

Chapter 24

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***Cross references** – Land use, Ch. 12; public services in floodplain district, § 12-1015 et seq.; subdivisions, § 12-1251 et seq.; engineering standards for utilities and subdivisions, § 12-1427; buildings and building regulations, § 12-1771 et seq.; streets and sidewalks, Ch. 20; interference with public land, § 20-31 et seq.

State law reference – Authority to franchise public service corporations, M.S.A. §§ 301B.01, 301B.02; authority to own and operate utility systems, M.S.A. § 412.321.

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ARTICLE I. IN GENERAL

Secs. 24-1--24-35. Reserved.

ARTICLE II. ELECTRIC

Sec. 24-36. Definitions.

The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

City utility system refers to the facilities used for providing any public utility service owned or operated by city or agency thereof, including sewer and water service.

Company means Northern States Power Company, a Minnesota corporation, its successors and assigns.

Notice means a writing served by any party or parties on any other party or parties. Notice to the company shall be mailed to any officer thereof at 414 Nicollet Mall, Minneapolis, Minnesota. Notice to city shall be mailed to the city clerk.

Public grounds means city parks and squares as well as land held by the city for the purpose of open space.

Public ways means streets, avenues, alleys, parkways, walkways and other public rights-of-way within the city. (Code 1982, § 1202.106)

Cross reference--Definitions generally, § 1-2.

Sec. 24-37. Grant of franchise.

The city hereby grants the company, for a period of 20 years from the date of adoption of the ordinance from which this section was derived, 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 city as its boundaries now exist or as they may be extended in the future. For these purposes, the company may construct, operate, repair and maintain an electric distribution system and electric transmission lines, including poles, pole lines, duct lines, fixtures, and any other necessary appurtenances in, on, over, under and across the public ways and public grounds of the city. The company may do all reasonable things necessary or customary to accomplish these purposes, subject, however, to the further provisions of this article. (Code 1982, § 1202.200)

Sec. 24-38. Location of facilities.

Company facilities included in the electric distribution system, transmission lines and appurtenances thereto, shall be located and constructed so as not to interfere with the safety and convenience of ordinary travel along and over the public ways. The company's construction, operation, repair, maintenance and location of such facilities shall be subject to such reasonable regulations as may be imposed by the city pursuant to ordinance or statute. (Code 1982, § 1202.301)

Sec. 24-39. New installations restricted.

The company shall not construct any new installations within or upon any public grounds without receiving the prior written consent of an authorized representative of the city for each new installation. (Code 1982, § 1202.302)

Sec. 24-40. Field locations for underground facilities.

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The company shall provide field locations for all its underground facilities when requested by the city within a reasonable period of time. The period of time will be considered reasonable if it compares favorably with the average time required by the cities in the county to locate municipal underground facilities for the company. (Code 1982, § 1202.303)

Sec. 24-41. Tree trimming.

The company is granted the permission and authority to trim all trees and shrubs in the public ways and public grounds of the city interfering with the proper construction, operation, repair and maintenance of any poles, pole lines, and fixtures or appurtenances installed in pursuance of the authority hereby granted; provided that the company shall save the city harmless from any liability in the premises. (Code 1982, § 1202.400)

Sec. 24-42. Service rates.

The service to be provided and the rates to be charged by the company for electric service in the city are subject to the jurisdiction of the public utilities commission of this state or its successor agency. (Code 1982, § 1202.500)

Sec. 24-43. Relocating.

(a) Whenever the city shall grade, regrade or change the line of any public way, or construct or reconstruct any city utility system therein and shall, in the proper exercise of its police power, and with due regard to reasonable working conditions, when necessary order the company to relocate permanently its lines, services and other property located in said public way, the company shall locate its facilities at its own expense. The city shall give the company reasonable notice of plans to grade, regrade or change the line of any public way or to construct or reconstruct any city utility system therein. However, after the company has so relocated, if a subsequent relocation or relocations shall be ordered within ten years from and after first relocation, the city shall reimburse the company for such non-betterment relocation expense which the company may incur on a time and material basis; provided, if subsequent relocations are required because of the extension of city utilities to previously unserved areas, the company may be required to relocate at its own expense at any time.

(b) Nothing contained in this article shall require the company to relocate, remove, replace or reconnect at its own expense its facilities where such relocation, removal, replacement or reconnection is for convenience and not of necessity in the construction or reconstruction of a city utility system or extension thereof.

