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SOAH DOCKET NO. 473-14-5144.WS
PUC DOCKET NO. 42866

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BEFORE THE STATE OFFICE

PETITION OF TRAVIS COUNTY
MUNICIPAL UTILITY DISTRICT
NO 12. APPEALING CHANGE OF
WHOLESALE WATER RATES
IMPLEMENTED BY WEST TRAVIS
COUNTY PUBLIC UTILITY
AGENCY; CITY OF BEE CAVE,
TEXAS; HAYS COUNTY, TEXAS;
AND WEST TRAVIS COUNTY
MUNICIPAL UTILITY DISTRICT
NO. 5

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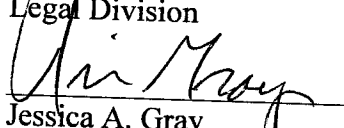
ADMINISTRATIVE HEARINGS

COMMISSION STAFF'S INITIAL BRIEF

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Date: June 26, 2015

153

TABLE OF CONTENTS

I. INTRODUCTION.....	3
II. PARTIES	4
III. PROCEDURAL HISTORY	5
IV. GENERAL DESCRIPTION OF PROTESTED RATES.....	6
V. JURISDICTION	6
VI. THE REQUESTED PUBLIC INTEREST DETERMINATION AND ITS SCOPE .	8
A. The Requirement for an Initial Public Interest Determination.....	8
B. Public Interest Considerations in This Case.....	9
C. Cost of Service Analysis is Not Relevant to Determining Whether Rates Adversely Affect the Public Interest (PUC SUBST. R. 24.133(b)).....	9
VII. DOES THE PROTESTED RATE EVIDENCE WTCPUA'S ABUSE OF MONOPOLY POWER? (PUC SUBST. R. 24.133(A)(3)).....	10
A. Is the WTCPUA a Monopoly?	10
B. Disparate Bargaining Power of the Parties (PUC SUBST. R. 24.133(a)(3)(A)).....	11
1. What Are TCMUD 12's Alternative Means, Alternative Costs, and Problems of Obtaining Alternative Wholesale Water Services?	11
2. Are There Other Disparate Bargaining Power Factors?	13
3. Conclusion: If There Was Disparate Bargaining Power, Does the Protested Rate Evidence WTCPUA's Abuse of Monopoly Power?	14
C. Methodology for Computation of Revenue Requirement and Rate (PUC SUBST. R. 24.133(a)(3)(C))..	15
1. Did WTCPUA Change the Methodology for the Computation of the Revenue Requirement?	15
2. Did WTCPUA Change the Methodology for the Computation of the Rate?	17
3. Conclusion: If There Was a Change in the Methodology for the Computation of the Revenue Requirement or Rate, Does the Protested Rate Evidence WTCPUA's Abuse of Monopoly Power?	18
VIII. TRANSCRIPTION COSTS.....	18
IX. CONCLUSION AND PRAYER.....	19

**SOAH DOCKET NO. 473-14-5144.WS
PUC DOCKET NO. 42866**

PETITION OF TRAVIS COUNTY MUNICIPAL UTILITY DISTRICT NO 12. APPEALING CHANGE OF WHOLESALE WATER RATES IMPLEMENTED BY WEST TRAVIS COUNTY PUBLIC UTILITY AGENCY; CITY OF BEE CAVE, TEXAS; HAYS COUNTY, TEXAS; AND WEST TRAVIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 5	§ § § § § § § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
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COMMISSION STAFF'S INITIAL BRIEF

I. INTRODUCTION

On March 6, 2014, Travis County Municipal Utility District No. 12 (TCMUD12), on behalf of itself and Travis County Municipal Utility Districts Nos. 11 and 13, filed a petition appealing the wholesale water rates implemented by West Travis County Public Utility Agency (WTCPUA), the City of Bee Cave, Texas, Hays County, Texas, and West Travis County Municipal Utility District No. 5, individually and as the Public Entities (Petition). On September 1, 2014, the Commission began the economic regulation of water and sewer utilities and this case was transferred from the TCEQ to the Public Utility Commission of Texas (Commission), where it was filed in the Commission's Central Records on September 5, 2014. In its Petition, TCMUD12 asserts that WTCPUA's wholesale water rate change adversely affect the public interest pursuant Title 16, Tex. Admin. Code (16 TAC) § 24.133.¹ TCMUD12 asserts jurisdiction under Texas Water Code Chapters 12² and 13.³

¹ Petition of Travis County Municipal Utility District No. 12 Appealing Change of Wholesale Water Rates Implemented by West Travis County Public Utility Agency; City of Bee Cave, Texas; Hays Count, Texas; and West Travis County Municipal Utility District No. 5 at 11 (March 6, 2014). (Petition.)

² In the original Petition, TCMUD12 also claimed jurisdiction under Tex. Water Code Chapter 11; however, TCMUD 12 subsequently withdrew this jurisdictional claim. *See* TCMUD12's Motion Amending its Jurisdictional Claim and TCEQ Executive Director's Motion to Withdraw at 2 (September 12, 2014).

³ Petition at 11.

