

TITLE XIV.

FRANCHISES

CHAPTERS:

- 14-01. Cable Television Franchise.
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CHAPTER 14-01.

CABLE TELEVISION FRANCHISE

Source: Ord. 2008-1

SECTIONS:

- 14-0101. Short Title and Definitions.
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- 14-0104. Construction and Operations Standards.
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14-0101. **SHORT TITLE AND DEFINITIONS.**

1. Short Title. This Ordinance shall be known and cited as the “Cable Communications Regulatory Ordinance.”
2. Definitions. For the purposes of this Ordinance, the following terms, phrases, words, and their derivations shall have the meaning given herein. When not inconsistent with the context, words in singular number include the plural number. The word “shall” is always mandatory and not merely directory. The word “may” is directory and discretionary and not mandatory.
 - a. “Basic Cable Service” means the service tier which includes the retransmission of local broadcast signals and any public, educational, and governmental access programming required by the franchise to be carried on the basic tier. Basic Cable Service as defined herein shall not be inconsistent with 47 U.S.C. §543(b)(7).
 - b. "Cable Programming Service" means any Video Programming provided over a Cable System, regardless of service tier, including installation or rental of equipment used for the receipt of such Video Programming, other than:
 - Video Programming carried on the Basic Service Tier;
 - Video Programming offered on a per-per-channel or pay-per-program basis;
 - or
 - A combination of multiple channels of per-per-channel or pay-per-program Video Programming offered on a multiplexed or time-shifted basis so long

as the combined service: consists of commonly-identified Video Programming; and is not bundled with any regulated tier of service.

Cable Programming Service as defined herein shall not be inconsistent with the definition as set forth un 47 U.S.C. §543(1)(2) and 47 C.F.R. 76.901(b) (1993).

- (c) “Cable Service” means the one-way transmission to Subscribers of Video Programming, or other programming servide, and Subscriber interaction, if any, which is required for the selection of such Video Programming or other programming service. There shall be at least 35 channels offered for cable service.
- (d) “Cable System” or “System” shall have the meaning ascribed to it in federal law.
- (e) “Council” means the Horace, North Dakota City Council.
- (f) “Franchise” means an initial authorization, or renewal thereof issued by a franchising authority, whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, which authorizes the construction or operation of a Cable System or other MVPD facility.
- (g) “Franchise Area” means the area within the legal boundaries of the Grantor.
- (h) “Grantee” is the Person which is granted a Franchise in City pursuant to this Ordinance, its agents and employees, lawful successors, transferees or assignees.
- (i) “Grantor” is the City of Horace.
- (j) “Gross Revenue” means only that monthly revenue received from Basic Cable Service, Cable Programming Service, and Pay Television directly by Grantee from the operation of its System within Franchise Area. The Term “Gross Revenues” shall not include any other revenue billed or received by the Grantee, including, but not limited to installation fees, franchise fees, late fees, any fees itemized and passed through as a result of franchise imposed requirements or any taxes or fees on services furnished by Grantee imposed directly on any Subscriber or user by any municipality, state, or other governmental unit and collected by Grantee for such governmental unit.
- (k) “Multichannel Video Program Distributor” or “MVPD” means a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, an OVS provider, or a television

receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.

- (l) “Open Video Services” or “OVS” means any video programming Services provided to any person by a Franchisee certified by the FCC to operate an Open Video System pursuant to Section 47 U.S.C. 573, as may be amended, regardless of the Facilities used.
- (m) “Pay Television” means the delivery over the System of pay-per-channel or pay-per-program audio-visual signals to Subscribers for a fee or charge, in addition to the charge for Basic Cable Service or Cable Programming Services.
- (n) “Person” is any person, firm, partnership, association, corporation, company, or other legal entity.
- (o) “Standard Installation” means any residential installation which can be completed using a drop of one hundred fifty (150) feet or less.
- (p) “Street” means the surface of, and the space above and below, any public street, road, highway, freeway, lane, alley, path, court, sidewalk, parkway, or drive, or any easement or right-of-way now or hereafter held by Grantor.
- (q) “Subscriber” means any Person who lawfully receives Cable Service.
- (r) “Video Programming” means programming provided by, or generally considered comparable to programming provided by a television broadcast station.

14-0102. **GRANT OF AUTHORITY AND GENERAL PROVISIONS.**

1. Franchise Required. It shall be unlawful for any Person to construct, operate or maintain a Cable System or MVPD facility or to provide Cable Service, Video Programming or other MVPD services, including OVS, in the Grantor without a Franchise authorizing the same, unless applicable federal or State law prohibits the Grantor’s enforcement of such a requirement.
2. Grant of Franchise. Any Franchise that is granted in City shall be subject to the terms and conditions contained herein.
3. Grant of Nonexclusive Authority.
 - a. A Grantee shall have the right and privilege to construct, erect, operate, and maintain, in, upon, along, across, above, over and under the Streets, public ways and public places now laid out or dedicated and all extensions thereof,

and additions thereto in Franchise Area, poles, wires, cables, underground conduits, manholes, and other television conductors and fixtures necessary for the maintenance and operation in Franchise Area of a Cable System. The Grantee shall be obligated to utilize underground facilities whenever reasonably possible.

- b. A Franchise shall be nonexclusive, and Grantor reserves the right to grant a similar use of said Streets to any MVPD at any time, provided, however, that all Franchises shall contain the same terms and conditions as this Franchise in order that one MVPD is not granted a competitive advantage over another. In the event a MVPD commences operation without a Franchise or is granted a Franchise to operate by the Grantor, the terms and conditions of which do not comply with this Ordinance, other Grantees shall have the right either (i) to opt in to the competitor's Franchise by providing ten (10) days prior written notice to the Grantor; or (ii) to petition the Grantor for modifications to its Franchise, in which case the Grantor shall work in good faith with the affected Grantee(s) to review and adopt modifications which the Grantee(s) deem necessary, review and approval by Grantor shall not be unreasonably denied.
 - c. Before granting an additional Franchise, the Grantor shall give written notice to all Grantees of any new application, identifying the applicant for such additional Franchise and providing at least thirty (30) days prior notice of the date, time, and place at which the Grantor shall consider and/or determine whether such additional Franchise should be granted.
 - d. Every Franchise shall apply to the entire service area of the Grantor, as it exists now or may later be configured.
 - e. In the event Grantor grants one or more additional Franchises or one or more non-franchised MVPD's commence providing Cable Service in the Grantor, a Grantee shall have the right to terminate or reduce the term of this Franchise in its sole discretion.
 - f. Neither City nor Grantee(s) may unilaterally alter the material rights and obligations set forth in this Franchise. In the event of a conflict between any other ordinance and this Franchise, the Franchise shall control.
4. Franchise Term. A Franchise shall be in effect for a period of up to fifteen (15) years from the date of acceptance by a Grantee, unless renewed, revoked, or terminated sooner as herein provided.
5. Territorial Area Involved. A Franchise shall be granted for the corporate boundaries of Grantor, as it exists from time to time. In the event of annexation by Grantor, or as development occurs, any new territory shall become part of the area covered,

provided, however, that Grantee(s) shall not be required to extend service beyond its present System boundaries unless there is a minimum of thirty (30) homes per cable mile as measured from the last fiber node or terminating amplifier.

