



STAFF REPORT

TO: Board of Directors
THRU: Mark Foree, General Manager
FROM: Scott Estes, Director of Engineering
DATE: November 5, 2014
SUBJECT: Request for Approval of Agreement with Verdi Business Park Cooperative for Interim Water System Operation

RECOMMENDATION

Staff recommends that the Board approve the Agreement for Interim Water System Operation of the Verdi Business Park Cooperative (VBP) system and authorize the General Manager to execute the Agreement for TMWA. The Agreement is attached.

DISCUSSION

Under an arsenic compliance order from the Washoe County Health District, VBP's preferred long term solution is to abandon their well and have TMWA own and operate their water system. The TMWA Board approved acquisition of the water assets of the VBP in March 2012. The Acquisition Agreement and Amendment were subsequently executed in September 2012 and December 2013, respectively. Per the terms and conditions of the Agreement, VBP has been working towards construction of facilities and improvements necessary to integrate the VBP system and meet current fire flow requirements. Construction of the necessary facilities was financed by VBP through acquisition of a Drinking Water State Revolving Fund (DWSRF) loan. TMWA will acquire the VBP water assets in return for assuming the liability associated with the DWSRF loan. The TMWA Board approved payoff of VBP's DWSRF loan in July 2014. TMWA will be reimbursed for the loan amount through a special assessment on each of the VBP properties. The current estimate of the annual surcharge for each property is \$2,695.47 based on the \$635,200 loan amount.

Acquisition of the VBP assets, including assumption of the DWSRF loan, cannot be completed until the loan is closed. Settlement of construction related claims made by VBP's contractor must be resolved before the loan can be closed. Due to potential issues that may arise with the Public Utilities Commission of Nevada and District Health as a result of continued operation of the water system, VBP desires to implement an interim operating agreement with TMWA pending consummation of the acquisition agreement. TMWA is willing to enter into this agreement under the attached terms and conditions. This agreement has already been approved by the VBP Board of Directors.

AGREEMENT FOR INTERIM WATER SYSTEM OPERATION

THIS AGREEMENT FOR INTERIM WATER SYSTEM OPERATION (this "Operating Agreement"), is dated November __, 2014, and is entered into by and among VERDI BUSINESS PARK WATER COOPERATIVE, a Nevada nonprofit cooperative corporation ("VBP"), and TRUCKEE MEADOWS WATER AUTHORITY, a joint powers authority created pursuant to NRS Chapter 277 by the Cities of Reno and Sparks, and Washoe County ("TMWA").

RECITALS

A. VBP owns certain assets and operates a private retail water sale and delivery system in Washoe County, Nevada which system serves approximately ten (10) commercial customers in the business developer consisting of fifteen (15) parcels commonly known as the Verdi Business Park (the "Water Business").

B. TMWA is a public purveyor of water in the greater Reno-Sparks area.

C. VBP and TMWA have entered into that certain Agreement for Water System Acquisition dated September 2012, as amended ("Acquisition Agreement"), pursuant to which VBP has agreed to sell its Water Business to TMWA.

D. VBP and TMWA desire to enter into an interim operating agreement on the terms and conditions below pursuant to which TMWA will operate the Water Business pending satisfaction of remaining conditions to the consummation of the Acquisition Agreement.

AGREEMENT

NOW, THEREFORE, in consideration of the above recitals and mutual covenants and agreements contained herein, and for other good and valuable consideration, the receipt and sufficiency of which all parties acknowledge, the parties hereto agree as follows:

1. DEFINITIONS.

As used in this Operating Agreement, the following terms have the meanings set forth below. All capitalized terms not otherwise defined in this Operating Agreement shall have the meaning ascribed to them in the Acquisition Agreement:

(a) "Effective Date" means November __, 2014.

