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PETITION OF NORTH AUSTIN §
UTILITY DISTRICT NO. 1, §
NORTHTOWN MUNICIPAL UTILITY §
DISTRICT, TRAVIS COUNTY WATER §
CONTROL AND IMPROVEMENT §
DISTRICT NO. 10 AND WELLS §
BRANCH MUNICIPAL UTILITY §
DISTRICT, FROM THE RATEMAKING §
ACTIONS OF THE CITY OF AUSTIN §
AND REQUEST FOR INTERIM RATES §
IN WILLIAMSON AND TRAVIS §
COUNTIES §

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PETITION OF NORTH AUSTIN §
MUNICIPAL UTILITY DISTRICT NO. §
1, NORTHTOWN MUNICIPAL §
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BEFORE THE STATE OFFICE

OF

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**CITY OF AUSTIN'S RESPONSE TO COMMISSION STAFF'S OBJECTION AND
REPLY TO PETITIONERS' RESPONSE TO CITY OF AUSTIN'S ADDITIONAL
MOTION TO ABATE AND MOTION FOR PREHEARING CONFERENCE AND
PETITIONERS' RESPONSE**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES:

COMES NOW, the City of Austin, (herein sometimes referred to as "City," "Austin", "Austin Water Utility" or "Respondent"), in the above styled and docketed wholesale water and wastewater rate appeal proceeding and files this, its Response to Commission Staff's Objection to City of Austin's Additional Motion to Abate and Motion for Prehearing Conference to the Public Utility Commission ("PUC," or "Commission"). As the Movant, Austin is entitled to the

last word on its Motion. Austin would respectfully show the Honorable Administrative Law Judges (“ALJs”) of the State Office of Administrative Hearings (“SOAH”) as follows.

I. INTRODUCTION

This response replies to Objection of the PUC Staff and the Response of Petitioners to the City of Austin’s Motion to Certify Questions; and Motion to Abate. Extensive pleadings have been filed in this case, and Austin, as the Movant, is entitled to the last word.

II. JURISDICTION ISSUES

The City’s Motion to Certify and Motion to Abate raises key issues which are not addressed in pleadings of Petitioners and the PUC Staff. The filings of the Petitioners and the PUC Staff do not address the seminal questions of subject matter jurisdiction, and, instead, insist that the passage of time and the adoption of rules by the Texas Commission on Environmental Quality (“TCEQ”) can act to confer jurisdiction on the agencies (the PUC and SOAH) which the Texas Legislature has not.

The Texas Water Code (“TWC”) provides a number of mechanisms under which parties may seek rate review of a rate set pursuant to a contract by a municipality. Tex. Water Code, §§11.036-11.041, together with Tex. Water Code, §12.013; Tex. Water Code, §12.013; Tex. Water Code, §13.043, also together with Tex. Water Code, §12.013 all provide for retrospective rate relief for Petitioners, as follows:

TEXAS WATER CODE, SECTION 12.013. RATE-FIXING POWER.

(a) The utility commission shall fix reasonable rates for the furnishing of raw or treated water for any purpose mentioned in Chapter 11 or 12 of this code.

* * * * *

(e) The utility commission may establish interim rates and compel continuing service during the pendency of any rate proceeding.

(f) **The utility commission may order a refund or assess additional charges from the date a petition for rate review is received by the utility**

commission of the difference between the rate actually charged and the rate fixed by the utility commission, plus interest at the statutory rate.
[Emphasis supplied.]

The retrospective rate relief provided under Chapter 12, and Tex. Water Code, §13.043 is contingent upon a public interest determination if the rates are set pursuant to a contract, as set out below:

RULE §24.128 Petition or Appeal Concerning Wholesale Rate

This subchapter sets forth substantive guidelines and procedural requirements concerning:

- (1) a petition to review rates charged for the sale of water for resale filed pursuant to TWC, Chapter 12; or
- (2) an appeal pursuant to TWC, §13.043(f) (appeal by retail public utility concerning a decision by a provider of water or sewer service).

Source Note: The provisions of this §24.128 adopted to be effective September 1, 2014, 39 TexReg 5903

And;

PUC Subst. RULE §24.131. Commission's Review of Petition or Appeal

(a) When a petition or appeal is filed, the commission shall determine within ten days of the filing of the petition or appeal whether the petition contains all of the information required by this subchapter. For purposes of this section only, the initial review of probable grounds shall be limited to a determination whether the petitioner has met the requirements §24.130 of this title (relating to Petition or Appeal). If the commission determines that the petition or appeal does not meet the requirements of §24.130 of this title, the commission shall inform the petitioner of the deficiencies within the petition or appeal and allow the petitioner the opportunity to correct these deficiencies. If the commission determines that the petition or appeal does meet the requirements of §24.130 of this title, the commission shall forward the petition or appeal to the State Office of Administrative Hearings for an evidentiary hearing.

(b) For a petition or appeal to review a rate that is charged pursuant to a written contract, the commission will forward the petition or appeal to the State Office of Administrative Hearings to conduct an evidentiary hearing on public interest.

(c) For a petition or appeal to review a rate that is not charged pursuant to a written contract, the commission will forward the petition or appeal to the State Office of Administrative Hearings to conduct an evidentiary hearing on the rate.

