

Crafting Inter-local Water Agreements

Tips relating to issues you may not have thought of or that you were hoping to avoid....

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For

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*Note: Example text is provided in these guidelines to illustrate different concepts. These excerpts are designed to generate discussion and inspire development of agreement clauses appropriate to local conditions. These excerpts are **NOT** presented as, nor should they be considered as, model contract clauses that can be copied into agreements.*

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Background

It seems like everyone is talking about water partnerships in one form or another these days. Large urban systems facing water supply challenges due to growth or drought are increasingly entering into partnerships with their neighbors to increase their water security. Small town systems that are struggling with the increased costs of managing their systems often look towards partnerships with other systems to manage system costs. Systems that find themselves with excess capacity due to the loss of large industrial customers realize that selling water to neighboring communities may be the only realistic way of taking advantage of their capacity and plugging revenue holes. Communities engaged in economic development activities often find that partnerships with other water suppliers are often the most cost effective and sustainable means of providing water to support future development.

The number of models for creating water partnerships is as numerous as the number of reasons systems have for pursuing them. These models range from the creation of new regional water authorities to simple emergency sales agreements, but by far, the most common tool for creating water partnerships in North Carolina is through inter-local agreements. There are hundreds if not thousands of these agreements in place throughout the state and they come in all shapes and sizes.

The EFC has provided direct assistance to communities developing partnerships through these agreements and has reviewed agreements from communities throughout the state. We have identified a collection of governance, financial and technical issues that seemed to us to be integral to the success of these agreements. If the issue in question was addressed improperly or ignored all together, the chances of tension or problems between the partners seemed higher. Many of these issues are not easy issues to address and the absence of clauses dealing with these issues is often intentional based on the understandable interest of the partners to avoid addressing an issue that might jeopardize the entire agreement.

This document lays out a list of topics that we believe should be addressed during the preparation of every inter-local agreement. It may be that there are good reasons for omitting contractual language addressing the topics, but at a minimum, partners entering into these agreements should be aware of the general issues surrounding the topic.

Topics of Consideration:

✓ What does the agreement say about each partner's current and future service area?

When two or more service providers agree to buy and/or sell water to one another, it is extremely important to remove as much ambiguity as possible about current and future service areas. Ideally, the partners have already defined the service area boundaries for each partner with some type of service area agreement prior to entering into a sales agreement. Alternatively, some sales agreements will contain detailed information on service area boundaries. At a minimum, each partner should understand who has the agreed upon authority to serve all unserved areas within close proximity to any of the partners. Some of these agreements include language that clarifies the process for changing or expanding service areas in the future. Ambiguity concerning unserved areas can lead to a range of problems including competition to serve new growth to uncoordinated and unnecessary duplicated line extensions. Discussing and negotiating these boundaries can be difficult, and partners may be tempted to avoid addressing this issue especially if at the time of entering into the agreement there does not appear to be debate over boundaries.

Example:

“Except as provided herein, water and sewer service to areas outside the existing Dobson Service Area shall be provided by the County either through the creation of Water and Sewer Districts or such other means as the County deems appropriate. If the County is unable or unwilling to provide an extension of service, the Town will have the option to make such extension of service, and utilize the County's utility lines in providing municipal services to potential customers inside or outside the corporate limits of Dobson but within Surry County, such as in the case of a satellite annexation. If the Town makes such extension of services at its own expense, the utility lines and any user fees generated thereby shall inure to the Town.” (Surry – Dobson, 3)

“Beginning January 1, 2011, University agrees to supply and sell to Town, and Town agrees to accept and pay or credit University for, an amount of water at least equal to the amount of water supplied by the Town to the following Appalachian State University facilities:

- a. Appalachian Panhellenic Hall (formerly Quality Inn)
- b. Existing facilities at State Farm (including, but not limited to, Physical Plant, Motor Pool and Fields)
- c. Child Development Center (Poplar Grove Road)
- d. Existing facilities at Ayers Property (536 Poplar Grove Road)
- e. McKinney Alumni Center (553 Blowing Rock Road)”

(ASU- Boone, 2)

“Because of the cost of the installation of such water systems as herein contemplated by both parties and in the interest of a reasonable rate being afforded to the consumers for such services, both parties agree not to invade the service area of the other party, as reflected upon Exhibit II, for the purpose of selling water, unless by mutual written consent of both parties. Where such

extensions may be made by one party in the other party's service area, the offending party shall abide by the prevailing policies and ordinances of the fended party as it relates top size, type and quality of water main installed. Further, the DISTRICT agrees that any water supply well constructed by the DISTRICT shall be constructed at least one mile from a CITY owned well or well site and at least one mile beyond the CITY'S Extraterritorial Zoning Jurisdiction boundary existing as of the construction of each well. However, the responsibility for extensions and ownership of water facilities within the DISTRICT boundary and/or the CITY'S Extraterritorial Jurisdiction shall not preclude, by special agreement, the DISTRICT and CITY making a special agreement for the extension of water mains herein, sharing the cost of making such extensions, and retaining and/or sharing in the ownership thereof." (Clinton – Sampson, 8)

✓ **What does the agreement say about the relationship between water service, annexation and growth?**

In many, if not most, partnerships, annexation policy is intertwined with water and wastewater service, and the relationship between the two is often an important component of a bulk sales agreement. The annexation water service relationship is multi-layered and includes a number of challenging issues. City and towns have diverse policies related to who is eligible to receive water service and how much they have to pay for it. In some towns, water service is only available to areas that agree to be annexed. Other municipal service providers will gladly provide water service to anyone asking for it, but may require that they pay much more for the service. Conversely, the ability to provide water service is often seen as an essential tool for carrying out voluntary and involuntary annexations and many municipalities are very wary of the impact a partnership agreement could have on their growth strategies. Many of these issues can and should be addressed at the same time service areas are clarified (see above), but in some situations, addressing annexation requires additional language.