6. Written Notice. All notices, reports, or demands required to be given in writing under this Ordinance shall be deemed to be given when delivered personally to any officer of Grantee or Grantor's Administrator of this Ordinance as specified in a Franchise.

14-0103. **APPLICATION FOR NEW FRANCHISE.**

1. An application for an initial Franchise to provide Video Programming shall be in writing on a form provided by the City which shall contain where applicable:
 - (a) Applicant name and business address of Applicant.
 - (b) A statement as to the proposed Franchise Area, and whether Applicant holds an existing authorization to access the Rights-of-Way in the City and a map of the areas where such authorization exists if for an area other than the entire City.
 - (c) Resume of prior history of Applicant, including the legal, technical, and financial expertise of Applicant in the Cable Service field.
 - (d) List of officers, directors and managing employees of Applicant and resumes of each.
 - (e) A proposed construction and schedule to provide Cable Service or Video Programming to Subscribers.
 - (f) A certificate of insurance consistent with the requirements of this Ordinance.
 - (g) A description of the Cable System the Applicant intends to build, including its capacity, the types of equipment proposed for use and the Cable Services or Video Programming which will be offered.
 - (h) A description of the financial qualifications of the Applicant to construct and operate the System, including a balance sheet, income statement sources and uses of funds statement and pro forma projections for at least three (3) years of operation subsequent to System completion.
 - (i) A proposed plan for Public, Educational, and Government Access Channels, including funding, facilities, and equipment and capacity on the System to be dedicated for educational and governmental use. No franchise applicant will

be expected to provide more than one (1) channel, and it may be subjected to shared use as determined by the City of Horace.

2. The Initial Franchise Application may be evaluated according to the following criteria, and approved within one-hundred eighty (180) days after City deems the Application is complete. In the event Applicant is already authorized to occupy the Rights-of-Way, the time for review and approval will be ninety (90) days.
 - (a) The evidence of legal, technical and financial ability required in the Applicant's proposal will be such as to assure the ability to complete the entire System within a reasonable time from the date the Franchise is granted. The City will also consider the Applicant's ability to operate the System and provide the necessary Cable Services or Video Programming in compliance with the terms of this Ordinance.
 - (b) The City Administrator or designee shall prepare a report and make his or her recommendations respecting such application to the City Council.
 - (c) A public hearing shall be set prior to any grant of a Franchise, at a time and date approved by the City Council. Within thirty (30) days after the close of the hearing, the City Council shall make a decision based upon the evidence received at the hearing as to whether or not the Franchise(s) should be granted, and, if granted, subject to what conditions.
 - (d) The City may consider any additional information that it deems applicable.

14-0104. **CONSTRUCTION AND OPERATIONS STANDARDS**

1. Conditions on Street Use.

- (a) A Grantee shall obtain all required permits from Grantor before commencing any construction upgrade or extension of the System.
- (b) The Grantor shall impose no permit fees upon a Grantee.
- (c) If at any time during the period of this Franchise Grantor shall elect to alter, or change the grade or location of any Street, alley or other public way, a Grantee shall, at its own expense, upon reasonable notice by Grantor, remove and relocate its poles, wires, cables, conduits, manholes and other fixtures of the System. If Grantor reimburses other occupants of the Street, a Grantee shall be likewise reimbursed.
- (d) A Grantee shall, on request of any Person holding a moving permit issued by Grantor, temporarily move its wires or fixtures to permit the moving of buildings with the expense of such temporary removal to be paid by the

Person requesting the same, and a Grantee shall be given not less than ten (10) days advance notice to arrange for such temporary changes.

- (e) A Grantee shall have the authority to trim any trees upon and overhanging the Streets, alleys, sidewalks, or public easements of Grantor so as to prevent the branches of such trees from coming in contact with the wires and cables of the Grantee.
- (f) Nothing contained in this Ordinance shall relieve any Person from liability arising out of the failure to exercise reasonable care to avoid injuring Grantee's facilities.
- (g) In areas where all other utility lines are placed underground, Grantee shall construct and install its cables, wires and other facilities underground. In any area where one or more public utilities are aerial, Grantee may construct and install its cables, wires and other facilities from the same pole with the consent of the owner of the pole.
- (h) A Grantee shall at all times construct and operate its System in accordance with applicable FCC Technical specifications.
- (i) In the event that the use of any part of the system is discontinued for any reason for a continuous period of twelve (12) months, or in the event such systems or property has been installed in any street or public place without complying with the requirements of this Ordinance, or the rights granted hereunder have been terminated, cancelled or have expired, Grantee shall, subject to the rights of the City to acquire the system as specified in Section 3.1.(j) herein, promptly remove from the streets, or public places all such property and poles of such system other than any which the City may permit to be abandoned in place. In the event of such removal, Grantee shall promptly restore the street or other area from which such property has been removed to a condition satisfactory to the City.
- (j) Any property of Grantee to be abandoned in place shall be abandoned in such a manner as the City may prescribe. Upon permanent abandonment of the property of Grantee in place, it shall submit to the City an instrument to be approved by the City, transferring to the City the ownership of such property.
- (k) All cable and passive equipment for cable television reception service installed by Grantee at a subscriber's location shall remain the property of Grantee, and Grantee shall have the right to remove said cable and equipment as owner. The City of Horace will have no right to use or remove said cable and equipment installed by Grantee. Upon termination of service to any subscriber, the Grantee shall promptly remove all its above ground facilities and equipment from the premises of such subscriber upon his request.

- (l) No poles or other wire-holding structures shall be erected by the Grantee without prior approval of the designated representative of the City Council with regard to locations, height, type or any other pertinent aspect, which approval shall not be unreasonably withheld. However, no locations of any pole or wire-holding structure of the Grantee shall be a vested interest, and such poles or structures shall be removed or modified by the Grantee at its own expense whenever the City Council or its designated representative determines that the public convenience would be enhanced thereby.
- (m) Where poles or other wire-holding structures already existing in use in serving the City are available for use by Grantee, but it does not make arrangements for such use, the City Council may require the Grantee to use such poles and structures if it determines that the public convenience would be enhanced thereby and the terms of the use available to the Grantee are just and reasonable.
- (n) Where the City or a public utility serving the City desires to make use of poles or other wire-holding structures of the Grantee but agreement therefore with the Grantee cannot be reached, and further provided, such proposed joint use would not unduly interfere with the Grantee's operations, the City Council may require the Grantee to participate in mediation/arbitration involving neutral third person(s) seeking to ascertain (1) just and reasonable consideration and (2) such other terms are necessary so as to enhance the public convenience of joint use of poles or other wire-holding structures of the Grantee.
- (o) Grantee shall at all times maintain on file with the City Auditor a schedule setting forth all rates and charges to be made to subscribers for basic cable service, including installation charges.
- (p) During the term hereof, the City may regulate rates only if authorized to do so by Federal Communications Commission regulations and then such regulation shall only be in accordance with the provisions of such regulation.

