

**ORDINANCE NO. 5503**

**AN ORDINANCE REPEALING AND REENACTING APPENDIX B (FRANCHISES), SUB-PART II, DIVISION 2 OF THE CITY OF MINOT CODE OF ORDINANCES**

WHEREAS, the City of Minot is a political subdivision lawfully recognized in the state of North Dakota as a home rule city and possessing municipal powers and authority pursuant to its home rule charter and the provision of North Dakota Century Code (NDCC) § 40-05.1, as well as statutory provisions codified in NDCC 40-05-01;

WHEREAS, the City of Minot previously implemented ordinances in 2000, which had a term of 20 years, relating to gas distribution franchises, particularly with Montana-Dakota Utilities Co.;

WHEREAS, the City of Minot now wishes to repeal the expired franchise ordinance and reenact the franchise ordinance for a new 20-year term;

§1. That Division 2, of Sub-Part II, of Appendix B (Franchises), of the Code of Ordinances, City of Minot, North Dakota, is hereby repealed and reenacted to read as follows:

**SUB-PART II. - GAS DISTRIBUTION**

**DIVISION 2. - MONTANA-DAKOTA UTILITIES CO.**

**Sec. 1. - Definitions.**

For the purposes of this ordinance, the following terms shall have the following meanings:

- (1) *City* is the City of Minot, North Dakota.
- (2) *Company* is Montana-Dakota Utilities Co., the grantee of the rights under this franchise.
- (3) *Council* is the city council of the City of Minot, North Dakota.
- (4) *Person* is any person, firm, partnership, association, corporation, company, or organization of any kind.
- (5) *Public Right-of-Way* is any public street, public alley, public walkway, city-owned property, public ground, or any other public right-of-way within the City.

**Sec. 2. - Franchise Granted.**

The City grants to Company its successors and assigns, subject to the limitations herein stated, the right and franchise to occupy and use its Public Right-of-Way for the purpose of constructing, maintaining and operating within, upon, in and under the same, a gas distribution system for transmitting and distributing natural or manufactured gas, or a mixture of both, for public and private use.

**Sec. 3. - Duty of Company to Maintain Distribution System; Rates.**

Grantee shall maintain an efficient distribution system for furnishing natural or manufactured gas, or a mixture of both, for public and private use at such reasonable rates as may be approved by the Public Service Commission of the State of North Dakota and under such orders, rules or regulations as may be issued by a federal or state agency having jurisdiction thereof.

**Sec. 4. - Franchise Nonexclusive.**

This franchise shall not be exclusive and shall not be construed to prevent the City from granting to any other party the right to use its Public Right-of-Way for like purposes.

**Sec. 5. – Police Powers.**

The City reserves any right it may have, under its police power or otherwise, to control or regulate the use by Company of its Public Right-of-Way. Without limiting the generality of the foregoing, the City specifically reserves the right by ordinance or resolution, or both, to require some or all of the following of Company in the exercise of its franchise rights:

- (1) Application for a permit to perform proposed work within the Public Right-of-Way, including particulars as to what is proposed to be done, when and for how long, (the granting of which shall not be unreasonably withheld or delayed by the City);
- (2) The provision of liability insurance coverage or self-insurance fund, either on a case-by-case or blanket basis, to provide appropriate financial responsibility in the event that the operations of Company under the franchise result in injuries to persons or property, or both;
- (3) The provision of contract performance bonds to secure the complete, timely, and satisfactory performance of work performed within the Public Right-of-Way;
- (4) The provision of specific warranties of continuing satisfactory performance and condition of Public Right-of-Way improvements for a specified period of time in respect to completed repairs or alterations within the Public Right-of-Way; and
- (5) Company will provide Company's "as built" plans to City on a request basis. These plans will be used for City reference only.

**Sec. 6. – Conditions on Public Right-of-Way Occupancy**

- (1) *Placement of Fixtures.* The Company shall submit plans to install, relocate, or place gas distribution facilities in the Public Right-of-Way to the City engineer for prior approval to ensure such gas distribution facilities do not interfere with sanitary sewer mains, storm sewer mains, water hydrants, water mains, flood control works, or other utility installations. The City engineer shall approve such usage, location, and placement of fixtures if same does not interfere with present or future usage by City utilities, with any disapproval of same being subject to appeal to the City Council. The City engineer shall have the right to inspect the placement of Company fixtures in order to insure compliance with approved plans. In the event the placement of Company fixtures is not in compliance with approved plans, the City engineer shall have the right to require removal of Company fixtures.
- (2) *Use and Restoration.* In erecting, installing, enlarging, repairing, maintaining, moving, removing, or replacing said gas distribution system, or any other fixtures or appurtenances installed in pursuance of the authority hereby granted, the Company shall, in all cases, adhere to the City's standard specification and details for construction in the Public Right-of-Way in effect at the time of the work, and replace the Public Right-of-Way streets, alleys, sidewalks, City utility lines, City-owned properties, or public ways in, on, under, over, or across which the same are located, in as good condition as they were prior to said operations, subject to the ordinances made and provided therefor.
- (3) *Relocation Due to Street Vacation or Municipal Improvement Projects.* In the event that at any time during the period of this franchise the City Council initiates an improvement project which requires the removal or relocation of the Company's facilities, located in the Public Right-of-Way, the Company, upon reasonable notice by the City, shall remove,

relay, and relocate its gas distribution system and any other Company fixtures or appurtenances without charge to the City.

