

BUNTROCK AVENUE WATER MAIN LOOP

BETTERMENT OF SERVICE

WATER SERVICES AGREEMENT

This Agreement (the "Agreement") is made by and among the Mequon Water Utility (the "Utility") and the Village of Thiensville ("Village"), collectively, the "Parties," individually, a "Party"), this \_\_\_\_\_ day of \_\_\_\_\_, 2020.

RECITALS

1. Pursuant to Section 66.0815, Wisconsin Statutes, the Village has granted to the Utility a franchise to operate a public water utility in the Village; and pursuant to such grant the Utility is actively engaged in providing public utility water service to customers within the user service area in the Village, as defined in the grant of franchise.

2. The Village and the City of Mequon entered into an Intergovernmental Agreement on June 22, 2009 which governs the relationship between the City and the Village for the provision of water services to properties within the Village.

3. The Village, the City of Mequon and the Utility entered into a subsequent Intergovernmental Agreement on \_\_\_\_\_ (the "Loop IGA") where the Utility agreed to loop and improve the water system along Buntrock Avenue from the Seminary to Main Street (the project, in whole, hereinafter referred to as the "Water Service Facilities").

4. The Village desires to exercise its right under the Loop IGA to accelerate the construction of the Water Service Facilities.

5. The Loop IGA provides the Village may undertake such construction on its own (subject to the Utility reviewing and approving the plans and specifications) and that the Utility reimburses the Village for its eligible and reasonable costs for the Water Service Facilities project as Betterment of Service Project under Wisconsin Public Service Commission (PSC) regulations by the date specified below. Such reimbursement shall not be for any expenses that are not eligible as a Betterment of Service cost under the PSC regulations.

6. The Loop IGA contemplates that the Utility and Village will negotiate the specific terms of such project and reimbursement in a Water Services Agreement to be entered into between the parties at the time a project is proposed.

7. The Parties intend that this Agreement shall be said Water Services Agreement.

8. The Village desires to transfer to the Utility all right, title and interest in and to the new water delivery facilities constructed, and any part or parts thereof being so acquired, so that the Utility becomes the owner of the Loop.

BASED UPON THE FOREGOING RECITALS, and in consideration of the mutual promises set forth herein and for other good and valuable consideration, the receipt and sufficiency of which is acknowledged, the Parties hereby agree as follows:

1. Recitals. The foregoing recitals are accurate and are incorporated and made part of this Agreement.
2. Acquisition. The Village agrees to transfer to the Utility, and the Utility agrees to accept and acquire the assets comprising the Water Service Facilities, pursuant to the terms and conditions of this Agreement.
3. Obligations of the Village. The obligations of the Village under this Agreement are as follows:
  - 3.1 The Water Service Facilities shall be restricted to the project outlined in this Agreement and the Loop IGA. Any additional water delivery facilities, or connections for properties shall be governed under a separate Water Services Agreement. The Water Service Facilities project is confined to a Betterment of Service Project governed by Wisconsin Public Service Commission (PSC) regulations.
  - 3.2 For any costs for which the Village will be seeking reimbursement from the Utility, prior to authorizing the contracts for the engineering, construction work and project management, the Village shall provide copies of the contracts to the Utility for staff approval. The Village shall complete due diligence to ensure the project is cost effective and shall follow a procurement policy substantially similar to that of the Utility. Where the Village seeks to utilize engineering, construction work and project management

services without prior authorization of Utility staff, such costs will not be reimbursable by the Utility.

3.3 The Village shall provide the engineering, construction work and project management for the Water Service Facilities, so as to result in the construction of a fully operational system of water delivery facilities consistent with current standard industry specifications, practices and design, and which meets regulatory requirements of the Wisconsin Department of Natural Resources, and which meets the approval of the Utility.

3.4 The Village shall transfer title and convey the Water Services Facilities to The Utility as set forth below, subject to any required governmental and regulatory approvals, on the Transfer Date as defined below.

3.4.1 The Transfer Date shall be a date specified by the Utility on which that it has accepted the completed work and the then-current physical and legal status of the Water Services Facilities, and on which the Utility shall assume responsibility as owner for the operation of the Water Services Facilities.