Example:

“That in the event the City annexes an area served by the Robeson County Water System, the City reserves the right to buy at a fair and equitable price, from the County, that portion of the Robeson County Water System that is annexed into the corporate limits of the City of Lumberton, North Carolina. The purchase price of the annexed portion of the Robeson County Water System shall be determined by a committee composed of representatives of the Robeson County Board of Commissioners and the City Council of the City of Lumberton, North Carolina; Said committee shall be ap[ointed by the Chairman of the Robeson County Board of Commissioners and the Mayor of the City of Lumberton, North Carolina, respectively. The purchase price shall be sufficient to cover the pro-rata share of the bonded indebtedness that Robeson County will have with Farmers Home Administration on that particular section of the Robeson County Water System purchased by the City.” (Robeson – Lumberton, 175, FHA 442-30 format)

“It is acknowledged by City and District that an area lies outside the perimeter of the corporate limits of the City of Dunn over which City, pursuant to N. C. Gen. Stat. §160A-360, exercises extraterritorial jurisdiction. City currently intends to annex into its corporate limits a portion of said area as herein below described and as a result thereof would be responsible, among other

things, for providing water service therein. In an effort to avoid duplication of facilities and in anticipation of such annexation, it is agreed between City and District that City, pursuant to this Agreement, will provide water services in said proposed annexation area.” (Dunn – Harnett, 3)

“In the event that such extension of services is the result of a voluntary or involuntary contiguous or satellite annexation, the Town shall be entitled the right of conduit (connection to County lines to serve newly annexed areas) upon written request to County and upon certification that the areas sought to be served by way of conduit are subject to pending voluntary or involuntary contiguous or satellite annexation and provided that

- (a) Dobson, at its sole expense, provides for such additional metering device acceptable to the County, and placed at a point acceptable to the County, or other procedure which will accurately measure the difference in treated water flow. The County shall not unreasonably withhold its approval to a metering device or point of placement.
- (b) Dobson shall assure delivery of treated water to the County upon the terms of this Agreement without diminished flow except in the case of emergencies as provided herein.

Any subsequent annexation by the Town of areas served by County's distribution system or by a District created by the County would result in either: (1) compensation by the Town to the District or County for such investment, or (2) provide for the District or the County to continue operating such distribution system(s) consistent with the terms of this agreement. Compensation for acquisition of improvements by Town as a result of annexation would be determined by a jointly selected third party auditor, or by such other method that is mutually agreed upon.” (Surry – Dobson, 3-4)

✓ **How precise does the agreement define key usage thresholds and limits?**

Contracts are often started during a time when the seller has excess capacity and the purchaser does not need all the water it purchases. For this reason, there is often a lack of urgency related to setting maximum thresholds in the contracts. In fact, many contracts do not even include maximum purchase amounts. Some agreements include maximum thresholds but in a way that is ambiguous and could lead to problems later. For example, the contract might say that the purchase agrees to provide 200,000 gallons per day to the seller without clarifying whether the limit refers to the average over the billing period or the actual purchase amount over one 24 hour period.

Example:

“The maximum daily amount of water furnished by the Town to the Water District is not to exceed 58,125 gallons per day. In the event of the daily maximum water quantity being exceeded due to a breakage in a Water District water line or other emergency, the Water District is obligated to immediately contact the Town's utility personnel and inform that such maximum daily amount will be exceeded.” (White Lake – Bladen, 2)

“(Quality and Quantity) To furnish the Purchaser at the point of delivery hereinafter specified, during the term of this Contract or any renewal or extension thereof, potable treated water meeting applicable purity standards of the State of North Carolina Department of Human Resources in such quantity as may be required by the Purchaser, not to exceed the following maximum demands:

- a. Maximum instantaneous rate of 2100 gallons per minute (3 million gallons per day).
- b. Maximum daily demand of 1.6 million gallons.
- c. Maximum monthly usage of 42 million gallons. “ (Anson – Richmond, 42)

“(Quality and Quantity) To furnish at the point of delivery hereinafter specified, during the term of this contract or any renewal or extension thereof, potable treated water meeting applicable purity standards of the State of North Carolina in such quantity as may be required by the Purchaser, not to exceed 7,500,000 gallons per month.” (Black Creek – Southwest District, 1)

“City agrees to sell to County at the Point of Delivery during the term of this Contract or any renewal or extension thereof potable treated drinking water in such quantity as may be required by County not to exceed 25,000 gallons per day.” (Bertie – County Water District IV, 5)

✓ **Does the agreement clearly outline meter maintenance and ownership responsibilities?**

If fences make good neighbors, meters make good water partners. Meters, especially larger meters that typically separate water sellers from water purchasers, require maintenance and periodic replacement. All contracts should have basic language about who will read meters, maintain meters, and replace meters if necessary.

