

ORDINANCE NO. 040300-A

ORIGINAL

AN ORDINANCE GRANTING THE FRANCHISE, RIGHT, PERMISSION, AND AUTHORITY TO SWEETWATER UTILITY, LLC, A TEXAS LIMITED LIABILITY COMPANY, ITS SUCCESSORS AND ASSIGNS, TO CONSTRUCT, EXTEND, MAINTAIN, REPAIR, REPLACE, OPERATE, AND REMOVE IN CERTAIN PORTIONS OF THE CITY OF NIEDERWALD, COUNTIES OF HAYS AND CALDWELL, STATE OF TEXAS, A SYSTEM FOR THE COLLECTION AND TREATMENT OF WASTEWATER AND FOR THE PROVISION OF WASTEWATER AND SEWER SERVICE, FOR ALL PURPOSES FOR WHICH THIS SERVICE MAY BE USED; ALLOWING THE USE OF STREETS, ALLEYS, SIDEWALKS, EASEMENTS, RIGHTS-OF-WAY, AND PUBLIC PLACES; ADDRESSING TITLE TO IMPROVEMENTS, CERTIFICATE OF CONVENIENCE AND NECESSITY, RATES, OPERATIONS, SERVICES, UTILITY RULES & REGULATIONS; REQUIRING A GROSS REVENUE FEE AND THE MAINTENANCE OF PLATS, MAPS, AND RECORDS; REGULATING EXCAVATIONS; REQUIRING LIABILITY INSURANCE AND INDEMNITY; SETTING TERM OF ORDINANCE; ALLOWING ASSIGNMENT; PROHIBITING WAIVER; REGULATING NOTICES; PROVIDING FOR ACCEPTANCE OF ORDINANCE, SEVERABILITY, REPEAL OF CONFLICTING ORDINANCE, AND AN EFFECTIVE DATE.

WHEREAS, Sweetwater Utility, LLC, a Texas limited liability company, hereafter also designated as the Utility, has requested that the Mayor and City Council grant it, its successors and assigns, the franchise, right, privilege, and authority by ordinance, to construct, extend, maintain, repair, replace, operate, and remove in the City of Niederwald a system for the collection and treatment of wastewater and for the provision of wastewater and sewer service, for all purposes for which this service may be used; and

WHEREAS, the Utility has duly complied with all provisions of the laws of the State of Texas, and with all ordinances of the City with reference to the obtaining of this franchise, right, privilege, and authority;

NOW THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF NIEDERWALD, TEXAS:

**SECTION 1. GRANT OF FRANCHISE**

(a) The City of Niederwald, Texas ("the City") hereby grants to Sweetwater Utility, LLC ("the Utility"), the nonexclusive right, privilege and franchise to construct, extend, maintain, repair, replace, operate, and remove in the City of Niederwald, Texas a system for the collection and treatment of wastewater and for the provision of wastewater and sewer service, for all purposes for which the Utility and its customers may use this service for a period of ten (10) years from the effective date of this franchise ordinance.

(b) The City hereby grants the Utility the nonexclusive right, privilege, and franchise to install in, over, under, along, and across the present and future streets, alleys, sidewalks, and other public easements and rights-of-way within the corporate limits of the City as they may now or hereafter exist, all necessary plants, works, mains, services, conduits, pipes, tanks, and appurtenances for the purpose of operating and extending to the City of Niederwald, Texas, and its inhabitants, a wastewater system. The Utility's use of City streets, alleys, sidewalks, or other public easements and rights-of-way shall be subject to and conducted in accordance with the City's policies, procedures, and ordinances now in force or that the City may subsequently adopt or enact relative to the use of the streets, alleys, sidewalks, easements, rights-of-way, or public places of the City, including all ordinances relating to the use of streets by public utilities. The terms of this franchise ordinance shall apply to all areas that the City subsequently annexes immediately upon the effective date of annexation.

(c) Nothing contained in this franchise ordinance shall be construed as preventing, diminishing, or restricting the Utility from using for public utility purposes any easement shown on any plat or plats of any portion of the City previously or subsequently platted or recorded or any easement that any person, firm, or corporation has or may subsequently create, grant, or dedicate for public utility purposes whatsoever.

**SECTION 2. USE OF STREETS, ALLEYS, SIDEWALKS, EASEMENTS, RIGHTS-OF-WAY, AND PUBLIC PLACES**

(a) The Utility will provide service by means of streets, alleys, easements, and other public rights-of-way. If the Utility needs additional easements to provide service, then the provision of those easements shall be the responsibility of the property owner requesting such service.

(b) The City reserves the right to reasonably regulate the erection and construction of any work by the Utility and to reasonably designate the location of any such work and construction prior to the commencement of the work.

