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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
HAYS COUNTY, TEXAS AND WEST
TRAVIS COUNTY MUNICIPAL
UTILITY DISTRICT NO. 5**

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARING

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**INITIAL BRIEF OF
HAYS COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF TEXAS**

Comes now Hays County, a political subdivision of the State of Texas and a Participant Entity in the West Travis County Public Utility Agency (hereinafter "*WTCPUA*"). In that capacity as a Participant Entity, Hays County has been named as a Party to the above-styled cause, and hereby submits the following brief, pursuant to Order No. 17 of this Honorable Court:

SUBMITTED BY:

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WEST TRAVIS COUNTY PUBLIC UTILITY AGENCY**

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I. INTRODUCTION

Hays County hereby adopts the Initial Brief of the WTCPUA, with which it considers itself aligned. The following Initial Brief of Hays County is meant to supplement the Initial Brief of the WTCPUA. All references to the Evidentiary Hearing held between April 21, 2015 and April 23, 2015 shall be made as “E.H., p. __, ll. __”

On or about the 6th of March, 2014, Travis County MUD No. 12 (hereinafter “**MUD 12**”), purporting to represent itself as well as Travis County MUDs No. 11 and No. 13,¹ filed the above-cited cause with the Texas Commission on Environmental Quality, challenging the Rates of WTCPUA that became effective on or about January 1, 2014.² MUD 12 sued not only the WTCPUA, but also each of its **Participant Entities**: Hays County, the City of Bee Cave, and Travis County MUD No. 5 (all Parties, including the WTCPUA shall be collectively referenced as “**Providers**”). This cause was transferred to the Texas Public Utilities Commission (the “**Commission**”) on or about September 4, 2014.

MUD 12’s claim hinges, in part, on its accusation that the rate methodology used by the WTCPUA changed just prior to the adoption of the January 1, 2014 rates; and MUD 12’s claim has been filed despite the undisputed fact that the January 1, 2014 rates were actually *lower* than the rates for the prior year. In fact, that new rate was lower than the last rate MUD 12 paid under its arrangement with LCRA, prior to the WTCPUA’s acquisition of the system(s) from LCRA.³

Despite the establishment of a lower rate, MUD 12 has alleged that the WTCPUA, and, by association, its Participant Entities, possessed monopoly power over MUD 12 and abused that monopoly power in its dealings with MUD 12. One factor that could reveal the abuse of

¹ E.H., p. 28, ll. 25 and p.29, ll.1-22.

² E.H., p.9, ll. 15-16.

³ E.H., p.15, ll. 10-16.

monopoly power, under Texas Public Utility Commission Rule, 16 TAC 24.133(a)(3)(C), is that the methodology used in establishing that rate has been changed. However, as recognized by all parties in this cause, the modification of rate methodology is but *one factor* that *may indicate* monopoly power has been abused. All factors described under 16 TAC 24.133(a)(3) are as follows:

- (A) the *disparate bargaining power* of the parties, including the purchaser's *alternative means*, alternative costs, environmental impact, regulatory issues, and problems of obtaining alternative water or sewer service;
- (B) the seller's failure to reasonably demonstrate the changed conditions that are the basis for a change in rates;
- (C) the seller *changed the computation of the revenue requirement or rate from one methodology to another*;
- (D) where the seller demands the protested rate pursuant to a contract, other valuable consideration received by a party incident to the contract;
- (E) incentives necessary to encourage regional projects or water conservation measures;
- (F) the seller's obligation to meet federal and state wastewater discharge and drinking water standards;
- (G) the rates charged in Texas by other sellers of water or sewer service for resale;
- (H) the seller's rates for water or sewer service charged to its retail customers, compared to the retail rates the purchaser charges its retail customers as a result of the wholesale rate the seller demands from the purchaser (emphasis added).