Example:

“Purchaser agrees in Lieu of connection fee, purchaser will furnish and install metering equipment, including a meter house or pit and required devices of standard type for properly measured quantity of water delivered to purchaser, when purchaser makes connection to seller's system.”(Northampton–Warren, 2, RD 442-30 format)

“Continuous recording devices with flow totalizing capability shall be provided, owned, and maintained, by Union to monitor allocated capacities defined herein. Both parties agree to calibrate using a certified third party such metering equipment at a frequency of at least once every six (6) months. Either party may request additional calibrations at their expense. A meter registering not more than two percent (2%) above or below the test result shall be deemed to be accurate. The previous readings at any meter disclosed by test to be inaccurate shall be corrected for the six (6) months previous to the test in accordance with the percentage of inaccuracy found by such tests. If any meter fails to register for any period, the amount of water during such period shall be deemed to be the amount of water delivered in the corresponding period immediately prior to the failure, unless both parties agree upon a different amount. Backup metering devices,

when available, maintained by either party shall be considered in establishing the amount of water delivered. The metering equipment shall be checked and read monthly and written record of all readings shall be available to either party upon request.” (Union – Monroe, 14)

“County shall construct, operate and maintain at its sole expense (as part of the County Project) at the Brunswick County / Columbus County line (herein “the Point of Delivery”) the necessary metering equipment, including a meter house or pit, and required devices of standard type for properly measuring the quantity of water delivered to the County and shall calibrate such meter every five (5) years or whenever requested by the City based on data acquired by the City demonstrating that the meter is not reading properly.” (Columbus – County Water District IV, 4)

“That the existing metering system owned and maintained by DUNN shall remain in use and shall remain the property of DUNN. It shall be the responsibility of DUNN to calibrate the metering equipment whenever requested by BENSON, but no more frequently than once every twelve months; a meter registering not more than 2% above or below the test results shall be deemed to be accurate. The previous readings of any meter disclosed by test to be inaccurate shall be corrected for the three (3) months previous to such test in accordance with the percentage of inaccuracy found by such test. If any meter fails to register for any period of time, the amount of water furnished for such period shall be deemed to be the amount of water delivered in the corresponding period immediately prior to the failure, unless DUNN and BENSON shall agree upon a different amount. The metering equipment shall be read monthly by DUNN according to DUNN’s prevailing meter reading schedule. An Official of BENSON shall have access to the meter for the purpose of verifying its reading at any reasonable time, upon request” (Dunn – Benson, 4)

“COMMISSION will maintain the water meter(s). The meter(s) will be tested annually to maintain a mid-scale accuracy of greater than ninety-eight percent (98%) of the actual flow. Should the meter test with less accuracy, then the bills for a three (3) month period prior to the test will be adjusted proportionately. The cost of meter testing and maintenance should be borne equally by both parties” (Greenville Commission-Winterville, 6)

“The Applicant shall install and maintain, at Applicant’s expense, a water meter and all necessary waterlines to the metered point located at Highway NC 8 at the Stokes / Forsyth County line. The Applicant shall be responsible for connecting waterlines to the metered point with the approval of the Commission. The point of connection shall be under the authority and control of the Commission” (Winston Salem-Stokes, 1)

✓ **How does the agreement address water quality problems?**

Water quality problems come in all shapes and sizes ranging from issues that pose immediate threats to public health to much less significant problems. At a minimum, all contracts should lay out a basic communication requirement between the buyer and seller that states when and how problems should be communicated. Given the variation in types of problem, the agreement may include different policies to address different types of problems.

Many systems should pay special attention to water quality problems that develop within distribution systems such as the concentration of disinfection by-products (DBPs). Anyone negotiating an agreement that cover the sale of water from a dense urban system to a sprawling rural system should carefully study the issue of DBP formation before entering into an agreement. Most contracts say that water will meet minimum criteria at the point of sale, yet the layout of many distribution systems make it all but impossible that the water will make it to the final customer under compliance. Purchasers may find that as time passes, and regulations get more stringent, they are forced to carry out actions they did not account for when they first entered into the agreement. They might have to carry out significant water line flushing or construct supplemental treatment facilities. While it may not be the seller's legal responsibility, the health of the agreement ultimately depends on both parties understanding the all the implications of their agreement.

Many agreements state that the seller will be responsible for providing water that meets minimum standards to the purchaser, but do not specify what occurs if this condition is not met – is the purchaser eligible for some type of refund or credit or is this just considered to be a basic risk that all purchasers have to accept. This is another example of where more specificity is probably needed in most agreements.

Example:

“The water delivered into the other system will meet the Primary and Secondary Water Quality Standards as established by the State of North Carolina” (Winterville – Greenville, 5)

“It is distinctly understood and agreed by both parties hereto that the CITY'S obligation as to the bacteriological quality of water furnished only applies to the point of delivery. The DISTRICT shall be solely responsible for the bacteriological quality of water beyond the point of delivery.” (Clinton – Sampson, 7)

“Monroe and Union agree to operate their respective water distribution systems from the points of delivery on to their users in such a manner as at no time to place the other party in jeopardy of failing to meet any water quality standard or other regulatory requirement. Monroe and Union each agree to notify the other as promptly as possible of all emergencies and other conditions which may directly or indirectly affect the quantity or quality of the treated water delivered were under.” (Union – Monroe, 20)

“The Commission hereby acknowledges that Applicant is purchasing this water for resale to its customers. The commission makes no warranty, expressed or implied, as to the quality of water beyond the metered point. The Applicant aggress to indemnify and hold harmless the Commission from and against any and all losses, cost, claims, damages, and expenses, including but not limited to reasonable attorney's fees, which the Commission may incur in any manner arising out of or connected with the quality of water beyond the metered point” (Winston Salem-Stokes, 3)

✓ **How does the agreement assure that water suppliers receive adequate payment for use of their capital?**

Bulk sales agreements contain an extremely diverse array of pricing structures. In some situations, such as short term emergency sales agreements, sales formulas may be as simple as a set unit price \$3/1,000. In other situations, agreements may require more complex rate structures that include upfront payments, recurring fixed charges, variable fees, and surcharges.

