

Control Number: 43931



Item Number: 17

Addendum StartPage: 0

SOAH DOCKET NO. 473-15-1626.WS
PUC DOCKET NO. 43931

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PUBLIC UTILITY COMMISSION
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APPEAL OF M.E.N. WATER § BEFORE THE STATE OFFICE
SUPPLY CORPORATION, ANGUS §
WATER SUPPLY CORPORATION, §
CHATFIELD WATER SUPPLY §
CORPORATION, CORBET WATER §
SUPPLY CORPORATION, AND § OF
CITY OF KERENS FOR REVIEW §
OF A DECISION BY THE CITY OF §
CORSICANA TO SET §
WHOLESALE RATES § ADMINISTRATIVE HEARINGS

**RATEPAYERS' STATUS REPORT IN RESPONSE TO ORDER NO. 3
AND REQUEST TO REINSTATE ABATEMENT**

M:E.N. Water Supply Corporation, Angus Water Supply Corporation, Chatfield Water Supply Corporation, Corbet Water Supply Corporation, and the City of Kerens, Texas (the "Ratepayers") hereby submit this Status Report ("Report") in Response to Order No. 3 ("Order") in this matter involving wholesale rates charged by the City of Corsicana, Texas ("Corsicana").

Background

This is the second consecutive rate appeal filed by the Ratepayers against Corsicana. This rate appeal involves a wholesale rate increase that occurred in 2014 (the "2014 Rate Appeal"). The first rate appeal, TCEQ Docket No. 2009-1925-UCR; SOAH Docket No. 582-10-1944 (the "2009 Rate Appeal") involved a wholesale rate increase that occurred in 2009 and was concluded this year after the Texas Supreme Court denied a petition for review of the decision by the First Court of Appeals, Houston, Texas noted in Order No 3.¹ In the 2009 Rate Appeal, the issue of whether Corsicana's rates violated the public interest sufficiently to warrant a cost of service hearing was

¹ *Navarro County Wholesale Ratepayers; M.E.N. Water Supply Corporation, et al. v. Zachary Covar, Executive Director of the Texas Commission on Environmental Quality, et al.*, 2015 Tex. App. LEXIS 6502 (Tex. App.-Houston [1st] Dist., June 25, 2015), *petition for review denied*, 2016 Tex. LEXIS 329 (Tex., April 15, 2016).

decided.² However, that appeal was considered based on the presumption that Corsicana’s wholesale rates were charged pursuant to a contract. A separate breach of contract lawsuit the Ratepayers filed in 2013 implicates whether the City of Corsicana’s rate changes in 2014 are or are not charged pursuant to a contract.

In 2013, after the 2009 Rate Appeal was filed, the Ratepayers filed a second lawsuit in Navarro County District Court alleging breach of their wholesale contracts by Corsicana (the “Breach of Contract Lawsuit”).³ Attached for the Court’s review here are the following pleadings from that lawsuit docket:

1. Order Regarding Plea to the Jurisdiction (April 15, 2015) - **Attachment A**
2. Defendant City of Corsicana’s Traditional and No Evidence Motion for Summary Judgment (“MSJ”) (April 15, 2016) - **Attachment B**
3. Final Judgment (November 1, 2016) - **Attachment C**
4. Notice of Appeal (October 28, 2016) - **Attachment D**

Four of the Plaintiffs that are also Ratepayers here were dismissed earlier in the lawsuit on jurisdictional grounds without reaching the merits of their breach of contract allegations.⁴ However, a fifth member of the Ratepayers, City of Kerens, remained a party.⁵ In Corsicana’s MSJ, Corsicana asserted that the rates charged to City of Kerens from September 2014 on were not charged pursuant

² *Id.*

³ Cause No. D-13-22473-CV, *M.E.N. Water Supply Corporation, et al. v. City of Corsicana, Texas*, in the District Court of Navarro County, Texas, 13th Judicial District.

⁴ **Attachment A** - Order Regarding Plea to the Jurisdiction (April 15, 2015).

⁵ *Id.*

to a contract because that particular contract expired.⁶ The Court granted the MSJ on November 1, 2016 in a Final Judgment.⁷

The Ratepayers are appealing the Final Judgment as to all five Ratepayers to the Court of Appeals for the Tenth District of Texas.⁸ Thus, the issue of whether Corsicana's rates are charged pursuant to a contract is not final.

Effect of Breach of Contract Lawsuit Appeal

The Commission rules at 16 Tex. Administrative Code §24.131 provide as follows:

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

(d) If the seller and buyer do not agree that the protested rate is charged pursuant to a written contract, the administrative law judge shall abate the proceedings until the contract dispute over whether the protested rate is part of the contract has been resolved by a court of proper jurisdiction.⁹

A similar issue was considered last year in *Petition of the City of Dallas for Review of a Decision by the Sabine River Authority*.¹⁰ There, a Commission wholesale rate appeal matter brought under Texas Water Code §12.013 and 13.043(f) was pending at SOAH.¹¹ The SOAH administrative law judge ("ALJ") granted a motion to abate because the seller and buyer did not agree that the protested rate was charged pursuant to a written contract and the ALJ was required to "abate the proceedings until the contract dispute over whether the protested rate is part of the contract has been resolved by

⁶ Attachment B - Corsicana's MSJ, at 6 (April 15, 2016).

⁷ Attachment C - Final Judgment (November 1, 2016).

⁸ Attachment D - Notice of Appeal (October 28, 2016).

⁹ 16 Tex. Admin. Code ("TAC") §24.131(c)-(d).

¹⁰ *Petition of the City of Dallas for Review of a Decision by the Sabine River Authority, SOAH Docket No. 473-15-1149.WS, PUC Docket No. 43674, Original Petition for Review and Request for Interim Rates (October 30, 2014) (Item No. 1).*

¹¹ *Id.*

a court of proper jurisdiction.”¹² In a later pleading considering a request for interim rates, the ALJ discussed the fact that City of Dallas filed a declaratory judgment action seeking a determination that the rate set by Sabine River Authority (“SRA”) was not set pursuant to their contract.¹³ The ALJ found, “If the Court finds SRA is charging a rate set by contract, the PUC may change that rate after finding that the rate adversely affects the public interest.”¹⁴ However, the ALJ also found, “If the court finds SRA is charging a rate not set by contract, the PUC may set the rate.”¹⁵ The ALJ’s approach discussed is consistent with 16 TAC §24.131(c)-(d).

Thus, from the Ratepayers perspective, proceeding to an evidentiary hearing on the rate pursuant to (c) here is premature since all Ratepayers’ contractual rights are not yet fully adjudicated. Therefore, this matter must be abated until there is final resolution of the Breach of Contract Lawsuit pursuant to (d). The result of the Breach of Contract Lawsuit may be that none of the rates charged to the Ratepayers resulting from the 2014 rate increase were charged pursuant to a contract. In that instance, an evidentiary hearing on the rates without a public interest evidentiary hearing would be warranted under (c).

Request to Reinstate Abatement

For all these reasons, the Ratepayers respectfully request that the presiding ALJ reinstate the abatement in this docket that was previously lifted. The Ratepayers offer to provide quarterly reports on the status of the Breach of Contract Lawsuit and a final report with a recommendation for further action at its conclusion.

¹² *Petition of the City of Dallas for Review of a Decision by the Sabine River Authority*, SOAH Docket No. 473-15-1149.WS, PUC Docket No. 43674, SOAH Order No. 5 Granting Motion to Abate (January 21, 2015) (Item No. 29).

¹³ *Petition of the City of Dallas for Review of a Decision by the Sabine River Authority*, SOAH Docket No. 473-15-1149.WS, PUC Docket No. 43674, SOAH Order No. 8 Establishing Interim Rates, at 2 (April 3, 2015) (Item No. 50).

¹⁴ *Id.*

¹⁵ *Id.*

On December 16, 2016 and December 19, 2016, the undersigned counsel for the Ratepayers conferred with counsel for Commission Staff and City of Corsicana. Commission Staff indicated they would not be opposed to abatement if Corsicana agrees. Corsicana has indicated it would not oppose abatement if the Ratepayers agree to withdraw the 2014 Rate Appeal in the event the Ratepayers do not prevail in the Breach of Contract Lawsuit. The Ratepayers are currently not in a position to consider next steps based on the result of the Breach of Contract Lawsuit without a full understanding of its result. The Ratepayers submit that the applicable Commission rules require abatement at this time without Corsicana's requested commitment from the Ratepayers.

Prayer

WHEREFORE, PREMISES CONSIDERED, the Ratepayers pray that the Public Utility Commission enter an order abating this proceeding until the Breach of Contract Lawsuit is fully adjudicated and ordering the Ratepayers to submit quarterly status reports in this docket beginning on March 31, 2017. Further, the Ratepayers pray for any such other and further relief to which they may show themselves legally or equitably entitled.

