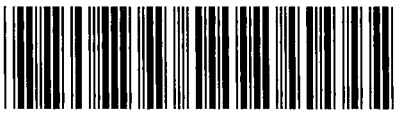
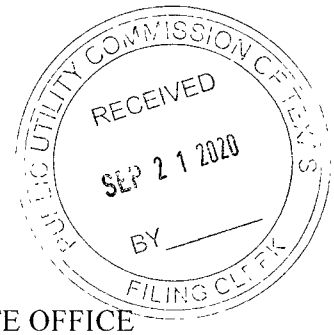


Control Number: 49351

Item Number: 72

Addendum StartPage: 0



SOAH DOCKET NO. 473-19-5674.WS
DOCKET NO. 49351

RATEPAYERS' APPEAL OF THE DECISION BY BEAR CREEK SPECIAL UTILITY DISTRICT TO CHANGE RATES	§ § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

RATEPAYERS' REPRESENTATIVES' MOTION TO COMPEL BEAR CREEK SPECIAL UTILITY DISTRICT'S RESPONSES TO RATEPAYERS' FIRST REQUEST FOR INFORMATION

TO THE HONORABLE JUDGE WISEMAN

COMES NOW, the Ratepayers Co-Representative of the Bear Creek Special Utility District ("Ratepayers") and files this Motion to compel in response to Bear Creek Special Utility District's Objections to Ratepayers' First Set of Request for Information, and in support thereof, respectfully shows as follows:

BACKGROUND

On September 4, 2020, Ratepayers filed and served their first set of requests for information ("RFIs") on Bear Creek Special Utility District ("BCSUD"). On September 14, 2020, BCSUD filed their Objections to the Ratepayers' First Request for Information. The specific objections to Ratepayers' RFI included grounds of relevance, and they seek information that will not be helpful to determining any facts at issue in this proceeding. Pursuant to 16 Tex. Admin Code §22.144(e), the party seeking discovery must file a motion to compel no later than five working days after an objection is received. Five working days after Monday, September 14, 2020 is Monday, September 21, 2020; therefore, this motion has been filed timely by the Ratepayers.

FAILURE TO NEGOTIOATE

In its Objections to the Ratepayers' RFIs, the BCSUD states that, "Counsel for BCSUD attempted to confer with Ms. Fato on behalf of the ratepayers to negotiate diligently and in good faith clarify the requests. Counsel for BCSUD will continue to attempt to resolve any disputes diligently and in good faith."

Ratepayers allege that BCSUD's counsel is erroneously portraying its efforts to negotiate diligently and in good faith. Mr. Carlton attempted to call Ms. Fato's cell phone on Monday September 14, 2020 at 2:29 pm. Ms. Fato was at work and on a conference call when Mr. Carlton's voicemail was left on her cellphone. Mr. Carlton had sent an email to Ms. Fato's personal Gmail account five minutes prior, at 2:24 pm. Before Ms. Fato even realized there was an email or voicemail from Mr. Carlton, his office emailed out the filing of BCSUD's Objections to Ratepayers RFIs at 2:55 pm, less than thirty minutes elapsing between the email and the filing. Ratepayers allege this is not a diligent effort, nor is it representative of any type of good faith.

Additionally, the Ratepayers acknowledge the insurmountable continued legal expenses which are being passed onto the BCSUD Ratepayers and believe that BCSUD Counsel continues to create a further burden on the ratepayers for unnecessary legal fees which the BCSUD Ratepayers will inevitably have to assume.[1] The BCSUD Counsel never successfully communicated their questions to Ms. Fato prior to filing the Objections, and seemingly prefer to perpetuate the BCSUD's usual mode of a total lack of transparency and unwillingness to respond to any questions Ratepayers seek whatsoever. BCSUD's objections to RFI 1-1 through RFI 1-28 could have easily been resolved if Counsel and Ratepayers' Representatives could effectively communicate. Instead, Mr. Carlton has in past, and continues to this day to avoid communications with Ratepayer representatives, and

[1] Attached as Exhibit A is a copy of the email from Counsel for BCSUD to Ratepayers' Representative Deborah Fato.

fails to respond to prior communications (such as the March 10, 2020 letter sent in attempt to clarify the salaries representation issue in the rate analysis, which has been ignored to this day).

