

A regular meeting of the City Council for the City of Canby, Minnesota was held on August 21st, 2012 at 7:00 P.M. in the City Council Chambers.

Members: Gene Bies, Nancy Bormann, Gene Eilers, Denise Hanson

Absent: Rick Bueltel

Visitors: Nicholas Johnson, City Administrator
Gerald Boulton, City Attorney
Dean Helstrom, City Engineer
Bill Klyve, Otter Tail Power Company
Collin Kremeier, Otter Tail Power Company
Ellie Beman, Canby News
Janel, Canby News

The Pledge of Allegiance was recited.

The public hearing for the electric franchise ordinance was opened at 7:00 P.M. There were no public attendants at the public meeting to comment on the electric franchise ordinance. The Council discussed items in regard to electrical service. A motion was made by Bormann and seconded by Eilers to close the hearing. The public hearing was closed at 7:15 P.M.

The minutes of August 7th, 2012 were reviewed. A motion was made by Eilers and seconded by Hanson to approve the minutes. All voted in favor. None voted against. The motion was carried.

The Council reviewed Ordinance 311, an electric franchise ordinance between the City of Canby and Otter Tail Power Company. A motion was made by Bormann and seconded by Eilers to adopt Ordinance 311. All voted in favor. None voted against. The motion was carried.

Electric Franchise Ordinance

City of Canby, Yellow Medicine County, Minnesota

ELECTRIC ORDINANCE

ORDINANCE NO. 311

AN ORDINANCE GRANTING TO OTTER TAIL POWER COMPANY, A MINNESOTA CORPORATION, ITS SUCCESSORS AND ASSIGNS, A NONEXCLUSIVE FRANCHISE TO CONSTRUCT, OPERATE, REPAIR AND MAINTAIN IN THE CITY OF CANBY, MINNESOTA, AN ELECTRIC DISTRIBUTION SYSTEM AND TRANSMISSION LINES, INCLUDING NECESSARY POLES, LINES, FIXTURES AND APPURTENANCES, FOR THE FURNISHING OF ELECTRIC ENERGY TO THE CITY, ITS INHABITANTS, AND

OTHERS, AND TO USE THE PUBLIC WAYS AND PUBLIC GROUNDS OF THE CITY FOR SUCH PURPOSES.

THE CITY COUNCIL OF THE CITY OF CANBY, YELLOW MEDICINE COUNTY, MINNESOTA, ORDAINS:

SECTION 1. DEFINITIONS.

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

City. The City of Canby, Yellow Medicine County, State of Minnesota.

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

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.

Company. Otter Tail Power Company, a Minnesota corporation, its successors and assigns including all successors or assignees that own or operate any part or parts of the Electric Facilities subject to this franchise.

Electric Facilities. Electric transmission and distribution towers, poles, lines, guys, anchors, conduits, fixtures, and necessary appurtenances owned or operated by Company for the purpose of providing electric energy for public or private use.

Notice. A writing served by any party or parties on any other party or parties. Notice to Company shall be mailed to **Otter Tail Power, 216 S Cascade St., Fergus Falls, MN 56537.**

Notice to the City shall be mailed to City of Canby 110 Oscar Ave. North, Canby, MN 56220-1332. Any party may change its respective address for the purpose of this Ordinance by written notice to the other parties.

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

Public Ground. Land owned or otherwise controlled by the City for park, open space or similar public purpose, which is held for use in common by the public.

SECTION 2. ADOPTION OF FRANCHISE.

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

2.2. **Effective Date; Written Acceptance.** This franchise shall be in force and effect from and after the passage of this Ordinance and publication as required by law and its acceptance by Company. If Company does not file a written acceptance with the City within 60 days after the date the City Council adopts this Ordinance, the City Council, by ordinance, may revoke this franchise or seek its enforcement in a competent jurisdiction.

2.3. **Service, Rates and Area.** The service to be provided and the rates to be charged by Company for electric service in City are subject to the jurisdiction of the Commission. The area within the City in which Company may provide electric service is subject to the provisions of Minnesota Statutes, Section 216B. 37 - .40.

2.4. **Publication Expense.** Company shall pay the expense of publication of this Ordinance.

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 thirty (30) days of the date of 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.

