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Contract for the People v. Contract on the People

By Katherine Watt

The following Term Sheet is an alternative proposal drafted to recognize Centre County citizens' ownership of the groundwater in the Nittany Valley sub-basin of the Susquehanna River Basin and the fair market value of the water – representing Centre County citizens' capital investment in the "Project;" to fairly allocate Project revenue to meet public needs; and to enforce these and other rights under Article 1, Section 27 of the Pennsylvania Constitution throughout the Project.

It's structurally similar to a transcription of the Term Sheet adopted by the Spring Township Water Authority board on February 28, 2018, with respect to the proposed Nestle water bottling plant, published earlier today.

Centre County Citizens/Spring Township Water Authority/Nestle Waters North America -- Capital Investment/ Profit-Sharing/Economic Development/Watershed Conservation/Water Supply -- Agreement -- Term Sheet

1. Parties to Agreement

1.1 Citizens of Centre County (the "People"), as beneficiaries of the corpus of the public trust: public natural resources.

1.2 Spring Township Water Authority ("STWA"), as fiduciaries representing the People and entrusted with conservation and maintenance of Pennsylvania's natural resources on their behalf.

1.3 Centre County Commissioners ("Commissioners"), as fiduciaries representing the People and entrusted with conservation and maintenance of Pennsylvania's natural resources on their behalf.

1.4 Nestle Waters North America Inc. ("Nwana")

2. Agreement Objectives

2.1 Conserve and maintain the People's environmental rights under Article 1, Section 27 of the Pennsylvania Constitution:

"The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural

resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

2.2 Apply the Pennsylvania Supreme Court's June 20, 2017 ruling in *Pennsylvania Environmental Defense Foundation v. Commonwealth* to Centre County watershed management.

2.3 Wisely manage Nittany Valley sub-basin water supplies to support Centre County human and wildlife populations, including during periods of drought.

2.4 When supplies are plentiful for Centre County human and wildlife populations, provide for sale and delivery of water to Nwana, for consumptive export, from STWA Well No. PW-2 ("Well PW-2") in a manner that qualifies as "spring water" under FDA standard of identity regulations.

2.5 Provide for the permitting, construction and operation of certain modifications to Well PW-2 (the "PW-2 Modifications") and a pipeline and related pumping facilities (the "Pipeline Facilities") from the Well PW-2 to the contemplated Nwana Bottling Plant to be located in Benner or Spring Townships (the "Nwana Plant").

2.6 Provide for the permitting, construction and operation of a new well ("PW-3") as a third reliable source for the STWA system.

2.7 Invest no less than 50% of the total sales revenue from Nwana's sale of bottled groundwater extraction, to public purposes, including maintenance and operation of the STWA public water supply system; maintenance of Centre County transportation corridors; education of the Centre County workforce; and Centre County small-business development, land conservation, streambank restoration and reforestation and small-business.

3. Stipulations.

3.1 The parties stipulate that access to local, potable, reliable drinking water is a universal biological need and a universal human right.

3.2 The parties stipulate that access to imported, plastic-bottled drinking water is a privilege-based, manufactured consumer demand.

3.3 In the event other bottling corporations seek access to the Nittany Valley sub-basin, the total amount of water withdrawn annually from the sub-basin for consumptive export shall not exceed 150 million gallons per year for all consumptive export combined.

4. Sale and Purchase of Raw Water

4.1 Sale of Raw Water. STWA would agree to sell to NWNA raw water derived from the Well PW-2 and deliver such water to the NWNA up to 150 million gallons per year (*Centre Daily Times*, March 10, 2018) or the permitted withdrawal rates of the Well PW-2 as established by the SRBC Project Approval, DEP Public Water Supply Permit and other applicable Governmental Approvals, whichever is lesser.

4.2 Raw Water Charge Rate. STWA shall establish three user classes for water extracted and delivered by the STWA:

- (i) "Primary" - household and small business customers
- (ii) "Secondary" - agricultural and industrial customers
- (iii) "Tertiary" - consumptive export customers

Each user class shall pay a different price for water, based on volume consumed, the total amount recharged to the Nittany Valley sub-basin directly through irrigation and indirectly through sewage treatment facilities, the total amount exported for consumption and discharge outside the Nittany Valley sub-basin, and the 2013 export market price.

4.5 STWA shall sell water to NWNA, and any other consumptive exporters, including NWNA, at the average of the standard rate, currently \$4.75 per thousand-gallons, and the 2013 average market price for 16.9-oz plastic bottles of water: \$7.50 per gallon/\$7,500 per thousand-gallons (*Business Insider*, July 12, 2013) rounded to the nearest whole dollar.

$$\begin{aligned} \$4.75 + \$7,500 &= \$7,504.75 \\ \$7,504.75 \div 2 &= \$3,752 \text{ per thousand-gallons.} \end{aligned}$$

5. Capital Investments in the Project

5.1 The People shall invest 150,000,000 gallons of water per year, with a market value dollar equivalency (150,000 thousand-gallons at \$7,500 per thousand-gallons) of \$1.125 billion per year, for a total capital investment over the 10-year term of the contract of \$11.25 billion.