While MUD 12's argument focuses on subsections (A) and (C), and while this Court, in Order No. 13, granted Partial Summary Judgment in favor of Providers related to subsections (B) and (D) through (H),⁴ it is important to note that this Court may, and should, consider evidence that *counterweighs* subsection (G), as a factor. If the Commission feels that these criteria are each important enough to include as factors that may show abuse of monopoly power, then evidence, under subsection (G), that the WTCPUA has *bettered* "the rates charged in Texas by

⁴ See SOAH Order No. 13 (March 24, 2015).

other sellers of water” should, indeed, be relevant and persuasive. As noted above, the protested rates represent a *decrease* from the existing rate. Importantly, in the context of subsection (G), these decreased rates are actually lower than the rates established by the Lower Colorado River Authority (“*the LCRA*”) in its 2009 Agreement with MUD 12 and its affiliate MUDs. The monthly rate charged by LCRA was \$9,430.00, as compared to the protested monthly rate of \$8,140.89, and the volumetric rate charged by the LCRA was \$2.40 per 1,000 gallons, while the protested volumetric rate was \$2.11 per 1,000 gallons.⁵

Even if this Court is not persuaded by the more favorable rates enjoyed by MUD 12 after the November 21, 2013 rate change, and even if this Court finds that the WTCPUA possessed monopoly power, MUD 12 has failed to qualify subsections (A) and (C) as factors for this Court’s consideration. Furthermore, even if this Court finds sufficient evidence to “check the box” under subsections (A) and (C), MUD 12 has failed to show, considering *all relevant factors*, that any abuse of power occurred.

II. PARTIES

Party

Representative

WTCPUA

David Klein, Georgia Crump, and Melissa Long

City of Bee Cave, Texas

Jim Haley

Hays County, Texas

Mark D. Kennedy

MUD No. 5

Randall Wilburn

MUD No. 12 (Petitioner)

Kay Trostle and Miguel Huerta

Commission Staff

Jessica Gray and Sam Chang

⁵ Direct Testimony of Don Rauschuber, Exhibit 1 at 32.

III. PROCEDURAL HISTORY

Below is a list of the major procedural events in this case:

| <u>Date</u> | <u>Event</u> |
|---------------------------|---|
| <u>March 6, 2014</u> | Petition of TCMUD 12 filed at TCEQ |
| <u>June 11, 2014</u> | Preliminary Hearing at State Office of Administrative Hearings |
| <u>July 14, 2014</u> | Beginning of Discovery |
| <u>August 15, 2014</u> | Deadline for requests for disclosure |
| <u>September 4, 2014</u> | Matter transferred to Public Utility Commission by Nunc Pro Tunc Order No. 3 |
| <u>September 11, 2014</u> | Prehearing conference to consider adjustments necessary due to transfer of jurisdiction from the TCEQ to the Commission |
| <u>October 31, 2014</u> | Deadline for TCMUD 12 to prefile its direct case in writing, including all testimony and exhibits |
| <u>December 19, 2014</u> | Deadline for parties other than TCMUD 12 and Commission Staff to prefile their direct case in writing, including all testimony and exhibits |
| <u>February 6, 2015</u> | Deadline for Commission Staff to prefile its direct case in writing, including all testimony and exhibits |
| <u>March 6, 2015</u> | Discovery to TCMUD 12 on direct case ends; deadline to file motions for summary decision |
| <u>March 6, 2015</u> | WTCPUA files Motion for Partial Summary Decision |
| <u>March 17, 2015</u> | Deadline to file objections to and motions to strike any prefiled direct-case evidence |
| <u>March 18, 2015</u> | Deadline to file responses to motions for summary decision |

