

**City of Florence
Ordinance No. 16, Series 2010**

AN ORDINANCE GRANTING A NON-EXCLUSIVE FRANCHISE TO HECETA WATER DISTRICT TO OPERATE A WATER UTILITY WITHIN THE CITY, AND FIXING TERMS, CONDITIONS AND COMPENSATION OF SUCH FRANCHISE, REPEALING ORDINANCE NO. 6, SERIES 2010 AND DECLARING AN EMERGENCY

WHEREAS, Chapter II, Section 4(c) of the City of Florence Charter gives the City of Florence ("City") authority to grant local franchises for the use of public ways and to regulate all franchisees; and

WHEREAS, the City has occasion to annex properties into the City of Florence; and

WHEREAS, some annexed properties are currently being serviced by the Heceta Water District ("District") which results in the District using the City's public ways to provide service to some of its water customers; and

WHEREAS, the Franchise Agreement attached as Exhibit "A" (the "Franchise Agreement") has been agreed to by the City and the District (the "Parties"); and

WHEREAS, the District has fully executed the attached Franchise Agreement and the Parties intend that it shall be effective when signed by both parties.

NOW, THEREFORE, THE CITY OF FLORENCE ORDAINS AS FOLLOWS:

- Section 1. The Mayor of the City is hereby authorized to sign the Franchise Agreement on behalf of the City.
- Section 2. Ordinance No. 6, Series 2010, an ordinance granting a non-exclusive franchise to the Heceta Water District, was never accepted by the District and is hereby repealed and shall be replaced by the attached Franchise Agreement.
- Section 3. This ordinance being necessary for public health, safety and welfare shall be declared an emergency and shall be effective on the date of its passage by the City Council and the signature of the Mayor. The payment of franchise fees will be effective upon execution of the agreement by both parties.

Passed by the Florence City Council this 7th day of September, 2010.

AYES 4 Councilors Burns, Roberts, Xavier, Mayor Brubaker
NAYS 0
ABSTAIN 0
ABSENT 0

APPROVED BY THE MAYOR, this 9th day of September, 2010.



Phil Brubaker, MAYOR

ATTEST:



Pat Heinze, CITY RECORDER

Exhibit A

Agreement for Non-Exclusive Franchise To Operate Water Utility within City

Between: Heceta Water District, an Oregon domestic water supply district;

And The City of Florence, an Oregon municipal corporation.

Section 1: Definitions and Explanations

- (1) As used in this Agreement.
 - (a) "City" means the City of Florence and the areas within its boundaries, including its boundaries as extended in the future.
 - (b) "Council" means the legislative body of the City.
 - (c) "Water Utility" means a public or private entity which provides water services to the public within its service territory.
 - (d) "Grantee" means the entity referred to in Section 2 of this Agreement.
 - (e) "Gross Revenue" means the revenue of the Grantee in whatever form accrued from providing Water Services to customers in the City using the Right-of-way of the City, including but not limited to: revenues from customers; installation fees, equipment fees and other fees related to the provided Water Service. "Gross revenue" does not include proceeds from the sale of bonds, mortgage or other evidence of indebtedness, or securities or stocks, any system development charges collected by the Grantee, any revenues that are exempt from franchise fees under federal or state law or any amounts received from federal, state or local governments.
 - (f) "Person" includes an individual, corporation, association, firm, partnership and joint stock company.
 - (g) "Public place" includes any city-owned park, place or grounds within the City that is open to the public but does not include a Right-of-way.
 - (h) "Right-of-way" includes a street, alley, avenue, road, boulevard, thoroughfare bridge or public highway within the City, but does not include a public place.
 - (i) "Water Service" means supplying water to users within the City.
- (2) As used in this Agreement, the singular number may include the plural and the plural number may include the singular.

Section 2: Rights Granted

Subject to the conditions and reservations contained in this Agreement, the City hereby grants to Heceta Water District, an Oregon domestic water supply district formed

pursuant to ORS Chapter 264, the right, privilege and franchise to Construct, install, maintain and operate a Water Utility on, under and above the rights of way of the City.

Section 3: Scope of Services Provided

If in the future Grantee intends to deliver services other than Water Services using its facilities in the right of way, Grantee and the City will negotiate a separate agreement. Nothing in this agreement shall restrict the City from imposing any franchise fees, license fees or related charges for services not covered by this franchise agreement.

