

**Lee County Board of County Commissioners
Agenda Item Summary**

Blue Sheet No. 20041006

1. REQUESTED MOTION:

ACTION REQUESTED: Consider, approve and authorize the Chairman's execution of a "Letter of Agreement" by and between Lee County, the City of Bonita Springs and Bonita Springs Utilities (BSU) to extend BSU's franchise to thirty (30) years for financing purposes.

WHY ACTION IS NECESSARY: Franchise Agreement requires Lee County's and the City of Bonita Springs' approvals for an extension of the franchise term for BSU.

WHAT ACTION ACCOMPLISHES: Extends BSU's franchise term by two (2) years, to thirty (30) years total.

2. DEPARTMENTAL CATEGORY:
COMMISSION DISTRICT # 3 *C12B*

3. MEETING DATE:
08-17-2004

4. AGENDA:

CONSENT
 ADMINISTRATIVE
 APPEALS
 PUBLIC

WALK ON
 TIME REQUIRED:


5. REQUIREMENT/PURPOSE:
(Specify)

STATUTE
 ORDINANCE
 ADMIN. CODE
 OTHER 2002 Franchise Agreement

6. REQUESTOR OF INFORMATION:

A. COMMISSIONER
 B. DEPARTMENT County Attorney
 C. DIVISION General Services

BY: David M. Owen
 Chief Assistant County Attorney



7. BACKGROUND:

In December, 2002, the City of Bonita Springs and Lee County entered into and granted to BSU, a franchise for providing water and sewer services to all of the incorporated area of Bonita Springs and the remaining portion of unincorporated Lee County that was included in the original franchise from Lee County to BSU.

(BACKGROUND CONTINUED - NEXT PAGE)

8. MANAGEMENT RECOMMENDATIONS:

9. RECOMMENDED APPROVAL:

A Department Director	B Purchasing or Contracts	C Human Resources	D Other	E County Attorney	F Budget Services				G County Manager
N/A	N/A	N/A	N/A	<i>8/3/04</i>	OA	OM	RISK	GC	<i>8-4-04</i>
					<i>8/3/04</i>	<i>8/3/04</i>	<i>8/3/04</i>	<i>8/3/04</i>	

10. COMMISSION ACTION:

_____ APPROVED
 _____ DENIED
 _____ DEFERRED
 _____ OTHER

RECEIVED BY
 COUNTY ADMIN: *AK*
8/3/04
 10:30 am SLT
 COUNTY ADMIN
 FORWARDED TO: *PK*
8-5-04
 9:15 AM

CO. ATTORNEY
 FORWARDED
 TO CO. ADMIN.
 9:50 AM

BACKGROUND: (Continued)

BSU is now continuing to expand its water and wastewater facilities in both the City of Bonita Springs and the unincorporated Lee County portion of its franchise. As the result, and as part of its financing for these improvements, BSU is petitioning both the City of Bonita Springs and Lee County for a rate increase and an extension of its franchise term for an additional two (2) years in order to coincide with the term of its proposed bond issue, which is consistent with such financings and attendant insurance and ratings requirements.

The 2002 Franchise Agreement at Section Four, "Renewal", Paragraph (C), provides that the Parties may "... extend this Franchise Agreement by mutual written agreement between them."

As the result, and as the most expeditious method for accommodating the BSU request for the extension of the term of its franchise for financing purposes, County staff is requesting that the Board consider, approve and authorize the Chairman to execute the attached July 22, 2004 Letter of Agreement as executed by BSU. Once executed by the County, it will be forwarded to the City of Bonita Springs for its approval and signature by the Mayor.

Staff recommends approval and execution of the Letter of Agreement.

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MARTIN S. FRIEDMAN, P.A.
VALERIE L. LORD

July 22, 2004

ROBERT M. C. ROSE, *OF COUNSEL*
WAYNE L. SCHIEFELBEIN, *OF COUNSEL*

David M. Owen, Esquire
Assistant County Attorney
Lee County, Florida
Post Office Box 398
Fort Myers, Florida 33902

Re: Bonita Springs Utilities, Inc. ("BSU")
Petition for Amendment to Tariffs and Extension of Franchise Term of June 21, 2004
Our File No.: 20989.31

Dear David:

In John Jenkins' absence, I am responding to your letter to John of July 16, 2004. This letter is intended to be the Letter of Agreement you reference with respect to BSU's Petition to Extend Franchise Term. BSU has signed three originals of the Agreement, as you requested, and I am forwarding them to you for consideration by the County. If all meets with the County's approval, please have the Agreement below signed where indicated and forward the originals to Audrey Vance, Attorney for the City of Bonita Springs, for execution by the City.

