



Attn: General Manager

Any party may change its respective address for the purpose of this Ordinance by written notice to the other parties.

**10. Person.** A natural person or any partnership, joint venture, corporation, cooperative, limited liability company or any public corporation, political subdivision or agency of the State or any other legal entity that may be created by law.

**11. Public Ground.** All real property owned by or dedicated to the City with respect to which the City holds the legal right or title to grant or withhold easement, leasehold or occupancy rights or servitudes.

**12. Public Way.** Any street, alley and other public rights-of-way within the City.

**13. Utility.** Transmitting, furnishing, transporting, distributing, delivering, selling, receiving, importing, manufacturing, or causing to be produced, transmitted, furnished, transported, delivered, sold, received, imported, or manufactured, Gas energy, natural gas, mixed gas, heat, light, power, and services provided through a cable communication system.

**14. Utility Service Provider.** Any Person who performs any one or more of the activities of a Utility to or for the public or to or for any one or more persons within the corporate limits of the City and may, as contemplated herein, be the ultimate user or consumer of the Utility service provided.

**1310.02 FRANCHISE INTENT.** This Ordinance is intended to cover only the right of the Company to the use of the City's public way for the purposes set forth in Section 1 hereof. In all other respects this Ordinance is not intended in any way to affect or modify or surrender any powers now held by the City, or which may hereafter be granted to the City by the State Legislature, or to affect the powers of the State Legislature in dealing with the Company in authorizing taxation of the Company or its properties, in the regulation of its rates and charges, or in otherwise regulating or controlling the Company and its properties in all ways consistent with the Constitution of the United States and the Constitution of the State of Minnesota.

### **1310.03 THE FRANCHISE.**

**Subd. 1. Grant of Franchise.** The City hereby grants the Company, for a period of ten (10) years from the effective date this Ordinance is passed and approved by the City, the right to import, transport, distribute, and sell natural gas for any public or private use within and through the limits of the City. The Ordinance/Franchise shall be automatically extended for up to one (1) additional term of ten (10) years, provided, however, that the City may notify the Company in writing at least ninety (90) days before the expiration of the initial term, that City desires to renegotiate the Ordinance/Franchise. For these purposes, the Company may construct, operate, repair and maintain Gas Facilities in, on, over, under and across the Public Way subject to the provisions of state law, this ordinance, and to provisions of other city right-of-way ordinances including permit and fee requirements, as the same may be amended, supplemented or replaced. The Company shall be notified sixty (60) days in advance of any adoption of, or proposed changes to, any City ordinance regulating its Public Ways or modifying permit or fee requirements of the Company. 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.

**Subd. 2. Not Exclusive.** This Franchise is not exclusive.

**Subd. 3. Effective Date.** This Franchise shall be in force and effect from and after the passage of this Ordinance and publication as required by law and upon the Company's duly authorized acceptance below as executed within sixty (60) days after passage and publication of this Ordinance or any amendment thereto.

### **1310.04 LOCATIONS; CONSTRUCTION; OTHER REGULATIONS.**

**Subd. 1 General.** Gas Facilities shall be located, constructed and maintained by the Company: (i) in as safe and secure a condition or manner as reasonably possible, (ii) so as not to interfere with the safety and convenience of ordinary travel along and over Public Ways, and (iii) so as not to disrupt or interfere with the normal use or operation of any Public Ways, Public Ground or the City Utility System. Gas Facilities may only be located on Public Ground as determined by the City in its sole discretion. The Company's construction, reconstruction, operation, repair, maintenance, location and relocation of Gas Facilities shall be subject to the terms of this Ordinance and such other regulations of the City consistent with authority granted the City to

manage its Public Ways and Public Grounds under state law, to the extent not inconsistent with a specific term of this Ordinance.

**Subd 2 Construction; Maintenance; Repairs.** Whenever the Company desires to open or disturb any Public Way or Public Ground for the purpose of constructing, maintaining, or repairing Gas Facilities, it shall give the City reasonable advance Notice, but not less than ten (10) business days, by filing a written Notice with the City Administrator. In any case, the Company shall not commence such work before obtaining any applicable permit for which the City may impose a reasonable fee, or other appropriate written consent from the City. The Company shall not, during the progress of the work, endanger or unnecessarily obstruct the passage of traffic or the normal and customary use of the Public Ways and Public Ground. During the progress of such work, the Company shall keep the affected Public Ways or Public Ground guarded in order to avoid accidents to persons or property. All work performed by the Company shall comply with all applicable federal, state, and local laws, rules, and regulations.

