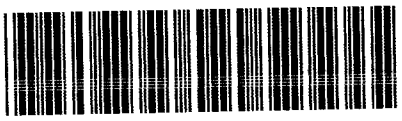

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SOAH DOCKET NO. 473-16-3113.WS
P.U.C. DOCKET NO. 45711

PETITION BY KEMPNER WATER SUPPLY CORPORATION TO REVISE RATES FOR WHOLESALE WATER SERVICE TO THE CITY OF LAMPASAS	§ § § § §	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

RESPONSE OF THE CITY OF LAMPASAS TO KEMPNER'S ORIGINAL PETITION AND REQUEST FOR INTERIM RATES AND MOTION TO DISMISS OR ALTERNATIVELY TO ABATE

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RESPONSE OF THE CITY OF LAMPASAS TO KEMPNER'S ORIGINAL PETITION AND REQUEST FOR INTERIM RATES AND MOTION TO DISMISS OR ALTERNATIVELY TO ABATE

The City of Lampasas ("City") respectfully submits this Response and Motion to Dismiss or Alternatively to Abate the Petition by Kempner Water Supply Corporation ("Kempner") to Revise Rates for Wholesale Water Service to the City of Lampasas and shows the following:

INTRODUCTION

The Commission should not take jurisdiction of this Petition. Since September 2013, Kempner and the City have been litigating in the district court in Lampasas, Texas the proper interpretation as well as the fairness/public interest aspect of the 10-year old Contract that Kempner here seeks to have the Commission rewrite. Kempner has thus far lost in the district court and is now resorting to the Commission in hopes of achieving a different result. Kempner raises here the same arguments it has raised in the district court and should therefore be precluded from seeking a second bite at the apple at the Commission. The Commission should reject Kempner's efforts to forum shop.

The Commission should also dismiss this Petition because it lacks jurisdiction to grant the relief requested. Commission jurisdiction over municipalities is limited, and this dispute does not fall within any of the statutes Kempner invokes to establish Commission jurisdiction.

Alternatively, the Commission should abate this docket until such time as the court litigation between the City and Kempner is final. 16 Tex. Admin. Code ("TAC") § 24.131(d) requires abatement of any Commission proceeding until the contract dispute is resolved. No final judgment has been rendered in the court case and, while Kempner has thus far lost on its interpretation of the Contract, it has not stipulated that it will accept the district court's rulings on what the Contract means. In addition, Kempner may appeal any final decision reached by the court. If the Commission finds it has jurisdiction, it should not consider this Petition until the court litigation is concluded.

For the reasons set forth below, Kempner's Petition is insufficient under the Commission rules.

Finally, Kempner's claim that the Contract adversely affects the public interest is meritless. The Contract was the product of a carefully negotiated settlement of earlier litigation between Kempner and Central Texas Water Supply Corporation ("Central Texas"), in which the City intervened to protect its own reserved capacity in the Central Texas water treatment plant, which Kempner was then and is now contractually bound to maintain. There is nothing unreasonably preferential, prejudicial, or discriminatory about the Contract. Nor does the Contract impact Kempner's financial integrity and operational capability so as to impair Kempner's ability to continue to provide service to either the City or to Kempner's other customers.

DISCUSSION

I. Kempner's participation in the district court litigation regarding the Contract should preclude its efforts to seek relief here.

The City and Kempner entered into the Contract in August 2006 as part of a settlement of a lawsuit Kempner had filed against Central Texas. *See* Ex. 1 to Kempner Petition (hereinafter referred to as "Contract" in citation references); Ex. A (Settlement Agreement that gave rise to the Contract, without attachments). The City intervened in that litigation in order to protect its reserved capacity in the Central Texas water treatment plant. At the time, the Central Texas plant was the exclusive source of supply for both the City and Kempner. Under the Contract, Kempner is required to deliver to the City through Kempner's transmission lines water that the City purchases from the Brazos River Authority ("Brazos") so that it can be withdrawn from Stillhouse Hollow Reservoir and treated by Central Texas. In 2006 and for decades before, water treated by Central Texas was also Kempner's sole source of supply; both the City and Kempner had reserved capacity in the Central Texas treatment plant. Accordingly, in addition to providing how Kempner should charge the City for delivering the City's water from Central Texas, the Contract allocates debt service attributable to Central Texas facilities as well as for Central Texas "operations and maintenance" (O&M") costs incurred in the treatment and delivery of the parties' water, assigning a share to both the City and Kempner. The Contract does so for a very good reason: in 2006, both parties relied on Central Texas to supply treated water. Only years later, after undertaking to build its own treatment plant, did Kempner – unilaterally –release its capacity (but not the City's capacity) in the Central Texas plant.

The 2006 settlement that gave rise to the Contract reflected a long history of litigation between Kempner and the City. Kempner and the City had settled earlier litigation in 2001, which resulted in a new Wholesale Water Supply Contract (the "2001 Contract"). The 2006 settlement replaced the 2001 Contract with the Contract at issue here. *See* Ex. A.

Under the Contract, the City pays Kempner the City's (i) contractually allocated shares of Central Texas treated water cost, Central Texas capital charge, and Central Texas O&M costs; (ii) contractually allocated shares of Kempner's O&M costs; (iii) Kempner's energy costs to deliver the City's water; and (iv) the City's percentage share of Kempner tank maintenance costs. The City also pays its contract share of Kempner's debt service on loans Central Texas took out to build the facilities to serve Kempner and the City, and loans Kempner took out to build facilities to serve the City and Kempner's retail customers – facilities that Kempner built and will solely own after the debt is extinguished.

After Kempner began imposing additional charges that the City believed were not authorized under the Contract, the City sued Kempner in September 2013 for breach of the Contract and for a declaratory judgment of the parties' rights and obligations under the Contract. That case is Cause No. 19005, *City of Lampasas v. Kempner Water Supply Corp.*, in the District Court of Lampasas County, Texas, 27th Judicial District. Kempner counterclaimed, seeking its own declaratory relief regarding the fairness and proper interpretation of the Contract. During the two and half years that this litigation has been ongoing, Kempner never suggested to the district court that the court should abate the district court case so that the parties could litigate any of their issues before the Commission.

Much discovery has been conducted in the lawsuit and Kempner has raised many issues above and beyond the simple interpretation of the Contract. In the lawsuit, Kempner complains about all but one of the same contract provisions it seeks to have the Commission set aside in this proceeding: (1) the fact that the Contract does not require the City to pay for Kempner-treated water (the City instead pays for delivery of Central Texas-treated water, which is adequate to meet its water needs); (2) the Contract's allocation of O&M costs; (3) the Contract's requirement that Kempner bear the cost of water loss from Kempner lines; and (4) the Contract's limits on the City's obligation to pay for capital repairs and maintenance. All of these issues, save the third one, were raised in Kempner's and the City's respective motions for summary judgment on the proper interpretation of the Contract. Ex. B, Kempner's Motion for Partial Summary Judgment.

That Kempner is raising the third issue listed above for the first time is not a basis for allowing this proceeding to go forward. Kempner *could* have raised that issue in the district court as well. Moreover, Kempner is misreading the Contract with respect to the third issue it raises here. Under § 3.5.C.2 of the Contract, the City *does* pay for lost water.

In arguing to the district court that the Contract could not be interpreted in the way the City contended, Kempner claimed that the City's interpretation was "absurd, unreasonable, inequitable and oppressive," and "would effectively invalidate the Agreement." Ex. C, Kempner's Amended Response to the City's Motion for Summary Judgment at 4. The very evidence Kempner attaches to its Petition was taken from the district court lawsuit. Kempner's notice for the deposition that is attached in part to its Petition (Ex. 2) addressed the exact topics Kempner seeks to revisit here, such as "whether the 2006 Contract is just and reasonable and without discrimination" and "whether the 2006 Contract serves the public interest." Ex. D, Kempner's Notice of Deposition, Topics 17 and 19.

In its live pleadings on file in the district court, Kempner alleges what is substantively the same challenge it makes here – that the Contract is contrary to the public interest: "Pleading in the alternative, Kempner asserts that the Agreement is unenforceable as it is substantively unconscionable, against public policy under the Texas Constitution, Texas statutory law and common law." Ex. E, Kempner's Second Amended Answer and Counterclaim at 1.07. Kempner's election to raise public interest concerns in the district court is not without precedent. Similar public policy challenges to a wastewater contract between a City and a water district were litigated in *City of The Colony v. North Texas Mun. Water Dist.*, 272 S.W.3d 699, 729-32 (Tex. App.—Fort Worth 2008, pet. dism'd).

When a party goes forward with litigation in the courts on disputes it could have litigated at a regulatory agency with primary jurisdiction over those same disputes, it forfeits the right to invoke the agency's primary jurisdiction. *See Oncor Elec. Delivery Co. v. Chaparral Energy, LLC*, ___. S.W.3d ___, 2016 WL 156054 at *3-4 (Tex. App.—El Paso 2016, no pet. h.) (holding that Oncor waived its primary jurisdiction argument by failing to raise it in the trial court). *See also Subaru of Am. Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 220 (Tex. 2002) ("primary jurisdiction is prudential whereas exclusive jurisdiction is jurisdictional"). Assuming – without conceding – that the Commission has jurisdiction over Kempner's Petition, one must recognize that Kempner had a choice: Kempner could have asked the district court to abate the lawsuit so that it could litigate those issues at the Commission. It chose not to do so. There are

"consequences" that accompany that choice. *Id.* Having gone forward for the last two and a half years in the district court – at great expense to both Kempner and the City[1] – Kempner should not be allowed to have a "do-over" at the Commission.

II. Kempner has no jurisdictional basis for the relief it seeks here.

Kempner asserts jurisdiction under three different chapters of the Water Code. The provisions are addressed below in the order and manner Kempner lists them. None apply.