14-0105. **SYSTEM PROVISIONS AND PUBLIC SERVICES**

1. Operation and Maintenance of System. A Grantee shall render effective service, make repairs promptly, and interrupt service only for good cause and for the shortest time possible.
2. Service to Schools and City. A Grantee shall, subject to the line extension requirements of Section 2.5 herein, provide one (1) Drop and one (1) outlet of Basic Cable Service at no cost to public and parochial elementary and secondary schools in City, and one (1) City building to be mutually agreed upon by City and a Grantee.

3. Community Channel. The Grantee shall allocate one (1) channel to the City as a community channel. A Grantee shall have no responsibility to manage, program or otherwise administer the use of the community channel. Until such time as the City files a written request with Grantee for full-time use of such channel, a Grantee may use that portion of the channel not being used by the City. City shall provide at least ninety (90) days prior written notice of its intent to increase its use of the community channel to allow Grantee a reasonable time period to vacate said capacity.
4. Emergency Use. In the case of any emergency or disaster, a Grantee shall, upon request of the City Council, make available its facilities to the City for emergency use. A Grantee shall comply with the emergency alert requirements of federal law.
5. Lockout Device. Upon the request of a Subscriber, Grantee shall provide by sale or lease a Lockout Device.

14-0106. **OPERATION AND ADMINISTRATION PROVISIONS**

1. Indemnification of Grantor.
 - a. A Grantee shall indemnify, defend, and hold harmless Grantor, its officers, boards, committees, commissions, elected officials, employees and agents, from and against all liability, damages, and penalties which they may legally be required to pay as a result of the exercise of a Franchise granted pursuant to this Ordinance, except claims covered by worker's compensation insurance or any claims arising from or related to Grantor's negligence. Nothing in this Ordinance relieves a Person from liability arising out of the failure to exercise reasonable care to avoid injuring the Grantee's facilities while performing work connected with grading, regrading, or changing the line of a Street or public place or with the construction or reconstruction of a sewer or water system.
 - (b) In order for Grantor to assert its rights to be indemnified, defended, and held harmless, Grantor must with respect to each claim:
 - (1) Promptly notify a Grantee in writing of any claim or legal proceeding which gives rise to such right;
 - (2) Afford Grantee the opportunity to participate in and fully control any compromise, settlement or other resolution or disposition of any claim or proceeding; and
 - (3) Fully cooperate with reasonable requests of Grantee, at Grantee's expense, in its participation in, and control, compromise, settlement or resolution or other disposition of such claim or proceeding subject to paragraph two (2) above.

2. Insurance. A Grantee shall maintain in full force and effect at its sole expense, a comprehensive general liability insurance policy, including contractual liability coverage, in protection of Grantor in its capacity as such. The policies of insurance shall be in the sum of not less than Three Hundred Thousand Dollars (\$300,000) for personal injury or death of any one Person, and One Million Dollars (\$1,000,000) for personal injury or death of two or more Persons in any one occurrence; Three Hundred Thousand Dollars (\$300,000) for property damage to any one Person and One Million Dollars (\$1,000,000) for property damage resulting from any one act or occurrence.
3. Franchise Fee.
 - (a) A Grantee will pay Grantor an annual franchise fee in the amount of three percent (3%) of Grantee's Gross Revenues for the first five (5) years of the franchise period. At its option by ninety (90) days written notice to Grantee, the City of Horace may increase the annual franchise fee for the years six (6) through ten (10) of the franchise term by up to an additional one (1%) percent [but no more than a total of 4%]. Similarly, at its option by ninety (90) days written notice to Grantee, the City of Horace may increase the annual franchise fee for the years eleven (11) through fifteen (15) of the franchise term by up to an additional one (1%) percent [but no more than a total of 5%].
 - b. The franchise fee shall be payable at least quarterly. The quarterly payments shall be made within thirty (30) days of the end of Grantee's fiscal quarter, together with a brief report showing the basis for the computation. Grantee can make franchise fee payments for lesser regular periods of time provided there exists a brief report showing the basis for the computation.
 - c. The period of limitation for recovery of any franchise fee payable hereunder shall be three (3) years from the date on which payment by Grantee is due.

14-0107. **REVOCAION, ABANDONMENT, AND SALE OR TRANSFER**

1. Grantor's Right to Revoke. Grantor reserves the right to revoke, terminate or cancel a Franchise, if, after strictly following the procedures required by Section 7.2 herein, it is determined that a Grantee has violated any material provision of its Franchise or this Ordinance and has failed to substantially cure said violation.
2. Procedures for Revocation.
 - (a) Grantor shall provide a Grantee with written notice of a cause for revocation and the intent to revoke and shall allow Grantee sixty (60) days subsequent to receipt of the notice in which to substantially cure the violation or to provide adequate assurance of performance. Together with the notice

required herein, Grantor shall provide Grantee with written findings of fact which are the basis of the revocation.

- (b) Grantee shall be provided the right to a public hearing affording due process before the Grantor Council prior to revocation, which public hearing shall follow the sixty (60) day notice provided in paragraph (a) above. Grantor shall provide Grantee with written notice of its decision together with written findings of fact supplementing said decision.
 - (c) After the public hearing and upon written determination by Grantor to revoke the Franchise, Grantee may appeal said decision with an appropriate state or federal court or agency.
 - (d) During the appeal period, the Franchise shall remain in full force and effect unless the term thereof sooner expires.
 - (e) Upon satisfactory correction by Grantee of the violation upon which said notice was given, the initial notice shall become void.
3. Sale or Transfer of Franchise. No sale or transfer of a Franchise shall take place without the written approval of the Grantor, which approval shall not be unreasonably withheld. All of the rights, privileges, obligations, duties, and liabilities created by this Franchise shall pass to and be binding upon the successor or assign of a Grantee. Said approval shall not be required where a Grantee grants a security interest in its Franchise and assets to secure indebtedness.

