ORDINANCE NO. 114

Electric Franchise Ordinance

City of New York Mills, Otter Tail County, Minnesota

AN ORDINANCE GRANTING TO THE OTTER TAIL POWER COMPANY, A DIVISION OF OTTER TAIL CORPORATION, A MINNESOTA CORPORATION, ITS SUCCESSORS AND ASSIGNS, A NONEXCLUSIVE FRANCHISE TO CONSTRUCT, OPERATE, REPAIR AND MAINTAIN IN THE CITY OF NEW YORK MILLS, 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 NEW YORK MILLS, OTTER TAIL 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 New York Mills, County of Otter Tail, 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, street lighting and traffic signals, 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. Otter Tail Power Company, a Division of Otter Tail Corporation, a Minnesota corporation, its successors and assigns including all successors or assignees that own or operate any part or parts of the Electric Facilities subject to this franchise.

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 or private use.

Notice. A writing served by any party or parties on any other party or parties. Notice to Company shall be mailed to Otter Tail Power, 216 S Cascade St., Fergus Falls, MN 56537. Notice to the City shall be mailed to City of New York Mills, PO Box H, New York Mills, MN 56567. Any party may change its respective address for the purpose of this Ordinance by written notice to the other parties.

Public Way. Any street, alley or other public right-of-way within the City.

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.

SECTION 2. ADOPTION OF FRANCHISE.

2.1. **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 to transmit and furnish electric energy for light, heat and power 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, 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 or permit requirements and to the further provisions of this franchise agreement.

2.2. **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 60 days after the date the City Council adopts this Ordinance, the City Council by resolution may revoke this franchise or seek its enforcement in a competent jurisdiction.

2.3. **Service, Rates and Area**. The service to be provided and the rates to be charged by Company for electric service in City are 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. 37 - .40.

2.4. **Publication Expense**. Company shall pay the expense of publication of this Ordinance.

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 thirty (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.

2.6. **Continuation of Franchise**. If the City and the 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 the Company serves written Notice to the other party of its intention to allow the franchise to expire. However, this franchise shall only continue for up to one 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 reasonably 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. Electric Facilities may be located on Public Grounds as determined by the City. Company's construction, reconstruction, operation, repair, maintenance, location and relocation of Electric Facilities shall be subject to 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.

3.2. **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. 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 Electric Facilities and (ii) Company gives telephone 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.

3.3. **Restoration**. After undertaking any work requiring the opening of any Public Way, the Company shall restore the Public Way in accordance with Minnesota Rules, part 7819.1100 and applicable City ordinances consistent with law. Company shall reasonably restore Public Ground to as near as practical to the condition as formerly existed. 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 3.3.

3.4. **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 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.

3.5. **Avoid Damage to Electric Facilities**. The Company must take reasonable measures to prevent the Electric Facilities from causing damage to persons or property. The Company must take reasonable measures to protect the Electric Facilities from damage that could be inflicted on the Facilities by persons, property, or the elements. The Company must take protective measures when the City performs work near the Electric Facilities, if given reasonable notice by the City of such work prior to its commencement.

3.6. **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 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 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 Electric Facilities the Company deems necessary.

3.7. **Mapping Information.** The Company must promptly provide mapping information for any of it underground Electric Facilities in accordance with Minnesota Rules parts 7819.4000 and 7819.4100.

SECTION 4. FACILITIES RELOCATION.

4.1. **Relocation in Public Ways.** The Company shall comply with Minnesota Rules, part 7819.3100 and applicable City ordinances consistent with law.

4.2. **Relocation in Public Grounds**. 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. Such relocation shall comply with applicable ordinances consistent with law.

4.3. **Projects with Federal Funding**. Relocation, removal, or rearrangement of any 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.

SECTION 5. TREE TRIMMING.

Unless otherwise provided in any permit or other reasonable regulation required by the City under separate ordinance, 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 hold the City harmless from any liability arising therefrom.

SECTION 6. INDEMNIFICATION.

6.1. **Indemnity of City**. Company shall indemnify and hold the City harmless 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 Electric 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.

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. 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.

