

**CITY OF ALBERTVILLE
COUNTY OF WRIGHT
STATE OF MINNESOTA**

ORDINANCE NO. 2009-014

WRIGHT HENNEPIN ELECTRIC COOP FRANCHISE ORDINANCE

AN ORDINANCE GRANTING TO WRIGHT HENNEPIN COOPERATIVE ELECTRIC ASSOCIATION, A MINNESOTA CORPORATION, ITS SUCCESSORS AND ASSIGNS, PERMISSION TO CONSTRUCT, OPERATE, REPAIR AND MAINTAIN IN THE CITY OF ALBERTVILLE, MINNESOTA, AN ELECTRIC DISTRIBUTION SYSTEM AND TRANSMISSION LINES, INCLUDING NECESSARY POLES, LINES, FIXTURES AND APPURTENANCES, FOR THE FURNISHING OF ELECTRIC ENERGY TO THE CITY, ITS INHABITANTS, AND OTHERS, AND TO USE THE PUBLIC WAYS AND PUBLIC GROUNDS OF THE CITY FOR SUCH PURPOSES.

THE CITY COUNCIL OF THE CITY OF ALBERTVILLE, WRIGHT COUNTY, MINNESOTA, ORDAINS:

SECTION 1. DEFINITIONS.

For purposes of this Ordinance, the following capitalized terms listed in alphabetical order shall have the following meanings:

City. The City of Albertville, County of Wright, State of Minnesota.

City Utility System. Facilities used for providing non-energy related public utility service owned or operated by City or agency thereof, including sewer and water service, but excluding facilities for providing heating, lighting or other forms of energy.

Commission. The Minnesota Public Utilities Commission, or any successor agency or agencies, including an agency of the federal government which preempts all or part of the authority to regulate electric retail rates now vested in the Minnesota Public Utilities Commission.

Company. Wright Hennepin Cooperative Electric Association, its successors and assigns.

Electric Facilities. Electric transmission and distribution towers, poles, lines, guys, anchors, conduits, fixtures, and necessary appurtenances owned or operated by Company for the purpose of providing electric energy for public use.

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Gross Revenues. Gross Revenues means all sums, excluding any surcharge or similar addition to the Company's charges to customers for the purpose of reimbursing the Company for the cost resulting from the franchise fee, received by the Company from the sale of electric energy to its retail customers within the corporate limits of the City.

Non-Betterment Costs. Costs incurred by Company from relocation, removal or rearrangement of Electric Facilities that do not result in an improvement to the Electric Facilities.

Notice. A written notice served by one party on the other party referencing one or more provisions of this Ordinance. Notice to Company shall be mailed to Wright-Hennepin Cooperative Electric Association, PO Box 330, Rockford, MN 55373. Notice to the City shall be mailed to the City Administrator, City Hall, 5959 Main Avenue NE, P.O. Box 9, Albertville, MN 55301. Either party may change its respective address for the purpose of this Ordinance by written notice to the other party.

Public Ground. Land owned by the City for park, open space or similar purpose, which is held for use in common by the public.

Public Way. The area on, below or above a public roadway, highway, street, cart way, bicycle lane, and public sidewalk in which the City has an interest, including other dedicated rights-of-way for travel purposes and utility and drainage easements of the City.

SECTION 2. ADOPTION OF FRANCHISE.

2.1 **Grant of Franchise.** City hereby grants Company, for a period of 20 years from the date passed and approved by the City, the right to transmit and furnish electric energy for light, heat, power and other purposes for public and private use within and through the limits of the City as its boundaries now exist or as they may be extended in the future. For these purposes, Company may construct, operate, repair and maintain Electric Facilities in, on, over, under and across the Public Ways and Public Grounds of City, subject to the provisions of this Ordinance. Company may do all reasonable things necessary or customary to accomplish these purposes, subject, however, to such reasonable regulations as may be imposed by the City pursuant to ordinance and to the further provisions of this franchise agreement. Two years prior to expiration of this franchise agreement, the parties will meet and discuss renewal of this franchise agreement.

