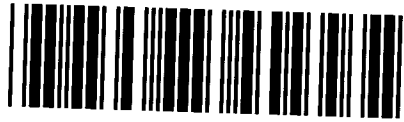


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BEFORE THE

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

PUBLIC UTILITY COMMISSION
OF TEXAS

CITY OF CORSICANA'S PROPOSED LIST OF ISSUES

TO THE HONORABLE COMMISSION:

NOW COMES the City of Corsicana ("Corsicana") and submits this Proposed List of Issues and in support thereof would show as follows:

I.
BACKGROUND

On December 9, 2014, M.E.N. Water Supply Corporation, Angus Water Supply Corporation, Chatfield Water Supply Corporation, Corbet Water Supply Corporation, and the City of Kerens (collectively, the "Ratepayers") filed a Petition challenging Corsicana's increase to its wholesale water rates pursuant to Texas Water Code § 13.043(f) ("the 2014 Rate Appeal"). On December 10, 2014, the Director of Docket Management issued Order No. 1 requiring the Commission Staff to file a recommendation on whether the rate appeal meets the requirements of P.U.C SUBST. R. 24.130. On December 11, 2014, the Ratepayers filed the First Supplement to their Petition. The following day, on December 12, 2014, the Commission Staff filed its Response to Order No. 1. In its Response, the Commission Staff recommended that the Petition be found to satisfy the requirements of P.U.C SUBST. R. 24.130. In addition, the Commission Staff recommended that this matter be referred to the State Office of Administrative Hearings ("SOAH") for an evidentiary hearing. The docket was referred to SOAH on December 15, 2015. The Order of Referral allows the Commission Staff and any interested party to file a List of Issues by January 12, 2015. This List of Issues is hereby timely filed.

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The five Ratepayers in this action – M.E.N. Water Supply Corporation, Angus Water Supply Corporation, Chatfield Water Supply Corporation, Corbet Water Supply Corporation, and the City of Kerens – were members of the “Navarro County Wholesale Ratepayers” in an appeal of Corsicana’s 2009 wholesale water rate increase. That appeal resulted in a Final Order from the Texas Commission on Environmental Quality in which the Commission denied any relief to the Navarro County Wholesale Ratepayers, including the five Ratepayers in this action.^{1,2} The Navarro County Ratepayers appealed the Commission’s Final Order and a Travis County District Court upheld the Commission Order.³ The Navarro County Wholesale Ratepayers appealed the District Court’s decision and that appeal is currently before the Court of Appeals for the First District at Houston, to which it was transferred under the Supreme Court’s docket equalization Order.⁴ Collectively, these proceedings are the “2009 Rate Appeal”.

II. PRELIMINARY ISSUES WHICH SHOULD BE BRIEFED FOR PRELIMINARY ORDER

The Order of Referral authorizes parties to identify any threshold legal or policy issues which should be briefed for purposes of the Preliminary Order with a specific explanation to support the proposed issues indentified as such.

The Ratepayers in this 2014 Rate Appeal are raising issues identical to issues raised in the 2009 Rate Appeal. In fact, many of the claims in the Ratepayers’ Petition in the 2014 Rate Appeal are word-for-word or nearly verbatim repetitions of the claims made in the 2009 Rate Appeal.

The Texas Supreme Court has held that collateral estoppel, or issue preclusion, applies when "an issue decided in the first action is actually litigated, essential to the prior judgment, and identical to an issue in a pending action" and when the party against whom it is asserted had a

¹ TCEQ Docket No. 2009-1925-UCR; SOAH Docket No. 589-10-1944; *Appeal of Navarro County Wholesale Ratepayers to Review Wholesale Water Rate Increase Imposed by the City of Corsicana, CCN No. 10776, and Request for Interim Rates in Navarro County*. Specifically, see TCEQ Final Order, Ordering Provision No. 1.

² The record of the administrative proceeding at the Texas Commission on Environmental Quality (TCEQ Docket No. 2009-1925-UCR) has been transferred to the Public Utility Commission of Texas and has been assigned PUC Docket No. 44128.