A. Texas Water Code § 12.013. Subsection (a) of § 12.013 states that the "commission shall fix reasonable rates for the furnishing of raw or treated water for any purpose mentioned in Chapter 11 or 12 of this Code." This provision gives the Commission authority to set rates, not to modify a wholesale contract whose terms were agreed-upon almost 10 years ago. Those cases in which the Commission has been found to have jurisdiction under § 12.013 did not involve revisions to agreed-upon terms but, instead, concerned disputes over contract provisions that authorized a change in the compensation. The issues were how the change could be made. *See Texas Water Comm'n v. Brushy Creek Mun. Util. Dist.*, 917 S.W.2d 19 (Tex. 1996) (finding PUC had authority to set rates pursuant to a rate change provision in the contract between the parties); *Petition of City of Dallas for Review of a Decision By the Sabine River Authority to Set Water Rates*, PUC Docket No. 43674, SOAH Order No. 4 (finding PUC had authority to consider City of Dallas' request to set rates for the City's purchase of water under its contract with the Sabine River Authority because the rates agreed to in the contract had expired).

The Contract between the City and Kempner has no such authorization for change. It is a long-term Contract with fixed percentage allocations of debt-service charges and water usage-based allocations of the other monthly charges. Those monthly costs and debt-service charges may change over time, but the methods of allocation do not. What Kempner is seeking is a change in the methodology that it agreed to as part of the settlement of litigation.

Texas Water Code § 12.013(d) precludes jurisdiction here. That provision expressly limits the Commission's § 12.013 jurisdiction over municipalities to "water *furnished by* such city, town, or village to another political subdivision on a wholesale basis." (Emphasis added.) The Contract at issue here concerns water furnished *to* the City of Lampasas, not to water furnished *by* the City. *Brushy Creek*, 917 S.W.2d at 20 does not support jurisdiction. In *Brushy Creek*, the city was the entity furnishing the water and was seeking to adjust the rates and, therefore, jurisdiction was appropriate. The jurisdictional limitation of § 12.013(d) was

[1] The City's legal fees in the district court suit are over $400,000, even though its legal counsel have discounted the charges substantially below their standard rates.

inapplicable. While *City of Dallas v. Sabine* did not involve a city furnishing water, no party raised the issue of § 12.013(d) as a bar to jurisdiction. More important, the issue in that case concerned a rate charged by Sabine, over whom the Commission *did have* jurisdiction. The City in that case was seeking relief as a ratepayer, not as an entity subject to the Commission's regulatory authority. Unlike Kempner here, Sabine was not attempting to subject the City of Dallas to Commission regulation. It is clear that one of the purposes of § 12.013(d) is to preclude Commission regulation of municipalities when they enter into contracts to purchase wholesale water service to serve their retail customers.

B. Texas Water Code § 11.036(b)

Water Code § 11.036 does not address Commission jurisdiction at all and cannot be an independent basis for jurisdiction. More important, § 11.036 does not apply to Kempner. Section 11.036(a) provides that persons and various entities "having in possession and control any storm water, floodwater, or rainwater that is conserved or stored as authorized by this chapter may contract to supply the water." As the Contract (at 1) indicates, Brazos – not Kempner – is the entity that possesses and stores water for the City at the Stillhouse Hollow Reservoir, with the City's water contractually assigned to Central Texas for treatment. The City pays Brazos for its stored water supply, and Central Texas treats the City's stored water. Kempner is providing wheeling services for the City, transporting through its pipelines water treated at the Central Texas plant. Because the Contract between Kempner and the City is not covered by § 11.036(a), subsection (b) is inapplicable.

C. Texas Water Code § 13.001 and 13.041(a)

Chapter 13 does not give the Commission jurisdiction to set aside the contract terms under the wholesale contract between the City and Kempner. Kempner cites two provisions in Chapter 13 and ignores other Chapter 13 provisions that make it clear the Commission should not accept jurisdiction of Kempner's Petition pursuant to its regulatory authority in Chapter 13. Kempner first cites § 13.001. Section 13.001 does not confer jurisdiction *at all* but is, instead, a general statement of "Legislative Policy and Purpose." And the purpose set out in § 13.001 makes clear that Chapter 13 is designed to regulate *retail* rates, not the rates voluntarily agreed to in a wholesale contract like that between Kempner and the City. Section 13.001(a) states that Chapter 13 is "adopted to protect the public interest inherent in the rates and services of *retail public utilities.*" (Emphasis added.)

The second provision Kempner cites is § 13.041(a). Section 13.041(a) gives the Commission the authority to "regulate and supervise the business of every water and sewer utility within its jurisdiction." This provision does not give the Commission jurisdiction over either the City or Kempner. Section 13.002(23), which defines "water and sewer utility" – the entity that § 13.041(a) states the Commission can "regulate and supervise" – expressly excludes from that definition municipal corporations like the City and water supply corporations like Kempner.

The Commission's jurisdiction and the extent of its regulatory authority under Chapter 13 are set out in Subchapter F, which makes plain that non-retail contracts between a municipality like the City and a water supply corporation like Kempner are *not* covered by Chapter 13. Section 13.181 is the first statute in Subchapter F. Section 13.181(b) reiterates the authority conferred by § 13.041(a), and § 13.182 addresses the Commission's authority to ensure rates are "just and reasonable." This authority, however, is circumscribed by Water Code § 13.181(a), which provides that "[e]xcept for the provision of Section 13.192, this subchapter shall apply only to a utility and *shall not be applied to municipalities*, counties, districts, *or water supply* or sewer service *corporations*." (Emphasis added.) Thus, regulatory proceedings before the Commission under Chapter 13 do not include municipalities like the City or water supply corporations like Kempner, unless they fall within the definition of a "utility" under Chapter 13. And, as previously discussed, § 13.002(23) defines what constitutes a "utility" for purposes of Chapter 13 and that definition expressly excludes "municipal corporations" and "water supply" corporations.

This exclusion of municipalities from most of the Commission's jurisdictional authority has existed since the Public Utility Regulatory Act ("PURA"), which originally had water rate regulation included in it, was first passed. *See City of Sherman v. Public Util. Comm'n*, 643 S.W.2d 681, 683-84 (Tex. 1983) (construing similar language in earlier version of the PURA and holding Commission did not have jurisdiction over dispute between City of Sherman and a privately owned public utility). As the Court explained in *City of Sherman*, municipalities "were concerned about state-wide regulation for two reasons: (1) they could lose their power to franchise and regulate utilities, and (2) municipally-owned utilities could be state regulated." *Id.* at 683. "As a compromise, [PURA] retained municipal regulation within the territorial

boundaries of municipalities and exempted municipally-owned utilities from most of the Act's regulatory provisions." *Id.*[2]

D. Texas Water Code § 13.043(b)

Section 13.043(b) gives the Commission appellate jurisdiction over a decision in a rate proceeding before the governing body of a municipality. There has been no rate proceeding before the City. Kempner is not appealing a rate decision by the City, it is challenging the terms of a Contract that has been in effect for almost 10 years. Those terms have not changed since August of 2006. In addition, when applicable, § 13.043(c) requires a party to appeal 90 days after the effective date of the rate change. Thus, even if Kempner could invoke this provision – which it plainly cannot – its "appeal" is almost a decade too late.

Texas Water Comm'n v. City of Fort Worth, 875 S.W.2d 332 (Tex. App.—Fort Worth 1994, no writ) does not support jurisdiction under § 13.043(b). That case involved jurisdiction under Water Code § 13.043(f), which the Fort Worth Court of Appeals held authorizes the Commission to exercise *appellate* jurisdiction over ratesetting engaged in pursuant to an agreement that allows one retail public utility *receiving* water service from another retail public utility or political subdivision to appeal a rate change by the latter. 875 S.W.2d at 334-35. Kempner is the provider, not recipient, of water services under the Contract. The only "rate" decision here is the Contract under which Kempner and the City have been operating for almost 10 years, the terms of which have not changed. And again, § 13.043(f) has a 90-day deadline for appealing a rate decision.

Kempner suggests (Petition at 3) that the City's monthly decision to pay its Kempner bill confers jurisdiction under § 13.043(b) despite the 90-day statute of limitations under § 13.043(c). Section 13.043(b)(1) provides an appellate remedy for Kempner's *ratepayers* from "the decision of the governing body of the entity affecting their water" rates. Neither Kempner's retail ratepayers nor the City – a ratepayer as well – has appealed any such "decision of the governing body of the entity (Kempner) affecting their water rates." Section 13.043(b) does not provide jurisdiction for Kempner's Petition.

[2] This history of exempting municipalities from most of PURA's regulatory provisions is further reflected in Water Code § 12.013(d), which exempts municipalities from Commission jurisdiction under § 12.013, except when the municipality is furnishing water to another political subdivision.

III. If the Commission finds it has jurisdiction, it must nevertheless abate this proceeding until the court litigation over the Contract is concluded.

Kempner admits in its Petition that the court proceedings are not concluded. *See* Petition at 4, n. 4 (acknowledging trial court's summary judgment ruling "has not been incorporated into a final order and is not yet ripe for appeal"). 16 TAC § 24.131(d) states: "If the seller and buyer do not agree that the protested rate is charged pursuant to a written contract, the [ALJ] 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." Kempner has not indicated that it will accept the district court's summary judgment ruling. On the contrary, it is suggesting that, when final, Kempner will appeal the decision. The rule requires that *both* parties agree the rates being charged are charged pursuant to a written contract. At this juncture, only the City agrees that these are the rates required under the Contract. The Commission rule therefore makes abatement mandatory, if the Commission does find it has jurisdiction.

IV. Kempner's Petition fails to satisfy Commission rules.

Kempner's Petition is insufficient under 16 TAC § 24.44(b). Under that rule, in order to seek review of rates pursuant to Water Code § 12.013, a petition filed by a supplier must include a statement that the petitioner is "willing and able to supply water at a just and reasonable price" and "that the price demanded by petitioner for the water is just and reasonable . . . and is not discriminatory." 16 TAC § 24.44(b)(4) and (5). Kempner's Petition does not reference the first requirement and its Petition fails even to indicate what price it is demanding, much less make any showing or allegation that the price it demands is "just and reasonable and not discriminatory."

