

March 2, 2010 Proposed final

GAS FRANCHISE ORDINANCE FOR XCEL ENERGY

ORDINANCE NO. 2010-05

CITY OF ST. AUGUSTA, STEARNS COUNTY, MINNESOTA

AN ORDINANCE GRANTING TO NORTHERN STATES POWER COMPANY, A MINNESOTA CORPORATION D/B/A XCEL ENERGY, ITS SUCCESSORS AND ASSIGNS, PERMISSION TO ERECT A GAS DISTRIBUTION SYSTEM FOR THE PURPOSES OF CONSTRUCTING, OPERATING, REPAIRING AND MAINTAINING MAINS AND APPURTENANCES FOR THE TRANSMISSION OR DISTRIBUTION OF GAS TO THE CITY AND ITS INHABITANTS AND OTHERS AND TRANSMITTING GAS INTO AND THROUGH THE CITY AND TO USE THE PUBLIC WAYS AND PUBLIC GROUNDS OF THE CITY FOR SUCH PURPOSES.

THE CITY COUNCIL OF ST. AUGUSTA, STEARNS COUNTY, MINNESOTA, ORDAINS:

**SECTION 1. DEFINITIONS.** For purposes of this Ordinance, the following capitalized terms shall have the following meanings:

1.1 **City.** The City of St. Augusta, County of Stearns, State of Minnesota.

1.2 **City Utility System.** Facilities used for providing public utility service owned or operated by the City or agency thereof, including sewer, storm sewer, water service, street lighting and traffic signals, but excluding facilities for providing heating or other forms of energy.

1.3 **Commission.** The Minnesota Public Utilities Commission, or any successor agency or agencies, including an agency of the federal government that preempts all or part of the authority to regulate gas retail rates now vested in the Commission.

1.4 **Company.** Northern States Power Company, d/b/a Xcel Energy, its successors and assigns, including successors to assignees of those portions of the Company that constitute any part of parts of the Gas Facilities subject to this franchise.

1.5 **Customer Classification.** The classes listed on the Fee Schedule and as defined or determined in Company's gas tariffs on file with the Commission.

1.6 **Effective Date.** The date on which this ordinance becomes effective under Section 2.2.

1.7 **Fee Schedule.** The schedule set forth in Paragraph (c) of Gas Franchise Fee Ordinance ~~2010-06~~ attached as Appendix A hereto. The Fee Schedule in the separate ordinance may include new Customer Classifications added by Company to its gas tariffs after the effective date of this franchise agreement

1.8 **Gross Revenue.** 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 gas to its retail customers within the corporate limits of the City.

1.9 **Gas.** Natural gas, manufactured gas, mixture of natural gas and manufactured gas or other forms of gas energy.

1.10 **Gas Facilities.** Gas transmission and distribution pipes, mains, lines, ducts, fixtures, and all necessary facilities, equipment and appurtenances owned, operated or otherwise used by the Company for the purpose of providing gas energy for public use.

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

1.12 **Public Ground.** Land owned or otherwise controlled by the City for parks, open space or similar public purpose.

## **SECTION 2. FRANCHISE.**

2.1 **Grant of Franchise.** The City grants the Company, for a period of Twenty (20) years from the Effective Date, the right to import, manufacture, transport, distribute and sell Gas for public and private use within and through the limits of the City. This right includes the provision of Gas that is (i) manufactured by the Company or its affiliates and delivered by the Company, (ii) purchased and delivered by the Company or (iii) purchased from another source by the retail customer and delivered by the Company. For these purposes, the Company may construct, operate, repair and maintain Gas Facilities in, on, over, under and across the Public Way and Public Ground subject to the provisions of this ordinance. The Company may do all things reasonably 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, as may be enacted from time to time, including but not limited to a right-of-way ordinance and to further provisions of this ordinance.

2.2 **Effective Date.** This franchise will be in force and effect from and after the passage of this ordinance and publication as required by law and its acceptance by the Company. If the Company does not file a written acceptance with the City within **sixty (60) days** after the date the City Council adopts this ordinance, or otherwise informs the City, at any time,

that the Company does not accept the franchise, the City Council by resolution may revoke this franchise or seek its enforcement in a court of competent jurisdiction.

2.3 **Non exclusive Franchise.** This ordinance does not grant an exclusive franchise.

2.4 **Publication Expense.** The expense of publication of this ordinance must be paid by the Company.