³ Cause No. D-1-GN-12-000226, *Navarro County Wholesale Ratepayers, et. al. v. Texas Commission on Environmental Quality et. al.* 419th Judicial District Court, Travis County, Texas.

⁴ Cause No. 01-14-00102-CV, *Navarro County Wholesale Ratepayers, et. al. v. Texas Commission on Environmental Quality et. al. and City of Corsicana*, Court of Appeals for the First District of Texas at Houston.

full and fair opportunity to litigate the issue in the first suit.⁵ In this instance, the Ratepayers are raising the same issues in this proceeding that they raised in the previous proceeding. Not only did the Ratepayers have a full and fair opportunity to litigate these issues, these issues were in fact fully litigated. The result of such litigation, however, resulted in the Ratepayers' appeal being denied at the Commission and the Commission's decision being upheld at the District Court. While it is true that the District Court's decision is on appeal, the Texas Supreme Court has held that a judgment is final for the purposes of issue and claim preclusion despite the taking of an appeal.⁶ The fact that the District Court's decision is on appeal does not prevent issue or claim preclusion from applying to the issues raised by the Ratepayers which are repetitions of issues raised in the 2009 Rate Appeal. Accordingly, the following threshold legal issues should be briefed for purposes of the Preliminary Order. If, after briefing, any of these issues are found to not be precluded by the decision in the prior proceeding, those issues should be added to the List of Issues to be addressed by this proceeding.

1. ***Are the Ratepayers precluded from claiming that the protested rates are not charged pursuant to a contract and consequently claiming that a public interest hearing is not required?***

With minor changes to update regulatory references and dates, Section III.B. (Paragraphs 16 through 21) of the Ratepayers' Petition in this 2014 Rate Appeal is a verbatim recitation of Section III.E. (Paragraphs 29 through 33) of the Ratepayers' Second Amended Petition in the 2009 Rate Appeal. The Administrative Law Judge in the 2009 Rate Appeal ruled that the protested rates were charged pursuant to contracts, a bifurcated hearing was warranted and that the case would proceed only on the issue of whether the protested rates adversely affected the public interest.⁷ In this 2014 Rate Appeal the Ratepayers – each of whom were parties to the 2009 Rate Appeal – raise identical arguments regarding the same contracts between the same parties as they raised in the 2009 Rate Appeal. Given that a prior ruling exists as to the same issue, subject matter, and parties, the question of whether the Ratepayers are precluded

⁵ *Texas Dep't of Pub. Safety v. Petta*, 44 S.W.3d 575, 579 (Tex.2001).

⁶ *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 6 (Tex. 1986); *Amedisys, Inc. v. Kingwood Health Care, LLC*, 437 S.W.3d 507, fn. 7(Tex. 2014); *Edwards Aquifer Authority et al., v. Chemical Lime, Ltd.*, 291 S.W.3d 392, fn 53 (Tex. 2009).

⁷ 2009 Rate Appeal, SOAH Order No. 6, pg. 3, section III (June 1, 2010).

from raising this issue again in this action should be briefed and settled to define the scope of the proceeding in the Preliminary Order.

2. *Are the Ratepayers precluded from claiming that Corsicana's use of an inclining block rate is adverse to the public interest or is not just and reasonable?*

The Ratepayers allege that the 2014 Rate Increase uses an inclining block rate and thus creates a situation where they pay more than the “minimum inside city retail water rate” as required by contract.⁸ This argument was presented by the Ratepayers in the 2009 Rate Appeal.⁹ The fact that the 2014 rate increase continues the 2009 inclining block rate structure is acknowledged by the Ratepayers’ in paragraph 29 of their Petition. The Ratepayers’ claims on this issue were fully litigated in the 2009 Rate Appeal. The Commission’s Final Order in the 2009 Rate Appeal, which has been upheld by the District Court, found that: Corsicana charges its wholesale customers, including the Ratepayers, the same rates as Corsicana charges its retail customers; the use of an inclining block rate was not abusive; and that Corsicana has retail customers that pay the highest tier gallonage rate that the wholesale customers pay.¹⁰

Given that a prior judgment exists that involves the same issues, subject matter, and parties, the question of whether the Ratepayers are precluded from raising this issue again in this action should be briefed and settled as a preliminary matter to define the scope of the proceeding.

