

ORDINANCE NO. 2018-04-10-001

AN ORDINANCE OF THE CITY OF KEMPNER, TEXAS, GRANTING KEMPNER WATER SUPPLY CORPORATION CERTAIN POWERS LICENSES, PRIVILEGES AND FRANCHISE TO OPERATE AND MAINTAIN A WATER UTILITY SYSTEM WITHIN THE CITY; TO USE THE STREETS, AVENUES, PUBLIC EASEMENTS, PUBLIC RIGHTS-OF-WAY, ALLEYS, HIGHWAYS, SIDEWALKS, AND BRIDGES IN SAID CITY FOR A PERIOD OF ONE (1) YEAR; PRESCRIBING CERTAIN RIGHTS, DUTIES, TERMS AND CONDITIONS; PROVIDING FOR THE PAYMENT TO THE CITY OF A PERCENTAGE OF GROSS RECEIPTS OF GRANTEE FROM ITS OPERATIONS; PROVIDING FOR ACCEPTANCE; AND PROVIDING FOR CERTAIN RELATED MATTERS.

WHEREAS, the Kempner Water Supply Corporation (the “Company”) operates a water Utility and delivers water within the City of Kempner (the “City”);

WHEREAS, the City Council believes it is in the best interest of the City to offer the Company a franchise on the terms and conditions set forth in this ordinance.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF KEMPNER, TEXAS, THAT:

Section 1. Definitions.

1.1 For the purposes of this ordinance, when not inconsistent with the context, words used in the present tense include the future tense, words in the plural include the singular, and words in the singular include the plural, and the use of any gender shall be applicable to all genders whenever the sense requires. The words “shall” and “will” are mandatory and the work “may” is permissive. Words not defined in the Section 1 shall be given their common and ordinary meaning.

1.2 For the purposes of this ordinance, the following words, terms, phrases their derivations shall have the meaning given in this Section 1.2

1.2.1 “City” shall mean the City of Kempner, Texas, a municipal corporation in the State of Texas.

1.2.2 “Company” shall mean the Kempner Water supply Corporation a Corporation authorized to transact and actually transacting business in the State of Texas, its legal representatives, successors, lessees and assigns.

1.2.3 “City Secretary” shall mean the City Secretary/City Clerk of the City.

1.2.4 "Consumer" or "Customer" shall mean any person or organization receiving and using water utility service from the Company.

1.2.5 "Council" shall mean the governing body of the City.

1.2.6 "Distribution system" shall mean all interrelated lines, equipment, pumps, and other appurtenances used or necessary for the transmission and distribution of water to consumers or customers in the City.

1.2.7 "Franchise" shall mean this Ordinance, and all rights and obligations established herein or as it may be amended.

1.2.8 "Gross receipts" shall mean the total amount collected by the Company from any and all customers for water service within the boundaries of the City.

1.2.9 "Public Easement" shall mean those easements held, owned or controlled by the City, the terms, conditions or limitations upon which are not inconsistent with the construction or maintenance of a water distribution and transmission system.

1.2.10 "Public Rights-of-Way" shall mean all of the public streets, avenues, alleys, highways, waterways, bridges, public easements, sidewalks and parks of the City, as they now exist or may be hereafter constructed, opened, laid out or extended within the present limits of the City, or in such territory as may hereafter be annexed by the City.

1.2.11 "Service line" shall mean lines directly connected to the Company's distribution system and used to convey water from there to the customer meter.

1.2.12 "Street" or "alley" shall mean a publicly dedicated or maintained right-of-way, a portion of which is open to use by the public or vehicular travel.

1.2.13 "Water" shall mean potable drinking water.

Section 2. Grant of Franchise.

2.1 There is hereby granted to Company a non-exclusive franchise to maintain, construct, equipment, extend, replace, alter, repair and otherwise establish and operate in the City, as constituted as of the effective date of this ordinance, or as may hereafter be constituted, works, systems, plants, distribution lines and all related facilities (including those now in service) necessary or appropriate to sell, distribute, convey or otherwise conduct, serve, supply and furnish the inhabitants of the City and others, and to the City, whenever the City may desire to contract therefore, water and said Company is hereby granted passage and right-of-way in, under, along and across the Public Rights-of-Way and beneath the surface of same, and the right to occupy and use in any lawful way during the term of this Franchise and Public Rights-of-Way, as they now or hereafter may exist, for every and any service, use, effect, and lawful purpose as herein mentioned; provided that all such work, activity and undertakings by the Company shall

be subject to the terms and provisions of this Franchise and the continuing exercise by the City of its governmental and police powers; and proved further that nothing herein shall be construed to require or authorize Company to exceed any rights granted herein or by state or federal law.

