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Title: Amending Appendix K, District Cooling Franchise-District Cooling St. Paul, Inc., to extend the term of the franchise to September 1, 2033.

Sponsors: Kathy Lantry

Indexes:

Code sections:

Attachments:

Date	Ver.	Action By	Action	Result
9/30/2013	1	Mayor's Office	Signed	
9/25/2013	1	City Council	Adopted	Pass
9/18/2013	1	City Council	Laid Over to Final Adoption	Pass
9/11/2013	1	City Council	Laid Over to Final Adoption	Pass
9/4/2013	1	City Council	Laid Over to Final Adoption	Pass
8/28/2013	1	City Council	Laid Over to Final Adoption	Pass
8/21/2013	1	City Council	Public Hearing Closed; Laid Over to Fourth Reading/Final Adoption	Pass
8/7/2013	1	City Council	Laid Over to Third Reading/Public Hearing	
7/24/2013	1	City Council	Laid Over to Second Reading	

Amending Appendix K, District Cooling Franchise-District Cooling St. Paul, Inc., to extend the term of the franchise to September 1, 2033.

THE COUNCIL OF THE CITY OF SAINT PAUL DOES HEREBY ORDAIN:

Section 1

Appendix K is hereby amended to read as follows:

Section 1. Franchise granted.

District Cooling St. Paul, Inc., (f/k/a District Energy Services, Inc.) a nonprofit Minnesota corporation, hereinafter referred to as "District Cooling," is hereby granted a franchise to use and occupy the streets and other public property within the City of Saint Paul for the purpose of constructing, maintaining and operating a system of pipes, subways and manholes with all other necessary appurtenances only for carrying on a district cooling system providing thermal energy to customers within said city and for provision of a fiber optic network for District Cooling and governmental use by the City of Saint Paul, the State of Minnesota, the County of Ramsey, and by other government entities as may hereafter be approved by city council resolution. Said franchise may not be sold, transferred, assigned, pledged, mortgaged or in any way disposed of or encumbered without the consent of the city except as provided in Section 16.

Section 2. Definitions.

For the purpose of this chapter the following terms, phrases, words and their derivations shall have the meaning given herein. When not inconsistent with the context, words used in the present tense include the

future, words in the plural number include the singular number, and words in the singular number include the plural number. The words "shall" and "will" are mandatory and "may" is permissive. Words not defined shall be given their common and ordinary meaning.

A. *Capitalization cost* shall mean the total cost incurred by District Cooling for the tangible assets of the district cooling system, exclusive of intangible assets such as goodwill or value of the franchise; provided that capitalization cost shall in no event be less than the amount required to fully pay and discharge all debts of the company incurred in connection with the district cooling system.

B. *City* shall mean the City of Saint Paul, Minnesota, a home-rule municipal corporation.

C. *Distribution facilities* shall mean all District Cooling piping, tunnels, conduits, vaults, chambers, cable or any other appurtenance or structure located in the streets and necessary or used for the delivery of thermal energy or a fiber optic network for government use.

D. *District cooling service agreement* shall mean the standard form of the uniform contract for service entered into by District Cooling and its customers.

E. *District cooling system or system* shall mean the distribution facilities together with the chillers, cooling towers, pumps, and other District Cooling equipment used to provide chilled water.

F. *District energy services, District Cooling* or company shall mean District Cooling St. Paul, Inc., a subsidiary of District Heating Development Company, d.b.a. District Energy Saint Paul, Inc., District Cooling's subsidiaries, successors and assigns.

G. *District Energy Saint Paul, Inc., District Energy or District Heating Development Company* shall mean District Heating Development Company, d.b.a. District Energy Saint Paul, Inc., its subsidiaries, successors and assigns, excluding District Cooling.

H. *Financial services director* shall mean the director of the office of financial services for the City of Saint Paul or his or her designee, or any successor to his or her functions.

I. *Gross earnings* shall mean all sums received or receivable by the company in demand and energy charges from the sale of thermal energy to customers of District Cooling and all sums collected by District Cooling for routine maintenance or use of the fiber optic network serving the State of Minnesota, the County of Ramsey, and other government entities as approved by the City. For purposes of this franchise and the district heating franchise, District Energy shall not be deemed a customer of District Cooling nor shall District Cooling be deemed a customer of District Energy.

