

**CITY OF PEORIA, ARIZONA
COUNCIL COMMUNICATIONS**

CC: _____
Amend No. _____

Date prepared: March 12, 2010

Council Meeting Date: April 6, 2010

TO: Honorable Mayor and Council
FROM: Steve Kemp, City Attorney
PREPARED BY: Steve Burg, Chief Assistant City Attorney
SUBJECT: Submission to the qualified electors of the City of a proposed franchise to Arizona-American Water Company

RECOMMENDATION: That the Mayor and Council:

- (1) Approve the proposed franchise to the Arizona-American Water Company, subject to approval by the qualified electors of the City; and
- (2) Direct that the proposed franchise be submitted to the qualified electors of the City at the next election and direct the City Clerk and City Attorney to undertake such actions to permit the franchise to be on the next City ballot.

SUMMARY:

Arizona-American Water Company provides water and wastewater utility services throughout the State of Arizona, including approximately two square miles within the City limits. Arizona-American has been serving customers within the City under an Utility Services Operating Agreement with the City, first entered into by Arizona-American's predecessor in 1999.

Now the City has reached agreement with Arizona-American on a franchise, which will allow Arizona-American the right and privilege to construct, maintain, and operate water distribution and wastewater collection systems upon, over, along, across, and under the present and future public rights-of-way within the City and within Arizona-American's certificated service area. The franchise contains similar terms to franchises that the City has granted to other utility providers operating within the City.

Under the Peoria City Charter and the Arizona Constitution, a franchise issued to a public service corporation for use of the City's rights-of-way and easements must be approved by the qualified electors of the City. The Public Works-Utilities and Finance Departments have assisted in the development of this franchise and join the Office of

CITY CLERK USE ONLY:

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- Carry Over to Date: _____
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- Unfinished Business (Date heard previous: _____)
- New Business
- Public Hearing: No Action Taken

ORD. # _____ RES. # _____
LCON# _____ LIC. # _____
Action Date: _____

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the City Attorney in requesting that the Mayor and Council approve the proposed franchise and direct that the franchise be submitted to the qualified electors of the City for approval. If approved by the electors, the City and Arizona-American will enter into a franchise agreement containing the terms found in the attached franchise Ordinance.

FISCAL NOTE: Under state statute, all costs resulting from a franchise election are to be borne by a public service corporation seeking a franchise. The proposed franchise imposes a 2% franchise fee (i.e. 2% of Arizona-American's gross receipts for its Peoria operations), in addition to the City's transaction privilege tax for utilities (currently 3.3%) and other applicable City taxes. The Finance Department estimates that the franchise fee will provide to the City approximately \$5,500 annually.

ATTACHMENT: Proposed Franchise with Arizona-American Water Company (Ordinance No. 2010-__)

ORDINANCE NO. 2010-_____

AN ORDINANCE GRANTING TO ARIZONA-AMERICAN WATER COMPANY, AN ARIZONA CORPORATION, ITS SUCCESSORS AND ASSIGNS, THE RIGHT, PRIVILEGE AND FRANCHISE TO CONSTRUCT, MAINTAIN AND OPERATE UPON, OVER, ALONG, ACROSS AND UNDER THE STREETS, AVENUES, ALLEYS, HIGHWAYS, BRIDGES AND OTHER PUBLIC PLACES IN THE CITY OF PEORIA, ARIZONA, AND FUTURE ADDITIONS THERETO, WATER DISTRIBUTION AND TRANSMISSION SYSTEMS AND WASTEWATER COLLECTION AND TREATMENT SYSTEMS AND LINES, TOGETHER WITH ALL NECESSARY OR DESIRABLE APPURTENANCES, FOR THE PURPOSE OF SUPPLYING DOMESTIC WATER TO AND DISPOSING OF WASTEWATER FROM DESIGNATED PORTIONS OF SAID CITY, ITS SUCCESSORS, THE INHABITANTS THEREOF, AND PERSONS AND CORPORATIONS WITHIN THE LIMITS THEREOF, FOR ALL PURPOSES, PRESCRIBING CERTAIN RIGHTS, DUTIES, TERMS AND CONDITIONS IN RESPECT THERETO; REPEALING CONFLICTING ORDINANCES; AND DECLARING AN EMERGENCY.