Section 4: Use of Right-of-Way by Grantee

- (1) Grantee is hereby permitted its current use and occupancy of the rights of way located within the City. For future expanded use or occupancy of the rights of way located within the City, Grantee shall first obtain permission in writing from the City to do so and shall comply with any reasonable conditions the City imposes on such use or occupation.
- (2) The compensation paid by the Grantee for this franchise includes all compensation for the use of rights of way located within the City as authorized. However, this subsection shall not be construed to prevent the City from requiring the grantee to pay charges as provided in Section 14 of this Agreement.

Section 5. Duration

This franchise is granted for a period of five (5) years from and after the effective date of this Agreement, unless sooner terminated as provided in this Agreement. At the end of the Franchise term, if the City and Grantee are negotiating another franchise and have not concluded their negotiations, Grantee's rights and responsibilities shall be controlled by this Franchise until the City grants a new franchise and Grantee accepts it.

Section 6. Franchise Not Exclusive

This franchise is not exclusive, and shall not be construed as a limitation on the City in:

- (1) Granting rights, privileges and authority to other persons similar to or different from those granted by this Agreement.
- (2) Constructing, installing, maintaining or operating any City-owned Water Utility.

Section 7. Public Works and Improvements Not Affected by Franchise

The City reserves the right to:

- (1) Construct, install, maintain and operate any public improvement, work or facility;
- (2) Do any work that the City may find desirable on, over or under any right-of-way or public place.
- (3) Vacate, alter or close any right-of-way or public place, provided that the City shall make available to Grantee an alternative right-of-way for the location of its facilities, if an alternative right-of-way is necessary.

- (4) Control or prevent the use of any public place by Grantee and require payment of additional compensation for use of the public place at a reasonable amount.
- (5) Whenever the City shall excavate or perform any work in any of the present and future rights of way and public places of the City, or shall contract, for such excavation or work where such excavation or work may disturb Grantee's water facilities, the City shall, in writing, notify Grantee sufficiently in advance of such contemplated excavation or work to enable Grantee to take such measures as may be deemed necessary to protect such water facilities from damage and possible inconvenience or injury to the public. In any such case, the Grantee, upon request, shall furnish maps or drawings to the City or contractor, as the case may be, showing the approximate location of all its structures in the area involved in such proposed excavation or other work.
- (6) Whenever the City shall vacate any right-of-way or public place for the convenience or benefit of any person or governmental agency or instrumentality Grantee's right under this franchise shall be preserved as to any of its facilities then existing in such right-of-way or public place.

Section 8: Safety Standards and Work Specifications

- (1) The Grantee's facilities within the City shall at all times be maintained in a safe, substantial and workmanlike manner.
- (2) For the purpose of carrying out the provisions of this section, all work shall be performed in accordance with all applicable laws and regulations, including but not limited to the reasonable conditions contained in the permit for the work and generally applicable standards published by the City or other applicable governing authority. The City may amend and add to such specifications from time-to-time, provided that the Grantee is given notice and an opportunity to address the City Council prior to adoption of such amendments and additions.

Section 9: Control of Construction

The Grantee shall file with the City maps showing the location of any construction, extension or relocation of its Water Utility in the rights of way and public places of the City and shall obtain from the City written approval of the location and plans prior to commencement of the work. The City may require the Grantee to obtain a permit before commencing the construction, extension or relocation of any of its Water Utility.

Section 10: Right-of-Way Excavations and Restorations

- (1) Subject to the provisions of this Agreement, the Grantee may make necessary excavations for the purpose of constructing, installing, maintaining and operating its facilities. Except in emergencies, and in the performance of routine service connections and ordinary maintenance, prior to making an excavation in the traveled portion of any right-of-way and, when required by the City, in any untraveled portion of any right-of-way, the Grantee shall obtain from the City written approval of the proposed excavation and of its location. Grantee shall give notice to the City by telephone, electronic data transmittal or other appropriate means prior to the commencement of service or maintenance work and as soon as is practicable after the commencement of work performed under emergency conditions.

- (2) When any excavation is made by the Grantee, the Grantee shall promptly restore the affected portion of the right-of-way to the same condition in which it was prior to the excavation. The restoration shall be in compliance with specifications, requirements and regulations of the City in effect at the time of such restoration. If the Grantee fails to restore promptly the affected portion of a right-of-way to the same condition in which it was prior to the excavation, upon 15 days written notice to the Grantee, the City may make the restoration, and Grantee shall be responsible for paying the cost of such restoration, including the City's cost of inspection, supervision and administration.