(c) The Utility will locate, erect, and maintain its system, plants, works, mains, services, conduits, pipes, tanks, and appurtenances so that none of these facilities will endanger or interfere with the lives of persons, interfere with any improvements the City may deem proper to make, or unnecessarily hinder or obstruct the free use of the streets, alleys, bridges, easements, rights-of-way, or public property.

(d) If at any time during the period of this franchise, the City shall lawfully elect to alter or change the grade of any street, alley, or other public right-of-way, or reasonably determines that the Utility's facilities restrict or obstruct the operation or location or any future operation or location of any street, alley, bridge, right-of-way, easement, or public property, the Utility, upon thirty (30) days written notice from the City, will commence removing or relocating, as necessary, any and all of its facilities or fixtures at its own expense.

(e) The Utility will not place facilities or fixtures where the facilities or fixtures will interfere with any existing water, gas, electric, or telephone facilities, traffic control signalization, street lights, fire lines, or communication lines, or obstruct or hinder in any manner the various utilities serving the residents of the City.

(f) The Utility will install all wastewater lines under this franchise ordinance so as not to injure or damage unnecessarily any public grounds, drains, storm sewers, catch basins, or other like improvements. However, if the Utility's installation of one of its wastewater lines damages any public grounds, drains, storm sewers, catch basins, or other like improvements, then the Utility shall repair the damage caused and restore the public grounds, drains, storm sewers, catch basins, or other like improvements to as good condition as existed prior to undertaking the work.

(g) If the Utility refuses or neglects to repair any public grounds, drains, storm sewers, catch basins, or other like improvements that it damages during installation of a wastewater line within a reasonable time after it completes its work on the related project and if the City has given the Utility thirty (30) days' written notice of the Utility's refusal or neglect, then:

(1) the City Council may direct the necessary repairs be made at the expense of the Utility, and

(2) the Utility shall be responsible for all damages sustained by any person or persons by reason of this refusal or neglect of the Utility.

### SECTION 3. TITLE TO IMPROVEMENTS

Title to all wastewater utility components whether situated on public grounds or on easements for public utility purposes, shall be and remain in the Utility, its successors or assigns.

### SECTION 4. CERTIFICATE OF CONVENIENCE AND NECESSITY

The Utility will secure from the Texas Natural Resource Commission a certificate of convenience and necessity to construct, operate, and maintain the its wastewater system in the area it proposes to serve.

### SECTION 5. RATES, OPERATIONS, AND SERVICES

(a) Because the City has elected to have the Texas Natural Resource Conservation Commission have exclusive jurisdiction over the sewer utility rates, operations, and services within the corporate limits of the City under Section 13.042 of the Texas Water Code, the rates that the Utility will charge and the rules and regulations governing the furnishing of services to inhabitants of the City that the Utility will follow under this franchise ordinance will be those authorized by and on file with the Texas Natural Resource Conservation Commission or any and all other public authorities having jurisdiction in the premises during the term of this franchise ordinance, unless and until the City reinstates its original jurisdiction to regulate utility rates, operations, and services.

(b) The Utility will file its approved tariff with the City and shall make it available for inspection by the public and residents of the City.

## **SECTION 6. UTILITY RULES AND REGULATIONS**

(a) The Utility shall have the authority to promulgate such rules, regulations, terms, and conditions affecting its customers as shall be reasonably necessary to enable the Utility to exercise its rights and perform its obligations under this franchise ordinance and to assure uninterrupted service to each and all of its customers.

(b) Any such rules, regulations, terms and conditions shall not be in conflict with the provisions hereof or applicable federal, state and local laws.

(c) The Utility will file a copy of its rules with the City and keep a copy in the Utility's local office for inspection by the public.

## **SECTION 7. GROSS REVENUE FEE**

(a) On the \_\_\_\_\_ day of \_\_\_\_\_, 2000, and quarterly thereafter, 45 days after each calendar quarter for the life of this franchise, Sweetwater Utility, LLC, its successors and assigns, shall pay to the City of Niederwald a sum equal to four percent (4%) of its gross revenue received from the sale of monthly wastewater service within the corporate limits of the City for the preceding calendar quarter in full payment for the privilege of using and occupying the streets, alleys, easements, rights-of-way, parks, and other public places in the City of Niederwald. This payment shall be in lieu of any other tax or increased rate of tax or other imposition, assessment, or charges, except ad valorem taxes.

(b) The Utility will pay to the City the gross revenue fee authorized in this section quarterly on or before the 15th day of the second month following the end of the quarterly period for which the payment is due. The Utility will deliver the gross revenue fee payment to the City Secretary, along with a gross revenue fee statement, showing, in a form that the City approves, the calculations of the amount of the quarterly payment. An officer of the Utility will certify this fee statement to be true and correct.