It is Staff's position that WTCPUA did not abuse its monopoly power in changing the wholesale rates charged to TCMUD12. TCMUD12 actively participated in the formation of agreement governing the provision of treated water service from LCRA, and later WTCPUA, to TCMUD12. Additionally, TCMUD12 had the opportunity to engage in communication with WTCPUA prior to the enactment of the proposed rate change. Therefore, Staff recommends that TCMUD12 has not proved that WTCPUA exercised disparate bargaining power when enacting the rate change. It is also Staff's position that WTCPUA did not change the methodology used to calculate its revenue requirement or set its rates during the rate case at issue from prior rate changes, since WTCPUA continued to utilize the cash basis methodology. Even if it is determined that WTCPUA has violated one of the public interest factors, it is Staff's position that the rate change is not adverse to the public interest because the rate change at issue results in rates lower than those previously charged,

II. PARTIES

The parties to the proceeding are as follows (1) WTCPUA, the provider of wholesale water service; (2) City of Bee Cave, Texas, a member of WTCPUA; (3) Hays County, Texas, a member of the WTCPUA; (4) West Travis County Municipal Utility District No. 5, a member of the WTCPUA; (5) TCMUD12, acting on behalf of itself and Travis County Municipal Utility District Nos. 11 and 13,⁴ recipients of wholesale water service; and (6) the Public Utility Commission of Texas, representing the public interest.⁵ At the beginning of the proceeding, the TCEQ Executive Director and the TCEQ Office of Public Interest Council (OPIC) were also named as parties to the proceeding.⁶ OPIC's party status was terminated on September 1, 2014 as a result of the transfer of the water and sewer program from TCEQ to the Commission. The Executive Director withdrew as a party on September 12, 2014 at the time TCMUD12 amended its Petition to withdraw its jurisdictional claim under Tex. Water Code Chapter 1.⁷

⁴ Petition at 1.

⁵ The Commission became a statutory party on September 1, 2014 as a result of the transfer of the water and sewer programs from TCEQ to the Commission pursuant to House Bill 1600 and Senate Bill 567, 83rd Legislative Session (2013).

⁶ See SOAH Order No. 1 at 1-2 (June 12, 2014).

⁷ TCMUD12's Motion Amending its Jurisdictional Claim and TCEQ Executive Director's Motion to Withdraw at 2.

III. PROCEDURAL HISTORY

On September 25, 2008, TCMUD12 entered into a contract with the Lower Colorado River Authority (LCRA) under which LCRA agreed to provide TCMUD 12 (and TCMUD 11 and 13) with raw water from the Colorado River for municipal use (LCRA Raw Water Contract). Under the Raw Water Contract, TCMUD12 has the right to divert raw water from Lake Austin and Lake Travis. On October 22, 2009, TCMUD12, on behalf of itself and TCMUD 11 and 13, entered into a Water Wholesale Services Agreement (LCRA Wholesale Agreement) with LCRA under which LCRA agreed to provide wholesale water services for the treatment of raw water and delivery of potable water to TCMUD 12 to be used by all three districts. On March 19, 2012, WTCPUA entered into a contract with LCRA through which WTCPUA agreed to purchase the West Travis County Water and Wastewater System from LCRA (PUA Transfer Agreement). Under the PUA Transfer Agreement, WTCPUA assumed the operation and management of the system, essentially stepping into the LCRA's shoes for the purposes of providing and transporting treated wastewater to TCMUD 12 for use by the three districts.⁸

On November 21, 2013, the WTCPUA Board adopted an order amending wholesale water rates to be charged to TCMUD12 pursuant to the PUA Transfer Agreement. This rate change went into effect on January 1, 2015 (rate change or 2014 rate change) and is the rate change at issue in this appeal. On December 17, 2013, TCMUD12 received the Notice of Adjustment of Wholesale Rates provided by WTCPUA. On March 6, 2014, TCMUD12 filed a Petition with the TCEQ appealing WTCPUA's wholesale rate change. On April 11, 2014 WTCPUA filed its Response to TCMUD12's Petition with TCEQ. On June 11, 2014, a preliminary hearing was held at the State Office of Administrative Hearings (SOAH). At the preliminary hearing, the SOAH Administrative Law Judge (ALJ) took jurisdiction over the matter and admitted parties. On June 12, 2014, the ALJ issued SOAH Order No. 1 memorializing the prehearing conference and adopting the procedural schedule as agreed to by the parties at the prehearing conference.⁹

⁸ WTCPUA asserted that it is not a successor in interest to the LCRA Rate Water Contract because, through the PUA Transfer Agreement, WTCPUA only treats and diverts water provided by LCRA. Response to Travis County Municipal Utility District No. 12's Original Petition at 2 (April 11, 2014). (Response to Petition.)

⁹ On July 1, 2014, WTCPUA filed an unopposed motion for clarification of the procedural schedule as set out in SOAH Order No. 1. On July 1, 2014, the ALJ issued SOAH Order No. 2 granting the motion, clarifying the

On September 11, 2014, a second prehearing conference was held at SOAH to address issues relating to the transfer. On September 12, 2014, TCMUD12 filed a motion amending its Petition to withdraw its jurisdictional claim pursuant to Texas Water Code Chapter 11; also in that motion, the TCEQ Executive Director requested to withdraw as a party to the proceeding. On September 17, 2014, the ALJ issued SOAH Order No. 4 memorialized the procedural rules governing the matter, as agreed to by the parties at the September 11, 2014 prehearing conference, and granting the Executive Director's motion to withdraw as a party.