MOTION TO COMPEL

A. Ratepayers' Request for Information No 1-1 through No 1-9.

Ratepayers 1-1	State the authority upon which you rely when you claim the SUD is "exempt" from its requirement to refund deposit monies which the Ratepayer neglected to leave a forwarding address upon closeout of its account under Chapter 49 of the Texas Water Code.
Ratepayers 1-2	State the authority upon which you rely when you claim the SUD is "exempt" from its requirement to refund deposit monies which the Ratepayer neglected to leave a forwarding address upon closeout of its account under Chapter 65 of the Texas Water Code.
Ratepayers 1-3	State the authority upon which you rely when you claim the SUD is "exempt" from its requirement to refund deposit monies which the Ratepayer neglected to leave a forwarding address upon closeout of its account under the Texas Commission on Environmental Quality Water Supply Division's *Water District Financial Management Guide* revised March 2004.
Ratepayers 1-4	State the authority upon which you rely when you claim the SUD is "exempt" from its requirement to refund deposit monies which the Ratepayer neglected to leave a forwarding address upon closeout of its account under the *Rate Order Certificate of Convenience and Necessity No. 10066 Collin County, Texas* adopted December 10, 2013, Amended October 9, 2018.
Ratepayers 1-5	State where on the Bear Creek Special Utility District website (www.bearcreeksud.com) that it states the authority upon which you rely when you claim the SUD is "exempt" from its requirement to refund deposit monies which the Ratepayer neglected to leave a forwarding address upon closeout of its account, as President Herman Stork told Director Deborah Fato ("you can find it on the website") at the Board of Directors meeting held in the summer of 2020.
Ratepayers 1-6	State the authority upon which you rely when you claim that you are "exempt" from being governed by the Utilities Code, Title 4, Subtitle B, Chapter 183, Section 183.001(2) which defines as ""Utility" means a person, firm, company, corporation, receiver, or trustee who furnishes water, electric, gas, or telephone service."

Ratepayers 1-7 State the authority upon which you rely when you claim that you are "exempt" from being governed by the Utilities Code, Title 4, Subtitle B, Chapter 183, Section 183.002 which requires the payment of interest on the deposit from the time the deposit is made.

Ratepayers 1-8 State the authority upon which you rely when you claim that you are "exempt" from being governed by the Utilities Code, Title 4, Subtitle B, Chapter 183, Section 183.006 which defines the Criminal Penalty of both payment of a fine and confinement in jail if a person violates this chapter, as President Herman Stork called out "We're exempt!" loudly from the back of the room for all in attendance to hear when this topic was brought up at the October 8, 2019 Ratepayers' Town Hall Meeting.

Ratepayers 1-9 State the authority upon which you rely when you claim the SUD is "exempt" from having to refund deposit monies for ratepayers who close their accounts but fail to leave a forwarding address, "because the Lavon Post Office doesn't forward SUD mail" as General Manager Camille Reagan stated in a 2020 Board meeting in response to Director Deborah Fato's direct question as to why the SUD cannot simply mail a deposit refund check to the ratepayer's last known address.

BCSUD Response to RFI 1-1 through 1-9:

Bear Creek objects to this Request on grounds of relevance, as it seeks information that will not be helpful to determining any facts at issue in this proceeding. Deposits are not used for covering the costs of the utility's services or Bear Creek's operating budget. *See* Tex. R. Civ. P. 192.3(a) (discovery must be "relevant to the subject matter of the pending action." Tex. R. Evid. 403 (permitting a court to exclude relevant evidence if it will confuse the issues, mislead the jury, or cause prejudice.).

Bear Creek objects to the request as disproportional to the needs to this case, as the likely benefit from discovery of the information is very small compared with the burden and expense of producing the information. Tex. R. Civ. P. 192.4.

Bear Creek objects to this Request as mischaracterizing or taking out of context its statements to Ratepayers. Tex. R. Civ. P. 192.4.

Ratepayers Response:

The BCSUD provides identical answers to RFI 1-1 through RFI 1-9 and therefore the Ratepayers will address all objections as one. The Ratepayers move to compel the

BCSUD to answer RFI 1-1 and through RFI 1-9 because the Ratepayers allege that all the answers to these requests can be easily accessed through BCSUD records and are already in existence and therefore the BCSID objections are not valid for the following reasons:

BCSUD's claim of exemption represents a mindset held by the BCSUD General Manager and President that is relevant to these rate hike proceedings and must be considered, even though, in reality, there is no such exemption regarding the retaining of deposit refund monies. When Ms. Fato hosted a Ratepayers' Town Hall Meeting on October 8, 2019 to discuss the Petition action, particularly when discussing the decades long problem of the BCSUD's policies of failing to return Ratepayers' deposit monies, and when mention was made of the penalties contained in the Texas Utility Code for failure to return deposit monies, it becomes entirely relevant to this Petition action when President Herman Stork and BCSUD's local counsel attorney Kristen Fancher shout out from the back of the room for all in attendance to hear "WE'RE EXEMPT!!!". For nearly a year since that October 8, 2019 meeting, Ms. Fato has made a constant inquiry as to what authority BCSUD relies upon to support its contentions that it is exempt.

