

ELECTRIC FRANCHISE ORDINANCE

ORDINANCE NO. 2013-05.

CITY OF MADISON LAKE, BLUE EARTH COUNTY, MINNESOTA

AN ORDINANCE GRANTING TO BLUE EARTH-NICOLLET FAIRBAULT COOPERATIVE ELECTRIC ASSOCIATION d/b/a BENCO ELECTRIC COOPERATIVE, ITS SUCCESSORS AND ASSIGNS, PERMISSION TO CONSTRUCT, OPERATE, REPAIR AND MAINTAIN IN THE CITY OF MADISON LAKE, MINNESOTA, AN ELECTRIC DISTRIBUTION SYSTEM AND TRANSMISSION LINES, INCLUDING NECESSARY POLES, LINES, FIXTURES AND APPURTENANCES, FOR THE FURNISHING OF ELECTRIC ENERGY TO THE CITY, ITS INHABITANTS, AND OTHERS, AND TO USE THE PUBLIC GROUNDS AND PUBLIC WAYS OF THE CITY FOR SUCH PURPOSES.

THE CITY COUNCIL OF THE CITY OF MADISON LAKE, BLUE EARTH COUNTY, MINNESOTA, ORDAINS:

**SECTION 1. DEFINITIONS.**

For purposes of this Ordinance, the following capitalized terms listed in alphabetical order shall have the following meanings:

- 1.1 **City.** The City of Madison Lake, County of Blue Earth, State of Minnesota.
- 1.2 **City Utility System.** Facilities used for providing non-energy related public utility service owned or operated by City or agency thereof, including sewer and water service, but excluding facilities for providing heating, lighting 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, which preempts all, or part of the authority to regulate electric retail rates now vested in the Minnesota Public Utilities Commission.
- 1.4 **Cooperative.** BENCO Electric Cooperative, its successors and assigns.
- 1.5 **Electric Facilities.** Electric transmission and distribution towers, poles, lines, guys, anchors, conduits, fixtures, and necessary appurtenances owned or operated by Cooperative for the purpose of providing electric energy for public use.
- 1.6 **Notice.** A written notice served by one party on the other party referencing one or more provisions of this Ordinance. Notice to Cooperative shall be mailed to General Manager, P.O. Box 8, Mankato, MN 56002-0008. Notice to the City shall be mailed to the City Administrator, P.O. Box 295, Madison Lake, MN 56063-0395. Either party may change its respective address for the purpose of this Ordinance by written notice to the other party.
- 1.7 **Public Ground.** Land owned by the City for park, open space or similar purpose, which is held for use in common by the public.

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

## **SECTION 2. ADOPTION OF FRANCHISE.**

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

2.2 **Effective Date: Written Acceptance.** This franchise agreement shall be in force and effect from and after passage of this Ordinance, its acceptance by Cooperative, and its publication as required by law. The City, by Council resolution, may revoke this franchise agreement if Cooperative does not file a written acceptance with the City within 90 days after publication.

2.3 **Service and Rates.** The service to be provided and the rates to be charged by Cooperative for electric service in City may be subject to the jurisdiction of the Commission. The area within the City in which the Cooperative for electric service may be subject to the provisions of Minnesota Statutes, Section 216B.40.

2.4 **Publication Expense.** The expense of publication of this Ordinance will be paid by City and reimbursed to City by Cooperative.

2.5 **Dispute Resolution.** If either party asserts that the other party is in default in the performance of any obligation hereunder, the complaining party shall notify the other party of the default and the desired remedy. The notification shall be written. Representatives of the parties must promptly meet and attempt in good faith to negotiate a resolution of the dispute. If the dispute is not resolved within 30 days of the written notice, the parties may jointly select a mediator to facilitate further discussion. The parties will equally share the fees and expenses of this mediator. If a mediator is not used, or if the parties are unable to resolve the dispute within 30 days after first meeting with the selected mediator, either party may commence an action in District Court to interpret and enforce this franchise or for such other relief as may be permitted by law or equity for breach of contract, or either party may take any other action permitted by law.