J. *Public works director* shall mean the director of the department of public works for the City of Saint Paul or his or her designee, or any successor to his or her functions.

K. *Street* shall mean the surface, and the spaces above and below, any public street, boulevard, road, highway, freeway, lane, alley, court, sidewalk, parkway, river, skyway or skyway bridge, or any other public place or area under control of the city, now or hereafter existing.

Section 3. Application and service of notice.

The Office of Financial Services of the City of Saint Paul is the department that is primarily responsible for the city's administration of this franchise. Except as otherwise specifically provided herein, any applications and notices required or permitted to be given under this ordinance shall be deemed properly given when deposited with the United States Postal Service, postage paid, addressed to the party to receive same at the address set forth below, or at such other address of which the party to receive the notice shall have designated in the franchise. The finance director shall develop all forms necessary to administer this chapter.

Notices to the city shall be addressed to the following:

Director of Financial Services
Room 700 City Hall
15 West Kellogg Boulevard
St. Paul, MN 55102

Notices to District Cooling shall be addressed to the following:

President
District Cooling St. Paul, Inc.
76 West Kellogg Boulevard
St. Paul, MN 55102-1611

Section 4. Term of franchise.

~~This franchise shall be in full force and effect for a term and period of twenty (20) years, beginning on the~~

~~effective date of this ordinance.~~ This franchise shall be in full force and effect until September 1, 2033.

Section 5. Nonexclusive franchise.

This franchise for the operation of a district cooling system shall be a nonexclusive franchise. The franchise granted shall be subject to the limitations imposed by this ordinance and reasonable regulations designed to protect the health, safety and welfare of the populace. District Cooling must specify to the public works director the locations of all facilities placed in the streets and shall strive to notify the public works director not less than ninety (90) days prior to any additions to these facilities. District Cooling may request that any information provided pursuant to this franchise be deemed nonpublic data as defined in Minnesota Statutes 13.37 et seq., and the city shall treat the information as nonpublic in accordance with the terms of that statute and any other applicable ordinances, rules or regulations.

Section 6. Interpretation.

Unless otherwise specifically prescribed herein, the following provisions shall govern the interpretation and construction of the franchise granted under this ordinance:

- A. District Cooling shall not be relieved of its obligation to promptly comply with any provision of this franchise by any failure of the city to enforce prompt compliance with the same or any other provision.
- B. Any right or power conferred or duly imposed upon any officer, employee, department, or board of the city is subject to transfer by operation of law to any other officer, employee, department or board of the city.
- C. Unless otherwise directly or indirectly provided herein, this franchise shall not relieve District Cooling of any requirement of the city Charter or provision of the Legislative or Administrative codes of the city.
- D. The granting of this franchise or any of the provisions contained herein shall not be construed to prevent the city from granting a similar franchise to any other person or corporation.
- E. This franchise is granted pursuant to applicable state and federal law and District Cooling shall at all times comply with all applicable present and future laws, rules and regulations. By acceptance of this franchise District Cooling does not waive its rights under such laws, rules and regulations. Furthermore, District Cooling shall obtain all necessary permits, franchises and authority required pursuant to city, state and federal rules, regulations and laws.

Section 7. Limitations upon franchise.

- A. No privilege or exemption is granted or conferred by this franchise except those specifically prescribed herein.
- B. Any privilege claimed under this franchise by District Cooling in any street shall be subordinate to any prior recorded easement.

Section 8. Rights reserved to city.

The city reserves every right and power which is required to be reserved by any provision of the city Charter or any statute, rule or regulation. Except as otherwise provided herein, neither the granting of this franchise nor any provisions thereof shall constitute a waiver or bar to the exercise of any governmental right or power of the city.

Section 9. Duties and responsibilities.

The finance director, or his or her duly authorized representative, is the principal city official responsible for the administration of this franchise, and all questions regarding interpretation or application of this franchise shall be raised initially with that designated official.