2.6. **Continuation of Franchise.** If the City and the Company are unable to agree on the terms of a new franchise by the time this franchise expires, this franchise will remain in effect until a new franchise is agreed upon, or until 90 days after the City or the Company serves written Notice to the other party of its intention to allow the franchise to expire. However, in no event shall this franchise continue for more than one year after expiration of the 20 year term set forth in Section 2.1.

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 or interfere with the normal operation of any City Utility System. Electric Facilities may be located on Public Grounds as determined by the City. Company's construction, reconstruction, operation, repair, maintenance, location and relocation of Electric Facilities shall be subject to other reasonable 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 franchise agreement.

3.2. **Street Openings.** Company shall not open or disturb the surface of any Public Way or Public Ground for any purpose without first having obtained a permit from the City, if required by a separate ordinance for which the City may impose a reasonable fee. Permit conditions imposed on Company shall not be more burdensome than those imposed on other utilities for

similar facilities or work. 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 Electric Facilities and (ii) Company gives telephone notice to the City before, if reasonably possible, commencement of the emergency repair. Within two business days after commencing the repair, Company shall apply for any required permits and pay any required fees.

3.3. **Restoration**. After undertaking any work requiring the opening of any Public Way, the Company shall restore the Public Way in accordance with Minnesota Rules, part 7819.1100 and applicable City ordinances consistent with law. Company shall restore Public Ground to as good a condition as formerly existed. All work shall be completed as promptly as weather permits, and if Company shall not promptly perform and complete the work, remove all dirt, rubbish, equipment and material, and put the Public Ground in the said condition, the City shall have, after demand to Company to cure and the passage of a reasonable period of time following the demand, but not to exceed five days, the right to make the restoration of the Public Ground at the expense of Company. Company shall pay to the City the cost of such work done for or performed by the City. This remedy shall be in addition to any other remedy available to the City for noncompliance with this Section 3.3.

3.4. **Shared Use of Poles**. Company shall make space available on its poles or towers for City fire, water utility, police or other City facilities whenever such use will not interfere with the use of such poles or towers by Company, by another electric utility, by a telephone utility, or by any cable television company or other form of communication company. In addition, the City shall pay for any added cost incurred by Company because of such use by City.

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

3.6. **Notice of Improvements to Streets**. The City must give Company reasonable written Notice of plans for improvements to 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 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 Way is involved, the order in which the work is to proceed. The notice must be given to Company a sufficient length of time, considering seasonal working conditions, in advance of the actual commencement of the work to permit Company to make any additions, alterations or repairs to its Electric Facilities the Company deems necessary.

3.7. **Mapping Information.** The Company must promptly provide mapping information for any of its underground Electric Facilities in accordance with Minnesota Rules parts 7819.4000 and 7819.4100.

SECTION 4. FACILITIES RELOCATION.

4.1. **Relocation in Public Ways.** The Company shall comply with Minnesota Rules, part 7819.3100 and applicable City ordinances consistent with law.

4.2. **Relocation in Public Grounds.** City may require Company at Company's expense to relocate or remove its Electric Facilities from Public Ground upon a finding by City that the Electric Facilities have become or will become a substantial impairment to the existing or proposed public use of the Public Ground. Such relocation shall comply with applicable ordinances consistent with law.

4.3. **Projects with Federal Funding.** Relocation, removal, or rearrangement of any Electric Facilities made necessary because of the extension into or through City of a federally-aided highway project shall be governed by the provisions of Minnesota Statutes Section 161.46.

SECTION 5. TREE TRIMMING.

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

SECTION 6. INDEMNIFICATION.

6.1. **Indemnity of City.** Company shall indemnify and hold the City harmless from any and all liability, on account of injury to persons or damage to property occasioned by the construction, maintenance, repair, inspection, the issuance of permits, or the operation of the Electric Facilities located in the Public Ways and Public Grounds. The City shall not be indemnified for losses or claims occasioned through its own negligence except for losses or claims arising out of or alleging the City's negligence as to the issuance of permits for, or inspection of, Company's plans or work.

6.2. **Defense of City.** In the event a suit is brought against the City under circumstances where this agreement to indemnify applies, Company at its sole cost and expense shall defend the City in such suit if 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 shall not be unreasonably withheld. This section is not, as to third parties, a waiver of any defense or immunity otherwise available to the City; and Company, in defending any action on behalf of the City shall be entitled to assert in any action every defense or immunity that the City could assert in its own behalf. This franchise agreement shall not be interpreted to constitute a waiver by the City of any of its defenses of immunity or limitations on liability under Minnesota Statutes, Chapter 466.