14-0108. MISCELLANEOUS PROVISIONS

- 1. Franchise Renewal. The Franchise may be renewed upon application of the Grantee pursuant to 47 U.S.C. § 546, or in accordance with any relevant successor state or federal law.
- 2. Amendment of Franchise. A Grantee and Grantor may agree, from time to time, to amend a Franchise. Such written amendments may be made at any time.
- 3. Marketing. A Grantee shall have the right to conduct direct selling in the Franchise Area, including door to door sales, notwithstanding any peddler or solicitor laws or regulations to the contrary.
- 4. Severability. If any section, sentence, clause or phrase of this Ordinance is for any reason held to be invalid, unenforceable or unconstitutional by a decision of any authority or court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance and the remainder shall remain in full force and effect.

5. Theft of Services. The City of Horace will support reasonable efforts of any Grantee to guard against theft of Grantee's services or tampering with Grantee's property.

CHAPTER 14-02

OTTER TAIL POWER COMPANY - ELECTRICAL

SECTIONS:

- 14-0201. Grant of Authority.
- 14-0202. Compliance with Applicable Regulations.
- 14-0203. Obstruction of Roadways to be Minimized.
- 14-0204. Construction of Facilities.
- 14-0205. Rights to Trim Trees.
- 14-0206. Limitation of Liability.
- 14-0207. Deposits.
- 14-0208. Rates.
- 14-0209. Contracts Subject to Applicable Regulations.
- 14-0210. Prior Franchise Ineffective.
- 14-0211. Grantee Subject to Police Power Regulations.
- 14-0212. Effective Date.

14-0201. **GRANT OF AUTHORITY.** There is hereby granted to Otter Tail Power Company, a Minnesota corporation, its successors and assigns, hereinafter called the Grantee, for a period of twenty (20) years from and after the passage and approval of this ordinance and during all of said time, subject to the conditions and requirements hereinafter set forth, permission to construct, install and maintain an electric light and power system and transmission line and to operate and maintain the same within and through the City and to transmit electricity to and from other towns or cities for the purpose of light, power and heat and to erect, construct, install and maintain conduits, poles, wires, pipes and other necessary fixtures and attachments upon and under the streets, alleys, bridges and public grounds of said City for the purpose of furnishing and selling electricity for light, heat and power and such other purposes for which electricity may be used by the inhabitants for said City, said permission and franchise to become operative and continue under the conditions hereinafter set forth.

14-0202. **COMPLIANCE WITH APPLICABLE REGULATIONS.** Said Grantee shall use poles, wires, crossarms, equipment and devices to conform with the standards of construction adopted by the National Electrical Safety Code of the United States, Department of Commerce, and all apparatus connected therewith shall be located so as not to obstruct the avenues, streets, and alleys of said City or to endanger persons or property or to hinder or to obstruct the use of said avenues, streets, and alleys or public places by the inhabitants of said City, or public in general, or to interfere with any sidewalk, street, curb, gutter or park improvements that the city may deem proper to make along the lines of said avenues, streets and public places.

14-0203. **OBSTRUCTION OF ROADWAYS TO BE MINIMIZED.** all conduits, poles, wires and pipes installed by virtue of this ordinance shall be erected in such places and in such

manner as not unnecessarily to encroach upon streets, alleys, bridges or public grounds of said City, and so as not to unnecessarily obstruct the use thereof for the ordinary purpose of travel thereon, and the erection thereof shall be subject to the reasonable supervision and direction of the City Council of the said City. Whenever practicable, all poles shall be set in alleys, and poles now in position upon or along the streets whenever practicable shall be removed, and the location of all of said poles shall be designated by the Mayor under the supervision of the City Council of said City.

All poles where set in alleys shall be set at or near the boundary line thereof and where set in streets shall be located at such distances as shall be directed by the City from the property line of the abutting owner, and shall be placed so as not to interfere with the construction or placing of any waterpipes, sewers, or drains or the flow of water therefrom which has been or may be placed by authority of said City. In the event that said Grantee shall make any unnecessary obstructions of said streets, alleys, public grounds or places not designated by the City Council, the City may cause the removal of such obstructions and charge and collect from such Grantee the actual cost of such removals.

14-0204. **CONSTRUCTION OF FACILITIES.** During the construction, maintenance or enlargement of any part of said electric light and power system, said Grantee shall not unnecessarily impede or block travel in said streets and highways in said City and shall leave all streets, highways, alleys, sidewalks, curbs, lanes and public places and all grounds disturbed by said construction in good condition upon the completion of said work.

Whenever the said Grantee is erecting, constructing and maintaining said lines or poles, shall take up any of the pavements, sidewalks, crossings or curbs on any of the avenues, streets and alleys, or public places in said City or shall make any excavations thereon, such excavations shall be refilled and the sidewalk, crossing or curb replaced under the direction of the City and any excavation so made shall be properly lighted at night during the construction, and in case of the failure to do so on the part of the said Grantee, then the City may do the same at the expense of said Grantee and said Grantee agrees to pay said City for the reasonable cost or value of said work. Said Grantee shall be liable for all loss or damage caused by the negligence of Grantee, which may result to persons or property within the said City, caused by it, or its agents, servants, or employees in erecting, operating and maintaining the said electric system within said City and shall at all times save the City harmless from any and all damages to persons or property in erecting, operating or maintaining said electric system.

14-0205. **RIGHTS TO TRIM TREES.** There is granted to said Grantee, its successors and assigns, during the term hereof, permission and authority to trim all trees in alleys, streets and public grounds of said City so as to remove all parts of said trees interfering with the proper erection, maintenance and operation of poles, cables, wires, masts or other fixtures, or appliances installed or to be installed pursuant to authority hereby granted.

Said Grantee shall have full right and authority to assign to any person, persons, firm or corporation all the rights that are given it by this ordinance, provided, that the assignee of such rights by accepting such assignment shall become subject to the terms and conditions of this ordinance.

14-0206. **LIMITATION OF LIABILITY.** The Grantee shall use due diligence and care in furnishing electric service as herein provided but shall not be liable for any loss or damage which may arise from failure of the service, either partial or total, but this shall not be construed to exempt said Grantee from liability for negligence.

14-0207. **DEPOSITS.** The Grantee shall have the right to require any person to whom electric service is furnished to make a deposit to insure the payment of bills for service to be rendered. The Company shall issue a receipt for such deposit and shall return same whenever the customer shall discontinue the use of electric service, provided all bills are then paid. The Grantee may apply all or any portion of the deposit to any unpaid bills and shall thereupon mail to the customer a receipt for such amount.

14-0208. **CONTRACTS SUBJECT TO APPLICABLE REGULATIONS.** The rates to be charged by said Grantee in the said City shall be filed with the Public Service Commission of the State of North Dakota, and no increase or decrease in said rates shall be made except in accordance with the rules and regulations of the Public Service Commission.

14-0209. **PRIOR FRANCHISE INEFFECTIVE.** The contract shall be subject to any present or future laws of a regulatory nature enacted by the State of North Dakota, or any amendment or addition to such laws, and further shall be subject to the rules and regulations laid down by the Public Service Commission of the State of North Dakota.