## **SECTION 3. LOCATION, OTHER REGULATIONS.**

3.1 **Location of Facilities.** Electric Facilities shall be located, constructed and maintained so as not to interfere with the safety and convenience of ordinary travel along and over Public Ways and so as not to disrupt normal operation of any City Utility System previously installed therein. Electric Facilities shall be located on Public Grounds as determined by the City. Cooperative's construction, reconstruction, operation, repair, maintenance and location of Electric Facilities shall be subject to permits if required by separate ordinance and to other reasonable regulations of the City to the extent not inconsistent with the terms of this franchise agreement. Cooperative may abandon underground

Electric Facilities in place, provided at the City's request, Cooperative will remove abandoned metal or concrete encased conduit interfering with a City improvement project, but only to the extent such conduit is uncovered by excavation as part of the City improvement project.

3.2 Field Locations. Cooperative shall provide field locations for its underground Electric Facilities within City consistent with the requirements of Minnesota Statutes, Chapter 216D.

3.3 Street Openings. Cooperative shall not open or disturb any Public Ground or 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 Cooperative shall not be more burdensome than those imposed on other utilities for similar facilities or work. Cooperative may, however, open and disturb any Public Ground or Public Way without permission from the City where an emergency exists requiring the immediate repair of Electric Facilities. In such event Cooperative shall notify the City by telephone to the office designated by the City as soon as practicable. Not later than the second working day thereafter, Cooperative shall obtain any required permits and pay any required fees.

3.4 Restoration. After undertaking any work requiring the opening of any Public Ground or Public Way, Cooperative 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 Cooperative shall not promptly perform and complete the work, remove all dirt, rubbish, equipment and material, and put the Public Ground or Public Way in the said condition, the City shall have, after demand to Cooperative 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 Cooperative. Cooperative 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 3.4, but the City hereby waives any requirement for 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.

3.5 Avoid Damage to Electric Facilities. Nothing in this Ordinance relieves any person from liability arising out of the failure to exercise reasonable care to avoid damaging Electric Facilities while performing any activity.

3.6 Notice of Improvements. The City must give Cooperative reasonable notice of plans for improvements to Public Grounds or Public Ways where the City has reason to believe that Electric Facilities may affect or be affected by the improvement. The notice must contain: (i) the nature and character of the improvements, (ii) the Public Grounds and Public Ways upon which the improvements are to be made, (iii) the extent of the improvements, (iv) the time when the City will start the work, and (v) if more than one Public Ground or Public Way is involved, the order in which the work is to proceed. The notice must be given to Cooperative a sufficient length of time in advance of the actual commencement of the work to permit Cooperative to make any necessary additions, alterations or repairs to its Electric Facilities.

3.7 Shared Use of Poles. Cooperative shall make space available on its poles or towers for City fire, water utility, police or other City facilities upon terms and conditions acceptable to Cooperative

whenever such use will not interfere with the use of such poles or towers by Cooperative, by another electric utility, by a telephone utility, or by any cable television Cooperative or other form of communication Cooperative. In addition, the City shall pay for any added cost incurred by Cooperative because of such use by City.

#### **SECTION 4. RELOCATIONS.**

4.1 Relocation of Electric Facilities in Public Ways. If the City determines to vacate a Public Way for a City improvement project, or at 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 Cooperative to relocate its Electric Facilities located therein if relocation is reasonably necessary to accomplish the City's proposed public improvement. Except as provided in Section 4.3, Cooperative shall relocate its Electric Facilities at its own expense. The City shall give Cooperative 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 years of a prior relocation of the same Electric Facilities, which was made at Cooperative expense, the City shall reimburse Cooperative 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, Cooperative may be required to make the subsequent relocation at its expense. Nothing in this Ordinance requires Cooperative to relocate, remove, replace or reconstruct at its own expense its Electric 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.

4.2 Relocation of Electric Facilities in Public Ground. City may require Cooperative, at Cooperative's expense, to relocate or remove its Electric Facilities from Public Ground upon a finding by City that the Electric Facilities have become or will become a substantial impairment to the existing or proposed public use of the Public Ground.

