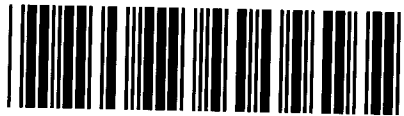


Control Number: 43114



Item Number: 20

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DOCKET NO. 43114

RECEIVED
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PUBLIC UTILITY COMMISSION
FILING CLERK
OF TEXAS

APPLICATION OF CITY OF §
MIDLOTHIAN AND MOUNTAIN §
PEAK SPECIAL UTILITY DISTRICT §
FOR SALE, TRANSFER AND MERGER §
OF CERTIFICATE RIGHTS IN §
ELLIS COUNTY §

CITY OF MIDLOTHIAN'S
RESPONSE TO ORDER NO. 2

TO THE HONORABLE JUDGE SUSAN E. GOODSON:

NOW COMES, the City of Midlothian, Texas (City or Midlothian) and files this Response to Order No. 2 (Sept. 14, 2015). Order No. 2 established a deadline for the City and the Mountain Peak Special Utility District (Mountain Peak) to provide additional information as to the status and next steps required for this proceeding.¹ This response is timely.

I. APPROVAL OF CONTRACT BETWEEN CCN-HOLDERS SOUGHT

The joint applicants' recently filed notices of appearance² confirm that this proceeding (originally filed in 2008 before the Texas Commission on Environmental Quality (TCEQ)), is intended to effectuate a 2008 service area agreement under TEX. WATER CODE § 13.248.³ The staff of the TCEQ had agreed with that Section 13.248 applied.⁴ Delays notwithstanding, the Commission should now promptly effectuate the Agreement which:

¹ Order No. 2 at 2 (establishing Sept. 29, 2015 as the "Deadline for the Applicants to clarify the intent of the Application and to provide proof of notice issued (including affidavits, evidence of publication of notice, a sample of the notice issued and accompanying map)").

² See *City of Midlothian's Notice of Appearance* (Sept. 9, 2015) (PUC Interchange Item 15) and *Mountain Peak's Notice of Appearance* (Sept. 15, 2015) (PUC Interchange Item 18).

³ *Retail Water Service Area Agreement Among the City of Midlothian and Mountain Peak Special Utility Agreement*, Attachment #1 to the Application, PUC Docket 43114, Interchange No. 1 at PDF p. 29-32 (Agreement). Although amended in 2012, the changes do not affect the nature of this proceeding. A copy of the *Amendment to Retail Water Service Area Agreement Among the City of Midlothian and Mountain Peak Special Utility District* is attached.

⁴ See, e.g., Letter of Sept. 29, 2010, to D. Miller (Mountain Peak counsel) from T. Benter, Manager (TCEQ Utilities & Districts Section) (referencing "Contract Service Agreement Pursuant to Texas Water Code, Section

- Converts a 43-acre dually-certificated area into an area singly-certificated to the City. This area has no retail water customers. The City has been ready, willing and able to serve customers, just as it has been ready, willing and able to serve since before 2008; and
- Transfers a 119-acre residential development and immediately adjoining lands from the City to Mountain Peak. In 2008, only 3 retail water customers existed at the site, but the development has added other customers who, in the interim, have been served by Mountain Peak.

Order No. 2 provides a means for the parties to confirm the extent and types of notice provided; however, it appears that the TCEQ did not direct the issuance of notice while determinations were being made as to the controlling TWC provision, i.e., that this application would be treated as a request for approval of a service area agreement under Section 13.248.⁵

II. NEXT STEPS IN THIS PROCEEDING

When considering such an agreement, the City asserts that, to the extent any notice is required, only notice applicable to CCN amendments is appropriate, since co-applicants are existing CCN holders and neither is having its CCN involuntarily revoked. The existing statutory scheme supports the City's assertion, particularly where certain notice provisions are expressly not required when dealing with Section 13.248 applications. *See* TEX. WATER CODE § 13.246(a-1) (providing exception to additional notice under subsection for matters under "Section 13.248 or 13.255...."). To the extent that the record is inconclusive as to whether notices were ordered to be issued by the TCEQ, the Commission is now in a position to address the situation.

13.248, from Mountain Peak Special Utility District (SUD), Certificate of Convenience and Necessity (CCN) No. 10908, to Transfer a Portion of CCN No. 11706 from the City of Midlothian and to Decertify a Portion of CCN No. 10908, in Ellis County; Application No. 36233-C" and enclosing consent form for map reflecting changes requested) (PUC Interchange Item 12).