On January 9, 2015, WTCPUA filed an unopposed motion to change the starting date of the hearing on the merits from April 20, 2015 to April 21, 2015 and the ALJ granted this request in SOAH Order No. 11 issued on January 12, 2015. The hearing on the merits began on April 21, 2015 and concluded on April 23, 2015. On May 1, 2015, the ALJ issued SOAH Order No. 17 setting out the post-hearing and briefing schedule and the outline for reply briefs, as agreed upon by the parties. Pursuant to SOAH Order No. 17, initial briefs are due on June 26, 2015.

IV. GENERAL DESCRIPTION OF PROTESTED RATES

The rates protested in this proceeding are actually *lower* than those the wholesale customers had been paying prior to the 2014 rate change.¹⁰ TCMUD12 seems most opposed to the potential rate increase that may occur in upcoming years.¹¹ TCMUD12 states that these projected rates were provided to TCMUD12 by WTCPUA as an example of how the rates may change in the future.¹² However, these hypothetical rate increases have not occurred and are not at issue in this proceeding.

V. JURISDICTION

In the original Petition, TCMUD12 brought its appeal pursuant to Tex. Water Code Ann. §§ 11.036, 11.041, 12.013 and 13.043(f) and Tex. Local Gov't Code § 572.061.¹³ TCMUD12 asserted that rates imposed by WTCPUA are "not reasonable and just or are unreasonably

procedures governing the proceeding, and modifying one of the dates in the procedural schedule to reflect the correct date as agreed to by the parties.

¹⁰ TCMUD12's Responses to WTCPUA's Second Requests for Admission RFA No. 2-1 (February 11, 2015).

¹¹ Tr. at 178:19-24, 186:4-8.

¹² Petition at 10-11.

¹³ Petition at 3.

preferential, prejudicial, or discriminatory under Tex. Water Code §§11.036, 11.041, 12.013, and 13.042(j)."¹⁴ WTCPUA opposed jurisdiction pursuant to Tex. Water Code §§ 11.036, 11.041, and 12.013. WTCPUA argued that § 11.041 is not applicable to the rates set pursuant to the PUA Transfer Agreement because WTCPUA provides only treatment and delivery services but does not sell the water the TCMUD12.¹⁵ Additionally, WTCPUA argued against jurisdiction pursuant to § 11.036 because WTCPUA does not provide a water supply to TCMUD12, stating that TCMUD12 still obtains raw water from LCRA under the LCRA Raw Water Contract.¹⁶ WTCPUA also asserted that jurisdiction under § 12.013 is not triggered because this section applies to providers of water supply, again arguing that TWCPUA only provides treatment and delivery services to TCMUD12 and not a supply of water.¹⁷ On September 12, 2014, TCMUD12 amended its petition by withdrawing its appeal pursuant to Tex. Water Code §§ 11.036 and 11.041, citing the fact that jurisdiction over Chapter 11 remained with TCEQ but that "[t]he standard for review and the procedure for processing this Petition is identical whether jurisdiction attaches under Chapter 11, 12 or 13 of the Water Code."¹⁸ As such, this appeal proceeds pursuant to Tex. Water Code §§ 12.013 and 13.043(f).

The ALJ found that jurisdiction under Tex. Water Code § 13.043(j) has been established; however the ALJ has not established that there is jurisdiction over this proceeding pursuant to Tex. Water Code § 12.013.¹⁹ Staff agrees with WTCPUA that jurisdiction over the matter pursuant to this section is improper because this section applies to rates charged for the "furnishing of raw or treated water."²⁰ The Texas Water Code does not define "furnishing" but a

¹⁴ Because Tex. Water Code § 13.042 does not contain a subsection (j), and because TCMUD12 invokes jurisdiction pursuant to Tex. Water Code § 13.034, it is presumed that TCMUD12 meant to cite Tex. Water Code § 13.043(j). Petition at 3.

¹⁵ Response to Petition at 4.

¹⁶ Response to Petition at 5.

¹⁷ Response to Petition at 5-6.

¹⁸ TCMUD12's Motion Amending its Jurisdictional Claim and TCEQ Executive Director's Motion to Withdraw at 1-2.

¹⁹ At the first prehearing conference, the ALJ found that jurisdiction under Tex. Water Code § 13.043(f) had been proved. SOAH Order No. 1, PUC Interchange Item No. 10 at 1 (June 12, 2014).

²⁰ Tex. Water Code § 12.013(a),

common definition of the term states that it refers to the act of supplying a product.²¹ While it is true that WTCPUA provides treated water to TCMUD12, the water originates from LCRA as agreed in the LCRA Raw Water Contract. Additionally, Chapter 12 of the Texas Water Code relates to provisions generally applicable to water rights. WTCPUA neither has nor conveys rights to the raw or treated water to TCMUD12. As such, TWCPUA does not furnish water to TCMUD12 and Tex. Water Code § 12.013 does not apply.