Failure or refusal by the finance director to respond to any question other than questions related to Section 23 herein within thirty (30) days of the date he/she receives it in written form, or District Cooling's receipt of a written response from the finance director to any question submitted in written form, shall be deemed exhaustion by District Cooling of its administrative remedies under this ordinance.

Section 10. Technical standards.

The franchise granted herein shall extend to the construction, operation and maintenance of the district cooling system by District Cooling in the City of Saint Paul and the fiber optic network installed for District Cooling and governmental use.

District Cooling shall perform all work and make all installations in conformity with the standards for installation established by the public works director, which standards shall be consistent with those administered for all similar work by other parties. District Cooling shall, prior to commencement of any construction or usage of the public streets or other public property within the City of Saint Paul, file with the public works director a detailed routing map showing the placement of all facilities and other details of such construction or usage. Upon

completion of construction District Cooling shall provide the public works director with a set of "as built" drawings.

District Cooling, in the installation, maintenance and operation of its distribution facilities, shall be subject to such reasonable regulations as may lawfully be provided by the city, and no equipment shall be installed or laid by District Cooling within the streets, except upon application to the public works director or other persons designated by the city council, and after written permission is granted by said director or person. District Cooling and the city shall make reasonable good faith efforts to advise each other of plans and programs, both long and short range, for the construction of improvements and facilities in public streets and other public property which might affect the other party or require its coordination. District Cooling shall not excavate or make installation in any public way without having obtained a permit to do so as required by Chapters 116 and 135 of the Saint Paul Legislative Code, and shall give the public works director at least forty-eight (48) hours' notice prior to any excavation or installation that requires a permit except in cases of emergency.

Section 11. Rates and regulation.

With respect to the setting of rates charged to customers the following shall apply:

A. All rates made, demanded or received by District Cooling shall be just and reasonable. Rates shall not be unreasonably preferential, unreasonably prejudicial or discriminatory, but shall be sufficient, equitable and consistent in application to each class of customers. Rates shall generate sufficient revenue to allow District Cooling to recover its reasonable operating cost and expenses; to provide for the timely and orderly payment of costs and expenses; to provide for the timely and orderly retirement of debt including, but not limited to, the bonds issued by the HRA and other public issuers and the HRA subordinate loans issued for financing the system; to provide coverage on such bonds and the debt service on HRA subordinate loans; and to provide for improvements, enlargements and extensions necessary to adequately service the territory of the city, including the principal and interest to become due on obligations issued or to be issued.

B. The rates contained in Schedule A, attached to this ordinance incorporated herein by reference, shall remain in force until amended or changed.

C. District Cooling shall not directly or indirectly charge, demand, collect or receive from any customer or person a greater or less compensation for any service rendered or to be rendered by it than that prescribed in Schedule A; nor shall any person knowingly receive or accept any service from District Cooling for a compensation greater or less than that prescribed in Schedule A. District Cooling shall not, as to rates or service, make or grant any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage. Nothing contained in this ordinance shall be construed to impair the tax-exempt status of bonds issued to finance the system. "Service," as used herein, does not include customer connection charges or other schedule of charges for specific services to individual customers.

D. District Cooling shall keep and render its books, accounts, papers and records accurately and faithfully in the manner and form prescribed by the city, and shall comply with all directions of the city relating to these books, accounts, papers and records, including furnishing of such information or compilations and permitting an audit of the books, accounts, papers and records, as may be requested by the city. Such books, accounts, papers and records shall include a detailed tracking of all expenses directly related to the operation of the system and any other subsidiary operations of District Cooling or District Energy, and an allocation of those expenses by business and customer classes.

E. After thirty (30) days' notice to the city, District Cooling may file pursuant to Section 23 a new or amended Schedule A, containing new or amended rates, fees and/or charges, together with rules and regulations not inconsistent with the district cooling service agreement. Such changes are jurisdictional to changes in Schedule A. Such new or amended rates shall be effective and may be charged on the tenth day after the filing of the new or amended Schedule A in the office of the city clerk, and shall continue in effect until approved or denied by the city council by resolution, or until deemed approved pursuant to Section 23.

