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**SOAH DOCKET NO. 473-17-1641.WS  
P.U.C. DOCKET NO. 46256**

**APPLICATION OF LIBERTY  
UTILITIES (WOODMARK SEWER)  
CORP., LIBERTY UTILITIES (TALL  
TIMBERS SEWER) CORP., AND  
LIBERTY UTILITIES (SUB) CORP.  
FOR A RATE/TARIFF CHANGE**

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**BEFORE THE PUBLIC UTILITY  
COMMISSION OF TEXAS**

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**LIBERTY UTILITIES' REPLY ON MOTION TO COMPEL RESPONSES TO  
FIRST REQUEST FOR INFORMATION TO CITY OF TYLER**

Liberty Utilities (Woodmark Sewer) Corp., Liberty Utilities (Tall Timbers Sewer) Corp, and Liberty Utilities (Sub) Corp. ("Liberty Utilities") file this Reply to the City of Tyler's ("Tyler") Response to Liberty Utilities' Motion to Compel Responses to its First Request for Information ("RFI"). Tyler's contentions in support of its Response are both misleading and factually incorrect, and therefore merit this Reply. The ALJ should overrule Tyler's Objections and grant Liberty Utilities' Motion to Compel as to each of the RFIs.

**I. SPECIFIC REQUESTS FOR INFORMATION**

**LIBERTY 1-20** Please provide copies of all documents, correspondence, e-mails, or other communications in the possession or control of the City of Tyler for the past five years with the Texas Commission on Environmental Quality or the United States Environmental Protection Agency regarding compliance or enforcement issues for the City of Tyler wastewater collection system or for the City of Tyler wastewater treatment plant(s) located within three miles of the Liberty Utilities (Tall Timbers Sewer) Corp. wastewater treatment plant.

Tyler's Response as to Liberty Utilities' RFI 1-20 identifies numerous alleged bases to support its Objections, each of which Liberty Utilities briefly addresses as follows:

Tyler's first basis for objecting to RFI 1-20 is that Liberty Utilities has mischaracterized Tyler's position and Tyler is not really arguing that Liberty "should have contracted for wholesale

service from Tyler.”<sup>1</sup> Tyler is the *only* potential alternative to Liberty Utilities’ decision to invest in system upgrades that would support its “regionalization” arguments, and is therefore the *only* alternative upon which Tyler’s claims of imprudence are based. Moreover, Tyler’s direct testimony belies its argument it somehow is not claiming that Liberty should have entered into a wholesale contract with Tyler, as reflected in the following excerpts of Tyler’s direct testimony which are reflective of many more similar passages:

- “Tyler has long believed that the state’s policies regarding regionalization would best be met if Tyler provides regional wastewater treatment for itself and the surrounding retail sewer providers, such as Liberty Utilities.”<sup>2</sup>
- “Tyler’s treatment costs are significantly lower than Liberty Utilities’ costs, and Tyler’s existing plants are *more modern and have been better maintained...*”<sup>3</sup>
- “If Tall Timbers obtains wholesale service from Tyler rather than trying to expand its plant or diverting more flows to Woodmark, the rates for these customers will not increase so dramatically.”<sup>4</sup>
- “This shows that obtaining service from Tyler would be far more cost effective than expanding the Tall Timbers’ facility.”<sup>5</sup>
- “It is my opinion that Liberty has not adequately examined opportunities to regionalize facilities in a manner that is in the best interest of its customers.”<sup>6</sup>
- “As I will explain herein, obtaining service from Tyler would be less expensive than diverting flows to Woodmark or expanding the Tall Timbers WWTP.”<sup>7</sup>

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<sup>1</sup> Tyler has apparently withdrawn its privilege objection because it does not address the issue in its Response.

<sup>2</sup> Direct Testimony of Gregory Morgan at 14.

<sup>3</sup> *Id.* (emphasis added).

<sup>4</sup> *Id.* at 16.

<sup>5</sup> Morgan Direct Testimony at 21.

<sup>6</sup> Direct Testimony of Chris Ekrut at 14. In other words, Liberty has allegedly failed to obtain wastewater service from the only alternative that would be consistent with Tyler’s stated regionalization rationale.

<sup>7</sup> *Id.* at 15.

To the extent this testimony stands,<sup>8</sup> Liberty Utilities is entitled to explore whether Tyler's proposed wholesale purchase alternative is as cost effective or otherwise superior as Tyler's testimony asserts.