2.2 **Effective Date; Written Acceptance.** This franchise agreement shall be in force and effect from and after passage of this Ordinance, its acceptance by Company, and its publication as required by law. The City by Council resolution may revoke this franchise agreement if Company does not file a written acceptance with the City within 90 days after publication.

2.3 Service and Rates. The service to be provided and the rates to be charged by Company for electric service in City are not subject to the jurisdiction of the Commission. The area within the City in which Company may provide electric service is subject to the provisions of Minnesota Statutes, Section 216B.40.

2.4 Publication Expense. The expense of publication of this Ordinance will be paid by City and reimbursed to City by Company.

2.5 Dispute Resolution. If either party asserts that the other party is in default in the performance of any obligation hereunder, the complaining party shall notify the other party of the default and the desired remedy. The notification shall be written. Representatives of the parties must promptly meet and attempt in good faith to negotiate a resolution of the dispute. If the dispute is not resolved within 30 days of the written notice, the parties may jointly select a mediator to facilitate further discussion. The parties will equally share the fees and expenses of this mediator. If a mediator is not used or if the parties are unable to resolve the dispute within 30 days after first meeting with the selected mediator, either party may commence an action in District Court to interpret and enforce this franchise or for such other relief as may be permitted by law or equity for breach of contract, or either party may take any other action permitted by law.

2.6. Continuation of Franchise. If this franchise expires and the City and the Company are unable to agree on the terms of a new franchise, this franchise, including any amendments thereto, will remain in effect until a new franchise is agreed upon, or until 90 days after the City or the Company serves written Notice to the other party of their intention to allow the franchise agreement to expire, but in no event shall the franchise continue for more than one (1) year after expiration of the 20-year term set forth in Section 2.1.

SECTION 3. LOCATION, OTHER REGULATIONS.

3.1 Location of Facilities. Electric Facilities 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. Electric Facilities shall be located on Public Grounds as determined by the City. Company's construction, reconstruction, operation, repair, maintenance and location of Electric 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. Under this franchise agreement, the City does not relinquish its police power or regulatory authority and the Company does not relinquish its eminent domain authority.

3.2 Field Locations. Company shall provide field locations for its underground Electric Facilities within City consistent with the requirements of Minnesota Statutes, Chapter 216D.

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3.3 Street Openings. Company 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 impose a reasonable fee. Permit conditions imposed on Company shall not be more burdensome than those imposed on other private, non-City owned utilities for similar facilities or work. Company 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 Electric Facilities. In such event Company shall notify the City by telephone to the office designated by the City as soon as practicable. Not later than the second working day thereafter, Company shall obtain any required permits and pay any required fees.

3.4 Restoration. After undertaking any work requiring the opening of any Public Way or Public Ground, Company shall restore the same, including paving and its foundation, to as good a condition as formerly existed, and shall maintain any paved surface in good condition for two years thereafter. The work shall be completed as promptly as weather permits, and if Company 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 Company to cure and the passage of a reasonable period of time following the demand, but not to exceed five business days, the right to make the restoration at the expense of Company. Company shall pay to the City the cost of such work done for or performed by the City. This remedy shall be in addition to any other remedy available to the City for noncompliance with this Section 3.4, but the City hereby waives any requirement for Company to post a construction performance bond, certificate of insurance, letter of credit or any other form of security or assurance that may be required, under a separate existing or future ordinance of the City, of a person or entity obtaining the City's permission to install, replace or maintain facilities in a Public Way.

3.5 Avoid Damage to Electric Facilities. Nothing in this Ordinance relieves any person from liability arising out of the failure to exercise reasonable care to avoid damaging Electric Facilities while performing any activity.

3.6 Notice of Improvements. The City must give Company reasonable notice of plans for improvements to Public Ways or Public Ground where the City has reason to believe that Electric 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 Grounds 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 be given to Company a sufficient length of time in advance of the actual commencement of the work to permit Company to make any necessary additions, alterations or repairs to its Electric Facilities.