F. The proposed changes shall be approved by a city council resolution if they are just, reasonable and nondiscriminatory. The city shall be required to take into account the requirements of subsection 11.A. above in reviewing the proposed new or amended Schedule A. The city shall also be required to take into account the operation of the terms and conditions of the district cooling service agreement, including Articles VI, VII and XXI thereof, which is the uniform contract entered into by District Cooling and its customers providing for a detailed method of charges for demand and energy related costs. The district cooling service agreement shall be filed in the office of the city clerk at the same time as the written acceptance required by Section 26 herein.

Amendments to the district cooling service agreement shall be filed with the city clerk at least thirty (30) days prior to the effective date of such an amendment or amendments; provided, however, that no amendment to Articles VI, VII and XXI of said agreement shall be effective unless and until approved by a city council by resolution. Any amendment to other sections of the district cooling service agreement shall be effective thirty (30) days after filing in the absence of a resolution by the city council disapproving such amendment.

G. Proposed changes to Schedule A shall by city council resolution be approved, approved in part if severable, or denied, and cannot be modified or amended. The city shall require District Cooling to refund or credit to its customers any increases in rates which are in excess of the lawful and reasonable rates as finally determined.

Section 12. Regulatory effort-staffing and process.

For the purpose of assisting the city in the regulation of the activities and rates of District Cooling as provided in this franchise, the finance director shall provide sufficient staff resources for the regulatory effort and the city attorney shall appoint an assistant city attorney or other attorney to perform the legal work that such regulation necessitates.

District Cooling shall pay the city during the term hereof an annual regulatory fee equivalent to the annual regulatory fee paid by District Heating Development Company, d.b.a. District Energy St. Paul, Inc., pursuant to the franchise granted said company. This fee shall be payable annually on July 1, beginning July 1, 2008, and shall be used solely to pay the cost of regulation, which is not limited to but may include that part of the salary and expenses of the individuals appointed by the finance director and the city attorney, their assistant or assistants, clerical help and office expenses, outside accountants, attorneys, advisors and consultants' fees reasonably related to the regulation of District Cooling, its rate schedules, and other matters and operations under this franchise. The amount of such payment or payments shall be allowed as an operating expense of District Cooling in the City of Saint Paul. Such sum shall be adjusted each year by a dollar amount expressed in percentages equal to the percentage increase or decrease in the U.S. All-Cities Consumer Price Index for All Urban Consumers (or its successor index) for the latest twelve-month period, the adjustments to be cumulative and based on the amount of the latest adjustment plus the previous year's payment.

Section 13. Reports to be filed.

District Cooling shall file not later than the twenty-fifth day of each month with the finance director, a report of the number of customers, sales and revenues by classes of service for the preceding month based upon its utility operations within the City of Saint Paul.

District Cooling shall also file with the finance director, within three (3) months after October 1 of each year, in a format to be approved by the finance director, an audited financial statement and any other information requested by the finance director, covering the utility operations within the City of Saint Paul for the preceding year, including all revenues, expenses and plant investment, together with such breakdown and analysis of operating statements as the said person may request. The city shall have the right to require additional information concerning operations under this ordinance from time to time in such form as may be prescribed. The city shall have the right, at all reasonable times and upon reasonable notice, to examine the books of accounts, records, vouchers, disbursements, rates, revenues, contracts, purchases, sales and other transactions bearing on and relevant to the rates District Cooling charges and the service it provides to its customers in the City of Saint Paul.

The provisions of this Section 13 are subject to the regulations of the last sentence in Section 5 hereof.

Section 14. Relocation.