14-0210. **PRIOR FRANCHISE INEFFECTIVE.** It is further expressly and specifically provided that all permits, licenses and franchises heretofore granted by the City giving or purporting to give permission to any person, persons or corporation to construct, install or maintain an electrical line or system in, upon or through the streets, alleys or public grounds of the City for the purpose of furnishing light, heat and power to the City or its inhabitants, be, and the same hereby are in all respects revoked, canceled and annulled.

14-0211. **GRANTEE SUBJECT TO POLICE POWER REGULATIONS.** The City reserves the right to make and adopt, and the rights and privileges hereby granted shall at all times be and remain subject to such reasonable regulations of a police nature as it may deem necessary for the best interests of the City, but the City will not by any such regulations or by acts of its own or agents do anything to prevent or interfere with the Grantee carrying on its business in accordance with the franchise hereby granted.

14-0212. **EFFECTIVE DATE.** This ordinance shall take effect and be in full force from and after its passage and approval by the City Council. The said Grantee shall specify its acceptance of this franchise in writing, to be filed with the City Auditor and in no event shall this ordinance be binding on said Grantee until the filing of such acceptance.

CHAPTER 14-03

NORTHERN STATES POWER COMPANY - GAS

Source: Ord. 2020-27

SECTIONS:

- 14-0301. Definitions.
- 14-0302. Adoption of Franchise.
- 14-0303. Location - Other Regulations.
- 14-0304. Relocations.
- 14-0305. Tree Trimming.
- 14-0306. Vacation of Public Ways.
- 14-0307. Franchise Fee.
- 14-0308. General Provisions.
- 14-0309. Previous Franchises Superseded.
- 14-0310. Effective Date - Written Acceptance.

14-0301. **DEFINITIONS.**

1. “City” means the City of Horace, County of Cass, State of North Dakota.
2. “City Utility System” means facilities used for providing non-energy related public utility service owned or operated by the City or agency thereof, including sewer and water service, but excluding facilities for providing heating, lighting, or other forms of energy.
3. “Commission” means the North Dakota Public Service Commission, or any successor agency or agencies, including an agency of the federal government which preempts all or part of the authority to regulate Gas retail rates now vested in the North Dakota Public Service Commission.
4. “Company” means Northern States Power Company, a Minnesota corporation, its successors and assigns.
5. “Franchise Agreement” authorizes Company to provide gas service to public and private entities in the City. “Franchise Agreement” and “this Ordinance” are used interchangeably.
6. “Gas” includes natural gas, manufactured gas, or other form of gaseous energy.
7. “Gas Facilities” means pipes, mains, regulators, and other facilities owned or operated by Company for the purpose of providing gas service for public use.

8. “Notice” means a written notice served by one party on the other party referencing one or more provisions of this Ordinance. Notice to Company shall be mailed to the General Counsel, 401 Nicollet Mall, 8th Floor, Minneapolis, MN 55401. Notice to the City shall be mailed to the City Administrator, 215 Park Drive East, Horace, ND 58047. Either party may change its respective address for the purpose of this Ordinance by written notice to the other party.
9. “Public Ground” means land owned by the City for park, open space, or similar purpose, which is held for use in common by the public.
10. “Public Way” means any street, alley, walkway, or other public right-of-way within the City.

14-0302. **ADOPTION OF FRANCHISE.** The City hereby grants Company, for a period of twenty (20) years from the date passed and approved by the City, the right to transmit and furnish Gas 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 Gas Facilities in, on, over, under, and across the Public Ways and Public Grounds of the City, subject to the provisions of this Franchise Agreement. 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.

14-0303. **LOCATION - OTHER REGULATIONS.**

1. Location of Facilities. Gas Facilities must 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. Gas Facilities must be located on Public Grounds as determined by the City. Company's construction, reconstruction, operation, repair, maintenance, and location of Gas Facilities is 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 underground Gas Facilities in place, provided, at the 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.
2. Street Openings. Company will not open or disturb 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 must not be more burdensome than those imposed on other utilities for similar facilities or work. Company may, however, open and disturb any Public Way or Public Ground without permission from the City where an emergency exists requiring the immediate repair of Gas Facilities. In such event

Company will notify the City by telephone, to the office designated by the City, as soon as practicable. Not later than the second working day thereafter, Company will obtain any required permits and pay any required fees.

3. Restoration. After undertaking any work requiring the opening of any Public Way or Public Ground, must restore the same, including paving and its foundation, to as good a condition as formerly existed, and will maintain any paved surface in good condition for two (2) years thereafter. The work must be completed as promptly as weather permits, and if Company does 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 has, after demand to Company to cure and the passage of a reasonable period of time following the demand, but not to exceed five (5) days, the right to make the restoration at the expense of Company. Company must pay to the City the cost of such work done for or performed by the City. This remedy is in addition to any other remedy available to the City for noncompliance with this section, 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.
4. Avoid Damage to Gas Facilities. Nothing in this Ordinance relieves any person from liability arising out of the failure to exercise reasonable care to avoid damaging Gas Facilities while performing any activity.
5. 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 (1) 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.

14-0304. **RELOCATIONS.**

1. Relocation of Gas Facilities in Public Ways. If the City determines to vacate a Public Way for a City improvement project, or at the City's cost to grade, regrade, or change the line 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 Section 14-0304(3), Company must relocate its Gas Facilities at its own expense. The City will 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. If a relocation is ordered within five (5) years of a prior relocation of the same Gas Facilities, which was made at Company expense, the City will reimburse Company for non-betterment costs on a time and material basis, provided that if a subsequent relocation is required because of the extension of a City Utility System to a previously unserved area, Company may be required to make the subsequent relocation at its expense. 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 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.

2. Relocation of Gas Facilities in Public Ground. The City may require Company, at Company's expense, to relocate or remove its Gas Facilities from Public Ground upon a finding by the City that the Gas Facilities have become or will become a substantial impairment to the existing or proposed public use of the Public Ground.
3. Projects with Federal Funding. Relocation, removal, or rearrangement of any Company Gas Facilities made necessary because of the extension into or through City of a federally-aided highway project will be governed by the provisions of North Dakota Century Code, Section 24-01-41, as supplemented or amended. It is understood that the right herein granted to Company is a valuable right. The City will not order Company to remove or relocate its Gas Facilities when a Public Way is vacated, improved, or realigned 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 and the loss and expense resulting therefrom are first paid to Company, but the City need not pay those portions of such for which reimbursement to it is not available.
4. No Waiver. The provisions of this Ordinance apply only to facilities constructed in reliance on a franchise from the City and will 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.

14-0305. **TREE TRIMMING.** Company is granted permission and authority to trim all shrubs and trees, including roots, in the Public Ways of the City to the extent Company finds necessary to avoid interference with the proper construction, operation, repair, and maintenance of Gas Facilities, provided that Company will save the City harmless from any liability in the premises.

