



SUBJECT: Berwick Water Association 28E Total Service Agreement

SUMMARY:

Des Moines Water Works has provided Total Service to Berwick Water Association under contract since October 1, 2013. This original contract expires June 30, 2017, and both parties wish to continue the Total Service relationship under a renewed 28E Total Service Agreement. This renewed agreement is consistent with the previous agreement in all material respects, and continues for a period of five years.

The agreement may be terminated without cause by either party if written notice is given at least one year prior to the effective date of termination.

The Berwick Water Association Board of Trustees approved the 28E Agreement at a meeting June 19, 2017. Legal Counsel has reviewed the agreement.

FISCAL IMPACT:

DMWW will continue to directly bill Berwick Water Association customers for water service. Rates will reflect the cost to serve customers in this service area.

RECOMMENDED ACTION:

Recommend the Board approve and authorize the Chairperson and CEO and General Manager to execute the Total Service Chapter 28E agreement with Berwick Water Association.

BOARD REQUIRED ACTION:

Motion to approve and authorize the Chairperson and CEO and General Manager to execute the Total Service Chapter 28E agreement with Berwick Water Association.

_____/_____ (date)	_____/_____ Amy Kahler (date) Director of Customer Service & Marketing	_____/_____ William G. Stowe (date) CEO and General Manager
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Attachment: 28E Total Service Agreement between Berwick Water Association and the Board of Water Works Trustees of the City of Des Moines, Iowa

Return To:

Prepared by: Richard A. Malm, 699 Walnut Street, Suite 1600, Des Moines, IA 50309-3986 (515) 246-4516

SPACE ABOVE THIS LINE FOR RECORDER

**TOTAL SERVICE CHAPTER 28E AGREEMENT
BETWEEN
BERWICK WATER ASSOCIATION
AND THE
BOARD OF WATER WORKS TRUSTEES
OF THE CITY OF DES MOINES, IOWA**

Total Service Chapter 28E Agreement by and between the Berwick Water Association ("**Association**") and the Board of Water Works Trustees of the City of Des Moines, Iowa ("**DMWW**") made as of the date set forth below:

R E C I T A L S:

- A. DMWW is a municipal water utility established and operating in the City of Des Moines, Iowa and elsewhere pursuant to Chapter 388 of the Iowa Code and other applicable statutes; and
- B. Association is a rural water Association organized and existing under Chapter 504 of the Code of Iowa, with a membership that consists of its water customers (the "**Members**"). Association has, for many years, obtained a supply of water from DMWW. The water so delivered has been delivered by Association to its Members, metered and billed in the name of Association. The water provided by DMWW to Association for delivery by Association to its Members is currently provided by DMWW to Association under the "Wholesale Water Service Master Agreement" dated June 10, 2005 and the Adoption Annex thereto between DMWW and Association (the "**Water Service Master Agreement**"); and
- C. Association and DMWW are parties to, and have operated under, a Total Service 28E Agreement dated October 1, 2013 whereby DMWW provides water service

to certain consumers within Association's service territory on a total service basis;
and

- D. Association and DMWW desire to extend, modify, and replace their agreement with respect to Total Service with this Agreement as of the Effective Date.

NOW THEREFORE, in consideration of the mutual undertakings hereby provided, Association and DMWW hereby agree as follows:

Part I - Joint Exercise of Powers Under
Chapter 28E of the Code of Iowa.

1. Pursuant to Chapter 28E of the Code of Iowa, the parties state that the purpose of this Agreement is to coordinate the exercise of the respective powers of Association and DMWW regarding water service to be provided to customers utilizing Association's existing water distribution facilities and systems, located as shown in Exhibit A (the "**Association Water Distribution Facilities**"). The Agreement shall also be deemed a contract for services under Section 384.84(7)(a), Code of Iowa.