3.7 Shared Use of Poles. Company shall make space available on its poles or towers for City fire, water utility, police or other City facilities whenever such use meets all applicable safety and clearance standards and will not interfere with the use of such poles or towers by Company, by another electric utility, by a telephone utility, or by any cable television company or other form of communication company. In addition, the City shall pay for any added cost incurred by Company because of such use by City.

3.8. Abandoned Facilities. Company may abandon underground Electric Facilities in place, provided, at City's request, Company will remove abandoned Electric Facilities interfering with a City improvement project, but only to the extent such Electric Facilities are uncovered by excavation as part of the City improvement project, and provided that the Company shall perforate the bottom of all unremoved vaults and fill such vaults with sand until such time as their removal may be required under the provisions of this Agreement. The Company shall preserve and maintain records describing the location of all abandoned and retired facilities within the City, produce such records at the City's request, and comply with the location requirements of Minnesota Statutes Section 216D.04 with respect to all facilities, including abandoned and retired facilities.

3.9 Mapping Information. The Company must promptly provide mapping information for any of its Electric Facilities in accordance with the requirements and Minnesota Rules Part 7819.4000 and 7819.4100.

SECTION 4. RELOCATIONS.

4.1 Relocation of Electric 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 alter or reroute the traveled surface of any Public Way or construct or reconstruct any City Utility System in any Public Way, it may order Company to relocate its Electric Facilities located therein if relocation is reasonably necessary to accomplish the City's proposed public improvement. Except as provided in Section 4.3, Company shall relocate its Electric Facilities at its own expense. The City shall give Company 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. Nothing in this Ordinance requires Company to relocate, remove, replace or reconstruct at its own expense its Electric Facilities where such relocation, removal, replacement or reconstruction is: 1) 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; or 2) reasonably necessary for the safety of the traveling public.

4.2 Relocation of Electric Facilities in Public Ground. Except as provided in Section 4.3 below, the City may require Company at Company's expense to relocate or remove its Electric Facilities from Public Ground upon a finding by City that the Electric Facilities have become or will become a substantial impairment to the existing or proposed public use of the Public Ground. Relocation shall comply with applicable City Code ordinances and other applicable law.

4.3 Projects with Federal Funding. Relocation, removal, or rearrangement of any Company Electric Facilities made necessary because of the extension into or through City of a federally-aided highway project shall be governed by the provisions of Minnesota Statutes, Section 161.46, as supplemented or amended. It is understood that the right herein granted to Company is a valuable right. City shall not order Company to remove or relocate its Electric Facilities when a Public Way is vacated, improved or realigned because of a renewal or a redevelopment plan which is financially subsidized in whole or in part by the Federal Government or any agency thereof, unless the reasonable non-betterment costs of such relocation and the loss and expense resulting therefrom are first paid to Company, but the City need not pay those portions of such for which reimbursement to it is not available.

4.4. Waiver. The provisions of this franchise apply only to facilities constructed in reliance on a franchise from the City and shall not be construed to waive or modify any rights obtained by Company for installations within a Company right-of-way acquired by easement or prescriptive right before the applicable Public Ground or Public Way was established, or Company's rights under state or county permit.

SECTION 5. TREE TRIMMING.

Company may trim all trees and shrubs in the Public Ways and Public Grounds of City to the extent Company finds necessary to avoid interference with the proper construction, operation, repair and maintenance of any Electric Facilities installed hereunder, provided that Company shall save the City harmless from any liability arising therefrom, and subject to permit or other reasonable regulation by the City.

SECTION 6. INDEMNIFICATION.

6.1 Indemnity of City. Company shall indemnify, keep and hold the City free and harmless from any and all liability on account of injury to or death of persons or damage to property occasioned by the construction, maintenance, repair, inspection, the issuance of permits, or the operation of the Electric Facilities located in the Public Ways and Public Grounds. The City shall not be indemnified for losses or claims to the extent such loss was occasioned through its own negligence except for losses or claims arising out of or alleging the City's negligence as to the issuance of permits for, or inspection of, Company's plans or work.