14-0306. **VACATION OF PUBLIC WAYS.** The City will give Company at least two (2) weeks prior written notice of a proposed vacation of a Public Way. Except where required for a City improvement project, the vacation of any Public Way, after the installation of Gas Facilities, will not operate to deprive Company of its rights to operate and maintain such Gas 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, will the City be liable to Company for failure to specifically preserve a right-of-way under North Dakota Century Code, Chapter 40-39.

14-307. **FRANCHISE FEE.**

1. Terms Defined.

- a. “Class” refers to the classes listed on the Fee Schedule and as defined or determined in Company's gas rate book on file with the Commission.
- b. “Fee Schedule” refers to the fee schedule in 14-0307(2) 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 Ordinance. The Fee Schedule in the separate ordinance may include new Customer Classes added by Company to its gas tariffs after the effective date of this Ordinance.
- c. “Gross Revenues” means all sums, excluding the 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.
- d. “Therm” is a unit of gas providing 100,000 BTU of heat content adjusted for billing purposes under the rate schedules of Company on file with the Commission.

2. Fee Schedule. During the term of this Franchise Agreement, and in lieu of any permit or other fees being imposed on Company, the City may impose on Company a franchise fee by collecting the amounts indicated in a Fee Schedule set forth in a separate ordinance from each customer in the designated Company Customer Class. The parties agree that the franchise fee collected by Company and paid to the City is two percent (2%) of Company's Gross Revenues, as hereinafter defined.

3. Separate Ordinance. The franchise fee will be imposed by a separate ordinance duly adopted by the City Council, which ordinance will not be adopted until at least ninety (90) days after written notice enclosing such proposed ordinance has been served upon Company by certified mail. The franchise fee will not become effective until the beginning of a Company billing month at least ninety (90) days after written notice enclosing such adopted ordinance has been served upon Company by certified mail. Section 14-0308(7) constitutes the sole remedy for resolving 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 14-0307(2) above will not be effective against Company unless the franchise 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 franchise fee on the residential class.

4. Collection of the Fee. The franchise fee is payable quarterly and 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 equal to the designated franchise fee for the applicable customer classification in all customer billings for gas service in each class. The payment is due the last business day of the month following the period for which the payment is made. The franchise fee may be changed by ordinance from time to time; however, each change must meet the same notice requirements and not occur more often than annually and no change will require a collection from any customer for gas service in excess of the amounts specifically permitted by this Section. The time and manner of collecting the franchise fee is subject to the approval of the Commission. A franchise fee will not 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 gas service. Company may pay the City the fee based upon the surcharge billed subject to subsequent reductions to account for uncollectibles, refunds, and correction of erroneous billings. 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.

5. Equivalent Fee Requirement. The separate ordinance imposing the franchise fee is not effective against Company unless it is lawfully imposed and the City monthly, 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" is 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 is applicable to energy sales for any energy use related to heating, cooling, or lighting, or to run machinery and appliances, but does not apply to energy sales for the purpose of providing fuel for vehicles. If 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 14-0307(5), the foregoing conditions will be waived to the extent of such written consent.

14-0308. **GENERAL PROVISIONS.**

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 is held invalid, it will 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 prevail.
2. Limitation on Applicability. This Ordinance constitutes a franchise between the City and Company as the only parties and no provision of this Ordinance will 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 (1) or more of the terms hereof, or otherwise give rise to any cause of action in any person not a party hereto.
3. Amendments. The City or Company may at any time propose that this Ordinance be amended to address a subject of concern and the other party will consider whether it agrees that the amendment is mutually appropriate. If an amendment is agreed upon, this Ordinance may be amended at any time by the City passing a subsequent ordinance declaring the provisions of the amendment, which amendatory ordinance will become effective upon the filing of Company's written consent thereto with the City Auditor within ninety (90) days after the date of final passage by the City Council of the amendatory ordinance.
4. Service and Rates. The service to be provided and the rates to be charged by Company for Gas service in the City are subject to the jurisdiction of the Commission.
5. Publication Expense. The expense of publication of this Ordinance will be paid by the City and reimbursed to the City by Company.
6. Dispute Resolution. If either party asserts that the other party is in default in the performance of any obligation hereunder, the complaining party must notify the other party, in writing, 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 Cass County District Court to interpret and enforce 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.

7. Indemnity of City. Company agrees to 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 Gas Facilities located in the Public Ways and Public Grounds. The City will 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 will 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.

8. Defense of City. In the event a suit is brought against the City under circumstances where the agreement to indemnify applies, Company, at its sole cost and expense, will 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 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 Company, in defending any action on behalf of the City will be entitled to assert in any action every defense or immunity that the City could assert in its own behalf.

9. Change in form of Government. Any change in the form of government of the City will 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.

14-0309. **PREVIOUS FRANCHISES SUPERSEDED.** This Franchise Agreement supersedes any previous Gas franchise granted to Company or its predecessor.

14-0310. **EFFECTIVE DATE - WRITTEN ACCEPTANCE.** This Franchise Agreement is in force and effect from and after passage of this Ordinance, its acceptance by Company, and its publication as required by law. The City by resolution may revoke this Ordinance if Company does not file a written acceptance with the City within ninety (90) days after publication.

CHAPTER 14-03A

GAS SERVICE FRANCHISE FEE

Source: Ord. 2020-21

SECTIONS:

- 14-0301A. Purpose.
- 14-0302A. Franchise Fee Statement.
- 14-0303A. Payment.
- 14-0304A. Enforcement.
- 14-0305A. Effective Date of Franchise Fee.

14-0301A. **PURPOSE.** The Horace City Council has determined that it is in the best interest of the City of Horace (the “City”) to impose a franchise fee on those public utility companies that provide natural gas services within the City.

1. Pursuant to City Ordinance Chapter 14-03, a Franchise Agreement between the City and Northern States Power Company, a Minnesota corporation (the “Company”), its successors and assigns, the City has the right to impose a franchise fee on the Company, its successors and assigns, in an amount and fee design as set forth in Section 14-0307 of the Northern States Power Company Franchise Agreement and in the fee schedule attached hereto as Schedule A.

14-0302A. **FRANCHISE FEE STATEMENT.** A franchise fee is hereby imposed on the Company, its successors and assigns, under the Franchise Agreement in accordance with the schedule attached here to and made a part of this Ordinance, commencing with the Company's March 1, 2021 billing month.

This franchise fee is an account-based fee on each premise and not a meter-based fee. In the event that an entity covered by this Ordinance has more than one (1) meter at a single premise, but only one (1) account, only one (1) fee shall be assessed to that account. If a premise has two (2) or more meters being billed at different rates, the Company may have an account for each rate classification, which will result in more than one (1) franchise fee assessment for gas service to that premise. If the Company combines the rate classifications into a single account, the franchise fee assessed to the account will be the largest franchise fee applicable to a single rate classification for energy delivered to that premise. In the event any entities covered by this Ordinance have more than one (1) premise, each premise (address) shall be subject to the appropriate franchise fee. In the event a question arises as to the proper franchise fee amount for any premise, the Company's manner of billing for energy used at all similar premises in the City will control.