3. *Are the Ratepayers precluded from claiming that Corsicana's rate structure results in its own residents paying lower rates and the out of city wholesale customers paying higher rates?*

The Ratepayers allege that the 2014 Rate Increase results in Corsicana’s residents paying lower rates and the out of city wholesale customers paying higher rates without any valid justification.¹¹ The same argument was presented by the Ratepayers in the 2009 Rate Appeal.¹² This argument was presented, argued, and briefed in the 2009 Rate Appeal. In the PFD in that case, the ALJ states that the Ratepayers’ contentions that Corsicana’s adoption of inclining block

⁸ See, Ratepayers’ Petition at Page 6, Paragraph 23 and Page 8, Paragraphs 29 and 30.

⁹ See, 2009 Rate Appeal, Navarro County Wholesale Ratepayer’s Second Amended Petition, Paragraph 39.

¹⁰ 2009 Rate Appeal, TCEQ Final Order, Findings of Fact Nos. 3, 69, 71 and 73.

¹¹ See, Ratepayers Petition at Page 6-7, Paragraph 24.

¹² See, 2009 Rate Appeal, Navarro County Wholesale Ratepayer’s Initial Brief, Section IV.A., pages 28 through 32.

rates disparately and negatively impacts the Ratepayers and their retail customers were considered and rejected.¹³ The Commission's Final Order did not contain any Findings of Fact or Conclusion of Law to indicate that it found this argument persuasive.

Given that a prior judgment exists that involves the same issues, subject matter, and parties, the question of whether the Ratepayers are precluded from raising this issue again in this action should be briefed and settled as a preliminary matter to define the scope of the proceeding.

4. *Are the Ratepayers precluded from claiming that Corsicana's rate structure results in an improper transfer from its water utility to its Utility Fund and that such a transfer is evidence of abuse of monopoly power?*

The Ratepayers allege that Corsicana's rate structure results in an improper transfer from its water utility to the City's Utility Fund.¹⁴ This argument was litigated in the 2009 Rate Appeal.¹⁵ After this argument was presented, argued, and briefed in the 2009 Rate Appeal, the ALJ held that addressing the shortfall in the Utility Fund was a changed condition that gave Corsicana a reasonable basis for increasing its water rates.¹⁶ The Commission's Final Order adopted the proposed findings on this issue and did not contain any Findings of Fact or Conclusion of Law to indicate that it found the Ratepayers' contention persuasive.¹⁷

Given that a prior judgment exists that involves the same issues, subject matter, and parties, the question of whether the Ratepayers are precluded from raising this issue again in this action should be briefed and settled as a preliminary matter to define the scope of the proceeding.

5. *Are the Ratepayers precluded from claiming that Corsican abused its monopoly powers through interfering with other water suppliers and due to penalty provisions in the wholesale water contracts?*

The Ratepayers claim that the 2014 Rate Increase reflects Corsicana's abuse of monopoly power due to Corsicana's interference with other water suppliers and due to penalty provisions in Corsicana's wholesale water contracts.¹⁸ The allegations in this paragraph are virtually identical

¹³ 2009 Rate Appeal, PFD, Pg. 41.

¹⁴ See, Ratepayer's Petition, Page 7, Paragraphs 25 and 26.

¹⁵ See, Ratepayer's Second Amended Petition, Page 11, Paragraph 40 and 41.

¹⁶ 2009 Rate Appeal, PFD, Pg. 49-50, Finding of Fact 68.

¹⁷ 2009 Rate Appeal SOAH Final Order, Finding of Fact 68.

¹⁸ See, Ratepayers Petition at Page 7, Paragraph 27.

(with only minor non-substantive changes) to the same allegations made in Paragraph 42 of the Ratepayers' 2009 Rate Appeal.¹⁹ During the 2009 Rate Appeal, these claims were fully litigated and decided against the Ratepayers.²⁰ Given that a prior judgment exists that involves the same issues, subject matter, and parties, the question of whether the Ratepayers are precluded from raising this issue again in this action should be briefed and settled as a preliminary matter to define the scope of the proceeding.