Sincerely,
ROSE, SUNDSTROM & BENTLEY, LLP


Daren L. Shippy
For the Firm

Letter of Agreement

By signing below, each of the parties to this Agreement acknowledge and agree that the term of the Franchise Agreement By, Between and Among Bonita Springs Utilities, Inc., The City of Bonita Springs, Florida and Lee County, Florida, as reflected in City of Bonita Springs Ordinance No. 02-14 and Lee County Resolution No. 02-12-11 ("Agreement"), is hereby extended to a total term of 30 years, as referenced in Section Four of the Agreement, from the date of the City's Ordinance approving the extension set forth in this Letter of Agreement. In all other respects, the Agreement shall remain unchanged and in full force and effect.

SIGNATURES

CITY OF BONITA SPRINGS

Mayor

City Clerk

APPROVED AS TO FORM: _____
City Attorney

LEE COUNTY BOARD OF COUNTY COMMISSIONERS

Attest:

LEE COUNTY, FLORIDA

By: _____
Deputy Clerk

By: _____
Chairman or Vice Chairman

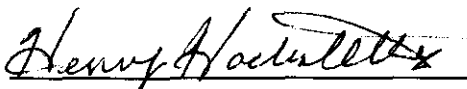
APPROVED AS TO FORM AND LEGALITY

By: _____
Lee County Attorney's Office

BONITA SPRINGS UTILITIES, INC.

Attest

BONITA SPRINGS UTILITIES, INC.



Henry Hochstetler
Secretary

By: 

Robert Bachman
President

DLS/dcr
G:\BONITA\Franchise\Owen letter of Agreement.wpd



LEE COUNTY
SOUTHWEST FLORIDA

BOARD OF COUNTY COMMISSIONERS

 **FILE**

Writer's Direct Dial Number ~~(239) 335-2236~~ _____

Bob Janes
District One

Facsimile (239) 335-2606

Douglas R. St. Cerny
District Two

Ray Judah
District Three

July 16, 2004

Andrew W. Coy
District Four

John E. Albion
District Five

John R. Jenkins, Esq.

Donald D. Stilwell
County Manager

Rose, Sundstrom & Bentley, LLP
2548 Blairstone Pines Drive

James G. Yaeger
County Attorney

Tallahassee, Florida 32301

Diana M. Parker
County Hearing
Examiner

BY: FACSIMILE (850-656-4029) & U.S. MAIL

**RE: BONITA SPRINGS UTILITIES' (BSU) PETITION FOR
AMENDMENT TO TARIFFS AND EXTENSION OF
FRANCHISE TERM OF JUNE 21, 2004**

Dear John:

Per our earlier discussions, I have reviewed the tri-party franchise for BSU, and am of the opinion that the requested two-year extension to the franchise in its June, 2004 petition best falls under Section Four, (c) [pages 4 and 5 of 12], which allows for such extensions by "... mutual written agreement among them."

As the result, I would suggest that a simple "Letter of Agreement" among the Parties be adopted and executed by each of the Parties' principals at a regular meeting and be incorporated into the City's proceedings for the BSU petition.

BSU should prepare, execute and provide such a letter to the County, which I will have our Board approve and authorize the Chairman to sign, which can then be incorporated into the City's public hearing.

BSU PETITION FOR AMENDMENT TO TARIFFS.jenkins.wpd

John R. Jenkins, Esq.
July 16, 2004
Page 2

**RE: BONITA SPRINGS UTILITIES' (BSU) PETITION FOR
AMENDMENT TO TARIFFS AND EXTENSION OF
FRANCHISE TERM OF JUNE 21, 2004**

Please call if you have any questions. As soon as I receive word back from Lee County Utilities, we will let you know if there are any concerns with the rates.

Cordially,

A handwritten signature in black ink, appearing to read "D. Owen", with a large, stylized initial "D" and "O".

David M. Owen
Chief Assistant County Attorney

DMO/dm
Enclosures

xc: James Lavender, Director, Public Works Administration
Rick Diaz, P.E., Director, Lee County Utilities
Ivan Velez, P.E., Deputy Director, Lee County Utilities
Audrey E. Vance, Esq., City Attorney, City of Bonita Springs
Daryl Walk, P.E., Public Works Director, City of Bonita Springs
G. Donald Thomson, Esq.