Tyler's second argument offered in defense of its objection to RFI 1-20 depends solely on its mischaracterization of Liberty Utilities' response to discovery. Liberty Utilities has nowhere stated, much less "admitted," that it did not give consideration to obtaining wholesale service from Tyler. The referenced discovery request, Tyler 1-36, asked for written documentation, not whether Liberty Utilities had considered the Tyler wholesale option. Other discovery responses, which Tyler elects to ignore, make clear that Liberty Utilities considered the Tyler wholesale option and rejected it as a viable option for a number of reasons.<sup>9</sup>

Third, Tyler wrongly asserts that: (1) no party has raised any issue relating to Tyler's collection system; (2) Tyler did not disparage Liberty's environmental compliance history or argue that Tyler's compliance is superior; and (3) Tyler did not "open the door" on environmental compliance issues. Again, Tyler's own testimony undermines these statements. Tyler directly raised the issue of its environmental compliance history by offering testimony regarding the consent decree, which speaks directly to Tyler's collection system.<sup>10</sup> On the issue of whether Tyler opened the door by disparaging Liberty's environmental compliance, Tyler's witness testified as follows:

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<sup>8</sup> Liberty Utilities has objected to each of these passages as irrelevant, but is entitled to the requested discovery if the ALJ overrules its objections. *See* Liberty Utilities Objection to City of Tyler's Prefiled Testimony and Exhibits and Motion to Strike (May 30, 2017).

<sup>9</sup> *E.g.* Liberty Utilities' Supplemental Response to OPUC RFI 2-5 (Apr. 28, 2017) and Second Supplemental Response Tyler RFI 6-5 (May 19, 2017).

<sup>10</sup> Morgan Direct at 21-22. In this testimony, Mr. Morgan explains that Tyler must implement "a program to enhance Tyler's existing programs, related to *management, operation, and maintenance* of its wastewater *collection* and *transmission* system." Morgan Direct at 21 (emphasis added).

- “As I previously discussed, Tyler has long been concerned about the operation of the Tall Timbers plant, both in terms of *environmental compliance* as well as the ability to keep up with growth in the Tall Timbers’ service area.”<sup>11</sup>

This testimony speaks for itself. None of Tyler’s asserted grounds for objection to RFI 1-20 have any merit and Tyler should be compelled to produce the requested information.

**LIBERTY 1-28** Please identify and describe every lawsuit, administrative hearing request, or legislative effort undertaken either directly or indirectly by the City of Tyler since 2001 to provide retail public sewer utility service within the sewer certificate of convenience and necessity (“CCN”) area of Liberty Utilities (Tall Timbers Sewer) Corp., take away sewer CCN service area from of Liberty Utilities (Tall Timbers Sewer) Corp., or take the wastewater treatment plant or collection system away from Liberty Utilities (Tall Timbers Sewer) Corp.

Tyler’s relevance objection to RFI 1-28 relies solely on its mischaracterization of the same discovery response, Tyler 1-36, as somehow standing for the proposition that Liberty Utilities did not consider wholesale service from Tyler as an alternative. Again, Tyler 1-36 simply cannot be read to stand for that proposition. The only thing that Tyler 1-36 might show is a lack of formal studies regarding Tyler as a potential alternative to investment in plant, and *not* whether Liberty Utilities considered the Tyler alternative. Yet Tyler here appears to suggest that Liberty Utilities should have invested in formal studies of Tyler as an option at the very time that Liberty Utilities was confronted with Tyler attacks on legal, regulatory and legislative fronts. And as explained in its Motion to Compel, the information sought by RFI 1-28 is directly related to Tyler’s testimony disagreeing with Liberty Utilities’ position that a “mutually beneficial business relationship” is unlikely.<sup>12</sup> The requested information is relevant and Liberty Utilities is entitled to the information in order to rebut Tyler’s assertion that its wholesale capacity is or ever was a viable option.

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<sup>11</sup> Morgan Direct Testimony at 18 (emphasis added).

<sup>12</sup> *Id.* at 20.

Finally, Tyler does not attempt to defend its claims of protection regarding communications between a member of the Legislature and the Legislative Council, and Liberty Utilities presumes that Tyler agrees with Liberty's argument in its Motion to Compel that no such privilege applies to Tyler. The ALJ should order Tyler to produce any such third-party communications in Tyler's possession, custody or control.

**LIBERTY 1-40** Please identify and provide an itemized list for any and all measures required under the Consent Decree in the federal case styled: *United States of America and, the State of Texas, Plaintiffs, v. the City of Tyler, Defendant*, Civil Action No. 6:17-cv-29, in the United States District Court for the Eastern District of Tyler Division. For each item, please provide the projected cost, timing, and scope. Please also provide any documents City of Tyler relies upon in support of its response to this request.