Utilities entering into bulk sales agreements should consider the impact of the sale on both current capital and on future capital needs. Common methods of addressing capital costs include:

Rolling capital costs into the commodity charge. The simplest and most tempting way of recovering capital costs is often for the seller to incorporate capital costs in the price they charge for each unit they sell. This approach can work well in many situations and does result in simpler contracts, but is not always feasible. Utility capital costs are fixed costs, in other words, these costs do not go up or down very much as more or less water is produced (and sold). If the volume of water sales is very predictable, then there is little risk in dividing total capital costs by the total amount of water to be sold and coming up with a cost per unit value. The more unpredictable sales are, the less reliable this method of recovering capital costs becomes. Many water providers are only willing to incorporate capital costs in their sales price if the agreement also includes a minimum purchase clause so that the the providers are assured of at least a minimum amount of revenue. In a worst case scenario, a utility may expand their capacity and take on significant fixed capital costs to meet the needs of one customer – if the customer uses less water than projected or ceases to buy water altogether, the seller may find themselves in precarious financial ground.

An upfront capacity fee. Some suppliers prefer to recover all or a significant portion of the capital costs associated with an agreement up front in the form of a capacity fee. This method is especially common for long term agreements in which the buyer is basically purchasing capacity.

A recurring capacity fee component (annual or monthly). Some agreements include a hybrid approach in which the purchaser agrees to some type of fixed payment each year in addition to the unit price they pay. The amount of the fixed payment is normally linked to the reserved capacity or actual maximum purchase over the year period. The fixed payment is often calculated based on annual debt payment obligations of the seller.

A minimum purchase amount. One of the simplest ways to assure that the seller receives revenue to cover the fixed costs associated with capital is to set up contracts that have commodity charges that include a portion linked to capital AND include a minimum purchase agreement. In this way, the seller is assured of a flow of revenue to cover basic capital costs.

On rare occasions, some agreements exclude the payment of capital costs. For example, the Greenville Utility Commission, has developed interruptible service agreements with neighboring utilities. Under these agreements, there is no guarantee of capacity and the seller is using the agreements to recover variable costs. The end result in this particular case is an agreement that

provides purchasers with a very low cost water option and the seller with an important source of revenue that ultimately lowers the costs to their existing customers.

For illustrative purposes, four different purchase scenarios are described below along with ideas concerning appropriate capital recovery strategies.

1. Purchaser uses a small percentage of seller's capital and their impact on future capital needs is negligible (e.g. Greenville Interruptible Sales Agreement)
2. Purchaser uses a significant percentage of current seller's capital, but has little impact on future capital needs (eg. Facility with a lot of unused capacity agrees to sell a lot of water to another entity for a fixed period of time)
3. Purchaser uses a small percentage of current capital but has a large impact on future needs (purchaser has explosive growth and the seller is close to capacity)
4. Purchaser uses a large percentage of capital and has a large impact on future capital needs.

Example:

“At the occurrence of such capital improvements, should Monroe issue long-term debt to finance, in whole or part, its water and sewer utility capital improvement program, Monroe agrees to negotiate with Union the terms and conditions of financing Union's share of the capital improvements to the WWTP, conveyance, and disposal facilities providing allocated capacity to Union.” (Union – Monroe, 11)

“The Additional Charge of \$400.00 per month is the figure calculated by City to provide for recovery of its capital costs, operating and maintenance costs and administrative costs” (Columbus – County Water District IV, 6-7)

“Murphy will establish a capital reserve fund out of interconnect receipts dedicated to capital costs associated with the interconnection water line and appurtenances. The amount to be established at the annual meeting...Andrews will establish a capital reserve fund out of interconnect receipts dedicated to capital costs associated with the interconnection water line and appurtenances. The amount to be established at the annual meeting” (Murphy- Andrews, 2-3)

Refund of Debt Service:

“Union shall immediately refund to Monroe all debt service payment made to Union by Monroe pursuant to Exhibit 6. Union's refund of debt service payments shall include interest at a rate of 4.6% per annum calculated from the receipt of each debt service payment to the date the refund is made to Monroe based on an actual/actual day count.” (Union Monroe, 13)

Addressing capital costs in agreements is particularly important when there is a likelihood that the seller will need to make substantial capital investments to provide water to the seller.

Example:

“It is recognized that the Dobson water and sewer plants have the following levels of current usage and capacity:

	Current Usage	Capacity
Water	0.9 mgd	1.5 mgd
Sewer	0.2 mgd	.35 mgd

It is also acknowledged that under DENR guidelines, planning must commence for an expansion of capacity when current usage reaches 80% of capacity, or 280,000 gd, for the sewer plant. Therefore, the County acknowledges and accepts responsibility with the Town to undertake a Section 201 Wastewater Facility Needs Study. The County will pay 80% of the cost of the study up to \$80,000 with the Town of Dobson paying 20% up to \$20,000. The County will fully participate financially in its proportionate share of the cost to develop such added capacity when needed.

