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PUC DOCKET NO. 46120
SOAH DOCKET NO. 473-16-5823.WS

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

STATE OFFICE OF
ADMINISTRATIVE HEARINGS

MOUNTAIN PEAK SPECIAL UTILITY DISTRICT'S MOTION TO TEMPORARILY ABATE PENDING PUC COMMISSIONERS' DECISION IN PUC DOCKET NO. 45848

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

NOW COMES, Mountain Peak Special Utility District ("Mountain Peak") and, pursuant to PUC Procedural Rules 22.77 and 22.79 files this Motion to Temporarily Abate Proceeding Pending PUC Commissioners' Decision in PUC Docket No. 45848. In support thereof, Mountain Peak would respectfully show as follows:

INTRODUCTION

This case involves the notice by the City of Midlothian ("Midlothian") to serve water to an approximately 97.7-acre tract of land (the "Park Property") that was decertified from Mountain Peak's water CCN in PUC Docket No. 44394.¹ The statutory purpose of this proceeding is to ensure that just and adequate compensation is paid to Mountain Peak.² In the summer of 2016, the PUC initiated a new procedure for compensation cases like this one.³ In the first compensation case to follow the PUC's new procedures, two Administrative Law Judges ("ALJs") issued a proposal for decision ("PFD") on January 27, 2017, in PUC Docket No. 45848.⁴ Among their many decisions, the ALJs recommend that the burden of proof rest with the decertified utility and that the definition of "property" be read broadly and address factors contained in Texas Water Code §13.254(g).

¹ *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 1, 2015).

² Tex. Water Code § 13.254(g) ("TWC").

³ See *City of Celina's Notice of Intent to Provide Water and Sewer Service to Area Decertified from Aqua Texas, Inc. in Denton County*, PUC Docket No. 45848, Preliminary Order (July 20, 2016).

⁴ *City of Celina's Notice of Intent to Provide Water and Sewer Service to Area Decertified from Aqua Texas, Inc. in Denton County*, PUC Docket No. 45848, Proposal for Decision (Jan. 27, 2017).

In light of some of the proposed findings in this newly-issued PFD, Mountain Peak respectfully requests that this case be abated until the PUC Commissioners can weigh in on the issues. Doing so will preserve the parties' and court's resources, avoid inconsistencies between the PFD in this case and the PUC Commissioners' ruling in PUC Docket No. 45848, and avoid a remand of this case.

Mountain Peak respectfully requests an abatement, which is anticipated to not exceed two months, for the PUC Commissioners' to weigh in on the PFD in PUC Docket No. 45848. Although this is Mountain Peak's third request to stay or abate this proceeding, there have not been any stays of this proceeding prior to this request. Mountain Peak has conferred with the parties and the PUC Staff is unopposed to this request. Midlothian, however, is opposed to this request.

MOTION TO ABATE PROCEEDING PENDING PUC COMMISSIONERS' DECISION

The PFD in Docket No. 45848 contains two proposed findings of particular importance which could directly impact how this case proceeds. Specific direction from the PUC Commissioners on these and other issues would benefit both the parties and the Honorable ALJ. The abatement would last only approximately two months and would not cause harm to Midlothian or unduly delay this proceeding. Because all parties and the ALJ would benefit and Midlothian would not be harmed, Mountain Peak requests an abatement.

The PUC Commissioners' ruling on the PFD in PUC Docket No. 45848 would generally benefit all parties and the Honorable ALJ in understanding the Commission's requirements in this first phase of the new compensation proceedings. Further, the PUC Commissioners' ruling in PUC Docket No. 45848 will directly impact this case as it relates to (1) the burden of proof and the associated case presentation procedures; and (2) the breadth of the definition of property and associated evidentiary and other decisions.

First, the burden of proof finding in PUC Docket No. 45848 conflicts with the decision of the Honorable ALJ in this case. In PUC Docket No. 45848, the ALJs recommend a finding that the decertified retail public utility – there Aqua Texas, Inc. – has the burden to prove what property is rendered useless or valueless.⁵ In SOAH Order No. 5 in this case, the Honorable ALJ

⁵ *City of Celina's Notice of Intent to Provide Water and Sewer Service to Area Decertified from Aqua Texas, Inc. in Denton County*, PUC Docket No. 45848, Proposal for Decision at 9 (Jan. 27, 2017).

found the opposite over Mountain Peak's objection.⁶ Texas courts have held that placing the burden of proof on the wrong party can be reversible error.⁷ Thus, if the PUC Commissioners affirm the finding in PUC Docket No. 45848, the Honorable ALJ may want to revisit this issue to avoid a remand and rehearing due to this error.

