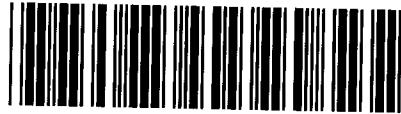




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SOAH DOCKET NO. 473-14-5144.WS
PUC DOCKET NO. 42866

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; AND
WEST TRAVIS COUNTY
MUNICIPAL UTILITY DISTRICT
NO. 5

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BEFORE THE STATE OFFICE

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ADMINISTRATIVE HEARINGS

WEST TRAVIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 5'S
REPLY BRIEF

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing document via hand delivery, facsimile, electronic mail, overnight mail, U.S. mail, and/or Certified Mail Return Receipt Requested on all parties on the 3rd day of August 2015.

By: 

Randall B. Wilburn

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**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; AND WEST TRAVIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 5	§ § § § § § § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
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**WEST TRAVIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 5'S
REPLY BRIEF**

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**WEST TRAVIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 5'S
REPLY BRIEF**

West Travis County Municipal Utility District No. 5 (the "District") files this Reply Brief and in support thereof, would respectfully show the following:

I. INTRODUCTION

This hearing focused on the public interest test. The sole purpose of the proceeding was to determine whether the wholesale water rate of the West Travis County Public Utility Agency (the "PUA") adversely affected the public interest. Travis County MUD No. 12 ("Petitioner" or "MUD 12") failed to present evidence to support its claim that the PUA's rates were adverse to the public interest. MUD 12 argued that the protested rates evidence the PUA's abuse of power in its provision of water service to MUD 12. MUD 12 narrowed that argument to a dispute over just two criteria listed in the Commission rules: (1) the disparate bargaining power of the parties, including whether MUD 12 had an alternative means in obtaining water service and (2) whether the PUA changed the computation methodology for the revenue requirement or the rate in such a way as to evidence an abuse of monopoly power.

However, the record lacks any evidence that the PUA is a monopoly. Even if one argues that the PUA changed its rate methodology and if one assumes the PUA is a monopoly, the

record is still void of any evidence that the PUA abused its “monopolistic powers.” Therefore, the Commission and the Administrative Law Judge (“ALJ”) must deny MUD 12’s petition.

II. PARTIES

[No Reply]

III. PROCEDURAL HISTORY

[No Reply]

IV. GENERAL DESCRIPTION OF PROTESTED RATES

[No Reply]

V. JURISDICTION

[No Reply]

VI. THE REQUIRED PUBLIC INTEREST DETERMINATION AND ITS SCOPE

A. The Requirement for an Initial Public-Interest Determination

[No Reply]

B. Public-Interest Considerations in this Case

[No Reply]

C. Cost of Service Analysis is not Relevant to Determining Whether Rates Adversely Affect the Public Interest (P.U.C. Subs. R. 24.133(b))

[No Reply]

VII. DOES THE PROTESTED RATE EVIDENCE WTCPUA’S ABUSE OF MONOPOLY POWER?

A. Is the WTCPUA a Monopoly?

In its brief, MUD 12 claims that the PUA is a monopoly, but fails to provide any evidence to support the claim. In fact, the evidence in the record is not only that the PUA is not a monopoly, but that MUD 12 chose for simple financial convenience to contract for water treatment services from the West Travis County Regional Water System, which is now operated by the PUA.

MUD 12 is located directly on Lake Travis.¹ Furthermore, MUD 12 has a raw water contract with the Lower Colorado River Authority (“LCRA”) to withdraw water from Lake Travis as its water supply.² In 2008, MUD 12 received voter approval for the issuance of to \$84.8 million in general obligation bonds,³ well above the 2014 estimate of \$25.2 million to construct its own water treatment facilities.⁴ The record is void of any MUD 12 estimate of the cost to construct its own water treatment facilities when MUD 12 chose to purchase treated water service from the LCRA. And that’s the point. For its own financial convenience, MUD 12 chose one of the available alternatives for treated water service . . . the LCRA. In fact, Mr. DiQuinzio, the general manager for MUD 12, admitted in his direct testimony that MUD 12 chose service from LCRA for its own convenience:

The Lazy 9 MUD line was constructed by Lazy 9 MUD and is on the south side of Highway 71, across from the Districts. Our Point of Delivery is on the Lazy 9 MUD line.