14-0303A. **PAYMENT.** The franchise fee is payable to the City in accordance with the terms set forth in the Franchise Agreement.

14-0304A. **ENFORCEMENT.** Any dispute, including enforcement of a default regarding this Ordinance will be resolved in accordance with Section 14-0308(7) of the Franchise Agreement.

14-0305A. **EFFECTIVE DATE OF FRANCHISE FEE.** The effective date of this Ordinance shall be after its publication and ninety (90) days after the sending of written notice enclosing a copy of this Ordinance to the Company by certified mail. Collection of a franchise fee commences as provided above.

SCHEDULE A

Franchise Fee Rates:

Gas Utility

The franchise fee is two percent (2%) of Company's Gross Revenues, as defined in City Ordinance Chapter 14-03, a Franchise Agreement between the City of Horace and Northern States Power Company, a Minnesota corporation, its successors and assigns.

Franchise fees are submitted to the City on a quarterly basis as follows:

January – March collections due by April 30, annually.

April – June collections due by July 31, annually.

July – September collections due by October 31, annually.

October – December collections due by January 31, annually.

CHAPTER 14-04

DICKEY RURAL SERVICES, INC. - FIBER OPTIC DATA FRANCHISE

Source: Ord. 2020-29

SECTIONS:

- 14-0401. Grant of Authority.
- 14-0402. Installation of Facilities.
- 14-0403. Obstruction of Roadways to be Minimized.
- 14-0404. Underground Installation.
- 14-0405. Relocating.
- 14-0406. Property Restoration.
- 14-0407. Removal of Abandoned Equipment.
- 14-0408. Rights to Trim Trees.
- 14-0409. Cooperative Subject to Police Power Regulations.
- 14-0410. Eminent Domain Authority.
- 14-0411. General Provisions.
- 14-0412. Limitation of Liability.
- 14-0413. Indemnification.
- 14-0414. Effective Date.

14-0401. **GRANT OF AUTHORITY.** The City of Horace (the "City") hereby grants to Dickey Rural Telephone Cooperative, its successors and assigns, including without limitation Dickey Rural Services, Inc., a North Dakota cooperative, (the "Cooperative"), a non-exclusive franchise for a period of twenty (20) years from and after the passage and approval of this franchise ordinance, subject to the conditions and requirements hereinafter set forth, which authorizes the Cooperative to construct or acquire, either or both, and, thereafter, to operate and maintain fiber-optic data systems and communications systems and telephone facilities consisting of, without limitation, exchange, toll, and truck lines, conduits, cables, poles, wires, fibers, voice radio circuits, exchanges, switches, boards, and all fixtures and appurtenances necessary or desirable for the proper construction, operation and maintenance of said system within the limits of the City of Horace, State of North Dakota, for the purpose of supplying data and communications and telephone service for public and private use therein and for the transmission of data and telephone service through and beyond the City.

14-0402. **INSTALLATION OF FACILITIES.**

1. Cooperative is authorized to construct, reconstruct, maintain, and operate the data and telephone systems and lines with all necessary appurtenances, including, without limitation, exchanges, switches, poles, wires, fibers, anchors, anchor rods, conduits, cables, and all fixtures and appurtenances necessary or advisable for the operation of the data and telephone systems in, on, over, under, across, and through public streets, roads, alleys, or other public ways of the City. The data and telephone systems shall be constructed, operated, and

maintained in a proper workmanlike manner so as to afford all reasonable safeguards to the public.

2. The Cooperative will not open or disturb any public way 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 the Cooperative must not be more burdensome than those imposed on other utilities for similar facilities or work. The Cooperative may, however, open and disturb any public way without permission from the City where an emergency exists requiring the immediate repair of the Cooperative's facilities. In such event the Cooperative will notify the City Auditor by telephone as soon as practicable. Not later than the second working day thereafter, the Cooperative will obtain any required permits and pay any required fees.

3. Whenever the Cooperative is erecting, constructing, or maintaining poles, wires, fibers, anchors, anchor rods, or other appurtenances and disturbs any pavement, sidewalk, crossing, or curb on any street, alley, bridge, or public way in the City or makes any excavations thereon, such disturbed area or excavations must be refilled and the pavement, sidewalk, crossing, or curb replaced under the direction of the City. Any excavation must be properly lighted at night during construction, and in case of the failure to do so on the part of the Cooperative, then the City may do the same at the expense of the Cooperative and the Cooperative agrees to pay the City for the reasonable cost or value of the work. The Cooperative is liable for all loss or damage caused by the negligence of the Cooperative, which may result to persons or property within the City, caused by it, or its agents, servants, employees, or subcontractors in erecting, operating, and maintaining the fiber-optic data systems, communications systems, and telephone facilities.

14-0403. **OBSTRUCTION OF ROADWAYS TO BE MINIMIZED.** All exchanges, switches, poles, wires, fibers, anchors, anchor rods, conduits, cables, and all fixtures and appurtenances installed by virtue of this franchise ordinance must be erected in such places and in such a manner as not to unnecessarily encroach upon streets, alleys, bridges, or public ways of the City, and so as not to unnecessarily obstruct the use thereof for the ordinary purpose of travel thereon, and the erection thereof is subject to the reasonable supervision and direction of the City. Whenever practicable, all poles shall be set in alleys. Poles now in position upon or along streets, whenever practicable, will be removed and the location of said poles shall be located in alleys or underground.

Poles set in alleys must be set at or near the boundary line of the property and where set in streets must be located at such distances as directed by the City from the property line of the abutting owner and placed so as not to interfere with the construction or placing of any water pipes, sewers, drains, or the flow of water therefrom which has been or may be placed by authority of the City. In the event that the Cooperative makes any unnecessary obstructions of streets, alleys, bridges, public ways, or places not designated by the City, the City may cause the removal of such obstructions and charge and collect from the Cooperative the actual cost of such removals.

14-0404. **UNDERGROUND INSTALLATION.**

1. All new wires, fibers, and new services, and any other equipment installed by the Cooperative must be buried underground in the following areas:

- (a) Any new district zoned residential.
- (b) Any new district zoned commercial.

2. In a district zoned residential and/or commercial, whenever the Cooperative undertakes any major replacement of any line, fiber, or other equipment, such replacement equipment will be buried underground. A major replacement is defined as five hundred feet (500') of line or fiber in an undeveloped property area or one (1) City block if in a developed property area.

3. Whenever the Cooperative relocates any of its existing equipment, such equipment capable of the same will be placed underground at the new location.