2. During the term hereof, DMWW shall serve Association's Members, and such other customers as may subsequently tap into the Association Water Distribution Facilities. The area within which such service is provided is referred to herein as the "**Association Service Territory**". Such customers shall be considered the direct customers of DMWW. DMWW's services shall be provided pursuant to the authority of Chapter 388, Code of Iowa, and Section 384.84(7)(a), Code of Iowa. The existing Members of Association, and their respective successors, shall retain previously existing membership rights as of the Effective Date (other than the right, if any, to receive water service from Association during the term of this Agreement). If any new service location is established within the Association Service Territory after the Effective Date during the Term of this Agreement, the new customer shall be required to become a new Member of the Association as a condition of service, and to pay a membership fee to Association of \$500, which Association shall collect and retain. Such membership fee shall be in addition to any system development fees or connection charges collected by DMWW hereunder.

3. Subject to the provisions of this Agreement, Association authorizes DMWW to exercise all of Association's rights and powers to serve water customers using Association Water Distribution Facilities within the Association Service Territory, including, but not limited to, the right and power to provide water service; to expand and improve availability of water service; to set and collect rates for water service, subject to the terms herein provided, under Section 384.84, Code of Iowa; to maintain, to replace, to service and to build new water distribution facilities; to bill and collect for connection and water service; to impose fees, liens and charges for nonpayment of water service; and to discontinue water service in the event of nonpayment or other delinquency with respect to water service provided by Association prior to the Effective Date of this Agreement, or provided by DMWW after the effective date of this Agreement.

4. This Agreement shall become effective on July 1, 2017, (the "**Effective Date**") after its execution by both parties and its filing with the Secretary of State, subject to the condition that this Agreement shall have been previously approved by the Board of Trustees of DMWW and by Association's Board of Directors (the "**Approvals**"). If the Approvals are not obtained prior to the Effective Date, this Agreement shall be null and void. Association represents and warrants that its Board of Directors has authority to enter into Agreement without a vote of its members.

5. No separate entity is created hereby. The administrator of this Agreement shall be the General Manager and Chief Executive Officer of the DMWW ("**Administrator**"). The Administrator, or the Administrator's designee, shall meet annually, or more frequently if requested by Association or by DMWW, with the Board of Directors of Association at such time, date, and place as are specified by notice given by the Administrator in order to review the administration of this Agreement, to approve plans established as provided in this Agreement, and to take actions necessary or appropriate in accordance with this Agreement.

6. No joint property shall be acquired, held or disposed of hereunder. Each party shall at all times hold and own its respective properties, before and after termination. Each party shall be solely authorized to supervise, direct, and manage its own activities and the activities of its respective employees and agents hereunder. Each party shall retain sole responsibility and liability for its own acts and omissions hereunder and for the acts and omissions of its respective employees and agents hereunder, and each party waives subrogation against the other for all claims, suits, damages, and demands which are covered by any insurance, including but not limited to property, casualty and workers compensation insurance.

7. This 28E Agreement supersedes and replaces the Total Service 28E Agreement dated October 1, 2013 between the parties.

Part II - DMWW and Association Responsibilities

1. From and after the Effective Date, DMWW shall continue to provide total water service to Association's Members and new customers within the Association Service Territory.

2. Association shall maintain ownership of its water utility assets, including mains, valves, easements, distribution facilities, and all related properties and facilities, but not including customer meters which shall become DMWW property during the term of this agreement, but which shall revert to Association's ownership upon termination of this Agreement. Without limiting the generality of the foregoing, Association shall retain ownership of its purchased capacity rights under the Water Service Master Agreement. Except for the Association Customer Meters, DMWW shall not acquire any ownership interest in any of Association's assets. DMWW shall be solely responsible for the

operation, maintenance, expansion and improvement of Association's Water Distribution Facilities as required to provide adequate service to customers per DMWW's customary rules, regulations, and standards, subject to reimbursements by Association to DMWW as provided herein. During the term of this Agreement Association grants to DMWW the unlimited and unrestricted use of Association's operating assets, but excluding Association's cash, cash equivalents and investments, office leasehold and office equipment.

3. Association shall continue to own the part of the customer service lines in existence and in active service as of October 1, 2013, from the main to and including the stopbox, which is also referred to by Association as a "curb stop", until such time as the property served shall be transferred to a new owner, at which time the ownership and responsibility for the full service line including the stop box, shall be required to be assumed by the new owner as a condition of obtaining water service. All new service lines created or installed after October 1, 2013, including replacement service lines, shall be installed at the customer's expense, and shall be owned by, and be the responsibility of, the customer in their entirety as provided in DMWW's customers service rules and policies.