Kempner's Petition is also insufficient with respect to its request for interim rates because, again, Kempner never says what rate it wants – *i.e.*, there is no "price demanded by the petition," as required by 16 TAC § 24.44(b)(5).

Kempner's Petition also fails to meet the requirements of 16 TAC § 24.130(b), which requires the petitioner to set out "specific factual allegations" as well as "the relief which the petitioner seeks." Kempner complains about the Contract but never sets out what rate it seeks to have the Commission authorize. Such a pleading does not contain the specificity required by Rule 24.130(b).

Additionally, even if the Commission had jurisdiction over Kempner's petition under Texas Water Code § 13.043(b) (which it does not), a petition under that provision must be signed by the lesser of 10,000 or 10 percent of ratepayers whose rates have been changed and are

eligible for appeal. Texas Water Code § 13.043(c) and 16 TAC § 24.41(b). Kempner's petition is not signed by any parties other than Kempner, therefore it is does not meet the requirements of the rule.

V. Kempner's request for interim rates should be denied but, if granted, any charges in excess of those authorized by the district court's rulings should be placed into escrow.

Whether the Commission abates or goes forward with this proceeding, it should deny Kempner's request for interim rates. Pursuant to the district court's rulings, the City is paying Kempner the charges the district court has held Kempner is allowed to charge under the Contract. The district court granted summary judgment that Kempner was prohibited from assessing such new charges and had breached the Contract by imposing them. In addition, its counsel entered into a Rule 11 agreement that Kempner would not bill for such treatment during the pendency of the district court litigation. *See* Exs. F and G (summary judgment order and Rule 11 agreement). Kempner's request for interim rates in this proceeding is an attempt to violate not only the district court's decision but its own agreement made in the litigation. The Commission should not facilitate Kempner's efforts to thwart the district court; nor should it permit Kempner to violate its own agreement to not impose additional charges until "the last day of any trial" in the district court. Ex. G at 1.

Article I, § 16 of the Texas Constitution prohibits the impairment of contracts, and the courts have held that this provision "limits the state's ability to pass laws that impair contractual obligations to instances where the public safety and welfare must be protected." *Tex. Water Comm'n v. City of Fort Worth*, 875 S.W.2d 332, 335 (Tex. App.—Austin 1994, writ denied). In order to abide by this constitutional limitation, the Commission has promulgated rules that limit Commission authority to alter contracts to when the Commission determines the contract adversely affects the public interest. *See* 16 TAC §§ 24.128 - .134. The district court has determined what the Contract requires and prohibits. The City has been making its payments to Kempner pursuant to that determination. Because the Commission has not made any determination that the existing Contract adversely affects the public interest, the rates cannot and should not be changed in an interim rate hearing.

The Commission's and SOAH's rulings in the *City of Dallas* proceeding in PUC Docket No. 43674 are not applicable here. In that case, the contract rates had expired and setting rates would not involve setting aside a contract rate. *See* PUC Docket No. 43674, SOAH Order No. 4 at 6 (Jan. 9, 2015) (finding that Commission has authority to set interim rates because "there

currently is no contractual rate"). In that order, the ALJ recognized that interim rates that would change a contract rate could not be set "until the PUC first determined that the protested rate adversely affects the public interest." *Id.* Here, while the parties are disputing what the proper Contract rate is, there is no question that there *is* a contract rate set by the existing Contract. That rate has not expired, and the district court has made a preliminary determination of what that rate is. To alter the *status quo* here with an interim rate hearing would both violate the Constitutional prohibition against impairment of contracts and interfere with the district court litigation.

Alternatively, if the Commission authorizes a hearing on interim rates, it should also require that any rate in excess of what the district court has ruled is permitted under the Contract be deposited into an escrow account pursuant to 16 TAC § 24.30.

VI. Kempner's claims that the Contract adversely affects the public interest within the meaning of 16 TAC § 24.133(a)(4) are meritless and based on a misleading representation of the Contract.

A. Circumstances Leading Up To The Contract.

In addition to falsely representing parts of the Contract, Kempner's description of the Contract omits critical aspects of the Contract and the context in which it came to be executed. An understanding of how the Contract came to be entered into is a critical component of any public interest analysis of it.

Since at least 1985 the City, under its contract with Brazos and Central Texas, has assigned its raw water to Central Texas, which has treated the City's water and delivered it to Kempner for delivery to the City. The City has paid millions of dollars for the construction and upkeep of the Central Texas treatment plant, transmission lines, and storage tanks necessary for Central Texas to do so. The City holds reserved capacity in the Central Texas water treatment plant totaling 4.84 million gallons of water per day ("MGD") – an amount sufficient to meet the City's needs in both the short and long term.

The City has for many years contracted with Kempner for delivery of the City's water from Central Texas. These relationships with Kempner and Central Texas have been governed by a series of wholesale water supply contracts between the City and Kempner on the one hand, and Kempner and Central Texas on the other. The City has paid millions of dollars for the construction of the facilities required to get the City's water to the City, on both the Central Texas and Kempner sides of the transmission lines.

In 2004, Kempner sued Central Texas over a contract dispute. The City intervened. The three parties settled that litigation in late 2005 and early 2006, including a new wholesale water supply contract between Kempner and Central Texas dated October 27, 2005, and a corresponding wholesale water supply contract between Kempner and the City dated August 28, 2006 – the Contract. *See also* Ex. A.

B. The Contract

A full evaluation and understanding of the Contract – including an understanding of its fairness – requires an examination of numerous other contracts because, as the recitals in the Contract and the Settlement Agreement attached hereto as Exhibit A establish, the Contract is the product of the parties' long-term contract and litigation history. The Contract expressly references numerous other contracts, including Kempner's companion contract with Central Texas, which is integral to the City's rights under the Contract. *See* Contract at 12, § 3.1.

The ultimate goal of the Contract is to ensure continued delivery of the City's water from Stillhouse Reservoir to the City's points of delivery. When the Contract was executed in 2006, both the City and Kempner received all of their water from a single source – Central Texas. There was no Kempner water treatment plant. Therefore, the Contract logically allocated certain costs between Kempner and the City based on each party's reserved capacity in the Central Texas water treatment plant and other Central Texas and Kempner facilities. For example, the City pays to Kempner, on a monthly basis, 63% of Kempner's share of debt service on one loan to Central Texas for Central Texas' facility construction, and 63% of the debt service on another loan to Kempner for Kempner's facility construction. Contract at § 3.4.A. The City also pays, semi-annually, 63% of Kempner's debt service on two other loans associated with facilities that Kempner either built or bought from Central Texas as part of the settlement. Contract at § 3.4.B.

In settling the litigation between Kempner, Central Texas, and the City, the Contract did not merely allocate benefits and costs based upon the parties' reservations of capacity in the Central Texas water treatment plant. For example, under the Contract, the City has paid millions in debt service; at the end of the Contract, however, only Kempner (and Central Texas) will own those facilities – the City will own nothing. The City also pays to Kempner a use-based percentage share of the O&M costs that Kempner is contractually obligated to pay to Central Texas for the Central Texas facilities used in treating and delivering the City's water. Contract at § 3.5.B.1.

In addition, the City assumed numerous obligations it did not have under its old contracts with Kempner, including but not limited to the following:

•The City agreed to pay a percentage of the costs of maintenance painting for certain storage tanks in Kempner's system (Contract at § 3.5.E.);

•The City agreed to pay a share of Kempner O&M costs for "non-capital repair and maintenance directly related" to the part of the Kempner system [excluding Kempner's new facilities] that delivers treated water to the City, as well as a 40% multiplier for administration and overhead for direct labor, and a 10% multiplier for independent contract fees for non-capital repair and maintenance. Contract at § 3.5.C. The City also agreed to pay a percentage of the cost of line breaks and resulting water loss in the Kempner lines serving the City. Contract at § 3.5.C.2.

•The City agreed, instead of being paid its share of lender-required reserve accounts for jointly used facilities, that Kempner could use the City's share to help fund two new accounts under the Contract: a "Joint Use Facilities Base Reserve Account," and a "Joint Use Facilities System Account" to be used, as mutually agreed, for the joint use facilities. Contract at § 4.8.2.d.

•The City agreed to a new dispute resolution mechanism for engineering disputes, new remedies for "intrusions" by either party into the other's capacity, and new mechanisms to help communication, including annual meetings, true-ups, and new forecasting and planning. Contract at § 4.4.

•The City agreed to a new Capital Policy, developed by Kempner, to specify what constituted "non-capital repair and maintenance," which the City pays as part of Kempner's O&M cost as defined under the Contract. Contract at § 3.5.C.5.; Kempner Petition at 77-79.

•The City agreed to pay an escalator on the Central Texas Capital Contribution charge. Contract at § 3.5.F. This new agreement was contingent upon Kempner enforcing portions of its agreement with Central Texas. *See* Contract at § 3.5.F.2.

Kempner suggests (at 4-5) the Contract is adverse to the public interest because the City is not assigned 100% of the O&M costs for Central Texas facilities. The percentage O&M cost allocations in the Contract, however, were based on the fact that, in 2006, *both* Kempner and the City received treated water from the Central Texas facilities for resale to their customers. The facts have changed only because of the unilateral decisions later made by Kempner to go forward with building its own plant and to give up its reserved capacity in treated water from Central

Texas. Moreover, Kempner ignores the fact that the City also pays 63% of Kempner's contractual share of the debt service on the Central Texas facilities.

