

## **ORDINANCE NO. 2019-39**

**AN ORDINANCE OF THE CITY OF BOERNE, TEXAS APPROVING THE FIRST AMENDED REGIONAL UTILITY FRANCHISE AGREEMENT BETWEEN THE CITY AND KENDALL WEST UTILITY, LLC; ESTABLISHING A FRANCHISE FEE IN CONSIDERATION FOR THE RIGHTS AND PRIVILEGES GRANTED TO KENDALL WEST UTILITY, LLC IN PROVIDING AMENDMENT TO MECHANISM: PROVIDING FOR SEVERABILITY; PROVIDING A REPEALER CLAUSE; PROVIDING AN EFFECTIVE DATE**

**WHEREAS**, the City of Boerne and Kendall West Utility, LLC have heretofore, on September 14, 2015 entered into a Regional Utility Agreement providing for the provision of water and sewer services to areas outside of the City's current Certificate of Convenience and Necessity; and

**WHEREAS**, the provision of such services by Kendall West Utility, LLC benefits City and the surrounding community, and is in the best interests of all parties; and

**WHEREAS**, by Letter Agreement dated August 9, 2016 agreed to changes and revisions to the Regional Utility Agreement; and

**WHEREAS**, the parties have agreed to enter into a First Amended Regional Utility Franchise Agreement to reflect the current and future rights, duties and responsibilities of the City and of Kendall West Utilities, LLC, and to reflect the franchise fee and its administration

**NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BOERNE, TEXAS:**

SECTION 1. That the First Amended Regional Utility Franchise Agreement attached hereto as Exhibit A is hereby approved.

SECTION 2. That the City Manager is authorized and directed to execute the First Amended Regional Utility Franchise Agreement on behalf of the City.

SECTION 3. Severability. If any provision, section, subsection, sentence, clause or the application of same to any person or set of circumstances for any reason is held to be unconstitutional, void or invalid or for any reason unenforceable, the validity of the remaining portions of this ordinance or the application thereby shall remain in effect, it being the intent of the City Council of the City of Boerne, Texas in adopting this ordinance that no portion thereof or provision contained herein shall become inoperative or fail by any reasons of unconstitutionality of any other portion or provision.

SECTION 4. Repealer. All ordinances, parts of ordinances resolutions and pans of resolutions in conflict with this ordinance are hereby repealed to the extent of conflict with this ordinance.

SECTION 5. Effective Date. This ordinance shall be effective immediately upon its passage and approval.

PASSED and APPROVED on first reading this the 24<sup>th</sup> day of September, 2019.

PASSED, APPROVED and ADOPTED on second reading this the \_\_\_\_ day of September, 2019.

APPROVED:

\_\_\_\_\_  
Mayor

ATTEST:

\_\_\_\_\_  
City Secretary

APPROVED AS TO FORM:

\_\_\_\_\_  
Interim City Attorney

**FIRST AMENDED REGIONAL UTILITY FRANCHISE AGREEMENT**

The purpose of this REGIONAL UTILITY FRANCHISE AGREEMENT ("Agreement") is to provide for the controlled expansion of regional utility services by KENDALL WEST UTILITY, LLC ("Kendall West") in and around the CITY OF BOERNE, a Texas home rule municipality ("City") (collectively referred to as the "Parties") and the use and enjoyment of certain property to fulfill this purpose.

Amendment as per Section V, 5.01 to the Regional Utility Agreement is as follows:

On August 9, 2016 a letter of agreement was signed by the City and Kendall West Utilities, see attached "**Exhibit A**" incorporated herein for all intents and purposes, regarding the institution of a franchise fee amount for provision of water service by Kendall West to the Service Areas cited below:

**1.06.02 Exceptions to Service Area.** If a request for service has been made to a Party (the "requested Party") in the other Party's (the "non-requested Party") potential Service Area as delineated in Section 1.03 above, then the requested Party shall have the obligation to properly notify the non-requested Party in writing. In order to promote proper growth and protection of groundwater in Kendall County, both Parties shall work together to analyze the request and evaluate the benefits of the project. The non-requested Party shall have the right of first refusal in the agreed upon Service Area described in Section 1.03. The non-requested Party shall have fourteen (14) days to approve or deny such request. In the event the non-requested Party fails to respond in fourteen (14) days, the right of first refusal shall expire with respect to that particular request for service and the requested party shall have the right to provide service. The requested Party's service shall not be provided if the non-requested Party elects to provide such service or the requested Party's service will have a detrimental impact in the non-requested Party's overall service plan. The non-requested Party's consent shall not be unreasonably withheld if the non-requested party elects not to provide such service or such service does not have a detrimental impact on the non-requested Party's overall service plan.

