

**THIS IS A DRAFT INTERIM ORDINANCE TO BE PROPOSED AT THE
MARCH 5, 2018 WAITE PARK CITY COUNCIL MEETING**

ORDINANCE NO. 2018-__

AN ORDINANCE GRANTING TO STEARNS ELECTRIC ASSOCIATION A MINNESOTA CORPORATION, ITS SUCCESSORS AND ASSIGNS, A NONEXCLUSIVE FRANCHISE TO CONSTRUCT, OPERATE, REPAIR AND MAINTAIN IN THE CITY OF WAITE PARK, 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 Waite Park, Stearns County, Minnesota, ordains:

SECTION 1. DEFINITIONS.

- 1.1.** “City” means the City of Waite Park, County of Stearns, State of Minnesota.
- 1.2.** “City Utility System” means the facilities used for providing non-energy related public utility service owned or operated by City or agency thereof, including sewer and water service, but extending facilities for providing heating, lighting or other forms of energy.
- 1.3.** “Commission” means 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.
- 1.4.** “Company” means Stearns Electric Association, a Minnesota corporation, its successors and assigns.
- 1.5.** “Electric Facilities” means electric transmission and distribution towers, poles, lines, guys, anchors, conduits, fixtures, and necessary appurtenances owned or operated by the Company for the purpose of providing electric energy for public or private use.
- 1.6.** “Notice” or “Notify” means a writing served by any party or parties on any other party or parties. Notice to the Company shall be mailed to the General Counsel, 900 Kraft Dr. SE, Melrose, MN 56352. Notice to the City shall be mailed to the City Clerk, P.O. Box 339, Waite Park, MN 56387-0339. Either party may change its respective address for the purpose of this Ordinance by written notice to the other parties.
- 1.7.** “Public Ground” means 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 and not a Public Way.
- 1.8.** “Public Way” means any street, alley, walkway or other public right-of-way within the City.

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SECTION 2. GRANT OF FRANCHISE.

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

SECTION 3. RESTRICTIONS.

3.1. Company Electric Facilities shall be located, constructed and maintained so as not to interfere with the safety and convenience of ordinary travel along and over Public Ways and so as not to disrupt normal operation of any City Utility System previously installed therein. Company's construction, reconstruction, operation, repair, maintenance and location of such facilities shall be subject to permits if required by separate ordinance and to other reasonable regulations of the City to the extent not inconsistent with the terms of this franchise agreement. Company may abandon its underground Electric Facilities in place, provided, at the City's request, Company will remove abandoned metal or concrete encased conduit interfering with a City improvement project, but only to extent such conduit is uncovered by excavation as part of the City's improvement.

3.2. Company shall not construct any new installations within or upon any Public Grounds without receiving the prior written consent of an authorized representative of City for each such installation.

3.3. In constructing, removing, replacing, repairing, or maintaining said Electric Facilities, Company shall be required to obtain any necessary permits from the City, and, if no franchise fee has been imposed pursuant to Section 9, pay any applicable permit fees as may be required by the City under separate existing or future ordinances which govern work done within the Public Ways and Public Grounds. The City hereby waives any requirement for Company to post security or assurance which may be required by such separate ordinance.

3.4. After undertaking any work requiring the opening of any Public Ground or Public Way, Company shall restore the same, including paving and its foundation, in accordance with the City's restoration standards, and shall maintain any paved surface in good condition for two years thereafter. The work shall be completed as promptly as weather permits, and if Company shall not promptly perform and complete the work, remove all dirt, rubbish, equipment and material, and put the Public Ground or Public Way 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, right to make the restoration expense of the Company. Company shall pay to the City the cost of such work done or performed by the City

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SECTION 4. TREE TRIMMING.

Company is also granted the permission and authority to trim all shrubs and trees, including roots, 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 Electric Facilities, provided that Company shall save City harmless from any liability in the premises.

SECTION 5. SERVICE AND RATES.

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.

SECTION 6. RELOCATING.

6.1. Whenever City at its cost 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 seasonable working conditions, when necessary, and after approval of its final plans have been obtained, order Company to relocate permanently Electric Facilities located in said Public Way materially interfering with the City's planned construction, Company shall relocate its Electric Facilities at its own expense. City shall give 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 Company has so relocated, if a subsequent relocation or relocations shall be ordered within five (5) years from and after first relocation, City shall reimburse Company for such non-betterment relocation expense which Company may incur on a time and material basis; provided, if subsequent relocations are requested because Company facilities materially and necessarily interfere with the extension of a City Utility System to previously unserved areas, Company may be required to relocate at its own expense. Nothing contained in this franchise shall require Company to relocate, remove, replace or reconstruct at its own expense its Electric Facilities within a Public Way 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.

6.2. 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.

