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

BEFORE THE STATE OFFICE OF PUBLIC UTILITY COMMISSION
CLERK
OF
ADMINISTRATIVE HEARINGS

**CITY OF MIDLOTHIAN'S RESPONSE TO
MOUNTAIN PEAK SPECIAL UTILITY DISTRICT'S
MOTION TO STAY PROCEEDING PENDING APPEAL**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

The City of Midlothian ("Midlothian") files this Response to Mountain Peak Special Utility District's ("Mountain Peak") Motion to Stay Proceeding Pending Appeal ("Motion to Stay").¹ Midlothian received Mountain Peak's motion on November 10, 2016. This response is therefore timely. Midlothian asserts that the Motion to Stay must be denied, respectfully showing as follows:

I. ABATEMENT COMPLETELY UNWARRANTED

Justice delayed is justice denied – William E. Gladstone²

On July 1, 2016, Midlothian notified the Commission pursuant to TWC § 13.254(d) & (e) and 16 TAC § 113(h) & (i) of Midlothian's intent to provide retail water service to an approximately 97.7-acre tract of parkland ("Park Property") which was decertified from Mountain Peak's water Certificate of Convenience and Necessity (CCN) No. 10908 in PUC Docket No. 44394.³ More than four months (*132 days*) later, Mountain Peak requests abatement so it can focus on further appeals of the Commission's decertification order in Docket No. 44394.⁴ In other words (and without citing any statutory or precedential basis), Mountain Peak

¹ In addition to those terms or abbreviations defined in this filing, abbreviations and acronyms utilized include: "Commission" or "PUC" for the Public Utility Commission of Texas, "SOAH" for the State Office of Administrative Hearings, "RFI" for request for information, "TAC" for the Texas Administrative Code, and "TWC" for the Texas Water Code.

² William E. Gladstone. BrainyQuote.com, Xplore Inc, 2016.
<https://www.brainyquote.com/quotes/quotes/w/williameg101551.html> (last visited Nov. 13, 2016).

³ Tex. Pub. Util. Comm'n, *Petition of City of Midlothian to Amend Mountain Peak Special Utility District's Certificate of Convenience and Necessity by Expedited Release in Ellis County*, Docket No. 44394 (May 5, 2015).

⁴ In particular, Mountain Peak asserts:

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wants to *completely freeze* what was meant to be *an expedited process* to determine what compensation, if any, might be appropriate as another retail public utility seeks to serve the decertified area. No good reason -- much less any compelling one -- is presented. Mountain Peak's request must be denied.

Judicial review of the Commission's orders are under the substantial evidence standard of review.⁵ Suits for review under the substantial evidence rule do not affect the enforcement of an agency's final order.⁶ Therefore, the Commission order granting decertification was final and enforceable from the effective date of that order (May 1, 2015), regardless of the further judicial review remedies Mountain Peak chose to pursue.

This is a separate and distinguishable proceeding filed more than one (1) year after the order decertifying the Park Property. The Commission has recognized and emphasized the need for expediency in this Docket.⁷ Midlothian is entitled to use the "expedited" statutory process to establish whether and what compensation is due and to provide service and Mountain Peak's requested relief will undermine this required expediency. In the more-than-four months since this proceeding was initiated, Mountain Peak has acknowledged this statutory expediency and previously referred to the preservation of resources and reductions of costs in this docket *twice*, and chose not to raise the current concerns then.⁸

Mountain Peak's appeal *could* entirely resolve the need for this compensation process. *If* the Third Court of Appeals finds that decertification was improper, the parties - and the PUC and SOAH - will have wasted time and resources in the instant docket for no reason. Thus, judicial economy favors staying this proceeding. Furthermore, Mountain Peak objects to continuing this proceeding which *could* ultimately result in another PUC Order which *could* be undermined by the Third Court of Appeals' decision. Mountain Peak's interests *could* be irreparably harmed by continuing this proceeding. Rather, the status quo should be maintained until the outcome of Mountain Peak's appeal to the Third Court of Appeals is determined.

Motion to Stay at 2 (emphasis added).

⁵ See TEX. WATER CODE § 13.381 and TEX. UTIL. CODE § 15.001; see also, *Reliant Energy, Inc. v. Public Util. Comm'n*, 153 S.W.3d 174, 184 (Tex.App.-Austin 2004, no pet.).