- (4) *Projects with Federal Funding.* Any relocation, removal, or arrangements of any such facilities made necessary because of the extension into or through the City of a federally aided state trunk highway included within the National System of Interstate Highways shall be governed by the provisions of Section 24-01-41 of NDCC, and any future amendments hereof. In the event that Federal or state grants are made available for financing of any City project requiring relocation of the Company's facilities, Company shall be reimbursed for removal or relocation costs to the extent that the federal or state funds are available. City shall not be required to commit any local funds to relocation or removal costs of Company's facilities located in the Public Right-of-Way on any improvement project initiated by the City Council.
- (5) *Vacation of Public Right-of-Way.* City shall not vacate any Public Right-of-Way for either public or private purposes, after the installation of the gas distribution system or any other fixtures or appurtenances, unless adequate easements for the operation of said facilities are provided or the reasonable cost of relocating the same and the loss and expense resulting from such relocation is first paid to the Company (except there shall be no reimbursement if the vacation is solely for a City improvement), and any such vacation shall not operate to deprive the Company of the right to operate such facilities until this has been accomplished.
- (6) *Relocation due to Mouse River Enhanced Flood Protection Project.* For utility relocations necessary as a result of the Mouse River Enhanced Flood Protection Project within the corporate limits of the City the Souris River Joint Board may have the ability to direct and approve utility relocations, but only after receiving prior written approval from the City engineer or public works director. Any and all expenses relating to relocating utilities pursuant to this subsection shall be paid in accordance with the Company's agreement with the Souris River Joint Board.

#### **Sec 7. – Permission to Trim Trees**

Unless otherwise provided in any permit or regulation of the City under separate ordinance, Company may trim trees and shrubs in and over the Public Right-of-Way to the extent the Company determines it is necessary to avoid interference with the construction, operation, maintenance and repair of the Company's gas distribution facilities, provided the Company shall indemnify and hold the City harmless from any liability arising therefrom.

#### **Sec. 8. – Indemnification, Defense, and Liability Insurance.**

- (1) Company shall indemnify and save and hold the City harmless from any loss, damage or costs due to the construction, installation, maintenance, and operation of its distribution system, and its use of the Public Right-of-Way.
- (2) In the event a lawsuit is brought against the City under circumstances where this franchise ordinance requires Company to indemnify City, Company, at its sole cost and expense, shall defend the City in such lawsuit if written notice thereof is promptly given the Company within a period wherein Company is not prejudiced by lack of such notice. If Company is required to indemnify and defend City, 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 on its own behalf.

- (3) Company shall maintain liability coverage, either through insurance policies or through a self-insurance fund, in an amount of not less than \$1,000,000.00.

**Sec. 9. - Assignment of franchise.**

Company shall not assign this franchise to any other entity without the City's approval, which the City shall not unreasonably withhold. In the event of such an assignment, all of Company's obligations shall be binding upon its assignee.

**Sec. 10. - Acceptance of franchise.**

Within thirty (30) days after Company is notified of passage and final approval of this ordinance, Company shall file with the clerk or finance director of the City its written acceptance of this franchise. If the Company does not file a written acceptance with the City within 30 days after notification, the City by resolution may revoke this franchise.

**Sec. 11. - Duration of franchise.**

This franchise shall continue and remain in full force and effect for a period of twenty (20) years from the date upon which this ordinance shall become effective as provided by law, unless renewed, revoked, or terminated sooner.

**Sec. 12. – Rights Reserved.**

The right is reserved to the City to adopt, in addition to the provisions herein contained and existing applicable ordinances, such additional regulations as it shall find necessary in the exercise of its police powers, provided such regulations shall be reasonable and not in conflict with the rights herein granted.

Although no franchise fees or revenue rights of the City are specified or required at this time pursuant to this ordinance granting a franchise to Company, nothing herein shall be construed as an abandonment by the City of its future right to impose taxes or fees on the Company under the then applicable law.

**Sec. 13. – Severability.**

If any section, subsection, sentence, clause, phrase, or other portion of this ordinance or franchise is, for any reason, declared invalid, in whole or in part, by any court, agency, commission, legislative body or other authority of competent jurisdiction, such portion shall be deemed to be a separate, distinct and independent portion. Such declaration shall not affect the validity of the remaining portions hereof, which other portions shall continue in full force and effect.

**Sec. 14. – Limitation on Applicability.**

This ordinance constitutes a franchise agreement 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.

**Sec. 15. – Amendment.**

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 Company's written acceptance in the same way as if it were the original acceptance contemplated under Section 10.

**Sec. 16. – Notice.**

All notices, reports, or demands required to be given in writing under this franchise agreement will be deemed to be given when delivered personally to the Person designated below, or when five days have elapsed after it is deposited in United States mail in a sealed envelope, with registered or certified mail, postage prepaid thereon, or on the next business day if sent by express mail or overnight air courier addressed to the party to which notice is being given, as follows:

If to City:                      City of Minot  
   City Manager  
   PO Box 5006  
   Minot, ND 58702

If to Company:                Montana-Dakota Utilities Co.  
   District Manager  
   1130 20<sup>th</sup> Ave. SW  
   Minot, ND 58701

**Sec. 17. – Entire Agreement.**

This ordinance and franchise agreement represent the entire understanding and agreement between the parties hereto with respect to the subject matter hereof.

**Sec. 18. – Previous Franchises Superseded.**

This ordinance and franchise agreement, upon final adoption and timely acceptance by the Company, supersedes any previously franchise granted to the Company or its predecessor with respect to the subject matter hereof.

§2. This ordinance shall become effective upon final passage and approval.

PASSED FIRST READING:                      May 18, 2020

PASSED SECOND READING:                      \_\_\_\_\_

ATTEST:

APPROVED:

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Kelly Matalka, City Clerk

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Shaun Sipma, Mayor