6.3. City shall not order Company to remove or relocate its Electric Facilities when a Public Way is vacated, improved or realigned for a right-of-way project or any other project 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 shall request federal funding for relocation costs, but City is obligated to pay Company only for those portions of its relocation costs for which City has received federal funding

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specifically allocated for relocation costs in the amount requested by the Company. Relocation, removal or rearrangement of any Company Electric Facilities made necessary because of a federally-aided highway project shall be governed by the provisions of Minnesota Statutes, Section 161.46, as supplemented or amended. The foregoing shall not be construed so as to require the City to reimburse Company directly or indirectly out of local funds for any such relocation costs.

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

SECTION 7. INDEMNIFICATION.

7.1. 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, 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. The City shall not be indemnified if the injury or damage results from the performance in a proper manner of acts reasonably deemed hazardous by Company, and such performance is nevertheless ordered or directed by City after notice of Company's determination.

7.2. 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 Notice thereof is promptly given to Company within a period wherein Company is not prejudiced by lack of such Notice. If Company is required to indemnify and defend, it will thereafter have control of such litigation, but Company may not settle such litigation without the consent of the City, which consent shall not be unreasonably withheld. This section is not, as to third parties, a waiver of any defense or immunity otherwise available to the City; and Company, in defending any action on behalf of the City shall be entitled to assert in any action every defense or immunity that the City could assert in its own behalf.

SECTION 8. VACATION OF PUBLIC WAYS.

The City shall give Company at least two (2) weeks prior 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 pay damages to Company for failure to specifically preserve a right-of-way, under Minnesota Statutes, Section 160.29.

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SECTION 9. FRANCHISE FEE.

9.1. During the term of the franchise hereby granted, and in lieu of any permit or other fees being imposed on Company, the City may impose on Company a franchise fee not to exceed five percent (5%) of the Company's Gross Revenues by collecting the amounts indicated in a Fee Schedule set forth in a separate ordinance from each customer in the designated Company Customer Class on a flat per meter/per month basis.

9.2. 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 ninety (90) days after Notice enclosing such proposed ordinance has been served upon Company by certified mail. The fee shall not become effective until the beginning of a Company billing month at least ninety (90) days after Notice enclosing such adopted ordinance has been served upon Company by certified mail. Section 11.2 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. A separate ordinance which imposes a lesser franchise fee on the residential class of customers than the maximum amount set forth in Section 9.1 above 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.

9.3. For the purpose of this Section, the following definitions apply:

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

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

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

9.4. The franchise fee shall be paid based on the amount collected by Company during complete billing months during the period for which payment is to be made by imposing a surcharge ("additional fee") equal to the designated franchise fee for the applicable Customer Classification in all customer billings for metered service in each class. The payment shall be paid four times a year and due the last business day of the calendar month following the end of each quarter (payments being due January 31, April 30, July 31, and October 31 during each calendar year). The franchise fee may be changed by ordinance from time to time; however, each change

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shall meet the same Notice requirements and not occur more often than annually, and no change shall require a collection from any customer for metered service in excess of the amounts specifically permitted by Section 9.1. The time and manner of collecting the franchise fee is subject to the approval of the Commission, which Company agrees to use its best efforts to obtain. 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 surcharge in Company's applicable rate for Electric Service. Company must pay the City the fee based upon the surcharge billed subject to subsequent reductions to account for uncollectibles, refunds and other error correction. 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 regarding identified customers.

9.5. The separate ordinance imposing the fee shall not be effective against Company unless it lawfully imposes and the City quarterly or more often collects a fee or tax of the same or greater equivalent amount on the receipts from sales of energy within the City by any other energy supplier. 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, as well as to the supply of energy needed to run machinery and appliances on premises located within or adjacent to the City, but shall not apply to energy sales for the purpose of providing fuel for vehicles.

SECTION 10. WRITTEN ACCEPTANCE.

Company shall, if it accepts this Ordinance and the rights and obligations hereby granted, file a written acceptance of the rights hereby granted with the City Clerk within ninety (90) days after the final passage and any required publication of this Ordinance.

SECTION 11. GENERAL PROVISIONS

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

11.2. 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. 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 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 thirty (30) days after first meeting with the selected mediator, either party may commence an action in district court to interpret and enforce

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this franchise or for such other relief as may be permitted by law or equity for breach of contract, or either party may take any other action permitted by law.

11.3. 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.

11.4. 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.

11.5. Nothing in this Ordinance relieves any person from liability arising out of the failure to exercise reasonable care to avoid damaging Company's facilities while performing any activity.

SECTION 12. PUBLICATION EXPENSE.

The expense of any publication of this franchise Ordinance required by law shall be paid by Company.

SECTION 13. EFFECTIVE DATE.

This Ordinance is effective as provided by statute or charter and upon acceptance by Company as provided in Section 10.

CITY OF WAITE PARK

By _____
Richard E. Miller
Its Mayor

By _____
Shaunna Johnson
Its Administrator-Clerk-Treasure