

CITY OF DELANO
ORDINANCE NO. 0-09-06

AN ORDINANCE GRANTING TO WRIGHT-HENNEPIN COOPERATIVE ELECTRIC ASSOCIATION A FRANCHISE TO CONSTRUCT AND MAINTAIN AN ELECTRICAL DISTRIBUTION AND/OR TRANSMISSION SYSTEM WITHIN THE CITY OF DELANO, MINNESOTA

FINDINGS

WHEREAS, Wright-Hennepin Cooperative Electric Association, a utility cooperative organized under the laws of the State of Minnesota ("Wright-Hennepin") is operating electrical power facilities within the City of Delano, a Minnesota municipal corporation ("Delano"); and

WHEREAS, Delano has requested that Wright-Hennepin enter a franchise agreement with Delano conferring on Wright-Hennepin the right to operate electric power facilities within Delano, on certain terms and conditions, including but not limited to payment of a franchise fee; and

AGREEMENT

NOW, THEREFORE, for good and valuable consideration, Delano proposes and Wright-Hennepin accepts as follows:

1. **DEFINITIONS.** The following definitions shall apply generally to the provisions of this Agreement.
 - 1.1 Effective Date. "Effective Date" means the date after adoption of this Ordinance by Delano, its publications required by law, and its acceptance by Wright-Hennepin, all of which will be accomplished on or before October 1, 2009.
 - 1.2 Equipment. "Equipment" means any equipment utilized by Wright-Hennepin in providing electrical power to its customers, including but not limited to: poles, wires, conductors, lines, cables, insulators, communication lines, bases, crossarms, braces, lamps, conduits, underground cables, transformers, and other usual appurtenances and appliances for transmitting and distributing electric power and energy, and for other compatible uses and applications, including but not limited to transmission of data and other information, telecommunications, and electric load dispatch and control.
 - 1.3 Fee. "Fee" means any assessment, license, charge, fee, imposition, tax, or levy of general application to entities doing business in Delano lawfully imposed by any governmental body (but excluding any utility users' tax franchise fees, or similar taxes or fees).

- 1.4 Laws. "Laws" means any and all statutes, constitutions, ordinances, resolutions, regulations, judicial decisions, rules, tariffs, administrative orders, certificates, orders, or other requirements of Delano or other governmental agency having joint or several jurisdiction over the parties to this Agreement.
- 1.5 Public Way. "Public Way" means the area on, below, or above a public roadway, highway, street, cartway, bicycle lane, and public sidewalk in which Delano has an interest, including other dedicated rights-of-way for travel purposes and utility easements of Delano. This term shall not include county, state, or federal rights of way or any property owned by any person or entity other than Delano, except as provided by applicable Laws or pursuant to an agreement between Delano and any such person or entity.
- 1.6 PUC. "PUC" means the Minnesota Public Utilities Commission.
- 1.7 Services. "Services" means the electrical services provided by Wright-Hennepin pursuant to Minnesota law.
2. **TERM**. This Agreement shall be effective as of the Effective Date as defined in Section 1.1 and shall extend for a term of ten (10) years commencing on the Effective Date, unless it is earlier terminated by either party in accordance with the provisions herein or by operation of law or PUC order resolving a service territory dispute. The term of this Agreement shall be renewed automatically for three (3) successive terms of five (5) years each on the same terms and conditions as set forth herein, unless either party notifies the other of its intention not to renew not less than one hundred eighty (180) calendar days prior to commencement of the relevant renewal term.
3. **SCOPE OF FRANCHISE AGREEMENT**. Any and all rights expressly granted to Wright-Hennepin under this Franchise Agreement, which shall be exercised at Wright-Hennepin's sole cost and expense, shall be subject to the prior and continuing right of Delano under applicable Laws. Nothing in this Franchise Agreement shall be deemed to grant, convey, create, or vest in Wright-Hennepin a real property interest in land, including any fee, leasehold interest, or easement. Any work performed pursuant to the rights granted under this Franchise Agreement shall be subject to the reasonable prior review and approval of Delano.
- 3.1 No Interference. Wright-Hennepin in the performance and exercise of its rights and obligations under this Franchise Agreement shall not interfere in any manner with the existence and operation of any and all public and private rights of way, sanitary sewers, water mains, storm drains, gas mains, poles, aerial and underground electrical and telephone wires, electroliers, cable television, and other telecommunications, utility, or municipal property, without the express written approval of the owner or owners of the affected property or properties, except as permitted by applicable Laws or this Franchise Agreement.
- 3.2 Compliance with Laws. Wright-Hennepin shall comply with all applicable Laws in the exercise and performance of its rights and obligations under this Franchise Agreement, including but not limited to Delano Code Section 301.01 (the "Right-of-Way Ordinance").