(d) If the seller and buyer do not agree that the protested rate is charged pursuant to a written contract, the administrative law judge shall abate the proceedings until the contract dispute over whether the protested rate is part of the contract has been resolved by a court of proper jurisdiction.

Source Note: The provisions of this §24.131 adopted to be effective September 1, 2014, 39 TexReg 5903

Unquestionably, if the rates are set pursuant to a written contract, the case must go to a public interest determination. [PUC Subst. R. 24.131, *Canyon Regional Water Authority v. Guadalupe Blanco River Authority*, 286 S.W.3d 397 (Tex. App – Corpus Christi 2008)] If the parties do not agree as to whether the rates are set pursuant to a written contract¹, then the matter must be abated for a court decision to make the determination of whether the rates are set pursuant to a written contract or not. If the rates are set pursuant to a written contract, then a public interest determination must be made before a cost of service hearing can be convened.

Conversely, the plain language of Tex. Water Code, §13.044 limits the “utility commissions” ability to provide rate relief to the point after a cost of service hearing has been held and the rate set by the Commission. Tex. Water Code, §13.044 provides a special consideration of rates charged by municipalities to districts where the purchase of water from the city was a condition of their consent agreements. The relief offered under §13.044 is *prospective only*, dating from the Commission’s final determination of the municipality’s cost of service after a contested case hearing. Neither the PUC nor the TCEQ ever enacted any rules detailing the

¹ In this case, there is no serious contention that Austin’s wholesale water and wastewater rates are set pursuant to a contract, because the applicable contracts were attached to Petitioners’ First Amended Original Petition. However, Petitioners have alleged at paragraph 3.13 that the rates are not set pursuant to contract.

terms and conditions for the cost of service determination or the requirement of a public interest determination for petitions under §13.044.

III. DISCUSSION

Petitioners and PUC Staff requested additional time to respond to Austin's motions and were granted that additional time. Nothing in the responses indicates that Tex. Water Code, §13.044 provides the relief requested. Petitioners and PUC Staff simply argue that the time has passed to make jurisdictional claims--which assertion is never correct. Their silence on the jurisdictional questions is a significant admission of the accuracy of Austin's claims.

In Austin's Reply to Responses of PUC Staff and Petitioners to Austin's Motion to Certify Questions to the Public Utility Commission; Motion to Abate, Austin advised the ALJs at page 12 that neither the TCEQ nor the PUC has adopted substantive or procedural rules which specifically reference TWC §13.044. This includes TCEQ Rules at 30 TAC §291.29/ PUC Subst. R. §24.29 upon which Order No. 9 supposedly awarded interim rates to Petitioners.

Therefore, Austin asserted in its Reply at p. 13 that Order No. 9 **either** granted interim rates under TWC §12.013 **or** was without statutory authority. Neither Petitioners nor the PUC Staff challenged the main premises of Austin's position: TWC §13.044 does not authorize interim rates; PUC Subst. R. 24.29 does not implement TWC §13.044. It is particularly telling that the PUC Staff did not contradict Austin's assertion that §24.29 does not implement TWC, §13.044. In fact, PUC Staff only argues that the ALJs have **ruled** it to be so. Order No. 9 is clearly erroneous and the PUC should be heard on the definitive jurisdictional issues of its case. This case should be abated either:

- (1) to allow the PUC to rule upon the applicability of TWC §13.044 to this case;
- (2) to allow the parties to seek jurisdictional review under the *Canyon Regional* case;
- (3) or both bases.

In light of the apparent confusion by PUC Staff, it would have been appropriate for the agency to take the opportunity offered by Austin to abate this proceeding and work toward resolution of the issues rather than an legally voidable conclusion. Austin continues to hope that the State Office of Administrative Hearings, which considers this case not standing alone in a vacuum, but within the greater context of its duty to provide due process to the rate litigants under the law, will act to abate this proceeding. In that manner, the expense to all parties of seeking additional assistance outside of the current contested case hearing framework can be avoided.

IV. SUMMARY AND CONCLUSIONS

Austin believes that Petitioners have attempted to avoid a public interest determination because they cannot provide any evidence that Austin has abused its monopoly power to provide water and wastewater utility service. The State should not be complicit in depriving Austin and its ratepayers of the benefit of over 20 years of participatory and inclusive rate setting. If PUC Staff is not aware of the various jurisdictional issues associated with their new water rate appeal jurisdiction, they should be willing to abate this proceeding and allow the Commission to consider the questions raised in Austin's Motion to Certify and Motion to Abate. In fact, PUC Staff has suggested an extension of the hearing schedule, and Austin agrees with that request.

IV. RELIEF REQUESTED

CONSIDERING THE FOREGOING, AUSTIN RESPECTFULLY REQUESTS THAT THE AMINISTRATIVE LAW JUDGES grant its Motion to Certify Questions to the Public Utility Commission and Motion to Abate.


ADDITIONALLY, AUSTIN specifically requests such other and further relief to which Austin is entitled, under applicable law and in equity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served via hand delivery, facsimile, electronic mail, overnight mail, US mail and/or Certified Mail Return Receipt Requested on all parties whose names appear on the mailing list below on this 20th day of January, 2015.

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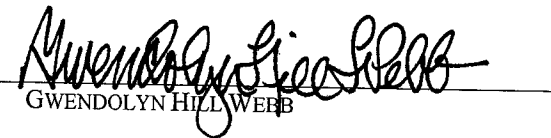
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