| | |
|-----------------------|--|
| <u>March 20, 2015</u> | Discovery ends for non-rebuttal discovery |
| <u>March 24, 2015</u> | Deadline for TCMUD 12 to file rebuttal evidence |
| <u>March 25, 2015</u> | SOAH Order No. 13 Granting Part and Denying Part of Motion for Partial Summary Decision |
| <u>March 31, 2015</u> | Deadline to propound discovery concerning TCMUD 12's rebuttal. |
| <u>March 31, 2015</u> | Deadline to file responses to objections and motions to strike direct-case prefiled evidence |
| <u>April 8, 2015</u> | Deadlines for Parties' objections to prefiled rebuttal testimony of TCMUD 12 |
| <u>April 10, 2015</u> | Deadline to conduct depositions |
| <u>April 13, 2015</u> | Prehearing conference held |
| <u>April 15, 2015</u> | Deadline for TCMUD 12's responses to objections to rebuttal testimony |
| <u>April 21, 2015</u> | Hearing on the public interest begins |
| <u>April 23, 2015</u> | End of hearing on the public interest |

IV. GENERAL DESCRIPTION OF PROTESTED RATES

The protested rates were adopted by the WTCPUA Board on November 21, 2013. The rates are a combination of a monthly charge and volumetric rate, both of which, as previously stated, *decreased* from the rates that preceded the November 21, 2013 action of the WTCPUA. The protested rates are represented by a monthly charge of \$8,140.89 and a volumetric rate of \$2.11 per 1,000 gallons.⁶

⁶ Direct Testimony of Don Rauschuber, Exhibit 1 at 32.

V. JURISDICTION

Jurisdiction properly lies with the State Office of Administrative Hearings, on referral of the Public Utilities Commission pursuant to 16 TAC 24.128 – 24.138. The Administrative Law Judge took jurisdiction over this matter pursuant to Texas Water Code § 13.043(f), but did not rule upon or assume jurisdiction over other matters alleged by MUD 12.⁷

VI. THE REQUIRED PUBLIC INTEREST DETERMINATION AND ITS SCOPE

A. The Requirement for an Initial Public-Interest Determination

Public Utility Commission Rule 24.132 states that “[i]f the commission forwards a petition to the State Office of Administrative Hearings pursuant to §24.131(a) and (b) of this title, the State Office of Administrative Hearings *shall* conduct an evidentiary hearing on public interest to determine whether the protested rate adversely affects the public interest” (emphasis added). Only if the State Office of Administrative Hearings determines that the protested rate “adversely affects the public interest” will a second phase of this cause be initiated via a remand order from the commission, ordering “further evidentiary proceedings on the rate.”⁸

B. Public-Interest Considerations in This Case

This Court has determined that Texas Public Utility Commission Rule 24.133, subsections (a)(3)(A) and (a)(3)(C) are the only public interest considerations in this case. Hays County’s brief will not address public interest arguments under Texas Public Utility Commission Rule 24.133(a)(1), (a)(2), or (a)(4).

⁷ See SOAH Order No. 1 (Jun. 12, 2014).

⁸ 16 TAC 24.134 (b).

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

As noted in Texas Public Utility Commission Rule 24.133(b), the Commission, and therefore this Court, “shall not determine whether the protested rate adversely affects public interest based on an analysis of the seller’s cost of service. Hays County’s brief will not address public interest arguments that conflict with Texas Public Utility Commission Rule 24.133(b), because cost of service analysis in making a public interest determination “does not give sufficient deference to contractual agreements between the seller and purchaser.”⁹

VII. DOES THE PROTESTED RATE EVIDENCE WTCPUA’S ABUSE OF MONOPOLY POWER? (P.U.C. Subst. R. 24.133(a)(3))

Concluding that the WTCPUA abused monopoly power under 16 TAC 24.133 requires several independent findings by this Court. First, a monopoly must exist. Secondly, the WTCPUA must use the power associated with its monopoly status in a way that is abusive and contrary to the interests of the public. As stated above, 16 TAC 24.133(A)(3)(A) and (C) are factors that may point toward abuse of monopoly power, but they are not always an indicator of abuse.¹⁰ If this Court finds that a monopoly exists, then this Court should consider all relevant factors in determining whether an abuse of monopoly power occurred.