In locating its distribution facilities, District Cooling shall in no way unreasonably interfere with the safety and convenience of ordinary travel along and over the streets nor interfere with other uses to which such places are put by the City of Saint Paul, any of its redevelopment agencies, the Housing and Redevelopment Authority (HRA) of the City of Saint Paul, or the Saint Paul Port Authority (Port Authority) and the Board of Water Commissioners of the City of Saint Paul. In the event it shall become necessary during the term of this franchise to remove or relocate the physical property of District Cooling located within or upon any of the streets or public property in the city because of such interference or use required by the city, HRA or Port Authority or as a result of any public improvement undertaken by the city, HRA or Port Authority, District Cooling shall, when so advised by the city council, remove and relocate said distribution facilities without delay and without cost to the city, HRA or Port Authority and shall place streets or public property in the same condition as they were prior to said removal or relocation. However, after District Cooling has so relocated its distribution facilities, District Cooling shall not within ten (10) years thereafter be required at its owners

expense to make any further relocation of the same distribution facilities if at the time of the first relocation the city had actual notice or knowledge of the subsequent public improvement project. The city shall strive to give the District Cooling at least one hundred eighty (180) days' prior notice of plans for improvements which may require relocation by District Cooling. In the event that District Cooling is required to remove its distribution facilities at the request of the city, the city shall cooperate with District Cooling in order to identify an alternative location for the relocation of the facilities.

Except where required for a public improvement project, the vacation of any street or public property, after the installation of District Cooling distribution facilities, shall not operate to deprive District Cooling of its rights to operate and maintain such distribution facilities until the reasonable cost of relocating the same and the loss and expense resulting from such relocation are first paid to District Cooling by the private property owner.

In an emergency, as determined by the city, when District Cooling or its representative is unavailable and/or unable to provide the necessary immediate repairs to a damaged or malfunctioning installation by District Cooling, or to any faults or settled or sunken areas that may develop in any area over, around or adjacent to the installation of District Cooling, the city, when apprised of such an emergency, shall have the right to make the necessary repairs with the total cost of same being charged to District Cooling. The city must attempt to contact District Cooling at its offices prior to commencement of any emergency repairs.

Section 15. Fees.

During the term of the franchise District Cooling shall pay the city an annual franchise fee in the amount of 3.4 percent of District Cooling's annual gross earnings. Said payments shall be made in monthly installments. The payment shall be due on or before the twenty-fifth calendar day of the succeeding month. The payment obligation shall be met if the payment is mailed and postmarked on or before the due date. In no event shall District Cooling be required to pay a franchise fee in excess of the amount which it can legally collect from its customers in the city by means of a surcharge on its rate schedule for the purpose of collecting the franchise fee.

Section 16. Assignment.

The rights granted District Cooling by this franchise inure to the benefit of District Cooling, and any parent, subsidiary, affiliated or successor entity now or hereafter existing. The rights shall not be assignable without the express written consent of the city council, except District Cooling may assign its rights under this ordinance to District Heating Development Company, d.b.a. District Energy St. Paul, Inc., without such consent, so long as such assignee assumes all of the obligations of the franchise and is bound to the same extent as District Cooling. Such consent shall not be arbitrarily, capriciously or unreasonably withheld, delayed or conditioned. Any required consent is to be evidenced by an ordinance of the city council that fully recites the terms and conditions, if any, upon which consent is given.

Notwithstanding the foregoing, the city hereby consents to the assignment of District Cooling's rights under this ordinance to the trustee for bonds issued by the Housing and Redevelopment Authority of the City of Saint Paul, Minnesota (the "HRA") or to any other public issuer to finance the district cooling system, such assignment being for the purpose of securing District Cooling's obligation to repay the loan from the HRA to District Cooling of the proceeds of such bonds. The city further consents to any amendment or supplement to the security instrument providing for such assignment if executed and delivered in connection with bonds issued in the future by the HRA or any other public issuer to provide financing for the district cooling system. In the event such trustee forecloses upon or enforces such security interest, the city shall recognize the rights of such trustee as a successor to District Cooling under this ordinance without any further consent from the city. The consent of the city further extends to the assignment to a bank, insurance company or other entity providing credit enhancement for the bonds issued by the HRA or any other public issuer if such credit enhancer becomes a co-mortgagee or co-secured party with the bond trustee. The city further consents to the assignment to the HRA of District Cooling's rights under this ordinance to secure repayment of a loan (separate and apart from the loan of bond proceeds) made to District Cooling by the HRA to finance the district cooling system, and the city similarly agrees that if the HRA forecloses upon its security interest in the ordinance, the city will recognize the HRA as the successor to District Cooling under this ordinance without any further consent from the city.