Jurisdiction over this matter is properly brought pursuant to Tex. Water Code § 13.043(f). TCMUD12 is a retail public utility that receives water service from WTCPUA, both a retail public utility and a political subdivision of the state, for compensation. TCMUD12 received notice of the rate change on December 17, 2013 and timely filed its appeal on March 6, 2014. WTCPUA argued that WTCPUA did not allege specific factual allegations as to how the proposed rates adversely affected the public interest.²² Because TCMUD12 generally alleged that WTCPUA had modified the methodology used to calculate the rate structure²³ and that WTCPUA had not engaged in meaningful discussions with TCMUD12 regarding the proposed rate change,²⁴ TCMUD12 has met its burden of identifying the ways in which the proposed rate change violated the public interest.

VI. THE REQUESTED PUBLIC INTEREST DETERMINATION AND ITS SCOPE

A. The Requirement for an Initial Public Interest Determination

Pursuant to 16 TAC §§ 24.131(b) and 24.132(a), an appeal of a wholesale rate change charged pursuant to a contract²⁵ and brought under Tex. Water Code § 13.043(f) must be sent to SOAH for an evidentiary hearing on the public interest to determine whether the protested rate adversely affects the public interest. TCMUD12 properly appealed the wholesale rate change in the manner required by Tex. Water Code § 13.043(f). When determining whether the rate change

²¹ “[T]o provide with what is needed; to make available for use.” Definition of “Furnish”, Merriam-Webster’s Dictionary and Thesaurus. Springfield, MA, Merriam-Webster, Inc., 2014.

²² Response to Petition at 6.

²³ Petition at 10.

²⁴ Petition at 10.

²⁵ No party has contested that WTCPUA charges wholesale rates pursuant to a contract with TCMUD12 and other wholesale customers.

is adverse to the public interest, the Commission must review the public interest criteria as listed in 16 TAC § 24.133(a) and, if it determines that at least one of the criteria have been violated, the Commission must find that the rate change violates the public interest.²⁶ During the public interest phase of a wholesale rate appeal, the burden lies with the petitioner to prove that a protested rate is adverse to the public interest.²⁷

B. Public Interest Considerations in This Case

TCMUD12 asserts that the rate change is adverse to the public interest because WTCPUA violated the public interest criteria in 16 TAC § 24.133(a)(3)(A) and (C).²⁸ Specifically, TCMUD12 argued that: 1) when arriving at the rate change, WTCPUA abused its monopoly power by changing the computation of the revenue requirement and rate from one methodology to another; and 2) WTCPUA exercised disparate bargaining power, as shown by the presence of limitations on TCMUD's alternative means and costs, problems with obtaining alternative water service, and WTCPUA's ability to control the price and quantity of water services in the market.²⁹

C. Cost of Service Analysis is Not Relevant to Determining Whether Rates Adversely Affect the Public Interest (PUC Subst. R. 24.133(b))

Commission rules set out a two-step process for wholesale rate appeals. The first step is a determination of whether the protested rate adversely affects the public interest, pursuant to 16 TAC § 24.133(a). Only upon determination that the rate change violates the public interest during the public interest phase of a proceeding will the matter then go to the second step and be remanded to SOAH for an evidentiary hearing on the cost of service.³⁰

16 TAC § 24.133 specifies that the Commission shall not determine whether the protested rate adversely affects the public interest based on an analysis of the seller's cost of service. As

²⁶ 16 TAC § 24.133(a).

²⁷ 16 TAC § 24.136.

²⁸ See Petition at 9-11; TCMUD12's Supplemental Responses to Requests for Disclosure at 24-25 (November 7, 2014).

²⁹ TCMUD12's Supplemental Responses to Requests for Disclosure at 24-25.

³⁰ 16 TAC § 24.134(b).

such, SOAH has found that any evidence relating to cost of providing service is irrelevant and must not be considered.³¹

VII. DOES THE PROTESTED RATE EVIDENCE WTCPUA'S ABUSE OF MONOPOLY POWER? (PUC Subst. R. 24.133(A)(3))

A. Is the WTCPUA a Monopoly?

WTCPUA, a political subdivision providing wholesale water service for compensation, is a retail public utility as defined in Tex. Water Code Ann. § 13.002(19). Retail public utilities are by definition monopolies within their service areas.³² For this reason, the Commission is tasked with ensuring that the rates charged by retail public utilities are just and reasonable.³³

TCMUD12 argued that WTCPUA has a monopoly over the provision of wholesale water service in the area based on the economic definition of monopoly based on federal antitrust law and related court decisions.³⁴ Specifically, TCMUD12 argued that WTCPUA represents the only viable supplier of wholesale water services to the area³⁵ and that, due to the essential nature of the service provided, WTCPUA holds extensive market power over the provision of wholesale water services.³⁶

WTCPUA bases its argument on a microeconomics textbook definition of monopoly,³⁷ countering that WTCPUA is not operating as a monopoly because it does not meet the five basic characteristics of a monopoly.³⁸ Specifically, WTCPUA alleged that TCMUD12 freely chose the LCRA and the WTCPUA as its service provider after negotiating terms and additional protections in the LCRA Wholesale Agreement and the PUA Transfer Agreement.³⁹

³¹ The TCEQ adopted the ALJ's Proposal for Decision, with minor modifications, on November 9, 2011. *Application of Navarro County Wholesale Ratepayers to Review the Wholesale Rate Increase Imposed by the City of Corsicana, Certificate of Convenience and Necessity No. 10776, in Navarro County*, SOAH Docket No. 582-10-1944, Proposal for Decision at 22 (August 17, 2011). (Navarro PFD.)