So, because LCRA's West Travis County Regional WTP had capacity to treat the water needed to serve The Highlands; the Lazy 9 MUD line had transmission capacity that would provide a means to get the treated water to a point of delivery near the Districts; and The Highlands service area is located within the LCRA Service Area, we entered into negotiations with LCRA for wholesale water services.⁵

Between the available alternatives, MUD 12 chose LCRA simply for its own financial convenience . . . because a supply line for another district just happened to run adjacent to MUD 12 and the LCRA water treatment plant had excess capacity.

Besides constructing its own treatment facilities, other suppliers of treated water were available to MUD 12 at the time MUD 12 made its choice between alternatives. Nearly half of the Rough Hollow subdivision receives water treatment services from a neighboring district, Lakeway MUD.⁶ Another neighboring district, Hurst Creek MUD, owns a water intake barge on Lake Travis, which has space available for additional water intake pumps to withdraw raw water

¹ Direct Testimony of Joseph DiQuinzio, MUD 12 Exhibit 1, JAD Exhibit 6.

² Direct Testimony of Joseph DiQuinzio, MUD 12 Exhibit 1, JAD Exhibit 2.

³ Tr. at 31:7-14.

⁴ Tr. at 83:3-8.

⁵ Direct Testimony of Joseph DiQuinzio, MUD 12 Exhibit 1, 6:9-16.

⁶ See e.g., Direct Testimony of Joseph DiQuinsio, MUD 12 Exhibit 1, 4:13-14.

on behalf of MUD 12.⁷ Beside those two neighboring public water systems, Lake Travis had 22 additional intakes for public water suppliers in 2010.⁸ Instead of choosing any of these 22 additional treated water suppliers, or the two neighboring treated water suppliers, or its own treatment facility, MUD 12 chose to obtain water from LCRA (now the PUA) based on its own financial convenience. The fact that MUD 12 could make a choice between so many alternatives demonstrates that the PUA is not a monopoly. If I have a choice between a Toyota Corolla, my neighbor's Mercedes Benz S600, and building my own car by hand, and I choose the Corolla, that choice does not make Toyota a monopoly car company.

As an additional argument, MUD 12 points to Section 7.07(h) of the Acquisition, Water Supply, Wastewater Treatment, and Conditional Purchase Agreement (the "Participation Agreement") as evidence that the PUA is a monopoly.⁹ Section 7.07 list the various covenants between the Participating Entities - the City of Bee Cave, Hays County, and the District. Subsection (h) reads as follows:

(h) No Competition. To the extent permitted by law, [the Participating Entities] will not grant any franchise or permit for the acquisition, construction, or operation of any competing facilities which might be used as a substitute for such Participant's System's facilities, and, to the extent permitted by law, each Participant will prohibit any such competing facilities.

MUD 12 fails to understand two basic tenets about the Participation Agreement. First, the PUA is not a party to the agreement, and the agreement does not have a direct impact on the actions of the PUA. This agreement addresses the actions of the Participating Entities only. Second, this subsection prohibits the Participating Entities, not the PUA, from allowing competing utilities into the existing service areas of each of the other Participating Entities once the Participating Entities created the PUA. Years before creation of the PUA or the execution of this agreement between the Participating Entities, MUD 12 made its choice of which water treatment service provider it would use. The Participating Entities' decision to not allow competing utilities to have parallel systems within each entity's existing service area does not make the PUA a

⁷ Tr. at 121:1-18.

⁸ Lake Travis Raw Water Intakes, Jul 21, 2010, http://www.lcra.org/water/water-supply/water-management-plan-for-lower-colorado-river-basin/Documents/advisory-committee-mtg-archives/lake_travis_water_intake_072110.pdf.

⁹ TCMUD 12's Initial Brief, June 26, 2015, at 23 (MUD 12 Brief).

monopoly. Finally, PUA General Manager Rauschuber testified under cross-examination that the language in the Wholesale Water Services Agreement between LCRA and MUD 12 did not preclude MUD 12 from obtaining treated water from any other source.¹⁰ Clearly, the Participation Agreement does not bind MUD 12 from obtaining treated water service from the multitude of treated water service providers in the area. Furthermore, the PUA is not bound to fight the existence of any third party alternative treated water service providers.