4. During the term of this Agreement, all Association water customers, including the Association itself, are, and shall continue to be, direct customers of DMWW.

5. During the term of this Agreement, DMWW shall bill customers for water service in the Association Service Territory in DMWW's own name, and water consumers within the Association Service Territory shall be treated by DMWW and Association as customers of DMWW, under DMWW's rules and regulations and billing and collection practices. DMWW therefore agrees that such customers shall have the same rights and privileges as water consumers located within the City of Des Moines. These rights and privileges include, but are not limited to, the following:

- (a) Billings to consumers will be performed on a monthly basis. Such bills may be paid using any payment method offered by DMWW, including check, electronic check, credit card, electronic funds transfer, and any pay stations maintained by DMWW. Online account access and all functionality provided therein will be available to Association's customers.
- (b) Procedures for billing, collections, liens and termination of service as they pertain to water service shall be in the sole discretion of DMWW. Consumers shall be subject to DMWW's policy from time to time concerning delinquent accounts.
- (c) Consumers shall be subject to such rationing, conservation rates, or other restrictions on water use as may be imposed by DMWW upon other DMWW consumers.

- (d) DMWW shall provide a program of regular inspection and preventive maintenance and repair on a scheduled basis for the purpose of leak detection, resolution of meter irregularities, leaking service repair, valve and hydrant maintenance, and main repair and replacement.
- (e) Water system development fees and connection fees or tap charges within the Association Service Territory shall be specifically established by DMWW to reflect appropriate cost recovery for new connections within the Association Service Territory.
- (f) DMWW shall provide a program of regular inspection and preventive maintenance and repair for Association's water system facilities.

6. DMWW shall provide for up to \$10,000 each year towards Capital Costs as defined in Part IV of this agreement and recover the costs thereof by collection of water rates and charges. To the extent additional capital improvements are required during the term hereof, DMWW shall communicate the need for any capital improvements to the Association, and Association shall provide funding for such improvements out of Association cash reserves.

7. DMWW shall undertake to provide planning for maintaining adequate water service hereunder within the Association Service Territory during the term of this Agreement, which shall include a system of planning for, design of, and construction of capital improvements required to provide adequate water service within the Association Service Territory during the term of this Agreement. DMWW's planning for water service shall take into account existing water service needs and reasonably anticipated future water service needs, and for projects estimated to exceed \$10,000, shall be determined in consultation with Association and its designated representatives. DMWW shall be responsible for design and construction of all capital improvement projects with respect to the Association Water Distribution Facilities during the Term of this Agreement and Association shall reimburse DMWW for the costs thereof as provided in Section 6 of this Part II. In order to implement the foregoing, DMWW and Association may, during the term of this Agreement, jointly establish a schedule and budget for capital improvement projects estimated to exceed \$10,000. Such budget shall include a contingency fund of at least 10% of the total budget. DMWW may in its discretion reallocate budget amounts among projects or to new projects deemed urgent by DMWW. The full cost of all projects within the scope of such schedule and budget shall be subject to reimbursement as provided in Section 6 of this Part II, provided that no project shall be undertaken by DMWW, without the written consent of the Association, which would cause Capital Costs, as defined in Part IV of this Agreement, to exceed the total budgeted amount, including the contingency reserve.

8. DMWW shall be liable for, and indemnify Association from any claims, demands and costs, including attorney's fees, which may be made or asserted by third parties on account of DMWW's (i) willful misconduct, (ii) negligent action or conduct in the performance hereunder or (iii) breach of any representation, warranty or covenant of

DMWW under this Agreement. Association shall be liable for and indemnify DMWW from any claims, demands and costs, including attorney's fees, which may be made or asserted by (a) third parties on account of the condition of the water distribution system on the Effective Date or (b) Association's customers claiming damages or other relief solely by reason of becoming direct customers of DMWW hereunder rather than being direct customers of Association.