EXCEPT

FRANCHISE AGREEMENT BY, BETWEEN AND AMONG
BONITA SPRINGS UTILITIES, INC.,
THE CITY OF BONITA SPRINGS, FLORIDA, and
LEE COUNTY, FLORIDA

CITY OF BONITA SPRINGS ORDINANCE NO. 02-14

AN ORDINANCE OF THE CITY OF BONITA SPRINGS, CREATING THE FRANCHISE AGREEMENT, BY, BETWEEN AND AMONG BONITA SPRINGS UTILITIES, INC., THE CITY OF BONITA SPRINGS, FLORIDA, AND LEE COUNTY, FLORIDA; GRANTING TO BONITA SPRINGS UTILITIES, INC., ITS SUCCESSORS AND ASSIGNS, AN EXCLUSIVE WATER AND WASTEWATER UTILITY FRANCHISE AGREEMENT, IMPOSING CITY-WIDE PROVISIONS AND CONDITIONS RELATING THERETO, AND PROVIDING FOR AN EFFECTIVE DATE

THIS AGREEMENT, entered into at Lee County, Florida, to become effective upon the last of (1) the adoption by the City of Bonita Springs of its Ordinance creating a Franchise Agreement by and between the City of Bonita Springs, Bonita Springs Utilities, Inc., and Lee County, Florida, (2) the adoption of a Resolution by the Board of County Commissioners of Lee County, Florida approving the Franchise Agreement between the parties hereto, and (3) the adoption by the Board of Directors of Bonita Springs Utilities, Inc. of the said Franchise Agreement; and

WHEREAS, Bonita Springs Utilities, Inc., a Florida not-for-profit corporation ("Utility"), the City Council of the City of Bonita Springs ("City") and Lee County, Florida ("County"), "The Parties" hereto, desire to enter into a Franchise Agreement, with the intention that such Franchise Agreement will supercede that certain existing "Amended and Restated Franchise Agreement by and between Bonita Springs Utilities, Inc. and Lee County, Florida" by the collective adoption of this Ordinance; and

WHEREAS, the City was created and established effective December 31, 1999; and

WHEREAS, the Utility, formerly known as Bonita Springs Water System, Inc. ("Utility"), is a tax-exempt entity under Internal Revenue Code Section 501(c)(12), and a company that provides water, wastewater and irrigation water service solely to its members who own and control the Utility. The Utility is also a Florida not-for-profit corporation, organized under Chapter 617, Florida Statutes; and

WHEREAS, because the Utility provides service solely to its members who own and control the Utility, it is exempt from regulation by the Florida Public Service Commission pursuant to Section 367.0229(7), Florida Statutes; and

5:00 #6

12-10-02

pipelines, pumps and other structures utilized by the Utility on, over, across, and along any highway, road or other right-of-way now owned or hereinafter acquired by the County within the unincorporated areas as described in Exhibit "A".

(C) The licenses granted are in perpetuity; provided, however, the City or the County, as may be applicable, may terminate the license, as to a specific highway, road or other right-of-way, or portion thereof, if such highway, road or other right-of-way is closed, abandoned, vacated, discontinued or reconstructed.

(D) The Utility shall not create any obstruction or condition that is, or may become, knowingly dangerous to the traveling public in either the City's or County's service area, further, the Utility will notify the City or County, whichever is applicable, before performing any work in City or County rights-of-way, unless work is of an emergency nature, and in which case notification should be as soon as practicable.

(E) The Utility shall hold the City, its Council members and employees, and the County, its Board of Commissioners and employees, harmless from the payment of any compensation or damages to any third parties resulting from the Utility's exercise of this Grant of License.

(F) The Utility shall promptly repair any damage or injury to any highway, road or other right-of-way to which this Grant of License is applicable, which is caused by reason of the exercise of this Grant of License. Further, the Utility shall restore such highway, road, or other right-of-way to a condition at least equal to that which existed immediately prior to the infliction of such damage or injury.

(G) If the City or County widens, repairs or reconstructs any highway, road or other right-of-way that is subject to this Grant of License, the Utility shall move or remove the Utility's water, wastewater or irrigation water lines or other structures at no cost to the City or County; provided, however, in the absence of an emergency, the Utility shall be provided at least 30 days advance written request to move or remove such lines. Whenever reasonable the City and County will attempt to minimize relocations to their best ability.

(H) All work performed by the Utility, or its designee, pursuant to this Grant of License shall be performed in a good and workmanlike manner utilizing best engineering practices. All excavations or damage caused by the Utility by reason of such work shall, within a reasonable time and as nearly as practicable after such excavation or damage, be repaired by the Utility to as good as condition as before the time of such excavation or damage.

✓ **SECTION FOUR: RENEWAL**

(A) At the end of each fifth year anniversary hereof, this Franchise Agreement shall automatically be renewed for an additional five year term, (for a total term of thirty [30] years) under the same terms and conditions as set forth herein, provided that at least six (6) months prior to the expiration of each such five year period Utility shall notify City and County of its intent to renew for an additional five year term.

(B) Within sixty (60) days of such notice, City and County will each schedule at a regular public meeting, the decision as to whether or not to renew. In the event the City and County decide not to renew, the Franchise Agreement shall terminate twenty-five years after the expiration of the five year period.

→ (C) This provision is not intended to in any way limit the ability of the City, County, and Utility to otherwise extend this Franchise Agreement by mutual written agreement between them.