⁵ Section 13.248 ("Contracts Valid and Enforceable"): provides:

Contracts between retail public utilities designating areas to be served and customers to be served by those retail public utilities, when approved by the utility commission after public notice and hearing, are valid and enforceable and are incorporated into the appropriate areas of public convenience and necessity.

As suggested in the City's Notice of Appearance, we request that the style in PUC Docket No. 43114 accurately reflect the co-applicants' intent to obtain Commission approval of a service area agreement under Section 13.248.

Under PUC SUBST. R. 24.107(b), a hearing may be unnecessary. Should a hearing be called, the City requests an expedited schedule and recommends and requests that the informal disposition process contemplated under PUC SUBST. R. 24.11(a) be followed in order to save both time and costs for all involved.

III. COORDINATION WITH CO-APPLICANT

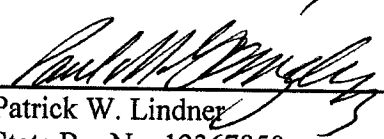
The City has been in contact with co-applicant, Mountain Peak. Mountain Peak is submitting its Response to Order No. 2, which is consistent with the City's instant filing and, as such, would engender the City's full concurrence and support.

To the extent the Honorable Administrative Law Judge or Commission Staff require additional information, the City is available to assist in the prompt administration of this proceeding.

Respectfully submitted,

DAVIDSON, TROILO, REAM & GARZA, P.C.

By:


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ATTORNEYS FOR THE CITY OF MIDLOTHIAN

CERTIFICATE OF SERVICE

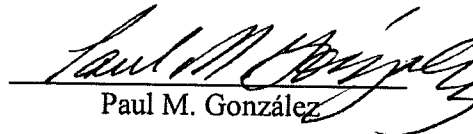
I hereby certify that a true and correct copy of the foregoing document has been delivered by First Class Mail, facsimile and/or electronic mail to the following persons on this 29th day of September 2015:

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Attorneys for Mountain Peak Special Utility District


Paul M. González

**AMENDMENT TO
RETAIL WATER SERVICE AREA
AGREEMENT AMONG THE CITY OF MIDLOTHIAN AND
MOUNTAIN PEAK SPECIAL UTILITY DISTRICT**

THIS AMENDMENT is made between the City of Midlothian, a Texas home rule municipality (the "City") and Mountain Peak Special Utility District ("Mountain Peak"), collectively the "Parties," pursuant to the following considerations:

WHEREAS, the City and Mountain Peak entered into an agreement ("Retail Water Service Area Agreement Among the City of Midlothian and Mountain Peak Special Utility District," referred to as "Agreement") that was executed on May 28, 2008 by Mountain Peak and on June 2, 2008 by the City; and

WHEREAS, as part of this Agreement, the City has agreed to transfer approximately 119 acres of land known as Cotton Creek Ranch PD to Mountain Peak and Mountain Peak has agreed to grant the City the exclusive right to provide water service to approximately 43 acres within the Dual Certificated Area; and

WHEREAS, as part of this Agreement, Mountain Peak has agreed to grant the City the right to provide water service to 25 acres of land, south of Old Fort Worth Highway and west of U.S. Highway 287 under certain conditions set forth within the Agreement; and

WHEREAS, paragraph 7 states that the Agreement will expire unless the Texas Commission on Environmental Quality (TCEQ) approves the Agreement on or before March 1, 2009 (or until such later date on which the TCEQ acts on the application, provided the application therefore is still pending and the Parties are exercising due diligence to prosecute it); and

WHEREAS, paragraph 8 states that the transfers and agreements by this Agreement will be effective upon approval by the TCEQ; and

WHEREAS, the TCEQ has reviewed this Agreement and the applications submitted by the Parties and has revised and submitted a map depicting the effective areas to the Parties; and

WHEREAS, the Parties agree that the areas covered by the Agreement have been accurately depicted on the map submitted by the TCEQ; however, the Parties are not in agreement with the overall map; and

WHEREAS, the Parties have an agreement (the "Dual Certification Agreement") dated November 4, 1996, that provides that either Party may consent on a case-by-case basis to the other Party providing water service within the "Dual Certificated Area"; and

WHEREAS, Mountain Peak is currently providing retail water service to all of Cotton Creek Ranch and certain contiguous lands; and

WHEREAS, the City is ready, willing and able to serve the approximate 43 acres within the "Dual Certificated Area" *(the triangular acreage between U.S. Highway 287, Business 287/Main Street and U.S. Highway 67);* and

WHEREAS, the Parties wish to complete the transfer detailed in the "Agreement" without the provision of receiving approval by the TCEQ.

