mandatory; the word "may" is permissive.

(a) *City* shall mean the City of Brookings, State of South Dakota.

(b) *City real property* shall mean all land currently or in the future owned by the City within the present and/or future corporate limits of the City.

(c) *Company* shall mean Northwestern Corporation, and its successors and/or assigns.

(d) *Company facilities* shall mean all gas facilities owned or operated or otherwise controlled by the Company.

(e) *Construction* shall mean, without limitation, constructing, acquisition, laying, maintaining, testing, operating, extending, renewing, relocating, removing, replacing, repairing, and using gas facilities.

(f) *Consumer* shall mean any person, firm, partnership, corporation, municipality, cooperative, organization, governmental agency or other form of legal entity currently or potentially provided services by the Company.

(g) *Gas* shall mean natural, artificial, and/or mixed methane-based gas.

(h) *Gas facilities* shall mean gas pipes, pipe lines, mains, laterals, conduits, feeders, regulators, meters, fixtures, connections, and all attachments, appurtenances, and accessories necessary and incidental thereto located within City real property or within public rights-of-way area, whether the same be located above or below ground.

(i) *Maintenance, maintaining, or maintain* shall mean, without limitation, relaying, repairing, replacing, relocating, examining, testing, inspecting, removing, digging and excavating, and restoring operations incidental thereto.

(j) *Public rights-of-way area* means all rights-of-way for public roads, streets, avenues, alleys and highways of the City as now or may hereafter be platted, dedicated, acquired or improved within the limits of the City.

(k) *Services* shall mean gas service provided by the Company.

Sec. 3. Powers Granted to the Company.

(a) Right to construct, maintain and operate. The Company shall have the right, privilege and authority to construct, maintain and operate, within City real property and the public rights-of-way area, gas facilities to provide services to consumers within the City limits.

(b) Non-exclusive use. The rights granted to the Company under this Ordinance are non-exclusive. Therefore, this Ordinance is adopted upon the express condition that it shall not in any manner prevent the City from granting others the right to use City real property or the public rights-of-ways area for any lawful purpose.

Sec. 4. Powers Retained by the City.

(a) Retention of power to abate a dangerous situation.

(1) Whenever the construction, maintenance or operation of the Company's facilities has caused or contributed to a condition that endangers the public or adjoining City real property, the public rights-of-way area or private property, the Company shall determine the actions appropriate to the circumstances to alleviate the condition or potential danger and proceed with due diligence to determine an appropriate and

timely remedy to alleviate the condition or potential danger. The Company shall promptly notify the City's Fire Chief of the condition or potential danger.

(2) Furthermore, in the event of a public emergency, and only in the event the Company does not act or is unable to take the necessary action, the City shall have the right to shut off service to affected consumers, without prior notice. Public emergency shall be such a condition which poses an immediate threat to the lives or property of the citizens of the City, caused by any natural or man-made disaster, including but not limited to storms, floods, fire, accidents, explosions, major water main breaks and hazardous spills. The City's action shall only be performed by its authorized Fire Department personnel and only in the event the Company cannot act or requests the City to take action and the action taken shall be limited to shutting the gas meter down by closing the nearest gas service valve.

Sec. 5. Duties of the Company.

(a) Comply with all laws and obtain all necessary permits.

(1) The Company shall at all times be subject to all laws, statutes, ordinances, codes, rules, regulations, standards, and procedures regarding the construction, operation or maintenance of the Company's facilities ("legal requirements"), whether Federal, State or local, now in force or which, hereafter, may be promulgated (including but not limited to zoning, land use, historic preservation ordinances, safety standards, and other applicable requirements). Notwithstanding the foregoing, the City acknowledges and agrees that federal legal requirements govern the construction, maintenance and operation of Company facilities and control over any conflicting or inconsistent local legal requirements. Additionally, if any term or condition of this Ordinance conflicts with any local legal requirements, the provisions of this Ordinance shall govern and control.

(2) No action or omission of the City shall operate as a future waiver of any legal requirements of the City under this Ordinance.

(b) Record all Company facilities.

(1) The Company shall mark (or otherwise clearly identify ownership of) Company facilities in accordance with federal legal requirements. Within thirty (30) days of the effective date of this Ordinance, the Company shall provide to the City, at no cost, maps and drawings showing the location of the Company facilities which have not been previously provided to the City. Upon reasonable request, the Company shall provide to the City, at no cost, updated maps and drawings to reflect modifications to the gas facilities.

(2) The Company shall at all times keep maps and drawings showing the location and size of all Company facilities. These Company facility location maps and drawings shall be subject to inspection by City officials during business hours after reasonable prior notice. In the case of a public emergency involving Company facilities, the Company

shall provide access to such Company facility location maps and drawings by City officials as expeditiously as possible even if outside business hours and without prior notice.