2.5 **Continuation of Franchise.** If this franchise expires and the City and the Company are unable to agree on the terms of a new franchise, the existing 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 their intention to allow the franchise agreement to expire. However, in no event shall this franchise continue for more than one year after the expiration of the **twenty** year term set forth in Section 2.1.

### **SECTION 3. CONDITIONS OF USE.**

3.1 **Location of Facilities.** Gas Facilities must be located, constructed, installed and maintained so as not to interfere with the existing City Utility System or the safety and convenience of ordinary travel along and over Public Ways. Gas Facilities may be located on Public Grounds as determined by the City. The Company's construction, reconstruction, operation, repair, maintenance, location and relocation of Gas Facilities shall be subject to other applicable ordinances and regulation 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. Company may abandon underground gas facilities in place, provided that at City's request Company will remove abandoned metal pipe interfering with a City improvement project, but only to the extent such metal pipe is uncovered by excavation as part of the City's improvement project or otherwise interferes with the installation of said City improvement project.

3.2 **Permit Required.** The Company may 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 separate ordinance, for which the City may impose a reasonable fee. The permit conditions imposed on the Company may not be more burdensome than those imposed on other non-public utilities for similar facilities or work. The 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) the Company gives notice to the city before, if possible, commencement of the emergency repair. Within two business days after commencing the repair, the Company must apply for any required permits and pay the required fees.

3.3 **Restoration.** After undertaking any work requiring the opening of any Public Way or Public Ground, Company shall restore the same, including paving and its foundation, to as

good a condition as formerly existed, 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 Way or 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 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, but the City hereby waives any requirement 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.

**3.4 Notice of Improvements.** The City must give Company reasonable notice of plans for improvements to Public Ways or Public Ground 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 and Public Grounds 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 or Public Ground is involved, the order in which the work is to proceed. The notice must be given to Company a sufficient length of time in advance of the actual commencement of the work to permit Company to make any necessary additions, alterations or repairs to its Gas Facilities.

**3.5 Mapping Information.** The Company must promptly provide complete mapping information for any of its Gas Facilities in accordance with the requirements of Minnesota Rules Parts 7819.4000 and 7819.4100 and any applicable City ordinances including but not limited to existing or future right of way ordinances.

**3.6 Tree Trimming.** To the extent that the City has the right and authority to do so, the City grants the Company 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.

## **SECTION 4. RELOCATIONS.**

**4.1 Relocation of Gas Facilities in Public Ways.** If the City determines to vacate a Public Way for a City improvement project, or to grade, regrade, or change the line of any Public Way, or alter or reroute the traveled surface 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 Minnesota Rules 7819.3200 and Section 4.4, Company shall relocate its Gas Facilities at its own expense. The City shall give Company reasonable 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. 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: 1) 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; or 2) not reasonably necessary for the safety of the traveling public.

4.2 **Relocation of Gas Facilities in Public Ground.** Except as provided in Section 4.3 below, 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. Relocation shall comply with applicable City Code ordinances and other applicable law.

4.3 **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 Company shall comply with Minnesota Rules 7819.3200 and applicable ordinances consistent with law.

4.4 **Projects with Federal Funding.** Relocation, removal or rearrangement of any Gas 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 Minnesota Statutes, Section 161.46. As for any non-highway project in which the City 1) chooses to utilize funding from the Federal Government or any agency thereof, and 2) requires Company to remove or relocate its Gas Facilities in conjunction with such project, the Company may request that the City apply for Federal funding for the Company's relocation costs. The City shall apply for such funding in good faith upon receipt of a written request by Company requesting such application. In such case, the Company shall pay any additional identifiable incremental cost attributable to the application and administration of such Federal funding application for the relocation of Gas Facilities.

## **SECTION 5. DEFENSE AND INDEMNIFICATION.**

5.1 **Terms.** The Company shall indemnify, keep and hold the City, its elected officials, officers, employees, and agents free and harmless from any and all liability, claims and actions on account of injury or death of persons or damage to property occasioned by the construction, maintenance, repair, removal, inspection, the issuance of permits, or operation of Gas Facilities on or across the Public Way and the Public Ground of the City, unless such injury or damage is the result of negligence of the City, its elected officials, employees, officers, or agents.