NOW THEREFORE, the Parties, for good and valuable consideration, agree to amend the "Agreement" as follows:

Paragraph 1 shall be amended as follows:

1. The City hereby transfers and conveys to Mountain Peak, ~~subject to the approval described in paragraph 7 below,~~ the approximate 119 acres of its CCN known as Cotton Creek Ranch PD and the contiguous area west of U.S. Highway 287, as shown on Exhibit "A" that is attached.

Paragraph 3 shall be amended as follows:

3. Mountain Peak also agrees to cede to the City the exclusive right to provide water service to up to 25 acres, the location and boundaries of which are to be determined by the City in its sole discretion, provided (a) the City provides a written notice (the "Service Notice") to Mountain Peak of any proposed tract with a description and survey or plat of the land involved (a "Proposed Tract"); (b) the Proposed Tract is located within one-quarter mile south of Old Fort Worth Highway and/or one quarter mile west of U.S. Highway 287 (the "Option Area") and, together with any previously designated Proposed Tracts, does not exceed an aggregate area of 25 acres; (c) the Proposed Tract is contiguous to any previously designated Proposed Tracts located ~~such that it has roadway frontage~~ and is in a shape that will not leave isolated or difficult-to-serve pockets (including flagged lots) of the remainder of the Dual Certificated Area and flag-lots or the Option Area for service by Mountain Peak (and if Mountain Peak does not object via written notice to the City within 30 days of its receipt of the Service Notice, the Proposed Tract will be conclusively presumed to be acceptable); and (d) to the extent the City has not provided retail water service to any portion of the Option Area or to any Proposed Tract within two five years after the date ~~the Texas Commission on Environmental Quality ("TCEQ") approves the application described in paragraph 7 below,~~ that the last Party executes this Amended Agreement, the right of the City to provide retail water service in the Option Area as described in this paragraph 3 expires and reverts back to the original dual service agreement.

Paragraph 4 shall be amended as follows:

4. Mountain Peak agrees to allow any person wanting service within the 43-acre tract and the Option Area described above to connect to the City, subject to the terms of this Agreement. ~~pending the approval by TCEQ of this Agreement. The Parties understand that this is a temporary connection and will cooperate to return to the status quo prior to this Agreement if it is not approved by TCEQ and implemented in its entirety.~~

Paragraph 5 shall be amended as follows:

5. ~~Subject to approval of the transfers described in this Agreement by TCEQ,~~ All water distribution infrastructure, such as pipelines, valves, and fire hydrants, owned by the City and located exclusively within the Cotton Creek Ranch Subdivision being transferred to the CCN of Mountain Peak are hereby transferred, assigned and conveyed to Mountain Peak, "as is, where is", with no express or implied warranties, except as to ownership.

Paragraph 7 shall be deleted in its entirety:

~~7. Section 13.248 TCEQ Approval. Within forty-five (45) days following the execution of this Agreement the Parties will jointly file the appropriate documents requesting approval of this retail service area agreement pursuant to Section 13.248 of the Texas Water Code. The Parties will fully cooperate with each other regarding this application and not take any action to directly or indirectly oppose this application. Each party will pay their respective costs relating to the application. This Agreement will expire, except for paragraph 4 above, unless TCEQ approves the agreements described herein which are subject to its approval on or before March 1, 2009 (or until such later date on which the TCEQ acts on the application, provided the application therefore is still pending and the Parties are exercising due diligence to prosecute it).~~

Paragraph 8 shall be amended as follows:

8. Effective Date: This agreement amendment is enforceable among the Parties following the execution of this Agreement. ~~The transfers and agreements contemplated by this Agreement will be effective upon approval by the TCEQ.~~

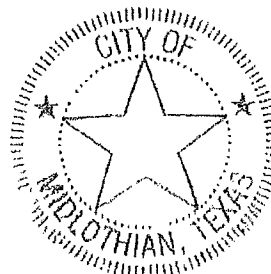
All other provisions of said "Agreement" shall remain in full force and effect.

EXECUTED by the City of Midlothian on this the 8th day of MAY, 2012.

City of Midlothian

By: Bill Houston
Bill Houston, Mayor

ATTEST:
City Secretary



EXECUTED by Mountain Peak Special Utility District on this the 12 day of June, 2012.

Mountain Peak Special Utility District

By: Clyde Bryant
Clyde Bryant, President

ATTEST:
Secretary

Ann Majors