City of Las Cruces®
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Council Action and Executive Summary

Item # 12 **Ordinance/Resolution#** 2744

For Meeting of January 5, 2015 (Ordinance First Reading Date)

For Meeting of February 3, 2015 (Adoption Date)

Please check box that applies to this item:

☐ QUASI JUDICIAL ☐ LEGISLATIVE ☒ ADMINISTRATIVE

TITLE: AN ORDINANCE GRANTING A FRANCHISE TO MOONGATE WATER COMPANY FOR THE OPERATION OF ITS POTABLE WATER DISTRIBUTION SYSTEM IN THE CITY OF LAS CRUCES.

PURPOSE OF ACTION:

To grant a franchise to Moongate Water Company.

COUNCIL DISTRICT: N/A		
Drafter/Staff Contact: Marcia B. Driggers	**Department/Section:** Legal/City Attorney	**Phone:** (575) 541-2128
City Manager Signature:		

BACKGROUND / KEY ISSUES / CONTRIBUTING FACTORS:

The City of Las Cruces previously granted Moongate Water Company as well as three (3) other private water companies franchises to operate their water companies in areas annexed by the City in 1987. All four (4) franchises, which were approved on July 18, 1988 for fifteen (15) years, have since expired. Although expired, Moongate has continued to pay the franchise fees set forth in the 1988 franchise.

The City has been in extended litigation with Moongate since 2004. As part of a court-ordered settlement facilitation in the last remaining State District Court case, which was an anti-trust case filed by Moongate in 2006, the parties with the assistance of a court appointed facilitator entered into a Term Sheet Agreement which set forth the general provisions of a settlement agreement of the anti-trust lawsuit as well as other administrative proceedings pending before the Office of the State Engineer and the Public Regulation Commission. The Term Sheet Agreement obligated the City and Moongate to use their best efforts to assure that all provisions will be approved by both parties. One provision of the Term Settlement Agreement obligated the City to offer Moongate "a franchise cloned from the 1988 franchise previously held by Moongate, subject to the City Council approving same as an Ordinance." Franchises are approved as ordinances and therefore, Council approval is required in order for the City to fully comply with the Term Sheet Agreement which was conditionally approved by the City's attorneys subject to Council approval of the franchise ordinance among other City obligations.

(Continue on additional sheets as required)

The parties are currently converting the Term Sheet Agreement into a detailed formal Settlement Agreement, which will be finalized, approved by the parties, and submitted to the Court for approval after the City Council grants Moongate the franchise among other City obligations. If the City fails to grant Moongate a franchise cloned after the 1988 franchise, the Settlement Agreement will be of no effect, and potentially the City and Moongate will proceed to trial in the above referenced anti-trust case, which trial is set on a trailing docket between May 18, 2015 and June 19, 2015.

City staff and the City's attorneys support granting Moongate a franchise in the form it requested, thereby enabling the City to enter into the formal Settlement Agreement to be approved by the City Manager on behalf of the City.

SUPPORT INFORMATION:

1. Ordinance.
2. Exhibit "A", Franchise to Moongate Water Company for the Operation of Its Potable Water Distribution System in the City of Las Cruces.

SOURCE OF FUNDING:

Is this action already budgeted?			
	Yes	☐	See fund summary below
	No	☐	If No, then check one below:
N/A	*Budget Adjustment Attached*	☐	Expense reallocated from: _____
		☐	Proposed funding is from a new revenue source (i.e. grant; see details below)
		☐	Proposed funding is from fund balance in the _____ Fund.
Does this action create any revenue?			
N/A	Yes	☐	Funds will be deposited into this fund: _____ in the amount of $_____for FY__.
	No	☐	There is no new revenue generated by this action.