**Subd. 3 Emergencies.** The requirements for obtaining permits from the City pursuant to Section 5.2 shall not apply if (i) an emergency exists requiring the immediate repair of Gas Facilities and (ii) the Company gives telephone notice to the City before, if reasonably possible, commencement of the emergency repair. Within two (2) business days after commencing the repair, the Company shall apply for any required permits and pay any required fees.

**Subd. 4 Restoration.** Following the completion of any work, the Company shall promptly and diligently restore the affected Public Ways and/or Public Ground to as good a condition as before the work commenced, and shall warrant the work for one (1) years thereafter. If the Company fails to promptly restore such Public Ways and/or Public Ground within thirty calendar (30) days of Notice by the City, the City may engage an independent contractor at the expense of the Company to perform the restoration of the Public Ways and/or Public Ground as required under this Section. The Company shall pay to the City upon demand the cost to the City of affecting such restoration including the City's administrative expenses and overhead.

**Subd. 5 Avoidance of Damage.** The Company must take reasonable measures to prevent the Gas Facilities from causing damage to persons or property. The Company must take reasonable measures to protect the Gas Facilities from damage that could be inflicted on the Gas Facilities by persons, property, or the elements. The Company must take protective measures when the City performs work near the Gas Facilities, if given reasonable Notice by the City of such work prior to its commencement.

**Subd. 6 Field Locations.** The Company shall provide field locations for all its underground Gas Facilities when requested by the City within a reasonable period of time. The period of time will be deemed reasonable if it meets the requirements of the one call excavation notice system as now provided in Minnesota Statutes, chapter 216D (commonly known as of the Effective Date as the "Gopher State One Call" system). The Company must promptly provide available mapping information for any of its underground Gas Facilities, subject to the Homeland Security Act or other applicable laws protecting confidential or proprietary information.

**Subd. 7 Permit Required.** The Company may not open or disturb the surface of any Public Way or Public Ground without first having obtained a permit from the City. Company will comply with all permit conditions established by the City. The permit conditions and fees imposed on the Company may not be more burdensome than those imposed on other utilities for similar facilities or work, however, when establishing permit fees, the City may take into account the renewal dates of existing franchises and whether the Company is also paying a franchise fee to the City. The Company may, however open and disturb the surface of any Public Way or Public Ground without a permit if (i) an emergency exists requiring the immediate repair of Gas Facilities and (ii) the Company gives notice to the City before, if possible, commencement of the emergency repair. Within two (2) business days after commencing the repair, the Company must apply for any required permits and pay the required fees.

**Subd. 8 Restoration.** After completing work requiring the opening of a Public Way or Public Ground, the Company must restore the same, including paving and its foundation, to the condition specified in the permit and maintain the restored areas in good condition for one (1) year thereafter. The work must be completed as promptly as weather permits. If the Company does not promptly perform and complete the work, remove all dirt, rubbish, equipment and material, and restore the Public Way or Public Ground, the City may, after demand to the Company to cure and the passage of a reasonable period of time not less than thirty calendar days following the demand, make the restoration at the expense of the Company. The Company must

pay to the City the cost of such work done for or performed by the City, including administrative expense and overhead. This remedy is in addition to any other remedies available to the City for noncompliance with this section.

**Subd. 9 Tree Trimming.** Subject to such procedures, regulation and supervision as the Council may establish, the Company may, at its cost, trim all trees and shrubs in the Public Ways located within the Company Service Area to the extent the Company finds it necessary to avoid interference with the proper construction, operation, repair and maintenance of any of the Company's Gas Facilities installed or maintained hereunder. Prior to any tree trimming, the Company will provide to the City a plan addressing the aesthetic impact of the proposed tree trimming.

**Subd. 10 Notice of City Improvements.** The City will give the Company ninety (90) days advance Notice of plans for improvements to Public Ways and Public Ground in the Company Service Area where the City has reason to believe that the Company's Gas Facilities may affect or be affected by such improvements. The Notice will contain: (i) the nature and character of the improvements, (ii) the Public Ways and/or Public Ground upon which the improvements are to be made, (iii) the extent of the improvements, (iv) the time when the City will start the work, and (v) if more than one Public Way or parcel of Public Ground is involved, the order in which the work is to proceed.