4.3 Projects with Federal Funding. City shall not order Cooperative to remove or relocate its Electric Facilities when a Public Way is vacated, improved or realigned for a right-of-way project or any other project which is financially subsidized in whole or in part by the Federal Government or any agency thereof, unless the reasonable non-betterment costs of such relocation are first paid to Cooperative. The City is obligated to pay Cooperative only for those portions of its relocation costs for which City has received federal funding specifically allocated for relocation costs in the amount requested by the Cooperative, which allocated funding the City shall specifically request. Relocation, removal or rearrangement of any Cooperative Electric Facilities made necessary because of a federally-aided highway project shall be governed by the provisions of Minnesota Statutes, Section 161.46, as supplemented or amended. It is understood that the rights herein granted to Cooperative are valuable rights.

4.4 No Waiver. The provisions of this franchise apply only to facilities constructed in reliance on a franchise from the City and shall not be construed to waive or modify any rights obtained by Cooperative for installations within a Cooperative right-of-way acquired by easement or prescriptive right before the applicable Public Ground or Public Way was established, or Cooperative's rights under state or county permit.

**SECTION 5. TREE TRIMMING.**

Cooperative may trim all trees and shrubs in the Public Grounds and Public Ways of City to the extent Cooperative finds necessary to avoid interference with the proper construction, operation, repair and maintenance of any Electric Facilities installed hereunder, provided that Cooperative shall save the City harmless from any liability arising therefrom, and subject to permit or other reasonable regulation by the City.

**SECTION 6. INDEMNIFICATION.**

6.1 Indemnity of City. Cooperative shall indemnify, keep and hold the City free and harmless from any and all liability on account of injury to persons or damage to property occasioned by the construction, maintenance, repair, inspection, the issuance of permits, or the operation of the Electric Facilities located in the Public Grounds and Public Ways. The City shall not be indemnified for losses or claims occasioned through its own negligence except for losses or claims arising out of or alleging the City's negligence as to the issuance of permits for, or inspection of, Cooperative's plans or work. The City shall not be indemnified if the injury or damage results from the performance in a proper manner, of acts reasonably deemed hazardous by Cooperative, and such performance is nevertheless ordered or directed by City after notice of Cooperative's determination.

6.2 Defense of City. In the event a suit is brought against the City under circumstances where this agreement to indemnify applies, Cooperative at its sole cost and expense shall defend the City in such suit if written notice thereof is promptly given to Cooperative within a period wherein Cooperative is not prejudiced by lack of such notice. If Cooperative is required to indemnify and defend, it will thereafter have control of such litigation, but Cooperative may not settle such litigation without the consent of the City, which consent shall not be unreasonably withheld. This section is not, as to third parties, a waiver of any defense or immunity otherwise available to the City and Cooperative, in defending any action on behalf of the City, shall be entitled to assert in any action every defense or immunity that the City could assert in its own behalf.

**SECTION 7. VACATION OF PUBLIC WAYS.**

The City shall give Cooperative at least two 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 Electric Facilities, shall not operate to deprive Cooperative of its rights to operate and maintain such Electric Facilities, until the reasonable cost of relocating the same and the loss and expense resulting from such relocation are first paid to Cooperative. In no case, however, shall City be liable to Cooperative for failure to specifically preserve a right-of-way under Minnesota Statutes, Section 160.29.

**SECTION 8. CHANGE IN FORM OF GOVERNMENT.**

Any change in the form of government of the City shall not affect the validity of this Ordinance. Any governmental unit succeeding the City shall, without the consent of Cooperative, succeed to all of the rights and obligations of the City provided in this Ordinance.

**SECTION 9. FRANCHISE FEE.**

9.1 **Fee Schedule.** During the term of the franchise hereby granted, and in lieu of any permit or other fees being imposed on Cooperative, the City may impose on Cooperative a franchise fee by collecting the amounts indicated in a Fee Schedule set forth in a separate ordinance from each customer in the designated Cooperative Customer Class. The parties have agreed that the franchise fee collected by the Cooperative and paid to the City in accordance with this Section 9 shall not exceed the following amounts.