4. **COMPENSATION; UTILITY CHARGES.** Wright-Hennepin shall be solely responsible for the payment of all lawful Fees in connection with Wright-Hennepin's performance under this Franchise Agreement, including those set forth below.

4.1 Franchise Fee. In order to reimburse Delano for management costs it may incur during the term of this Agreement, and as a franchise fee, Wright-Hennepin shall pay to Delano, on an annual basis, an amount equal to \$0.00317 per kilowatt hour of electrical power sales to customers in Delano. Wright-Hennepin shall furnish to Delano with each payment a statement, executed by an authorized officer of Wright-Hennepin or his or her designee, showing the kilowatt hour sales to customers in Delano for the period covered by the payment. If Wright-Hennepin or Delano discovers any error in the amount of compensation due, Delano shall be paid within thirty (30) days of the discovery of the error or determination of the correct amount. Any overpayment to Delano through error or otherwise shall be refunded or offset against the next payment due. Acceptance by Delano of any payment of the Franchise Fee shall not be deemed to be a waiver by Delano of any breach of this Franchise Agreement occurring prior thereto, nor shall the acceptance by Delano of any such payments preclude Delano from later establishing that a larger amount was actually due or from collecting any balance due to Delano. A condition of the payment of this franchise fee is that an equivalent fee must be charged to all other energy suppliers that provide electrical energy service in Delano.

4.2 Accounting Matters. Wright-Hennepin shall keep accurate books of account at its principal office for the purpose of determining the amounts due to Delano under § 4.1 above. Delano may inspect Wright-Hennepin's books of account relative to Delano at any time during regular business hours on fifteen (15) days' prior written notice and may audit the books from time to time at Delano's sole expense, but in each case only to the extent necessary to confirm the accuracy of payments due under § 4.1 above.

4.3 Reimbursement of Delano's Project Review Expenses. Wright-Hennepin shall reimburse Delano, at Delano's standard rates, for attorney's fees and other project review expenses, incurred on or after August 1, 2009, relating to the preparation, drafting, negotiation, review and enforcement of this Franchise Agreement, promptly upon receipt of itemized bills.

5. **SERVICE AND REGULATIONS.**

5.1 Provision of Service. In consideration for the right to use the streets, alleys, highways and public grounds, Wright-Hennepin shall furnish safe, adequate, efficient and reasonable electric service to consumers in that part of Wright-Hennepin's service territory that is located within Delano city limits, unless prevented by causes not within Wright-Hennepin's reasonable control.

5.2 Services and Rates. The services to be provided by Wright-Hennepin are established by Wright-Hennepin, subject to applicable law. The rates to be charged for the services provided are established by Wright-Hennepin. The area

within Delano in which Wright-Hennepin may provide service is subject to the provisions of Minnesota Statutes, Section 216B.40.

5.3 Standard of Care. All poles, wires and other appliances shall be constructed and maintained by Wright-Hennepin in as safe and secure a manner as reasonably possible; in such a manner so as not to unnecessarily interfere with the public use of the said streets, alleys, highways and public grounds; and subject to reasonable regulation by Delano, including but not limited to the Delano Right-of-Way Ordinance.