3.5 It shall be the responsibility of the Village to provide the Utility with any easements necessary for the construction, permanent location, and use, maintenance, repair, enlargement and replacement of a connection between the Utility's water main and the Water Service Facilities, whether it shall be necessary for the Village to obtain such easements across private property, all without cost to the Utility, and to that end shall cooperate with the Utility in the exercise of eminent domain authority if necessary with respect to private property. This section includes any easements required for the pressure reducing pit/station.

3.6 The Village shall provide an assignment to the Utility of the warranties provided by the contractor(s) who constructed the Water Service Facilities.

4. Obligations of the Mequon Water Utility. The obligations of the Mequon Water Utility under this

Agreement are as follows:

- 4.1 The Utility shall provide pre-construction review of the engineering plans and specifications which shall be provided by the Village to the Utility in accordance with the City's Standard Specifications for Land Development. When approved, the Utility shall provide an owner letter to the Wisconsin Department of Natural Resources attesting to such fact.
- 4.2 The Utility may conduct any inspection which it deems necessary during the construction of the Water Service Facilities, and will assist the Village and the contractor with start-up operations for the newly constructed Water Service Facilities.
- 4.3 The Village shall provide As-Built Drawings of the newly constructed Water Service Facilities in accordance with the Standard Specifications for Land Development, which costs shall be included in the work covered by Section 4.2.
- 4.4 After the Water Service Facilities have passed final inspection, certifying that they are installed according to Utility Standards, the Utility shall acquire and take possession of the Water Service Facilities on the Transfer Date.
- 4.5 On and after the Transfer Date, the Utility shall incorporate the Water Service Facilities to the Utility and provide to all future properties water service at quantities and pressure adequate and sufficient to satisfy peak business demand, and under rates, rules, regulations and conditions of service on file with the Public Service Commission of Wisconsin ("PSCW") or any successor regulatory agency.
- 4.6 After transfer of the Water Service Facilities to the Utility, the Utility shall maintain such Facilities in a manner consistent with any and all applicable federal state and local statutes, regulations, ordinances and the franchise grant, at the Utility's sole expense.
- 4.7 When performing future maintenance, repair, enlargement or replacement of the Water Facilities, the Utility shall restore at its expense any easement area or right-of-way necessary for the location and maintenance of the Water Service Facilities and the connection to the Utility water main, so that it reasonably approximates its condition just

before disturbance, if disturbed by Utility construction or maintenance activity after the Transfer Date, except that no previously existing landscaping which is inconsistent with the purpose for the easement and the future maintenance of the Water Service Facilities or the connection shall be restored or replaced.

4.8 After the Transfer Date and upon submittal of invoicing for the engineering, construction work and project management, the Utility shall provide reimbursement not later than December 31, 2023.

5. Representations and Warranties by the Utility. The Utility makes the following representations and warranties which are true and correct on the date of this Agreement and will be true on the Transfer Date.

5.1 The Utility is a wholly owned department of the City of Mequon, and is and on the Transfer Date will be, duly empowered and authorized to enter into this Agreement and to consummate the transactions contemplated herein.

5.2 That the execution and delivery of this Agreement and the consummation of the transactions contemplated herein have been duly authorized and, if necessary, approved by the Mequon Water Utility Commission and, except for approvals from the PSCW and other appropriate regulatory agencies, no further action by the Utility is necessary for the validity and enforceability of this Agreement.

5.3 That except for the PSCW approvals referenced herein, there is not now any litigation, suit or regulatory agency proceeding pending or to the Utility's knowledge, or threatened, which might interfere with the sale of purchase contemplated hereby; and it will promptly notify the Village in writing if any such litigation, suit or regulatory agency proceeding, shall be instituted or threatened prior to, the Transfer Date.

5.4 The Utility shall have received all necessary governmental and regulatory approvals, including, but not limited to, PSCW approvals, permits and licenses necessary for the execution and performance of this Agreement.

6. Survival of Warranties and Representations. Any warranty expressly stated upon the face of this Agreement shall survive the Transfer Date hereunder notwithstanding any investigation made by or on behalf of the Parties.

7. Rates. All future customers shall pay standard, non-discriminatory service rates as filed and approved by the PSCW for customers water service. These rates are subject to change from time to time, pursuant to approval from the PSCW. A copy of the current The Utility tariff is available upon request.