<u>Class</u>	<u>Fee Per Premise Per Month</u>
Residential	\$1.00
Sm C & I – Non-Dem	\$1.00
Sm C & I – Demand	\$1.00
Large C & I	\$1.00
Public Street Ltg	\$1.00
Muni Pumping –N/D	\$1.00
Muni Pumping – Dem	\$1.00

9.2 **Separate Ordinance.** The franchise fee shall be imposed by a separate ordinance duly adopted by the City Council, which ordinance shall not be adopted until at least 90 days after written notice enclosing such proposed ordinance has been served upon Cooperative by certified mail. The fee shall not become effective until the beginning of a Cooperative billing month at least 90 days after written notice enclosing such adopted ordinance has been served upon Cooperative by certified mail. Section 2.5 shall constitute the sole remedy for solving disputes between Cooperative and the City in regard to the interpretation of, or enforcement of, the separate ordinance. No action by the City to implement a separate ordinance will commence until this Ordinance is effective. A separate ordinance which imposes a lesser franchise fee on the residential class of customers than the maximum amount set forth in Section 9.1 above shall not be effective against Cooperative unless the fee imposed on each other customer classification is reduced proportionately in the same or greater amount per class as the reduction represented by the lesser fee on the residential class.

9.3 **Terms Defined.** For the purpose of this Section 9, the following definitions apply:

9.3.1 “Customer Class” shall refer to the classes listed on the Fee Schedule and as defined or determined in Cooperative’s electric tariffs on file with the Commission.

9.3.2 “Fee Schedule” refers to the schedule in Section 9.1 setting forth the various customer classes from which a franchise fee would be collected if a separate ordinance were implemented immediately after the effective date of this franchise agreement. The Fee Schedule in the separate ordinance may include new Customer Class added by Cooperative to its electric tariffs after the effective date of this franchise agreement.

9.4 **Collection of the Fee.** The franchise fee shall be payable quarterly and shall be based on the amount collected by Cooperative during complete billing months during the period for which payment is to be made by imposing a surcharge equal to the designated franchise fee for the applicable customer classification in all customer billings for electric service in each class. The payment shall be

due the last business day of the month following the period for which the payment is made. 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 and no change shall require a collection from any customer for electric service in excess of the amounts specifically permitted by this Section 9. The time and manner of collecting the franchise fee is subject to the approval of the Commission. No franchise fee shall be payable by Cooperative if Cooperative 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 Cooperative's applicable rates for electric service. Cooperative 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. Cooperative 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. In addition, the Cooperative agrees to provide at the time of each payment a statement summarizing how the franchise fee payment was determined, including information showing any adjustments to the total surcharge billed in the period for which the payment is being made to account for any uncollectibles, refunds or error corrections.

9.5 **Equivalent Fee Requirement.** The separate ordinance imposing the fee shall not be effective against Cooperative unless it lawfully imposes 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" shall be measured, if practicable, by comparing amounts collected as a franchise fee from each similar customer, or by comparing, as to similar customers the percentage of the annual bill represented by the amount collected for franchise fee purposes. The franchise fee or tax shall be applicable to energy sales for any energy use related to heating, cooling or lighting, or to run machinery and appliances, but shall not apply to energy sales for the purpose of providing fuel for vehicles. If the Cooperative specifically consents in writing to a franchise or separate ordinance collecting or failing to collect a fee from another energy supplier in contravention of this Section 9.5, the foregoing conditions will be waived to the extent of such written consent.

## **SECTION 10. PROVISIONS OF ORDINANCE.**

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

10.2 **Limitation on Applicability.** This Ordinance constitutes a franchise agreement between the City and Cooperative as the only parties, and no provision of this franchise shall in any way inure to the benefit of any third person (including the public at large) so as to constitute any such person as a third party beneficiary of the agreement or of any one or more of the terms hereof, or otherwise give rise to any cause of action in any person not a party hereto.

**SECTION 11. AMENDMENT PROCEDURE.**

Either party to this franchise agreement may at any time propose that the agreement be amended 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 shall become effective upon the filing of Cooperative's written consent thereto with the City Clerk within 90 days after the date of final passage by the City of the amendatory ordinance.

**SECTION 12. PREVIOUS FRANCHISES SUPERSEDED.**

This franchise supersedes any previous electric franchise granted to Cooperative or its predecessor.

Passed and approved: May 20, 2013.  
  
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Mayor

Attest:   
\_\_\_\_\_  
City Clerk

Date Published: July 31, 2013