(b) "Force Majeure" is the inability of a party to perform due to acts of God; orders of the Government of the United States, State of Nevada or any agency or instrumentality thereof; orders of any other governmental or quasi-governmental agency having jurisdiction over water supplies furnished hereunder; acts of terrorism; insurrections; riots; epidemics; landslides; lighting; earthquakes; fires; storms; floods; washouts; droughts; explosions; breakage or accidents to machinery, pipelines, dams or canals or partial or entire failure or contamination of water supply, not due to the

negligence of the party claiming such occurrence as the reason for the inability to perform; arrests; civil disturbances; acts of any public enemy; and any other causes not reasonably within the control of the party claiming such inability to perform.

(c) "Force Majeure Event" is any event which causes a Force Majeure.

(d) "Transaction Close" means the closing and consummation of the acquisition by TMWA of VBP's Water Business pursuant to the Acquisition Agreement.

2. TERM AND TERMINATION

This Operating Agreement shall commence on the Effective Date, and shall continue until the earlier of (i) termination by TMWA upon thirty (30) days' notice to VBP or (ii) the Transaction Close.

3. OPERATION AND MAINTENANCE OF WATER BUSINESS

3.1 Final Cutover to TMWA System. Within ten (10) business days of the Effective Date, TMWA will perform the final cutover to the TMWA system through Capital Improvements constructed by VBP pursuant to Acquisition Agreement. TMWA will physically isolate the connection to the existing VBP well and will assume responsibility for abandonment of the existing VBP well at its convenience.

3.2 Operation and Maintenance of Water Facilities. During the Term of this Operating Agreement, TMWA will, at its cost, operate and maintain the Water Facilities in accordance with standard industry practice, TMWA Rules and regulations or other governmental regulations applicable to TMWA. In connection with the operation and maintenance of the Water Facilities, TMWA may engage such employees, agents, contractors and consultants as it shall deem necessary or convenient from time to time.

3.3 Administration of Water Business. VBP shall operate and administer the Water Business, including computation and preparation of user charges and bills and collection thereof, consistent with past practices and in such a manner as to not adversely impact the Acquisition Agreement, including, without limitation, VBP continued obligation to pay any amounts due on the SRF Loan.

3.4 Capital Improvements. VBP shall remain responsible for performing and constructing extraordinary maintenance or extraordinary repairs on the Water Facilities (for purposes of this sentence, "extraordinary" shall refer to a facility or component failure warranting emergency repair). The parties acknowledge VBP has no capital improvements planned at this time. TMWA shall have the right, but not the obligation, to perform such extraordinary maintenance or repair or capital improvements at TMWA's cost, subject to VBP's review and approval. To the extent TMWA performs such work, TMWA may impose assessments on VBP for reimbursement of such costs, which shall be collected and paid to TMWA until TMWA is reimbursed or the Transaction Close, whichever occurs first. VBP shall remain solely responsible for all costs and expenses arising in connection with Capital Improvements performed pursuant to the Acquisition Agreement.

3.5. Limitations. TMWA in its undertakings under this Agreement is acting for the benefit of VBP and TMWA shall not be liable for any loss or damage to VBP arising out of or related to this Agreement. In no event shall TMWA bear any liability to VBP (or any person or entity not a signatory to this Agreement) for any action taken by TMWA in accordance with TMWA's ordinary and usual course of business consistent with TMWA past practice.

3.6. Cooperation. VBP shall cooperate as reasonably requested by TMWA to support and assist TMWA in the operation, management, and direction of the Water Business and/or Water Facilities.

3.7. System Condition. It is understood and agreed that for purposes of this Operating Agreement TMWA accepts the Water Facilities in their present condition. Nothing in the foregoing shall alter or be construed to alter or affect VBP's obligations to complete Capital Improvements in accordance with the Acquisition Agreement.

4. WATER DELIVERY

4.1. Delivery. TMWA shall treat and deliver water to VBP through the Water Facilities in an aggregate quantity consistent with past practices and up to but not in excess of the Water Resources (as defined in the Acquisition Agreement). TMWA shall deliver water to the VBP system through existing points of connection between the Water Facilities and TMWA's system.

4.2. Impairment of Delivery. TMWA shall notify VBP of any Force Majeure Event or other occurrence that may impair TMWA's ability to deliver water to the VBP in accordance with this Agreement. If such Force Majeure Event or other occurrence renders TMWA unable to deliver water to VBP, such event shall be governed by and remediated in accordance with TMWA's rules of service as if the VBP were a TMWA customer.