SECTION FIVE: RATES AND CHARGES

(A) Utility is hereby authorized and empowered to establish, charge and enforce such rates and charges as are shown on the rate schedules (tariffs) attached hereto as Exhibit "C," however, notwithstanding such existing rate schedules, Utility is authorized and empowered to establish, amend, revise and enforce from time to time or times to times in the future, different rates or rate schedules reflecting rates either lower or higher than those shown in Exhibit "C", however, any such lower or higher rates or rate schedules so established and enforced from time to time by Utility shall at all times be reasonable, fair and just, and must have the prior consent by Resolution of the City Council, before said revised rates can be placed into effect.

(B) Notwithstanding the foregoing, Utility may file and enforce amended tariffs showing proposed rates and charges and impose such new rates and charges upon sixty (60) days notice to the City, subject to final review by the City and refund to Utility's members of the difference between the prior tariff rates and the revised tariff rates in the event such rates are found to be excessive, unjustified and/or unwarranted. Upon filing of any amended tariffs, the Utility will produce to the City a copy of its rate study for review by the public and the City. This provision shall not be construed to require a rate study for any "pass through" expenses, franchise fee charges or other charges or indexing, as referenced in Subsection (D) below. The City further acknowledges that a "rate study", as defined herein and as used by the industry, may be satisfied by a letter report or other similar documentation, depending upon the complexity of the rate(s) adjustments.

(C) The City shall hold a Public Hearing in order to consider the Utility's proposed rates and charges, but at such Public Hearing, the City may not deny the Utility's reasonable request to increase its rates and charges in order to pay for its prudent cost of operation and maintenance of its system, plus satisfy its debt service obligations. If the City believes that any portion of the Utility's proposed rates are excessive or unreasonable, the City must find there is competent substantial evidence in the form of a City rate study, which is subject to review and challenge by the Utility. As an alternative, the City may hire a Hearing Examiner to take public input and issue a recommendation to City Council, in accordance with the Florida Administrative Procedures Act, Florida Statutes Chapter 120. Any rate study procured by the City or any affected third party must be prepared by a qualified professional using the generally accepted standards for preparing such rate studies for utilities tariffs. Failure by the City

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June 22, 2004

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VALERIE L. LORD

VIA FEDERAL EXPRESS

Audrey Vance, Esquire
City Attorney
City of Bonita Springs
9220 Bonita Beach Road, Suite 111
Bonita Springs, Florida 34135

Re: Bonita Springs Utilities, Inc.;
Petition to Amend Tariffs and Extend Franchise Term
Our File No. 20989.31

Dear Ms. Vance:

Pursuant to section five of the Franchise Agreement by, between and among Bonita Springs Utilities, Inc., the City of Bonita Springs, and Lee County, Florida, enclosed please find the original and twelve (12) copies of a Petition to Amend Tariffs and Extend Franchise Term filed with the City on behalf of Bonita Springs Utilities, Inc.

The Company recently completed a Water and Wastewater Rate Sufficiency Study, prepared by its rate consultant, Public Resources Management Group, Inc. The Study recommended that service rates and ANC Fees be modified to address increasing costs of operation and to fund necessary capital improvements benefitting existing and future customers. Principal among these capital improvements are the recently completed Reverse Osmosis Water Treatment Plant and Wellfield and the new East Water Reclamation Facility. The Company believes each of these projects will be a source of pride for the community, and position the Utility to provide high quality service for years to come.

The Petition and Rate Study request two annual rate increases beginning September 1, 2004. The Company's timetable is driven by a pending \$57,000,000 tax-exempt bond issue scheduled to close in October due to requirements of State law regarding bond volume allocation provided by the State Division of Bond Finance. It is necessary to have rates in place to assure rating agencies, bond insurers and underwriters of the Company's ability to repay the debt.

2004 JUN 24 AM 9:33
RECEIVED BY
LEE CO. ATTORNEY

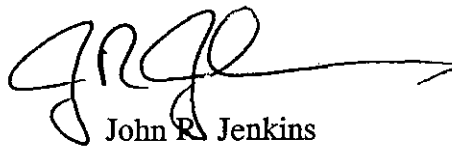
Audrey Vance, Esquire

June 22, 2004

Pg. 2

We look forward to working with you and the City staff on this matter. Contact persons for this Petition are myself, Director of Finance Debbie Bautista, and General Counsel Don Thomson. At any time should you have any questions regarding the Petition or other matters, please feel free to call.

Sincerely,

A handwritten signature in black ink, appearing to read "JRJ", with a long horizontal line extending to the right.

John R. Jenkins
For the Firm

JRJ:kg

Enclosures

cc: Mr. Gary Price
David Owen, Esq.
Mr. Fred Partin
Ms. Debbie Bautista
G. Donald Thomson, Esq.