BUDGET NARRATIVE:

N/A

(Continue on additional sheets as required)

FUND EXPENDITURE SUMMARY:

Fund Name(s)	Account Number(s)	Expenditure Proposed	Available Budgeted Funds in Current FY	Remaining Funds	Purpose for Remaining Funds
N/A	N/A	N/A	N/A	N/A	N/A

OPTIONS / ALTERNATIVES:

1. Vote "Yes", this action will approve the Ordinance and will grant Moongate a franchise to operate its potable water distribution system in the City of Las Cruces.
2. Vote "No", this action will not approve the Ordinance and will not grant Moongate a franchise to operate its potable water distribution system in the City of Las Cruces, and will not allow the City to finalize the proposed settlement agreement with Moongate.
3. Vote to "Amend", this action would allow the City Council to modify provisions of the franchise, which modifications would have to be approved by Moongate.
4. Vote to "Table", this action would allow the City Council to table or postpone consideration of the Ordinance and to direct staff accordingly.

REFERENCE INFORMATION:

The resolution(s) and/or ordinance(s) listed below are only for reference and are not included as attachments or exhibits.

1. Ordinance No. 1018.

(Continue on additional sheets as required)

COUNCIL BILL NO. 15-025
ORDINANCE NO. 2744

AN ORDINANCE GRANTING A FRANCHISE TO MOONGATE WATER COMPANY FOR THE OPERATION OF ITS POTABLE WATER DISTRIBUTION SYSTEM IN THE CITY OF LAS CRUCES.

The City Council is informed that:

WHEREAS, the City of Las Cruces previously granted Moongate Water Company a franchise for the operation of its potable water distribution system in newly annexed areas of the City of Las Cruces in Ordinance No. 1018 which Ordinance was enacted and approved on July 18, 1988; and

WHEREAS, the franchise has since expired and the parties desire to renew the 1988 franchise on the same terms and conditions as set forth in Ordinance No. 1018 except as to dates, to minor rewording such as changing the name of the "Public Service Commission" to the "Public Regulation Commission", and to minor formatting modifications such as setting out the franchise as separate document attached to the Ordinance.

NOW, THEREFORE, Be it ordained by the governing body of the City of Las Cruces:

(I)

THAT the Franchise attached hereto as Exhibit "A" and made a part of this Ordinance is hereby enacted.

(II)

THAT City staff is hereby authorized to do all deeds necessary in the accomplishment of the herein above.

DONE AND APPROVED this ____ day of _____, 20___.

APPROVED:

_____
Mayor

ATTEST:

_____
City Clerk

(SEAL)

VOTE:
Mayor Miyagishima: ____
Councillor Silva: ____
Councillor Smith: ____
Councillor Pedroza: ____
Councillor Small: ____
Councillor Sorg: ____
Councillor Levatino: ____

Moved by: _____

Seconded by: _____

APPROVED AS TO FORM:

_____
City Attorney

FRANCHISE TO MOONGATE WATER COMPANY FOR THE OPERATION OF ITS POTABLE WATER DISTRIBUTION SYSTEM IN THE CITY OF LAS CRUCES

I. FRANCHISE AREA

Moongate Water Company, Inc. hereafter called "Franchisee", is hereby granted a non-exclusive franchise to operate its potable water distribution system, including all necessary facilities such as wells, tanks, and water mains, in the City of Las Cruces.

II. POWERS AND DUTIES

Said Franchisee is hereby authorized, licensed and empowered to do any and all things necessary and proper in executing the powers and utilizing the privileges herein mentioned and granted by this Franchise, including the making of necessary excavations and the right to acquire, erect and maintain and operate its pipes, tanks, pumps and appurtenances in and on any and all of the streets, avenues, alleys, highways, public ways, sidewalks, bridges, and other public structures and public places, and public grounds of said City. The Franchisee is hereby authorized to extend, construct, place, locate its pipes, tanks and pumps, connections, and appurtenances through, across, and under any and all of the streets, avenues, highways, public ways, sidewalks, bridges, and other public structures and public places, and public grounds of said City, subject, however, to the Franchisee placing its mains, conduits, and other structures or apparatus used in its water system in such a manner as to not interfere unnecessarily with the use of the public ways by motor vehicles and pedestrians. The Franchisee shall place no mains, conduits, or apparatus of any kind in such a manner as to interfere with any underground gas lines, water lines, sewer lines, electrical lines,

or other underground improvements or structures. Water lines within the street must meet the location requirements of the City's Utility Standards where possible. Franchisee, prior to any construction within a publicly-dedicated right-of-way, must:

(1) obtain the appropriate excavation permits required by law; and

(2) obtain any and all required permits from the New Mexico Public Regulation Commission and/or the New Mexico Environmental Department; and

(3) Within 30 days following the completion of such construction, submit a copy of "as built" plans to the City of Las Cruces Utilities Department.

III. EXCAVATION

Prior to undertaking any excavation activity within the franchise area, the Franchisee shall notify the appropriate one call notification system for the marking of underground pipes, wires, and other structures. Such notice shall be given as required by the appropriate one call notification system. The Franchisee shall report any damage, to underground City facilities caused by excavation undertaken by it, to the City's Utilities Director, and the Franchisee shall bear the cost to repair any such damage. The Franchisee shall also have the duty to report and repair any damage to municipally-owned property caused by its excavation activity.

The Franchisee shall restore the surface of any street, alley, or other public way following any excavation therein by the Franchisee. However, the Franchisee shall not recreate any pre-existing defective condition, but rather shall restore the surface to a reasonably useful condition.

No trench excavations or pavement cuts in any public way shall be commenced under the license herein granted until an excavation permit is secured from the City of Las Cruces. The fee charged for excavation permits shall be as set from time to time by the City Council and applicable to all utilities and/or contractors.

The replacement of pavement shall be performed in accordance to City standards and ordinances. All expenses associated with such replacement of pavement shall be borne by Franchisee, whether completed by private contractors or by City work force.

IV. RELOCATION OF FACILITIES

Where facilities are installed in City streets and street right-of-ways, alleys, highways, public ways, sidewalks, bridges, and other public structures and public places, and public grounds of said City, and it is determined that Franchisee's facilities are in conflict with authorized street widening and street improvements, the City, upon giving at least ninety (90) days written notice to Franchisee, may require Franchisee to relocate such facilities to a mutually acceptable location. All of such relocation work and installation shall be performed by the Franchisee at no expense to the City. All work done in said streets, alleys, highways, public ways, sidewalks, bridges, and other public structures and public places, and public grounds of said City by said Franchisee shall be performed with reasonable diligence; and said Franchisee shall, within a reasonable time, restore such streets, alleys, and public grounds excavated by it, to their original condition as nearly as possible. The City, at its option, and with the consent of the Franchisee, may contract with the Franchisee to perform any such relocation required under this Franchise.

The City and its officers, agents and employees shall be indemnified and held harmless for all claims, losses and damages to persons or property on account of or resulting from the Franchisee's operation, work, duties and obligations pursuant to the terms of this Franchise.

V. REGULATIONS

The Franchisee shall operate and maintain its potable water service within the franchise area in accordance with all regulations and tariffs of the New Mexico Public Regulation Commission, and other state and federal regulatory authorities.

VI. TERM

The Franchise shall be in force and effect until the 31st day of December, 2040. This Franchise may be assigned only after Franchisee has given the City ninety (90) days written notice of the proposed assignment and the proposed assignment has received the required City and Public Regulation Commission approval.

VII. ACCEPTANCE OF FRANCHISE

This Franchise shall be accepted by the Franchisee in writing within 30 days from the date this Ordinance is passed by the City Council. If not so accepted, this Franchise Ordinance shall be repealed and negotiation for a new Franchise may take place between the City and Franchisee; PROVIDED, that in any such negotiation neither party shall be bound by the terms of this Franchise Ordinance. It is hereby made an essential condition of the granting of this Franchise, and its use and enjoyment by the Franchisee, its successors, lessees, and assigns, that the acceptance by the

Franchisee, its successors, lessees and assigns, of all the conditions, reservations and restrictions herein is provided and contained; and when this Franchise has been accepted as aforesaid in the space provided at the end of this instrument, this Ordinance shall be and become a contract duly executed by and between the aforesaid City of Las Cruces and the Franchisee, PROVIDED, however, that excepting for mortgages, stockholders, bondholders, or any others having any lien or claim of whatever sort against the Franchisee, including its rights and privileges as herein granted, the Franchisee will make no transfer, assignment, lease or other succession of or to the rights herein granted, without the approval of the City and the regulatory agencies having jurisdiction over the Franchisee's operations.