Likewise, in the event that the Town and the County determine that it is in the public interest to proceed with any construction, reconstruction, refurbishing, rehabilitation, additions, or alterations to the Water Treatment Facility in accordance with the November 2007 Capital Improvement Plan, the Town and the County agree to pay a proportionate share of the costs as set forth below. The proportionate share of costs will be determined by the projected capacity needs as determined by the November 2007 Capital Improvement Plan commissioned by the County, as it is updated, from time to time, to keep pace with projected growth. The parties shall determine the estimated proportion of additional capacity that is needed to serve one or more Water and Sewer Districts that may be created by the County. The County's share of the capital cost to expand water and/or sewer capacity shall be the proportion of District's projected usage to the total project cost. The Town's share of the capital cost to expand water and/or sewer capacity shall be the proportion of Town's projected usage to the total project cost. Creation of one or more Water and Sewer Districts in the Dobson area by County is a prerequisite to liability for costs under this section.” (Surry – Dobson, pp. 6)

“COMMISSION and WINTERVILLE agree that if one party to this Agreement requires any modification or improvement to the water system of the other party, the requesting party must give at least six (6) months' written notice of such requirement” (Greenville Commission – Winterville, 7)

“The Parties to this Agreement shall review the capacity of water treatment and transmission facilities and make recommendations concerning the need to expand said facilities. Monroe and Union agree to consult and work together in connection with any expansion of facilities. In the event that both parties agree to jointly expand the facilities, then any additional capacity shall be allocated between the Monroe and Union based upon their respective financial contributions to the expansion. No party shall be entitled to use any of the allocated capacity of the other party, whether original capacity jointly expanded capacity or singly expanded capacity, without the express written consent of the other party.” (Union – Monroe, 15)

Minimum Purchase Requirements

Example:

“Town will bill the County Monthly for the actual amount of water sold and delivered to it at the then applicable rate; provided however, the Town will bill and County will pay for a minimum quantity of 500,000 gallons per month regardless of whether or not the County actually uses such quantity.” (Chatham - Siler City, 1)

“To furnish the COUNTY at the point of delivery hereinafter specified during the term of this Contract or any renewal or extension hereof, potable treated water meeting applicable purity standards of the rules governing public water supplies, NCAC title 10, Department of Human Resources, Chapter 10, Health Services: Environmental Health, Subchapter 10D-Water Supplies as promulgated by The North Carolina Safe Drinking Water Act, General Statutes, Chapter 130, Article 13D, in such quantity as may be required by the COUNTY not to exceed a monthly average of 450,000 gallons per day; provided however, that the COUNTY shall purchase a minimum quantity of 100,000 GPD.” (Nash-Rocky Mount, 2)

“Effective July 1, 2008, the minimum daily volume shall be one million four hundred thousand (1,400,000) gallons per day.” (Halifax – Roanoke, 1)

✓ **What does the agreement say about how commodity charges are calculated and modified over time?**

One of the first questions anyone involved in negotiating an agreement asks is “what will we have to pay for the water we use.” Some contracts are little more than price agreements that state the price per thousand gallons at the time the contract is signed. Setting the initial commodity charge in a contract requires a mixture of accounting, business, and political skills. Cost accounting certainly should be an important component of setting the price however different cost assumptions can lead to radically different prices so even the accounting portion of this exercise is open to negotiation. The number generated by an accounting spreadsheet may not be as important as whether the price meets basic business and political criteria. The relationship between bulk rates and retail rates get lots of attention during agreement negotiation. The relationship between what bulk rate customers and retail customer’s pay should take into consideration what they are each buying. Retail customers normally also own capacity in the system and are guaranteed long term service. Bulk purchases often only receive a short term capacity commitment and could argue for a lower rate than retail customers. Despite economic rational, some sellers find it difficult to price the water they sell to “outside customers” at rates that are lower than what they sell to their inside customers even if there is economic or business justification.

While the price per thousand is important, however in the long run, how that price is going to change with is much more important. The variable price often referred to as the commodity charge also depends on how capital costs are being addressed (see capital section above). There is often a temptation to link price increases to inflation (normally through CPI clauses), however

there is no guarantee that the costs related to providing water service will vary at the same rate as inflation – for many utilities, the cost of water provision has risen must faster than inflation due to construction increases and the need to add additional treatment systems to meet regulatory requirements. CPI adjusted contracts are especially problematic if the initial price of water is set below what the water actual costs to provide. Based on financial reports, many water systems do not price their water at a high enough rate to recover their costs. An alternative to CPI indexing is to index price increases based on the retail price increases. Bulk purchasers often view these indexes as protection against the temptation the seller might have protect their retail customers from price increases by increasing the cost to bulk purchasers. If bulk sales are in the future increases are indexed to retail price

Example:

“As a bulk purchaser of water, the County agrees to pay Town an amount equal to 150% of rates as stated for Town’s consumer rates in the attached Town Water Rates, (Exhibit A), for all water sold and delivered pursuant to this agreement, subject to changes in said rate, as hereinafter, set forth. The Town agrees to provide the County at least 90 days notice prior to a rate change.” (Chatham County –Siler, pp. 1)

“To pay the City not later than the past due date posted on the statement for water furnished, which said past due date shall be at least 10 days but not more than 20 days after the date of statement for water delivered in accordance with the following scheduled rates.