4. In districts zoned industrial, new lines and fiber do not have to be buried or placed underground.

5. The Cooperative may seek the permission of the City Auditor to waive the requirements contained in this section, or his/her designee who is granted the discretion to grant exceptions, upon good cause shown.

14-0405. **RELOCATING.**

1. Whenever the City grades, regrades, or changes the line of any public way, or constructs or reconstructs any City utility system therein, it may, when necessary, order the Cooperative to relocate permanently its poles, wires, fibers, anchors, anchor rods, and other appurtenances, and other property located in said public way, the Cooperative must relocate its facilities at its own expense. The City will give the Cooperative reasonable notice of plans to grade, regrade, or change the line of any public way, or to construct or reconstruct any City utility system.

2. Any relocation, removal, or rearrangement of any Cooperative facilities made necessary because of the extension into or through the City of a federally aided highway project will be governed by the provisions of North Dakota or federal statutes as supplemented or amended.

3. Nothing contained herein relieves any person, persons, or corporations from liability arising out of the failure to exercise reasonable care to avoid injuring the Cooperative's facilities while performing any work connected with grading, regrading, or changing the line of any public way, or with the construction or reconstruction of any City utility system.

14-0406. **PROPERTY RESTORATION.** After undertaking any work requiring the opening of any public way, the Cooperative must restore the same, including paving and its foundation, to as good a condition as formerly existed, and will maintain any paved surface in good condition for two (2) years thereafter. The work must be completed as promptly as weather permits, and if the Cooperative does not promptly perform and complete the work, remove all dirt, rubbish, equipment, and material, and put the public way in the same condition as existed before the work was completed, the City has, after demand to the Cooperative to cure and the passage of a reasonable period of time following the demand, but not to exceed five (5) days, the right to make the restoration at the expense of the Cooperative. The Cooperative must pay to the City the cost of such work done for or performed by the City. This remedy is in addition to any other remedy available to the City for noncompliance with this section, but the City hereby waives any requirement for the Cooperative 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.

14-0407. **REMOVAL OF ABANDONED EQUIPMENT.** Whenever the Cooperative abandons any site or any equipment, including but not limited to its poles, wires, fibers, anchors, anchor rods, and other appurtenances; such equipment must be completely removed by the Cooperative and the site cleaned of any remaining or residual equipment or Cooperative property.

14-0408. **RIGHTS TO TRIM TREES.** There is granted to the Cooperative, its successors and assigns, during the term of this franchise ordinance, permission and authority to trim all trees in streets, alleys, bridges, and public ways of the City so as to remove all parts of the trees interfering with the proper erection, maintenance, and operation of poles, wires, fibers, anchors, anchor rods, and other appurtenances installed or to be installed pursuant to authority granted by this franchise ordinance.

14-0409. **COOPERATIVE SUBJECT TO POLICE POWER REGULATIONS.** The City reserves the right to make and adopt, and the rights and privileges hereby granted will at all times be and remain subject to such reasonable regulations of a police nature as it may deem necessary for the best interests of the City, but the City will not by any such regulations or by acts of its own or agents do anything to prevent or interfere with the Cooperative carrying on its business in accordance with the franchise hereby granted by this franchise ordinance.

14-0410. **EMINENT DOMAIN AUTHORITY.** The granting of the franchise will in no way be construed to limit or restrict the right of the City to exercise the powers of eminent domain as set forth in Chapter 32-15 of the North Dakota Century Code and any other applicable laws of the State of North Dakota.

14-0411. **GENERAL PROVISIONS.**

1. Severability. Every section, provision, or part of this franchise ordinance is declared separate from every other section, provision, or part; and if any section, provision, or part is held invalid, it will not affect any other section, provision, or part. Where a provision of any

other City ordinance conflicts with the provisions of this franchise ordinance, the provisions of this franchise ordinance prevail.

2. **Limitation on Applicability.** This franchise ordinance constitutes a franchise between the City and the Cooperative as the only parties and no provision of this franchise ordinance will 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 (1) or more of the terms hereof, or otherwise give rise to any cause of action in any person not a party hereto.

3. **Force Majeure.** The service rendered by the Cooperative shall be continuous except that the Cooperative shall not be held accountable for a failure of service which is caused by floods, Acts of God, strikes, weather, or other causes beyond the control of the Cooperative.

4. **Amendments.** The City or the Cooperative may at any time propose that this franchise ordinance be amended to address a subject of concern and the other party will consider whether it agrees that the amendment is mutually appropriate.

5. **Publication Expense.** The expense of publication of this franchise ordinance will be paid by the City and reimbursed to the City by the Cooperative.

6. **Dispute Resolution.** If either party asserts that the other party is in default in the performance of any obligation hereunder, the complaining party must notify the other party, in writing, 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 Cass County District Court to interpret and enforce the 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.

7. **Management Costs.** Any management costs incurred by City related to this Franchise shall be paid by Cooperative, as allowed by N.D.C.C. § 49-21-26.

8. **Change in Form of Government.** Any change in the form of government of the City will not affect the validity of this franchise ordinance. Any governmental unit succeeding the City shall, without the consent of the Cooperative, succeed to all of the rights and obligations of the City provided in this franchise ordinance.

14-0412. **LIMITATION OF LIABILITY.** The Cooperative will use due diligence and care in supplying data and communications and telephone service as herein provided but will not be liable for any loss or damage which may arise from failure of the service, either partial or total, but

this will not be construed to exempt the Cooperative from liability for negligence caused by it, or its agents, servants, employees, or subcontractors.

14-0413. **INDEMNIFICATION.** The Cooperative will 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, or operations of the Cooperative's data and communications and telephone service facilities located in, on, over, under, across, or through the public ways and public grounds of the City, unless such injury or damage results from the negligence of the City, its employees or agents. In the event a suit is brought against the City under circumstances where the above agreements to indemnify applies, the Cooperative at its sole cost and expense agrees to defend the City in such suit if written notice thereof is promptly given to the Cooperative within a period wherein the Cooperative is not prejudiced by lack of such notice. If such notice is not reasonably given as hereinbefore provided, the Cooperative will have no duty to either indemnify or defend. If the Cooperative is required to indemnify and defend, it will thereafter have complete control of such litigation, but the Cooperative may not settle such litigation without the consent of the City, which consent will not be unreasonably withheld, conditioned, or delayed. This section is not, as to third parties, a waiver of any defense or immunity otherwise available to the Cooperative; and every defense or immunity that the City could assert in its own behalf.

14-0414. **EFFECTIVE DATE.** This franchise ordinance takes effect and is in full force from and after its passage and approval by the City Council. The Cooperative must specify its acceptance of the franchise in writing, within ninety (90) days of City Council approval of this franchise ordinance, to be filed with the City Auditor and in no event will this franchise ordinance be binding on the Cooperative until the filing of such acceptance.