



Filing Receipt

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WHOLESALE WATER CONTRACT

STATE OF TEXAS §
 §
COUNTY OF SMITH §

THIS CONTRACT (the "Contract") entered into this 27th day of April, 2023, (the "Effective Date") by and between the City of Tyler ("Tyler") and Southern Utilities Company ("Southern") hereinafter collectively referred to as the "Parties," evidences the binding agreement between the Parties regarding Tyler's purchase of treated water on a wholesale basis. For good and valuable consideration of the agreements contained in this Contract, the adequacy, receipt, and sufficiency of which are acknowledged, the Parties hereby agree as follows:

Recitals

WHEREAS, Tyler is a home rule municipality operating under and governed by its Charter and laws and Constitution of the State of Texas that owns and operates a retail water utility; and,

WHEREAS, Southern is a Texas corporation that owns and operates water distribution and supply facilities; and,

WHEREAS, Southern currently provides retail water utility service to John Soules Foods, Inc.'s, ("JSF's") food processing plant located at 10150 FM 14, Tyler, Texas 75706 ("JSF Plant") located within a dual certificate of convenience and necessity ("CCN") service area that Southern and Tyler share, but, pursuant to an agreement between JSF and Southern, Southern has agreed for Tyler to provide retail water utility service to JSF; and,

WHEREAS, Tyler is extending its water facilities to supply retail water utility service to the JSF Plant, with construction of the pipeline, infrastructure, and facilities for such service estimated to commence on or before December 31, 2023; and,

WHEREAS, Southern is agreeable to allowing Tyler to begin serving the JSF Plant after the term of this Contract commences, and Southern is agreeable to providing treated water to Tyler on a wholesale basis during the Term of this Contract to allow Tyler to begin providing retail water service to the JSF Plant; and,

WHEREAS, both Southern and Tyler are authorized to provide retail water service to JSF pursuant to their respective certificates of convenience and necessity ("CCN");

NOW, THEREFORE, in consideration of mutual covenants and agreements herein contained, Southern agrees to furnish treated water to Tyler, and Tyler agrees to purchase treated water from Southern, upon the terms and conditions and for the consideration herein set forth, to wit:

Section 1. INTENT OF THE PARTIES. It is the intent of the Parties that JSF will withdraw its pending formal complaint against Southern in Public Utility Commission of Texas ("PUCT") Docket No. 51233 (the "Complaint") and that Southern will provide treated water to

Tyler at the JSF Plant on a wholesale basis until Tyler completes construction of its own water delivery facilities and begins providing water to the JSF Plant using those facilities.

Section 2. DELIVERY OF TREATED WATER/QUANTITY. Southern agrees during the term of this Contract, and at the Points of Delivery specified herein, to deliver treated water to Tyler at rates sufficient to meet JSF's demand. Delivery of treated water in excess of 15,000,000 gallons in a 30-day period shall be considered Excess Use and shall be billed at a higher rate as specified in Section 7 of this Contract.

Section 3. QUALITY. Under the provisions of this Contract, Southern is obligated to furnish Tyler with treated water suitable for human consumption in accordance with all applicable laws, rules, and regulations of this state.

Section 4. POINTS OF DELIVERY. The Points of Delivery of water to Tyler from Southern shall be at two retail meters located adjacent to 10150 FM 14, Tyler, Texas. Point of Delivery No. 1 shall be at the location of a new meter installed just up flow of the existing 1" meter which is currently assigned Southern Billing Account No. 0122404000 and identified by Southern as Meter Number 000009065427. Point of Delivery No. 2 shall be at the location of a new meter installed just up flow of the existing 6" meter which is currently assigned Southern Billing Account No. 0122460000 and identified by Southern as Meter Number 000008876053. Southern agrees to deliver at the Points of Delivery the quantities of water herein contracted for at the pressure which is maintained in Southern's water supply system and in compliance with all applicable laws, rules, and regulations of this state. Southern shall convey the existing Southern meters identified above to Tyler.

Section 5. MEASURING EQUIPMENT. Southern shall furnish, install, operate, and maintain at its own expense at the Points of Delivery the necessary equipment, and devices of standard type for properly measuring the quantity of water delivered under this Contract. Southern shall read the meters monthly. The meters used under this Contract shall be read by Southern's operator in accordance with Southern's standard meter reading schedule currently used for JSF and Southern's retail water utility service customers and shall be available for checking by a representative of Tyler during Southern's normal business hours.