**Amendment to Section 1.04 Kendall West's Obligations** is as follows:

**1.04.7 Franchise Fee.** In consideration for the rights and privileges herein granted, the administration of this Franchise by the City, beginning on August 9, 2016, a franchise fee equal to four percent (4.00%) of gross receipts of Kendall West within the City is instituted for providing water, wastewater, or other billable utility services in the Service Area as defined above;

**1.04.8 Franchise Fee Payments.** Such franchise fee payments described in the above section shall be calculated and paid to the City monthly on or before the 15<sup>th</sup> day of each month. Late payments shall accrue interest at six percent (6.00%), plus a late payment fee of \$50.00 per day.

**1.04.9 Books of Account.** Kendall West shall keep complete and accurate books of accounts and records of its business operations under and in connection with this Franchise. To the extent practicable, all such books of accounts and records shall be made available upon request by City of Boerne for review at the Kendall West local office.

**1.04.10 Access by City.** The City shall have access to all books of accounts and records of Kendall West, during regular business hours and with ten (10) business days' notice, to the extent said books of accounts and records relate to and will assist the City in ascertaining the correctness of any and all payments or reports to the City.

**1.04.11 Audits.** The City may inspect the Kendall West's books of accounts relative to the City at any time during regular business hours on ten (10) business days' prior written notice and may audit the books from time to time. All records reasonably necessary for such audit shall be made available by Kendall West at the Kendall West's local office. Kendall West agrees to give its full cooperation in any audit and shall provide complete responses to inquiries within thirty (30) days of written request. If the results of any audit indicate that Kendall West (i) paid the correct Franchise Fee, (ii) overpaid the Franchise Fee and is entitled to a refund or credit, or (iii) underpaid the franchise fee by three percent (3.00%) or less, then the City shall pay the costs of the audit. If the results of the audit indicate Kendall West underpaid the Franchise Fee by more than three percent (3.00 %), then Kendall West shall pay the reasonable costs of the audit. The City agrees that any audit shall be performed in good faith. If the results of the audit indicate that Kendall West underpaid the Franchise Fee by more than three percent (3.00%), and Kendall West is unable to produce contrary evidence that in the City's reasonable judgment is satisfactory to demonstrate to the City that the results of the audit are not accurate, then Kendall West shall pay interest on the total amount of underpayment at an annualized interest rate of six percent (6.00%) and interest shall be calculated from the time the original amount is due. Any additional amount due to the City hereunder shall be paid within thirty (30) days from the date of invoice. Any amount not paid within thirty (30) days from the date of the invoice will cause interest to be payable at an annualized interest rate of 6.00% on the entire amount from the date of invoice. Notwithstanding the above, if Kendall West's auditor disagrees with the City's determination that the additional amount due exceeds three percent (3.00 %), the City's auditor and Kendall West's auditor shall choose a neutral auditor who shall make a determination which is final and binding on both parties as to whether the three percent (3.00 %) amount was exceeded.

Executed in duplicate originals, each of which shall have the full force and effect of an original, on this \_\_\_\_\_ DAY OF \_\_\_\_\_ 2019.

**SIGNATURES APPEAR ON THE FOLLOWING PAGE[S].**

CITY OF BOERNE

BY: \_\_\_\_\_  
RONALD C. BOWMAN

**ACKNOWLEDGMENT**

THE STATE OF TEXAS §

§

COUNTY OF KENDALL §

This instrument was acknowledged before me on the \_\_\_\_\_ day of  
\_\_\_\_\_, 2019 A. D., by Ronald C. Bowman

\_\_\_\_\_  
Notary Public In and For

The State of Texas

My Commission Expires: \_\_\_\_\_

Printed Name of Notary:

\_\_\_\_\_

KENDALL WEST UTILITY, LLC

BY: \_\_\_\_\_  
JOHN MARK MATKIN, P.E.

**ACKNOWLEDGMENT**

THE STATE OF TEXAS §

§

COUNTY OF KENDALL §

This instrument was acknowledged before me on the \_\_\_\_\_ day of  
\_\_\_\_\_, 2019 A. D., by John Mark Matkin.

\_\_\_\_\_  
Notary Public In and For

The State of Texas

My Commission Expires: \_\_\_\_\_

Printed Name of Notary:

\_\_\_\_\_