Respectfully submitted,

TERRILL & WALDROP

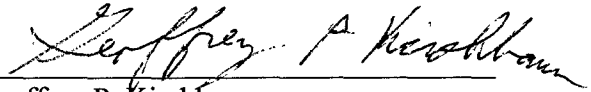
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ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2016, a true and correct copy of the foregoing *Navarro County Wholesale Ratepayers' Status Report in Response to Order No. 3 and Request to Reinstate Abatement*, was delivered in accordance with P.U.C. PROC. R. 22.74.



Geoffrey P. Kirshbaum

M.E.N. WATER SUPPLY CORPORATION, §
ANGUS WATER SUPPLY CORPORATION, §
CHATFIELD WATER SUPPLY §
CORPORATION, CORBET WATER §
SUPPLY CORPORATION, CITY OF §
BLOOMING GROVE, CITY OF FROST, §
CITY OF KERENS, AND COMMUNITY §
WATER COMPANY §

Plaintiffs, §

v. §

CITY OF CORSICANA, TEXAS §

Defendant §

IN THE DISTRICT COURT

NAVARRO COUNTY, TEXAS

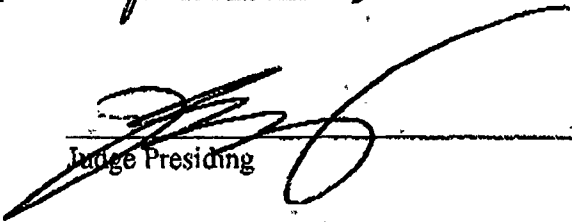
13TH JUDICIAL DISTRICT

ORDER REGARDING PLEA TO THE JURISDICTION

On this day, came on to be heard the City of Corsicana's Plea to the Jurisdiction and this Court, having considered same and related responses and replies, along with the accompanying evidence and arguments of counsel, finds that the Plea to the Jurisdiction should be in all things GRANTED.

IT IS THEREFORE ORDERED that the City of Corsicana's Plea to the Jurisdiction is GRANTED and that the claims asserted by M.E.N. Water Supply Corporation, Angus Water Supply Corporation, Chatfield Water Supply Corporation, Corbet Water Supply Corporation, and Community Water Company are hereby dismissed for lack of subject matter jurisdiction.

SIGNED this the 15th day of April, 2013.



Judge Presiding



Joshua B Tackett
District Clerk

Navarro County, Texas
By **Carolyn Kilcrease Deputy**

D13-22473-CV

CAUSE NO. ~~D13-22473-CV~~

M.E.N. WATER SUPPLY CORPORATION, §
ANGUS WATER SUPPLY CORPORATION, §
CHATFIELD WATER SUPPLY §
CORPORATION, CORBET WATER §
SUPPLY CORPORATION, CITY OF §
BLOOMING GROVE, CITY OF FROST, §
CITY OF KERENS, AND COMMUNITY §
WATER COMPANY §

Plaintiffs, §

v. §

CITY OF CORSICANA, TEXAS §

Defendant §

IN THE DISTRICT COURT

NAVARRO COUNTY, TEXAS

13TH JUDICIAL DISTRICT

**DEFENDANT CITY OF CORSICANA'S
TRADITIONAL AND NO EVIDENCE MOTION FOR SUMMARY JUDGMENT**

TO THE HONORABLE JUDGE OF SAID COURT:

Pursuant to Rule 166a of the *Texas Rules of Civil Procedure*, Defendant City of Corsicana, Texas makes this its Traditional and No Evidence Motion for Summary Judgment and for same respectfully shows the Court as follows:

**I.
PROCEDURAL BACKGROUND AND LIST OF SUMMARY JUDGMENT PROOF**

In 2009, Defendant City of Corsicana ("Corsicana") raised its retail and wholesale water rates on the respective Plaintiffs herein, various Navarro County Wholesale Ratepayers ("Ratepayers"). In raising its rates, Corsicana implemented block rates requiring customers purchasing more water to pay higher rates at a graduated level of consumption. After originally filing suit on July 30, 2013, Ratepayers filed their Third Amended Petition on March 5, 2014 seeking breach of contract damages and specific performance from Corsicana. The gravamen of their



complaint is that the 2009 rate increase damaged the Plaintiffs in breach of their respective water purchase contracts with Corsicana.

On April 15, 2015, this Court dismissed Plaintiffs M.E.N. Water Supply Corporation, Angus Water Supply Corporation, Chatfield Water Supply Corporation, Corbet Water Supply Corporation and Community Water Company for want of jurisdiction. The Court dismissed the City of Frost on Corsicana's motion the same day. Then, on about November 13, 2015, the City of Blooming Grove filed a notice of non-suit leaving the City of Kerens as the sole remaining Plaintiff.

For the Court's reference and convenience, the City attaches the following exhibits as proof in support of its traditional motion for summary judgment.

A. Water Purchase Contract

On or about September 6, 1994, the City of Corsicana ("Seller") and City of Kerens ("Purchaser") entered in to a 20-year Water Purchase Contract attached hereto as Exhibit "A" and hereby authenticated by the Affidavit of Connie Standridge, *infra*, both adopted and incorporated by reference, the same as if fully copied and set forth at length herein.

B. Affidavit of Connie Standridge

The Affidavit of Defendant City of Corsicana's City Manager Connie Standridge is attached hereto as Exhibit "B" and is hereby adopted and incorporated by reference, the same as if fully copied and set forth at length herein.

C. Oral Deposition of Cindy Scott

On December 2, 2010, Defendant City of Corsicana took the Oral Deposition of Plaintiff City of Kerens' City Administrator Cindy Scott. A true and correct copy of relevant excerpts from Ms. Scott's deposition, including a true and correct copy the original Reporter's Certificate is

attached hereto as Exhibit "C" and is hereby adopted and incorporated by reference, the same as if fully copied and set forth at length herein.

D. Plaintiff's Third Amended Petition (filed March 12, 2014)

The City asks the Court to take judicial notice of Plaintiffs' Third Amended Petition filed on March 12, 2014. A true and correct, file-marked copy of Plaintiffs' Third Amended Petition is attached hereto as Exhibit "D," and is hereby adopted and incorporated by reference, the same as if fully copied and set forth at length herein.

**II.
APPLICABLE SUMMARY JUDGMENT STANDARDS**

This Motion is brought pursuant to Rule 166a (b), which provides that:

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

This Motion is also brought pursuant to Rule 166a (i), which provides that:

After adequate time for discovery, a party, without presenting summary judgment evidence, may move for summary judgment on the grounds that there is no evidence of one or more essential elements of a claim or a defense on which an adverse party would have the burden of proof at trial. The Motion must state the elements to which there is no evidence. The Court must grant the Motion unless the Respondent produces summary judgment evidence raising a genuine issue of material fact.

**III.
SPECIFIC GROUNDS UPON WHICH THIS MOTION IS BASED**

In over two years since filing Plaintiffs' Third Original Petition in this suit, the City of Kerens has not produced evidence and cannot produce evidence which establishes that Plaintiff is entitled to recover on any of its claims against Corsicana. Plaintiff has not produced evidence and cannot produce evidence that it is entitled to a reduction of its wholesale rates through specific performance

under that Water Purchase Contract (the "Contract") made the basis of this suit or that the Contract is currently enforceable.

A. Water Purchase Contract Has Expired

The Contract only extended for a term of 20 years, thus the Contract expired by its own terms in September of 2014. *See Water Purchase Contract*, p. 3, ¶ 1, "Term of Contract," attached hereto as Exhibit "A." Absent a new agreement between the parties, Plaintiff has no basis for asserting it is entitled to a reduction in its rate, and specific performance is not available.

B. No Other Basis for Specific Performance

In addition, Plaintiff has no legal or evidentiary basis for its claim for specific performance requiring Corsicana to charge the "minimum inside the city retail water rate" – a fact that Kerens City Administrator Cindy Scott affirmed in her December 2, 2015 oral deposition. *See infra*.

Q: Have you read the Third Amended Petition before?

A: Yes.

Q: All right. Do you know whether you saw it before it was filed?

A: I'm not positive.

Q: All right. Do you think the Third Amended Petition accurately sets forth the city of Kerens' position in this lawsuit?

A: Yes.

Q: All right. Over on page 3 in paragraph 18 there is a reference to, it's in quotations, minimum inside city retail water rate. Do you see that?

A: Yes.

Q: And it's in quotes. Do you know where that language comes from?

A: No.

Q: Would you agree with me that that language is not found in the city of Kerens water purchase contract? ...

A: It is not.

Excerpt from Oral Deposition of Cindy Scott, p. 47, ll. 1-23, attached as Exhibit "C." Plaintiff has no basis for its claim of specific performance.