A. Is the WTCPUA a Monopoly?

In order to properly analyze whether the WTCPUA is a monopoly, one should consider that, prior to executing its agreement for wholesale water services with LCRA in 2009, MUD 12 had an option to seek out alternative providers. It did not do so. Instead MUD 12 and its

⁹ WTCPUA Ex. 76.

¹⁰ SOAH Docket No.582-10-1944, TCEQ Docket No. 2009-1925-UCR.

affiliate MUDs opted to “buy into” the LCRA system.¹¹ The time frame for the development of MUD 12’s decision is still relatively short. Their discretion to allow LCRA (and, by virtue of its acquisition of the systems, the WTCPUA) to become a sole source provider happened only about six years ago, and it appears to have happened because it was a cheaper alternative to constructing a MUD 12 water treatment plant¹².

While Joseph Diquenzio, General Manager of MUD 12, contends that MUD 12 could not have issued the debt it would have taken to construct a water treatment plant in 2009, he altogether ignores how MUD 12 managed to “buy into” the LCRA system: by participation from developer as cosigner or guarantor.¹³ So options were certainly available to MUD 12, with the support of developer, which is how MUD 12 negotiated and attained the predecessor to its existing wholesale water contract.

A significant consideration in determining the existence of a monopoly in this case, according to MUD 12’s expert Dr. Jay Zarnikau, is his belief that there are “formidable barriers to entry” into MUD 12’s market.¹⁴ Although, as will be pointed out in the next section, there remain current opportunities for alternative water resources, it cannot be ignored that MUD 12 has played a significant role in creating the current market in its area.

Considering MUD 12’s role in establishing the WTCPUA as its sole-source provider, and considering the fact that alternative means continue to exist (see below), it is Hays County’s belief that the WTCPUA cannot be construed as a monopoly.

¹¹ E.H., p. 96, ll.3-7.

¹² E.H., p.96, ll.8-21.

¹³ E.H., p.118, ll.5-25.

¹⁴ E.H., p.276, ll.1-14.

B. Disparate Bargaining Power of the Parties (P.U.C. 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?

MUD 12 claims that a considerable factor in its claim that a monopoly exists is that there are “formidable barriers to entry” into MUD 12’s market. Dr. Jay Zarnikau conceded, however, that his finding that a monopoly exists is based upon assumptions that were provided to him, primarily by Mr. Diquenzio.¹⁵ Those assumptions provided by Mr. Diquenzio do not comport with reality.

Mr. Diquenzio states that in his dealings with the Hurst Creek MUD, it “was obvious that they barely have enough water to satisfy their own internal demands.”¹⁶ This statement, however, ignores any possibility of partnering with Hurst Creek MUD to expand the capacity of its system. Mr. Diquenzio recognizes that the Hurst Creek MUD barge has the capacity to expand, in which case the Hurst Creek MUD would have more water than is required to satisfy their internal demands.¹⁷ Yet, he admits that he has never provided them with a request for additional water services.¹⁸ The only barrier to entry in this instance, it seems, is the formidable inability of these two municipal utility districts to have a productive conversation about existing capacity and how to fund expansion of existing capacity.

Mr. Diquenzio also identifies the “Rough Hollow” system as an emergency interconnect that is available to MUD 12.¹⁹ Again, he conclusively states that it would not be available for long-term (and may not even be available for emergency) use, but that conclusion seems to be

¹⁵ E.H., p.276, ll.1-14 and p.277, ll.10-17.

¹⁶ E.H., p.120, ll.22-25.

¹⁷ E.H., p.121, ll.1-18 and p.124, ll.

¹⁸ E.H., p.65, ll.8-19.