9. The Water Service Master Agreement shall remain in effect between the parties, but the provisions thereof for wholesale water service shall be deemed suspended during the term of this Agreement. The economic benefits of Association's existing purchased capacity under the Water Service Master Agreement shall be recognized during the term hereof as a part of the process whereby rates and charges are determined by DMWW as provided in Part IV, Section 2(c), of this Agreement. Association shall be entitled to restoration of full rights under the Water Service Master Agreement upon termination of this Agreement, which rights shall include but not be limited to the right to obtain water at the purchased capacity rate as provided in the Water Service Master Agreement for as long as Association retains its purchased capacity.

10. DMWW shall perform its services, including, but not limited to, the provision of water pursuant to this Agreement in compliance with all applicable laws, rules, regulations and ordinances. DMWW will, at all times, maintain all licenses and permits required for the performance by DMWW of its obligations pursuant to this Agreement and the provision of water service pursuant to this Agreement.

11. DMWW shall be solely responsible for providing the personnel necessary for DMWW to perform its obligations pursuant to this Agreement, including, but not limited to, all personnel necessary to provide water service pursuant to this Agreement.

12. DMWW and Association shall each timely pay all of its respective liabilities and will not permit any liens to attach to any of Association's assets by reason of such liabilities.

13. All water facilities constructed or installed by DMWW within the Association Service Territory shall become the property of Association after such water facilities are constructed or installed by DMWW and Association shall have reimbursed DMWW for the cost thereof as provided in this Agreement. All water meters installed by DMWW shall become the property of Association upon termination. Neither Association nor DMWW shall allow the assets of Association to become subjected to any liens, mortgages, security interests or other encumbrances.

Part III- Term and Termination

1. This Agreement shall continue in force from the Effective Date until June 30, 2022, unless sooner terminated as provided herein.

2. This Agreement may be terminated, without cause, by either party by written notice given at least one year prior to the effective date of termination.

3. In the event that either party determines that the other party has defaulted in the performance of its obligations hereunder, the aggrieved party may declare that default has occurred and give notice thereof to the defaulting party. Notice of default shall be given in writing, shall specify the nature of the default and the provision of the Agreement involved, and shall specify what action is required of the defaulting party to correct the default. The defaulting party shall have 30 days from the date of its receipt of the notice of default to correct the default. If at the end of said 30-day period, the default has not, in the opinion of the aggrieved party, been corrected, that party may thereupon pursue its remedies as provided herein. In the event of default by one party in the performance of any material provision of this Agreement, the other party may, at its option, after declaring default and giving notice thereof, terminate this Agreement or seek specific performance of its provisions. A party seeking termination of this Agreement due to a default in performance by the other party shall also be entitled to seek damages for such default.

4. On or prior to the effective date of such termination, DMWW shall deliver copies of such records of consumer accounts as it may be maintaining in order to enable Association to thereafter do as it wishes in respect to such consumer accounts. Such termination shall not extinguish any liability of any consumers to DMWW for unpaid bills for water service previously delivered, and, unless DMWW shall have been able to determine the quantity of water consumed and not billed prior to the termination date, Association shall account to DMWW on a per diem basis for service between the DMWW's last meter reading and Association's first meter reading.

5. DMWW's revenues and operating and maintenance costs shall be determined annually, in accordance with DMWW's regular system of accounting and shall be reported to Association on an annual and cumulative basis. Upon termination, the cumulative total of DMWW's revenues less operating and maintenance costs shall be determined through the effective date of termination. If the cumulative total of revenues is greater than the cumulative total of operating and maintenance costs, the difference (the "**Excess Revenues**") shall be paid by DMWW to Association within 90 days following the termination of this Agreement. If the cumulative total of operating and maintenance costs is greater than the cumulative total of revenues, the difference (the "**Cost Deficit**") shall be paid by Association to DMWW within 90 days following the termination of this Agreement. Upon termination, Association shall also reimburse DMWW for all Capital Costs, as defined in Part IV of this Agreement, that have not been previously reimbursed through separate payment by Association or by applying any existing balance of Excess Revenues within 90 days following the termination of this Agreement. In the absence of agreement as to the amount of the Excess Revenues or, if applicable, the Cost Deficit or unpaid Capital Costs as of the date of any termination, either party may apply to the Chief Judge of the Association Court for Polk County, Iowa for the appointment of an arbitrator to determine the applicable amount. The arbitrator

shall have access to all relevant books and records of DMWW respecting its claim for Cost Deficit or, if applicable, Association's claim for Excess Revenues. The arbitrator shall decide the question based on such books and records and such other information as the arbitrator shall deem appropriate. The costs of the arbitration shall be allocated, as the arbitrator shall determine. The decision of the arbitrator shall be final and shall constitute an award within the meaning of Chapter 679A, Code of Iowa.