### **1310.05 GAS FACILITIES RELOCATION.**

**Subd. 1 Relocation.** In the event the City reasonably determines that it is necessary for the Company to move any part of its Gas Facilities because the City has determined to change, move or improve its Public Ways when necessary to prevent interference and not merely for convenience of the City or that the Gas Facilities have become or will become a substantial impairment to the existing or imminent public use of Public Ground, upon reasonable Notice by the City to the Company, then the Company will move its Gas Facilities at its sole cost. The City shall consider reasonable alternatives in designing its public works projects so as not to arbitrarily cause the Company unreasonable additional expense in exercising its authority under this Subdivision. The Company is not required to remove or relocate its facilities from a right of way that has been vacated or altered in favor of a non-governmental entity unless and until the reasonable cost to do so are first paid to the Company. This Subdivision shall not constitute a taking by the City nor be construed as a waiver or modification of any easement or prescriptive rights acquired by the Company independent of and without reliance by the Company on this Franchise.

**Subd. 2 No Release of Liability.** Nothing contained herein shall relieve any third party from liability arising out of their failure to exercise reasonable care to avoid injuring the Company's Gas Facilities while performing any work connected with grading, regrading or changing the line of any Public Way or with any construction on or adjacent to any Public Way; provided, however, this Subdivision shall not limit the City's rights to indemnification under Sub-Section 1310.06 nor shall the City in any way be liable to the Company for claims arising from the negligence of any third party.

**Subd. 3 Projects with State or Federal Funding.** Relocation, removal, or rearrangement of any Gas distribution facilities owned by the Company made necessary because of the extension into or through the City of a federally-aided highway project shall be governed by the provisions of §161.46 of Minnesota Statutes. It is understood that the right herein granted to the Company is a valuable right and the City shall not order the Company to remove, or relocate its 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 United States or any agency thereof, unless the reasonable non-betterment costs of such relocation and the loss and expense resulting therefrom are first paid to the Company, but the City need not pay those portions of such items for which reimbursement to it is not available.

### **1310.06 INDEMNIFICATION.**

**Subd. 1 Indemnification.** If at any time any claim of any kind is made against the City for injury to persons or property arising from the acts or failure to act by the Company, its agents, servants, or employees in connection with the operations of the Company under and pursuant to this Franchise, the Company shall indemnify, defend and hold harmless the City, its agents, servants or employees from any and all such claims, including, but not limited to, reimbursement of any reasonable attorneys fees and costs and expenses the City may incur in handling, denying, or defending such claims. The Company's obligation to indemnify, defend and hold harmless the City shall not extend to any injury to persons or property caused by the negligent act or

failure to act by the City or any actions taken by the Company pursuant to directions of the City if performed within the scope of the City's directions without negligence by the Company. The Company will have complete control of such litigation. This Section is not a waiver of any defense or immunity otherwise available to the City pursuant to the Minnesota Municipal Tort Claims Act, or otherwise. The Company in defending any action shall be entitled to assert every defense or immunity that the City could itself assert in its own behalf. The Company's obligations under this Section shall survive the expiration, amendment, or termination of this Ordinance.

**Subd. 2 Insurance.** Before the Effective Date, the Company shall furnish the City a summary of insurance, if any, carried by the Company, or of its self-insured status, in either case demonstrating adequate protection to the City from any and all obligations, liabilities, or claims of any nature whatsoever, growing out of the operation, construction, and maintenance of its Gas Facilities within the City. The Company shall maintain such insurance coverage at all times during this Franchise.

**Subd. 3 Compliance with Laws; Hazardous Substances.** In its operation under this Ordinance, the Company shall observe all federal, state and local laws, rules, regulations and orders with respect to the transmission, distribution, transformation or furnishing of Gas energy and the handling of materials, substances and wastes deemed toxic or hazardous to health, natural resources or the environment (collectively, "Hazardous Substances"). The Company shall remove or remediate any Hazardous Substances located on, in or surrounding its Gas Facilities or caused to be located on, in or surrounding the Public Ways and Public Grounds or elsewhere in the City in compliance with all applicable laws, regulations and lawful government orders, and pay or cause to be paid all costs associated therewith. The indemnification terms and conditions of Sub-section 1310.06, Subd.1, shall apply to all claims made against the City by any Person, including any governmental agency, who or which asserts any right to costs, damages or other relief based upon the terms and conditions imposed upon the Company under this Subdivision or which arise from or are related to the Company's acts or failure to act in compliance with any law, rule, regulation or lawful order governing Hazardous Substances.

**1310.07 ABANDONED FACILITIES.** The Company shall comply with City ordinances and Minnesota Statutes, Section 216D.01 et seq., as they may be amended from time to time.