BE IT ORDAINED by the Mayor and Council of the City of Peoria, Arizona, as follows:

Sec. 1. Franchise Granted.

That in consideration of the payments hereinafter provided to be paid and the benefits to the City of Peoria, Arizona ("City") to be derived from the installation, operation and maintenance of Water Distribution and Wastewater Collection systems in certain portions of City, Arizona-American Water Company, its successors and assigns (collectively, "Utility"), shall have the right and privilege to construct, maintain, and operate upon, over, along, across, and under the present and future public rights-of-way (including but not limited to streets, alleys, rights of ways, highways and bridges) within the present and any future corporate limits of City for the areas within Utility's then-approved Certificates of Convenience and Necessity granted by the Arizona Corporation Commission (the "Certificated Service Area"), Water Distribution and Wastewater Collection systems, together with all necessary or desirable appurtenances (including but not limited to storage, pumping and treatment facilities, service lines, pipes, manholes, distribution mains and equipment for its own use), for the purpose of supplying Water Distribution and Wastewater Collection services to a portion of the City, its successors, the inhabitants thereof, and all individuals and entities thereof, for all purposes.

Sec. 2. Compliance with Requirements; Plans Submitted for Approval; City Construction near Utility's Facilities.

(a) The quality of water treatment, transmission, and distribution services and wastewater collection, treatment, and disposal provided by Utility shall comply with the requirements of the United States Environmental Protection Agency, Arizona Department of Environmental Quality, Arizona Corporation Commission, Arizona Department of Health Services, and the Maricopa County Department of Environmental Health Services.

(b) Utility shall furnish on a monthly basis to City certain information as determined by the City relating to customers serviced by Utility in the Certificated Service Area for use by City in calculating the cost of City services. Because certain of Utility's water customers within the Certificated Service Area are provided wastewater service by the City ("City Wastewater Customers"), the City needs to be able to receive water consumption data for City Wastewater Customers for City wastewater billing purposes.

(c) All new construction under this Agreement shall be performed in accordance with the adopted specifications (including but not limited to, infrastructure guidelines and City Code requirements) of City for public works projects with respect to such public rights-of-way. Prior to Utility making any new installations in the public rights-of-way, Utility shall submit for approval plans prepared by a registered professional engineer showing the location of such proposed new installations to City's Public Works-Utilities Department.

(d) If City undertakes either directly or through a contractor any construction project adjacent to or near Utility's facilities operated pursuant to this Agreement, City shall include in all such construction specifications, bids, and contracts a requirement that, as part of the cost of the project, and at no cost to Utility, the contractor or his designee obtain from Utility the temporary removal, relocation, barricading or depressurization of Utility's facilities or equipment, the location of which create an unsafe condition in view of the equipment to be utilized or the method of construction to be followed by the contractor. City shall indemnify and hold Utility harmless from any and all claims, costs, losses, or expenses incurred by Utility as a result of the failure of City to comply with the requirements hereof.

Sec. 3. Construction and Relocation of Utility Facilities: Payment.

(a) All new facilities installed or constructed pursuant to this Agreement shall be so located or relocated and so erected as to reasonably minimize interference with vehicular and pedestrian traffic and other authorized uses over, under or through the public rights-of-way. Those phases of construction of Utility's facilities relating to traffic control, backfilling, compaction and paving, as well as the location or relocation of facilities herein provided for shall be subject to regulation by the City. Utility shall keep accurate records of the location of all facilities in the public right-of-way and furnish them to City upon request.

(b) Upon completion of new or relocation construction of underground facilities in the public right-of-way, Utility shall promptly furnish to the City in a format compatible with the City's computer-aided drafting and geographic information system software, suitable documentation showing the actual location of the underground facilities in those cases where the actual location differs from the proposed location approved in the permit plans. In the event that Utility's electronic format is not compatible with the City's electronic system, then Utility shall provide the drawings in hard copy format satisfactory to the City, subject to payment of a fee for conversion to the City's electronic format.