Section 11: Location and Relocation of Facilities

- (1) All facilities of the Grantee shall be placed so that they do not interfere unreasonably with the use by the City and the public of the rights of way and in accordance with any specifications adopted by the City governing the location of all utility facilities in the City. Nothing in this paragraph shall require the Grantee to relocate facilities in the right of way as of the effective date of this Agreement, except as required in subparagraph (2) of this Section.
- (2) The City may require, when it reasonably determines it is in the public interest, the relocation of facilities maintained by the Grantee in the rights of way of the City, and the Grantee shall relocate such facilities within a reasonable time after receiving notice so to do from the City. The City shall provide the Grantee with timely notice of any anticipated requirement to relocate its facilities. The cost of such relocation of its facilities shall be paid by the Grantee. When a relocation is required for the convenience or benefit of any person, governmental agency or instrumentality other than the City, Grantee may refuse to accomplish such relocation unless such party agrees to pay the reasonable cost thereof.

Section 12. Emergency Repair Service

Grantee shall maintain emergency repair service available on a 24-hour a day basis.

Section 13: Compensation

- (1) As compensation for the franchise granted by this Agreement, the Grantee shall pay to the City an amount equal to five percent (5%) of the Gross Revenue collected by the Grantee from its customers for Water Services provided within the City.
- (2) Grantee shall make quarterly payments to the City on or before the 15th day of each April, July, October, and January for the immediately preceding quarter. Upon termination, the Grantee shall pay a pro rata fee for the last quarterly payment to the date of termination in addition to any other sums due the City and shall make such payment within 30 days of termination.
- (3) The Grantee shall furnish to the City with each payment of compensation required by this section a sworn statement showing the amount of gross revenue of the Grantee within the City for the period covered by the payment computed on the basis set out in subsection (1) of this section. The compensation for the period covered by the statement shall be computed on the basis of the gross revenue so reported. If the Grantee fails to pay the entire amount of compensation due the City through error or otherwise, the difference due to City shall be paid by the Grantee within fifteen (15) days from discovery of the error or

determination of the correct amount. Any overpayment to the City through error or otherwise, shall be offset against the next payment due from the Grantee.

- (4) Acceptance by the City of any payment due under this section shall not be deemed to be a waiver by the City of any breach of this franchise occurring prior thereto, nor shall the acceptance by the City of any such payments preclude the City from later establishing that a larger amount was actually due, or from collecting any balance due to the City.

Section 14. Permit and Inspection Fees

Nothing in this Agreement shall be construed to limit the right of the City to require the Grantee to pay reasonable charges imposed by the City in connection with issuing a permit, making an inspection or performing any other service for or in connection with the Grantee's facilities in the City, whether pursuant to this Agreement or any other ordinance or resolution now in effect or adopted by the City in the future, as long as these fees apply to all persons alike.

Section 15. Compensation to be Credit Against Certain Taxes

The compensation required by Section 13 of this Agreement to be paid by the Grantee to the City shall be a credit against all license, occupation, business or excise taxes which the City may now or hereafter impose upon the Grantee for the delivery of Water Services. However, nothing contained in this franchise shall give the Grantee any credit against any ad valorem property tax now or hereafter levied against real or personal property within the City, or against any local improvement assessment or against any charges imposed upon the Grantee as provided in Section 14 of this Agreement or reimbursement or indemnity paid to the City. Notwithstanding the foregoing, nothing in this Section shall act as or constitute a waiver of the right to remonstrate against the local improvement.

Section 16: Books of Account

The Grantee shall keep accurate books of account at an office in Oregon for the purpose of determining the amounts due to the City under Section 13 of this Agreement. Upon reasonable written notice, the City may inspect the books of account during business hours and may audit the books from time-to-time for the sole purpose of determining the amounts due under Section 13, provided that the City shall not be entitled to inspect or audit any books or recover any underpayment three (3) or more years from the date on which the franchise fee payment is due. Grantee shall reimburse City for the reasonable costs of such audit if the audit discloses that Grantee has paid 97% or less of the fee owing for the period of the audit.

Section 17: Confidentiality

Grantee and the City may determine that the locations of certain water facilities should be confidential as the public interest may require. If they so determine, notwithstanding any other provision of this Agreement, Grantee shall thereafter not be obligated to provide records of the location of such facilities to the City. If Grantee provides such records to the City, the City shall treat them as records given in confidence and:

- (1) Retain and disclose them as provided by Oregon Public Records Law and any other applicable law;

- (2) Limit employee access to any such confidential record facilities to those employees of the City required to use information in the record;
- (3) Store such records provided by Grantee under this section pursuant to the City's adopted Records Management Policy;
- (4) Use its best efforts to maintain such confidential records in a locked location and avoid making and distributing copies of such records.