5.2 **Litigation.** If such a suit is brought against the City under circumstances where the agreement in this Section 5 to indemnify applies, the Company at its sole cost and expense will defend the City in such suit if Notice thereof is promptly given to the Company within a reasonable period. If the Company is required to indemnify and defend, it will thereafter have control of such litigation, but the Company may not settle such litigation without the consent of the City, which consent will 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 the Company, in defending any action on behalf of the City is 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 or available at common law.

## **SECTION 6. SUCCESSORS IN INTEREST.**

6.1 This ordinance and the rights and obligations conferred hereby, is binding on and inures to the benefit of the City and its successors and on the Company and its successors and permitted assigns.

## **SECTION 7. FRANCHISE FEE.**

7.1 **Authorization.** During the term of the franchise hereby granted, and in lieu of any permit, licensing, or other fees, charges or costs imposed on Company for providing gas service or performing work necessary to provide gas service in the City during the term of this franchise, the City may impose on Company a franchise fee not to exceed five percent (5%) of the Company's Gross Revenue by collecting the amounts calculated on a flat fee per meter or premise/per class, per/month basis as indicated in the Fee Schedule set forth in Paragraph (c) of Gas Franchise Fee Ordinance \_\_\_\_\_ attached as Appendix A hereto.

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7.2 **Separate Ordinance.** The franchise fee shall be imposed by separate ordinance in the form and substance attached as Appendix A hereto. The franchise fee may be modified from time to time by the City by separate ordinance duly adopted by the City Council, which ordinance shall not be adopted until at least thirty (30) days after written notice enclosing such proposed ordinance has been served upon the Company by certified mail. A modification of the franchise fee imposed under this subsection does not become effective until 10 days after Notice enclosing the adopted ordinance has been served upon the Company by certified mail.

7.3 **Collection of the Franchise Fee.** 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 franchise fee may be changed by ordinance from time to time; however, each change shall meet the same notice requirements and not occur more often than annually. 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. Said franchise fee shall be payable by Company only to the extent Company is legally able 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 rate for gas service. Company may pay the City the fee based upon the surcharge billed subject to subsequent reductions to account for uncollectibles, refunds, correction of erroneous billings, or other error corrections. 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 which would indicate the amount paid by any identifiable customer or customers or any other information regarding identified customers, unless the City is required to disclose such information under applicable state or federal law.

**7.4 Payment of the Franchise Fee.** Franchise fees are to be collected by the Company and submitted to the City as follows:

January – March collections due by April 30.

April – June collections due by July 31.

July – September collections due by October 31.

October – December collections due by January 31.

**7.5 Franchise Fee in Lieu of Other Permit Fees.** The Company will administer the collection and payment of franchise fees to the City in lieu of permit fees, or other fees that may otherwise be imposed on the Company in relation to its operations as a public utility in the City so long as the Company applies for any and all permits, licenses and similar documentation as though this provision did not exist.

**7.6 Condition of Fee.** The separate ordinance modifying the franchise fee shall not be effective against the Company unless it lawfully imposes a fee or tax of the same substantially similar amount on the sale and/or delivery of natural gas within the City by any other natural gas supplier, provided that, as to such supplier, the City has the authority to require a franchise fee or impose a tax.

## **SECTION 8. LIMITATION ON APPLICABILITY.**

**8.1 Limitations on Applicability.** This Ordinance constitutes a franchise agreement between the City and the Company. No provision of this franchise inures 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 for any person not a party hereto.

**SECTION 9. PREVIOUS FRANCHISES SUPERSEDED.**

9.1 **Previous Franchise superseded.** This franchise supersedes and replaces previous franchises granted to the Company or its predecessors.

**SECTION 10. AMENDMENTS.**

10.1 **Amendments.** 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 the Company's written consent thereto with the City Clerk within 60 days after the effective date of the amendatory ordinance.

**SECTION 11. SEVERABILITY.**

11.1 **Severability.** If any portion of this franchise is found unenforceable for any reason, the validity of the remaining provisions will not be affected.

**SECTION 12. DISPUTE RESOLUTION.**

12.1 **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 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 ordinance or for such other relief permitted by law.

Passed and approved MARCH 2, 2010

B. J. Kroll  
Mayor of St. Augusta

ATTEST: William R. McCall

Clerk of St. Augusta

Accepted this \_\_\_\_\_ day of \_\_\_\_\_, 2010.



Northern States Power Company d/b/a Xcel Energy

\_\_\_\_\_  
By:  
Its \_\_\_\_\_