8. Right of Further Extension.

8.1 The Utility shall have the right to further extend its water mains from and beyond the water mains constructed as contemplated by this Agreement.

8.2 In the future, should the Utility deem it necessary, in its sole discretion, to expand the water main system in order to serve additional future customers, the Village shall grant to the Utility one or more additional easements and temporary construction easements within Village right-of-way, as may be required by the Utility for the purpose of constructing one or more water main extensions, at no charge to the Utility for such easement(s) provided, however, the Utility shall restore any such easement areas to its condition just prior to construction at the Utility's expense.

9. Contingencies. This Agreement shall be contingent upon the Parties obtaining any and all approvals from appropriate federal, state and local governments and agencies relating to this project.

10. Resolution of Disputes. If a disagreement arises between the parties concerning the terms of this agreement, the parties shall resort to the following.

10.1 Negotiation. The parties shall first endeavor, in good faith, to settle any dispute(s) (hereinabove defined as a "Dispute;" and collectively, "Disputes,") through direct negotiation between the parties. If the parties are unable to reach a negotiated settlement with respect to such Dispute within thirty (30) days after the commencement of negotiations, the parties may continue to negotiate diligently and in good faith with respect to such Dispute, or, at the option of either party, the Dispute may be submitted to mediation

upon written demand for mediation delivered to the other party. Such mediation shall be conducted pursuant to paragraph 0 below.

- 10.2 Mediation. If the parties are unable to reach a negotiated settlement with respect to any Dispute pursuant to the negotiations provided for above, and one of the parties has submitted a written demand for mediation to the other party, both parties shall promptly submit the Dispute to Mediation. Such mediation shall be conducted by a mediator reasonably acceptable to the Parties with the fees and expenses of said mediator to be split equally between the parties. In the event the parties are unable, within forty-five (45) days after a written demand for mediation, to agree on a mutually acceptable mediator, either party may demand arbitration pursuant to subsection 10.3 below.

Upon selection of the mediator by the parties, the parties shall diligently attempt, in good faith, to settle the Dispute by mediation. If the parties are unable to reach a mediated settlement with respect to such Dispute within ninety (90) days after the commencement of mediation, the parties may continue to mediate diligently and in good faith with respect to such Dispute, or, at the option of either party, the Dispute may be submitted to arbitration by written demand therefore delivered to the other party; provided, however, that in no event shall a demand for arbitration be made after the date when institution of legal or equitable proceedings have been instituted, or after the matter in question would be barred by the applicable statute of limitations. Arbitration shall be held pursuant to subsection 10.3 below.

- 10.3 Arbitration.

10.3.1 Subject to Arbitration. Any Dispute referred to arbitration as provided above shall be settled by arbitration in Ozaukee County, Wisconsin under rules for arbitration that the parties may mutually agree upon, or, in the absence of such agreement, as selected by the arbitrator(s) as provided in subsection (0) below.

10.3.2 Arbitrator. The parties shall select a single arbitrator to hear the Dispute. If the parties are unable to agree on the selection of a single arbitrator, then each party shall name one arbitrator and the two arbitrators thus selected shall select a third arbitrator; provided, however, if either party fails to select an arbitrator, or if the two arbitrators selected by the parties fail to select the third arbitrator within fourteen (14) days after the appointment of the second arbitrator, then either party may petition the Circuit Court of Ozaukee County for the appointment of the third arbitrator. Once selected, unless the parties have already agreed upon a set of rules, the arbitrator(s) shall determine the rules by which the arbitration shall be conducted.

10.4 Award; Binding Effect. The arbitrator shall have no authority to award monetary damages, including punitive damages, nor make any ruling, finding or award that does not conform to the terms and conditions of this Section. The prevailing party shall be entitled, in addition to other relief granted, to an award of its costs and expenses related to such arbitration, including, without limitation, the fees and expenses of the arbitrator, reasonable attorneys' fees, administrative expenses and witness fees. The award of the arbitrator or arbitrators shall be accompanied by a written, reasoned opinion and shall be rendered no later than thirty (30) days from the date the subject arbitration is formally closed unless mutually extended in writing by the parties. The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

11. Successors and Assigns. This Agreement shall be binding upon the respective heirs, successors and assigns of the Parties.