If, as indicated in its Response, Tyler has not compiled a list and has not developed projections of the cost, timing, and scope of measures required to comply with the Consent Decree, the ALJ's order on Liberty Utilities Motion to Compel should require that Tyler provide a response to RFI 1-40 so stating.

**LIBERTY 1-41** With respect to the measures required to be taken by the City of Tyler under the Consent Decree in the federal case styled: *United States of America and, the State of Texas, Plaintiffs, v. the City of Tyler, Defendant*, Civil Action No. 6:17-cv-29, in the United States District Court for the Eastern District of Tyler Division, please provide the following information:

- a. The impacts of the required measures on the City of Tyler's retail public sewer utility rates.
- b. The impacts of the required measures on the City of Tyler's projected costs for wholesale wastewater treatment capacity.
- c. How the City of Tyler intends to pay for and/or finance all measures required under the Consent Decree.
- d. The total cost amount for all measures required under the Consent Decree.
- e. Any and all documents relied upon by the City of Tyler in support of its responses to this request.

Tyler's attempts to defend its objections to RFI 1-41(a) on relevance are undermined by its own witness testimony.<sup>13</sup> The argument that Tyler does not "even mention its retail sewer rates or costs" is simply false.<sup>14</sup> In direct testimony, Tyler characterizes Liberty Utilities' retail rates as "among the *highest retail sewer rates* in the state,"<sup>15</sup> and, in contrast, explains that Tyler is "dedicated to providing reliable sewer service *at a low cost and in accordance with applicable state and federal regulations*."<sup>16</sup> Tyler then asserts that the Consent Decree will have no effect on Tyler's proposed wholesale treatment cost to Liberty Utilities.<sup>17</sup> Based on these two statements, it follows as a matter of logic that Tyler's retail customers will bear all or some portion of costs to comply with the Consent Decree, raising the credibility of Tyler's assertions regarding Liberty's retail rates. It further follows that Tyler's theoretical wholesale cost as an alternative to Liberty's investment in plant may be artificially low due to retail customer subsidization of Tyler's theoretical desired wholesale business or *vice versa*.

Liberty is entitled to test the accuracy of Tyler's estimated wholesale alternative upon which it relies as a proxy to support its imprudence allegations in this docket, including whether it is based on improper cross-subsidization of wholesale activities to the detriment of its own citizens. To the extent Tyler's testimony is allowed to stand, Liberty Utilities is entitled to test the credibility and viability of Tyler's characterization of itself as a potential alternate source of service, and the Motion to Compel should be granted as to RFI 1-41(a).

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<sup>13</sup> Morgan Direct Testimony at 16, 18. The comparative cost of Liberty Utilities' retail rates to the Tyler retail rates has also been directly raised by the testimony of Katherine Carter. See Carter Direct at 13-20. Liberty Utilities has objected to this portion of Ms. Carter's proffered evidence, but Tyler is the only party to this proceeding with direct access to its own retail cost of service.

<sup>14</sup> Tyler Response at 3.

<sup>15</sup> Morgan Direct Testimony at 18 (emphasis added).

<sup>16</sup> *Id.* at 16 (emphasis added).

<sup>17</sup> *Id.* at 21.

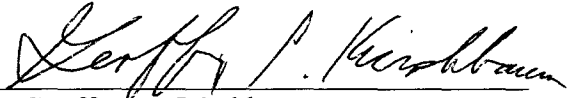
Subparts (c) and (d) of RFI 1-41 were directed at the same issues, namely, testing the accuracy and viability of Tyler's newly-developed wholesale service cost and whether such is truly reflective of Tyler's actual costs of providing such service given the many expenditures required for Tyler to comply with the Consent Decree. Liberty Utilities is entitled to the requested information in order to address these estimated costs which serve as the basis of Tyler's imprudence recommendations.

## **II. CONCLUSION**

For the reasons set out above, Liberty Utilities request that the ALJs enter an order granting their Motion to Compel and requiring the City of Tyler to provide full and complete responses to Liberty Utilities' Request for Information Nos. 1-20, 1-28, 1-40 and 1-41(a), (c) and (d), including all documents requested therein. Liberty Utilities further request that they be granted any such further relief to which they are entitled.



Respectfully submitted,

By: 

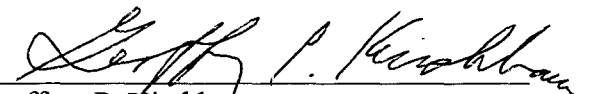
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**CERTIFICATE OF SERVICE**

I certify that a copy of this document will be served on all parties of record on June 13, 2017 in accordance with P.U.C. Procedural Rule 22.74.

  
Geoffrey P. Kirshbaum