VIII. REPEAL OF CONFLICTING ORDINANCES

All other ordinances or parts of ordinances in conflict herewith are hereby repealed.

IX. SCOPE

This Franchise Ordinance incorporates all of the agreements, covenants and understandings between the parties hereto concerning the subject matter hereof, and all such covenants, agreements, and understandings have been merged into this written Franchise Ordinance. No prior agreement or understanding, verbally or otherwise, of the parties or their agents, shall be enforceable unless embodied in this Franchise Ordinance.

X. AMENDMENTS

This Franchise Ordinance shall not be altered, changed or amended except by ordinance in writing and executed by the parties hereto.

XI. RIGHTS OF SUCCESSORS

This Franchise Ordinance shall be binding upon the successors, underlessees and assigns of the parties hereto.

XII. NON-EXCLUSIVE FRANCHISE - CITY RIGHT OF PURCHASE

The City of Las Cruces, in granting this Franchise, surrenders no privileges or rights that it may now have or possess of owning or installing any potable water system and furnishing potable water to the City and inhabitants thereof. Notwithstanding anything to the contrary, the City recognizes the investment that the water companies have in serving existing customers and does not wish to inhibit the service to remote areas. Therefore, the City will in good faith enter into negotiations with the Franchisee for an agreement whereby compensation will be paid to the Franchisee for the loss of plant investment. In addition, the Franchisee in no way surrenders any privileges or rights or causes of action that it may have now or in the future against the City if the City chooses to own or install any potable water system and furnishing of potable water to the City or inhabitants thereof which lie within the service area of the Franchisee. In the event that the City of Las Cruces shall at any time hereafter seek to acquire by purchase or otherwise obtain the property of the Franchisee, it is agreed that in any negotiations or proceedings looking toward the acquisition of said property by the City,

the value of this Franchise shall be arbitrarily fixed and determined at the sum of $1.00 and no more.

XIII. SAVINGS CLAUSE - CONDITIONAL FRANCHISE - REPEAL

If any section, paragraph, subdivision, clause, phrase or provision of this Ordinance, except the provision containing the Franchise rental or tax, shall be adjudged invalid or unconstitutional, the same shall not affect the validity of this Ordinance as a whole, or any part or provisions thereof, other than the part so decided to be invalid or unconstitutional.

XIV. PARAGRAPH HEADINGS

The paragraph headings of this Franchise Ordinance are inserted only for reference and in no way define, limit or describe the scope of the intent of this Franchise Ordinance nor affect its terms and provisions.

XV. PAYMENT BY FRANCHISEE

The Franchisee shall pay to the City of Las Cruces on or before January 31st of each year during the term of this franchise the following franchise fee:

(1) 0-50 customers residing within the City limits of the City of Las Cruces - $125.00;

(2) 50-100 customers residing within the City limits of the City of Las Cruces - $250.00;

(3) Over 100 customers - 2% per annum of the gross receipts of the Franchisee received from potable water service to customers within the City limits of the City of Las Cruces during the preceding calendar year.

EXECUTED on this _____ day of _____, 2015.

CITY OF LAS CRUCES

By:_____
Ken Miyagishima, Mayor

Approved as to Form:

_____
Marcia B. Driggers
Utilities Attorney

ACCEPTANCE BY FRANCHISEE

The above Franchise is accepted by Moongate Water Company, Inc. on this _____ day of _____, 2015.

MOONGATE WATER COMPANY, INC.

By: _____
Louis A. Gariano, President