³² Tex. Water Code Ann. § 13.001(b)(1).

³³ Tex. Water Code Ann. § 13.001(c).

³⁴ Direct Testimony of Dr. Jay Zarnikau, TCMUD12 Ex. 3 at 6-7).

³⁵ Direct Testimony of Joseph A. DiQuinzio, TCMUD12 Ex. 1 at 14-16.

³⁶ TCMUD12 Ex. 3 at 12, 15-16.

³⁷ Direct Testimony of Richard A. Baudino, WTCPUA Ex. 2 at 13.

³⁸ WTCPUA Ex. 2 at 13-14.

³⁹ WTCPUA Ex. 2 at 11.

Additionally, WTCPUA asserts that TCMUD12 had other options for obtaining service but that receiving service from LCRA, and later WTCPUA, represented the most feasible option.⁴⁰

Based on the plain reading of the definition of “retail public utility” in the Texas Water Code, WTCPUA is a monopoly and likely operates as such. While WTCPUA asserts that TCMUD12 may have had other service options that it did not adequately explore,⁴¹ it appears that TCMUD12 considered WTCPUA the closest and only reasonable service provider.⁴² However, while statutory law expressly contemplates that retail public utilities will operate as monopolies, the main issue to address in this matter is whether WTCPUA has abused the market power pursuant to 16 TAC § 24.133(a)(3)(A).

B. Disparate Bargaining Power of the Parties (PUC Subst. R. 24.133(a)(3)(A))

1. What Are TCMUD 12’s Alternative Means, Alternative Costs, and Problems of Obtaining Alternative Wholesale Water Services?

TCMUD12 alleged that limitations on TCMUD's alternative means and costs and problems with obtaining alternative water service evidence WTCPUA’s disparate bargaining power.⁴³ TCMUD12 failed to adequately explore other options available to it at either the time it entered into the LCRA Wholesale Agreement or at the time the agreement was transferred to WTCPUA through the PUA Transfer Agreement. TCMUD12 asserted that constructing its own diversion, transmission, and storage facilities would cost approximately \$25,250,000.⁴⁴ However, TCMUD12 provides no corroboration for this amount or for the implication that this was the only possible alternative. TCMUD12 witness Dr. Zarnikau admitted that he did not undertake a full engineering analysis of other possible options for receiving service, but that he relied almost entirely on TCMUD12 witness Mr. DiQuinzio’s testimony on the feasibility on

⁴⁰ WTCPUA Ex. 2 at 15.

⁴¹ WTCPUA Ex. 1 at 16-17.

⁴² TCMUD12 Ex. 1 at 15-16.

⁴³ West Travis County Public Utility Agency’s Motion for Partial Summary Decision, Exhibit C at 24-25 (Mar. 6, 2015).

⁴⁴ TCMUD12 Ex. 1 at 5.

alternative providers.⁴⁵ TCMUD12 witness Mr. DiQuinzio admitted that he did not personally develop or verify the estimate to build a new system⁴⁶ and that there may have been potential to add to existing infrastructure; yet, TCMUD12 witness Mr DiQuinzio did not explore whether other surrounding service providers would be willing to work with TCMUD12 to expand facilities and provide service to TCMUD12 at a reasonable cost.⁴⁷ Additionally, TCMUD12 witness Mr. DiQuinzio stated that, while he was aware that Lakeway MUD and the City of Austin also provide wholesale water service in the area, TCMUD12 made no official inquiry into whether either of these or any other providers would be willing to provide service.⁴⁸

TCMUD12 argued that it did not have the money to construct its own system either at the time it entered into the LCRA Wholesale Agreement⁴⁹ or at the time WTCPUA was negotiating the PUA Transfer Agreement.⁵⁰ However, TCMUD12 had invested significant funds in constructing the interconnect with Lakeway MUD, an interconnect that is not currently usable and that has little potential to be used in the future.⁵¹ Additionally, TCMUD12 invested \$1.5 million in the West Travis County water and wastewater system at the time it entered into the LCRA Wholesale Agreement,⁵² money that could have been put toward construction of its own system. These decisions to invest in other possibilities show that TCMUD12 may not have lacked the money to construct its own system, but that it made business decisions to use its money on other options. The fact that TCMUD12 is a municipal utility district also means that it can issue bonds to collect needed revenue. TCMUD12 witness Mr. DiQuinzio admitted that he believed TCMUD12 was authorized to issue up to \$84.8 million in bonds.⁵³

⁴⁵ Tr at 247:1-15 (Zarnikau Cross) (April 21, 2015).

⁴⁶ Tr. at 96:8 – 97:2 (DiQuinzio Cross) (April 21, 2015).

⁴⁷ Tr at 124:5 – 125:3 (DiQuinzio Cross) (April 21, 2015).