5.2 STWA shall invest \$1,221,892 for construction of the Cerro Well (PW-2), pump station, and accessory structures, under the terms of the project bids accepted by STWA on October 25, 2017, funded by a ratepayer-backed loan approved by the STWA on December 20, 2017. STWA shall further invest funds required for siting, design,

construction and operation of a third public well (PW-3). Said PW-3 shall be directly funded from the STWA portion of the public revenue collected from sale of public water to NWNA.

5.3 NWNA shall make a one-time investment of \$50 million for siting, design and construction of a delivery pipeline from PW-2 to the water bottling facility, and construction of the bottling facility, as reported in public relations materials prepared by NWNA in 2018.

5.4 Centre County Government shall invest a nominal sum of \$1.00.

6. Monitoring, Collection and Distribution of Project Revenue

6.1. The People, Centre County Government and STWA shall have full access to all NWNA financial records upon 24 hours notice to NWNA's principal Centre County place of business, and shall have full audit authority, to monitor bottled water product sales and ensure appropriate payments are timely submitted to STWA, Centre County Government and other local, county and state agencies.

6.2 Payments for water delivery to NWNA shall be submitted quarterly, at a rate of \$3,752 per thousand-gallons delivered the previous quarter. Payments shall be submitted to STWA, Spring or Benner Township (depending on the location of the bottling plant), Bellefonte School District, Pennsylvania Department of Revenue, Centre County Government Small Business Development Fund and Watershed Management Fund, as follows, assuming up to but no more than 37.5 million gallons (37,500 thousand-gallons) delivered per quarter for total quarterly STWA water sales to NWNA up to \$140.7 million.

- 5% - STWA - \$7,035,000
- 5% - Spring/Benner Township - \$7,035,000
- 5% - Bellefonte Area School District - \$7,035,000
- 5% - Pennsylvania DoR - \$7,035,000
- 40% - Centre County Small Business Development Fund - \$56,280,000
- 40% - Centre County Watershed Management Fund - \$56,280,000

6.3 Centre County Commissioners shall establish an elected board of no fewer than nine (9) Centre County citizens to manage and disburse the proceeds of the Small Business Development Fund and Watershed Management Fund, for the purposes of launching small businesses owned and operated by Centre County citizens to provide essential goods and services to the community, and protecting and improving critical natural resources and habitats.

6.4 NWNA shall employ no fewer than 50 full-time human employees within the bottling plant at all times, at wages and as otherwise reported in NWNA public relations materials prepared by NWNA in 2018, and shall give priority to human employment over automation.

6.5 The People, Centre County Government and STWA shall have full access to all NWNA operational records upon 24 hours notice to NWNA's principal Centre County place of business, and shall have full review authority, to ensure continued employment of Centre County citizens at full-time, living wage jobs.

7. Well PW-2 Modifications and Pipeline Facilities.

7.1 Ownership. STWA would at all times own and be the permittee for all public wells and distribution pipelines.

7.2 Design to Allow Segregated Use. PW-2 Modifications would be designed and constructed to provide a split of flows from after the output from the Well PW-2 pump. The split of lines would be equipped with two "spool pieces," one on the line leading to the STWA potable water treatment units and the second on the line leading to the spring water Pipeline Facilities, such that the spool piece may be removed from each respective side while water is being conveyed to the other side (e.g., the spring water Pipeline Facilities would be physically disconnected from the Well PW-2 by removing the spool piece while water is flowing to the STWA potable treatment unit, and vice versa).

7.3 Construction

(a) STWA would commit to site, design, permit and construct the PW-2 Modifications and Pipeline Facilities (collectively, the "PW-2 Projects"), using qualified engineering firms and contractors hired through a public bidding process, and to complete construction and final inspections no later than December 31, 2019.

(b) Should NWNA decide to move forward with the pipeline and bottling plant construct, NWNA shall provide STWA and the design engineer with NWNA's specifications to meet applicable FDA and other regulatory standards and NWNA's requirements. The design would, at a minimum, meet the all applicable federal and state regulations and standards and NWNA specifications.

(c) Should NWNA decline to pursue the Project, STWA shall complete construction and final inspections of PW-2, and operate PW-2 as the public back-up water supply for which it was originally planned and designed.

(d) The People, Centre County Government, and NWNA may, at their discretion, provide input to STWA with respect to the qualifications, experience and performance history of prospective contractors. However, STWA retains

independent, final and sole authority to select contractors, subject to public bidding procedures.

(e) Representatives of the People, Centre County Government, and NWNA shall have a right to observe and monitor all construction, including the right to observe all acceptance testing of the PW-2 Modifications and Pipeline Facilities.

7.4 Operation

(a) STWA would at all times operate and maintain the Well PW-2 Facilities and Pipeline Facilities in accordance with Prudent Industry Practice and coordinated operating procedures agreed to between the Parties (see 3.5 below).

(b) The People, Centre County Government, and NWNA would have a right of access (subject to notice to and coordination with STWA) to the Well PW-2 Facilities to inspect the Well PW-2 Facilities and to conduct all sampling and monitoring required or permitted under applicable federal and state regulations (e.g., FDA regulations).