In 2013, after servicing the debt for its own plant for several years and giving up its rights in the Central Texas water, Kempner tried to change the deal. It announced its *new* unilateral interpretation, or "Billing Methodology" for the Contract. It imposed new charges going back to March 2010 and insisted that the Contract allowed Kempner to send only water from Kempner's plant to the City, which would expose the City to an increased "floor penalty" under Kempner's own take-or-pay contract with Central Texas. It charged a new "Kempner Treated Water Cost" for Kempner-treated water. Ex. H (Sept. 2013 letter). The City sued Kempner in district court to establish that these charges were not authorized under the Contract and Kempner had breached the Contract in assessing them.

C. The rates under the Contract do not violate the criteria in 16 TAC § 24.133(a)(4) so as to adversely affect the public interest.

Kempner's first claim (at 3-6) under its public interest analysis is that the Contract violates 16 TAC § 24.133(a)(4). Kempner misstates that portion of the rule: it addresses a rate that is "unreasonably preferential, prejudicial or discriminatory, compared to the wholesale rates the seller charges other wholesale customers." Kempner adds to that definition a requirement that the rate be "just and reasonable." While the Contract and all charges in it are just and reasonable, that is not the test under the rule.

Kempner suggests (at 4) the Contract is discriminatory because it prohibits Kempner from passing certain costs onto the City and Kempner claims it therefore must pass these costs onto other customers. This claim is flawed for at least two reasons. First, Kempner fails to account for the payments the City *does* make to Kempner and the fact that those kinds of payments – including debt service and a direct contribution to O&M costs – are not made by Kempner's other customers. Second, Kempner appears to be referring to the rates it charges its *retail* customers. The rule requires comparing wholesale customers, not a comparison of cost burdens as between retail and wholesale customers. *See* 16 TAC § 24.133(a)(4) (limiting discrimination considerations to "wholesale rates the seller charges other wholesale customers").

Kempner claims (at 4) that the Contract requires it to supply the City with "free water" from its own water treatment plant. This misstates the Contract. The Contract requires the City to pay its share of what Kempner pays Central Texas as "treated water cost." That requirement is properly based on the fact that the City's stored water is assigned to Central Texas for treatment as well as the fact that Kempner is to deliver water from the Central Texas system for

the City's use. Contract at § 3.1. The Contract also requires Kempner to use "best efforts" to deliver water to the City at the required pressures and rates. Contract at § 3.9.A. Kempner contends that if water is not available from the Central Texas plant, or if it needs to "restrict deliveries . . . for operational reasons," it must deliver "free water" to the City. This argument ignores multiple provisions in the Contract. First, if Central Texas is not delivering good quality treated water as required by Kempner's contract with Central Texas, it is Kempner's obligation under the Contract to use "best efforts" to ensure Central Texas meets its contractual obligations to Kempner. Kempner also fails to acknowledge that the parties carefully fashioned steps (including meeting and conferring) as well as non-damages remedies for occasions when Kempner fails to make available sufficient water. Contract at § 3.9.C. Kempner took the position in the district court that it could unilaterally decide to serve the City 100% from its own plant and to impose a "Kempner treated water cost." The Court's order declares that Kempner breached the Contract by imposing this new "Kempner treated water cost." Ex. F.

Kempner claims (at 4-5, § 2) the Contract is discriminatory because it does not allocate to the City *all* O&M costs associated with the Central Texas facilities that are used to treat and deliver water to the City. Kempner ignores that the City is paying not only its allocated share of the O&M costs associated with these facilities but is also paying 63% of Kempner's debt service obligations on them. Kempner states (at 4-5, § 2) that it is prohibited "from using this source of treated water to serve any other retail or wholesale customers," suggesting that the City should be paying 100% of the O&M costs associated with the Kempner facilities. Kempner, which gave up its own reserved capacity in water from Central Texas, does not have any right to use the City's water for its other customers. When Kempner in 2010 unilaterally gave up its reserved capacity in the Central Texas water treatment plant, it fully understood its continuing obligation to fund the Central Texas O&M costs as set forth in the examples appended as Exhibit D to the Contract. If Kempner had not given up its capacity, it would still be able to use that reserved capacity to send its customers water from the Central Texas plant. But the City does not "prohibit" Central Texas from selling water to Kempner; Kempner can and does purchase water from Central Texas when its own plant is not operating. It was Kempner's choice to build an oversized water treatment plant instead of continuing to use its reserved capacity at Central Texas.

Kempner also ignores the fact that these Central Texas O&M costs are attributable to facilities that Kempner elected to build and used for years in order to get its treated water. The

City's agreement to continue to contribute toward Kempner's investment in these facilities was part of a settlement of litigation; Kempner should not be permitted to undo that settlement 10 years later.

Kempner's claim (at 5, § 3) that the Contract does not require the City to bear costs associated with lost water is simply false (and also improperly alleges discrimination against retail customers). *See* Contract at 25-26, § 2 (allocating a portion of certain water losses to the City).

Kempner complains (at 5-6, § 4) that the Contract "limits Respondent's obligation to pay for required repairs and maintenance to the water delivery system used by [Kempner] to transport water from the sources of the water to [the City's] delivery points." When the Contract was signed in 2006, the parties knew Kempner might build its new plant and new lines. The City had already paid for adequate capacity in the Central Texas plant and has no capacity in the new plant or lines. Thus, Kempner and the City deliberately excluded Kempner's "New Facilities" (new plant and lines) from the Kempner O&M Costs that the City pays. The City is properly required to pay only "non-capital repair and maintenance" on defined lines and facilities. Contract at § 3.5.C.2.

Kempner complains (at 5, § 4) that the City declined to pay for capital repairs to the Highway 195 Pump Station, which Kempner bought in 2006 from Central Texas. Under the Capital Policy adopted by the parties pursuant to the Contract at § 3.5.C.5, the proposed repairs were classified as capital repairs and hence not compensable by the City. Kempner has never disputed that the repairs are capital repairs. Recognizing that repairs were needed, the City offered to authorize $50,000 from the Joint Use Facilities System Account to assist with the costs. Kempner declined. Kempner says (at 6, § 4) that the City is entitled to 56% of the capacity of the Pumping Station. Capacity figures are irrelevant here because, as Kempner acknowledges (at 5, § 4), the City is not obligated to pay for capital repairs (except in limited circumstances defined by the Contract). Kempner points to no provision requiring the City to participate in these costs. In addition, Kempner asserts that the allocation of these costs it wants to have assessed to the City is based on Kempner's alleged capacity of 6.19 MGD. On March 7, 2016, Kempner General Manager Delores Goode furnished the City with a document in which Kempner claims the Pumping Station now has 8.21 MGD capacity, not 6.19 MGD as stated in the Petition. Ex. I. Thus, even if Kempner were entitled to such an allocation – which it is not – Kempner's requested allocation is wrong, based on its own numbers.

D. The rates under the Contract do not violate the criteria in 16 TAC § 24.133(a)(1) so as to adversely affect the public interest.

Kempner's second claim (at 6-7)) under its public interest analysis is that the Contract violates 16 TAC § 24.133(a)(1), which applies when a "protested rate impairs the seller's ability to continue to provide service, based on the seller's financial integrity and operational capability."

Kempner's claims that the Contract impairs its ability to provide service is at odds with its representations of its financial integrity and operational capability.

Kempner claims (at 6, § 1) that its retail customers "subsidize" the City's retail customers. The rates retail customers pay is not a relevant inquiry under Rule 24.133(a)(1). The relevant inquiry is whether the protested rate impairs Kempner's ability to continue to provide service. The alleged subsidization is not a proper issue in a public interest hearing. "In order for the Commission to determine whether there was in fact a subsidy, it would necessarily have to examine the costs and revenues," which examination is prohibited by Rule 24.133(b). *Navarro Co. Wholesale Ratepayers v. Covar*, No. 01-14-00102-CV, 2015 WL 3916249 at *8 (Tex. App.—Houston [1st Dist.] 2015, pet. filed) (mem. op.).

In any event, Kempner provides no facts on how the City's retail customers are "subsidized." Instead, Kempner attaches a fragment from an incomplete and unsubstantiated draft "Lampasas Cost of Service Analysis" from "economists.com." *See* Petition, Ex. 5. This fragment claims that the City uses all of Kempner's 12-inch and larger lines, and accounts for 48% of Kempner's billed volume, and hence the City should pay 48% of Kempner's "cost of service." The "cost of service" figure is not substantiated (or relevant). Kempner does not differentiate costs for the City and Kempner's retail customers. Kempner ignores that the Contract expressly provides for the City to pay non-capital repair and maintenance on designated transmission lines that carry the City's water, based on the City's actual percentage of water usage of the water sent through those lines (the monthly "City Percentage," based on water delivered to the City divided by the water that exits the Hwy. 195 Pump Station).

Kempner also references (at 6, § 2) testimony by the City's former city manager and suggests this testimony supports the notion that Kempner's financial stability is at risk. The excerpted testimony says no such thing. *See* Petition, Ex. 3 at 103. It merely recognizes that when Kempner and the City entered into the Contract, there was no expectation that Kempner was "required to deliver water to the city at no cost." *Id.* And Kempner does not deliver water at no cost. The City pays Kempner hundreds of thousands of dollars every year.

Kempner claims (at 6-7, § 3) that it is "obligated under the Agreement to provide free water" to the City under the district court's summary judgment order and suggests the order may result in Kempner breaching its Loan Agreement with the Texas Water Development Board because ¶ 9.08 of that agreement prohibits Kempner from providing "free services of the System." The district court's order nowhere obligates Kempner to provide "free water." The district court has properly interpreted the Contract to limit the charges that may be assessed. The Contract is not free for the City. Moreover, again, the amounts the City must pay under the Contract and the limitations on what Kempner can charge are relevant under Rule 24.133(a)(1) only to the extent they impair Kempner's ability to continue to provide service. Kempner makes no showing of any such impairment or any linkage between the district court's rulings and its ability to serve its customers.

The fact that Kempner operated under this Contract for seven and a half years before deciding it needed to charge the City differently strongly indicates that any financial issues Kempner may have are not caused by this Contract but are the result of other business decisions Kempner made after it entered into the Contract.