⁴⁸ Tr. at 66:5-9 (DiQuinzio Cross) (April 21, 2015).

⁴⁹ TCMUD12 Ex. 1 at 5.

⁵⁰ TCMUD12 Ex. 1 at 14.

⁵¹ Tr. at 92:16-25 (DiQuinzio Cross) (April 21, 2105).

⁵² TCMUD12 Ex. 1 at 14.

⁵³ Tr. at 30:17-22 (DiQuinzio Cross) (Aprile 21, 2015).

TCMUD12 witness Mr. DiQuinzio admitted that, while he testified that it was financially prohibitive to build its own system,⁵⁴ he actually has no personal knowledge of how the estimate was calculated or whether it was accurate.⁵⁵ In fact, with the limited information he does have, TCMUD12 witness Mr. DiQuinzio admitted that the estimate provided to build a new system was a high-end estimate.⁵⁶

2. Are There Other Disparate Bargaining Power Factors?

TCMUD12 also alleged that WTCPUA's ability to control the price and quantity of water services in the market show that WTCPUA's holds disparate bargaining power.⁵⁷ However, it appears that TCMUD12 had adequate opportunity to participate in both the formation of the LCRA Wholesale Agreement and the PUA Transfer Agreement. TCMUD12 worked with LCRA to negotiate terms that provided benefits and imposed duties on both parties. Prior to the PUA Transfer Agreement, TCMUD12 was able to propose additional protections to be added into the Agreement.⁵⁸ While TCMUD12 argued that this does not show that they had any bargaining power, they agree that WTCPUA needed TCMUD12's consent to the Agreement and that TCMUD12 conditioned its consent on the inclusion of those terms.⁵⁹

Ultimately, these protections were added to the PUA Transfer Agreement terms, and included a provision ensuring that TCMUD12 received full credit for the paid connection fees and a provision conditioning TCMUD12's agreement to the PUA Transfer Agreement on the closure of the sale from LCRA to PUA.⁶⁰ Additionally, WTCPUA offered its wholesale customers the option to amend their contracts by reducing customers' maximum reserved capacity, which may in turn lower the monthly bills received by the customers.⁶¹ While some wholesale customers opted to amend their contracts, TCMUD12 chose to not exercise this

⁵⁴ Rebuttal Testimony of Joseph A. DiQuinzio, Jr., TCMUD12 Ex. 4 at 7.

⁵⁵ Tr. at 96:8 – 97:2 (DiQuinzio Cross (April 21, 2015).

⁵⁶ TCMUD12 Ex. 4 at 7.

⁵⁷ West Travis County Public Utility Agency's Motion for Partial Summary Decision, Exhibit C at 24-25 (Mar. 6, 2015)

⁵⁸ Tr. at 86:24 – 87:24 (DiQuinzio Cross) (April 21, 2015).

⁵⁹ Tr. at 387:6-10 (Rauschuber Cross) (April 22, 2015).

⁶⁰ Tr. at 87:3-24 (DiQuinzio Cross) (April 21, 2015).

⁶¹ Tr. at 35:25 – 36:3 (DiQuinzio Cross) (April 21, 2015).

option, citing concerns over having enough capacity to serve customers at full build-out.⁶² While this may possibly be a valid concern for immediate growth, TCMUD12 does not expect full build-out for up to ten years.⁶³ The option to amend its wholesale contract represents that TCMUD12 has some level of control over the rates it is charged.

TCMUD12 also asserted that it was not provided the opportunity for meaningful participation during the 2014 rate change process.⁶⁴ WTCPUA formed the Wholesale Customer Committee to provide input from wholesale customers when developing future wholesale water treatment service rates.⁶⁵ The Committee included representatives from each of the wholesale customer groups including TCMUD12, whose representative was Mr. DiQuinzio.⁶⁶ The Committee met multiple times to discuss issues relating to the proposed rate change; however, Mr. DiQuinzio did not attend any of these meetings.⁶⁷ While representatives of TCMUD12 did attend Committee meetings, TCMUD12 did not attend every meeting held on the matter.⁶⁸ Even so, the fact that WTCPUA held multiple meetings and that TCMUD12 participated in some, but not all, of these meetings does not support TCMUD12's claim that it was not offered the opportunity to participate in the ratemaking process.

3. Conclusion: If There Was Disparate Bargaining Power, Does the Protested Rate Evidence WTCPUA's Abuse of Monopoly Power?

As stated above, during the public interest phase of a wholesale rate appeal, the burden lies with the petitioner to prove that a protested rate is adverse to the public interest. TCMUD12 did not adequately explore other options that may have been available at the time TCMUD12 entered into the contract with LCRA and later with WTCPUA. Even if it is true that TCMUD12 had few options for obtaining wholesale water service other than from WTCPUA, TCMUD12 has not proved that WTCPUA acted in any manner to limit those options.⁶⁹ TCMUD12 actively

⁶² Tr. at 107:13-21 (DiQuinzio Cross) (April 21, 2015).

⁶³ Tr. at 91:7-9 (DiQuinzio Cross) (April 21, 2015).

⁶⁴ TCMUD12 Ex. 1 at 16.

⁶⁵ Direct Testimony of Donald G. Rauschuber, P.E., WTCPUA Ex. 1 at 22.