(c) Any relocation, removal, or rearrangement of any company facilities made necessary because of the extension into or through the city of a federally aided highway project shall be governed by the provisions of M.S.A. § 161.46. It is expressly understood that the right herein granted to the company is a valuable property right and the city shall not order the company to remove or relocate its facilities without compensation 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 the company.

(d) Nothing contained in this section shall relieve any person from liability arising out of the failure to exercise reasonable care to avoid injuring the company's facilities while performing any work connected with grading, regrading or changing the line of any public way, or with the construction or reconstruction of any city utility system. (Code 1982, § 1202.600)

Sec. 24-44. Indemnification.

The company shall indemnify, keep and hold the city free and harmless from any and all liability on account of injury to persons or damage to property occasioned by the construction, maintenance, repair or operation of the company's electric facilities located in, on, over, under, or across the public ways and public grounds of the city, unless such injury or damage grows out of the negligence of the city, its employees, or agents, or results from the performance in a proper manner of acts reasonably deemed hazardous by the company, but such performance is nevertheless ordered or directed by the city after notice of the company's determination. If a suit shall be brought

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against the city under circumstances where the above agreement to indemnify applies, the company at its sole cost and expense shall defend the city in such suit if written notice thereof is promptly given to the company within a period wherein the company is not prejudiced by lack of such notice. If such notice is not reasonably given as hereinbefore provided, the company shall have no duty to indemnify nor defend. If the company is required to indemnify and defend, it will thereafter have complete control of such litigation, but the 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 company; and the 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.
(Code 1982, § 1202.700)

Sec. 24-45. Vacation of public ways.

Except where required solely for a city improvement project, the vacation of any public way or public ground, after the installation of electric facilities, shall not operate to deprive the company of its rights to operate and maintain such electrical facilities, until the reasonable cost of relocating the same and the loss and expense resulting from such relocation are first paid to the company.
(Code 1982, § 1202.800)

Sec. 24-46. Written acceptance.

The company shall, if it accepts the ordinance from which this article was derived and the rights and obligations thereby granted, file a written acceptance of the rights hereby granted with the city clerk within 90 days after the final passage and any required publication of the ordinance from which this article was derived.
(Code 1982, § 1202.900)

Sec. 24-47. Nonexclusive franchise.

The provisions of this article do not constitute an exclusive franchise.
(Code 1982, § 1202.1100)

Secs. 24-48--24-75. Reserved.

ARTICLE III. GAS

DIVISION 1. GENERALLY

Secs. 24-76--24-100. Reserved.

DIVISION 2. MINNESOTA GAS COMPANY

Sec. 24-101. Definitions.

The following words, terms and phrases, when used in this division, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Company means the Minnesota Gas Company, a Delaware corporation, its successors and assigns.

Gas means natural gas, manufactured gas, a mixture of natural gas and manufactured gas or other forms of gas energy.

Municipality, municipal council, municipal clerk mean, respectively, the City of Afton, the council of the City of Afton, and the Clerk of the City of Afton.
(Code 1982, § 1201.101)

Cross reference--Definitions generally, § 1-2.

Sec. 24-102. Grant of franchise.

There is hereby granted to the company, for a period of 25 years, the right to import, manufacture, transport, distribute and sell gas energy for public and private use in the municipality, and for these purposes to construct, operate, repair and maintain in, on, over, under and across the streets, alleys, public ways and public grounds of the municipality, all facilities and equipment used in connection therewith, and to do all things which are necessary or customary in the accomplishment of these objectives, subject to the provisions of this division.

(1) *Effective date; written acceptance.* This division shall be in force and effect from and after the passage and publication of the ordinance from which this division was derived as required by law, which was accomplished on October 16, 1979, and its acceptance in writing by the company filed with the municipal clerk. The company shall, if it accepts this division and the rights hereby granted, file a written acceptance with the municipal clerk within 60 days after publication.

(2) *Nonexclusive franchise.* The provisions of this division do not constitute an exclusive franchise.
(Code 1982, § 1201.102)

Sec. 24-103. Conditions of street use.

(a) *Use of streets.* All utility facilities and equipment of the company shall be located, constructed, installed and maintained as not to endanger or unnecessarily interfere with the usual and customary traffic and travel upon the streets, alleys, public ways and public grounds of the municipality.