- (1) \$200.00 for the first 100,000 gallons which amount shall also be the minimum rate per month.
- (2) \$.90 per 1,000 gallons for water in excess of 100,000 gallons, subject to (3) below.
- (3) Water rates charged by the CITY to the DISTRICT shall be no greater than the prevailing lowest wholesale rate charged by the municipality to its “outside” customers, but in no event shall the rate exceed two (2) times the prevailing lowest wholesale rate charged by the municipality to its “in-town” customers. In exchange therefore, and in order to minimize the potential for competition between the DISTRICT and the CITY for a particular customer or group of customers, the DISTRICT will establish rates that are equal to or greater than the rate charged by the CITY for a corresponding volume used by the same classification of user.” (Clinton – Sampson, 4)

“For water produced, each party’s monthly record for water production is multiplied by an adjustment factor, said adjustment factor to account for water treatment and additional expenses associated with running booster pump stations to aid in the transmission of water (costs not typically associated with water production). A sum of the weighted adjusted production by each party is made and a weighted percentage of production for each party is calculated. The weighted adjusted total production is then multiplied by the unit price for water production, herein established as \$0.60 per 1,000 gallons, to compute an amount which represents total payment for

water purchase. Each party's weighted percentage of production is applied against the total payment to determine the amount to be received by the respective parties.

For water consumption, each party's monthly total is identified in a single column and summed. The previously determined total monthly production is divided by the total consumption in order to compute a loss factor which accounts for all water which is not used by consumers (leaks, line flushing, fire protection, etc.) Each party's individual total for consumption is multiplied by the loss factor to determine a factored water consumption which, when summed for all parties, will be equal to the previously determined total water production sum. The factored water consumption by each party is then multiplied by the established unit cost for water (\$0.60 per 1,000 gallons) to compute an amount which reflects payment to be made by each party for water purchased." (Bertie – District IV, 3)

"City shall sell water to County at a rate equal to \$2.75 per 1,000 gallons of water (the "Base Charge"), this figure being the amount charged by City to its customers for water used in excess of the minimum charge, plus an additional sum of \$400.00 per month (the "Additional Charge"). The Additional Charge of \$400.00 per month is the figure calculated by City to provide for recovery of its capital costs, operating and maintenance costs and administrative costs. Provided that the minimum monthly charges to County shall not be less than \$850.00. Provided, further, City shall have the right to adjust the Base Charge and the Additional Charge at the beginning of each new fiscal year provided that City gives County 30 days notice of such new charges and written justification for any increase in such charges." (Columbus – County Water District IV, 6-7)

✓ **What does the agreement say about reselling water or capacity?**

Many water systems have interconnections with multiple other systems providing an opportunity for water to be bought and resold multiple times before it reaches the final user. If there is nothing in the agreement concerning the resale of water, than technical and financial constraints will govern whether and where water is resold. The main reasons why most sellers try to limit how their water is used relates to growth concerns – either a concern to where growth may occur or a concern for how much growth should occur. Ideally growth-oriented resale limits should be addressed transparently along with service area limits as part of an open discussion about the relationship between water and growth. These discussions are not easy for communities especially when communities have different views about growth and perceive that one community is trying to control another's growth through the a water contract. A county with a water system that spends years developing a land use development plan to guide the future of their area may not be willing to enter into a water contract without some guarantee that their own water is not used by others to hinder their plan's implementation.

Sometimes, the issue of where water is sold is secondary to how much the water is sold for. Given the tension revolving around water rates, sellers sometimes seek assurance that the water the sell at a heavily discounted bulk rate will not be resold at a cut rate price. This issue of price is especially important if a municipality views its ability to provide lower water rates to its inside customers as part of its strategy for encouraging voluntary annexation.

If there is a very robust dialogue and agreement related to growth and service area, the urgency and motivation to include these limits is likely to be reduced.

Example:

“The Town’s water customer service area includes all areas within its corporate limits and those out-of-town customers identified in Appendix “C”; Town of White Lake Out-of-Town Water Service Area Customers. Appendix “C” is hereby made a part of this contract. The Water district may not provide water service to any areas within the Town’s corporate limits nor provide water service to those out-of-town customers identified in Appendix “C” of this contract, without first receiving approval of the Town.” – (Whitelake – Bladen, 5-6)

“The COUNTY shall not, during the term of this Contract, sell water to its customers at an amount less than the “outside rate” charged by the CITY to its customers located outside the corporate limits without the written consent of the CITY. The COUNTY shall submit its rate schedule for determination of compliance upon the adoption of a rate schedule and any subsequent modification thereof. The CITY shall notify the COUNTY of changes in its rate schedule so that the COUNTY may adjust its rates accordingly.” (Nash-Rocky Mount,4)

✓ **What does the agreement say about water pressure?**

Water pressure standards go far beyond the comfort and convenience of residents. Water pressure below certain levels leads to slow, anemic water flow, while pressures above certain levels can harm household plumbing. Related to water pressure, water velocity through pipes must also stay within a certain range, with slow velocities leading to sediment fallout in the pipes, and high velocities causes water ‘hammering’ in the pipes. Most critically, there is a minimum flow necessary to combat fires.