2.2 The Company shall be allowed to operate, maintain and repair all lines existing on the effective date of this Franchise within City parks, or then existing on land hereafter designated as a City Park, but shall not undertake a replacement of such lines or install new lines within said parks. The Company may directly petition the Council for permission to cross park lands; provided that the grant of any such permission shall be in the sole discretion of the Council.

2.3 The construction, maintenance and operation of the system and property of Company within the City shall be subject to this franchise and the ordinances and regulations adopted by the Council in the exercise of the City's police and regulatory powers.

2.4 The term of this Franchise shall be for a period of one (1) year from the date this Ordinance is accepted by Company as herein provided.

2.5 The Company shall not transfer this Franchise nor any rights and privileges granted herein without the written approval of the Council expressed by the Ordinance. Such approval shall not be unreasonably withheld.

2.6 Three (3) months prior to the expiration of the Franchise, City and Company shall commence negotiations to determine the terms and conditions upon which a successor franchise could be awarded to Company. The parties shall meet and negotiate in good faith toward the goal of finalizing a successor franchise prior to the expiration of this Franchise. If a successor franchise is not finally adopted by the City and accepted by the Company prior to the expiration of this Franchise, Company's continued occupancy of the Public Rights-of-Way after such expiration shall be on a year-to-year basis and under the same terms and conditions as this Franchise. During any such year-to-year renewal period, either the City or the Company may terminate this Franchise at the end of any such renewal period by written notice provided to the other party not less than 180 days before the end of the renewal period by written notice provided to the other party no less than 180 days before the end of the renewal period.

2.7 Nothing contained in the Franchise shall be construed as granting any exclusive franchise or right.

2.8 Nothing contained in this Franchise shall be construed as affecting any private easement rights held by Company.

2.9 Nothing contained in this Franchise shall be construed as a relinquishment by Company of any rights on ownership of its facilities. Nothing in this Franchise shall be construed as a waiver by Company of any rights under state or federal law concerning ownership of its facilities or as a consent by Company to condemnation of its facilities.

Section 3. Use of the Public Rights-of-Way. The City reserves the right to lay and permit to be laid, sewer, cable television, telephone, electric and other lines, cables and conduits and to do and permit to be done any underground or overhead work that may be necessary or proper in, across, along, over, or under any Public Rights-of-Way occupied by the Company. The City shall be liable to the Company only for any damage to the Company's lines, equipment or appurtenances of the Company, the producing cause of which is the negligence of the City or its employees. Damage caused to Company as a result of work done by persons other than the City shall be corrected through payment to the Company by the responsible person. Removal and relocation expenses incurred by the Company shall be reimbursed by the person for whom the removal or relocation is made, except as provided in Sec. 4.

Section 4. Modification and Relocation of Facilities.

4.1 If, during the period of this Franchise, the City shall elect to alter or change the grade or alignment of any street, alley or other public right-of-way, or any water pipe, wastewater pipe, or any overhead or underground structure within the corporate limits of the City, so as to not conflict with the transmission or distribution lines, equipment and appurtenances of the Company, that were first installed after the effective date of this Franchise, the Company shall remove, at its own expense, or relocate, as necessary, all of its transmission or distribution lines, equipment and appurtenances, that were first installed after the effective date of this Franchise. Schedules for this work shall be developed by designated representatives of the Company and the City. If, such representatives cannot agree on the schedules, the City Secretary, after consultation with the Company, shall establish a schedule. This schedule shall provide for a minimum of sixty (60) days between the time the schedule is furnished to the Company and the time that any specific work to be done by the Company covered in the schedule is to begin.