(b) *Restoration of streets.* The company shall, upon completion of any work requiring an opening, restore the street, alley, public way or public ground to the same condition as before the opening was made, insofar as reasonably possible.

(c) *Relocation of utility facilities.* The company shall relocate its facilities or equipment at its own expense whenever the municipality in the proper exercise of its police power shall grade, regrade, change the line or otherwise improve any street, alley, public way or public ground or construct or reconstruct any sewer or water system therein and shall, with due regard to seasonal working conditions, order the company to relocate permanently its facilities or equipment located in such street, alley, public way or public ground. The municipality shall give the company reasonable notice of plans requiring such relocation.

(d) *Relocation when streets vacated.* The municipality may not order the company to relocate any of its facilities or equipment when a street, alley, public way or public ground is vacated, unless the reasonable cost of such relocation and the loss and expense resulting from such relocation are first paid to the company.
(Code 1982, § 1201.103)

Cross reference--Streets and sidewalks, Ch. 20.

Sec. 24-104. Indemnification.

The company shall indemnify and hold harmless the municipality, its officers, employees and agents from all liability on account of injury to persons or damage to property caused by the company's construction, maintenance, repair or operations in the municipality, unless such injury or damage is the result of the negligence of the municipality, its officers, employees or agents.
(Code 1982, § 1201.104)

Sec. 24-105. Termination.

If the company is in default in the performance of any material part of this division for more than 90 days after receiving written notice from the municipality of such default, the municipal council may, by ordinance duly passed and adopted, terminate all rights granted hereunder to the company. The notice of default shall be in writing and specify the provision of this franchise under which the default is claimed and state the basis therefor upon all material issues relative to such default. Such notice shall be served on the company by personally delivering it to an officer thereof at its principal place of business. The reasonableness of any ordinance declaring a termination of the rights and privilege granted by this franchise, shall be subject to judicial review by a court of competent jurisdiction.

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(Code 1982, § 1201.105)

Sec. 24-106. Publication expense.

The expense of publication of the ordinance from which this division was derived shall be paid by the company.
(Code 1982, § 1201.106)

Sec. 24-107. Assignment.

The company upon notice to the municipality shall have full right and authority to assign all rights conferred upon it by this division to any person. The assignee of such rights, by accepting such assignment, shall become subject to the terms and provisions of this division.
(Code 1982, § 1201.108)

Sec. 24-108. Change in form of government.

Any change in the form of government of the municipality shall not affect the validity of this division. Any governmental unit succeeding the municipality shall, without the consent of the company, automatically succeed to all of the rights and obligations of the municipality provided in this division.
(Code 1982, § 1201.109)

Secs. 24-109--24-135. Reserved.

DIVISION 3. GAS FRANCHISE. XCEL ENERGY

Sec. 24-136. Definitions.

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

City. The City of Afton, County of Washington, State of Minnesota.

City Utility System. Facilities used for providing public utility service owned or operated by City or agency thereof, including sewer, storm sewer, 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 Gas retail rates now vested in the Minnesota Public Utilities Commission.

Company. Northern States Power Company, a Minnesota corporation, d/b/a Xcel Energy, its successors and assigns, including all successors or assignees that own or operate any part or parts of the Gas Facilities subject to this franchise.

Gas Facilities. Gas transmission and distribution pipes, mains, regulators and necessary appurtenances owned or operated by Company for the purpose of providing natural gas, manufactured gas, or other form of gaseous energy for public use.

Non-Betterment Costs. Costs incurred by Company from relocation, removal or rearrangement of Gas Facilities that do not result in an improvement to the Gas Facilities, taking into consideration salvage value of Facilities removed.

Notice. A writing served by one party on the other party referencing one or more provisions of this Ordinance. Notice to Company shall be mailed to the General Counsel, Legal Services, Suite 3000, 800 Nicollet Mall, Minneapolis, MN 55402. Notice to the City shall be mailed to the City Administrator, City Hall, 3033 St. Croix Trail South, P.O. Box 219, Afton, MN 55001-0219. Either party may change its respective address for the purpose of this Ordinance by written notice to the other party.

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

Public Way. Public right-of-way within the City as defined in Minn. Stat. § 237.163, subd. 3.

