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BEFORE THE
PUBLIC UTILITY COMMISSION
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PUBLIC UTILITY COMMISSION
OF TEXAS

CITY OF MIDLOTHIAN NOTICE OF §
INTENT TO PROVIDE WATER §
SERVICE TO LAND DECERTIFIED §
FROM MOUNTAIN PEAK SPECIAL §
UTILITY DISTRICT §

**MOUNTAIN PEAK SPECIAL UTILITY DISTRICT'S
THRESHOLD ISSUES AND LIST OF ISSUES TO BE ADDRESSED**

TO THE PUBLIC UTILITY COMMISSION OF TEXAS:

NOW COMES, Mountain Peak Special Utility District ("Mountain Peak") and files these Threshold Issues and List of Issues to be Addressed in response to Order of Referral. In support thereof, Mountain Peak would respectfully show as follows:

INTRODUCTION

In Docket No. 44394, the Public Utility Commission of Texas ("PUC") granted the City of Midlothian's ("Midlothian") petition to amend Mountain Peak's water Certificate of Convenience and Necessity ("CCN") No. 10908, by expedited release on May 1, 2015 ("PUC Order"). The PUC's Order resulted in the decertification of an approximately 97.7-acre area of land owned by Midlothian (the "Property") from Mountain Peak's water CCN.¹ On July 1, 2016, Midlothian filed a notice of its intent (the "Notice of Intent") to provide retail water service to the Property.

THRESHOLD POLICY ISSUE

The Order of Referral requested the parties address any threshold legal and/or policy issues which should be briefed for purposes of the preliminary order. Mountain Peak requests that the Commission, in furtherance of judicial economy and efficiency, refer the compensation, valuation and appraisal issues to the State Office of Administrative Hearings ("SOAH") for a single hearing on all compensation issues given: 1) the relatively small amount of land at issue (97.7 acres) and 2) the statutory mandate in Water Code § 13.254(g) that the determination of

¹ Mountain Peak filed a motion for reconsideration which was overruled as a matter of law and subsequently filed a petition for judicial review which remains pending in Travis County District Court. *Mountain Peak Special Utility Dist. v. Public Utility Comm'n of Tex.*, No. D-1-GN-15-002843 (200th Judicial Dist. Ct., Travis County, Tex., July 14, 2015).

“just and adequate” compensation includes matters in addition to the § 13.254(e) “useless and valueless” factors.

As background, in at least two other cases to determine compensation owed under §13.254, the Commission has indicated a preference for a bifurcated process with a first phase designed to only determine what specific property has been rendered useless or valueless under § 13.254(e) and a second phase designed to determine the compensation based on the value of the property identified in the first phase.² In these cases, the PUC referred the matters to SOAH and requested that the SOAH ALJs address what property, if any, had been rendered useless or valueless to the decertified entity.³ Due to the procedural posture of those cases, the parties had already prepared appraisals of the property to be valued, thus the SOAH ALJs were also instructed to evaluate those appraisals.

Mountain Peak requests that, rather than use of a “bifurcated” process as ordered in these other two cases, the PUC refer this compensation matter to the SOAH ALJ only once to determine all issues of fact. Mountain Peak urges the Commission to adopt a one-step process rather than a two-step process because it is necessary to insure that just and adequate compensation is determined and because it furthers judicial economy and efficiency.

First, and most importantly, the presiding officer in determining the compensation owed to the decertified utility must take into consideration both the property rendered useless or valueless and the factors specified in § 13.254(g). While Section 13.254(d) requires compensation for any property determined by the PUC to be useless or valueless, Section 13.254(g) lists additional factors that must be considered to insure that “just and adequate” compensation is paid to the decertified entity. The § 13.254(g) factors are identified in the statute as follows:

(g) . . . The factors ensuring that the compensation to a retail public utility is just and adequate shall include: the amount of the retail public utility's debt allocable for service to the area in question; the value of the service facilities of the retail public utility located within the area in question; the amount of any expenditures for planning, design, or construction of service facilities that are

² See Tex. Pub. Util. Comm'n, *Zipp Road Utility Company LLC's Notice of Intent to Provide Sewer Service to Area Decertified from Guadalupe-Blanco River Authority in Guadalupe County*, Docket No. 45679, Preliminary Order (July 20, 2016); *City of Celina's Notice of Intent to Provide Water and Sewer Service to Area Decertified from Aqua Texas, Inc. in Denton County*, Docket No. 45848, Preliminary Order (July 20, 2016).