4.2 If, during the period of this Franchise, the City shall elect to alter or change the grade or alignment of any street, alley or other public right-of-way, or any water pipe, wastewater pipe, or any overhead or underground structure within the corporate limits of the City, so as to not conflict with the transmission or distribution lines, equipment and appurtenances of the Company that existed and were installed before the effective date of this Franchise, including any repairs or replacements for such facilities whenever constructed, the City shall fully compensate Company for the cost to remove, relocate, as necessary, any such transmission or distribution lines, equipment, and appurtenances. Schedules for this work shall be developed by designated representatives of the Company and the City. If such representatives cannot agree on the schedules, the City, after consultation with the Company, shall establish a schedule. This schedule shall provide for a minimum of ninety (90) days between the time schedule is furnished to the Company and the time that any specific work to be done by the Company covered in the schedule is furnished to the Company and the time that any specific work to be done by the Company covered in the schedule is to begin.

4.3 Whenever any such public works project is funded in whole or in part, with federal or state highway monies, if federal or state law provides compensation for utility adjustments, the City shall request that compensation be provided to the Company by the funding authority.

If the City receives such requested utility adjustment compensation, it shall deliver same to the Company.

Section 5. Service to be Provided by Company.

5.1 Service may be provided by means of transmission and distribution lines, equipment, and appurtenances in the Public Rights-of-Way. The Company shall not place its transmission or distribution lines, equipment and appurtenances where the same will obstruct or interfere with motor vehicle traffic, or any existing television cable, electric, drainage, sewer or telephone facilities, traffic control signalization, street lights, fire lines or communications lines.

5.2 The Company shall furnish service consistent with the requirements and intent of this Franchise and its "service regulations" as now or hereafter adopted by the Company; provided that consistent with such regulations the Company shall provide water service to all areas of the City and within the Company's certificated service area.

5.3 The Company's system and appurtenances shall be located, installed and maintained so that none of the facilities shall unreasonably endanger the lives of persons, unreasonably interfere with any public improvements the City may deem proper to make, or unnecessarily obstruct the free use of the streets, Public Rights-of-Way.

5.4 The Company shall repair all excavations and work sites by the Company in compliance with any applicable City rules and regulations provided that in any event the area of excavation or work shall be, at minimum, repaired and replaced to as good or better condition.

Section 6. Company Rules and Regulations.

6.1 The Company's rates, rules and regulations shall be and remain in effect as adopted amended from time to time by its board of directors and membership.

6.2 Company shall be entitled to require from each and every customer to made such deposits and payments as required by the Company, and to comply with the rules and regulations adopted by the Company.

Section 7. Franchise and Rental Fees.

7.1 The Public Rights-of-Way to be used by the Company in the operation of its system within the boundaries of the City as such boundaries exist as of the effective date of this ordinance, as are valuable public properties acquired and maintained by the City at great expense to its taxpayers, without which the Company would be required to invest in the right-of-way costs and acquisitions, and since the City will incur costs in regulating and administering this Franchise, the Company shall through the term of this Franchise pay to the City five percent (5%) of the Company's total gross receipts (exclusive of Texas Limited Sales Tax) each month collected from customers and consumers within the corporate limits of the City under the Company's rates effective from time to time.

7.2 The Franchise fee shall be in lieu of any and all other city imposed rentals or compensation or franchise , license, privilege, instrument, occupation, excise or revenue taxes or fees and all other exactions or charges (except as and when applicable ad valorem property taxes, special assessments for local improvements, city sales tax, and such other charges for utility services imposed uniformly upon persons, firms or corporations then engaged in business within the City) or permits upon or relating to the business, revenue, franchise, transmission and distribution lines, installations and systems, fixtures, and other facilities of the Company and all other property of the Company and its activities, or any part thereof, in the City which relate to the operations of the Company's water utility system.

7.3 Should the City not have the legal power to agree that the payment of the foregoing sums of money shall be in lieu of license, fees, street or alley rentals or charges easement or franchise taxes or charges aforesaid, then City agrees that it will apply so much of said sums of money paid as may be necessary to satisfy Company's obligations, if any, to pay any such licenses, charges, fees rentals, easement or franchise taxes or charges.

7.4 The City expressly acknowledges and agrees that the Company may, in its sole discretion, pass through to Company's members and customers residing within the boundaries of City all franchise fees and other charges imposed upon the Company under this Franchise.

Section 8. Insurance Provided by Company. The Company shall maintain throughout the term of the Franchise, property damage coverage, general liability insurance, and worker compensation insurance, with an insurance company, or companies licensed to do business in the State of Texas insuring against claims for liability and damages.