5. BILLING AND CUSTOMER SERVICE

5.1. Billing. TMWA shall read meters for water usage on a monthly basis and provide such meter data to VBP at least once monthly. VBP shall be TMWA's customer of record for deliveries under this Agreement, and TMWA shall bill VBP on a monthly basis an amount equal to the amount that would be otherwise billed by TMWA under TMWA rate tariffs GMWS, FPS or MIS, as applicable, for the water usage in the period corresponding to the meter data. VBP shall pay TMWA such amount billed within twenty-one (21) days of issuance. VBP may continue to bill and collect charges for the delivery of water service and SRF debt directly from VBP customers in accordance with VBP's rules and customary billing practices.

5.2. Water Business Revenues. VBP shall own and be entitled to receive and retain all revenues derived from the operation of the Water Business during the term of this Operating Agreement, in excess of amounts paid to TMWA under Section 5.1.

5.3. Customer Rates. VBP represents and warrants that it has taken all action necessary to adopt TMWA's Rules and Rate Tariffs in their entirety so such apply to all VBP customers as if they were TMWA retail customers. VBP acknowledges and agrees that during the term of this Agreement VBP shall bill all VBP customers amounts not less than the TMWA GMWS, FPS or MIS rate.

5.4. Rules of Service. TMWA's delivery of water to VBP shall be governed by, and VBP shall be subject to, TMWA's Rules and Rate Tariffs during the term of this Agreement, as if VBP were a TMWA customer. TMWA shall have the right to exercise, in its sole discretion and consistent with TMWA's customary business practices, all procedures, rights and remedies under TMWA Rules with respect to the delivery or non-delivery of water to VBP.

6. INDEMNIFICATION AND INSURANCE

6.1 Third Party Claims. If any person, governmental agency, or other entity which is not a party to this Operating Agreement commences a proceeding or makes a claim in equity or law (hereafter referred to as a "Claim") against a party to this Operating Agreement (hereafter referred to as "Indemnified Party") and if such Claim arises to the proportionate extent from and/or is based upon the wrongful acts or omissions of the other party to this Operating Agreement (hereafter referred to as the "Responsible Party"), the Responsible Party shall defend, indemnify and hold harmless the Indemnified Party from the Claim. The Indemnified Party shall notify the Responsible Party of the Claim within a reasonable period of time after it has received actual notice of the Claim. The parties shall take all reasonable actions necessary to assist each other in determining the nature and extent of the issues contained in the Claim. If a proceeding is commenced against the Indemnified Party which is based upon or arises out of this Operating Agreement, then the Indemnified Party shall be entitled to make the Responsible Party a party to the proceeding for the purpose of enforcing the terms and conditions of this section. The Responsible Party shall pay all reasonable attorney fees and costs to the proportionate extent that the Indemnified Party incurs or is subject to as a result of the Claim.

The obligations contained herein shall survive any termination of this Operating Agreement. This provision is not intended to effect a waiver, nor shall it be deemed to effect a waiver, by TMWA of the limitation on liability provided in Ch. 41 of NRS and TMWA shall not be responsible for nor shall the foregoing indemnity apply to damages in excess of the amounts provided therein in any event. Notwithstanding anything to the contrary herein, TMWA shall not be responsible for damages arising from or related the condition of the Water Facilities, acts or omissions of VBP, or any claims arising from or related to the construction of the Capital Improvements (as defined in the Acquisition Agreement).

6.2 Insurance. TMWA shall have no obligation to provide any insurance with respect to the Water Facilities or Water Business, but may, at its option, maintain insurance covering TMWA for TMWA's acts in performing obligations under this Operating Agreement.

6.3 Limitation of Indemnities. In no case shall any party be responsible or liable to the other party under any indemnity set forth in this Operating Agreement for consequential or punitive damages, including, without limitation, lost Water Business profits, and each party's

right to recover from the other thereunder shall be limited to such recovering party's direct, reasonably foreseeable damages.