Example:

“To furnish the County, at the points of delivery hereinafter specified, during the term of this contract or any renewal or extension thereof, potable treated water, satisfying applicable purity standards of the North Carolina Division of Environmental Health at an approximately constant, normal gravity pressure, based upon an elevated storage level of 795 feet above sea level, subject to reductions or failures of pressure of supply due to main supply line breaks, power failures, floods, fire and the use of water to fight fire, earthquakes, and other causes beyond the Town’s control for such reasonable period of time as may be necessary to restore normal service. It is understood, however, that the Town shall not be liable to any person, firm, or corporation for any claim arising from its failure to provide water to the County under the terms hereof” (Chatham–Siler, 1)

“That water will be furnished at a reasonably constant pressure calculated at 40 psi from an existing eight-inch main supply at a point located _____. If a greater pressure than that normally available at the point of delivery is required by the Purchaser, the cost of providing such greater pressure shall be borne by the Purchaser. Emergency failures of pressure or supply due to main supply line breaks, power failure, flood, fire or use of water to fight fire, earthquake or other

catastrophe shall excuse the Seller from this provision for such reasonable period of time as may be necessary to restore service.” (Stantonburg – Southeast Water District, 1-2)

“The Town agrees that water will be furnished at reasonably constant pressures estimated to be not less than 40 pounds per square inch and delivered through existing mains and bulk water meters. Town shall be responsible for water pressure to the point of delivery to the master meter. Thereafter County shall be responsible for water pressure and delivery which may result in needed pumps, tanks and/or additional hardware. Emergency failures of pressure or supply due to (mail) supply line breaks, power failures, flood, fire and use of water to fight fire, earthquake or other catastrophe shall excuse the Town from this provision for such reasonable period of time as may be necessary to restore service.” (Surry – Dobson, pp. 5)

“That water will be furnished at a reasonably constant pressure calculated at 45 to 50 PSI from an existing 12” supply main at points located on Exhibit I attached hereto and made a part hereof, and designated as Meter Point A and Meter Point B. If a greater pressure than that normally available at the point of delivery is required by the DISTRICT, the cost of providing such greater pressure shall be born by the DISTRICT: emergency failures of pressure or supply due to main supply line breaks, power failure, flood, fire, and use of water to fight fire, earthquake, or other catastrophe, shall excuse the CITY from this provision for such reasonable period of time as may be necessary to restore service.” (Clinton – Sampson, 3)

✓ **How does the agreement address communicating and handling supply interruptions or shortages?**

All agreements should take into consideration that supply interruptions will occur – it’s not a question of if, but when and how often. Proactive agreements often have clear language that helps the seller and purchaser prepare for these situations.

Example:

“Union agrees to notify Monroe as soon as possible of any interruption or diminution of its services under this Agreement. Said service interruption shall be remedied with all possible dispatch and service diminution to Monroe shall be no greater than to any other user of the Catawba River WTP, recognizing that future expanded water supply capacity in Union's system may come from other water supply sources. High water demand on the Union system shall not be cause for service interruption or diminution, so long as Monroe is not exceeding its allocated capacity. Union warrants and agrees that delivery of water allocated capacity to Monroe shall have first right over other Union customers. Upon reasonable notice, Union shall allow inspection of those physical facilities which are the subject of this Agreement by representatives of Monroe. Notice shall be deemed reasonable if not less than two (2) business days. (Union – Monroe, 13)

“City’s ability to provide water to County is subject to it receiving water from Brunswick County pursuant to that contract between Brunswick County and City described hereinabove. If for any reason, Brunswick County fails to provide water to City, then City shall be relieved of any obligation to provide water to County under the terms of this contract. In the event the supply of

water available to City is reduced by County below the amount specified in that contract between City and Brunswick County as described hereinabove, then City shall be authorized to provide water first to customers within the City limits of City and then and only then will excess water be made available to County under the terms of this contract. Temporary or partial failures to deliver water shall be remedied by City with all possible dispatch.” (Columbus – County Water District IV, 8)

“Ramseur undertakes to use reasonable care and diligence to provide uninterrupted service as provided herein, but reserves the right at any time to temporarily interrupt service for reasons of force majeure and maintenance purposes. Ramseur shall give notice to Franklinville not less than forty-eight (48) hours in advance of any such service interruption, except that in emergencies, it shall give notice that is reasonable under the particular circumstances. No adjustment shall be made to the Monthly billing charge in the event of emergency or maintenance service interruption. No adjustment shall be made to the Municipal Bulk Rate Charge set forth herein in the event of emergency or maintenance service interruption.” (Ramseur-Franklinville, 6-7)

✓ **What does the agreement about the transferability of conservation status/measures?**

Utility A has a long term agreement to sell water to Utility B. It is a solid agreement that benefits both parties quite a bit. Both cities have car washes and beautiful gardens. Utility A decides to restrict water use by limiting car washing and lawn watering. Residents from City A drive to City B to get their car washed and gardeners in City A are furious that residents in City B still have green grass. This situation is easily addressed by incorporating language that requires purchasers to follow the same water restrictions as the water sellers.