³ *Id.*

allocable to service to the area in question; the amount of the retail public utility's contractual obligations allocable to the area in question; any demonstrated impairment of service or increase of cost to consumers of the retail public utility remaining after the decertification; the impact on future revenues lost from existing customers; necessary and reasonable legal expenses and professional fees; and other relevant factors. The utility commission shall adopt rules governing the evaluation of these factors. (emphasis added)

The Section 13.254(g) factors are not necessarily limited to only the property determined to be useless or valueless. Specifically, the Section 13.254(g) factors include consideration of such items as i) the amount of the retail public utility's contractual obligations allocable to the area in question; and ii) any demonstrated impairment of service or increase of cost to consumers of the retail public utility remaining after the decertification. These may be significant factors given the impact of a decertification on, for example, the decertified utility's take-or-pay water supply contract, and the burden on remaining customers of the loss of the decertified area. While it may be unclear whether a take-or-pay contract is rendered "useless or valueless" by the loss of customer growth, Section 13.254(g) nevertheless allows for such a contractual obligation to be valued and compensated for, where appropriate.

Because the Legislature specifically precluded the decertification of property which is receiving water service, the § 13.254(g) factors ensure just and adequate compensation will necessarily arise from property and assets which are in all instances not providing actual water service to the subject decertified area. Under Section 13.254(a-5), there can be no existing customers on the tract to be decertified, as that is one of the key elements that the landowner must prove to obtain decertification.

The statute requires the PUC to both insure that a decertified utility is paid for the actual, physical property that is rendered useless or valueless to the decertified utility due to the decertification⁴ and it requires consideration of certain factors to insure that "just and adequate" compensation is paid to the decertified utility.⁵ Thus, the statute includes two determinations which combine to form the compensation owed: (1) payment for all property, both real and personal, which is rendered useless or valueless by the decertification; and (2) compensation

⁴ Tex. Water Code § 13.254(d).

⁵ Tex. Water Code § 13.254(g).

based on the non-exhaustive list of factors identified by the Texas Legislature to insure that the entire compensation package is “just and adequate.” Thus, to first consider property rendered useless or valueless and then to apply the § 13.254(g) factors to that determination could erroneously limit the compensation to the decertified utility in a manner that was not envisioned by the Legislature. Hence, compensation should be determined in a single hearing at the end of which the ALJ makes a recommendation to the Commissioners.

Finally, in this instance, given the 97.7 acre area at issue, a bifurcated process creates undue expense for the parties and the PUC. Judicial economy suggests that in this case, rather than holding two SOAH hearings, one should suffice.

ISSUES TO BE ADDRESSED

Mountain Peak urges the Commissioners to refer this matter to SOAH to address all issues relevant to the determination of compensation – including the property rendered useless and valueless and the compensation owed pursuant to the § 13.254(g) factors – in a single hearing. Thus, Mountain Peak requests that the issues to be addressed by the SOAH ALJ include:

1. What property both real property and personal property, if any, has been rendered useless or valueless to Mountain Peak by the decertification in PUC Docket No. 44394?
2. What is the value of the property rendered useless or valueless to Mountain Peak by the decertification in PUC Docket No. 44394?
3. Based on the factors in Tex. Water Code § 13.254(g) and 16 Tex. Admin. Code § 24.113(k) as set forth below, and in light of Items 1 and 2 above, what is the appropriate compensation to be paid to Mountain Peak?
 - a. What is the amount of Mountain Peak’s debt allocable for service to the decertified property?
 - b. What is the value of the service facilities of Mountain Peak located within the decertified property (if any)?
 - c. What is the amount of any expenditures for planning, design, or construction of service facilities that are allocable to service to the decertified property?
 - d. What is the amount of Mountain Peak’s contractual obligations allocable to the area in question?
 - e. What is monetary amount of any demonstrated impairment of service or increase of cost to consumers of Mountain Peak remaining after the decertification?

- f. What is the impact on future revenues lost from existing customers?
 - g. What are the necessary and reasonable legal expenses and professional fees incurred by Mountain Peak?
4. When is the payment of compensation to Mountain Peak due?

ISSUES NOT TO BE ADDRESSED

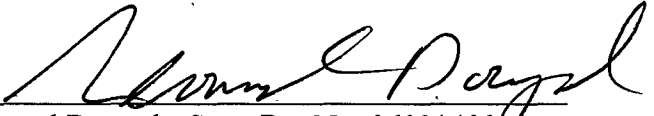
Mountain Peak has not identified any issues which should not be addressed by the SOAH ALJ at this time.

CONCLUSION

Mountain Peak respectfully requests that the Commission issue an order as requested herein.

Respectfully submitted,

JACKSON WALKER L.L.P.

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CERTIFICATE OF SERVICE

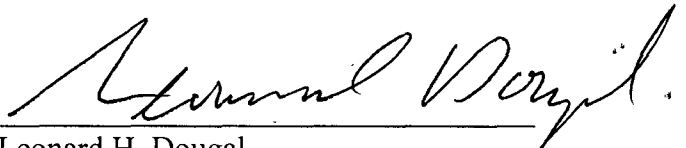
I hereby certify that on the 6th day of September 2016, a true and correct copy of the foregoing document was served on the individuals listed below by facsimile.

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