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. The City and the Company shall comply with Minnesota Rules, 7819.3200 and applicable ordinances consistent with law.

SECTION 8. ABANDONED FACILITIES.

The Company shall comply with City ordinances, Minnesota Statutes, Section 216D.01 et seq. and Minnesota Rules Part 7819.3300, as they may be amended from time to time. The Company shall maintain records describing the exact 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 Section 216D.04 with respect to all Facilities, including abandoned and retired Facilities.

SECTION 9. 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 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; provided, however, that if the City is unable to enforce its franchise fee provisions for any reason the City will be allowed to amend the franchise agreement to impose a franchise fee pursuant to statute. 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.

SECTION 11. FRANCHISE FEES.

During the term of this Franchise, the franchisee, Company, shall pay to the franchisor, City,

An amount of $_____ per month per residential meter, and $_____ per month per commercial/industrial meter within the City of New York Mills. The payment shall be made to the City within 60 days after the last day of each calendar quarter.

OR

An amount equal to _____% of "gross revenues" derived by the franchisee from the provision of its basic service within the City of New York Mills. The payment shall be made to the City within 60 days after the last day of each calendar quarter. No one account served by Otter Tail Power Company shall be assessed a franchise fee in excess of $100 for any one month.

It is recognized by the City that the Company is authorized to collect such franchise fees from its customers who are citizens of the City by the addition of such fees to customer bills.

SECTION 12. 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.

Passed and approved: Dec. 9, 2008.

Larry Hodgson
Mayor of the City of New York Mills, Minnesota

Attest:

Darla Berry
City Clerk, New York Mills, Minnesota

ACCEPTANCE

OTTER TAIL CORPORATION, a Minnesota corporation, acting through its proper officers thereunto duly authorized, does hereby accept Ordinance No. 114, of the City of New York Mills, Minnesota, being an Ordinance entitled:

> "AN ORDINANCE GRANTING TO THE OTTER TAIL CORPORATION, A MINNESOTA CORPORATION, ITS SUCCESSORS AND ASSIGNS, PERMISSION TO ERECT, CONSTRUCT, INSTALL, AND MAINTAIN WITHIN THE CITY OF NEW YORK MILLS, MINNESOTA, AN ELECTRIC LIGHT AND POWER SYSTEM AND TRANSMISSION LINE, AND TO OPERATE THE SAME, AND TO INSTALL CONDUITS, POLES, WIRES, PIPES, AND OTHER FIXTURES IN, UPON AND UNDER THE STREETS ALLEYS, BRIDGES, AND PUBLIC GROUNDS OF SAID CITY FOR THE PURPOSE OF FURNISHING ELECTRIC LIGHT, HEAT, AND POWER TO SAID CITY AND THE INHABITANTS THEREOF";

and all of the terms, conditions, requirements, and provisions of said Ordinance No. 114.

IN WITNESS WHEREOF, Otter Tail Corporation has caused this Acceptance to be duly executed this 22nd day of December, 2008.

In Presence of:

Becky Luhning

Nancy L. Olson

OTTER TAIL POWER COMPANY,
a Division of Otter Tail Corporation

By _____
President

And _____
Associate General Counsel,
Otter Tail Corporation

STATE OF MINNESOTA)
)SS
COUNTY OF OTTER TAIL)

On this 22nd day of December, 2008, before me, a Notary Public within and for said County, personally appeared Chuck MacFarlane and Bruce Gerhardson to me personally known, who, being each by me duly sworn, did say that they are, respectively, the President of Otter Tail Power Company and the Associate General Counsel of Otter Tail Corporation, the corporation named in the foregoing instrument, and that said instrument was signed in behalf of said corporation by authority of its Board of Directors, and said Chuck MacFarlane and Bruce Gerhardson acknowledged said instrument to be the free act and deed of said corporation.

PENNY MOSHER
Notary Public
Minnesota
My Commission Expires January 31, 2010

(Notarial Seal)

Penny Mosher

The foregoing Acceptance was duly filed in the office of the City Clerk of the City of New York Mills, Minnesota, this 9th day of January, ~~2008~~. 2009

Darla Berry
City Clerk