(3) The City acknowledges and agrees that Company facility information delivered to the City pursuant to this Ordinance is proprietary and confidential. The City shall restrict access to Company facility information to those employees whose job duties require an understanding of the gas facilities. The City shall not disclose or disseminate Company facility information to any third parties without the express written consent of the Company.

(4) The plans, maps and drawings delivered to or inspected by the City are for informational purposes only and Company does not warrant the accuracy thereof. To the extent the information delivered to the City identifies Company facilities, such Company facilities are shown in an approximate location. Nothing herein is intended or may be construed to relieve the City or any person with access to or in receipt of Company facility information of their respective obligation under SDCL § 49-7A-5 to determine the location of underground utilities.

(c) Construction, maintenance and operation of Company facilities.

(1) Except in an emergency situation, the Company shall obtain all necessary permits before excavating City real property or the public rights-of-way area for the purpose of constructing or maintaining Company facilities, which shall not be unreasonably withheld or denied. If excavation is commenced without a permit due to an emergency situation, the Company shall obtain all necessary permits as soon as commercially reasonable after the emergency situation is resolved.

(2) The Company shall have the obligation under this Ordinance to maintain and operate its facilities at all times in accordance with applicable industry standards. No City real property or public rights-of-way area shall be obstructed longer than necessary during the Company's construction, maintenance and operations. The Company shall coordinate with the City's plans for street construction, rebuilding, resurfacing and repair to minimize multiple disturbances of the same area. The Company shall cause no damage to any City real property or public rights-of-way area; however, if any such damage shall occur due to the negligence of Company, the Company shall begin repair of the same as promptly as possible. Upon ten (10) days written notice by the City to the Company of the repairs required by the Company's actions and failure by the Company to begin such repairs as requested by the City, the City may make such repair of the City real property and public rights-of-way area and the Company shall reimburse the City for all reasonable costs and expenses incurred. Repairs and restoration by the City shall be limited to City real property and the public rights-of-way area and this provision does not authorize any repair of Company facilities. On notice from the City, the Company shall be responsible for correcting or replacing, at its sole cost and expense, any defective work or Company facilities affecting

City real property or public rights-of-way area. Such corrections or replacements by the Company shall be completed within the reasonable time specified by the City.

(3) Upon not less than thirty (30) days prior written notice, the City, through its authorized representative, may request that the Company relocate, protect, support, disconnect, or remove Company facilities because of work to be otherwise performed by the City for the construction, grading, reconstruction, maintenance or repair of a City street or alley, or water, sewer or storm drainage lines. The Company will be permitted additional time appropriate to the circumstances to take action pursuant to this provision if necessary due to inclement weather or other circumstances which, through no fault of the Company, delays the Company's performance. Notice of the Company's request for additional time shall be given to the City, and the Company and City shall enter into good faith discussions concerning the delay and the City shall thereafter determine whether additional time is appropriate given the circumstances. The City shall provide to the Company a description of its planned work and a description of the actions requested of the Company. The Company shall expeditiously take the action requested by the City, and shall as soon as reasonably possible (not to exceed 10 business days) inform the City of when such actions will be completed after receiving such notice. If relocation is requested, the Company shall relocate its facilities to a reasonable alternative route mutually agreed by the City and the Company.

(4) If the City vacates or consents to the vacation of a street or alley within the City limits, and the City Manager determines that such vacation necessitates the removal and/or relocation of Company facilities, the Company agrees to consent to the vacation and further agrees to relocate or remove its facilities at its sole cost and expense if asked to do so by the City. The Company will not be obligated to remove or relocate Company facilities if the vacation of a street or alley does not also require or make necessary the removal or relocation. If relocation is requested, the Company shall relocate its facilities to a reasonable alternative route mutually agreed by the City and the Company.

(5) If the Company abandons a gas main after the effective date of this Ordinance and such main restricts the City's construction, grading, reconstruction, maintenance or repair of a City street or alley, or water, sewer or storm drainage lines, upon request from the City's authorized representative and within a reasonable time after receipt thereof, the Company shall remove the gas main, or shall take other action directed by the City to allow for the completion of the restricted work. The Company will only be obligated to remove the abandoned portion of the gas main necessary for the City to complete the construction, grading, reconstruction, maintenance or repair. Such removal or other action shall be at no cost to the City. All City real property or public rights-of-way area affected by the Company's removal of abandoned gas mains shall be restored to its condition prior to the removal of the gas main by the Company. In the event the Company fails to remove the abandoned gas main or perform the actions

requested by the City after a reasonable period, the City shall have the right to take such actions and the Company shall pay the costs incurred by the City for such actions.

(d) Obtain and maintain insurance.