5.4 Other Property Rights of Wright-Hennepin. The provisions of this Franchise Agreement apply only to Wright-Hennepin facilities constructed in reliance on this Franchise and Wright-Hennepin does not waive or modify its rights under any easement, prescriptive right, state or county permit, or other real property interests that Wright-Hennepin might have in any public way or in any public ground.

6. **INDEMNIFICATION AND WAIVER.**

6.1 Liability of Delano. Delano shall in no way be liable or responsible for any accident or damage that may occur in the construction, operation and maintenance by Wright-Hennepin of its lines and appurtenances hereunder, except to the extent caused by Delano.

6.2 Indemnification by Wright-Hennepin. Wright-Hennepin agrees to indemnify Delano and hold it harmless against any and all liability, loss, damage or expense which may accrue to Delano by reason of the neglect, default or misconduct of Wright-Hennepin in the construction, operation or maintenance of its facilities hereunder.

6.3 Waiver of Claims. Wright-Hennepin waives any and all claims, demands, causes of action, and rights it may assert against Delano on account of any loss, damage, or injury to any Equipment or any loss or degradation of the Services as a result of any event or occurrence which is beyond the reasonable control of Delano, or on account of Delano's exercise of its regulatory or police powers.

7. **TERMINATION OR EXPIRATION OF AGREEMENT.** Upon the expiration or earlier termination of this Agreement, Wright-Hennepin and Delano will enter into a new franchise agreement, containing reasonable terms and conditions, pursuant to law. Either Wright-Hennepin or Delano may request mediation in the event that the parties have not been able to successfully negotiate and enter into a new franchise agreement within 60 days prior to expiration or termination of the Agreement. In no event, however, shall such a mediation process delay the expiration or termination of this Agreement if the mediation is unsuccessful.

8. **INSURANCE.** Wright-Hennepin shall obtain and maintain at all times during the term of this Franchise Agreement adequate liability and workers' compensation insurance, in such amounts as is appropriate, to satisfy its indemnity obligations to Delano under Section 6.2 hereof. Wright-Hennepin will provide Delano at all times with appropriate certificates evidencing such insurance. On the effective date of this franchise agreement,

adequate insurance is Commercial General Liability Insurance and Commercial Automobile Liability Insurance in an amount not less than One Million Dollars (\$1,000,000) per occurrence (combined single limit), including bodily injury and property damage in an amount not less than Two Million Dollars (\$2,000,000) annual aggregate for personal injury liability.

9. **NOTICES.** All notices which shall or may be given pursuant to this Franchise Agreement shall be in writing and delivered personally or transmitted (a) through the United States mail, by registered or certified mail, postage prepaid; (b) by means of prepaid overnight delivery service; or (c) by facsimile or email transmission, if a hard copy of the same is followed by delivery through the U. S. mail or by overnight delivery service as just described, addressed as follows:

if to Delano:

CITY OF DELANO
Attn: City Administrator
234 Second Avenue South
P.O. Box 108
Delano, MN 55328

if to Wright-Hennepin:

WRIGHT-HENNEPIN COOPERATIVE ELECTRIC ASSOCIATION
Attn: Mark Vogt, President and CEO
P.O. Box 330
6800 Electric Drive
Rockford, MN 55373-0330

Notices shall be deemed given upon receipt in the case of personal delivery, three (3) days after deposit in the mail, or the next business day in the case of facsimile, email, or overnight delivery. Either party may from time to time designate any other address for this purpose by written notice to the other party delivered in the manner set forth above.