⁶⁶ WTCPUA Ex. 1 at 28).

⁶⁷ Tr. at 45:17 – 46:5 (DiQuinzio Cross) (April 21, 2015).

⁶⁸ Tr. at 88:18-20 (DiQuinzio Cross) (April 21, 2015).

⁶⁹ Navarro PFD at 70 (August 17, 2011).

participated in the formation of the LCRA Wholesale Agreement. During the transfer of the LCRA Wholesale Agreement to WTCPUA, TCMUD12 had the opportunity and enough bargaining power to negotiate the inclusion of protective provisions. TCMUD12 had the option to amend its wholesale contract in a manner that may reduce its bills but chose not to exercise the option.

Additionally, WTCPUA held multiple meetings on the proposed rate change which TCMUD12 chose not to attend, showing that TCMUD12 had an opportunity to participate in the proposed rate change but did not fully avail itself of that opportunity. TCMUD12 has not met its burden of proving that it had no other viable options for receiving wholesale water service, nor has it shown that it was unable to participate meaningfully in the formation of the contracts by which it would receive service. Therefore, TCMUD12 has not proved that WTCPUA exercised disparate bargaining power, thereby abusing its monopoly power.

C. Methodology for Computation of Revenue Requirement and Rate (PUC Subst. R. 24.133(a)(3)(C))

1. Did WTCPUA Change the Methodology for the Computation of the Revenue Requirement?

A change in methodology may refer to changes in the way either the revenue requirement or rate was calculated.⁷⁰ Commission rules define only two methodologies for calculating wholesale rates: the cash basis and the utility basis.⁷¹ These methodologies are defined by the components utilized in each. However, these may not be the only types of methodologies that can be used in setting rates.⁷² Commission Staff testified that the cost of service studies WTCPUA used to calculate both the fiscal year (FY) 2013 and FY 2014 rates and revenue requirement utilized the cash basis method of calculation.⁷³

When reviewing whether WTCPUA changed the methodology used to calculate the revenue requirement, Staff reviewed the components used in the 2013 and 2014 cost of service and rate studies to determine whether they had changed between the two years.⁷⁴ The

⁷⁰ 16 TAC § 24.133(a)(3)(C); Navarro PFD at 22.

⁷¹ 16 TAC § 24.129.

⁷² Navarro PFD at 55-56.

⁷³ Direct Testimony of Heidi Graham, Staff Ex. 1 at 11.

⁷⁴ Staff Ex. 1 at 9.

components used in calculating revenue requirement indicate whether WTCPUA used the cash basis method or some other method.⁷⁵ While it is true that there may be other methodologies used to calculate revenue requirement, TCMUD12 admitted that it used the cash basis to calculate the revenue requirement for the protested rates.⁷⁶

TCMUD12 witness Mr. Joyce argued that changing components from year to year, such as including a different allocation factor from one year to the next, is something he examined when determining whether the methodology for computing rates had changed.⁷⁷ Mr. Joyce stated that, when referring to the methodology, he was referring to the overarching methodology used to set *rates* and not the methodology used to calculate the *revenue requirement* specifically.⁷⁸ However, when testifying on whether the methodology has changed, Mr. Joyce explains that he examined the components used in the overarching methodology.⁷⁹ He then admitted that the term methodology as used in his testimony could refer to cost of service methodology.⁸⁰ However, Mr. Joyce also asserted that changes in *allocation* of funds between components remaining the same from year to year can evidence a change in methodology in computing rates.⁸¹ This unpredictable and constantly fluctuating approach to reviewing methodology provides no guidance as to what TCMUD12 witness Mr. Joyce actually considers a change in methodology; when components change, he considers that a methodology change but, when they stay the same but are allocated different amounts, he also considers that a methodology change.

However, it is clear that TCMUD12 witness Mr. Joyce's reliance on the difference in allocation between components that stayed the same in both 2013 and 2014 is flawed and an impermissible reliance on cost of service evidence. The M1 manual⁸² states that "a cost-of-

⁷⁵ "The M1 Manual also states that in the Cash Needs methodology, the *components of revenue requirements* include operation and maintenance expenses, debt-service costs, cash-financed capital improvements, reserve fund requirements, taxes and consideration of debt-service coverage requirements." Staff Ex. 1 at 9 (emphasis added).

⁷⁶ Tr. at 199:14-18 (Joyce Cross) (April 21 2015).

⁷⁷ Direct Testimony of Jay Joyce, TCMUD12 Ex. 2 at 7.

⁷⁸ Tr. at 136:2-5 (Joyce Cross) (April 21, 2015).

⁷⁹ Tr. at 136:2-5 (Joyce Cross) (April 21, 2015).

⁸⁰ Tr. at 136:19-22 (Joyce Cross) (April 21, 2015).

⁸¹ Tr. at 214:13 (Joyce Cross) (April 21, 2015).

⁸² American Water Works Association, *M1 Principles of Water Rates, Fees and Charges* (6th Ed. 2012). (M1 Manual.)

service analysis is used to functionalize, *allocate*, and equitable distribute the revenue requirements to the various customer classes”⁸³ While examining the components to which WTCPUA allocated costs is permissible in determining whether the overarching methodology has changed, reviewing changes in the actual amounts allocated delves into an examination of the cost of service.