Kempner complains (at 7, § 4) of potential loss of service territory, based on the request for service letter it received from the Lampasas Economic Development Corporation ("LEDC") Business Park under Texas Water Code §13.254(a-1). Kempner complains that the City has annexed the Business Park, and that the City may secure single certification under Water Code § 13.255, which entitles the City to single certification in areas within its city limits. Whether Kempner or the City serves the Business Park has nothing to do with whether the Contract adversely affects the public interest. In any event, Kempner has never served and has no facilities in the Business Park. Moreover, Kempner's suggestion that it will be harmed by single certification of the Business Park reflects a fundamental misunderstanding of the Contract and how it works. Kempner will *benefit* from the City's serving the Business Park. If the City's water demand increases, so does the City Percentage, *increasing* the City's share of (i) Central Texas O&M Costs, (ii) Kempner's O&M Costs, (iii) Tank Maintenance Costs, and (iv) Kempner Energy Cost.

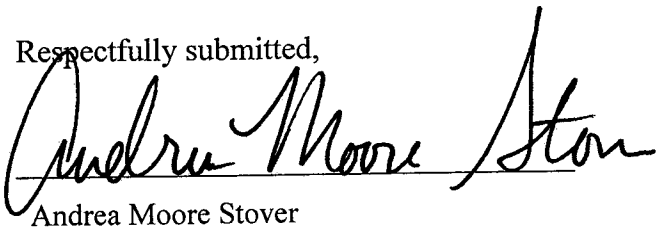
Kempner's claim that it would financially benefit from serving the Business Park is ill conceived. Kempner's correspondence with LEDC states that the cost just to get its facilities to the Business Park is $2.3 million (indicating how far away its existing lines are from the Park). Kempner informed LEDC that it might waive recovery of that $2.3 million from LEDC but

would reserve the right to try to recover the sum from the City. The Contract does not authorize transferring those costs to the City. If Kempner were to serve the LEDC, it would therefore incur significant additional debt (and perhaps more litigation with the City over what the Contract says). Per Kempner's latest audit, Kempner's debt-service level, resulting from its other poor business decision to build a plant much larger than it needed, is already substantial. Taking on service to the Business Park is just another bad idea that would burden its ratepayers. Kempner's suggestion that it needs the Business Park to preserve its "economies of scale" is also inconsistent with Kempner's agreements to transfer hundreds of acres within its CCN to Copperas Cove. *See, e.g.*, PUC Docket No. 43735. In short, in addition to being meritless, Kempner's arguments make no sense.

CONCLUSION AND PRAYER

For the reasons stated, the City of Lampasas respectfully requests that the Commission dismiss the Petition or alternatively abate it, deny Kempner's request for a modification to the Contract between them, deny the request for interim rates and grant the City such other and further relief to which it is entitled.

Respectfully submitted,



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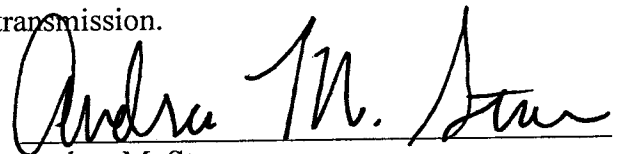
ATTORNEYS FOR THE CITY OF LAMPASAS

CERTIFICATE OF SERVICE

I certify that on the 30th day of March, 2016, a true and correct copy of the foregoing instrument was served on all parties of record by email, hand delivery, Federal Express, regular first class mail, certified mail, or facsimile transmission.



Andrea M. Stover

CAUSE NO. 207,477

KEMPNER WATER SUPPLY CORPORATION	§	IN THE DISTRICT COURT
VS.	§	169TH JUDICIAL DISTRICT
CENTRAL TEXAS WATER SUPPLY CORPORATION	§	BELL COUNTY, TEXAS

AMENDED SETTLEMENT, COMPROMISE, RELEASE AND TOLLING AGREEMENT

This Amended Settlement, Compromise, Release and Tolling Agreement ("Agreement") is entered into by and between KEMPNER WATER SUPPLY CORPORATION ("KWSC") and THE CITY OF LAMPASAS, TEXAS (the "City") on the last date written herein. KWSC and the City may hereafter be collectively referred to as "Parties." The Parties agree as follows:

WHEREAS, KWSC is a Texas non-profit corporation, organized and established under Chapter 67, Texas Water Code (formerly Article 1434a, R.C.S. of Texas 1924, as amended), and KWSC independently owns and operates its potable water distribution system in order to provide potable water to its customers; and

WHEREAS, the City is a Texas municipal corporation chartered under Article XI, § 5 of the Texas Constitution, and the City independently owns and operates its potable water distribution system in order to provide potable water to its customers; and

WHEREAS, as part of settlement of litigation between KWSC and the City in 2001, the Parties agreed that prior contracts between them needed to be amended,

modified and completely replaced by the Wholesale Water Supply Contract entered into as of September 13, 2001 (the "2001 Contract"); and

WHEREAS, KWSC and the City have operated pursuant to the 2001 Contract to this date; and

WHEREAS, disputes have arisen between and among KWSC, the City, and Central Texas Water Supply Corporation ("CTWSC"), resulting in litigation brought by KWSC in Cause No. 15,419, *Kempner Water Supply Corporation vs. Central Texas Water Supply Corporation*, 27th Judicial District Court of Lampasas County, Texas, said lawsuit having been transferred to Bell County and now referred to as Cause No. 207,477 C, *Kempner Water Supply Corporation vs. Central Texas Water Supply Corporation*, 169th Judicial District Court of Bell County, Texas ("Lawsuit"); and

WHEREAS, on February 21, 2006, the City and KWSC agreed to a 2006 Wholesale Water Supply Contract which was submitted to the United States Department of Agriculture-Rural Development ("USDA-RD") for its concurrence; and

WHEREAS, on February 21, 2006, the City and KWSC also agreed to a Settlement, Compromise, and Release Agreement which was also submitted to USDA-RD for its concurrence; and

WHEREAS, in response to the comments of USDA-RD, the City and KWSC have agreed to and submitted to USDA-RD certain amendments to the 2006 Wholesale Water Supply Contract (the "2006 Contract" herein means and includes agreed amendments

thereto) (a copy of the 2006 Contract is attached hereto as Exhibit A), which 2006 Contract shall be effective upon written concurrence from USDA-RD in the form attached hereto or as it may be modified in future by agreement of the Parties in order to gain the concurrence of USDA-RD; and

WHEREAS, KWSC has obtained a commitment for approximately $33 million in loan funds from the Texas Water Development Board ("TWDB") in order to acquire additional water treatment, storage and transmission facilities, through construction and through purchase, and to pay off all KWSC indebtedness to USDA-RD ("TWDB Loans" as defined in the 2006 Contract); and

WHEREAS, the Parties have determined that it is in their mutual best interests and in the best interests of their respective members and customers to provide for the 2006 Contract to become effective in the event that KWSC repays all of its indebtedness to USDA-RD before USDA-RD provides its concurrence in the 2006 Contract, or, if those events do not occur by September 1, 2006, to provide for interim operation with a tolling agreement and nonsuit pending the 2006 Contract becoming effective, and further to provide a means to fully settle and resolve all claims and counterclaims between them that have been asserted and/or which might have been asserted in the above-styled and numbered clause, and to amend the February 21, 2006 Settlement, Compromise and Release Agreement to address the matters herein; and

NOW, THEREFORE, for the consideration herein expressed, the Parties agree as follows:

1. Superseding Amendment. This Amended Settlement, Compromise, Release and Tolling Agreement supersedes and replaces the February 21, 2006 Settlement, Compromise, and Release Agreement executed by the Parties.

2. Condition Precedent and Effective Date. A condition precedent to the effectiveness of paragraphs 6, 7 and 8 of this Agreement is that the 2006 Contract has become effective. The effective date of paragraphs 6, 7 and 8 of this Agreement ("Effective Date") shall be the date, or earlier date, upon which the 2006 Contract becomes fully effective under either or both of 2.a. or 2.b. below (i.e., not merely in interim operation). The remaining covenants of this Agreement shall become effective upon execution of this Agreement by the Parties. The 2006 Contract shall become effective (the "Effective Date" of the 2006 Contract as defined therein) on the earliest to occur of the following:

a. Concurrence by USDA-RD to the 2006 Contract. KWSC and the City have been notified by letter dated August 22, 2006, from Bryan Daniel, State Director of USDA-RD, that USDA-RD has concurred in the 2006 Contract, conditioned only upon the payoff by KWSC of USDA-RD Loans 91-06 and 91-07 to KWSC, as evidenced by the security agreements and promissory notes relating thereto. Therefore, upon the date that KWSC warrants to the City that it has

caused to be tendered the amount demanded by USDA-RD in discharge of KWSC indebtedness to USDA-RD for USDA-RD Loans 91-06 and 91-07, the 2006 Contract shall become effective, and paragraphs 6, 7 and 8 of this Agreement shall become effective, irrevocable and fully binding and enforceable between the Parties.

b. Repayment by KWSC of All Indebtedness to USDA-RD. "KWSC Indebtedness" shall mean USDA-RD loans 91-01, 91-02, 91-06 and 91-07 to KWSC as evidenced by the security agreements and promissory notes relating thereto. The Parties agree that upon the date that KWSC warrants to the City that it has caused to be tendered the amount demanded by USDA-RD in discharge of all KWSC Indebtedness to USDA-RD, the 2006 Contract shall become effective between the Parties as if USDA-RD had concurred therein, and paragraphs 6, 7 and 8 of this Agreement shall become effective, irrevocable and fully binding and enforceable between the Parties. KWSC agrees promptly to provide to the City copies of documents confirming such tender to USDA-RD of the amount designated by USDA-RD,

3. Interim Operation/Tolling Agreement/September 1, 2006. If USDA-RD's unconditional concurrence ("2.a" above) or KWSC payoff of KWSC Indebtedness ("2.b" above) has not occurred by September 1, 2006, the Parties shall operate under the Interim

Operation/Tolling Agreement set forth in this paragraph 3 until the 2006 Contract becomes effective.

a. Beginning September 1, 2006, and until the occurrence of "2.a." or "2.b." above, or until the Parties mutually agree otherwise in a duly executed written instrument, the Parties agree to operate on an interim basis under all terms of the 2006 Contract as if fully effective.

b. For purposes of interim operation under the 2006 Contract, the Parties agree that "Effective Date" in the 2006 Contract shall mean September 1, 2006. For example, for purposes of the Effective Date Adjustments in Section 4.9 of the 2006 Contract, "Effective Date" shall be September 1, 2006.

c. USDA-RD. During interim operation under the 2006 Contract, the Parties agree to work diligently and in good faith to take prompt and reasonably necessary steps to secure (i) USDA-RD's unconditional concurrence in the 2006 Contract, including submittal to USDA-RD of any mutually agreed modifications to the 2006 Contract and (if required) settlement agreement, and (ii) KWSC's warranty to the City that it has caused to be tendered the amount demanded by USDA-RD in discharge of all KWSC Indebtedness.

d. Nonsuit and Tolling.