(1) The Company shall self-insure or maintain, at its sole expense, during the entire term of this Ordinance, general comprehensive liability insurance coverage for property damage and bodily injury, including coverage for construction, operations, maintenance, relocation, and repair. The Company may self-insure or maintain liability insurance in such amounts as are consistent with applicable law and industry standards. The Company shall provide to the City evidence of such insurance policy(ies) or self-insurance upon request of the City; provided that the City shall not make such request more frequently than annually. The Company shall hold the City harmless for any premiums due, amounts of deductible, or claims under such policy(ies).

(2) Recovery by the City under insurance shall not limit the Company's duty to hold the City harmless for its construction, maintenance and operations as set forth herein. Recovery by the City under insurance is in addition to all other rights of the City, whether specified in this Ordinance or as otherwise authorized by law. Such insurance policy(ies) may not be suspended, voided, canceled by either party, or reduced in coverage or limits, except after sixty (60) days prior written notice has been received by the City. If the Company proposes to suspend, void or cancel such insurance previously approved by the City, unless the City expressly waives its right under this subsection (e), this Ordinance may be terminated at the sole discretion of the City.

(e) Reimburse the City for costs and expenses for proposed transfer of this Agreement. At the City's request, the Company shall reimburse the City for reasonable expenses incurred with respect to any proposed transfer of this Agreement, including, without limitation, attorney's fees, consultant's fees, publication of notices and ordinances, and copying of documents in connection with a proposed transfer of this Agreement.

(f) File and maintain a local emergency response plan.

(1) The Company shall provide to the Brookings Fire Department those portions of its emergency management plan applicable to the City.

(2) With respect to any construction of Company facilities subsequent to the date of this Ordinance, the Company shall ensure, as of the date of completion of such construction (but not thereafter), that Company service valves which can be used to shut off service at the meter are accessible to authorized Fire Department personnel in time of an emergency at no cost to the City. To the extent existing facilities are not so accessible and any construction occurs concerning such existing facilities, the Company either shall relocate or require the customer to relocate its inaccessible meter at no cost to the City.

Sec. 6. Term.

(a) Term of Ordinance. The term of the Ordinance is ten (10) years from and after the effective date hereof, provided that neither the Company nor the City shall be bound by the provisions herein until the Company has filed with the City its written acceptance of this Ordinance as provided in Section 7 below.

(b) Termination.

(1) If the Company fails to comply with any material provision of this Ordinance, the City may serve on the Company a written order to so comply within sixty (60) days from the date of the order. If the Company is not in compliance after expiration of that designated time period, the City may, after affording the Company a reasonable opportunity to be heard, terminate this Ordinance; provided, however, that if any failure to comply cannot with reasonable and appropriate efforts by the Company be corrected within the designated time period, the City shall reasonably extend that period upon appropriate representations and assurances by the Company that corrections are being made. Such extension will not be considered or deemed a waiver by the City of any such lack of compliance. The City may allow continuation of this Ordinance for as long as the City deems appropriate, despite a breach or forfeiture as described herein, in order to ensure continuation of service to consumers; such continuation of the arrangement will not be deemed a waiver of the City's right to terminate pursuant to this paragraph.

(2) Nothing in this Ordinance shall limit or restrict any legal rights that the City or the Company may possess arising from any alleged violation of this Ordinance.

Sec. 7. General Conditions.

(a) Indemnification and hold harmless. The Company agrees to protect, hold harmless, and indemnify the City (including its officials, agents, contractors, and employees) from and against all claims, losses, damages, causes of action, suits and liability of every kind, which may occur to, or be suffered by, any person or persons, corporation, or property by reason of any negligent act or negligent failure to act on the part of the Company. In case suit or action is brought against the City for damages arising out of or by reason of the above-mentioned causes, the Company shall, upon written notice to it of the commencement of said action against the City, defend the same at its sole cost and expense, and hold harmless and indemnify the City from reasonable attorney's fees and costs of litigation incurred by the City in connection with the litigation. In case judgment shall be rendered in such a suit or action against the City, the Company shall fully satisfy the judgment within sixty (60) days after the suit or action shall have been finally determined, if determined adversely to the City.

(b) Exception. Notwithstanding Section 7(a) of this Ordinance, the Company shall not be required to indemnify the City for negligence on the part of the City or its officials, agents, contractors, or employees (hereinafter "such acts"). The City shall hold the Company harmless for any damage resulting from any such acts of the City or its officials, agents, contractors, or employees and for any such negligent acts committed by the Company in connection with

negligent action taken by the City and permitted by this Ordinance, on or adjacent to the Company's facilities.

(c) No waiver. Neither the City nor the Company shall be excused from complying with any of the terms and conditions of this Ordinance by any failure of the other (including its affiliates, employers, or agents) to insist upon or seek compliance with any such term or condition.

(d) No third-party rights. It is the express intent of the City and the Company that neither this Ordinance nor any of its provisions shall create any rights in third parties.