Part IV - Financing

1. DMWW's sole compensation for services, other than any other separate incidental services that may be later agreed upon to be provided by DMWW, shall be obtained by collection of water service rates and fees from consumers and by reimbursement as provided herein by Association to DMWW of Capital Costs incurred by DMWW hereunder. As used herein, "**Capital Costs**" shall mean all expenditures made with respect to work on the Association Water Distribution Facilities that would be capitalized by DMWW under its regular system of accounting and shall include, but not be limited to, the costs of any improvements made by DMWW to the Association Water Distribution Facilities, such as main replacements or extensions, installation or replacement of fire hydrants or blow-off valves, and the costs of meters acquired by DMWW for use by Association customers.

2. Rates for water service shall be as follows:

- (a) The initial rate to be charged by DMWW to consumers for water shall be the sum of (i) a monthly availability charge for each separately metered service location equal to \$3.00 per location, plus (ii) \$4.00 per thousand gallons of water delivered.
- (b) The rates set forth in Section 2(a) shall apply until March 31, 2018, and are subsequently subject to change from time to time, in the sole discretion of DMWW. Such discretion shall always be exercised in a manner consistent with the following provisions of this subsection (b) so as to reasonably relate the cost of water provided to Association consumers with the cost of production and delivery of such water and with other costs associated with the performance by DMWW of this Agreement. Rates shall be set in accordance with the regular cost of service study conducted by DMWW each year, with a goal of preventing service to Association customers from being subsidized by other DMWW customers, and preventing service to other DMWW customers from being subsidized by Association customers. Notwithstanding the discretion of DMWW as described in this paragraph, DMWW shall, at least 180 days prior to any proposed change in rates, solicit comments from Association as to such a rate change. DMWW agrees to consider fully all such comments from Association and its consumers in making any decision on a rate change.

The Association will have opportunity to provide additional funding sources in lieu of rate changes before a rate change goes into effect.

- (c) The economic benefit of the Association's Purchased Capacity under the Water Service Master Agreement shall be recognized during the Term hereof by applying a credit in the rate calculation equal to the purchase price paid for capacity of 0.250 MGD amortized on a straight line basis over forty (40) years, the length of the Wholesale Water Service Master Agreement. The result is a credit of \$6,250 per year that will be used when calculating the cost to serve Association. In the event the Association, in its sole discretion, sells its purchased capacity during the term of this Agreement, the rate calculation will not include this credit component.

3. If a property owner or developer desires water service within Association's Service Area and there is no water main in front of the property or properties to be served, the owner or developer will be required to construct a water main from the nearest Association water main to the property or properties to be served to be owned by Association. The water main will be constructed in accordance with DMWW's water main standards. Construction will be inspected by DMWW staff to ensure construction of the water main is completed in accordance with such standards. Property owner or developer will be responsible for the cost of construction, inspection, system development fees, tap fees, any easements that may be required, and a maintenance bond to guarantee the water main to be free from leaks and any other construction or material defects for a period of two (2) years from the date the water main is put into service. Once constructed and put into service, ownership of the water main will be conveyed by the property owner or developer to Association and after the two (2) year warranty period expires, Association will be responsible for the maintenance, upkeep and repair of the main and otherwise treat it in all respects as part of its system.

4. DMWW shall periodically invoice Association for Capital Costs in excess of \$10,000, as described in Part II and incurred by DMWW hereunder, and Association shall pay each such invoice within thirty (30) days of date of issuance. Failure to timely make payment shall cause interest to accrue from and after the due date at the rate of 5% per annum. In addition, if Association fails to timely pay any such invoice, Association shall be subject to legal action for collection and enforcement and such failure shall constitute a default under Part III of this Agreement.