(1) The City and KWSC agree that within 10 calendar days after September 1, 2006, if the 2006 Contract and this Agreement have not

already become effective under "2.a." or "2.b." above, the Parties shall each file a notice of nonsuit without prejudice of all currently pending claims against the other in the lawsuit.

(2) The Parties expressly agree that, provided (i) KWSC is in compliance with this Agreement and the Parties are operating under the 2006 Contract on an interim basis as provided herein, and (ii) KWSC is diligently pursuing funding of TWDB Loans described in the 2006 Contract and still has outstanding unfunded loan commitments from TWDB for the TWDB Loans described in the 2006 Contract, the City will not refile its claims against KWSC. The foregoing notwithstanding, the Parties further agree that (i) unless the 2006 Contract (in its current form or as it may be modified by agreement of the Parties) has become effective pursuant to "2.a." or "2.b." above, the City may re-file these claims at any time after September 1, 2007, and (ii) in the event of such re-filing, KWSC shall not assert Timing Defenses with respect to the Tolling Period (both as defined below). Nothing herein shall constitute any acknowledgment by KWSC as to the validity or merit of any of the City's claims tolled hereunder.

(3) Tolling.

i. The Tolling Period means the period which extends from March 30, 2004 until the earlier of 90 days after September 1,

2007, or such earlier date (if any) of re-filing of the Lawsuit pursuant to paragraph 3.b above with respect to KWSC. The Tolling Period may be extended by written agreement of the Parties.

ii. The Parties agree that all time periods governing any Timing Defenses shall be tolled during the Tolling Period. "Timing Defenses" shall mean any affirmative defenses based on statute(s) of limitation, statute(s) of repose, laches or the passage of time to any claims, known or unknown, that the City may have against KWSC, or to any claims, known or unknown, that KWSC may have against the City. This Agreement shall not revive any claim that is barred before March 30, 2004 by any Timing Defense. Any lawsuit filed pursuant to this subparagraph 3.d shall be deemed by the Parties to be treated as if it were filed on March 30, 2004, so that no prejudice will have occurred by the nonsuit contemplated herein.

4. TWDB Loans. KWSC represents and warrants to the City that, to the best of KWSC's knowledge, information and belief, TWDB does not and will not require review, approval, or any change to the 2006 Contract as a condition of funding the TWDB Loans, as reflected by the TWDB letter attached as Exhibit B.

5. Agreement to Cooperate. In consideration of the undertakings herein, and assuming TWDB seeks no changes to the 2006 Contract, upon the Parties' execution of

this Agreement the City will cooperate with KWSC in seeking the closing of the TWDB Loans, as further set forth in Section 4.6 of the 2006 Contract.

6. City Releases. Effective as of the Effective Date of this Agreement, for and in consideration of the execution by KWSC of the 2006 Contract, and in the further consideration of the releases herein made, sufficiency of which consideration is hereby acknowledged, the City does for itself and its Council Members, agents, employees and assigns, hereby and forever release and discharge KWSC, its members, representatives, employees, agents and assigns, whether specifically mentioned or not, of and from any and all known and unknown liability, actions, causes of action, claims, demands, damages, costs, expenses, claims for contribution or indemnity, and/or compensation of any kind whatsoever arising out of or allegedly relating to any of the following:

(a) the Settlement Agreement executed by the Parties on or about September 13, 2001, in connection with Cause No. 14,130 filed in the 27th Judicial District Court of Lampasas County, Texas ("2001 Settlement Agreement"), together with the Judgment entered in said cause;

(b) the 2001 Contract;

(c) any alleged breach by KWSC of the 2001 Settlement Agreement or the 2001 Contract, or of any prior agreement between the Parties;

(d) any alleged failure of KWSC to comply with any provision of the 2001 Settlement Agreement or 2001 Contract, or of any prior agreement between the Parties;

(e) any alleged conversion by KWSC of any property or property right owned or claimed by the City including (without limitation) rights to raw or treated water or capacity to treat water from CTWSC's water treatment plant and any water storage and transmission capacity in any facilities owned by CTWSC or KWSC;

(f) any alleged failure of KWSC to provide water or water storage or transmission capacity to the City in quantities and/or at rates allegedly required by any contract, including the 2001 Contract and the 2001 Settlement Agreement, at any time up to the effective date hereof;

(g) any claim or action asserted or alleged by the City against KWSC and CTWSC relating to the 2000 Contract, the 2001 Contract, the 2001 Settlement Agreement or to the sale, production, treatment, provision or transmission of water by or from either of the Parties;

(h) any alleged entitlement to attorney's fees or costs by the City relating to the above-listed causes;

(i) any claim for declaratory relief, damages, unjust enrichment, constructive trust, attorneys' fees, costs of suit, interest and other or further relief asserted or which could have been asserted by the City in the Lawsuit, including, without limitation, claims for accounting, over-billing, failure to pay or allow credit for interest on escrow and/or reserve accounts maintained by or for the benefit of KWSC and/or the City;

(j) any and all other claims and/or causes of action which the City has or may have by reasons of the transactions and occurrences described more fully in the pleading identified as the First Amended Petition in Intervention of City of Lampasas, Texas, or any other petition or pleading filed by the City in the Lawsuit, including any alleged entitlement to attorney's fees or costs by the City relating to any of the above or foregoing causes;

PROVIDED, HOWEVER, the foregoing does not release any claims based upon requests by the City for correction of billing errors since January 2006 and Billing Adjustments under Section 4.9B of the 2006 Contract.

7. KWSC Releases. Effective as of the Effective Date of this Agreement, for and in consideration of the execution by the City of the 2006 Contract and of the releases herein made, the sufficiency of which consideration is hereby acknowledged, KWSC does by these presents, for itself, its Board of Directors, its members, employees and assigns, hereby and forever release and discharge the City, its Council Members, representatives, employees, agents and assigns, whether specifically mentioned or not, of and from any and all known and unknown liability, actions, causes of action, claims, demands, damages, costs, expenses, claims for contribution or indemnity, and/or compensation of any kind whatsoever arising out of or allegedly relating to any of the following:

(a) the 2001 Settlement Agreement;

(b) the 2001 Contract;

(c) any alleged breach of the 2001 Settlement Agreement or the 2001 Contract by the City, or of any prior agreement between the Parties;

(d) any alleged failure of the City to comply with any provision of the 2001 Settlement Agreement or 2001 Contract, or of any prior agreement between the Parties;

(e) any claim or action asserted or alleged by KWSC against the City relating to the 2000 Contract, the 2001 Contract, the 2001 Settlement Agreement or to the sale, production, treatment, provision or transmission of water by or from either of the Parties;

(f) any alleged entitlement to attorney's fees or costs by KWSC relating to the above listed causes;

(g) any claim for declaratory relief, damages, unjust enrichment, constructive trust, attorneys' fees, costs of suit, interest and other or further relief asserted or which could have been asserted by KWSC in the Lawsuit, including, without limitation, claims for accounting, over-billing, failure to pay or allow credit for interest on escrow and/or reserve accounts maintained by or for the benefit of KWSC and/or the City;

(h) any and all other claims and/or causes of action which KWSC has or may have by reasons of the transactions and occurrences described more fully in the pleading identified as Kempner's First Amended Petition and Cross-Action, or any other petition or pleading filed by any party in the Lawsuit, including any alleged entitlement to attorney's fees or costs by KWSC relating to any of the above or foregoing causes;

PROVIDED, HOWEVER, the foregoing does not release any claims based upon requests by KWSC for correction of billing errors since January 2006 and Billing Adjustments under Section 4.9B of the 2006 Contract.

8. Dismissal of Claims. In the event any lawsuit between the Parties is on file at such date as the 2006 Contract becomes effective, then, within ten days after the 2006 Contract becomes effective under paragraph 2.a or 2.b above, the Parties will dismiss with prejudice all claims asserted by them against each other which relate to any of the matters released herein. More particularly, (i) if, at such date, a notice of nonsuit has not been previously filed, then the Parties will dismiss with prejudice all claims asserted against each other in the lawsuit, and (ii) if at such date a re-filing under paragraph 3.d(2) above has occurred, then the Parties will dismiss with prejudice all claims asserted against each other in the new lawsuit contemplated under paragraph 3.d(2) above.

9. Warranty of Authority. KWSC warrants and acknowledges that the Board of Directors of KWSC has approved this Agreement and that the person signing on behalf of KWSC has full authority to execute this Agreement on behalf of KWSC.

10. Warranty of Authority. The City warrants and acknowledges that the City Council of the City has approved this Agreement and that the person signing on behalf of the City has full authority to execute this Agreement on behalf of the City.