Section 9. Indemnification and Hold Harmless. The Company agrees to indemnify, defend and save harmless the City, its agents, officers and employees against and from any all claims by or on behalf of any person, firm, corporation or other entity, arising from the Company's distribution system, or arising from any act of negligence of the Company, or any of its agents, contractors, servants, employees or licensees and from and against all costs, council fees, expenses and liabilities incurred in or about any such claim or proceeding brought thereon, and from any and all claims arising from any breach or default on the part of the Company in the performance of any covenant or agreement on the part of the Company to be performed pursuant to the terms of this Franchise. The duty to indemnify only applies where, and to the extent, the Company's negligence or willful misconduct is either the sole or contributing cause of injury, death or damage. It does not extend to any portion of any injury, death or damage caused by either the sole or contributing negligence or intentional act or omission of the City or any third party under the control of the City. The City shall promptly notify the Company of any claim or cause of action which may be asserted against the City relating to or covering any matter against which the Company has agreed, as set forth above, to indemnify, defend and save harmless the City. The Company reserves the right, but not the obligation, to employ such attorneys, expert witnesses and consultants as it deems necessary to defend against the claim or cause of action. The Company may be granted the right to take, in the event the Company and the City are Co-Defendants in a suit, total or partial lead responsibility for the defense of any claim or cause of action. It is understood that it is not the intention of either the City or the Company to create any

liability, right or claim for the benefit of third parties and this Franchise is intended and shall be construed for the sole benefit of the City and the Company.

Section 10. Acceptance of Franchise by Company.

10.1 This Franchise shall not become effective until accepted by the Company executing a written acceptance on the letterhead of the Company in the form and content set forth in section 10.2 and, within thirty (30) days from the final adoption of this ordinance, filing such properly executed acceptance with the City Secretary. When accepted by the Company in conformance with Sections 10.1 and 10.2, this Franchise shall be a duly executed contract by and between the City and the Company.

10.2 The Company shall, if it elects to accept this Franchise, give written notice of acceptance to the City Secretary within thirty (30) days from the date of this ordinance. Such acceptance shall be typed or printed on the letterhead of the Company and, with the blank spaces appropriately completed, shall be as follows:

Date:

The City of Kempner
P. O. Box 660
Kempner, Texas 76539

ATTENTION: City Secretary

The Kempner Water Supply Corporation (the "Company"), acting by and through the undersigned officer who is acting within his/her official capacity and authority, hereby accepts the franchise to operate a water supply and distribution system within the City of Kempner (the "City") as said franchise is set forth and provided in Ordinance No. 2018-04-10-001 (the "Ordinance"). The Company agrees to be bound and governed by each term, provision and condition of the Ordinance, to accept and to give the benefits provided by the Ordinance and to perform each service and duty set forth and provided for in the Ordinance in a business-like and reasonable manner and in compliance with the Franchise.

Kempner Water Supply Corporation

By: Rex Hooten

Name: Rex Hooten

Title: President

Section 11. Transfer, Sale or Conveyance by Company. The Company shall not transfer, sale or convey the property and assets that constitute the water system with the City, or a part of the distribution system, within the City, without the prior approval of the Council expressed by ordinance; which approval shall not be unreasonably withheld; and provided that this Section 11

shall not apply to replacements, maintenance, upgrades of modifications of equipment, machinery, lines and buildings by Company for the purpose of maintaining and continuing its operation within the City.

Section 12. Severability. If any section, paragraph, subdivision, clause, part or provision hereof shall be adjudged invalid or unconstitutional the same shall not affect the validity here of as a whole or any part or provision other than the part or parts held invalid or unconstitutional.

Section 13. Open Meetings. It is hereby officially found and determined that the meeting at which this ordinance was passed was open to the public, and public notice of the time, place and purpose of said meeting was given, as required by the Open Meetings Act. Chapter 551, Texas Government Code.

Section 14. Publication. The full caption of this ordinance shall be published one (1) time in a weekly newspaper published within or in general circulation within the City. This ordinance shall take effect only upon its acceptance by the Company within the time and manner hereinabove provided. In the event this Franchise is not accepted by the Company, this ordinance shall expire and become null and void.

PASSED AND APPROVED on this the 10th day of April, 2018.

ATTEST:

CITY OF KEMPNER



Lisa Campanella, City Secretary



Carolyn Crane, Mayor