SECTION 7. VACATION OF PUBLIC WAYS.

The City shall give Company at least two weeks prior written notice of a proposed vacation of a Public Way. The City and the Company shall comply with Minnesota Rules, 7819.3200 and applicable ordinances consistent with law.

SECTION 8. ABANDONED FACILITIES.

The Company shall comply with City ordinances, Minnesota Statutes, Section 216D.01 et seq. and Minnesota Rules Part 7819.3300, as they may be amended from time to time. The

Company shall maintain records describing the exact location of all abandoned and retired Facilities within the City, produce such records at the City's request and comply with the location requirements of Section 216D.04 with respect to all Facilities, including abandoned and retired Facilities.

SECTION 9. 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 Company, succeed to all of the rights and obligations of the City provided in this Ordinance.

SECTION 10. FRANCHISE FEE.

10.1. Form. During the term of the franchise hereby granted, and in addition to permit fees being imposed or that the city has a right to impose, the City may charge the Company a franchise fee. The fee may be (i) a percentage of gross revenues received by the Company for its operations within the City, or (ii) a flat fee per customer based on a metered service to retail customers within the City or on some other similar basis, or (iii) a fee based on units of energy delivered to any class of retail customers within the corporate limits of the City. The method of imposing the franchise fee, the percentage of revenue rate, or the flat rate based on metered service may differ for each customer class or combined the methods described in (i)-(iii) above in assessing the fee. The City shall seek to use a formula that provides a stable and predictable amount of fees, without placing the Company at a competitive disadvantage. If the Company claims that the City required fee formula is discriminatory or otherwise places the Company at a competitive disadvantage, the Company shall provide a formula that will produce a substantially similar fee amount to the City and reimburse the City's reasonable fees and costs in reviewing and implementing the formula. The City will attempt to accommodate the Company but is under no franchise obligation to adopt the Company-proposed franchise fee formula and each review will not delay the implementation of the City-imposed fee.

10.2. Separate Ordinance. The franchise fee shall be imposed by separate ordinance duly adopted by the City Council, which ordinance shall not be adopted until at least one hundred twenty (120) days after written notice enclosing such proposed ordinance has been served upon the

Company. The fee shall become effective with the first billing cycle of the next month following the month the City adopts such ordinance.

10.3. **Condition of Fee.** The separate ordinance imposing the fee shall not be effective against the Company unless it lawfully imposes a fee of the same or substantially similar amount on the sale of electric energy within the City by any other electric energy supplier, provided that, as to such supplier, the City has the authority or contractual right to require a franchise fee or similar fee through a previously agreed upon franchise.

10.4. **Collection of Fee.** The franchise fee shall be payable not less than quarterly during complete billing months of the period for which payment is to be made. The franchise fee formula may be changed from time to time, however the change shall meet the same notice requirements and the fee may not be changed more often than annually. Such fee shall not exceed any amount that the Company may legally charge to its customers prior to payment to the City. Such fee is subject to substantial reductions to account for uncollectibles and customer refunds incurred by the Company. The Company agrees to make available for inspection by the City at reasonable times all records necessary to audit the Company's determination of the franchise fee payments.

10.5. **Continuation of Franchise Fee.** If this franchise expires and the City and the Company are unable to agree upon terms of a new franchise, the franchise fee, if any being imposed by the City at the time this franchise expires, will remain in effect until a new franchise is agreed upon.

SECTION 11. PROVISIONS OF ORDINANCE.

11.1. **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; provided, however, that if the City is unable to enforce its franchise fee provisions for any reason the City will be allowed to amend the franchise agreement to impose a franchise fee pursuant to statute. Where a provision of any other City ordinance conflicts with the provisions of this Ordinance, the provisions of this Ordinance shall prevail.

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

SECTION 12. AMENDMENT PROCEDURE.

Either party to this franchise agreement may at any time propose that the agreement be amended. This Ordinance may be amended at any time by the City passing a subsequent ordinance declaring the provisions of the amendment, which amendatory ordinance shall become effective upon the filing of Company's written consent thereto with the City Administrator after City Council adoption of the amendatory ordinance.

Passed by the Council this _____ day of _____, 2012.