6.2 Defense of City. In the event a suit is brought against the City under circumstances where this agreement to indemnify applies, Company at its sole cost and expense shall defend the City in such suit if written notice thereof is promptly given to Company within a period wherein Company is not prejudiced by lack of such notice. If Company is required to indemnify and defend, it will thereafter have control of such litigation, but Company may not settle such litigation without the consent of the City, which consent shall not be unreasonably withheld. This section is not, as to third parties, a waiver of any defense or immunity otherwise available to the City; and Company, in

defending any action on behalf of the City shall be entitled to assert in any action every defense or immunity that the City could assert in its own behalf.

SECTION 7. VACATION OF PUBLIC WAYS.

The City shall give Company at least two weeks prior written notice of a proposed vacation of a Public Way. Except where required for a City improvement project, the vacation of any Public Way, after the installation of Electric Facilities, shall not operate to deprive Company of its rights to operate and maintain such Electric Facilities, until the reasonable cost of relocating the same and the loss and expense resulting from such relocation are first paid to Company. In no case, however, shall City be liable to Company for failure to specifically preserve a right-of-way under Minnesota Statutes, Section 160.29. In accordance with Minnesota Rules, Part 7819.3200, if the City's order directing vacation of the Public Way does not require relocation of the Company's Electric Facilities to prevent interference with a current public improvement, the vacation proceedings shall not be deemed to deprive Company of its right to continue to use the right-of-way of the former Public Way for its Electric Facilities installed prior to such order of vacation.

SECTION 8. CHANGE IN FORM OF GOVERNMENT.

Any change in the form of government of the City shall not affect the validity of this Ordinance. Any governmental unit succeeding the City shall, without the consent of Company, succeed to all of the rights and obligations of the City provided in this Ordinance.

SECTION 9. FRANCHISE FEE.

9.1 **Fee Schedule.** During the term of the franchise hereby granted, and in lieu of any permit or other fees being imposed on Company the City may impose on Company a franchise fee not to exceed five percent (5%) of the Company's Gross Revenues, as hereinafter defined, by collecting the amounts calculated on a flat fee per meter/per class, per/month basis as indicated in a Fee Schedule set forth in a separate ordinance from each customer in the designated Customer Classification for service at each and every customer location, based on a Fee Schedule form similar to the following:

<u>Class</u>	<u>Fee Per Premise Per Month</u>
Residential	\$__
Sm C & I – Non-Dem	\$__
Sm C & I – Demand	\$__
Large C & I	\$__
Public Street Lighting	\$__
Muni Pumping N/D	\$__

Muni Pumping Dem

\$__

In the event the City desires to collect a franchise fee as set forth above, the City shall give Company Notice of its intent to impose such a franchise fee by separate ordinance. Such Notice shall set out the proposed franchise fee as a percentage of the Company's Gross Revenues received from customers served within the City of Albertville and shall be calculated in an amount consistent with this franchise agreement. Upon receipt of such Notice, Company shall prepare and deliver to City within 30 days of such Notice a fee schedule that imposes said franchise fee upon the classes of users set forth above. The annual franchise fee imposed upon each class of user as set forth in the Fee Schedule form shall, to the extent reasonably possible, not exceed the percentage being collected from any other class of user.

9.2 **Separate Ordinance.** The franchise fee shall be imposed by separate ordinance duly adopted by the City Council, which ordinance shall not be adopted until at least thirty (30) days after written notice enclosing such proposed ordinance has been served upon the Company by certified mail, and written acceptance or refusal to accept thereof by Company. No action by the City to implement a separate ordinance will commence until this Ordinance is effective.

9.3 **Terms Defined.** For the purpose of this Section 9, the following definitions apply:

9.3.1 "Customer Classification" shall refer to the classes listed on the Fee Schedule and as defined or determined in Company's electric tariffs.