11. Doubtful Claims. It is agreed and understood by the Parties that this is a settlement of doubtful and disputed claims and that this settlement is not to be construed

as an admission of liability on the part of the City, KWSC, or any person, entity or corporation hereby released, by all of whom liability is expressly denied.

12. Review of Agreement. It is further acknowledged that the undersigned and the respective Board of Directors and Council Members of the Parties have directed that the undersigned persons execute the same based wholly upon their own judgment and knowledge of the claims, liability questions and alleged damages involved herein.

13. Counterparts. This Agreement may be executed in multiple originals. Properly executed signature pages, whether they constitute original signature pages, copied signature pages, or facsimile copied signature pages, may be attached to the original Amended Settlement, Compromise, Release and Tolling Agreement. Any such copied signature page or facsimile copied signature page attached to the original Amended Settlement, Compromise, Release and Tolling Agreement will have the same force and effect as an original signature page.

14. Severability. In the event that, at the behest of USDA-RD or other state or federal agency, any provision contained in this Agreement (including the provision for interim operation, or any aspect thereof, under the 2006 Contract) shall be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability of such provision shall not affect any other provision of this Agreement, and this Agreement shall be construed (i) as if such invalid, illegal or unenforceable provision had never been contained herein, and (ii) notwithstanding the foregoing, and to

the maximum extent possible, to effectuate the intent of the Parties as set forth in this Agreement and in the 2006 Contract..

WITNESS OUR HANDS on this the 28th day of August, 2006.

KEMPNER WATER SUPPLY CORPORATION

By: _____
Print Name: Robert R. Bikoski
Title: President, Kwsc BOD

CITY OF LAMPASAS, TEXAS

By: _____
Print Name: Jack Alvis
Title: Mayor

THE STATE OF TEXAS §
§
COUNTY OF Lampasas §

BEFORE ME, the undersigned authority, on this day personally appeared Robert R. Bitoski, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he/she is authorized to execute this Agreement on behalf of KEMPNER WATER SUPPLY CORPORATION, that he/she understood the same and executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND and seal of office this the 28th day of August, 2006.

SUSAN ISENBURG
Notary Public
STATE OF TEXAS
My Commission
Expires 07/03/2007

Susan Isenburg
NOTARY PUBLIC, STATE OF TEXAS

THE STATE OF TEXAS §
§
COUNTY OF Lampasas §

BEFORE ME, the undersigned authority, on this day personally appeared Jack Calvert, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he/she is authorized to execute this Agreement on behalf of THE CITY OF LAMPASAS, TEXAS, that he/she understood the same and executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND and seal of office this the 28th day of August, 2006.

SUSAN ISENBURG
Notary Public
STATE OF TEXAS
My Commission
Expires 07/03/2007

Susan Isenburg
NOTARY PUBLIC, STATE OF TEXAS

APPROVED:

ROBERT LLOYD
JAMES CHRISMAN PHILLIPS
Attorney for Kempner Water Supply Corporation

JOHN J. MCKETTA, III
HELEN CURRIE FOSTER
Attorney for the City of Lampasas

CAUSE NO. 19005

CITY OF LAMPASAS, TEXAS *Plaintiff*	§ §	IN THE DISTRICT COURT
	§	LAMPASAS COUNTY, TEXAS
VS.	§ §	
KEMPNER WATER SUPPLY CORP. *Defendant*	§ §	27TH JUDICIAL DISTRICT

KEMPNER WATER SUPPLY CORP.'S
MOTION FOR PARTIAL SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES, KEMPNER WATER SUPPLY CORP. (hereinafter "KWSC" or "Kempner") and files this its Motion for Partial Summary Judgment on the claims for declaratory relief relating to a dispute between KWSC and the City of Lampasas, Texas (hereinafter the "City" or "Lampasas") concerning the interpretation of the 2006 Wholesale Water Supply Contract. In support thereof KWSC would respectfully show the Court as follows:

I.

SUMMARY OF MOTION

1.01 Kempner delivers treated water to the City pursuant to the 2006 Wholesale Water Supply Contract (hereinafter "the Agreement"), dated August 26, 2006.[1] *See* Plaintiff's First Amended Petition; *see also* Agreement, introductory paragraph, p. 3. The Agreement arose following litigation between Kempner and Central Texas Water Supply Corporation ("Central Texas" or "CTWSC"), in which the City intervened. *See* Agreement, introductory paragraph, p. 1. In the Agreement, Kempner agreed to deliver

[1] The 2006 Wholesale Water Supply Contract (hereinafter "the Agreement"), dated August 26, 2006 is attached to the Affidavit of J Hubbard, as Exhibit A-1, and incorporated by reference herein.

treated water to the City for a period of approximately 80 years. *See* Agreement, Exh. A-1, Art. 5.4. Kempner also executed an agreement with Central Texas permitting it to purchase treated water for a period of approximately 80 years ("the CTWSC Agreement"). *See* Agreement, Exh. A-1, p. 2. The City does not have a contract with Central Texas to purchase treated water. *See* Plaintiff's First Amended Petition. The City has rights to capacity in Stillhouse Reservoir (hereinafter "Stillhouse") but lacks the ability to treat or transport the water. *Id.* The City relies on Kempner to transport treated water from Stillhouse to it at least 30 miles to the City's Points of Delivery. *Id.*

1.02 The City does not contend that Kempner is obligated to provide water to it from CTWSC, but interprets the Agreement in an absurd, unreasonable manner that Kempner can provide water to it from any source it pleases, but that Kempner can only bill the City for water delivered, if the water was treated by Central Texas. This completely defies the express and plain language in the Agreement that requires Kempner to deliver "treated water" and requires the City to pay for "treated water." The parties agreed and acknowledged that the water delivered by Kempner would be Kempner water—irrespective of who treated it. By definition, it is Kempner's water until, it is delivered to the City's Points of Delivery, at which point it becomes the City's water for which Kempner is entitled to be paid.

1.03 The absurdity of the City's requested interpretation is further compounded by the City's admissions at the deposition of its corporate representative. The City admits that under the Agreement, Kempner is required to (1) meet the future additional capacity needs of the City which may be met by Kempner's water treatment plant at Kempner's sole option, (2) meet the City's water needs even during events of force majeure when the Central Texas plant is not operable, (3) provide treated water meeting

state and federal standards even if Central Texas is unable to meet such requirements, and (4) operate Kempner's system in a manner that benefits all of its customers, not for the City's exclusive benefit, or to the detriment of Kempner's other customers. It is the City's contention that the Court should determine whether the Agreement is unambiguous and if so determined, interpret this Agreement to require Kempner to meet all of these obligations, but not charge the City in the event that water is delivered from Kempner's plant. Such a reading of the Agreement is obviously absurd and should not be indulged by the Court.

1.04 Significantly, throughout this case, the City looks very little to the actual language of the Agreement and instead, chooses to divert attention by relying on inadmissible, parole evidence to support its unreasonable interpretation of the Agreement. *See* Plaintiff's First Amended Petition; *see also* Plaintiff City of Lampasas's Amended Motion for Summary Judgment. The Court should not be misled by such efforts. The Court should look at the Agreement and ascertain whether the Agreement is ambiguous or not. Upon review, it is apparent that the Agreement is unambiguous and should be read to allow Kempner to deliver water treated from whatever source and to require the City to pay for treated water delivered by Kempner at the City's Points of Delivery in accordance with the plain language of the Agreement. The rate provisions of the Agreement provide that the City is obligated to pay for water delivered at the rate that Central Texas charges to KWSC per 1,000 gallons of water treated. This provides the protection that the City desires, Kempner delivering treated water to meet the City's varying needs at a defined Central Texas rate that the City agreed to pay Kempner.

1.05 The Court should interpret this Agreement in accordance with its express, plain terms given the objectives intended and should avoid a construction that is absurd,

unreasonable, inequitable and oppressive. The parties agreed that this Agreement should be construed to effectuate the purposes set forth therein, sustain the validity of the contract and to comply with all applicable laws and rules. The interpretation suggested by the City contravenes reason and the language of the Agreement would effectively invalidate the Agreement. Such and interpretation should be avoided.

1.06 The issues submitted to the Court in this motion focus on two key provisions of the Agreement. First, the proper interpretation of the Agreement, specifically as to whether or not the Agreement allows for or permits KWSC to deliver water to the City from KWSC's own water treatment plant, and Lampasas being obligated to pay for such water. Secondly, the proper interpretation of Article 3.5(c) of the Agreement, specifically as to whether or not this provision allows KWSC to take below the "Floor", as defined in that provision, thus resulting in Lampasas paying a proportionate share of the Central Texas Operation and Maintenance Expenses ("CTWSC O&M") in the amount of 63.6%.

1.07 The interpretation of these two provisions is critical to the contractual relationship between the two parties, and impacts the ability of KWSC to effectively service Lampasas' water needs on a reasonable basis in accordance with the unambiguous terms of the parties' Agreement.

1.08 Kempner requests a declaration by this Court pursuant to this Motion that, under the unambiguous provisions of this Agreement, the City is required to: (1) pay Kempner for treated water that is delivered by Kempner to the City's Points of Delivery at the same rate per 1,000 gallons as Kempner pays Central Texas for treated water, no matter the source of the water delivered to Kempner; (2) pay a proportionate share of the Floor—of 26.4% of Central Texas' overall production—in the event demand does not

meet the Floor; and (3) pay for Central Texas O&M as set forth in the Agreement regardless of how much of the water supplied by Kempner to the City is produced by the Kempner treatment plant or the Central Texas treatment plant.

II.

SUMMARY JUDGMENT EVIDENCE

2.01 In support of this Motion for Summary Judgment, Kyle incorporates by reference the following Exhibits:

Exhibit A. Affidavit of Jim Hubbard.