Section 18: Indemnity

Within the limits of the Oregon Constitution and the Oregon Tort Claims Act, codified at ORS 30.260 through 30.300, the Grantee shall indemnify and save harmless the City and its officers, agents and employees from any and all loss, cost and expense, including court costs and attorney fees, whether at trial or on appeal, arising from damage to property and/or injury to, or death of, persons due to any wrongful or negligent act or omission of the Grantee, its agents or employees in exercising the rights, privileges and franchise hereby granted.

Section 19: Assignment of Franchise

This franchise shall be binding upon and inure to the benefit of the successors, legal representatives and assigns of the Grantee; but no transfer of this franchise by merger, consolidation, sale, assignment or otherwise shall be made unless the City Council first consents by resolution.

Section 20. Reservation of Statutory Authority: Incorporation of Charter Provisions

The City reserves the right to exercise, with regard to this franchise and the Grantee, all authority now or hereafter granted to the City by State statutes. All rights of the City under the City charter are reserved to the City.

Section 21: Termination of Franchise for Cause

The City may terminate this franchise as provided in this Section, subject to Grantee's right to a court review of the reasonableness of such action, upon the willful failure of the Grantee to perform promptly and completely each and every material term, condition or obligation imposed upon it under or pursuant to this Agreement. The City shall provide the Grantee written notice of any such failure and the Grantee shall have sixty (60) days from receipt of notice to cure such failure, or if such failure cannot reasonably be cured within sixty (60) days, to commence and diligently pursue curing such failure.

Section 22: Remedies Not Exclusive, When Requirement Waived

All remedies and penalties under this Agreement, including termination of the franchise, are cumulative, and the recovery or enforcement of one is not a bar to the recovery or enforcement of any other such remedy or penalty. The remedies and penalties contained in this Agreement, including termination of the franchise, are not exclusive and the City reserves the right to enforce the penal provisions of any ordinance or resolution and to avail itself of any and all remedies available at law or in equity. Failure to enforce shall not be construed as a waiver of a breach of any term, condition or obligation imposed upon the Grantee by or pursuant to this Agreement. A specific waiver of a particular breach of any term, condition or obligation imposed upon the Grantee by or pursuant to this Agreement shall not be a waiver of any other or subsequent or future

breach of the same or of any other term, condition or obligation, or a waiver of the term, condition or obligation itself.

Section 23. Effective Date

This Agreement will be effective upon execution by the parties.

Heceta Water District

City of Florence



Bob Hursh, Board President

Phil Brubaker, Mayor



Date

Date

**CITY OF FLORENCE
RESOLUTION NO. 13, SERIES 2014**

A RESOLUTION CONSENTING TO THE ASSIGNMENT OF A WATER FRANCHISE AGREEMENT TO HECETA WATER PEOPLE'S UTILITY DISTRICT.

WHEREAS, Ordinance No. 16, Series 2010 granted to the Heceta Water District a non-exclusive franchise to operate a water utility within the City; and

WHEREAS, the entirety of Heceta Water District's territory has been transitioned to the recently formed Heceta Water People's Utility District; and

WHEREAS, as a result of the transition to the Heceta Water People's Utility District, through correspondence from the Board President dated May 15, 2014, Heceta Water District requested that the City allow the assignment of the franchise agreement to Heceta Water People's Utility District; and

WHEREAS, the franchise agreement allows for the transfer of the agreement pursuant to the following provision: "This franchise shall be binding upon and inure to the benefit of the successors, legal representatives and assigns of the Grantee; but no transfer of this franchise by merger, consolidation, sale, assignment or otherwise shall be made unless the City Council first consents by resolution."

NOW, THEREFORE, BE IT RESOLVED by the Florence City Council:

Section 1. The City Council hereby consents to the assignment by the Heceta Water District to the Heceta Water People's Utility District of the non-exclusive franchise granted by Ordinance No. 16, Series 2010. The Heceta Water People's Utility District shall hereinafter have all the rights, duties, and obligations of the franchisee under the franchise agreement.

Section 2. This resolution shall take effect upon passage by the City Council and the signature of the Mayor.

PASSED BY THE FLORENCE CITY COUNCIL, this 7th day of July, 2014.


Nola Xavier, MAYOR

ATTEST:



Kelli Weese, CITY RECORDER