7. MISCELLANEOUS

7.1 Jurisdiction. This Operating Agreement shall be construed under the laws of the State of Nevada. The sole venue for any arbitration or action to enforce the provisions of this Operating Agreement (or for any other cause arising hereunder) shall be Washoe County, Nevada.

7.2 Notices. All notices or demands required or desired to be given under this Agreement shall be in writing and shall be validly given or made only if (i) personally delivered, (ii) mailed by United States mail, certified or registered, postage prepaid, return receipt requested, (iii) delivered by reputable overnight delivery service, such as FedEx, or (iv) sent by facsimile if the sender's facsimile machine prints confirmation records showing the date sent, the recipient's facsimile number, and the completed status of the transmission, and shall be addressed as follows:

To VBP: Verdi Business Park Water Cooperative

With a copy to: Allison, MacKenzie, Pavlakis, Wright & Fagan
P.O. Box 646
Carson City, NV 89702
Attn: Chris MacKenzie

To TMWA: Truckee Meadows Water Authority
1355 Capital Blvd.
Reno, Nevada 89502
Attn: Mark Foree

With a copy to: McDonald Carano Wilson LLP
P.O. Box 2670
Reno, Nevada 89505
Attn: Michael A.T. Pagni, Esq.

Delivery of any such notice or demand shall be conclusively deemed made upon receipt if personally delivered or delivered by overnight delivery service, upon the date of delivery or attempted delivery shown on the return reply card if delivered by United States Mail, or upon the date of transmission shown on the sender's fax confirmation page.

7.3 Entire Agreement. This Operating Agreement constitutes the entire agreement between the parties pertaining to the subject matter hereof and supersedes all prior agreements, oral or written, express or implied, and all undertakings, negotiations or discussions of the parties, whether oral or written, all of which are integrated herein to the extent agreed upon by

the parties. This Operating Agreement may not be amended, changed, waived, terminated or modified unless the same shall be in writing and signed by or on behalf of the party to be charged. No waiver of any provision of this Operating Agreement shall be valid unless in writing and signed by the party against whom it is sought to be enforced.

7.4 Attorneys Fees; Governing Law and Venue. In the event of any action for breach of, to enforce the provisions of, or otherwise involving this Operating Agreement, the court in such action shall award a reasonable sum as attorneys' fees to the party who, in the light of the issues litigated and the court's decision on those issues was more successful in the action. This Operating Agreement shall be governed by the laws of the State of Nevada.

7.5 Severability. If any provisions or part of a provision in this Operating Agreement shall, for any reason, be held to be invalid, illegal or unenforceable in any respect, the same shall not affect any other provision or part of a provision, but, to the fullest extent possible without defeating the parties' intentions hereunder, this Operating Agreement shall be reformed and construed as if such invalid or illegal or unenforceable provision or part of a provision had never been contained herein.

7.6 Relationship of Parties. Nothing contained in this Operating Agreement is intended to nor shall be deemed to create any partnership, joint venture, agency, fiduciary duty or other relationship between VBP and TMWA other than with respect to their contractual obligations contained herein.

7.7 Third Party Beneficiaries. There are no express or implied third party beneficiaries to this Operating Agreement, or any obligation, claim, or right arising under this Operating Agreement, and no other person or entity who is not a signatory to this Operating Agreement shall have any obligation, claim, right, or remedy hereunder.

7.8 Counterparts. This Operating Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

7.9 Assignment. Neither party shall have the power to or will assign any of the duties or rights without the written consent of the other party, which shall not be unreasonably withheld. Any unauthorized assignment is void and unenforceable.

7.10 Excusable Delay. Neither VBP nor TMWA shall be in default because of any failure to perform this Operating Agreement in accordance with its terms if the failure arises from a Force Majeure Event.

IN WITNESS WHEREOF, VBP and TMWA have executed this Operating Agreement effective the date first written above.

“TMWA”
TRUCKEE MEADOWS WATER
AUTHORITY

By: _____

Its: _____

“VBP”
VERDI BUSINESS PARK WATER
COOPERATIVE, a Nevada nonprofit
corporation

By: Lamy Berleppus

Its: PRESIDENT