⁶ TEX. GOV'T CODE § 2001.176(b)(3); see also *Tex. State Bd. of Pharmacy v. Seely*, 764 S.W.2d 806, 815 (Tex. App.—Austin 1988, writ denied).

⁷ Preliminary Order at 2 (Sept. 23, 2016) ("While the Commission requests that the case be expedited to the extent possible, the Commission recognizes it is unlikely that SOAH can complete a hearing and issue a proposal for decision (PFD) within the directory 90-day timeframe provided by Texas Water Code (TWC) § 13.254(e)).

⁸ See Joint Expedited Motion of City of Midlothian and Mountain Peak SUD for Suspension of Requirement to File Appraisal Reports (Aug. 23, 2016) ("Joint Motion")(where parties agreed by corresponding Rule 11 to defer submitting appraisal reports, in order to "... effectuate the expeditious treatment contemplated under TWC § 13.254(d), (e) & (g), to promote the timely and efficient management of this proceeding contemplated under 16 TAC §§ 22.121 and 22.122(a), and to minimize the time and expense..."); and Mountain Peak's Threshold Issues

Mountain Peak knew about the pending appeal of Docket No. 44394 since well before this proceeding was initiated. At no time before now, 559 days⁹ after the Commission's decertification order, has Mountain Peak requested the Commission or any court involved in the Docket No. 44394 appellate process for the type of relief currently requested by claiming some imminent harm, judicial inefficiency, or otherwise. Instead, either due to strategy or misplaced optimism, Mountain Peak chose to take part in substantial discovery and hearings in this Docket. Mountain Peak should not be rewarded for laying behind the log and raising a fallacious reason to abate this case.

Finally, even if some compelling reason for a stay had been presented (which is not the case here), an abatement is still inappropriate as the decertified area is for a public purpose voted on by the Midlothian's citizens: the *uncontroverted* evidence in Docket No. 44394 demonstrates how Midlothian's purchase of the Park Property "in 2010 is the planned result of a voter-approved Park Facilities Bond Program in 2006, which included the concept for a 'Multi-Use Community Park' of roughly 125 acres, more or less."¹⁰ This park will serve many area residents (including many that are customers of Mountain Peak). Midlothian has expended public funds to develop the park and is entitled to have this case move forward, even if potentially subject to an adverse ruling in the pending appeal. The public purpose of the parkland and ongoing expenditure of voter-authorized bond funds in developing the park are compelling reasons to push forward in this case. Unfortunately, this Motion to Stay is one more

and List of Issues to be Addressed at 4 (Sept. 6, 2016) (emphasis added) (arguing in support of its ultimately rejected combined procedure instead of the adopted bifurcated process: "*Judicial economy* suggests that in this case, rather than holding two SOAH hearings, one should suffice").

⁹ Here, 559 days equals 1 year, 6 months and 9 days.

¹⁰ PUC Docket No. 44394, City of Midlothian's Response to Order No. 2, Attachment A (Supplemental Affidavit of Michael G. Adams, P.E. ¶9) (March 11, 2015) (PUC Interchange Item 10). In its entirety, this paragraph states:

9. The city's purchase of the Park Property in 2010 is the planned result of a voter-approved Park Facilities Bond Program in 2006, which included the concept for a "Multi-Use Community Park" of roughly 125 acres, more or less. Attached as **Exhibit G** is a true and correct copy of the information pamphlet on the four separate bond measures set for voter approval on May 13, 2006, including Proposition No. Three for the Park Facilities Bond Program. The Midlothian Community Park was planned and conceptually designed separate and apart from any consideration based upon the park's proximity to the Lawson Farms subdivision. [emphasis in original]

The presiding officer may take official notice of the foregoing affidavit for establishment of the facts addressed therein.

attempt by Mountain Peak to insert needless delays and increased expense into a process intended by the Legislature (and the Commission) to be *expedited*.

II. CONCLUSION

Midlothian respectfully requests that the Honorable Administrative Law Judge expeditiously deny Mountain Peak's Motion to Stay Proceeding Pending Appeal and requests any and all other relief to which it is justly entitled.

Respectfully submitted,

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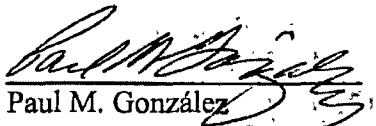
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ATTORNEYS FOR CITY OF MIDLOTHIAN

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this document was served on all parties of record in this proceeding on November 14, 2016, in the following manner: by facsimile and e-mail.


Paul M. González