In response to this argument, TCMUD12 witness Mr. Joyce stated that there is a “bright line” between examining the methodology used to set rates and examination of the cost of service, and that a party only violates this rule if it goes so far as to make a cost of service *recommendation*.⁸⁴ This argument is incorrect. Any evidence relating to cost of service is irrelevant during a public interest hearing.⁸⁵ Mr. Joyce admitted that he reviewed cost of service aspects when forming his opinion; the fact that he did not go so far as to actually make a cost of service recommendation does not change the fact that his review encroached into cost of service territory.

2. Did WTCPUA Change the Methodology for the Computation of the Rate?

Staff maintains its position that WTCPUA did not change the methodology for the computation of the rate subject to this appeal. As explained above, TCMUD12 witness Mr. Joyce examined the “overall” methodology used to set rates.⁸⁶ He admitted that both this rate change and the rate change before were calculated using the cash basis method.⁸⁷ The rate designs for both FY 2013 and 2014, based on the cash basis, include a minimum base rate and volumetric rates. Further, it appears the method used to compute the minimum base rate did not change since it was computed in both 2013 and 2014 by using the fixed revenue WTCPUA needed to recover along with a forecasted number of connections.⁸⁸ To examine these rates further would be to engage in examination of cost of service evidence, which is prohibited in this portion of the proceeding.

⁸³ WTCPUA Exhibit No. 73 at 2 (emphasis added).

⁸⁴ Tr. at 567:9-12 (Joyce Cross) (April 23, 2015).

⁸⁵ Navarro PFD at 22.

⁸⁶ Tr. at 136:4-5 (Joyce Cross) (April 21, 2015).

⁸⁷ Tr. at 199:14-18 (Joyce Cross) (April 21, 2015).

3. Conclusion: If There Was a Change in the Methodology for the Computation of the Revenue Requirement or Rate, Does the Protested Rate Evidence WTCPUA's Abuse of Monopoly Power?

As stated above, the methodology used to compute the revenue requirement and rates at issue in this proceeding did not change, as WTCPUA used the cash basis method in both this proceeding and the prior rate change. However, even if it is determined that the methodology changed, TCMUD12 has not shown that there has been an abuse of monopoly power. TCMUD12's rates went down as a result of this computation. Changes in methodology and disparate bargaining power are simply factors to be considered and do not themselves prove that the public interest has been violated.⁸⁹ Perhaps most importantly, the 2014 rate change resulted in rates that are lower than those charged in 2013.

VIII. TRANSCRIPTION COSTS

In SOAH Order No. 1, issued on June 12, 2014 before jurisdiction transferred to the Commission, the ALJ directed TCMUD12 to arrange for a court reporter to transcribe the hearing on the merits.⁹⁰ Pursuant to this Order, once the Commission has made its final decision, the costs for recording and the transcript shall be allocated pursuant to 30 TAC § 80.23.⁹¹ However, jurisdiction over 30 TAC Chapter 80 did not transfer to the PUC on September 1, 2014. Therefore, it does not appear that the Commission has jurisdiction to recommend an allocation of transcription costs pursuant to this section.

While the Commission's rules do address transcripts for evidentiary hearings,⁹² the rules do not specify how the Commission may allocate costs associated with the transcripts. Because the Commission's rules do not grant the Commission the authority to allocate these costs, Staff recommends that TCMUD12 and WTCPUA come to an agreement on how to allocate the

⁸⁸ Staff Ex. 1 at 11.

⁸⁹ See Navarro PFD at 56; Tr. at 206:7-14 (Joyce Cross) (April 21, 2015).

⁹⁰ SOAH Order No. 1 at 7 (June 12, 2014).

⁹¹ SOAH Order No. 1 at 7-8 (June 12, 2014).

⁹² 16 TAC § 22.204.

transcription costs. However, Commission Staff recommends that it is not appropriate for the Commission to be allocated any portion of the costs of the transcripts.⁹³

IX. CONCLUSION AND PRAYER

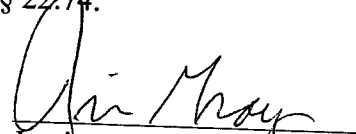
For the reasons stated above, it is Staff's position that TCMUD12 had adequate bargaining power in negotiating both the LCRA Wholesale Agreement and the PUA Transfer Agreement and was afforded ample opportunity to participate in the rate change process. Additionally, Staff believes that the methodology used to calculate WTCPUA's 2014 revenue requirement and rates did not change from the prior year. As such, it is Staff's position that TCMUD12 has not met its burden of showing that WTCPUA exercised disparate bargaining power in enacting the rate change. However, if the ALJ determines that one of these factors has been proved, the protested rate does not violate the public interest due to the fact that TCMUD12 participated in the process and that the protested rate change resulted in a rate lower than that of the year before.

⁹³ See 16 TAC § 22.143(c).

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PUC DOCKET NO. 42866

CERTIFICATE OF SERVICE

I certify that a copy of this document will be served on all parties of record on this the 26th day of June, 2015 in accordance with 16 TAC § 22.74.



Jessica A. Gray, Attorney