**1310.08 RATES AND SERVICE.** The Gas service provided and the rates charged by the Company for Gas service, as of the Effective Date, are subject to the jurisdiction of the Commission as provided in Minnesota Statutes, chapter 216B. In the event the Company shall determine after the Effective Date to change its rates or terms and conditions of Gas service, the City recognizes they will receive advance Notice of such proposed action via the Minnesota Public Utility Commission regulatory process.

**1310.9 FRANCHISE FEE.**

**Subd. 1 Franchise Fee.** In exchange for the franchise granted herein, Grantee (Minnesota Energy Resources) shall collect from its customers and pay to the Grantor an amount based on the following fee schedule after adjustment for the net write-off of uncollectible accounts and corrections of bills theretofore rendered:

<b>CUSTOMER CLASS</b>	<b>FEE</b>
Residential	\$3.00/Month/Customer
Commercial Firm	\$3.00/Month/Customer
Commercial Interruptible	\$3.00/Month/Customer
Industrial Firm	\$3.00/Month/Customer
Industrial Interruptible	\$3.00/Month/Customer
Transportation	\$3.00/Month/Customer

The amount paid by Grantee shall be in lieu of, and Grantee shall be exempt from, all other occupation, license, excise or right-of-way permit fees or taxes which the City of Silver Bay may impose for the rights and privileges herein granted or for the privilege of doing business within the City of Silver Bay, and in the event any such fee, charge, license, tax or assessment shall be imposed by the Grantor, the payment to be made in accordance with the provisions of this section shall be reduced in an amount equal to the annual burden of such fee, charge, license, tax or assessment imposed upon the Grantee. Ad valorem property taxes imposed generally upon all real and personal property within the City of Silver Bay shall not be deemed to affect the obligation of the Grantee under this section.

**Subd. 2 Exemption.** No franchise fee will imposed upon: (i) a meter if the City has notified the Company that such meter services property owned or leased by the City; or (ii) a meter servicing property owned or leased by the Company.

**Subd. 3 Calculation of the Fee.** The 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 meter at a single premise, but only one account, only one fee shall be assessed to that account. If a premise has two 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 franchise fee assessment for natural 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 the ordinance have more than one premise, each premise shall be subject to the appropriate fee. In the event a question arises as to the proper fee amount for any premise, the Company's manner of billing for energy used at all similar premises in the city will control.

**Subd. 4 Collection of the Fee.** Implementation, collection and payment of the franchise fee are subject to any additional requirements imposed by order of the Minnesota Public Utility Commission. The first franchise fee shall be collected with the Company's first full billing cycle following the issuance of a written order from the Minnesota Public Utilities Commission authorizing the Company to incorporate the franchise fee imposed by this Ordinance/Franchise into its rate schedule. Company shall use its best efforts to obtain the authorization of the Minnesota Public Utilities Commission.

Grantee shall list the local franchise fee collected from customers as a separate item on bills for utility service issued to customers. If at any time the Minnesota Public Utilities Commission, or other authority having proper jurisdiction, prohibits such recovery, then Grantee will no longer be obligated to collect and pay the franchise fee herein contemplated. In addition, the Company will notify the City, and upon approval by the City, the Company may discount or reduce the fee payable for natural gas delivered to a specific customer of the Company when it is required to reduce the franchise fee to retain the business of that customer. Modification or reduction of the franchise fee should occur if the fee would cause the customer to cease purchase or transportation deliveries of natural gas from the Company by installing equipment to access the natural gas supply not subject to the City's franchise fee.

**Subd. 5 Payment of the Fee.** The franchise fee shall be payable by the Company quarterly and shall be 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 natural gas 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. No franchise fee shall be payable by Company if Company is legally unable to first collect an amount equal to the franchise fee from its customers in each applicable class of customers by imposing a surcharge in Company's applicable rates for natural 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.

The Company shall 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 uncollectibles, refunds or error corrections. Company shall make its records available for inspection by the City at reasonable times.

**Subd. 6 Additional or Amended Fee.** During the term of the Ordinance/Franchise hereby granted, and in addition to other fees being imposed or that the City has the right to impose, the City has the right to alter, amend or repeal the franchise fee imposed in Section 1330.09 hereof. The altered or amended franchise fee must be imposed by a separate ordinance adopted by the City Council, which ordinance may not be adopted until at least ninety (90) days after Notice enclosing such proposed ordinance has been served upon the Company by certified mail. The fee will not become effective until ninety (90) days after adoption of the ordinance by the City Council.

**Subd. 7 Restricted Use of Franchise Fee.** The City has chosen to restrict the use of the franchise

fees to the maintenance, repair, and/or replacement of city streets, curbs, gutters, sidewalks, and public parking areas.