¹⁹ E.H., p.84, ll.12 to p.85, ll.23.

drawn without extensive, exploratory communication. Mr. Diquenzio appears satisfied to simply state that the Lakeway MUD “has, to date, refused to entertain any discussions of using that line.”²⁰

In addition to these alternatives, the City of Austin could provide water to MUD 12, or MUD 12 could, itself, provide water. Mr. Diquenzio summarily declares these alternatives as “prohibitive from a cost standpoint...[and] for a variety of reasons,”²¹ but there seems to be a general lack of interest in exploring these alternatives in enough detail to really test feasibility. These existing barriers to entry are self-inflicted. They are perception. Alternative means were available to MUD 12 in 2009, and alternative means remain available.

2. Are There Other Disparate Bargaining Power Factors?

Hays County believes there are no other disparate bargaining power factors, but reserves the option to address those raised by MUD 12’s Initial Brief in its Responsive Brief.

3. Conclusion: If there was disparate bargaining power, does the protested rate evidence WTCPUA’S abuse of monopoly power?

Assuming that this Court finds that the WTCPUA possessed monopoly power, nothing in the record of the evidentiary hearing establishes that the WTCPUA abused such power.

The testimony of Mr. Diquenzio illustrates the imbalance that results from MUD 12’s effort to construe the WTCPUA as abusive in its bargaining activities. During his testimony, Mr. Diquenzio exerted great effort to deny that he had ever *actually* received communications from Donald Rauschuber, General Manager of the WTCPUA, during the time the Parties were negotiating the protested wholesale rates.²² Mr. Diquenzio’s testimony appeared to be an effort

²⁰ E.H., p.85, ll.8-17.

²¹ E.H., p. 108, ll.16-17.

²² E.H., p.46, ll.20 to p.48, ll.14.

to isolate the negotiation of the protested rate to Mr. Jay Joyce, MUD 12's rate analyst, and select others,²³ while construing the negotiation as a unilateral action by the WTCPUA. This also removed Mr. Diquenzio from any obligation to testify about the fact that the Parties truly negotiated the contract that resulted in the protested rate. Mr. Joyce's Direct Testimony, however, revealed that Mr. Diquenzio was, indeed, involved in communications during the negotiation of the protested rate.²⁴ He, like other members of MUD 12, received communications from Mr. Rauschuber during the negotiation.²⁵

On the other hand, from Mr. Rauschuber's point of view, MUD 12 was given plenty of opportunity to voice its concerns in "multi-hour meetings in which there was a lot of exchange of information."²⁶ In those meetings, many benefits to wholesale customers were discussed and considered.²⁷ These are not the activities of an overpowering, abusive monopolist. Rather, they are the "inactivities" of MUD 12's representatives, who opted not to attend those meetings between the WTCPUA and its wholesale customers.²⁸

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

1. Did WTCPUA change the methodology for the computation of the revenue requirement?

Based upon the testimony of Jack Stowe, on behalf of the WTCPUA, and Heidi Graham, on behalf of the Commission, it seems clear that the methodology for the computation of the revenue requirement did not change. Mr. Stowe's testimony concludes that a cash needs

²³ E.H., p. 46, ll. 9-13.

²⁴ Rebuttal Testimony of Jay Joyce, MUD 12 at 44 (and documents cited therein). *See also* E.H., p.58, ll.19 to p.60, ll.15.

²⁵ E.H., p. 59, ll.17-25 and p. 60, ll.1-15.

²⁶ E.H., p.388, ll.24-25.

²⁷ E.H., pp.390-91.

²⁸ E.H., pp.129, ll.10 to pp.130, ll.16.

methodology was used to establish the revenue requirement for both the protested rates and the former rates,²⁹ and Ms. Graham, on behalf of the Commission, agrees.³⁰ Although Jay Joyce, MUD 12's witness, felt compelled, contrary to 16 TAC 24.144(b), to delve into costs of service analysis, even he eventually agreed that a cash basis methodology was used consistently.³¹

2. Did WTCPUA change the methodology for the computation of the rate?

Testimony from Jay Joyce regarding the methodology used for the computation of the rate served to confuse matters greatly.³² Mr. Joyce's position is that "changing the methodology means changing the components of the calculations,"³³ which he interprets as a "single methodology to change rates."³⁴ This was the basis for Mr. Joyce's conclusion that the methodology for the computation of the rate had changed, even though Mr. Joyce recognizes that the methodology used to compute the rate is (and has previously been) a combination of monthly charge and volumetric rate, as described above.³⁵ In other words, despite his confusion, Mr. Joyce actually agrees that the methodology has not changed.