Sec. 24-137. Adoption of Franchise.

(1) **Grant of Franchise.** City hereby grants Company, for a period of 20 years from the date this Ordinance is passed and approved by the City, the right and privilege of erecting a gas distribution system and using the Public Ways and Public Grounds for the purpose of installing, operating, repairing, and maintaining, in, on, over, under, and across the same, all gas pipes, mains, and appurtenances, usually, conveniently or necessarily used in connection therewith, for the purpose of the transmission of gas, or the distribution of gas, for public and private use within and through the limits of the City as its boundaries exist or as they may be extended in the future. 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 further provisions of this franchise agreement.

(2) **Effective Date; Written Acceptance.** This franchise shall be in force and effect from and after the passage of this Ordinance and publication as required by law and its acceptance by Company. If Company does not file a written acceptance with the City within 90 days after the date the City Council adopts this Ordinance, or otherwise places the City on notice, before that time, that the Company does not accept all terms of this franchise, the City Council by resolution may revoke this Ordinance or seek its enforcement in a court of competent jurisdiction.

(3) **Service and Rates.** The service to be provided and the rates to be charged by Company for gas service in City are subject to the jurisdiction of the Commission.

(4) **Publication Expense.** The expense of publication of this Ordinance shall be paid by City and reimbursed to City by Company within 30 days.

(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 date of 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.

(6) **Continuation of Franchise.** If the City and Company are unable to agree on the terms of a new franchise by the time this franchise expires, this franchise will remain in effect until a new franchise is agreed upon, or until 90 days after the City or Company serves written Notice to the other party of its intention to allow the franchise to expire, but in no event shall this franchise continue for more than one year after expiration of the 20-year term set forth in Section 24-137(1).

Sec. 24-138. Location, Other Regulations.

(1) **Location of Facilities.** Gas 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 or interfere with the normal operation of any City Utility System previously installed therein. Gas Facilities shall be located on Public Grounds as determined by the City. Company's construction, reconstruction, operation, repair, maintenance, location and relocation of Gas Facilities shall be subject to any permit requirements authorized in a separate ordinance and other reasonable regulations of the City, consistent with authority granted the City to manage its Public Ways and Public Grounds under state law, to the extent not inconsistent with a specific term of this franchise agreement. Company may abandon underground Gas Facilities in place, provided at City's request, Company at its own expense, removes abandoned metal conduits or concrete encased conduit or other Facilities interfering with a City improvement project, but only to the extent such conduit is uncovered by excavation as part of the City's improvement project.

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(2) **Street Openings.** Company shall not open or disturb the surface of 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, subject to the provisions of Section 24-143. Permit conditions imposed on Company shall not be more burdensome than those imposed on other utilities for similar facilities or work. Company may, however, open and disturb the surface of any Public Way or Public Ground without a permit if (i) an emergency exists requiring the immediate repair of Gas Facilities and (ii) Company gives telephone, e-mail or similar notice to the City before, if reasonably possible, commencement of the emergency repair. Within two business days after commencing the repair, Company shall apply for any required permits and pay any required fees.

(3) **Restoration.** After undertaking any work requiring the opening of any Public Way, Company shall restore the Public Way in accordance with Minnesota Rules, Part 7819.1100 and applicable City ordinances to the extent consistent with law. Company shall restore the Public Ground to as good a condition as formerly existed, and shall maintain the surface in good condition for two years thereafter, but shall have no obligation to water any grass or other vegetation thereon. All 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 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 days, the right to make the restoration of the Public Ground 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.

(4) **Performance Security.** In the absence of a specific written request from the City, the Company is exempt from posting 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 or the Public Ground. The City reserves the right to require a performance bond for new installation, replacement, or repairs, when the Company's completion of its work is required in order for the City to proceed with its work for constructing a public improvement to the Public Way.

(5) **Major Facilities.** Before Company constructs any new structure or converts any existing structure for the manufacture or storage of gas, Company shall first obtain the approval of the structure and the location thereof from the City. Such approval by the City shall not be unreasonably withheld. The Company shall abide by all City codes in the maintenance of all structures.

(6) **Avoid Damage to Gas Facilities.** Nothing in this Ordinance relieves any person, including Company, from liability arising out of the failure to exercise reasonable care to avoid damaging Gas Facilities or other persons or property while performing any activity.