### **1310.10 DEFAULT AND ELECTION OF REMEDIES.**

If the Company shall be in default in the performance of any of the material terms and conditions of this franchise, and shall continue in default for more than thirty (30) days (or fails to initiate the cure of the default within said period and diligently pursue said cure, if the cure of the default cannot reasonably be accomplished within said 30 days) after receiving Notice from the City of such default, the City may elect to cure such default and charge the Company for the costs and expenses incurred by the City for the cure thereof.

No remedy provided hereunder shall be deemed an exclusive remedy and the election of any such remedy shall not bar pursuit of any other remedy or any combination thereof, or subsequent seeking of the same remedy for other damages or otherwise, whether available hereunder or existing at law or in equity. No waiver of any breach of any covenant, condition or agreement herein contained shall operate as a waiver of any subsequent breach thereof.

### **1310.11 GENERAL PROVISIONS OF FRANCHISE.**

**Subd. 1 Governing Law.** This Franchise is granted and is intended to be performed in the State of Minnesota and shall be construed and enforced in accordance with the laws of the State of Minnesota. The Company shall be subject to personal jurisdiction in the State of Minnesota. All actions related to this franchise or its enforcement shall be venued in the District Court of the State of Minnesota within which venue the City is located.

**Subd. 2 Right to Repeal.** If any clause, sentence or section of this Franchise is deemed invalid by any judicial, regulatory or legislative body having proper jurisdiction, the remaining provisions shall not be affected.

**Subd. 3 Limitation on Applicability.** This franchise constitutes a franchise between the City and the Company as the only parties and no provision of this Franchise shall in any way inure to the benefit of any third person (including the public at large) so as to constitute any such person as a third party beneficiary of the agreement or of any one or more of the terms hereof, or otherwise give rise to any cause of action in any person not a party hereto.

**Subd. 4 Assignment.** Company shall provide thirty (30) days' advance written notice to City of any sale, assignment, or transfer of this Ordinance/Franchise. The notice must provide the name, address, contact information of any successor to the Company. Any successor entity to the Company is subject to all of the terms and conditions of this Ordinance/Franchise and prior to such sale, assignment or transfer being effective such successor entity must provide City with a written acknowledgment and agreement that it is bound by the terms and provisions of this Ordinance/Franchise.

### **1310.12 ACCEPTANCE BY THE COMPANY.**

**Subd. 1 Acceptance by the Company.** The Company shall, within sixty (60) days after passage and publication of this franchise or any amendment thereto, file with the City Administrator in writing its acceptance or rejection as provided in Subd. 2. If such acceptance is not filed or if a rejection is filed within said period, the Company, by its continuing operations, shall be deemed to have accepted the terms and conditions of this Franchise or any amendment hereto, except with respect to such particulars as it may successfully challenge under the procedures specified in Subd. 2.

**Subd. 2 Rejection Procedures.** A rejection of this Franchise or any amendment hereto may be made by the Company only upon the grounds that the terms and conditions hereof or of such amendment exceed the lawful authority of the City under the Constitutions or Laws of the United States or the State of Minnesota or are otherwise unlawful. Any rejection shall be submitted in writing to the City, stating with particularity the points and authorities of law upon which the Company relies. If the City fails to amend this Franchise or otherwise satisfy the Company's objections as stated within sixty (60) days of its receipt of the Company's rejection, the Company shall have the right thereafter to seek appropriate judicial or administrative relief based solely upon those provisions it has alleged are unlawful in its rejection notice. If the Company fails to initiate such legal

action within sixty (60) days from the expiration of the aforementioned thirty (30) day period provided for the City's amendment or cure, the Company shall be deemed to have waived its objections and to have accepted the terms of this Franchise or any amendment hereto.

**1310.13 Publication Expense.** The expense of any publication of this franchise required by law shall be paid by Company.

**1310.14 Previous Gas Franchise Repealed.** The prior Gas Franchise granted to Minnesota Energy Resources, the predecessor to the Company herein, pursuant to Silver Bay City Code Section 1310, is hereby repealed and superseded by this Section 1310 Gas Franchise (2013).

The City Council first read the amended ordinance on July 1, 2013 and a second reading on October 7<sup>th</sup>, 2013. This amendment shall be effective following its passage and publication according to law and is considered the third reading.

Adopted by the City Council of the City of Silver Bay this 7<sup>th</sup> day of October, 2013

ATTEST:

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Joanne Johnson, Mayor

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Lana Fralich, City Administrator