1. 2006 Wholesale Water Supply Contract – City of Lampasas and Kempner Water Supply Corporation;

2. July, August and September KWSC Invoices to the City

Exhibit B. Deposition Excerpts of Finley deGraffenried, Corporate Representative of the City of Lampasas.

III.

PROCEDURAL HISTORY

3.01 On September 24, 2013 Lampasas filed its Original Petition asserting a cause of action for breach of contract, specifically breach of Articles 3.5 and 3.6 of the Agreement, and an additional claim for Declaratory Judgment which in essence seeks that the Court hold that the City is not obligated to pay KWSC for water delivered that was treated at KWSC's water treatment plant and that the KWSC is alone responsible for the "floor" payments where the City's demand for water is sufficient to meet the required threshold. *See* Plaintiff's First Amended Petition. Lampasas subsequently filed its First Amended Petition. *See Id.*

3.02 On October 21, 2013 KWSC filed its Original Answer and Counterclaim asserting affirmative defenses and a claim for declaratory relief, seeking the Court to rule

that KWSC may deliver and the City is obligated to pay for KWSC treated water and that KWSC may take below the "floor" and upon going below the "floor" Lampasas is responsible for 63.6% of any "floor" payment. *See* Defendant's Original Answer and Counterclaim.

3.03 Several rounds of written discovery have been exchanged between the parties. Depositions of the corporate representatives for KWSC and the City have been taken. No other depositions have been taken.

3.04 This case is currently set for trial on February 23, 2015. Lampasas has submitted a jury demand.

IV.
APPLICABLE SUMMARY JUDGMENT STANDARDS

4.01 **General Standard**. KWSC, as movant in a summary judgment proceeding, has the burden of showing that no genuine issue of material fact exists and that it is entitled to judgment as matter of law. *Starcrest Trust v. Berry*, 926 S.W.2d 343 (Tex. App.--Austin 1996, no writ). The moving party's summary judgment evidence must facially establish its right to judgment as a matter of law; upon such a showing, the burden shifts to the non-moving party to raise a genuine issue of material fact sufficient to defeat summary judgment. *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1987).

4.02 **Claim for Declaratory Relief** The purpose of the Uniform Declaratory Judgments Act is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and it is to be liberally construed and administered." Tex. Civ. Prac. & Rem. Code § 37.002(b). In suits for declaratory relief, a trial court has limited discretion to refuse a declaratory judgment, and may do so only

when judgment would not remove the uncertainty giving rise to the proceedings. *SpawGlass Constr. Corp. v. City of Houston,* 974 S.W.2d 876, 878 (Tex. App.-Houston [14th Dist.] 1998, pet. denied). A declaratory judgment is appropriate when a real controversy exists between the parties and a court may determine the entire controversy by judicial declaration. *Id.* at 879. To constitute a justiciable controversy, the controversy must be real and substantial and involve a genuine conflict of tangible interests and not merely be a theoretical dispute. *Id.* In this case a declaratory judgment will resolve all uncertainty as to the proper interpretation of Articles 3.5(a) and 3.5(c) of the Agreement and will dispose of the conflict between Plaintiff and Defendant. The City has paid certain amounts billed by KWSC for KWSC treated water under protest; a declaration by this Court would resolve the dispute as to the proper billing of such amounts. *See* Plaintiff's First Amended Petition, 2-3; Defendant's Original Answer and Counterclaim.

4.03 **Construction of Contracts.** Texas law presumes that the parties to a contract intended every clause to have some effect. *MasTec N. Am., Inc. v. El Paso Field Services, L.P.,* 317 S.W.3d 431 (Tex. App.—Houston [1st Dist.] 2010, pet. granted), rev'd, 389 S.W.3d 802 (Tex. 2012); *Thedford Crossing, L.P. v. Tyler Rose Nursery, Inc.,* 306 S.W.3d 860 (Tex. App.—Tyler 2010, pet. denied); *Virginia Power Energy Mktg., Inc. v. Apache Corp.,* 297 S.W.3d 397 (Tex. App.—Houston [14th Dist.] 2009, pet. denied); *Worldwide Asset Purchasing, L.L.C. v. Rent-A-Ctr. E., Inc.,* 290 S.W.3d 554 (Tex. App.—Dallas 2009, no pet.). A court must consider each part of the document with every other part of the document so that the effect and meaning of one part on any other part may be determined. *Pineridge Associates, L.P. v. Ridgepine, LLC,* 337 S.W.3d 461 (Tex. App.—Fort Worth 2011, no pet.); *Thedford Crossing, L.P. v. Tyler Rose Nursery, Inc.,* 306

S.W.3d 860 (Tex. App.—Tyler 2010, pet. denied).To achieve the objective of ascertaining the true intentions of the parties as expressed in the instrument, a court must examine and consider the entire contract in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless. *Grohman v. Kahlig*, 318 S.W.3d 882 (Tex. 2010); *Chrysler Ins. Co. v. Greenspoint Dodge of Houston, Inc.*, 297 S.W.3d 248 (Tex. 2009).

A. **Ambiguity: Question of Law**. Whether the Agreement is ambiguous is a question for the court. *Brown v. Payne*, 176 S.W.2d 306, 308 (Tex. 1943); *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 861 (Tex. 2000)("Whether a contract is ambiguous is a question for law for the court to decide."); *see also Dynegy Midstream Services, Ltd. Partnership v. Apache Corp.*, 294 S.W.3d 164, 168 (Tex. 2009). A mere disagreement between the parties on the meaning of a contract does not create an ambiguity. *GTE Mobilnet v. Telecell Cellular, Inc.*, 955 S.W.2d 286, 289 n. 1 (Tex. App.—Houston [1st Dist.] 1997, writ denied).

B. **The Agreement is Not Ambiguous**. If a contract as written can be given a clear and definite legal meaning, then, as a matter of law, it is not ambiguous. *Chrysler Ins. Co. v. Greenspoint Dodge of Houston, Inc.*, 297 S.W.3d 248 (Tex. 2009). A contract is not ambiguous simply because the parties disagree over its meaning and advance conflicting interpretations of it. *Dynegy Midstream Services, Ltd. Partnership v. Apache Corp.*, 294 S.W.3d 164 (Tex. 2009). An agreement is ambiguous only if it is subject to more than one reasonable interpretation. *Nat'l Union Fire Ins. Co. v. CBI Indus.*, 907 S.W.2d 517, 520 (Tex.1995)(emphasis added). KWSC's allegations about the Agreement are in accordance with the express language of the Agreement, do not require additional information outside the Agreement and are reasonable.

C. **Parole Evidence is Inadmissible Unless Ambiguity Is Found First by the Court.** If the court determines that the contract is ambiguous, the parties' intent is a fact issue. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003). The Court is permitted to consider parole evidence after it determines that the Agreement is ambiguous, but not before such a determination. Parole testimony is admissible to show what the real contract was to the extent necessary to remove the ambiguity. *Atl. Lloyds Ins. Co. v. Butler, 137 S.W.3d 199, 211 (Tex. App.—Houston [1st Dist.] 2004, pet. denied)* As a result, the evidence submitted by KWSC in support of this Motion is very limited.

V.
THE EXPRESS, PLAIN LANGUAGE OF THE AGREEMENT SUPPORTS KWSC'S CLAIMS FOR DECLARATORY RELIEF

A. The Agreement expressly and plainly requires KWSC to deliver treated water to the City's Points of Delivery and requires the City to pay for the treated water delivered.

5.01 In 2006, at the time that the Agreement was executed, both KWSC and the City were receiving their treated water from CTWSC up to 7.68 MGD. *See* Agreement, Exh. A-1, p. 12-13, Art. 3.1 A. The Agreement addressed KWSC's plans to build a plant and treat water. *See* Agreement, Exh. A-1, p. 7; p. 12-13, Art. 3.1 (B.1.a). The City would have this Court believe that either KWSC was required to deliver water treated exclusively by CTWSC to it, or in the alternative, that if KWSC delivers water to the City that has been treated at KWSC's plant, that the City is under no obligation to pay for said water. *See* Plaintiff's First Amended Petition; *see also* Plaintiff City of Lampasas's Amended Motion for Summary Judgment. The Agreement does not impose obligations on KWSC to deliver water that has been treated by CTWSC and certainly does not

support a contention that if treated water is delivered from its plant that the City has no obligation to pay for such water.

5.02 **Delivery of Treated Water.** KWSC is required to deliver "treated water" and the City is required to take "treated water" at the City's Points of Delivery. Section 3.9 of the Agreement requires KWSC to use its:

> best efforts to deliver treated water to the City at each of the two Points of Delivery, at a minimum pressure of 55 psi at the 580 Meter, and 78 psi at the 190 Meter; and, unless the City is drawing water at the Points of Delivery at an instantaneous rate greater than 127 percent of the then applicable Maximum Rate of Delivery, KWSC shall deliver treated water to the City at each of the two Points of Delivery, at a minimum pressure of 55 psi at the 580 Meter, and 78 psi at the 190 Meter.

See Agreement, Exh. A-1, p. 31-32, Art. 3.9 (A). In Article 3.6 of the Agreement the "City agree[d] to take treated water at its Points of Delivery defined as the existing meters located on F.M. 580 northeast of the City and on U.S. Highway 190 east of the City, as shown on the System Map. Any modification to Points of Delivery must be mutually agreed to in writing between KWSC and the City." *See* Agreement, Exh. A-1, p. 30, Art. 3.6. The Agreement simply does not specify the location from which the "treated water" is supposed to come.

5.03 **Delivered Water is KWSC Water.** In fact, the Agreement provides that all delivered water, no matter where treated, is KWSC water. By alleging that the City is only contractually obligated to pay for water treated at the CTWSC treatment facility, the City is disregarding its agreement that all water delivered to the City's Points of Delivery is the property of KWSC, effectively KWSC treated water. Article 4.2 of the Agreement states:

> (i) title to all water supplied to the City shall be in KWSC up to the Points of Delivery at which point title shall pass to the City...and (iii) the City shall