Section 17. Subleasing of facilities.

District Cooling shall not sublease any part of the system to any person or entity not related to or affiliated with District Cooling without the consent of the city. District Cooling must retain responsibility for servicing and

repairing all parts of the system if it enters into any sublease.

Section 18. District Cooling indemnification and liability for damages.

A. The company shall indemnify and save the city whole and harmless from any and all claims for injury or damage to persons or property occasioned by or arising out of the construction, maintenance, operation or repair of the system or by the conduct of District Cooling's business in the city whether or not any act or omission complained of is authorized, allowed or prohibited by this franchise. The company shall reimburse the city for all expenses incurred by the city in defending itself, its officers, agents or employees, against any and all claims for damages or penalties. These expenses shall include, but not be limited to, attorney fees, expert witness fees and court costs and shall also include the reasonable value of any services rendered by any officers or employees of the city.

B. The city shall not and does not by reason of the granting of this franchise assume any liability of District Cooling whatsoever for injury to persons, damage to property, loss of services, damage claims by users, or other penalties. The foregoing does not indemnify the city for its own negligence except for claims arising out of or alleging the city's negligence where such negligence arises out of or is primarily related to the construction, operation, maintenance or repair of said system, including, but not limited to, the issuance of permits and inspection of plans or work. This section is not, as to third parties, a waiver of and defense or immunity otherwise available to District Cooling or the city; and District Cooling, in defending any action on behalf of the city, shall be entitled to assert in any action every defense or immunity that the city would be able to assert on its own behalf.

C. District Cooling agrees that it will not bring, nor cause to be brought, any action, suit or other proceeding claiming damages, or seeking any other relief against the city, its officials, officers, boards, commissions, employees or agents, for any other award of a franchise made in conformity with applicable local, state or federal law.

Section 19. Liability insurance.

A. District Cooling shall purchase and maintain such insurance as will protect District Cooling and subcontractors from claims set forth below which may arise out of or result from District Cooling operations under this ordinance, whether such operations be by District Cooling or by any subcontractor or by anyone directly employed by them, or by anyone for whose acts any one of them may be liable. District Cooling may self-insure any or all of the following if authorized by the commissioner of the Department of Commerce of the State of Minnesota.

B. District Cooling shall obtain the following and submit certificates of insurance to the finance director in amounts to be determined by him or her; provided, that while any loan agreement between District Cooling and the Housing and Redevelopment Authority of the City of Saint Paul remains in effect, required insurance amounts shall be as provided in such agreement:

1. Workers' compensation and employers' liability insurance.
2. General liability insurance.
3. Automobile liability insurance.

C. All certificates of insurance shall provide that the insurance company give the city through its finance director thirty (30) days' prior written notice of cancellation, nonrenewal, or any material changes in the policy, and shall name the city as an additional insured.

D. The above paragraphs establish minimum insurance requirements and it is the sole responsibility of District Cooling to purchase and maintain additional insurance that may be necessary.

E. District Cooling shall not commence construction of the initial distribution facilities until it has obtained the required insurance and filed an acceptable certificate of insurance with the finance director.

F. Nothing in this franchise shall constitute a waiver by the city of any statutory limits or exceptions on liability.

G. District Cooling's failure to procure or maintain required insurance shall constitute a material breach of this franchise and shall also, at the city's discretion, allow the city to procure or renew such insurance to protect the city's interests and pay any and all premiums in connection therewith and recover all monies so paid from District Cooling.

Section 20. Future uses.