Section 6. UNIT OF MEASUREMENT. The unit of measurement for water delivered under the provisions of this Contract shall be one thousand (1,000) gallons of water, U.S. Standard Liquid Measure.

Section 7. PRICE AND TERMS. The rate for water shall be as follows:

Point of Delivery No. 1	Point of Delivery No. 2
<u>Monthly Charge</u> - \$58.46	<u>Monthly Charge</u> - \$1,169.25
<u>Gallonge Charge</u> (measured at each Point of Delivery)	
0 6,000 gallons -	\$2.00 per 1,000 gallons
6,001 12,000 gallons	\$2.50 per 1,000 gallons
12,001 15,000,000 gallons	\$3.50 per 1,000 gallons
15,000,001 gallons and up	\$7.00 per 1,000 gallons

Section 8. WHOLESale BILLING AND PAYMENT. Southern shall send a bill to Tyler once per month setting forth the quantity of water delivered to Tyler as determined by Southern's readings of the meters installed at the Points of Delivery. Each bill shall include a due date, which shall be at least 30 days after the bill is sent to Tyler, and the total amount owed to Southern based on the metered quantity of wholesale water delivered multiplied by the rates set out herein. If Tyler in good faith questions the amount of the bill, Southern shall follow the procedures established in Southern's retail tariff.

Tyler agrees to make timely payments to Southern for water delivered to the Points of Delivery. Payments shall be considered past due 30 days after the date of issuance of each bill. Southern may apply a late charge on past due payments of \$5.00.

Section 9. DEFAULT. In the event Tyler defaults on any amounts due Southern under this Contract or in the performance of any material obligation to be performed by Tyler under this Contract, Southern shall have the right to disconnect wholesale water service at the Points of Delivery to Tyler under this Contract until the default is cured by Tyler. Before exercising this right, Southern shall give Tyler and JSF thirty (30) days written notice of the default and of the opportunity to cure the same. In the event the default remains uncured after forty-five (45) days after Southern gives Tyler and JSF the aforesaid written notice of default, then Southern shall have the right under this Contract to permanently disconnect wholesale service to Tyler at the Points of Delivery. In the event that Southern disconnects wholesale service to Tyler at the Points of Delivery, Tyler shall be responsible for providing retail water utility service directly to the JSF Plant through alternative means. Southern shall also have the right to pursue any remedy available at law or in equity pending cure of such default by Tyler.

In the event Southern defaults in the performance of any material obligation to be performed by Southern under this Contract, then Tyler, after having given Southern 30 days written notice of the default and of the opportunity to cure the same, shall have the right to pursue any remedy available at law or in equity pending cure of such default by Southern.

Section 10. TERM OF CONTRACT. The term of this Contract and all Southern's obligations herein shall not commence unless and until JSF unconditionally withdraws the Complaint with prejudice to refile. Upon such withdrawal, this contract shall continue in force and effect until Tyler completes construction of its water facilities and begins delivering water to JSF through those facilities, and Tyler gives notice of termination to Southern. Upon expiration of the term, Southern shall have the right to disconnect wholesale service to Tyler. If JSF or any of its affiliates file a new complaint at the PUC against Southern or any other legal action related to Southern water utility service to the JSF Plant or Southern's water conservation rate surcharge, the term of this Contract will end.

Section 11. FORCE MAJEURE. In case of reason of "force majeure" wherein either party hereto shall be rendered unable wholly or in part to carry out its obligations under this Contract, then, if such party shall give notice and full particulars of such "force majeure" in writing to the other party within a reasonable time after occurrence of the event or cause so relied on, the

obligation of the party giving such notice, insofar as it is affected by such "force majeure" shall be suspended during the continuance of the inability then claimed, but for no longer period, and any such party shall endeavor to remove or overcome such inability with all reasonable dispatch. The term "force majeure" as employed herein, shall mean acts of God, strikes, lockouts, or other industrial disturbances, acts of a public enemy, orders of any kind of the government of the United States or the State of Texas or any kind of civil or military authority, earthquake, fires, hurricanes storms, floods, washouts, droughts, arrests, restraint of government and people, civil disturbances explosions, breakage, or accidents of machinery, pipe lines or canals, partial or entire failure of the water supply, and inability on the part of Southern to deliver water hereunder or of Tyler or JSF to receive such water, or on account of any other causes not reasonably within the control of the party claiming such inability. It is understood and agreed that the settlement of strikes and lockouts shall be entirely within the discretion of the party having the difficulty, and that the above requirement that any "force majeure" shall be remedied with all reasonable dispatch shall not require the settlement of strikes and lockouts by acceding to the demands of the opposing party or parties when such settlement is unfavorable to it in the judgment of the party having the difficulty.