(c) The Utility will file annually with the City Secretary no later than four (4) months after the end of the Utility's fiscal year, an audited statement of revenues attributable to the operations of its system within the City pursuant to this franchise ordinance, which statement shall have been audited by an independent Certified Public Accountant whose report shall accompany the statement.

(d) The City shall have the right to review or audit the Utility's gross revenue fee statements and statements of revenues and other books and records, and to recompute any amounts determined to be payable under this franchise ordinance.

## **SECTION 8. PLATS, MAPS, AND RECORDS**

The Utility will make and keep full and complete plats, maps, and records showing the exact location of all plants, works, mains, services, conduits, pipes, tanks, and facilities located and that the Utility uses in the City of Niederwald, Texas, in connection with its system. The Utility will keep these

plats, maps, and records current at all times to reflect all changes in the system and all additions, relocations, and modifications to its system.

## SECTION 9. EXCAVATION

(a) The Utility will not disturb the surface or subsurface of any street, alley, sidewalk, right-of-way, or public place for the purpose of construction or maintenance without first obtaining a permit to do so from the City.

(b) The Utility will not encumber any street, alley, sidewalk, right-of-way or public place for a longer period than shall be necessary to perform and complete the work.

(c) Whenever the Utility does take up or disturb any street, alley, sidewalk, right-of-way, or public place in building, constructing, renewing, maintaining, or removing its facilities, the Utility will guard and protect the street, alley, sidewalk, right-of-way, or public place at all times by the placement of adequate barriers, fences, or boardings, the bounds of which during periods of dusk and darkness, the Utility will clearly designate by warning lights.

(d) The Utility shall fill in any excavation or opening of an excavation and will restore the surface at its expense within a reasonable time after completion of the work to as good a condition as before the commencement of the work.

(e) If the Utility fails to restore the surface and make repairs within a reasonable time, the City may fix a reasonable time and notify the Utility of the restoration and repairs required and the time fixed for completion of those actions.

(f) Upon the Utility's failure to comply within the time specified in the previous subsection, the City may cause proper restoration and repairs to be made, and the Utility will pay the expense of such work upon demand by the City.

## SECTION 10. LIABILITY INSURANCE

(a) Prior to commencing the installation of its system, and continuing for the duration of this franchise, the Utility shall procure and maintain public liability and property insurance in an amount not less than \$500,000.00 for bodily injury and \$300,000.00 from property damage for each occurrence, with an insurance company licensed to do business in Texas, insuring against claims for liability or damages in connection with:

(1) Liability to persons or damages to property in any way arising out of or through the acts or omissions of the Utility, its agents, servants, or employees, or to which the Utility negligence may in any way contribute; and

(2) Liability arising out of the Utility's operations and relationships with any independent contractor or subcontractor.

(b) The City Attorney shall approve this insurance policy, and the Utility will file and maintain a copy of this policy along with written evidence of payment of required premiums, with the City Secretary during the term of this franchise.

(c) The Utility shall immediately advise the City of any significant litigation, actual or potential, that might affect this insurance policy.

(d) All insurance policies maintained pursuant to this franchise shall contain the following conditions by endorsement:

(1) The City of Niederwald shall be a named insured and the term "owner" or "City of Niederwald" shall include all authorities, Boards, Bureaus, Commissions, Divisions, Departments, and offices of the City and the individual members, employees, and agents of the City in their official capacities and/or while acting on behalf of the City.

(2) Each policy shall require that the insurance company provide the City Secretary by certified mail written notice of cancellation or of material change in the terms of the policy at least thirty (30) days prior to the proposed cancellation or material change.

(3) Insurers shall not have any right of recovery against the City, it being the intention that the insurance policies shall protect the Utility and the City and shall be primary coverage for all losses that the policies cover.

(4) The policy clause "other insurance" shall not apply to the City of Niederwald when the City is an insured on the policy.

## SECTION 11. INDEMNITY

(a) The Utility agrees to indemnify, defend, and save harmless the City, its agents, officers, servants, and employees, against and from any and all claims by or on behalf of any person, firm, or corporation, arising from the conduct of or management of the franchise, or from any occurrence in connection with the franchise; and from any and all claims arising from any breach or default on the part of the Utility in the performance of any covenant or agreement on the part of the Utility to be performed pursuant to the terms of this franchise ordinance, or arising from any act or negligence of the Utility, or any of its agents, contractors, subcontractors, servants, employees, or licensees; and from and against all costs, counsel fees, expenses, and liabilities incurred in or about any such claim or proceeding brought on such claim.