(7) **Notice of Improvements to Streets.** The City must give Company reasonable written Notice of plans for improvements to Public Ways where the City has reason to believe that Gas 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 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 is involved, the order in which the work is to proceed. The Notice must be given to Company a sufficient length of time, considering seasonal working conditions, in advance of the actual commencement of the work to permit Company to make any additions, alterations or repairs to its Gas Facilities Company deems necessary.

(8) **Mapping Information.** Company must promptly provide mapping information for any of its underground Gas Facilities in accordance with Minnesota Rules Parts 7819.4000 and 7819.4100.

Sec. 23-139. Relocations.

(1) **Relocation 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 Company to relocate its Gas Facilities located therein if relocation is reasonably necessary to accomplish the City's proposed public improvement. Except as provided in Section 23-139(3), Company shall relocate its Gas Facilities at its own expense. The City shall give Company reasonable

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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 a relocation is ordered within five years of a prior relocation of the same Gas Facilities, which was made at Company expense, the City shall reimburse Company 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, or to avoid interference with a joint project of the City with another governmental unit, Company may be required to make the subsequent relocation at its expense. Nothing in this Ordinance requires Company to relocate, remove, replace or reconstruct at its own expense its Gas 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.

(2) Relocation in Public Grounds. The City may require Company at Company's expense to relocate or remove its Gas Facilities from Public Ground upon a finding by City that the Gas Facilities have become or will become a substantial impairment to the existing or proposed public use of the Public Ground. Such relocation shall comply with applicable city ordinances consistent with law.

(3) Projects with Federal Funding. Relocation, removal, or rearrangement of any Gas 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 expressly understood that the right herein granted to Company is a valuable property right. City shall not order Company to remove or relocate its facilities without compensation when a Public Way is vacated, improved or re-aligned 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. The City is obligated to pay Company, however, only for those portions of its relocation costs for which City has received federal funding specifically allocated for relocation costs in the amount requested by the Company.

(4) No Waiver. By entering this or any prior franchise agreement with the City, Company does not waive its rights under an easement or prescriptive right or State or County permit.

Sec. 23-140. Indemnification.

(1) Indemnity of City. Company shall indemnify and hold harmless the City from any and all liability on account of injury to persons or damage to property occasioned by the construction, maintenance, repair, inspection, the issuance of permits, or the operation of the Gas Facilities located in the Public Ways and Public Grounds. The City shall not be indemnified for losses or claims 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.

(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. This franchise agreement shall not be interpreted to constitute a waiver by the City of any of its defenses of immunity or limitations on liability under Minnesota Statutes, Chapter 466.

Sec. 23-141. 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 solely for a City improvement project, the vacation of any Public Way, after the installation of Gas Facilities, shall not operate to deprive Company of its rights to operate and maintain such Gas 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 the 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 Gas Facilities to prevent interference with a current public improvement, the vacation proceedings shall not be deemed to deprive Company

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of its right to continue to use the right-of-way of the former Public Way for its Gas Facilities installed prior to such order of vacation.

Sec. 23-142. 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.

Sec. 23-143. Franchise Fee.

(1) **Fee Schedule.** During the term of the franchise hereby granted, and in lieu of any permit or other fees being imposed on the Company, the City may impose on the Company a franchise fee by collecting the amounts indicated in a Fee Schedule set forth in a separate ordinance from each customer in the designated Company Customer Class. The parties have agreed that the initial fee collected by the Company and paid to the City in accordance with this Section 23-143 shall not exceed the following amounts:

<u>Class</u>	<u>Fee Per Month</u>
Residential	\$ 2.00
Comm. Firm Non-Demand	\$ 4.00
Comm. Firm Demand	\$ 5.00
Small Interruptible	\$ 5.00
Large Interruptible	\$ 5.00
Firm Transportation	\$ 5.00
Interruptible Transportation	\$ 5.00