Attest:

Mayor

City Administrator

Bill Klyve from Otter Tail Power Company presented information regarding an energy review study to identify areas of energy savings. A motion was made by Eilers and seconded by Hanson to approve moving forward with the energy review study. All voted in favor. None voted against. The motion was carried.

Dean Helstrom was present to discuss the sidewalk situation at the new bakery building. A motion was made by Hanson and seconded by Eilers to approve having half of the proposed sidewalk at the new bakery building paid for by the project. All voted in favor. None voted against. The motion was carried.

Dean Helstrom presented a short review of the televising done for the next infrastructure project area (Highway 75 to the east side of town, then 6th Street East to Highway 68).

Dean Helstrom presented an invoice from Bolton and Menk for services rendered in the amount of \$18,273.35. A motion was made by Hanson and seconded by Eilers to approve the invoice. All voted in favor. None voted against. The motion was carried.

Blaine Merritt was present to discuss advertising on the backfield fence at Lake Sylvan ball field. A motion was made by Hanson and seconded by Eilers to approve COBRA to advertise on the Lake Sylvan ball field fencing. All voted in favor. None voted against. The motion was carried.

Nicholas Johnson discussed changes to the 2013 Budget as well as the preliminary levy.

Resolution 2012-8-21-1, a resolution providing for the adjustment of special assessment, was reviewed. A motion was made by Bormann and seconded by Hanson to approve. Bies, Hanson, and Bormann voted in favor. Eilers voted against. The motion was carried.

Resolution No. 2012-8-21-1

Resolution Providing For The Adjustment of Special Assessment

Whereas, Lots 4 & 5, Block 7, Original Plat to the City of Canby (Tax Parcel ID 31-300-0704) was assessed the sum of \$12,628.68 for the 2011 parking lot improvement project and,

Whereas, said assessment was based on square footage cost for 4679 square feet of area improved, and

Whereas, upon remeasurement it is found that the actual square feet of area improved is 3462 square feet, resulting in an over assessment of \$3,286.68,

Therefore, be it resolved, that the City of Canby reduce the original assessment against said parcel to the sum of \$9,342.00. The City Administrator shall recertify the corrected amount to the Yellow Medicine County Auditor.

Passed by the Council of the City of Canby on this 21 day of August, 2012.

Attest:

Mayor

City Administrator

Resolution 2012-8-21-2, a resolution providing for the issuance, sale, and delivery of \$750,000 taxable general obligation tax increment bonds, series 2012A; establishing the terms and conditions therefor; creating a construction account and a debt service account therefor; and awarding the sale thereof, was reviewed. A motion was made by Hanson and seconded by Bormann to adopt Resolution 2012-8-21-2. All voted in favor. None voted against. The motion was carried. Resolution 2012-8-21-2 will be attached to the minutes hereto and made a part thereof.

Nicholas Johnson discussed a request from John Meyer to pursue a SMAHC (Southwest Minnesota Arts and Humanities Council) grant request as part of the theater project. Eilers asked if Johnson would be able to do the grant instead of paying John. Johnson responded he would be able to. A motion was made by Bormann and seconded by Eilers to pursue the grant opportunity. All voted in favor. None voted against. The motion was carried.

A motion was made by Hanson and seconded by Bormann to adjourn to a closed session to discuss union negotiations for LELS, sale prices for lots in Out lot A of the 1944 Addition, and employment agreement negotiations for the City Administrator. All voted in favor. None voted against. The motion was carried.

Denise Hanson exited the meeting.

A motion was made by Eilers and seconded by Bormann to reopen the meeting.

A motion was made by Bormann and seconded by Eilers to approve selling proposed lots 1 through 5 to the Canby HRA for the cost of platting and legal fees; selling proposed lots 7 through 17 to the public at the price of \$2,500 per lot; and selling proposed lots 18 and 19 to the school district for the cost of platting and legal fees. The priority order for the sale of the public lots would be to the adjacent property owners across the alley first; then to any property owner in blocks 7, 8, and 9 of the 1944 Addition; then to the general public. All voted in favor. None voted against. The motion was carried.

A motion was made by Bormann and seconded by Eilers to approve the City Administrator's employment agreement for 2013. All voted in favor. None voted against. The motion was carried.

A motion was made by Eilers and seconded by Bormann to adjourn the meeting. All voted in favor. None voted against. The motion was carried.

Attest:

Mayor

City Administrator