(c) If Utility's facilities are required to be relocated, Utility shall relocate its facilities. The costs of relocation shall be borne as follows:

(i) If Utility's existing facilities are located in private easements or rights-of-way obtained by Utility prior to City's acquisition of the public right-of-way, the entire cost of relocating Utility's facilities (including the cost of purchasing a new private easement or right-of-way, if necessary) shall be borne by City. However, Utility shall install any future new facilities in City easements and rights-of-way.

(ii) If Utility's facilities are located on public rights-of-way and City requires that the facilities must be relocated as part of a City project, then City shall bear the costs of the relocation. Utility's right to retain its facilities in their original location is subject to the paramount right of City to use its public rights-of-way for all governmental purposes.

(iii) If Utility's facilities are located on public rights-of-way and Utility requires that the facilities must be relocated as part of a Utility project, then Utility shall bear the costs of the relocation.

(iv) Where City's facilities or other facilities occupying a right-of-way under

authority of a City permit or license are already located in the right-of-way and a conflict between Utility's potential facilities and the existing facilities can only be resolved expeditiously, as determined by the City's Deputy City Manager for Operations (or designee), by relocating the existing City or permittee facilities, if Utility requests in writing such relocation Utility shall bear the entire cost of relocating the existing facilities, irrespective of the function they served.

(v) If City participates in the cost of relocating Utility's facilities for any reason, the cost of relocation to City shall not include any upgrade or improvement of Utility's facilities as they existed prior to relocation unless deemed beneficial by the City.

(vi) City will not exercise its right to require Utility's facilities to be relocated in an unreasonable or arbitrary manner, or to avoid City's obligations under Section 2. Utility and City may agree to cooperate on the location and relocation of facilities at Utility's expense.

(d) In the event that City abandons a public right-of-way, Utility at its election shall abandon its facilities or shall request City to convey its easement interest to Utility to be held as a private easement of Utility. If Utility requests such conveyance by City and there is no legal impediment to City doing so, City shall convey such easement by quit claim and make no warranties of title.

Sec. 4. Civil Liability.

City shall indemnify, defend and protect Utility and hold Utility harmless from any loss or costs due to any claim or liability and all costs and expenses, including but not limited to actual attorneys' fees, incurred by Utility and resulting from (i) failure of City to comply with the requirements of Section 2, or (ii) the construction or maintenance or from operation of City's facilities..

Sec. 5. Indemnification and Hold Harmless.

(a) Except as provided in Section 4, Utility shall indemnify, defend, and protect City and hold City harmless from any loss or costs due to any claim or liability and all costs and expenses, including but not limited to actual attorneys' fees, resulting from the construction or maintenance or from operation of Utility's facilities.

(b) The City shall not be liable to any third party for damages, losses or liability arising from the issuance of approval by the City of this franchise.

(c) Utility shall obtain and maintain at all times during the term of this franchise commercial general liability insurance and commercial automobile liability

insurance protecting Utility in an amount not less than FIVE MILLION Dollars (\$5,000,000) per occurrence (combined single limit), including bodily injury and property damage, and in an amount not less than FIVE MILLION Dollars (\$5,000,000) annual aggregate for each personal injury liability and products-completed operations. Coverage shall be in an occurrence form and in accordance with the limits and provisions specified herein. Claims-made policies are not acceptable. When an umbrella or excess coverage is in effect, coverage shall be provided in following form. Such insurance shall not be canceled or materially altered to reduce the policy limits until City has received at least thirty (30) days' advance written notice of such cancellation or change. Utility shall be responsible for notifying City of such change or cancellation.

(d) Filing of Certificates and Endorsements. Within thirty (30) days following execution of this franchise and prior to the commencement of any work pursuant to this franchise, Utility shall file with City the required original certificates of insurance, with endorsements, which shall clearly state all of the following:

- (i) The policy number; name of insurance company; name and address of the agent or authorized representative; name, address, and telephone number of insured; project name and address; policy expiration date; and specific coverage amounts;
- (ii) That City shall receive thirty (30) days' prior notice of cancellation; and
- (iii) That Utility's insurance is primary for services it provides as respects any other valid or collectible insurance that City may possess, including any self-insured retention City may have; and any other insurance City does possess shall be considered excess insurance only and shall not be required to contribute with this insurance.