B. Disparate Bargaining Power of the Parties (P.U.C. Subs. R. 24.133(a)(3)(A))

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

[Not Addressed]

2. Are there Other Disparate Bargaining Power Factors?

[Not Addressed]

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

[Not Addressed]

C. Methodology for Computation of Revenue Requirement and Rate (P.U.C. Subs. R. 24.133(a)(3)(C))

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

As the District highlighted, one could argue that the PUA did change its revenue requirement methodology or established its first revenue requirement methodology when the Board adopted the rates in November 21, 2013. However, even if, *arguendo*, the PUA did change its revenue requirement methodology and assuming the PUA is a monopoly, that change does not mean the PUA abused any monopolistic power. On the contrary, the fact that the PUA Board adopted the November 2013 rates based upon a sound, scientific methodology is the exact opposite action from abusing one's monopolistic power. As the Administrative Law Judge found in the *Appeal of Navarro County Wholesale Ratepayer to Review the Wholesale Rate*

¹⁰ Tr. at 373:23 - 374:1

Increase Imposed by the City of Corsicana, a change in methodology for either the revenue requirement or the rate does not necessarily indicate an abuse of monopolistic power.¹¹

The language of 16 TAC§ 24.133(a)(3), which sets out specific factors, also states that “all relevant factors” *may be considered* in determining whether the protested rates evidence the seller’s abuse of monopoly power. Even if the PUA did change its revenue requirement methodology, the Commission should not consider a change to a reasoned, scientific methodology as an abuse of monopoly power.

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

Again, as the District highlighted in its Initial Brief, one could argue that the PUA did change its rate methodology or established its first rate methodology when the Board adopted the rates in November 21, 2013. And again, even if, *arguendo*, the PUA did change its rate methodology and assuming the PUA is a monopoly, that change does not mean the PUA abused any monopolistic power. On the contrary, the fact that the PUA Board adopted the November 2013 rates based upon a sound, scientific methodology is the exact opposite action from abusing one’s monopolistic power. A change in methodology for either the revenue requirement or the rate does not necessarily indicate an abuse of monopolistic power.¹²

Again, the language of 16 TAC§ 24.133(a)(3), which sets out specific factors, states that “all relevant factors” *may be considered* in determining whether the protested rates evidence the seller’s abuse of monopoly power. Even if the PUA did change its rate methodology, the ALJ and the Commission should not find that the change to a reasoned, scientific methodology is an abuse of monopolistic power.

¹¹ *Appeal of Navarro County Wholesale Ratepayer to Review the Wholesale Rate Increase Imposed by the City of Corsicana*, SOAH Docket No. 582-10-1944; TCEQ Docket No. 2009-1925-UCR, Proposal for Decision at 50 (August 17, 2011) (PFD).

¹² *Appeal of Navarro County Wholesale Ratepayer to Review the Wholesale Rate Increase Imposed by the City of Corsicana*, SOAH Docket No. 582-10-1944; TCEQ Docket No. 2009-1925-UCR, Proposal for Decision at 50 (August 17, 2011) (PFD).

3. Conclusion: If there was a change in the Methodology for the Computation of the Revenue Requirement or the Rate, does the Protested Rate evidence WTCPUA's Abuse of Monopoly Power?

No. Even if the PUA changed its methodology from adopting the former operator's rates verbatim to a method that used a scientific and rational basis for determining its revenue requirement and rates, the ALJ and the Commission should not find the change an abuse of monopoly power. As the ALJ found in the *Navarro* case, a change in and of itself is not an abuse of monopolistic power. In this case, *arguendo*, the change in methodologies was both rational and the very opposite of abuse of power. If a change occurred, it provided all wholesale customers, including MUD 12, with a reasoned approach to developing the PUA revenue requirement and rates. It is not an abuse of monopoly power for the PUA to switch from its prior, arbitrary adoption of a rate to a methodology in which there is not any evidence of wrong doing,

VIII. TRANSCRIPTION COSTS

Under SOAH rules, the court reporter is required to make a stenographic record of the proceeding, but the court report provides a transcript only on the request of a party or the judge.¹³ In accordance with the same rule, the costs of a transcript provided to a party ordinarily should be borne by that party.¹⁴ The ALJ should split transcription costs between the parties that ordered a transcript of the proceeding. The District did not order a transcript and should not bear any of the costs for a transcript.

IX. CONCLUSION AND PRAYER

Based upon the arguments presented above, West Travis County Municipal Utility District No. 5 respectfully requests that the ALJ issue his Proposal for Decision and find that the complained rates of the PUA are not against the public interest.

¹³ 1 TEX. ADMIN. CODE § 155.423(e).

¹⁴ *Id.*