(c) STWA shall manage deliveries of water to the NWNA bottling facility, up to the permitted amounts from the Well PW-2.

(d) STWA shall suspend deliveries of water to NWNA for the duration of any water security threat, including but not limited to contamination of other STWA sources, documented water loss in adjacent private wells, and drought as identified by local, county, state or federal authorities.

(e) Coordinated operating procedures shall provide for timely notification by STWA to NWNA of emergency conditions requiring use of the Well PW-2 to supply the STWA Primary and Secondary users, and procedures for disconnection of the Tertiary NWNA pipeline and bottling facility, and procedures for termination of use of the Well PW-2 as a backup supply to the STWA Primary and Secondary users. STWA would agree to use all commercially reasonable efforts to minimize the frequency and duration of any usage of the Well PW-2 as a backup supply.

(f) Protection of the functions, operations and security of the STWA water supply and distribution is under STWA's sole authority. NWNA shall NOT, under any circumstances, be permitted access to the SCADA (Supervisory Control And Data Acquisition) system for remote monitoring and control of the STWA water system.

(g) In the event that STWA does not maintain and repair the Well PW-2 Facilities and Pipeline Facilities in accordance with its obligations under the Agreement, and fails to implement any required corrective action within a

specified period after receiving written notice from NWNA, NWNA may initiate the conflict resolution procedures outlined in Section 12.

(h) During any period when STWA is using the Well PW-2 as a backup source of supply to its Primary and Secondary customers, NWNA shall shut down bottling operations.

8. Protection of STWA Public Wells' Wellhead Protection and Primary Recharge Areas.

8.1 STWA will cooperate with NWNA, Spring Township, Centre County Government and The People to develop and implement a wellhead protection program and primary recharge area protection program for all STWA public wells, utilizing appropriate zoning, easement and other measures to protect the quantity and quality of water produced by all STWA public wells.

8.2 As part of such program, STWA will establish and record restrictive covenants in a form to be agreed to restrict development and activities on the public well properties consistent with the wellhead protection and primary recharge area program.

9. Development of PW-3

9.1 STWA shall commit to site, design, permit and construct a new Well PW-3 at a site to be selected by STWA, to provide a source capacity of at least 350 gpm (e.g., equivalent to the currently permitted capacity of Well PW-2) and any pipeline facilities to connect Well PW-3 to the existing STWA system (the "PW-3 Project").

9.2 STWA shall be solely responsible for (1) the selection and acquisition of the PW-3 Project site; (2) the design of all related well, pumping and treatment facilities; (3) applying for and obtaining all required permits to implement the PW-3 project; and (4) operation of the PW-3 Project.

9.3 STWA's obligations to design and construct PW-3, and NWNA's reimbursement obligations, would not commence until NWNA provides STWA with a Notice of Intent to Proceed regarding the Pipeline and Bottling Plant.

9.4 STWA would commit to use all commercially reasonable efforts to complete construction of, and place in operation, the PW-3 Project, within 48 months of the NWNA Notice to of Intent to Proceed (the "PW-3 Target Date").

10. Representations and Warranties

10.1 The Agreement will provide typical reps and warranties from each Party.

11. Insurance

11.1 STWA and NWNA shall be required to maintain commercial general liability insurance with a minimum per occurrence and aggregate limit of \$2 million.

12. Default, Remedies and Dispute Resolution

12.1 The Agreement shall provide notice and reasonable cure periods before any party shall be deemed to be in default.

12.2 STWA shall have a right to seek specific performance.

12.3 In the event of permanent contamination or loss of public water supplies, the party responsible shall be liable for incidental, consequential, special and/or punitive damages to direct and third parties.

12.4 In light of the People's very substantial investment in the Project – \$11.25 billion over ten (10) years – the rights to terminate the Agreement upon a breach by NWNA would be extensive.

12.5 The Agreement shall provide for a single dispute resolution process, namely, filing of suit in Centre County Court of Common Pleas.

(a) Any party may initiate litigation by notifying all other parties of intent, stating the grounds for suit.

(b) Upon receipt of the Notice of Intent, each party shall designate counsel, and obtain hourly terms for legal representation.

(c) Legal counsel so designated shall then be randomly assigned to the parties, to ensure competent representation for all parties by attorneys proficient in contract, water rights, land use and/or Constitutional law, as required by the stated grounds for the litigation.

13. Term

13.1 The Agreement shall be in effect for 10 years following the date of signing.

13.2 At the close of the contract, the Parties shall have the opportunity, but no obligation, to negotiate terms for a new 10 year contract.

13.3 If no new contract is negotiated, complete ownership and control of all infrastructure, including the bottling plant, shall revert to local government agencies: 50% to the Spring Township Water Authority and 50% to the Centre County Government.

Disclaimer:

Neither this Term Sheet nor any provision hereof is binding on STWA or NRNA or obligates either party to enter into any agreement or consummate any transaction. This term sheet constitutes only an outline of significant terms and a statement of mutual intentions. The Term Sheet does not contain all matters on which agreement must be reached in order for the proposed transactions to be consummated. The only documents binding upon STWA and NRNA shall be a fully executed definitive agreement between the parties.

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