C. Increase in Wholesale Water Rates Otherwise Authorized under Contract

"The City of Kerens seeks as damages the difference between what Corsicana actually charged Plaintiff and the amounts that Corsicana should have charged based upon 'the rates being charged general consumers of Seller (*i.e.*, Defendant), within the City of Corsicana.'" See ¶ 21 of Plaintiffs' Third Original Petition attached as Exhibit "D" citing Exhibit A, p. 4, ¶ 8. The only qualifying language in the Contract regarding the modification or adjustment of rates states the following:

That the provisions of this contract pertaining to the "schedule of rates" to be paid by Purchaser (*i.e.*, Plaintiff) to Seller for water are subject to modification **at the end of every one year period by Seller ... Any increase or decrease shall be system-wide rates for the consumers of Seller within the City of Corsicana, subject to the "schedule of rates" as hereinafter set forth.**

See p. 3, ¶ 5 of Exhibit A, "Modification of Contract" (emphasis added).

Thus, the modification of the rate being wholly within the right of the Seller, Plaintiff's claim for breach of contract on the grounds that the Defendant "charged rates higher than those authorized by the contract" must fail on its face.

D. Evidence Proves No Breach, No Damages or Entitlement to Reduction in Rate

Regardless of the Contract's terms providing for equitable relief notwithstanding, Plaintiff has not produced evidence and cannot produce evidence which establishes Plaintiff is entitled to a

reduction of the current rate Corsicana set in 2009. Instead, the evidence proves that there was no breach and no damage.

As Kerens City Administrator Cindy Scott testified below, there is no dispute regarding the underlying facts.

Q: You [the City of Kerens] have always been a major user of water, correct?

A: Correct.

Q: And you've always been charged the base rate, the same base, that's charged to many of the people who live here in Corsicana, correct?

A: Base on a three-inch meter, which very few customers unless they're wholesale customers are going to have a three-inch meter.

Q: In addition to that then you're also charged the incrementally – volume metric rate, correct?

A: Correct.

Q: And the rate that's charged the city of Kerens on the volume metric rate is the same rate the city of Corsicana charges its large water users, correct?

A: Correct.

Q: That's always been the case as long as – as far as you know?

A: As far as I know.

Exhibit C, Deposition of Cindy Scott, p. 43, l. 24 - p. 44, l. 16.

Q: [D]id the rates actually change in terms of what was billed to you versus what was billed to city of Corsicana customers in-city customers?

A: No.

Q: The rates have been the same the entire time of the contract?

A: It just changed the volume.

Q: All right. The impact may have been different?

A: The impact was definitely different.

Q: But the rates are exactly the same, aren't they?

A: The rates are the same.

Q: And that's always been the case?

A: Yes.

Exhibit C, Deposition of Cindy Scott, p. 45, ll. 4 - 16. There has been no breach of contract.

E. No Evidence Summary Judgment Motion

Plaintiff has not produced evidence and cannot produce evidence that Corsicana breached the Contract. The elements of a breach of contract claim are:

1. the existence of a valid contract;
2. performance or tender of performance by the Plaintiff;
3. breach by the Defendant; and,
4. damages resulting from the breach.

Marquis Acquisitions, Inc. v. Steadfast Ins., 409 S.W.3d 808, 813-14 (Tex.App-Dallas, no petition).

Defendant seeks a No Evidence Summary Judgment with respect to three of the four elements in the Plaintiff's breach of contract claim. Other than Plaintiff's performance, Plaintiff has not produced evidence and cannot produce evidence supporting any other essential element of its claim.

**IV.
CONCLUSION**

Defendant Corsicana is entitled to summary judgment because the evidence proves there

was no breach of the expired 1994 Water Services Contract and no damages to Plaintiff City of Kerens. Likewise, Plaintiff has not and will not be able to offer any evidence that the Contract is enforceable, in part or in whole, whereby Plaintiff is entitled to a reduction in its wholesale water rate. Moreover, because Plaintiff has not produced evidence and cannot produce evidence that Corsicana breached the Contract, Defendant is entitled to summary judgment on no-evidence grounds as well.

WHEREFORE, PREMISES CONSIDERED, Defendant City of Corsicana prays that upon hearing hereof the Court grant its Motion for Summary Judgment and dismiss City of Corsicana from this lawsuit.

Respectfully submitted,

JACOBSON LAW FIRM, P.C.
733 West Second Avenue
Corsicana, Texas 75110
(903) 874-7117
Fax: (903) 874-7321

By: /s/ Terry Jacobson

Terry Jacobson
State Bar No. 10528000.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been served on counsel for Plaintiff, The Terrill Law Firm, P.C., 810 W. 10th St., Austin, Texas 78701 pursuant to TEX.R.CIV.P. 21a, this ____ day of April, 2016.

 /s/ Terry Jacobson

Terry Jacobson

EXHIBIT A

WATER PURCHASE CONTRACT

This contract for the sale and purchase of water is entered into as of the 6th day of September, 1994, between the CITY OF CORSICANA, Corsicana, Texas hereinafter referred to as the "Seller" and the CITY OF KERENS hereinafter referred to as the "Purchaser".

WITNESSETH:

WHEREAS, the Purchaser is organized and established under the provisions of a general law city in the State of Texas for the purpose of constructing and operating a water supply distribution system serving water users within the area described in plans now on file in the office of the Purchaser and to accomplish this purpose, the Purchaser will require a supply of treated water; and

WHEREAS, the Seller owns and operates a water supply distribution system with a capacity currently capable of serving the present customers of the Seller's system and the estimated number of water users to be served by said Purchaser as shown in the plans of the system now on file in the office of the Purchaser; and

WHEREAS, by City Commission approval of the Contract on the 6th day of September, 1994, by the Seller, the sale of water to the Purchaser in accordance with the provisions of the said contract was approved, and the execution of this contract by the Mayor and attested by the City Secretary carries out the said action of the City Commission; and

WHEREAS, by Resolution of the City Council of the Purchaser, enacted on the 6th day of September, 1994, the purchase of water from the Seller in accordance with the terms set forth in the said Resolution was approved, and the execution of this contract by the Mayor and attested by the City Secretary was duly authorized.

NOW, THEREFORE, in consideration of the foregoing and the mutual agreements hereinafter set forth, the Seller agrees:

1. **Quality and Quantity.** To furnish the Purchaser at the point of delivery hereinafter specified, during the term of this contract or any renewal or extension thereof, potable treated water meeting applicable purity standards of the Texas Natural Resources Conservation Commission in such quantity as may be required by the Purchaser not to exceed ten million (10,000,000) gallons per month.

2. **Point of Delivery and Pressure.** That water will be furnished at a reasonably constant pressure from an existing 12" main supply at a point located at the intersection of SH 31 and County Road 0070. If a greater pressure than that normally available at the point of delivery is required by the Purchaser, the cost of providing such greater pressure shall be borne by the Purchaser. Emergency failures of pressure or supply due to main supply line breaks, power failure, flood, fire and use of water to fight fire, earthquake or other catastrophe shall excuse the Seller from this provision for such reasonable period of time as may be necessary to restore service.

3. **Metering Equipment.** To operate and maintain, at its own expense at point of delivery, the necessary metering equipment, including a meter house or pit, and required devices of standard type for properly measuring the quantity of water delivered to the purchaser and to calibrate such metering equipment whenever requested by the Purchaser but not more frequently than once every 12 months. A meter registering not more than 2.0% above or below the test result shall be deemed to be accurate. The previous readings of any meter disclosed by test to be inaccurate shall be corrected for the 12 months previous to such test in accordance with the percentage of inaccuracy found by such tests. If any meter fails to register for any period, the amount of water furnished during such period shall be deemed to be the amount of water delivered in the corresponding period immediately prior to the failure, unless Seller and Purchaser shall agree upon a different amount. The metering equipment shall be read on a date selected by the City of Corsicana. An appropriate official of the Purchaser at all reasonable times shall have access to the meter for the purpose of verifying its readings.

4. **Billing Procedure.** To furnish the Purchaser, not later than the 10th day of the following month, with an itemized statement of the amount of water furnished the Purchaser during the preceding month.

The Purchaser agrees:

1. **Rates and Payment Date.** To pay the Seller, not later than the 20th day following each monthly billing cycle for water delivered in accordance with the "schedule of rates" as hereinafter defined, said rates not be altered or amended more often than yearly as provided hereinafter. The said "schedule of rates", as hereinafter defined, shall be the then prevailing rate in effect at the time of initial delivery of water to Purchaser's meter, said rate yearly established by the City Commission of the City of Corsicana. The rates shall include a base rate and a volume rate (per 1,000 gallons rate).

2. **Metering Equipment.** To furnish and install, at its own expense, the necessary metering equipment, including a meter house or pit, at the point of delivery.

3. **Connection Fee.** To pay as an agreed cost, a connection fee to connect the Seller's system with the system of the Purchaser, the sum of \$1.00.

IT IS FURTHER MUTUALLY AGREED BETWEEN THE SELLER AND THE PURCHASER AS FOLLOWS:

1. **Term of Contract.** That this contract shall extend for a term of 20 years from the date of the initial delivery of any water as shown by the first bill submitted by the Seller to the Purchaser and thereafter may be renewed or extended for such term, or terms, as may be agreed upon by the Seller and the Purchaser.