The city reserves the right, subject to further conditions described in this section, to lay and permit to be laid sewer, gas, water, and other pipelines or cables and conduits, and to do and permit to be done any underground and overhead installation or improvement that may be deemed necessary or proper by the

governing body of the city in, across, along, over or under any streets occupied by District Cooling and to change any curb or sidewalk or the grade of any street. The foregoing right is subject to the condition that if the laying of such pipelines or cables or conduits or the doing of any said installation or improvement is on behalf of or for an entity other than the city, such laying of pipelines or cables or conduits or doing of any said installation or improvement shall not interfere with District Cooling's existing distribution facilities and said entity or entities shall be required by the city to compensate District Cooling for any damage so caused; provided, however, that in permitting such work to be done by said other entity or entities, the city shall not be liable for any damage so caused; further provided, however, that nothing in this section or elsewhere in this franchise shall relieve the city of liability for any damages it causes to District Cooling's distribution facilities by reason of the city's, or its contractor's, work in laying pipelines or cables or conduits or doing of any installation or improvement described above.

Section 21. Termination and forfeiture.

A. In addition to all other rights and power retained by the city in this ordinance, the city reserves the right to terminate this franchise and all rights and privileges of this franchise in the event of a material breach by District Cooling of its terms and conditions. A material breach by District Cooling shall mean one or more of the following:

1. Violation of any material provision of this franchise;
2. Disposing of any of the facilities or property of its system with the intent solely to prevent the city from purchasing it as provided for herein;
3. Material intentional misrepresentation of fact in an application pursuant to Section 23; or
4. Failure to maintain necessary insurance.

B. The foregoing shall not constitute a material breach if the violation occurs but it is without fault of District Cooling or occurs as a result of circumstances beyond District Cooling's reasonable control. Circumstances beyond the control of District Cooling shall include, but not be limited to: acts of God; strikes, lockouts or other labor disturbances; unavailability of labor or materials; failure of other utilities to perform walkout and make ready and to locate underground utilities in a timely manner; orders or restraints of any kind of the government of the United States or the State of Minnesota or their respective departments, agencies or officials or any civil or military authority; insurrections, riots; landslides, earthquakes, fires, storms, droughts, floods; explosions; breakage or accident to machinery, pipes or lines; or any other extraordinary cause or event not reasonably within the control of District Cooling and not proximately caused by its negligence. District Cooling shall not be excused by mere economic hardship, nor by malfeasance or misfeasance of its directors, officers or employees.

C. District Cooling shall be given written notice by the city of any material breach of this ordinance and shall have thirty (30) days from receipt of such notice to remedy any failure constituting such a breach.

D. If, upon expiration of the thirty-day period referred to in paragraph C above, District Cooling shall not have remedied the breach, the city may seek to terminate this franchise; in such case, the city shall file an application for termination of the franchise in accordance with Section 23 hereof.

E. Upon receipt of the city council's approval or denial of the application to terminate the franchise pursuant to Section 23, District Cooling shall have ninety (90) days within which to serve upon the city an appeal of the city council's decision to District Court. Service of process of such appeal on the city shall be made upon the city clerk and the finance director.

F. During the pendency of said application and the appeal provided for in paragraph E hereof, the rights and obligations of the city and District Cooling hereunder shall continue in full force and effect.

Section 22. Abandonment of service and removal of equipment upon abandonment, termination or forfeiture. If District Cooling abandons its distribution facilities or any portion thereof, it shall give prompt written notice to the city. "Abandon," as used herein, shall mean to remove from service and refrain from using for three (3) years or more.

A. Upon abandonment or upon termination or forfeiture of the franchise, District Cooling shall remove the piping conduits, wires and appliances from the streets, alleys and other public places within the city to which such abandonment or termination or forfeiture applies if the city so requests in writing. District Cooling shall restore the area according to the standard specifications of the public works director.

B. Should District Cooling fail to remove the aforementioned equipment as requested by the city, the city shall have the right to make such removal at the expense of District Cooling.

Section 23. Renewal or modification of franchise or change in Schedule A.

A. Procedure. Following the adoption and acceptance of the franchise and except as otherwise specifically provided herein, all applications by the city or District Cooling for a renewal or modification of the franchise or by District Cooling for a change in the rates, fees and/or charges provided in Schedule A may be made and processed in accordance with the following procedure:

1. The city and District Cooling shall work to assure the orderly, timely and cost effective process for review of the proposed changes.