5. Association shall retain the right during the term of this Agreement to sell and transfer its legal right to serve new customers within, or within the legally protected area adjacent to, the Association Service Territory, provided that such sale and transfer shall not transfer any Association Water Facilities then in use by DMWW under this Agreement, and further provided that such sale and transfer shall not apply to any customer served by DMWW as of the date of sale and transfer. In the event of such sale and transfer, Association shall retain all of the proceeds thereof.

Part V - General Provisions

1. All notices which the parties are authorized or required to give one another pursuant to this Agreement shall be in writing and may be personally delivered or sent by ordinary mail to the addresses, hereafter provided. Mailed notices shall be deemed to be received by the party to whom directed when they are postmarked. Such notices shall be delivered or mailed to the following persons at the addresses listed:

Notices to Association:

Board President or Board Treasurer
Berwick Water Association
P.O. Box 187
Berwick, Iowa 50032

Notices to the DMWW:

Director of Customer Service and Marketing
Des Moines Water Works
2201 George Flag Drive
Des Moines, IA 50321

2. This Agreement is the entire understanding of the parties concerning the subject matter hereof, and it may be modified only in writing signed by the parties. The parties may enter into other agreements in writing, including but not limited to service agreements.

3. If any provision or provisions of this agreement shall be held to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

4. Neither party shall be liable for any failure to perform any or all of the provisions of this Agreement if and to the extent that performance has been delayed or prevented by reason of any cause beyond the reasonable control of such party. The expression "cause beyond the reasonable control" shall be deemed to include, but not be limited to: acts, regulations, laws, or restraints imposed by any governmental body; wars, hostilities, sabotage, riots, or commotions; acts of God; or fires, frost, storms, or lightning.

5. Neither party shall assign this Agreement without the consent of the other party, which consent shall not be unreasonably withheld.

Dated this _____ day of _____, 2017.

BERWICK WATER ASSOCIATION

By: _____
Ted Griffieon, Board President

By: _____
Richard E. Moore, Board Treasurer

BOARD OF WATER WORKS TRUSTEES
OF THE CITY OF DES MOINES, IOWA

By: _____
Susan R. Huppert, Board Chairperson

Attest: _____
William G. Stowe, General Manager
and CEO

STATE OF IOWA)
) SS:
COUNTY OF POLK)

On this _____ day of _____, 2017 before me, the undersigned, a Notary Public in and for the State of Iowa, personally appeared Ted Griffieon and _____, to me personally known, and, who, being by me duly sworn, did say that they are Board President and _____ of the BERWICK WATER ASSOCIATION that no seal has been procured by the entity; that the instrument was signed on behalf of the entity by authority of its Board as contained in the resolution adopted by the Board on the ____ day of _____, 2017, and that Ted Griffieon and _____ acknowledged the execution of the instrument to be the voluntary act and deed of the BOARD OF DIRECTORS OF BERWICK WATER ASSOCIATION by it and by them voluntarily executed.

Notary Public in and for the State of Iowa

STATE OF IOWA)
) SS:
COUNTY OF POLK)

On this _____ day of _____, 2017, before me, a Notary Public in and for the State of Iowa, personally appeared Susan R. Huppert and William G. Stowe , to me personally known, and, who being by me duly sworn, did say that they are the Board Chairperson and the Chief Executive Officer and General Manager of the BOARD OF WATER WORKS TRUSTEES OF THE CITY OF DES MOINES, IOWA, that no seal has been procured by the entity; that the instrument was signed on behalf of the entity by authority of its Board as contained in the resolution adopted by the Board on the ____ day of _____, 2017, and that Susan R. Huppert and William G. Stowe acknowledged the execution of the instrument to be the voluntary act and deed of the BOARD OF Water Works TRUSTEES OF THE CITY OF DES MOINES, IOWA, by it and by them voluntarily executed.

Notary Public in and for the State of Iowa

EXHIBIT A ASSOCIATION WATER DISTRIBUTION FACILITIES