Jack Stowe's testimony clarifies and reconciles the source of confusion, which deals with "customer class cost allocations."³⁶ In the opinion of Mr. Stowe, an opinion with which Heidi Graham concurs,³⁷ it is erroneous to argue, as Mr. Joyce does, that there was a change in methodology simply because there was a change in allocation factors between fiscal year 2013

²⁹ Direct Testimony of Jack E. Stowe, WTCPUA Ex. 3 at 11-13.

³⁰ E.H., pp.399, ll.19-23.

³¹ E.H., pp.148, ll.25 to pp.149, ll.13.

³² E.H., p134, ll.21 to p.136, ll.5.

³³ E.H., pp.133, ll. 21-22.

³⁴ E.H., pp.135, ll. 25 to pp.136, ll.1.

³⁵ E.H., pp 168, ll.19 to pp.169, ll.8.

³⁶ E.H., pp.363, ll.4-16.

³⁷ E.H., pp.400, ll.2-14.

and fiscal year 2014.³⁸ Interpreting a change in allocation factors to mean that a complete change in methodology has occurred would likely trigger public interest factors under 16 TAC 24.133 for most water providers in *any given year*, particularly in areas of high growth like central Texas. For these reasons, Mr. Joyce's position seems untenable and contrary to good public policy. The methodology for the computation of rate did not change when the protested rate was adopted. Construing it as such is a slippery slope.

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?

16 TAC 24.133 identifies some factors that *may* be included, but the overarching rule is that the Court *shall* consider all relevant factors. Hays County does not believe that there was a change in the methodology for the computation of the revenue requirement or rate. However, if this Court finds that one of those factors has been triggered, the existence of a change under 16 TAC 24.133(a)(3)(C) does not conclusively point toward the WTCPUA's abuse of monopoly power. First of all, a monopoly must be determined to exist, which requires ignorance of the alternative means available to MUD 12 (and its failure to genuinely explore those alternative means). If a monopoly is found, then consideration of other relevant factors is also important, including WTCPUA's willingness to negotiate the wholesale contract with its customers and the approximately twelve to fourteen percent (12-14%) *reduction* in rates between fiscal years 2012 and 2013.

VIII. TRANSCRIPTION COSTS

Hays County is not claiming transcription costs in this cause.

³⁸ E.H., pp.363, ll.17-24.

IX. CONCLUSION AND PRAYER

Hays County, as a Participant Entity in the West Travis County Public Utility Agency, prays that this Court finds, in descending alternative order that:

- 1) the WTCPUA is not a monopoly for the purposes of 16 TAC 24.133; or
- 2) the WTCPUA, and, by association its Participant Entities, did not abuse monopoly power based on consideration of:
 - a) disparate bargaining power, if any, held by the WTCPUA due to a lack of alternative means of water resources for MUD 12,
 - b) a change, if any, in the methodology for computing the revenue requirement or the rate, and
 - c) other relevant factors.

Respectfully submitted,



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**ATTORNEY FOR HAYS COUNTY, TEXAS
PARTICIPANT ENTITY –
WEST TRAVIS COUNTY PUBLIC UTILITY AGENCY**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was transmitted by e-mail, fax, hand-delivery and/or regular, first class mail on this 26th day of June, 2015, to the parties of record.

A handwritten signature in black ink, appearing to read 'Mark D. Kennedy', is written over a horizontal line.

MARK D. KENNEDY