12. Force Majeure. Neither Party shall be liable to the other for failure, default or delay in performing any of the obligations set forth in this Agreement reasonably attributable to any cause not within the control of the Party affected in which, by the exercise of due diligence, such Party is unable to prevent or overcome.

Should any of the foregoing occur, the Parties agree to proceed with diligence to enable each Party to perform its obligations under this Agreement.

13. Notice. Notice to either party under this Agreement shall not be effective unless sent via by certified United States mail to the following addresses:

If to the Utility:

Mequon Water Utility  
11333 North Cedarburg Road  
Mequon, WI 53092

With a copy to:

Brian C. Sajdak  
Mequon City Attorney  
11402 W. Church St.  
Franklin, WI 53132

If to the Village:

Amy Langlois, Village Clerk  
Thiensville Village Hall  
250 Elm Street  
Thiensville, WI 53092

With a copy to:

Timothy S. Schoonenberg  
Thiensville Assistant Village Attorney  
1650 9th Ave  
PO Box 104  
Grafton, WI 53024-0104

Either party may change the address of notice by providing notice to the other party pursuant to this section of the Agreement.

14. Failure to Enforce. Failure to enforce any provision of this Agreement by either Party shall not be deemed to be a waiver of any other provision of the Agreement.

15. Default. If, before or at the Transfer Date, either party fails to perform one or more of the representations, covenants, warranties or other terms of this Agreement and such failure is not cured or

corrected within fifteen (15) business days after receipt of written notice, the other party may (i) terminate this Agreement, (ii) sue for specific performance or (iii) pursue any and all remedies available at law or in equity, including, without limitation, recovery of the actual costs incurred in connection with the transaction contemplated in this Agreement.

16. Entire Agreement. This Agreement constitutes the entire Agreement between the Parties. This Agreement may not be modified or altered in any way except by mutual written agreement of the Parties.

17. Governing Law. This Agreement shall be governed and construed under the laws of the State of Wisconsin.

18. Indemnification.

18.1 General Indemnification by Village. Village shall indemnify and hold the Utility and the City of Mequon harmless against and from any and all liability, judgments, costs and expenses incurred by the Utility and/or the City of Mequon as the result of any action by whomsoever or whenever brought or obtained against the Utility and/or the City of Mequon, which may in any manner result from or arise in the course of, out of, or as a result of the carelessness, negligence or neglect of Village, its agents, contractors or employees. In every case where judgment is recovered against the Utility and/or the City of Mequon and where notice of the pendency of the suit and an opportunity to defend the same has been given to Village within ten (10) days after its commencement, the judgment shall be conclusive upon Village, not only as to the amount of damages, but also as to its liability to the Utility and/or the City of Mequon.

18.2 General Indemnification by Utility and the City of Mequon. Utility and/or the City of Mequon shall indemnify and hold the harmless Village against and from any and all liability, judgments, costs and expenses incurred by the Village as the result of any action by whomsoever or whenever brought or obtained against the Village, which may in any manner result from or arise in the course of, out of, or as a result of the carelessness, negligence or neglect of Utility and/or the City of Mequon, its agents, contractors or

employees. In every case where judgment is recovered against the Village and where notice of the pendency of the suit and an opportunity to defend the same has been given to Utility and/or the City of Mequon within ten (10) days after its commencement, the judgment shall be conclusive upon Utility and/or the City of Mequon, not only as to the amount of damages, but also as to its liability to the Village.

18.3 Nothing contained within this Agreement is intended to be a waiver or estoppel of the City, Utility, Village or their insurer to rely upon the limitations, defenses, and immunities contained within Wisconsin law, including those contained within Wisconsin Statutes §§ 893.80, 895.52, and 345.05. To the extent that indemnification is available and enforceable, the City, Utility, Village or their insurer shall not be liable in indemnity or contribution for an amount greater than the limits of liability for municipal claims established by Wisconsin Law.

**IN WITNESS WHEREOF**, the parties have executed this Agreement as of the day and year first above written.

**VILLAGE OF THIENSVILLE**

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Van A. Mobley, Village President

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Amy Langlois, Village Clerk

Approved as to Form:

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Timothy S. Schoonenberg  
Assistant Village Attorney

**MEQUON WATER UTILITY**

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John M. Wirth, Mayor

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Caroline Fochs, City Clerk

Approved as to Form:

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Brian C. Sajdak  
Mequon City Attorney