2. **Delivery of Water.** That 30 days prior to the estimated date of completion of construction of the Purchaser's water supply distribution system, the Purchaser will notify the Seller in writing the date for the initial delivery of water.

3. **Water for Testing.** When requested by the Purchaser, the Seller will make available to the contractor at the point of delivery, or other point reasonably close thereto, water sufficient for testing, flushing, and trench filling the system of the Purchaser during construction, irrespective of whether the metering equipment has been installed at that time at the normal charge for such water which will be paid by the contractor or, for his failure to pay, by the Purchaser.

4. **Failure to Deliver.** That the Seller will, at all times, operate and maintain its system in an efficient manner and will take such action as may be necessary to furnish the Purchaser with quantities of water required by the Purchaser. Temporary or partial failures to deliver water shall be remedied with all possible dispatch. In the event of an extended shortage of water or the supply of water available to the Seller is otherwise diminished over an extended period of time the supply of water to Purchaser's consumers shall be reduced or diminished in the same ratio or proportion as the supply to Seller's consumers is reduced or diminished.

5. **Modification of Contract.** That the provisions of this contract pertaining to the "schedule of rates" to be paid by Purchaser to Seller for water are subject to modification at the end of every one year period, by Seller, with said one year period construed to be the anniversary date from date of inception of the delivery of water to point of delivery at Purchaser's clear-well. Any increase or decrease shall be based on system-wide rates for the consumers of Seller within the corporate limits of the City of Corsicana, subject to the definition of "schedule of rates" as hereinafter set forth. Other provisions of this contract may be modified or altered by mutual agreement.

6. **Regulatory Agencies.** That this contract is subject to such rules, regulations, or laws as may be applicable to similar agreements in this State and the Seller and Purchaser will collaborate in obtaining such permits, certificates, or the like, as may be required to comply therewith.

7. **Successor to the Purchaser.** That in the event of any occurrence rendering the Purchaser incapable of performing under this contract, any successor of the Purchaser, whether the result of legal process, assignment or otherwise, shall succeed to the rights of the Purchaser hereunder.

8. **Schedule of Rates.** Rates shall be interpreted, for all purposes under this contract, as meaning the rates being charged general consumers of Seller, within the City of Corsicana, Texas.

IN WITNESS THEREOF, the parties hereto, acting under authority of their respective governing bodies, have caused this contract to be duly executed in six (6) counterparts, each of which shall constitute an original.

**SELLER:
CITY OF CORSICANA**

By: Wilson Griffin
Wilson Griffin, Mayor

ATTEST:

Nelda J. Neal
Nelda J. Neal, City Secretary

**PURCHASER:
CITY OF KERENS**

By: Otis Ray Spufflock
Otis Ray Spufflock, Mayor

ATTEST:

Susan Dockery
Susan Dockery, City Secretary

EXHIBIT B

CAUSE NO. D-13-22473-CV

M.E.N. WATER SUPPLY CORPORATION, §
ANGUS WATER SUPPLY CORPORATION, §
CHATFIELD WATER SUPPLY §
CORPORATION, CORBET WATER §
SUPPLY CORPORATION, CITY OF §
BLOOMING GROVE, CITY OF FROST, §
CITY OF KERENS, AND COMMUNITY §
WATER COMPANY §

Plaintiffs, §

v. §

CITY OF CORSICANA, TEXAS §

Defendant §

IN THE DISTRICT COURT

NAVARRO COUNTY, TEXAS

13TH JUDICIAL DISTRICT

AFFIDAVIT OF CONNIE STANDRIDGE

STATE OF TEXAS §
§
COUNTY OF NAVARRO §

BEFORE ME, the undersigned Notary Public, on this day personally appeared Connie Standridge and having been duly sworn upon her oath, testified as follows:

1. "My name is Connie Standridge. I am the City Manager for the City of Corsicana, Texas. I am authorized to testify to the matters set forth in this Affidavit and those matters are true and correct based upon my personal knowledge. I have been the City Manager of Corsicana, Texas ("Corsicana") since 2004. I am a licensed Professional Engineer in the State of Texas, my license number is 66776. I graduated from Texas A&M University in 1984, with a Bachelor of Science degree in Civil Engineering and I practiced Civil Engineering as my primary occupation for 30 years, including serving as the City of Corsicana's City Engineer from 1996 to 2003. I maintain my Engineering license by attending and sometimes speaking at continuing education courses.

2. I have reviewed the Water Purchase Contract dated September 6, 1994 (the "Contract"), a true and correct copy of which is attached to *Defendant City of Corsicana's Traditional and No Evidence's Motion for Summary Judgment* as Exhibit A, and am familiar with the content therein.

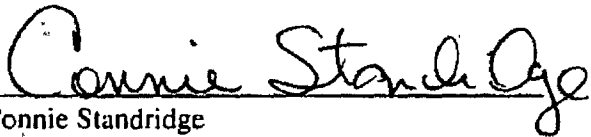
3. According to the 'Schedule of Rates' found on page 4, paragraph 8 of the Contract, Corsicana ("Seller") was to sell water to Plaintiff City of Kerens ("Purchaser") at 'the rates being charged general consumers of Seller, within the City of Corsicana, Texas.' Under the Contract, the

'Schedule of Rates' was 'subject to modification at the end of every one year period, by Seller according to the 'Modification of Contract' provisions found on page 3, paragraph 5 of Exhibit A.

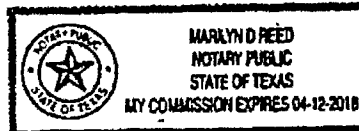
4. After, determining the requisite public necessity and public purpose to do so, the Corsicana City Council passed Ordinance No. 2625 on August 4, 2009, thereby implementing a block rate schedule for all customers, including the City of Kerens. See Ordinance attached hereto as Exhibit 1. The City of Kerens now pays the same rates for water as Corsicana charges their general consumers who purchase similar amounts of water.

5. Meanwhile, state law prohibits a water supplier from selling water to customers within the Certificate of Convenience and Necessity of another water supplier. Thus, only the City of Kerens has the legal right to sell water directly to customers within the areas covered by their Certificate of Convenience and Necessity.

6. Further affiant sayeth not."


Connie Standridge

SUBSCRIBED AND SWORN TO BEFORE ME by the said Connie Standridge, to certify which witness my hand and seal of office on this 12th day of April, 2016.



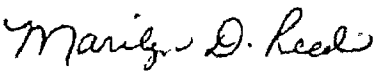

Notary Public in and for The State of Texas
My commission expires: 4-12-2018

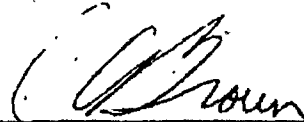
EXHIBIT 1

ORDINANCE NO. 2625

**AN ORDINANCE AMENDING CHAPTER 13, ENTITLED
MUNICIPAL FEES, OF THE CITY CODE OF
ORDINANCES INCREASING WATER AND SEWER
RATES.**

BE IT ORDAINED by the City Council of the City of Corsicana, Texas, that Chapter 13, entitled "Municipal Fees," of the City Code of Ordinances be amended to increase water and sewer rates as set forth in the attached Exhibit A.

PASSED and APPROVED by the City Council of the City of Corsicana, Texas, this the 4th day of August, 2009:

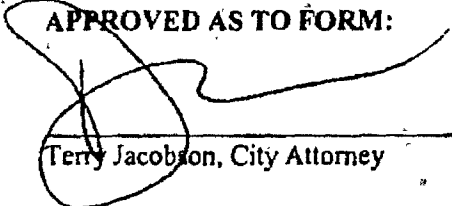


C. L. Brown, Mayor

ATTEST:


Virginia Richardson, City Secretary

APPROVED AS TO FORM:


Terry Jacobson, City Attorney

CITY OF CORSICANA, TEXAS

EXHIBIT A

CHAPTER 13
FEES AND COST OF SERVICES

THE FOLLOWING SHALL BE THE SCHEDULE OF FEES AND COST OF SERVICES

DIVISION	TYPE	RATE	PER (UNIT)	OTHER INFORMATION
UTILITIES - WATER AND WASTEWATER				
	Black - Current	Red - Proposed		
	After Hours Turn On Fee	30 00	Each	
Class I - Residential and Commercial (Inside City Limits)		16 78	5/8" OR 3/4"	First 1,000 gals + \$3 00/per 1,000
		17 80		First 1,000 gals + Volumetric Use
		16 78	5/8" OR 3/4"	Age 65 & older-3,000 gals + \$3 00/per 1,000 single family residence only
		17 80		Age 65 & older-3,000 gals + Volumetric Use
		27 97	1"	First 1,600 gals + \$3 00/per 1,000
		29 37		First 1,000 gals + Volumetric Use
		55 58	1 1/2"	First 3,300 gals + \$3 00/per 1,000
		58 38		First 1,000 gals + Volumetric Use
		89 02	2"	First 5,300 gals + \$3 00/per 1,000
		93 47		First 1,000 gals + Volumetric Use
		187 04	3"	First 10,000 gals + \$3 00/per 1,000
		175 39		First 1,000 gals + Volumetric Use
		278 82	4"	First 18,600 gals + \$3 00/per 1,000
		292 55		First 1,000 gals + Volumetric Use
		558 88	6"	First 33,300 gals + \$3 00/per 1,000
		584 51		First 1,000 gals + Volumetric Use
		1,002 28	8"	First 60,000 gals + \$3 00/per 1,000
	1,052 37		First 1,000 gals + Volumetric Use	
	1,614 78	10"	First 96,800 gals + \$3 00/per 1,000	
	1,895 52		First 1,000 gals + Volumetric Use	
			Volumetric Rate	
			1 - 10,000 gals - \$3 00	
			10,001 - 25,000 gals - \$3 15	
			25,000 + gals - \$3 25	
Class II - Residential and Commercial (Outside City Limits)		25 13	5/8" OR 3/4"	First 1,000 gals + \$3 78/per 1,000
		19 36		First 1,000 gals + Volumetric Use
		41 95	1"	First 1,600 gals + \$3 78/per 1,000
		32 30		First 1,000 gals + Volumetric Use
		83 38	1 1/2"	First 3,300 gals + \$3 78/per 1,000
		84 20		First 1,000 gals + Volumetric Use
		133 54	2"	First 5,300 gals + \$3 78/per 1,000
		102 82		First 1,000 gals + Volumetric Use
		250 55	3"	First 10,000 gals + \$3 78/per 1,000
		182 93		First 1,000 gals + Volumetric Use
	417 92	4"	First 18,600 gals + \$3 78/per 1,000	
	321 80		First 1,000 gals + Volumetric Use	
Wholesale Contract Customers	Same as Class I		Same as Class I	Up to contract limit - \$3 00 per 1,000 after contract limit - \$3 78 per 1,000
	Same as Class I		Same as Class I	Up to contract limit @ Volumetric Rate after contract limit - \$3 78/per 1,000 gals
			Volumetric Rate	
			1 - 10,000 gals - \$3 00	
			10,001 - 25,000 gals - \$3 15	
			25,000 + gals - \$3 25	
Commercial Wastewater Rates		15 37	Base	Plus \$2 23/per 1,000 gals
		17 00	5/8" - 3/4"	Plus \$2 55/per 1,000 gals
		40 00	> 3/4"	Plus \$2 55/per 1,000 gals
Residential Wastewater Rates		15 37	Base	Plus \$2 23 per 1,000 gal up to 12,000 gals
		17 00	5/8" - 2"	Plus \$2 55 per 1,000 gal up to 12,000 gals
		40 00	> 2"	Plus \$2 55 per 1,000 gal up to 12,000 gals
Multi-Family Rates				80% Base Rate of meter x 80% of units + Volumetric Use

CITY OF CORSICANA, TEXAS

EXHIBIT A

CHAPTER 13
FEES AND COST OF SERVICES

THE FOLLOWING SHALL BE THE SCHEDULE OF FEES AND COST OF SERVICES

DIVISION	TYPE	RATE	PER (UNIT)	OTHER INFORMATION
Customer Deposit		100.00	Residential	Plus \$10/connection fee
		150.00	Commercial	Plus \$10/connection fee
		250.00	Industrial	Plus \$10/connection fee
		800.00	Fire Hydrant	Plus \$400 water usage fee
Tampering, Damaged, Broken Lock		100.00	-Per incident	Damaged or broken lock plus cost of replacement and possible prosecution
		100.00	Per MXU	If MXU must be replaced plus cost of replacement and possible prosecution
Late Penalty		10%	Unpaid balance	
Meter Calibration		15.00	Per general calibration test	
		30.00	Certified meter calibration test	
Reconnect for Non-Payment (To be deleted)		15.00	Each	Normal hours
		25.00	Each	After hours
(Replaces Reconnect for N-P) Cut-off Lat - Fee		25.00	Each	
Sewer Tap Fee		700.00	Per tap	8" or less with street cut
		500.00	Per tap	8" or less without street cut
		800.00	Per tap	Larger than 8" with street cut
		800.00	Per tap	Larger than 8" without street cut
Water Tap Fee		300.00	3/4" with existing tap	
		850.00	3/4" tap	Without street cut
		1,050.00	3/4" tap	With street cut
		900.00	1" tap	Without street cut
		1,100.00	1" tap	With street cut
		1,200.00	1 1/2" tap	Without street cut
		1,400.00	1 1/2" tap	With street cut
		1,350.00	2" tap	Without street cut
	1,550.00	2" tap	With street cut	
Moderate Drought Surcharges Residential		2.00	Per 1,000 Gallons	Usage in excess of 7,000 gallons
		5.00	Per 1,000 Gallons	Usage in excess of 10,000 gallons
Wholesale Water Systems		2.00	Per 1,000 Gallons	Usage in excess of 7,000 gallons per meter based upon # of connections reported to TCEQ
		5.00	Per 1,000 Gallons	Usage in excess of 10,000 gallons per meter based upon # of connections reported to TCEQ
Severe Drought Surcharges Residential		2.00	Per 1,000 Gallons	Usage in excess of 5,000 gallons
		5.00	Per 1,000 Gallons	Usage in excess of 7,000 gallons
		10.00	Per 1,000 Gallons	Usage in excess of 10,000 gallons
Commercial Surcharge per Connection Wholesale Water Systems		100.00		Per meter
		2.00	Per 1,000 Gallons	Usage in excess of 5,000 gallons per meter based upon # of connections reported to TCEQ
		5.00	Per 1,000 Gallons	Usage in excess of 7,000 gallons per meter based upon # of connections reported to TCEQ
		10.00	Per 1,000 Gallons	Usage in excess of 10,000 gallons per meter based upon # of connections reported to TCEQ
Irrigation Meters		2.00	Per 1,000 Gallons	Usage 0-10,000 gallons
Tap Inspection		25.00	Each	
Industrial Pretreatment (Permit Fee)		100.00	Permit Fee	Minor User
		250.00	Permit Fee	Significant and Categorical User (permits valid for 5 years)

CITY OF CORSICANA, TEXAS

EXHIBIT A

CHAPTER 13
FEES AND COST OF SERVICES

THE FOLLOWING SHALL BE THE SCHEDULE OF FEES AND COST OF SERVICES

DIVISION	TYPE	RATE	PER (UNIT)	OTHER INFORMATION	
Industrial Pretreatment		25 00	Inspection Fee	Minor User	
		30 00			
	(Inspection Fee)	50 00	Inspection Fee	Significant and Categorical User	
		60 00			
Industrial Pretreatment (Fees for Sampling and Testing)		30 00	B O D	Fees for Sampling and Testing	
		15 00	T S S	Fees for Sampling and Testing	
		17 00			
		8 00	pH	Fees for Sampling and Testing	
		13 00	pH/temp		
		20 00	C O D	Fees for Sampling and Testing	
		23 00			
		20 00	Ammonia	Fees for Sampling and Testing	
		23 00			
		40 00	Fats, Oil & Grease	Fees for Sampling and Testing	
		50 00			
		100 00	Petroleum Based Oil Tnp Charge	Fees for Sampling and Testing Fees for Sampling and Testing	
		20 00			
		40 00			
	50 00	Equipment Rental	Fees for Sampling and Testing		
	160 00				
		25 00	Per Hr/1 hr minimum	Fees for Labor to Sample & Inspect	
Industrial Pretreatment (Outside Lab Charges)		-	Outside Lab Charges	The actual fees, as charged to the City for outside laboratory services relating to an Industrial User, will be passed on to the Industrial User. All other related costs as required to collect, preserve, ship, etc., will also be charged to the Industrial User	
Industrial Pretreatment (Industrial Waste Surcharges)		0 12	per lb (B O D)	In excess of the industry's wastewater discharge permit limit. (Biochemical Oxygen Demand)	
		0 12	per lb (T S S)	In excess of the industry's wastewater discharge permit limit. (Total Suspended Solids)	
		0 12	per lb (C O D)	In excess of the industry's wastewater discharge permit limit. (Chemical Oxygen Demand)	
		1 00	per lb (F O G)	In excess of 100 mg/l (Fats, Oils and Grease)	
Ingestion Permit		40 00	Permit		
		10 00	Connection Fee		
Temporary Water Fee		25 00 + Usage	Temporary for residents		
Service Transfer Fee		15 00	Per transfer	Transfer of service	
Backflow Prevention Fees	Backflow Assembly Testing		75 00	Each	Per each Backflow Assembly tested at site
	Backflow Assembly Retest		75 00	Each	Per each Backflow Assembly retested after repairs or maintenance
Backflow Assembly Registration Fee		15 00	Each	Initial Fee to register each new non-residential unit with the City	
Backflow Tester Registration		25 00	Individual	Tester must register with City of Corsicana	
Backflow Assembly Inspection		25 00	Each	Basic inspection to verify proper operation	

EXHIBIT C

CAUSE NO. D-13-22473-CV

M.E.N. WATER SUPPLY) IN THE DISTRICT COURT
CORPORATION, ANGUS WATER)
SUPPLY CORPORATION,)
CHATFIELD WATER SUPPLY)
CORPORATION, CORBET WATER)
SUPPLY CORPORATION, CITY)
OF BLOOMING GROVE, CITY OF)
FROST, CITY OF KERENS AND)
COMMUNITY WATER COMPANY,)
Plaintiffs)

vs.) NAVARRO COUNTY, TEXAS
)
CITY OF CORSICANA, TEXAS)
Defendant) 13TH JUDICIAL DISTRICT

ORAL DEPOSITION

CINDY SCOTT

December 2, 2015

COPY

ORAL DEPOSITION OF CINDY SCOTT, produced as a witness at the instance of the Defendant and duly sworn, was taken in the above-styled and numbered cause on December 2, 2015, from 10:29 a.m. to 11:30 a.m., before Susan A. Waldrip, CSR, RPR, in and for the State of Texas, reported by computerized stenotype machine at the offices of Terry Jacobson, 733 West Second Avenue, Corsicana, Texas 75110, pursuant to the Texas Rules of Civil Procedure and the provisions stated on the record or attached hereto.