9.3.2 "Fee Schedule" refers to the schedule in Section 9.1 setting forth the various customer classes from which a franchise fee would be collected if a separate ordinance were implemented immediately after the effective date of this franchise agreement. The Fee Schedule in the separate ordinance may include new Customer Classifications added by Company to its electric tariffs after the effective date of this franchise agreement

9.3.3 "Gross Revenue" means all sums, excluding any surcharge or similar addition to the Company's charges to customers for the purpose of reimbursing the Company for the cost resulting from the franchise fee, received by the Company from the sale of electricity to its retail customers within the corporate limits of the City.

9.4 **Collection of the Fee.** The franchise fee shall be paid based on the amount collected by Company during complete billing months during the period for which payment is to be made by imposing a surcharge ("additional fee") equal to the designated franchise fee for the applicable Customer Classification in all customer billings for metered service in each class. The payment shall be paid four times a year and due the last business day of the calendar month following the end of each quarter (payments being due January 31, April 30, July 31, and October 31 during each calendar year). The franchise fee may be changed by ordinance from time to time; however, each change shall meet the same notice requirements and not occur more often than annually, and no change shall require a collection from any customer for metered service in excess of the amounts specifically permitted by this Section 9. Said franchise fee shall

be payable by Company only to the extent Company is legally able to first collect an amount equal to the franchise fee from its customers in each applicable class of customers by imposing a surcharge in Company's applicable rate for electric service. Company may pay the City the fee based upon the surcharge billed subject to subsequent reductions to account for uncollectibles, refunds and correction of erroneous billings. Company agrees to make its records available for inspection by the City at reasonable times provided that the City and its designated representative agree in writing not to disclose any information which would indicate the amount paid by any identifiable customer or customers or any other information regarding identified customers, unless the City is required to disclose such information under applicable state or federal law.

9.5 **Equivalent Fee Requirement.** The separate ordinance imposing the fee shall not be effective against Company unless it lawfully imposes and the City quarterly or more often collects a fee or tax of the same or greater equivalent amount on the receipts from retail sales of electrical energy within the City by any other retail electrical energy supplier, provided that, as to such a supplier, the City has the authority to require a franchise fee or to impose a tax without abrogating an existing franchise agreement.

SECTION 10. PROVISIONS OF ORDINANCE.

10.1 **Severability.** Every section, provision, or part of this Ordinance is declared separate from every other section, provision, or part; and if any section, provision, or part shall be held invalid, it shall not affect any other section, provision, or part. Where a provision of any other City ordinance conflicts with the provisions of this Ordinance, the provisions of this Ordinance shall prevail.

10.2 **Limitation on Applicability.** This Ordinance constitutes a franchise agreement between the City and Company as the only parties and no provision of this franchise shall in any way 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 in any person not a party hereto.

10.3 **Waiver.** This franchise agreement shall not be interpreted to constitute a waiver of the City of any of its defenses of immunity or limitations on liability under any applicable law, including, but not limited to the provisions of Minnesota Statutes Chapter 466.

SECTION 11. AMENDMENT PROCEDURE.

Either party to this franchise agreement may at any time propose that the agreement be amended to address a subject of concern and the other party will consider whether it agrees that the amendment is mutually appropriate. If an amendment is agreed upon, this Ordinance may be amended at any time by the City passing a subsequent ordinance declaring the provisions of the amendment, which amendatory ordinance shall become effective upon the filing of Company's written consent thereto with the City Clerk within 90 days after the date of final passage by the City of the amendatory ordinance.

SECTION 12. PREVIOUS FRANCHISES SUPERSEDED.

This franchise supersedes any previous electric franchise granted to Company or its predecessor.

Passed and approved: Tuesday, September 8, 2009.

Ron Klecker, Mayor

Attest:

Bridget Miller, City Clerk

Date Published: Monday, September 21, 2009