(e) Workers' Compensation Insurance. Utility shall obtain and maintain at all times during the term of this franchise statutory workers' compensation and employer's liability insurance in an amount not less than Five Hundred Thousand Dollars (\$500,000) and shall furnish City with a certificate showing proof of such coverage,

(f) Insurer Criteria. Any insurance provider of Utility shall be admitted and authorized to do business in the State of Arizona and shall be rated at least A- in *A.M. Best & Company's Insurance Guide*. Insurance policies and certificates issued by non-admitted insurance companies are not acceptable.

Sec. 6. Restoration of Rights-of-Way.

(a) Except as hereinafter provided with regard to repairs of Utility facilities, whenever Utility shall cause any opening or alteration whatever to be made for any purpose in any public right-of-way owned or maintained by City, Utility shall apply for and obtain a right-of-way permit from City and shall provide for inspection of the right-of-way by City. When time does not permit prior application for a permit and repairs to Utility's facilities are reasonably required, Utility first may institute and complete the repairs and then complete and file the right-of-way permit application. In this case, telephone notification of the repair will be given as soon as practicable to the contact person designated by the City. Utility shall complete all work with due diligence within a reasonably prompt time, and Utility shall, upon completion of such work, restore the property disturbed back to as good condition as it was prior to such openings or alteration in accordance with the specifications for public works adopted by City. Utility shall comply with the Manual of Uniform Traffic Control Devices and the City of Phoenix Barricade Manual and shall bear the full cost of any barricades, signing, rerouting of traffic, or other action or expense that City shall consider necessary or desirable in the interest of public safety during any such opening or alteration within the public right-of-way and shall bear the full cost of removal of barricades and traffic control devices upon completion of construction, including but not limited to any storage cost incurred by City in holding barricades removed to prevent obstruction to traffic. Nothing herein shall prevent the Director of Public Works-Utilities from restricting construction to certain designated hours and days based on traffic control and impact on surrounding areas.

(b) In the event that Utility fails to repair the public right-of-way to a safe and satisfactory condition, normal wear and tear excepted and reasonably satisfactory to the City's Public Works-Utilities Director, the City shall have the option upon fifteen (15) days prior written notice to Utility to perform or cause to be performed such reasonable and necessary work on behalf of Utility and to charge Utility for the proposed costs to be incurred or the actual costs incurred by the City at City's standard rates, plus an administrative fee of fifteen percent. Upon the receipt of such a demand for payment by the City, Utility shall within thirty (30) days reimburse the City for such costs. Unpaid amounts after thirty (30) days shall bear interest at the rate of 1.5% per month.

Sec. 7. Franchise Fee.

(a) In consideration of the granting of the rights under this franchise, Utility agrees to pay to the City, a sum equal to two percent (2%) of the gross receipts of Utility within the City (excluding from gross receipts all sales taxes, gross revenue taxes or similar charges based upon gross receipts), from sale by it of water and wastewater service within the present and any future corporate limits of City, as shown by Utility's billing records (the "Fee"). This Fee shall be due and payable monthly and shall be in

lieu of all fees or charges for permits or licenses issued for the construction of Utility's facilities hereunder (except for inspection fees relating to new installation of equipment in City rights-of-way). Notwithstanding the foregoing, fees charged by the City for pavement damage resulting from cuts into new or rehabilitated pavement in accordance with Chapter 23 of the Peoria City Code (1992) shall be permitted. For the purpose of verifying the amounts payable hereunder, the pertinent books and records of Utility shall be subject to inspection by duly authorized officers or representatives of City upon reasonable notice during regular business hours.

(b) The City charges an additional Transaction Privilege Tax for the utilities classification at the rate of 3.3% on gross revenues of Utility, which shall not be deducted from the Fee.

Sec. 8. Occupation Tax.