2. The party seeking such a renewal, modification or change shall file an application with the finance director and the city clerk. The application shall include statements of all material facts, opinions and evidence supporting the application. A renewal may involve renegotiation of any term contained in the franchise and consent to a renewal may not be unreasonably withheld.

3. The city clerk shall place the fact that an application has been made upon the next available council agenda.

4. The city council shall by resolution refer the application to a committee of appropriate city staff. Within sixty (60) days after such referral, staff shall review the application, giving due consideration to the provisions of Section 11.F. and other provisions of this franchise ordinance, and shall request in writing any clarifying or supplementary information needed from the party making the application. The party making the application shall respond within fourteen (14) days after receiving said request. Within seven (7) days after such response, staff shall notify such party in writing whether the information provided is sufficient. Following a notice of insufficient information, the applying party shall have seven (7) days to file rebuttal material.

5. Not more than ninety (90) days after referral to committee, staff shall have completed its review and provided the council with a written evaluation. Upon staff request, the committee chair may at his or her discretion extend staff's reporting deadline by no more than fourteen (14) days.

6. No later than thirty (30) days after said staff report has been filed with the committee, the committee, giving due consideration to the provisions of Section 11.F. and other provisions of this franchise ordinance, shall make a recommendation to the full council for consideration at the next scheduled council meeting.

7. The council, giving due consideration to the provisions of Section 11.F. and other provisions of this franchise ordinance, shall approve or deny the application within one hundred eighty (180) days of the filing of said application. Such 180-day period may be extended by mutual agreement of District Cooling and the city. Should an extension be agreed upon, the chair of the committee considering the application may adjust the committee and staff's timetable accordingly. However, whatever the extension may be, the committee shall refer the application back to the council at least thirty (30) days before the final day for approval or denial. If no action is taken by the city council on an application filed by District Cooling within one hundred eighty (180) days of filing, the application is deemed approved.

Before this ordinance or any amendments thereto by ordinance shall be finally adopted by the council, a public hearing shall be held upon ten (10) days' published notice in the official newspaper. District Cooling shall bear the costs of publication of the franchise ordinance or any amendments thereto.

B. Contested case hearing. At the request of District Cooling and in order to assist in determining whether the proposed changes in Schedule A shall be approved or denied, the city may require a public hearing before a hearing examiner who shall be selected by mutual agreement of city and District Cooling within ten (10) days of District Cooling's request. The hearing examiner shall hold a hearing as a contested case and make recommendations to the city. Upon receipt of such recommendations, the city shall by resolution approve or deny the proposed changes in Schedule A within 180 days of the filing of District Cooling's application. If no such action is taken by the city within 180 days of the filing of District Cooling's application or thirty (30) days after receipt of the hearing examiner's recommendations, whichever is greater, such proposed changes are deemed approved.

In the event a contested case hearing is requested pursuant to this section, District Cooling shall reimburse the city for expenses incurred as a result of that process, including all hearing examiner costs, plus other directly related costs, such as city staff, expert witnesses, or consultants fees, up to a maximum of ten thousand dollars (\$10,000.00) for such directly related costs. The cost of any city staff time shall be computed at the employee's rate of pay plus fringe benefits per hour of time spent working on the contested case.

C. District Cooling franchise expenses. All District Cooling costs related to or incurred in connection with the provisions of this franchise shall be allowed as operating expenses.

Section 24. Police powers.

In accepting this franchise, District Cooling acknowledges that its rights hereunder are subject to the lawful exercise of the police power of the city to adopt and enforce general ordinances necessary to the safety and welfare of the public.

Section 25. Severability.

If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held invalid or unconstitutional by any court or administrative agency of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions thereof.

Section 26. Acceptance of franchise.

District Cooling shall, within thirty (30) days after the passage and approval of this franchise ordinance, file with the city clerk its written acceptance in a form to be approved by the city attorney and shall agree to abide by, keep and perform all the terms, limitations, conditions and provisions of this ordinance.

Section 2

The terms of the existing Schedule A of Appendix K on file with the City shall not be amended by this ordinance and shall remain in full force and effect unless amended in accordance with the terms of this ordinance.

Section 3

This ordinance shall take effect 30 days from the date of approval by this council.