(b) Upon receipt of notice in writing from the City, the Utility shall, at its own expense, defend any action or proceeding brought against the City in which it is claimed that the activities of the Utility or its agents, servants, or employees caused personal injury or property damage in connection with the installation, operation, and maintenance of the Utility's system.

**SECTION 12. PERIOD OF TIME OF THIS ORDINANCE; TERMINATION**

This agreement shall be in full force and effect for the period beginning with the effective date of this franchise ordinance and ending ten (10) years, provided that at the end of the expiration of the initial period, the term of this ordinance will automatically renew for successive periods of ten (10) years. However, if during the last four months of the initial period or of any successive ten (10) year period, if one party gives the other party not less than ninety days' prior written notice setting forth its desire to terminate this franchise ordinance-agreement, then this franchise ordinance-agreement shall terminate at the expiration of the then current period.

**SECTION 13. ASSIGNMENT**

All provisions of this franchise ordinance that are obligatory upon or which inure to the benefit of the Utility shall also be obligatory upon and shall inure to the benefit of all successors and assigns of the Utility, and the word "Utility" wherever used in this franchise ordinance shall include and be taken to mean not only the Utility, but all successors and assigns of the Utility. The Utility shall not assign or transfer this franchise unless it has obtained the approval of the City Council of the City expressed by ordinance.

**SECTION 14. NO WAIVER**

Neither the Utility nor the City shall be excused from complying with any of the terms of this franchise ordinance by any failure of the Utility or the City on one or more occasions to insist upon or seek compliance with any such terms or conditions.

**SECTION 15. NOTICES**

Unless otherwise notified in writing by the other party, the addresses and telecopier numbers of the City and the Utility are and shall remain as set forth beneath the signature of each party. Notice to a party is effective when a party actually receives it at its then-current address or telecopier number or when a party is deemed to have received it. A party is deemed to have received a notice on the fifth calendar day following the day it is deposited with the U.S. Postal Service properly addressed and with proper postage affixed as certified or registered mail.

**SECTION 16. ACCEPTANCE OF FRANCHISE ORDINANCE**

The Utility shall have fifteen (15) days after passage of this franchise ordinance in which to file its written acceptance of the franchise ordinance with the City Secretary, and upon the Utility's filing of its acceptance, this franchise ordinance shall take effect and be in force from and after the date of its passage and the Utility's filing shall effectuate and make binding the agreement contained in this franchise ordinance.

**SECTION 17. SEVERABILITY**

(a) If any portion of this franchise ordinance is held to be invalid or unenforceable for any reason, that holding shall not be construed to affect any other portion of this ordinance, and all other portions shall remain in full force and effect.

(b) If the City determines that a court action or the action of the state or federal government affects a material provision of this Agreement and franchise ordinance, then the City shall have the right to modify this ordinance to such reasonable extent as it deems necessary to carry out the full intent and purpose of this Agreement and franchise ordinance.

**SECTION 18. REPEAL OF CONFLICTING PROVISIONS**

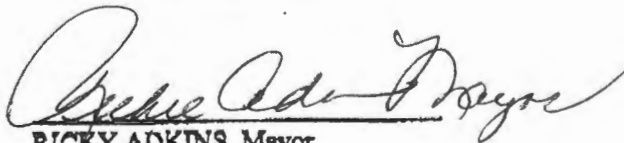
All provisions in all other ordinances in conflict with this ordinance are repealed, which repeal shall take effect upon the effective date of this ordinance.

**SECTION 19. EFFECTIVE DATE**

The effective date of this Ordinance is April 3, 2000.

PASSED AND APPROVED this 3rd day of April, 2000.

**CITY OF NIEDERWALD**



RICKY ADKINS, Mayor  
City of Niederwald, Texas  
13851 Camino Real  
Niederwald, Texas 78640  
Telecopier: \_\_\_\_\_

**ATTEST:**

\_\_\_\_\_  
DENA DAVID, City Secretary

FROM : AGUAS DULCE L.L.C.

PHONE NO. : 5128476392

Mar. 28 2000 04:20PM

ACCEPTED this 17<sup>th</sup> day of April, 2000.

SWEETWATER UTILITY, LLC

P.O. Box 918

Wimberley, Texas 78676

Telecopier: 512-847-7326

By:

J. Michael Moore  
J. Michael Moore, President-Chief Operating OfficerCIVIL ENGINEER'S SIGNATURE No. 040300A  
CIVIL ENGINEER  
CIVIL ENGINEER

ACCEPTED this \_\_\_\_\_ day of \_\_\_\_\_, 2000.

**SWEETWATER UTILITY, LLC**

P.O. Box 918

Wimberley, Texas 78676

Telecopier: 512-847-7326

By:

J. Michael Moore, President-Chief Operating Officer