Second, in PUC Docket No. 45848, the ALJs recommend that the definition of "property" be read broadly and incorporate intangible property interests such as expenditures for planning or design of facilities and reasonable and necessary legal expenses and professional fees – both of which are factors listed in Texas Water Code § 13.254(g).⁸ Mountain Peak has repeatedly requested that the § 13.254(g) factors be considered in determining what property, if any, belonging to Mountain Peak has been rendered useless or valueless.⁹ To date, the Honorable ALJ has indicated that the § 13.254(g) factors are to be considered during the second phase of this proceeding.¹⁰ Midlothian has requested that certain testimony in Mountain Peak's prefiled direct testimony be stricken from the record because it pertains to § 13.254(g) factors which Midlothian contends are irrelevant in this first phase. Thus, the PUC Commissioners' ruling on the definition of "property" could directly impact the Honorable ALJ's evidentiary rulings in this proceeding. Moreover, it could impact the Honorable ALJ's interpretations and understandings of the evidence presented to him during the hearing on the merits in this case.

An abatement of only two months will not significantly delay this proceeding. In each of Mountain Peak's previous requests for a stay of this proceeding, Midlothian argued that this proceeding was designed to be expedited and should not be stayed for an indefinite – and potentially lengthy – period of time. However, in making those arguments, Midlothian did not contend that it would be harmed by a short stay of only two months. In fact, it did not identify

⁶ SOAH Order No. 5 at 1.

⁷ See, e.g., *USX Corp. v. Union Pacific Resources Co.*, 753 S.W.2d 845, 855 (Tex.App.—Fort Worth, 1988, no writ) ("Placing the burden as to a material issue upon the wrong party is generally reversible error.") (citing *C. & R. Transport, Inc. v. Campbell*, 406 S.W.2d 191, 194 (Tex. 1996)); *Golaz v. Golaz*, 77 S.W.2d 829, 881 (Tex.Civ.App.- Fort Worth 1934), no writ history.

⁸ *City of Celina's Notice of Intent to Provide Water and Sewer Service to Area Decertified from Aquia Texas, Inc. in Denton County*, PUC Docket No. 45848, Proposal for Decision at 6-9 (Jan. 27, 2017).

⁹ See, e.g., Mountain Peak SUD's Threshold Issues and List of Issues to be Addressed (Sept. 6, 2016); Mountain Peak SUD's Motion to Reconsider Stay of Proceeding Pending Appeal or, in the Alternative, Motion to Broaden Scope of Hearing (Dec. 29, 2016).

¹⁰ SOAH Order No. 8 at 3 (Jan. 17, 2017).

any particular harm to it by any length of delay – merely that the process was intended to be expedited and therefore should not be stayed. Midlothian is currently developing the Park Property and providing irrigation to the Park Property. Because Midlothian has already constructed its facilities, the delay in this proceeding will not impact Midlothian's development of its park. A short abatement of two months, which would assist the parties and the Honorable ALJ, will not undermine the intended expedited process and will not harm Midlothian. Thus, the abatement should not be denied merely because it will cause this proceeding to take slightly longer than it would without the abatement.

CONCLUSION

Because this abatement will benefit all parties and the Honorable ALJ and will not harm Midlothian, Mountain Peak respectfully requests that the Honorable Administrative Law Judge grant this motion and abate this case until the PUC Commissioners rule on the PFD in PUC Docket No. 45848.

Respectfully submitted,

JACKSON WALKER L.L.P.

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ATTORNEYS FOR MOUNTAIN PEAK
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CERTIFICATE OF CONFERENCE

I hereby certify that on January 30, 2017, I conferred with counsel for the PUC Staff via telephone and e-mail and they were unopposed to this request. I hereby certify that on January 31, 2017, I conferred with counsel for the City of Midlothian via telephone and they were opposed to this request.



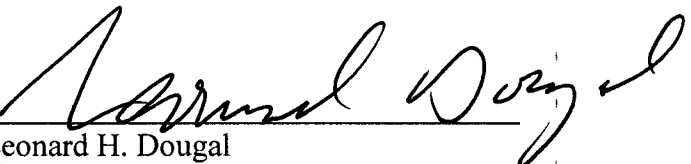
Leonard H. Dougal

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of January 2017, a true and correct copy of the foregoing document was served on the individuals listed below by Email.

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