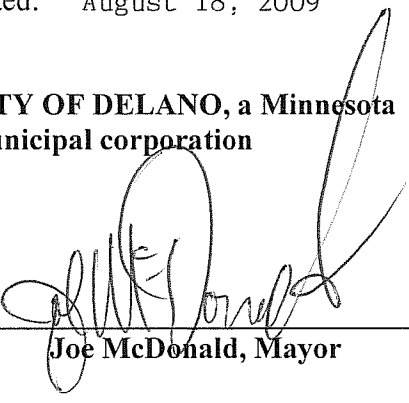
10. **TERMINATION.** This Franchise Agreement may be terminated by either party upon forty five (45) days' prior written notice to the other party upon a default of any material covenant or term hereof by the other party, which default is not cured within forty-five (45) days of receipt of written notice of default (or, if such default is not curable within forty-five (45) days, if the defaulting party fails to commence such cure within forty-five (45) days or fails thereafter diligently to prosecute such cure to completion), provided that the grace period for any monetary default shall be ten (10) days from receipt of notice. Except as expressly provided herein, the rights granted under this Franchise Agreement are irrevocable during the term.
11. **ASSIGNMENT.** Wright-Hennepin will not assign its interest under this franchise agreement to any third party without the prior written consent of Delano.
12. **MISCELLANEOUS PROVISIONS.** The provisions which follow shall apply generally to the obligations of the parties under this Franchise Agreement.

- 12.1 Waiver of Breach. The waiver by either party of any breach or violation of any provision of this Franchise Agreement shall not be deemed to be a waiver or a continuing waiver of any subsequent breach or violation of the same or any other provision of this Franchise Agreement.
- 12.2 Severability of Provisions. If any one or more of the provisions of this Franchise Agreement except §4 and its subsections, shall be held by court of competent jurisdiction in a final judicial action to be void, voidable, or unenforceable, such provision(s) shall be deemed severable from the remaining provisions of this Franchise Agreement and shall not affect the legality, validity, or constitutionality of the remaining portions of this Franchise Agreement. Each party hereby declares that it would have entered into this Franchise Agreement and each provision hereof regardless of whether any one or more provisions, except § 4 and its subsections, may be declared illegal, invalid, or unconstitutional. In the event § 4 or its subsections is or are declared invalid, this Agreement shall terminate.
- 12.3 Governing Law; Jurisdiction. This Franchise Agreement shall be governed and construed by and in accordance with the laws of the State of Minnesota, without reference to its conflicts of law principles. If suit is brought by a party to this Franchise Agreement, the parties agree that trial of such action shall be vested exclusively in the state courts of Minnesota, County of Wright.
- 12.4 Attorneys' Fees. Should any dispute arising out of this Franchise Agreement lead to litigation, the prevailing party shall be entitled to recover its costs of suit, including (without limitation) reasonable attorneys' fees.
- 12.5 Consent Criteria. In any case where the approval or consent of one party hereto is required, requested or otherwise to be given under this Franchise Agreement, such party shall not unreasonably delay, condition, or withhold its approval or consent.
- 12.6 Representations and Warranties. Each of the parties to this Agreement represents and warrants that it has the full right, power, legal capacity, and authority to enter into and perform the parties' respective obligations hereunder and that such obligations shall be binding upon such party without the requirement of the approval or consent of any other person or entity in connection herewith, except as provided in § 3 above.
- 12.7 Amendment of Franchise Agreement. This Franchise Agreement may not be amended except pursuant to a written instrument signed by both parties.
- 12.8 Entire Agreement. This Franchise Agreement contains the entire understanding between the parties with respect to the subject matter herein. There are no representations, agreements, or understandings (whether oral or written) between or among the parties relating to the subject matter of this Franchise Agreement which are not fully expressed herein.

Dated: August 18, 2009

**CITY OF DELANO, a Minnesota
Municipal corporation**

By


Joe McDonald, Mayor

Accepted by:

Dated:

**WRIGHT-HENNEPIN COOPERATIVE
ELECTRIC ASSOCIATION, a utility
cooperative**

By


Its: President + CEO

ATTEST:



Marlene Kittock, City Clerk

Motion By:	Bartels
Seconded By:	Hotchkiss
McDonald:	Aye
Schrupp:	Absent
Bartels:	Aye
Hotchkiss:	Aye
Stolfa:	Absent