

**AGREEMENT BETWEEN THE CITY OF RAPID CITY AND BLACK HILLS POWER, INC. FOR REIMBURSEMENT OF UNDERGROUND UTILITY EXPENSES**

This Agreement is made and entered into between the CITY OF RAPID CITY, 300 Sixth Street, Rapid City, SD 57701, herein after referred to as "City" and BLACK HILLS POWER, INC., 625 Ninth Street, Rapid City, SD 57701, herein after referred to as "BHP."

WHEREAS, the City, in combination with the South Dakota Department of Transportation, is undertaking a project to re-construct Mt. Rushmore Road; and

WHEREAS, BHP utilizes the Mt. Rushmore Road right-of-way for its electrical utility distribution system, which consists of overhead power lines and service lines; and

WHEREAS, the design of the re-constructed Mt. Rushmore Road calls for all power lines to be either buried underground or relocated overhead off of Mt. Rushmore Road; and

WHEREAS, the City has agreed to pay the additional expense for BHP to bury its lines in the Mt. Rushmore Road right-of-way or relocate off of Mt. Rushmore Road; and

WHEREAS, this Agreement shall apply only to the corridor along Mt. Rushmore Road/US Highway 16 from Highland Park to the east/west alley between St. Patrick Street and St. Andrew Street (the "Corridor"); and

WHEREAS, the City and BHP desire to reduce their mutual agreements to writing.

NOW THEREFORE, in consideration of the mutual promises, covenants and conditions herein set forth, it is agreed by the parties as follows:

1. Recitals. The recitals set forth above constitute an integral part of this Agreement and are incorporated herein by this reference as if fully set forth herein as agreements of the parties.
2. Relocation of Power Lines. BHP agrees to move its overhead power lines located in the Corridor as follows:
  - a. Between Flormann Street and Highland Park, all overhead lines and service lines shall be buried underground; and
  - b. Between Flormann Street and the east/west alley between St. Patrick Street and St. Andrew Street, all overhead lines shall be relocated to the north/south alley west of Mt. Rushmore Road ((a) and (b) together are referred to herein as the "Planned Relocation").

BHP may alter the Planned Relocation so long as the overhead power lines along the Corridor are either buried or relocated overhead off of the Corridor.

3. Service Lines. BHP agrees to coordinate with property owners along the project right-of-way and cause all necessary service line relocations and associated electrical wiring to be carried out.

4. Expense Reimbursement. The City agrees to reimburse BHP for its expenses in relocating its power lines and associated service lines in excess of the costs that BHP would otherwise incur to relocate its power lines overhead along the Corridor (the "Base Costs") in an amount not to exceed One Million Dollars (\$1,000,000) The Base Costs are set forth in Exhibit "A". If BHP's actual costs exceed this amount due to unknown conditions or circumstances that were unable to be foreseen, the City and BHP agree to negotiate in good faith an amendment to this Agreement to reimburse BHP for such unknown or unforeseeable expenses.

5. Claims for Reimbursement. BHP shall invoice the City for its expenses. BHP shall have the option to invoice on a monthly, quarterly, or one-time basis upon completion of part or all of the work contemplated hereunder. Any invoice shall describe with particularity the work completed and the cost associated with such work.

6. Payment of Claims. Upon receipt of the claim for reimbursement submitted pursuant to ¶ 5, the City agrees to pay the claim within 45 days of the date the claim was submitted.

7. Relationship Between the Parties. This Agreement does not create an employment relationship between the City of Rapid City and the officers, directors, employees or agents of BHP. Nothing contained in this Agreement is intended to create a partnership or joint venture between the City of Rapid City and BHP.

8. Liability, Release and Indemnification. BHP assumes all liability for the work performed pursuant to this Agreement by its officers, employees, agents and assigns. BHP agrees to fully release, acquit and forever discharge the City from any and all actions, causes of action, claims, demands, damages, losses, and expenses of any kind, relating to work contemplated by the terms of this Agreement, with the exception of the reimbursement provided hereunder. BHP further agrees to defend, indemnify and hold the City, its officers, employees and agents harmless from and against any and all suit, claim, loss, liability, personal injury, property damage, costs and expenses (including reasonable attorneys' fees and expenses of litigation), relating in any way to or arising out of BHP's relocation of distribution and service lines as provided in this Agreement.

9. Notices. All notices given hereunder shall be made by hand delivery or certified mail, return receipt requested, to the parties at the following addresses:

City of Rapid City  
Attn: Public Works Director  
300 Sixth Street  
Rapid City, SD 57701

Black Hills Power, Inc.  
Attn: Operations Manager  
625 Ninth Street  
Rapid City, SD 57701

10. Time of Essence. Time is of the essence of this Agreement.

11. Waivers. The failure by one party to require performance of any provision herein shall not affect that party's right to require performance at any time thereafter, nor shall a waiver of any breach or default of this Agreement constitute a waiver of any subsequent breach or default or a waiver of the provision itself.

12. Amendments. This Agreement may only be amended by a written document duly executed by both parties.

13. Enforceability. This agreement is intended solely for the benefit of the parties hereto and shall not be enforceable by, or create any claim of right or right of action, in favor of any other party.

14. Entire Agreement. This Agreement constitutes the entire agreement between the parties, and supersedes all prior negotiations, agreements and understandings, whether oral or written.

15. Counterparts. This Agreement may be executed in counterparts; each such counterpart shall be deemed an original and when taken together with other signed counterparts, shall constitute one Agreement.

16. Severability. If any provision of this Agreement is held unenforceable by a court of competent jurisdiction, such holding shall not affect the remaining provisions of this Agreement, which shall remain in full force and effect.

17. Construction. This agreement shall be deemed to be prepared jointly by the parties hereto and neither shall be deemed to be its sole author. In the event of any claim of ambiguity, no provision shall thereby be construed against either party.

18. Headings. The headings and numbering of the different paragraphs of this Agreement are inserted for convenience only and are not to control or affect the meaning, construction or effect of each provision.

19. Jurisdiction and Venue. This Agreement shall be interpreted under the laws of the State of South Dakota without regard to any conflict of laws provision. Any litigation under this Agreement shall be resolved in the Seventh Judicial Circuit Court in Pennington County, State of South Dakota.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2013.

**CITY OF RAPID CITY**

By \_\_\_\_\_  
Sam Kooiker, Mayor

ATTEST

\_\_\_\_\_  
Pauline Sumption, Finance Officer

EXHIBIT A

**Base Costs**

|                         |                  |
|-------------------------|------------------|
| Street Lights           | \$8,205          |
| Overhead                | \$238,885        |
| <b>Total Base Costs</b> | <b>\$247,090</b> |

**BLACK HILLS POWER, INC.**

By Michael Schrad

Its Manager, Contracts