Section 12. REGULATORY BODIES AND LAWS. This Contract shall be subject to all valid rules, regulations, and law applicable hereto, passed or promulgated by the United States of America, the State of Texas, or any governmental body or agency thereof having lawful jurisdiction, or any authorized representative or agency of any of them.

Section 13. NOTICES. All notices or communications provided for herein or necessary in connection with this Contract shall be in writing and hand delivered or sent certified mail, postage prepaid, return receipt requested, to:

City of Tyler

City of Tyler
Attn: City Manager
P.O. Box 2039
Tyler, TX 75710

Southern Utilities Company

Southern Utilities Company
Attn: President
218 N. Broadway Ave.
Tyler, TX 75702-5707

John Soules Foods, Inc.

John Soules Foods, Inc.
Attn: Chief Financial Officer
P.O. Box 4579
Tyler, TX 75712

Addresses may be changed by giving written notice to the other Party in compliance with this Section 13.

Section 14. **ENTIRE AGREEMENT/MODIFICATION.** This Contract constitutes the sole agreement between the Parties relating to the rights herein granted and the obligations herein assumed and supersedes any and all prior understandings, negotiations, representations, or agreements, whether oral or written. This Contract shall be subject to change or modification only with the mutual written consent of Tyler and Southern.

Section 15. **SEVERABILITY.** The provisions of this Contract are severable and if any provision or part of this Contract or the application thereof shall be held by an agency or court of competent jurisdiction to be unenforceable, invalid, or unlawful for any reason, the remainder of this Contract shall not be affected thereby.

Section 16. **GOVERNING LAW/VENUE.** The terms and provisions hereof shall be governed by and construed in accordance with the laws of the State of Texas. Smith County, Texas shall be the place of venue for any suit hereon.

Section 17. **WATER CONSERVATION PLANS.** Tyler shall adopt water conservation and drought contingency plans as required by the Texas Commission on Environmental Quality and shall make copies of the plans available to Southern upon request.

Section 18. **ASSIGNMENT.** This Contract may not be assigned by either Party without the express written consent of the other Party.

Section 19. **GOODS AND SERVICES.** Southern and Tyler agree that this Contract constitutes an agreement for providing goods and services by Southern to Tyler and is subject to the provisions of Subchapter I of Chapter 271, Texas Local Government Code, as amended, and any successor statute(s). As consideration for this Contract, Southern is providing treated water, a good, and wholesale water supply services to Tyler. In accordance with Sections 271.152 and 271.153 thereof, Tyler hereby waives any constitutional, statutory, or common law right to sovereign or governmental immunity from liability or suit and expressly consents to be sued and liable as described in said statutes, by only as to Southern and this Contract. Tyler does not waive any additional rights under Texas Local Government Code Sections 271.155-157.

Section 20. **THIRD PARTY BENEFICIARY.** Southern and Tyler hereby designate JSF as the third-party beneficiary of this Contract with the right to enforce its provisions against Southern if Tyler declines or fails to do so.

IN WITNESS WHEREOF, the Parties hereto acting under authority of their respective governing bodies have caused this Contract to be duly executed in several counterparts, each of which shall constitute an original, all as of the day and year first above written, which is the Effective Date.

[SIGNATURE PAGE TO FOLLOW]

AGREED TO AND EXECUTED to be effective as of the date last signed:

CITY OF TYLER

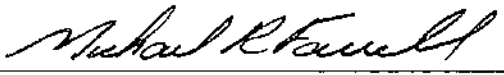
By: 

Name: Edward Broussard

Title: City Manager

Date: 04/21/2023

SOUTHERN UTILITIES COMPANY

By: 

Name: Michael R. Farrell

Title: President

Date: 04/27/2023