1 APPEARANCES

2
3 *FOR PLAINTIFF:*

4 MR. RYAN GREENE

5 The Terrill Firm, P.C.
6 810 West 10th Street
7 Austin, Texas 78701

8 *FOR DEFENDANT:*

9 MR. TERRY JACOBSON

10 Jacobson Law Firm
11 733 West Second Avenue
12 Corsicana, Texas 75110

13
14 *ALSO PRESENT:*

15 Connie Standridge
16
17
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EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>PAGE</u>
1	Deposition Notice.	9
3	Water purchase contract between city of Corsicana and city of Kerens dates September 6, 1994.	29

1 instruct you not to answer. This is outside the two deposition
2 topics plus I think she's already answered your question.

3 MR. JACOBSON: Okay. So your position is that I'm
4 inquiring into matters that she's not been produced to address?

5 MR. GREENE: That's right.

6 MR. JACOBSON: Okay. So I guess if I want to address
7 it, we'll take a second deposition.

8 MR. GREENE: That's right. That's right.

9 BY MR. JACOBSON:

10 Q Based upon your training that you go through
11 periodically, do you understand the consequences of the city
12 council not having properly authorized the filing of this lawsuit
13 in accordance with open meetings and open records procedures?

14 MR. GREENE: You don't -- again, you don't have to
15 answer that question. I'll instruct the witness not to answer.
16 This is outside of the topics of the deposition.

17 BY MR. JACOBSON:

18 Q Are you familiar with the phrase "walking quorum"?

19 A No..

20 Q You never heard that come up in the context of any of
21 your training on open meetings?

22 A No.

23 (Exhibit 3 marked)

24 BY MR. JACOBSON:

5 Q Let me hand you what I've marked as Deposition

1 Exhibit 3 to your deposition, which I believe should be a copy --
2 a complete copy of the water purchase contract between the city
3 of Corsicana and the city of Kerens dated September 6th of 1994.
4 If you'd take a moment and look that over, I'll have a few
5 questions for you on that contract.

6 (Witness reviews document.)

7 Is Exhibit Number 3 a complete copy of the contract
8 between the city of Kerens and the city of Corsicana dated
9 September 6th of 1994?

10 A It appears to be.

11 Q Are you aware of any other contracts that have been
12 entered into by the city of Kerens and the city of Corsicana
13 relating to water purchase since this contract?

14 A No.

15 Q Oh, before I forget, back to the water rates.

16 Did your \$1.69 increase in 2014 also include an
17 increase due to the attorneys' fees the city of Kerens has
18 incurred in either the Rick Pears litigation or this litigation?

19 A No.

20 Q How much money has the city of Kerens paid the Terrill
21 law firm in total in both cases?

22 A I'm not sure exactly, because we don't make the checks
23 to Terrill law firm.

24 Q Where do the checks get paid to?

5 A The -- what do you call it --

1 been substantially the same as what the city of Corsicana has
2 charged the city of Kerens?

3 A No.

4 Q Then identify for me one single time in the last
5 20 years where the rate charged to a single customer of the city
6 of Corsicana differed from the rate charged to the city of
7 Kerens?

8 A The main one was --

9 Q Identify for me --

10 A Okay. I'm trying to remember which year. Three or
11 four years ago, I would have to look at the increase, the base
12 rates were changed. The base rates for consumers in the city --
13 small consumers in the city of Corsicana went from 1,000 gallons
14 as a base rate to 10,000 gallons. The large consumer -- our
15 three-inch meter was taken from 10,000 gallons to 1,000 gallons,
16 which means everything over 1,000 gallons had to pay the higher
17 rate, everything under 10,000 gallons for the city of Corsicana
18 pays the smaller rate.

19 Q And how do you --

20 A The lowest rate.

21 Q How did you acquire this information, I'm curious?
22 Because I think I have a different understanding.

23 A It came from city of Corsicana.

24 Q You have always been a major user of water, correct?

5 A Correct.

1 Q And you've always been charged the base rate, the same
2 base rate, that's charged to many of the people who live here in
3 Corsicana, correct?

4 A Based on a three-inch meter, which very few customers
5 unless they're wholesale customers are going to have a three-inch
6 meter.

7 Q In addition to that then you're also charged the
8 incrementally -- volume metric rate, correct?

9 A Correct.

10 Q And the rate that's charged the city of Kerens on the
11 volume metric rate is the same rate the city of Corsicana charges
12 its large water users, correct?

13 A Correct.

14 Q That's always been the case as long as -- as far as you
15 know?

16 A As far as I know.

17 Q And, again, try to explain to me, because I'm not sure
18 I understand, the time that you think that what the city of
19 Kerens was charged was different from what the city of Corsicana
20 charged its in-city customers.

21 A Mostly what happened when they changed those base rate
22 figures was the majority of their customers then fell into the
23 lowest tier of their base rate -- I mean, of their volume rate,
24 and only the major consumers would have hit outside that. But
5 the majority of their customers at that time, because the

1 majority of the customers use less than 10,000 gallons --

2 Q All right. But --

3 A -- a month.

4 Q -- did the rates actually change in terms of what was
5 billed to you versus what was billed to city of Corsicana
6 customers in-city customers?

7 A No.

8 Q The rates have been the same the entire time of the
9 contract?

10 A It just changed the volume.

11 Q All right. The impact may have been different?

12 A The impact was definitely different.

13 Q But the rates are exactly the same, aren't they?

14 A The rates are the same.

15 Q And that's always been the case?

16 A Yes.

17 Q Okay. In paragraph 5 when it refers to system wide
18 rates, do you see that?

19 A Yes.

20 Q Do you understand that to mean system wide in terms of
21 all manner of purchasers, that is, those who purchase a little
22 versus those who purchase a lot?

23 MR. GREENE: Objection; form.

24 BY MR. JACOBSON:

25 Q If you can answer the question, answer it.

1 A I don't really understand what you're saying.

2 Q Okay. I'll try to rephrase it.

3 What does the term system wide rate mean to you?

4 A Okay. System wide, all customers.

5 Q All customers.

6 A All customers.

7 Q Meaning the entire range of customers from those who
8 purchase a little to those who purchase a lot?

9 A Right.

10 Q All right. And you've already told me that the right
11 themselves that are charged to in-city customers and the rates
12 that are charged to the city of Kerens have been the same for the
13 entire length of the contract, as far as you know.

14 MR. GREENE: Objection; form.

15 BY MR. JACOBSON:

16 Q The rates themselves.

17 MR. GREENE: Objection; form.

18 THE WITNESS: The rates themselves, yes.

19 *(Exhibit 4 marked)*

20 BY MR. JACOBSON:

21 Q Okay. I'm going to hand you Exhibit Number 4 to this
22 deposition, and ask you to take a moment. Then I'll represent to
23 you that this is what your attorneys have filed as their Third
24 Amended Petition, which I believe is the most recent amended
25 petition that has been filed.

1 (Discussion is held off record.)

2 Q Have you read the Third Amended Petition before?

3 A Yes.

4 Q All right. Do you know whether you saw it before it
5 was filed?

6 A I'm not positive.

7 Q All right. Do you think the Third Amended Petition
8 accurately sets forth the city of Kerens' position in this
9 lawsuit?

10 A Yes.

11 Q All right. Over on page 3 in paragraph 18 there is a
12 reference to, it's in quotations, minimum inside city retail
13 water rate.

14 Do you see that?

15 A Yes.

16 Q And it's in quotes. Do you know where that language
17 comes from?

18 A No.

19 Q Would you agree with me that that language is not found
20 in the city of Kerens water purchase contract? And if you need
21 to go back and look at Exhibit Number 2 to confirm that fact --
22 or excuse me, 3 to confirm that fact, please do so.