(e) Dispute resolution. In the event that there is any dispute between the City and the Company arising by reason of this Ordinance, the City and Company may, by mutual agreement (both as to whether to hire and whom to hire) employ the services of technical consultants as mediators. All reasonable fees of the consultants incurred by the City and the Company in this regard shall be borne equally.

(f) Assignment, lease/sublease, and transfer. The rights granted Company pursuant to this Ordinance may be assigned or transferred upon reasonable prior written notice to the City so long as the assignee submits written confirmation of the assignee's written acceptance of all terms and conditions of the Agreement to the City. In the event of transfer or assignment in whole or in part to secure indebtedness, submission of such written acceptance shall not be required, but the Company shall provide notice of such assignment or transfer to the City within thirty (30) days of the effective date of such assignment or transfer.

(g) Company as independent contractor. When performing under this Ordinance, the Company's status shall be that of an independent contractor and not an agent, servant, employee or representative of the City in the performance of work pursuant to this Ordinance. No term or provision of this Ordinance, or act of the Company (or its employees, contractors, or subcontractors), shall be construed as changing that status.

(h) Modification of the Ordinance. The City and the Company hereby reserve the right to alter, amend or modify the terms and conditions of this Ordinance upon written agreement of both parties to such alteration, amendment or modification, and acceptance of such by the City Council, if required.

(i) Notice.

(1) All notices, including communications and statements which are required to be in writing under the terms of this Ordinance, shall be evidenced by receipt service of the written notice and may be accomplished by facsimile, personal service, registered or certified mail (postage prepaid), or reputable daytime or overnight courier service.

(2) Written notices shall be sent to the parties at the following addresses:

City:

City of Brookings
Attn: City Manager
P.O. Box 270
Brookings, SD 57006
Tele: (605) 692-6281
Fax: (605) 692-6907

Company:

Northwestern Corporation
Attn: Area Manager
1232 – 22nd Ave. S.
P.O. Box 57
Brookings, SD 57006
Tele: (605) 692-6265
Fax: (605) 692-9108

(3) The City or the Company may designate a new address for itself for purpose of notice hereunder by written notice to the other duly given as provided herein.

(j) Approval by City. The Ordinance as set forth herein shall be approved by the City Council before acceptance by the Company.

(k) Acceptance by the Company. Within sixty (60) days after approval and passage of this Ordinance by the City, the Company shall file with the City Clerk an unconditional written acceptance thereof. Failure of the Company to so accept this Ordinance within said period of time shall be deemed a rejection of this Ordinance by the Company, and the rights and privileges granted herein (after the designated timed period for filing acceptance) shall absolutely cease and be forfeited and null and void as to the Company, unless the time period for acceptance is extended by order of the City Council.

(l) Effective date. This Ordinance shall be in full force and effect from and after its passage, approval by the City, acceptance by the Company, and legal publication as provided by law.

Sec. 8. Miscellaneous.

(a) The headings of sections and subsections of this Ordinance are for convenience of reference only and are not intended to restrict, affect, or be of any weight in the interpretation or construction of the provisions of such sections or subsections.

(b) This Ordinance contains the entire agreement of the parties; and no other agreement (oral, written, or otherwise) regarding the subject matter of the Ordinance shall be deemed to exist or to bind the parties hereto. The Ordinance may not be changed, modified, discharged, or

extended, except by written amendment, duly approved by the City if necessary and accepted by the Company.

(c) If any term, condition, or provision of this Ordinance, to any extent, be held to be invalid, illegal or unenforceable (referred to herein as an "impaired provision") the remaining terms, conditions and provisions shall remain valid in all other respects and continue to be effective. With respect to the impaired provision, the City and the Company shall enter into good faith negotiations and proceed with due diligence to draft a term, condition or provision that will achieve the original intent of the parties hereunder. In the event of a subsequent change in applicable, law so that the impaired provision is no longer impaired, and the impaired provision has not been renegotiated by mutual agreement of the City and the Company, upon reasonable written notice by the City said provision shall thereupon return to full force and effect without further action by the City and shall thereafter be binding on the Company and the City.

(d) Governing law: This Ordinance shall, in all respects be construed and interpreted in accordance with the laws of the State of South Dakota.

II.

Any or all ordinances in conflict herewith are hereby repealed.

First Reading:	January 8, 2013	
Second Reading:	January 22, 2013	TABLED
Second Reading:	February 26, 2013	
Published:	February 28, 2013	

CITY OF BROOKINGS, SOUTH DAKOTA

Tim Reed
Tim Reed, Mayor



Shari Thornes
Shari Thornes, City Clerk

ACCEPTED: This Ordinance is accepted by Northwestern Corporation which agrees to be bound by its terms and conditions.

Dated: 3/21/13

NORTHWESTERN CORPORATION
By: Curt [Signature]

Its: Vice President Distribution