INFORMATION MEMO
Gas and Electric Utility Franchising

Learn about city gas and electric utility franchising authority, especially authority to charge franchise fees. This memo includes links to two model franchise ordinances incorporating city rights under state law and many of the Minnesota Public Utility Commission’s right-of-way management rules, and two sample franchise fee ordinances.

The League thanks James Strommen of the Kennedy and Graven Law Firm, who is attorney for the Suburban Rate Authority, for his assistance in creating this memo and the model and sample ordinances.

RELEVANT LINKS:


LMC Information Memo, Cell Towers, Small Cell Technologies & Distributed Antenna Systems.

Minn. R. ch. 7819.

I. Franchising authority

Cities have broad gas and electric franchise rights under state law. In Minnesota, these franchises are negotiated and take the form of a contract set forth in an ordinance. Cities have the right to require franchises and to include certain terms, such as franchise fees. There is little case law guidance on what specific franchise terms may be required by the city. Accordingly, a franchise can incorporate all reasonable terms within the limits of a city’s statutory franchise and police power authority. These rights are extensive and can be found in state statute and case law.

II. Franchising ordinances

There has been little legislative change in the scope of city franchise authority in recent years. However, in 2017 new laws regarding the regulation of telecommunications right-of-way users were adopted. Though outside the scope of this memo, it is recommended cities review their ordinances to ensure compliance with the new statutory requirements and new federal requirements. The main focus of discussion involving gas and electric franchises in the post-1999 right-of-way standards rules by the Minnesota Public Utilities Commission (MPUC) is the franchise fee. That remains a matter negotiated with the utility but also one where cities should take care to retain their full franchise fee rights in the franchise agreement itself.
A. Fees

The city’s legal right to include a particular franchise provision, and the practical realities facing a city when the utility refuses to agree, are two quite different matters. Though a city may have the right to insist on a franchise fee, potentially as high as 8 percent of the utility’s gross revenues, it is unlikely that the utility would readily agree to such a percentage, even though the utility passes the fee through to its customers within the city.

Gas and electric utilities remain concerned that, despite their retained monopoly or near monopoly status, franchise fees will harm their position relative to perceived competitors. This fee pass-through also becomes an issue to the residential and business customers who pay the fee. Thus, cities must be careful to gauge the level of local acceptance or resistance to the exercise of their full franchise rights under the law. As a result of the realities of the franchise negotiation and community acceptance process, a “take it or leave it” franchise ordinance that includes the imposition of franchise fees and strict right-of-way management provisions may be difficult to enact without compromise.

B. Right-of-way rules

The two franchise ordinances offered here incorporate many of the MPUC’s right-of-way management rules on such matters as street restoration, relocation for utilities, construction performance bonds, mapping information, street vacation, removal of abandoned facilities, and indemnification. The MPUC right-of-way rules were largely a product of negotiations between local government units and members of the utility industry, including a number of gas and electric providers. By all indications—lack of formal legal disputes over terms—these rules have been very successful.

To take full advantage of the rules and to fully implement the right-of-way management authority granted to cities by Minn. Stat. §§ 237.162 - .163, a city should consider adopting a comprehensive right-of-way management ordinance by exercising its option under state law.

C. Model ordinance notes

The two model franchise ordinances offered here are the result of a cooperative effort between the League of Minnesota Cities and James Strommen of the Kennedy & Graven Law Firm, attorney for the Suburban Rate Authority (SRA), a joint powers organization consisting of 29 Twin City suburban municipalities.
The models are based on actual ordinances that have been reviewed by gas and electric companies. Because these models are more city-oriented than many currently existing franchises, utilities have objected to many of the provisions contained in these models. As a result, there is likely to be negotiation on at least the following provisions:

- Franchise fees; in form, amount, and class of service distinctions.
- Fee obligation on perceived competitors.
- Where a city seeks additional rate and service consideration regarding renewable energy or infrastructure investment.
- Rights regarding city-requested location and relocation of facilities.
- The city’s right to amend the franchise during the term.

Each city must evaluate the importance of the provisions contained in these models as such provisions may affect the city’s particular needs. One franchise cannot fit all because of the many variations of city-utility relationships, including factors such as urban, suburban, or rural settings; developing versus redeveloping cities; single versus multiple utilities serving the city; residential-commercial customer mix; larger employer versus diversified economic base; the presence of a municipal utility or contemplated utility; and revenue needs of the city.

One section is taken from the City of Minneapolis-Xcel Energy Electric franchise. It introduces an agreement to obtain additional service and reliability reporting from the utility for comparison purposes among other utility service areas. These are matters governed by the MPUC and routinely produced by regulated utilities, but not on a city-by-city basis. This section is slightly different, depending on whether it is a gas or electric utility.

Electric utilities have reliability issues such as outages and reduced power. Gas utilities bring the public safety risk of unsafe gas lines when infrastructure ages. This type of information is available to all customers through the MPUC. Putting a provision in the franchise establishing annual reporting may heighten the city and the company’s awareness of where improvements can be made within the city.

For cities interested in establishing additional dialog with the utility and identifying its service record in the franchised city when compared with other cities, this provision can achieve greater awareness and perhaps heightened attention by the utility to the needs of the city.
III. Further assistance

For more information, contact the League or James Strommen.