

**ELECTRIC FRANCHISE ORDINANCE**

**ORDINANCE NO. 2007-5**

**CITY OF RICHFIELD, HENNEPIN COUNTY, MINNESOTA**

**AN ORDINANCE GRANTING TO NORTHERN STATES POWER COMPANY, D/B/A XCEL ENERGY, A MINNESOTA CORPORATION, ITS SUCCESSORS AND ASSIGNS, PERMISSION TO CONSTRUCT, OPERATE, REPAIR AND MAINTAIN IN THE CITY OF RICHFIELD, 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 RICHFIELD, HENNEPIN 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 Richfield, County of Hennepin, 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.** 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 Electric Facilities subject to this franchise.

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

**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 writing served by either party or parties on the other party Notice to Company shall be mailed to the General Counsel, Legal Services, 414 Nicollet Mall, 5<sup>th</sup> Floor, Minneapolis, MN 55401. Notice to the City shall be mailed to the City Manager, City of Richfield, 6700 Portland Avenue South, Richfield, MN 55423-2560. Either party may change its respective address for the purpose of this Ordinance by written notice to the other party.

**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. § 237.162 subd. 3.

## **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 or similar electric energy purpose 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 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 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.

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

**2.4 Publication Expense.** The expense of publication of this Ordinance shall be paid 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 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 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 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. Electric Facilities shall 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 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 Electric Facilities in place, provided 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, to the extent such conduit is uncovered as part of the City's improvement project.

**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, subject to the provisions of Section 9. 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, 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.

**3.3 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 six months on unpaved surfaces and two years on paved surfaces thereafter. All work shall be completed as promptly as weather permits. 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 and after demand to Company to cure, City shall, after passage of a reasonable period of time following the demand, but not to exceed five working days, have 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 or its designees. This remedy shall be in addition to any other remedy available to the City for noncompliance with this Section.

**3.4 Performance Security.** The City hereby waives any requirement, in the normal course of Company operations, 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 or the Public Ground. Notwithstanding the foregoing, the City reserves the right to require a performance bond for new Facilities installation, relocation, 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 project to the Public Way on a timely basis.

**3.5 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.

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

**3.7 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 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.

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

## **SECTION 4. RELOCATIONS.**

**4.1 Relocation in Public Ways.** Company shall comply with the requirements of any applicable ordinance of the City relating to relocation of Electric Facilities in Public Ways to the extent consistent with Minnesota Rules, Part 7819.3100 and applicable law.

**4.2 Relocation in Public Grounds.** 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. Such relocation shall comply with applicable city 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, as supplemented or amended. It is expressly understood that the right herein granted to Company is a valuable property right and 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 are first paid to Company. The City is obligated to pay Company 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.

**4.4 No Waiver.** The provisions of Section 4 apply only to Electric Facilities constructed in reliance on a franchise from City and Company does not waive its rights under an easement or prescriptive right or State or County permit.

## **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 save 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. Except where required solely 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 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 Electric Facilities, 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 Separate Ordinance.** 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 of not more than five percent of the Company's gross revenues as hereinafter defined. Such franchise fee shall initially be equal to the amounts indicated in the Fee Schedule set forth in franchise fee Ordinance No. 2005-14. Any 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 the 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 the Company by certified mail. Section 2.5 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. A separate ordinance which imposes a lesser franchise fee on the residential class of customers shall not be effective against Company unless the fee imposed on each other customer classification is reduced proportionately in the same or greater amount per class as the reduction represented by the lesser fee on the residential class.

**9.2 Terms Defined.** The term “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 electricity to its retail customers within the corporate limits of the City.

**9.3 Collection of the Fee.** The franchise fee shall be payable not less often than quarterly, and shall be based on the amount collected by the Company during complete billing months during the period for which payment is to be made by imposing a surcharge equal to the designated franchise fee for the applicable customer classification in all customer billings for electric service in each class. The payment shall be due the last business day of the month following the period for which payment is made. The percent fee may be changed by ordinance from time to time, however, each change shall meet the same notice requirements and the percentage may not be changed more often than annually. No franchise fee shall be payable by Company if Company is legally unable 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 rates for electric service. The Company may pay the City the fee based upon the surcharge billed subject to subsequent reductions to account for uncollectibles, customer refunds and correction of erroneous billings. The time and manner of collecting the franchise fee is subject to the approval of the Public Utilities Commission, which the Company agrees to use best efforts to obtain. The Company agrees to make its gross revenues 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.

**9.4 Conditions on the Fee.** The separate ordinance imposing the fee shall not be effective against the 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 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 franchise fee purposes. The franchise fee or tax shall be applicable to energy sales for any energy use related to heating, cooling, or lighting, as well as to the supply of energy needed 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 9.4, the foregoing conditions will be waived to the extent of such written consent. Notwithstanding the foregoing equivalent fee requirement, City retains the right to determine a franchise fee structure that is a reasonably equivalent fee.

**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, 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.

**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. 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 council adoption of the amendatory ordinance.

**SECTION 12. PREVIOUS FRANCHISES SUPERSEDED.**

This franchise supersedes and replaces previous franchises granted to the Company or its predecessors. Upon Company acceptance of this franchise under Section 2.2, the previous franchise shall terminate; provided, however, and notwithstanding anything in section 9.2 to the apparent contrary, that the franchise fee ordinance duly adopted on October 25, 2005 as Ordinance No. 2005-14 and implemented by the Company, shall continue in full force and effect without interruption and is hereby incorporated into this franchise ordinance.

Passed and approved: \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Mayor of the City of Richfield, Minnesota

Attest:

\_\_\_\_\_  
City Clerk, Richfield, Minnesota