23 A It is not.

24 Q It is not.

5 All right. That language is language that might be

1 found in one of the other water purchase contracts that had --
2 has been negotiated more recently between one of the rate payers
3 and the city of Corsicana?

4 A Possibly.

5 Q But it's not language in your contract, correct?

6 A Correct.

7 Q Okay. In the entire time that you've been the city
8 secretary, how many different rates has the city of Corsicana
9 charged the city of Kerens on water purchases?

10 A How many times have they changed their rates?

11 Q No, no. What kinds of -- what are the kinds of rates
12 that's been charged the city of Kerens? Let me ask the question
13 that way. You have a base rate?

14 A Right, base rate and a volume rate.

15 Q And any other rates besides those two rates?

16 A No.

17 Q The numbers --

18 A Unless -- I mean, we've got some drought contingency
19 rates that kind of thing that have come into effect once or
20 twice.

21 Q Okay. Other than the exceptional circumstance when
22 there's a drought situation --

23 A Right.

24 Q -- which I assume you recognize that you're part of
.5 whatever drought contingency plans --

Oral Deposition - Cindy Scott
December 2, 2015

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CAUSE NO. D-13-22473-CV

M.E.N. WATER SUPPLY) IN THE DISTRICT COURT
CORPORATION, ANGUS WATER)
SUPPLY CORPORATION,)
CHATFIELD WATER SUPPLY)
CORPORATION, CORBET WATER)
SUPPLY CORPORATION, CITY)
OF BLOOMING GROVE, CITY OF)
FROST, CITY OF KERENS AND)
COMMUNITY WATER COMPANY,)
Plaintiffs)

vs.) NAVARRO COUNTY, TEXAS)
CITY OF CORSICANA, TEXAS)
Defendant) 13TH JUDICIAL DISTRICT

REPORTER'S CERTIFICATE

ORAL DEPOSITION OF CINDY SCOTT

December 2, 2015

I, Susan A. Waldrip, Certified Shorthand Reporter in and for the State of Texas, hereby certify to the following:

That the witness, CINDY SCOTT, was duly sworn by the officer and that the transcript of the oral deposition is a true record of the testimony given by the witness;

That the deposition transcript was submitted on: _____ to the witness or to the attorney for the witness for examination, signature, and return to me by _____;

That the amount of time used by each party at the deposition is as follows:

Ryan Greene (0h0m)
Terry Jacobson (0h59m)

That pursuant to information given to the deposition officer at the time said testimony was taken, the following includes counsel for all parties of record:

Ryan Greene, Attorney for Plaintiffs,
Terry Jacobson, Attorney for Defendant,

1 I further certify that I am neither counsel for, related to,
 2 nor employed by any of the parties in the action in which this
 3 proceeding was taken, and further that I am not financially or
 otherwise interested in the outcome of the action.

4 Further certification requirements pursuant to Rule 203 of
 the TRCP will be certified to after they have occurred.

5 Certified to by me on this 7 day of

6 Decm 2015.

7 

8 SUSAN A. WALDRIP, CSR, RPR
 9 Texas CSR 3377
 Expiration: 12/31/14
 10 P. O. Box 1507
 11 Fairfield, Texas 75840
 1-800-949-7984

12
 13 **FURTHER CERTIFICATION UNDER TRCP RULE 203**

14 The original deposition was/was not returned to the
 deposition officer on _____;

15 If returned, the attached Changes and Signature page
 contains any changes and the reasons therefor;

16 If returned, the original deposition was delivered to Terry
 Jacobson, Custodial Attorney;

17 That \$_____ is the deposition officer's charges to the
 Defendant for preparing the original deposition transcript and
 18 any copies of exhibits;

19 The deposition was delivered in accordance with Rule 203.3,
 and that a copy of this certificate was served on all parties
 shown herein on and filed with the Clerk.

20 Certified to by me on this _____ day of _____ 2015.

21
 22
 23 SUSAN A. WALDRIP, CSR, RPR
 Texas CSR 3377
 Expiration: 12/31/14
 24 P. O. Box 1507
 Fairfield, Texas 75840
 1-800-949-7984
 5

EXHIBIT D

1151

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CAUSE NO. D-13-22473-CV

M.E.N. WATER SUPPLY §
 CORPORATION, ANGUS WATER §
 SUPPLY CORPORATION, §
 CHATFIELD WATER SUPPLY §
 CORPORATION, CORBET WATER §
 SUPPLY CORPORATION, CITY OF §
 BLOOMING GROVE, CITY OF §
 FROST, CITY OF KERENS, AND §
 COMMUNITY WATER COMPANY, §
 Plaintiffs, §
 v. §
 CITY OF CORSICANA, TEXAS §
 Defendant. §

IN THE DISTRICT COURT OF
 DEPUTY
 NAVARRO COUNTY, TEXAS
 13th JUDICIAL DISTRICT

PLAINTIFFS' THIRD AMENDED PETITION

TO THE HONORABLE COURT:

COME NOW M.E.N. Water Supply Corporation, Angus Water Supply Corporation, Chatfield Water Supply Corporation, Corbet Water Supply Corporation, City of Blooming Grove, City of Frost, City of Kerens, and Community Water Company (the "Ratepayers") complaining of Defendant City of Corsicana, Texas (the "City" or "Corsicana"), and for cause of action allege the following:

I. PARTIES

1. Plaintiff M.E.N. Water Supply Corporation is a Texas corporation with its principal office in Navarro County.
2. Plaintiff Angus Water Supply Corporation Texas corporation with its principal office in Navarro County.

3. Plaintiff Chatfield Water Supply Corporation is a Texas corporation with its principal office in Navarro County.

4. Plaintiff Corbet Water Supply Corporation is a Texas corporation with its principal office in Navarro County.

5. Plaintiff City of Blooming Grove is a political subdivision of the State of Texas, located in Navarro County.

6. Plaintiff City of Frost is a political subdivision of the State of Texas, located in Navarro County.

7. Plaintiff City of Kerens is a political subdivision of the State of Texas, located in Navarro County.

8. Plaintiff Community Water Company is a Texas corporation with its principal office in Navarro County.

9. Defendant City of Corsicana, Texas is a Texas municipal corporation who has appeared in this case through its attorney, Terry Jacobson.

II. DISCOVERY CONTROL PLAN

10. Discovery is intended to be conducted under Level 3 pursuant to Texas Rule of Civil Procedure 190.4.

III. JURISDICTION AND VENUE

11. This Court has jurisdiction pursuant to Article V, § 8 of the Texas Constitution and Texas Government Code § 24.007. The amount in controversy is within the jurisdictional limits of this Court.

12. Venue is proper in Navarro County pursuant to Texas Civil Practice and Remedies Code § 15.002 and pursuant to the contracts between the Parties.

IV. FACTS

13. The Ratepayers are wholesale water customers of the City of Corsicana. The Ratepayers purchase tens of millions of gallons of water from Corsicana every month.

14. All of the individual Ratepayers have contracts with Corsicana under which they purchase water. The contracts do not set forth water rates, but instead allow Corsicana the unilateral right to set rates. That right is not unlimited, however. Most of the Ratepayers' contracts require Corsicana to charge the "minimum inside city retail water rate." Blooming Grove's contract provides that Corsicana shall charge \$0.45 per 1,000 gallons and that any change in rate "shall be based on a demonstrable increase or decrease in the costs of production." City of Kerens' contract provides that Corsicana shall charge Kerens "the rates being charged general consumers of Seller, within the City of Corsicana."

15. At the time the Ratepayers and Corsicana entered contracts, Corsicana charged a flat volumetric water rate to all of its retail and wholesale customers.

16. In 2009, Corsicana raised its retail and wholesale water rates and, for the first time, implemented inclining block rates under which customers who purchase more water pay higher rates (the "2009 Rate Increase"). The rate was \$3 per 1,000 gallons for the first 10,000 gallons a customer purchases per month, \$3.15 per 1,000 between 10,000 and 25,000 gallons per month, and \$3.25 per 1,000 gallons above 25,000 gallons per month.

17. Later, Corsicana again amended its rates to charge \$2.80 per 1,000 up to 10,000 gallons per month, \$3.15 per 1,000 between 10,000 and 25,000 gallons per month, and \$3.25 per 1,000 gallons above 25,000 gallons per month.

18. Therefore, since 2009, the City's "minimum inside city retail water rate" has been either \$3 per 1,000 gallons or \$2.80 per 1,000 gallons. However, because the Ratepayers buy

millions of gallons of water per month, they are not charged the minimum, but rather the maximum inside city retail water rate of \$3.25 on almost all of the water they buy.

19. Additionally, the vast majority of Corsicana's retail customers purchase less than 10,000 gallons per month and therefore pay only \$2.80 per 1,000 gallons. In fact, Corsicana intentionally designed its inclining block rate structure so that its wholesale customers would pay the maximum rate for virtually all of the water they buy, while Corsicana residents would pay the minimum rate for the vast majority of their water. Thus, the Ratepayers are not being charged "the rates being charged general consumers of Seller, within the City of Corsicana."