(2) **Separate Ordinance.** The franchise fee shall be imposed by a separate ordinance duly adopted by the City Council, which ordinance shall not be adopted until at least 60 days after written notice enclosing such proposed ordinance has been served upon Company by certified mail. The fee shall not become effective until at least 60 days after written notice enclosing such adopted ordinance has been served upon Company by certified mail. Section 24-137(5) shall constitute the sole remedy for solving disputes between Company and the City in regard to the interpretation of, or enforcement of, the separate ordinance. No action by the City to implement a separate ordinance will commence until this Ordinance is effective. Notwithstanding the formula set forth above, during the term of this franchise at intervals no more frequently than one year, the City may impose a lesser fee under Section 24-143 (4) or the City may request an amendment pursuant to Section 24-146 allowing the City to impose a greater fee on one or more Classes of customer and/or a different fee design, including but not limited to, a customer usage fee, or a meter fee. If the City proposes such an amendment, it shall notify Company in writing no less than six (6) months prior to the anniversary date of the then current franchise fee required by the City. Promptly thereafter, City and Company shall attempt to negotiate a mutually acceptable modification to the fee amount and design for intended future collection by Company. If City and Company are unable to agree on a modification, all disputes shall be resolved pursuant to Section 24-137 (5) of this franchise ordinance. Nothing in this Section is intended to be a limitation on the City’s right to raise revenue under Minnesota Statutes, Section 216B.36

(3) **Terms Defined.**

(3.1)“Class” shall refer to classes listed in the Fee Schedule and as defined or determined in Company’s gas rate book on file with the Commission.

(3.2)“Fee Schedule” refers to the Schedule in Section 24-143(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 Classes added by the Company to its gas tariffs after the effective date of this franchise agreement.

(3.3)“Therm” shall be a unit of gas providing 100,000 Btu of heat content adjusted for billing purposes under the rate schedules of Company on file with the Commission.

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(4) Collection of the Fee. The franchise fee shall be payable quarterly and shall be based on the complete billing months during the period for which payment is to be made. The payment shall be due the last business day of the month following the period for which the payment is made. The fee may be changed by ordinance from time to time, however each change shall meet the same notice requirements and may not occur more often than annually. Such fee shall not exceed any amount, which the Company may legally charge to its customers prior to payment to the City by imposing a surcharge equivalent to such fee in its rates for Gas service. The Company may pay the City the fee based upon the surcharge billed subject to subsequent reductions to account for uncollectibles or customer refunds. The time and manner of collecting the franchise fee is subject to approval of the Public Utilities Commission, which the Company agrees to use best efforts to obtain. The 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 that is not public data which would indicate the amount paid by any identifiable customer or any other information regarding specific customers.

(5) Equivalent Fee Requirement. The separate ordinance imposing the fee shall not be effective against Company, unless it lawfully imposes and the City monthly or more often collects a fee or tax of the same or greater equivalent amount on the receipts from sales of energy within the City by any other energy supplier, provided that, as to such a supplier, the City has the authority to require a franchise fee or to impose a tax. The “same or greater equivalent amount” shall be measured, if practicable, by comparing amounts collected as a franchise fee from each similar customer, or by comparing, as to similar customers, the percentage of the annual bill represented by the amount collected for the franchise fee purposes. The franchise fee or tax shall be applicable to energy sales for any energy use related to heating, cooling, or lighting, or to run machinery and appliances, but shall not apply to energy sales for the purpose of providing fuel for vehicles. If the Company specifically consents in writing to a franchise or separate ordinance collecting or failing to collect a fee from another energy supplier in contravention of this Section 23-143(5), the foregoing conditions will be waived to the extent of such written consent. Notwithstanding the foregoing, the City retains the final right to determine a franchise fee structure that is a reasonably equivalent fee.

Sec. 24-144. Tree Trimming.

Company is also granted the permission and authority to trim all shrubs and trees, including roots, in the Public Ways of City to the extent Company finds necessary to avoid interference with the proper construction, operation, repair and maintenance of Gas Facilities, provided that Company shall save City harmless from any liability in the premises.

Sec. 24-145. Provisions of Ordinance.

(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; provided, however, if any provision is held invalid, the parties agree to negotiate in good faith to substitute, to the extent reasonably possible, amended provisions that validly carry out the primary purpose of the invalid provisions. Where a provision of any other City ordinance conflicts with the provisions of this Ordinance, the provisions of this Ordinance shall prevail.

(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.

Sec. 24-146. Amendment Procedure.

Either party to this franchise agreement may at any time propose that the agreement be amended. 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 after City council adoption of the amendatory ordinance.

(Ord. 6-2004, § 24-136 – 24-146, 8/17/2004)