6. *Are the Ratepayers precluded from making other claims that are identical to claims made in the 2009 Rate Appeal?*

The Ratepayers' petition paragraphs 31 through 34 are a verbatim recitation of the Ratepayers' claims in paragraphs 43 and 45 through 47 of the Ratepayer's claims in the 2009 Rate Appeal regarding: the rates to the Ratepayers' retail customers exceeding the rates to Corsicana's retail customers; Corsicana's wholesale rates being not just and reasonable; Corsicana having certain obligations as a Regional water supplier; and interim rates. Given that a prior judgment exists denying relief on the same issues, subject matter, and parties, the question of whether the Ratepayers are precluded from raising these issues again in this action should be briefed and settled as a preliminary matter to define the scope of the proceeding.

III.
ISSUES TO BE ADDRESSED

1. Does the Commission have jurisdiction to consider the Ratepayers' Rate Appeal under TEXAS WATER CODE § 13.043(f)?
2. Are the challenged rates charged pursuant to a written contract between Corsicana and each of the Ratepayers (whether by agreement of the parties or as resolved by court determination in accordance with P.U.C. SUBST. R. 24.131, 16 Tex. Admin. Code § 24.131)?
3. If the challenged rates are charged pursuant to a written contract, have the Ratepayers met their burden of proof under P.U.C. SUBST. R. 24.136, 16 Tex. Admin. Code § 24.136, by demonstrating that the rates adversely affect the public interest by violating at least one of the public interest criteria listed in P.U.C. SUBST. R. 24.133(a), 16 Tex. Admin. Code § 24.133(a) and plead by the Ratepayers?

¹⁹ 2009 Rate Appeal, Ratepayers' Second Amended Petition, Page 11, Paragraph 42.

²⁰ 2009 Rate Appeal, TCEQ Final Order, Findings of Fact Nos. 29, 52, and 56-63.

4. If the challenged rates do not affect the public interest, what are the bases for determining that the challenged rates do not adversely affect the public interest, as required by P.U.C. SUBST. R. 24.134(a), 16 Tex. Admin. Code § 24.134(a)?
5. If the challenged rates are charged pursuant to a written contract and affect the public interest, what are the bases for determining that the challenged rates adversely affect the public interest, as required by P.U.C. SUBST. R. 24.134(e), 16 Tex. Admin. Code § 24.134(e)?
6. If the challenged rates are not charged pursuant to a written contract, has Corsicana met its burden of proof under P.U.C. SUBST. R. 24.136, 16 Tex. Admin. Code § 24.136, by showing that its cost of service supports the rate change pursuant to P.U.C. SUBST. R. 24.131(c) and 24.135, 16 Tex. Admin. Code §§ 24.131(c) and 24.135?
7. Any issues identified in Section II above that are not precluded by the Commission's Final Order in the 2009 Rate Appeal should be added to this List of Issues.
8. If all the issues identified in Section II above are precluded by the Commission's Final Order which was upheld by the District Court's decision in the 2009 Rate Appeal, the only claim remaining is a question of fact relating to whether Corsicana reasonably identified the changed conditions that are the basis for a change in rates.²¹ As such, the issue to be resolved would be limited to: Have the Ratepayers met their burden of proof under P.U.C. SUBST. R. 24.136, 16 Tex. Admin. Code § 24.136, by demonstrating that Corsicana did not reasonably identify the changed conditions that are the basis for a change in rates pursuant to P.U.C. SUBST. R. 24.133(a)(3)(B), 16 Tex. Admin. Code § 24.133(a)(3)(B)?


IV.
CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, the City of Corsicana respectfully requests that the Commission direct the parties to brief those issues identified above and then issue a Preliminary Order containing the Commission's decision on those preliminary matters related to issue preclusion and a List of Issues to be Addressed, if any, and for such further relief to which it may be entitled.

²¹ See, Ratepayer's Petition, Page 7-8, Paragraph 28.

Respectfully submitted,


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ATTORNEYS FOR CITY OF CORSICANA

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of January, 2015, a true and correct copy of the foregoing document is being served via facsimile, U.S. mail and/or hand delivery to all parties of record.


Miguel A. Huerta