20. Moreover, a rate study conducted by a consultant for the City determined that the rates being charged the Ratepayers are more than 40% above the "costs of production" related to serving Corsicana's wholesale customers.

21. Thus, the Ratepayers with standard contracts seek as damages the difference between the amounts actually charged by the City and the amounts that should have been charged based on the "minimum inside city retail water rate." Blooming Grove seeks as damages the difference between the amounts actually charged by the City and \$0.45 per thousand, or alternatively the amounts that should have been charged "based on a demonstrable increase or decrease in the costs of production." The City of Kerens seeks as damages the difference between the amounts actually charged by the City and the amounts that should have been charged based on "the rates being charged general consumers of Seller, within the City of Corsicana."

22. The Ratepayers' damages increase each month that Corsicana continues to overcharge for water.

V. CAUSES OF ACTION

A. **Breach of Contract.**

23. The City's actions and omissions constitute a breach of contract. The Agreement is a valid, written contract under which the Ratepayers have fully performed their obligations. The City breached the Agreement by charging rates higher than those authorized by the contracts, and the Ratepayers have incurred damages as a result.

24. A local governmental entity is not immune from suit when it performs proprietary functions. The Texas Legislature has expressly classified "the operation and maintenance of a public utility" as a "proprietary function." TEX. CIV. PRAC. & REM. CODE § 101.0215(b)(1). Because sovereign immunity does not apply, no waiver of sovereign immunity is required.

25. In the alternative, the Texas Legislature has waived "sovereign immunity to suit for the purpose of adjudicating a claim for breach of the contract" for local governmental entities, including the City. TEX. LOC. GOV'T CODE § 271.152.

B. **Specific Performance.**

26. Section 6.09 of the standard contract between the parties provides that "in the event of any default, the non-defaulting Party shall have available to it the equitable remedy of specific performance in addition to other legal or equitable remedies which may be available."

27. Therefore, the Ratepayers also seek specific performance of their contracts in the form of an order requiring Corsicana to charge the "minimum inside city retail water rate" for *all* of the water bought by the Ratepayers, and disallowing Corsicana from applying an inclining block rate structure to the Ratepayers.

C. **Attorney fees.**

28. As a result of the City's conduct, the Ratepayers have been required to employ legal counsel to institute this cause and are entitled to recover reasonable attorneys' fees and costs incurred in connection with this proceeding pursuant to Texas Civil Practice and Remedies Code § 38.001 and the Agreement.

VI. CONDITIONS PRECEDENT


29. All conditions precedent have been performed or have occurred.

VII. PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully pray that Defendant City of Corsicana, Texas be cited to appear and answer, and that upon trial of this cause that Plaintiffs have and recover from the City all actual, special, consequential, and compensatory damages as the evidence will show, plus any additional and ongoing amounts as the evidence will show, specific performance of the contracts between the City and Plaintiffs, pre- and post-judgment interest as provided by law, reasonable attorney's fees, costs of suit, expenses, and such other and further relief to which the Plaintiffs may be justly entitled at law or in equity.

Respectfully submitted,

THE TERRILL FIRM, P.C.

By: 

Paul M. Terrill, III
State Bar No. 00785094
Schuyler B. Marshall
State Bar No. 24055910
810 W. 10th Street
Austin, Texas 78701
(512) 474-9100
(512) 474-9888 (fax)

ATTORNEYS FOR PLAINTIFFS


CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2014, a true and correct copy of the preceding motion was delivered to the following parties of record via the method indicated:

Terry Jacobson
Jacobson Law Firm
733 W 2nd Ave
Corsicana, TX 75110
Fax: (903) 874-7321

via fax to: (903) 874-7321

ATTORNEY FOR DEFENDANT, CITY OF
CORNICANA



Schuyler B. Marshall

FILED

2016 NOV -1 PH 4: 28

CAUSE NO. D-13-22473-CV

M.E.N. WATER SUPPLY CORPORATION, §
ANGUS WATER SUPPLY CORPORATION, §
CHATFIELD WATER SUPPLY §
CORPORATION, CORBET WATER §
SUPPLY CORPORATION, CITY OF §
BLOOMING GROVE, CITY OF FROST, §
CITY OF KERENS, AND COMMUNITY §
WATER COMPANY §

Plaintiffs, §

v. §

CITY OF CORSICANA, TEXAS §
Defendant §

IN THE DISTRICT COURT OF
NAVARRO COUNTY, TEXAS

JOSHUA B. TACKETT
CLERK
Bates

NAVARRO COUNTY, TEXAS

13TH JUDICIAL DISTRICT

FINAL JUDGMENT

Came on for consideration the entry of a Final Judgment in the above referenced cause and the Court, having considered its prior rulings, judgments and orders, and the pleadings on file in this case, hereby enters this Final Judgment.

On or about April 15, 2015, this Court entered an order granting the City of Corsicana's Plea to Jurisdiction.

On or about April 15, 2016, this Court entered an order granting the City of Corsicana's Motion to Dismiss Without Prejudice.

On or about November 13, 2015, the City of Blooming Grove filed its Notice of Non-Suit.

On or about October 19, 2016, this Court entered an order granting the City of Corsicana's Traditional and No Evidence Motions for Summary Judgment.

The Court's rulings on these various motions dispose of all the claims and causes of action asserted in this case.



IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the claims of M.E.N. Water Supply Corporation, Angus Water Supply Corporation, Chatfield Water Supply Corporation, Corbet Water Supply Corporation and Community Water Company are hereby dismissed for lack of subject matter jurisdiction and that M.E.N. Water Supply Corporation, Angus Water Supply Corporation, Chatfield Water Supply Corporation, Corbet Water Supply Corporation and Community Water Company take nothing on their claims and causes of action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the claims asserted by the City of Frost are hereby dismissed without prejudice to the refiling of same.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the City of Kerens take nothing on its claims against the City of Corsicana.

All costs of court are taxed against M.E.N. Water Supply Corporation, Angus Water Supply Corporation, Chatfield Water Supply Corporation, Corbet Water Supply Corporation, Community Water Company, the City of Frost and the City of Kerens.

All relief requested in this case and not expressly granted is DENIED. This Judgment finally disposes of all parties and claims and is appealable.

SIGNED this the 1st day of November, 2016.



Judge Presiding

D13-22473-CV

Joshua B. Tackett

District Clerk
Navarro County, Texas

CAUSE NO. ~~XXXXXXXXXX~~ CV

By Carolyn Kilcrease Deputy

M.E.N. WATER SUPPLY
CORPORATION, ANGUS WATER
SUPPLY CORPORATION,
CHATFIELD WATER SUPPLY,
CORPORATION, CORBET WATER
SUPPLY CORPORATION, CITY OF
FROST, CITY OF KERENS, AND
COMMUNITY WATER COMPANY,
Plaintiffs,

IN THE DISTRICT COURT OF

NAVARRO COUNTY, TEXAS

v.

CITY OF CORSICANA, TEXAS
Defendant.

13th JUDICIAL DISTRICT

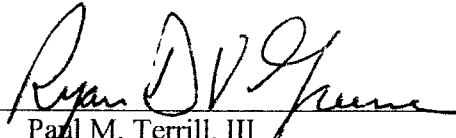
NOTICE OF APPEAL

Notice is hereby given that Plaintiffs M.E.N. Water Supply Corporation, Angus Water Supply Corporation, Chatfield Water Supply Corporation, Corbet Water Supply Corporation, City of Frost, City of Kerens, and Community Water Company desire to appeal, and do hereby appeal, the trial court's final judgment in the above-styled and numbered cause, which includes and incorporates the (1) Order granting Defendant's motion to dismiss against the City of Frost dated and signed April 15, 2015, (2) Order granting Defendant's plea to the jurisdiction against M.E.N. Water Supply Corporation, Angus Water Supply Corporation, Chatfield Water Supply Corporation, Corbet Water Supply Corporation, and Community Water Company dated and signed April 15, 2015, and (3) Order granting Defendant's motion for summary judgment against the City of Kerens dated and signed September 30, 2016.

This appeal is taken to the Court of Appeals for the Tenth District of Texas (Waco).



Respectfully submitted,

By: 
Paul M. Terrill, III
State Bar No. 00785094
Ryan D.V. Greene
State Bar No. 24012730
David D. DuBose
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ATTORNEYS FOR PLAINTIFFS

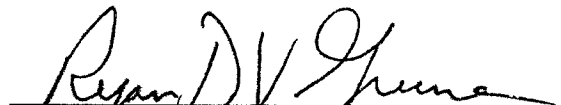
CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2016, a true and correct copy of the preceding was delivered to the following parties of record via the method indicated:

VIA FAX TO (903) 874-7321 AND ELECTRONIC CASE FILING

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ATTORNEY FOR DEFENDANT, CITY OF CORSICANA


Ryan D.V. Greene