Example:

“In the event of an extended shortage of water, or the supply of water available to the Seller is otherwise diminished over an extended period of time, the supply of water to Purchaser’s consumers shall be reduced or diminished in the same ration or proportion as the supply to Seller’s consumers is reduced or diminished.” (Ellenboro – Forest City, 4, FHA 442-30 format)

“The County shall adopt a water conservation ordinance in accordance with the Town of Siler City Ordinance (Exhibit B). The County shall enforce said ordinance on all County water customers who are served with water provided by the Town of Siler City. The County shall enforce the ordinance according to the various stages as enacted by the Siler City Town Board of Commissioners” (Chatham – Siler City, 3)

“In the event COMMISSION declares water use restrictions in accordance with COMMISSION’s Utility Regulations, Terms and Conditions of Service, Part C, Section 21.0 Water Emergency Management,, WINTERVILLE agrees, with regard to any water delivery to WINTERVILLE by COMMISSION pursuant to this Agreement, to implement water use restrictions equal to those implemented by COMMISSION within twenty-four (24) hours of notification to WINTERVILLE by COMMISSION.”(Greenville Commission-Winterville, 5)

“In the event that Andrews has to institute any mandatory or voluntary water conservation efforts while supplying water to Murphy, Murphy will institute the same conservation efforts” (Murphy-Andrews, 2)

“In the event of implementation of water restrictions by Ramseur (due to drought), Franklinville will work in conjunction with Ramseur to impose appropriate water restrictions on the same basis as restrictions are required of Ramseur’s other customers.” (Ramseur-Franklinville, 7)

“During periods of State of North Carolina and/or Federal and/or Roanoke Rapids Sanitary District mandatory conservation restrictions the minimum daily volume shall be one million one hundred thousand (1,100,000) gallons per day.” (Halifax – Roanoke, 1)

✓ **Does the agreement address non-revenue water or excessive inflow/infiltration?**

A utility that buys a significant amount of water for resale to retail customers will always find that the amount of water they sell is less, sometimes significantly less, than what they purchase from their water provider. This non-revenue water is due to leaks and authorized and unauthorized unmetered uses. A utility that is retiring a well system in favor of signing a purchase agreement with another utility should take this into consideration when studying the financial impact of their new agreement. These systems are sometimes surprised when they see the bill for water purchase after they have a major fire in their jurisdiction that required the local fire company to use enormous amounts of water. Some agreements provide some relief for these unexpected occurrences, but most contracts require the purchaser to pay for every drop of water that passes through the meter. There are some creative clauses in some contracts where the seller tries to create a financial incentive for the purchaser to minimize non-revenue water (or non revenue wastewater due to inflow and infiltration). For example, the water and sewer authority of Cabarrus County will allow its bulk purchasers of wastewater service to reduce their payments for excessive inflow and infiltration if they can document that they invested funds in to repairing the problem. Some utilities may not see a reason for this type of initiative, but in the end, water losses (or excessive I&I) that eat up valuable capacity are not really in anyone’s long term best interests.

✓ **Does the agreement allow for variations due to emergencies?**

Many agreements modify or suspend key contractual requirements during times of emergency. In other cases, contracts specifically state that there are limits to what the seller can do during an emergency. This is another important topic that requires discussion before the emergency hits.

Example:

“ If it becomes necessary for Murphy to supply water to Andrews in the event of a water emergency or in the event that fire flow protection to water system customers cannot be maintained, Murphy will sell water to Andrews for a period of 45 days at the cast cost of production for the Murphy Water Department” (Murphy – Andrews, 2)

“Should either party have an emergency need for water supply the other party shall provide assistance to the maximum extent possible so long as providing this emergency supply does not impact the ability to serve the users of the supplying system. In the event that an emergency supply of water is initiated, the party receiving the emergency supply shall use all available means to remedy the supply emergency with all due dispatch. Cost for said emergency water supply shall be the lowest per thousand gallon rate as defined in the respective prevailing fee schedule available to Monroe customers for service to Union or Union customers for service to Monroe.” (Union – Monroe, 15-16)

“Emergency failures of pressure or supply due to main supply line breaks, power failure, flood, fire, and use of water to fight fire, earthquake or other catastrophe shall excuse City from the provisions of this Section for such reasonable period of time as may be necessary to restore services. In such event, District shall have the right to obtain its supply of water from alternate sources until service is restored.” (Dunn- Harnett, pp. 10)

“Emergency Supply of Water: In the event of a failure or other emergency within the water system of one party, and the other system having excess water available, the non-failing system will provide water to the failed system to the maximum extent feasible; provided, however, that each party’s obligation under this Agreement shall not limit or restrict that party’s ability to meet the water supply needs of its constituents and provide for the safety, health and welfare of persons and property within its jurisdiction at any point in time, or require production of potable water in excess of any permit issued to it by the North Carolina Department of Environment and Natural Resources (NCDENR) or any of NCDENR’s divisions (all of which shall be determined by the supplying party in its sole discretion). For the purposes of this Agreement, “emergency” is defined as a situation or set of facts that would lead a reasonable person to conclude that the condition of a party’s water treatment or water distribution system presents an immediate or imminent threat to public health or safety. In the event of an emergency, the party in need of water shall promptly take all necessary and available steps to alleviate the emergency. A situation which lasts a period of greater than thirty (30) days shall no longer be considered an “emergency”, and the provision of water subsequently shall require further discussions as to the length of time and amount of water which will be needed, and an agreement as to the scope and timing of remedial measures which will be taken to end the emergency” (ASU – Boone, 1-2)

Reference

Standard Department of Agriculture Form used by Municipalities: Form RH 442-0030. Based on older FHA form 442-30 created in 1972.
<http://forms.sc.egov.usda.gov/efcommon/eFileServices/Forms/RD0442-0030.pdf>