Notwithstanding any provision contained herein to the contrary, Utility shall, in addition to the payment provided in Section 7, pay any business or occupation tax established by City and not levied by City exclusively upon utilities, provided the tax is a flat fee per year and that the annual amount of such fee does not exceed the amount of similar fees paid by the other businesses with comparable gross revenue from sales within City.

Sec. 9. Election, Term and Acceptance.

(a) The right, privilege, and franchise hereby granted shall continue and exist for a period of fifteen (15) years from the date of the granting hereof

(b) Utility shall be responsible for the costs of the required franchise election. If the franchise is the only item on the ballot, Utility shall pay all City costs. If more than one franchise or item is on the ballot, each franchise will pay a pro-rata share of the total based on the total number of items on the ballot.

(c) The franchise shall be void and of no effect if written acceptance thereof by the Utility is not filed in the Office of the City Clerk of City within sixty (60) days after it is granted.

Sec. 10. Transfer of Franchise.

The right, privilege, and franchise hereby granted may not be transferred in whole or in part by Utility, its successors and assigns, without the prior consent of both the Peoria City Council and the Arizona Corporation Commission and payment of an appropriate transfer fee to the City to reimburse City for any reasonable costs it incurs in processing

the transfer. The Peoria City Council's consent shall not be unreasonably withheld. No consent shall be required in connection with an assignment made as security pursuant to a mortgage or deed of trust or in connection with subsequent transfer made pursuant to any such instrument.

Sec. 11. Franchise Not Exclusive.

This grant is not exclusive, and nothing herein contained shall be construed to prevent the City from granting other like or similar grants or privileges to any other person, firm, or corporation.

Sec. 12. Repealer.

All ordinances and parts of ordinances previously granting this Utility a Franchise and which are in conflict with the provisions hereof, are hereby repealed.

Sec. 13. Severability.

If any section, paragraph, clause, phrase or provision of the franchise, other than Section 7, shall be adjudged invalid or unconstitutional, the same shall not affect the validity of the franchise as a whole or any part of the provisions hereof other than the part so adjudged to be invalid or unconstitutional. If Section 7 shall be adjudged invalid or unconstitutional in whole or in part by a final judgment, the franchise shall immediately terminate and shall be of no further force or effect.

Sec. 14. Title to Facilities; Right to Use Easements; Reserved Right to Purchase or Condemn.

(a) Title to all water and wastewater utility facilities wherever situated on public grounds or in easements for public utility purposes and installed by Utility or its agents or contractors shall be and remain in Utility, its successors, or assigns.

(b) Nothing contained in this franchise shall be construed as preventing, diminishing, or restricting Utility from using for public utility purposes any easement shown on any plat or plats of any portion of the City before or hereafter platted or recorded that has been or may hereafter be created, granted, or dedicated for public utility purposes by any person, firm, or corporation. The costs associated with such use shall be borne by Utility. The City shall have the right to deny Utility the uses of restricted easements limited to sewer or drainage or easements not wide enough to accommodate a City Water Line and Utility Water Line.

(c) The City reserves the right and power to purchase and condemn the plant and distribution facilities of the Utility within the corporate limits or any additions thereto, as

provided by law. Utility likewise reserves all of its rights and remedies provided by law in any such circumstance.

(d) In the event of a purchase of Utility or under the exercises of eminent domain, this franchise agreement shall be construed to have no value for purposes of establishing value of Utility.

Sec. 15. Submission to Qualified Electors.

Upon adoption of this Ordinance by the Mayor and Council, the question of whether to issue a franchise to Utility in accordance with the terms of this Ordinance shall be submitted to the qualified electors of City at an election to be held on August 24, 2010 and the City Clerk and City Attorney upon approval are authorized to take all steps necessary to accomplish submission of this item to the qualified electors of City.

Sec. 16. Effective Date.

To preserve the peace, health and safety of the residents of City, an emergency is hereby declared to exist, and this Ordinance shall become effective from and after its passage.

PASSED AND ADOPTED by the Mayor and Council of the City of Peoria, Arizona, this ____ day of _____, 2010.

Bob Barrett, Mayor
City of Peoria, Arizona

ATTEST:

Mary Jo Waddell
City Clerk

APPROVED AS TO FORM:

Stephen M. Kemp
City Attorney