Never has Ms. Fato received an answer, even when asking as a Director at several board meetings. Ms. Fancher did not reply to her text assurances that she would provide the exemption citations. Ms. Fancher did not respond to a certified letter sent by Ms. Fato asking for any such exemption authority. When the subject of closed accounts arises in the monthly General Managers Reports at the board meetings, Ms. Fato asks how many of those closed accounts did a deposit refund go to the Ratepayers. "As many as who

thought to leave a forwarding address" is the only answer provided. When Ms. Fato asked the General Manager why the BCSUD did not automatically send a deposit refund to the last known address, the only answer provided was "The Lavon Post Office does not forward our mail." This is a direct quote and is not mischacterizing or take out of context what was said to Ms. Fato.

When Ms. Fato asked on many occasions at board meetings where it says BCSUD is 'exempt' the only answers provided by President Herman Stork or attorney Kristen Fancher are vague and ambiguous, such as "It's somewhere on the website" or "It's somewhere in either of the chapters the BCSUD was formed under." This is a direct quote and is not mischacterizing or take out of context what was said to Ms. Fato.

Ratepayers allege that because Ms. Fato can never get a straight answer to this continuous question, that indeed, there is no such exemption, and the BCSUD nor its counsel can cite any authority to this 'exempt' mindset of the BCSUD's General Manager and President. It is this same mindset of being 'above the law' that caused 274 fire hydrants in the BCSUD's area of service to be padlocked with a MasterLock from 2007 through 2015, for over eight (8) years, which was in violation of many codes, ordinances, and laws. Obviously, there is no 'exemption' to the International Fire Code, although BCSUD acted otherwise.

It is this same mindset of being 'above the law' of the BCSUD General Manager that the Fifth District of Texas at Dallas Court of Appeals cited in its published opinion when Justice Lang-Miers opined that "Reagan's understanding of the lease terms cannot supplant the plain language of the Lease." (*See* page 12 of the Opinion shown as Exhibit

B, first paragraph, and beginning on line 3) that triggered the TierOne 'Tower Lease' litigation. In this action, General Manager Camille Reagan attempted to evict an internet service provider's equipment lease by simply holding lease payment checks in a drawer for some months, then deeming the internet company tenant as being in 'default' for nonpayment of rent and trying to terminate the lease. This resulted in the Ratepayers bearing the burden of paying all costs of the litigation, for both TierOne and BCSUD, in an amount reputed to be well over One Hundred Thousand Dollars. Of course, in BCSUD's usual total lack of transparency mode, Ratepayers were never informed of this action, which was all discussed in executive session board meetings, and under the agenda topic of 'Tower Lease'. See Exhibit B, Memorandum Opinion.

Ratepayers contend that even though the money kept by the BCSUD was not considered in its rate hike calculations for the October 2018 rate increase, it nonetheless must be considered as a source of 'revenue'. Even if it is illegally obtained. However the BCSUD gets and hides some of its monies, it should not fall to the Ratepayers to continually be considered the sole source of revenue to this public utility entity.

Finally, Ms. Fato has conducted diligent research on this subject and finds no authority to support BCSUD's 'supplanted' contentions of exemption to the Texas Water Code requiring a water utility to return deposits to Ratepayers. In fact, the Texas State Comptroller's office representative confirmed in a telephone call with Ms. Fato that neither the Lavon Water Supply Corporation, the Lavon Special Utility District, nor the Bear Creek Special Utility District has NOT EVER tendered any unclaimed or forfeited deposit refund monies to the State Comptroller's office, dating all the way back to this water company's inception in 1965.

BCSUD alleges that it would be burdensome to producing the information requested. Compared to the burden the Ratepayers endure every month of usually paying more in the monthly now $35.00 'service fee' than we do in the cost of water purchased, the Ratepayers' burden of having to continually finance the mismanagement of the water company is an even greater burden. The BCSUD should quit fighting the Ratepayers on transparency issues and simply answer the question as to where they get the authority to claim being 'exempt' from having to refund deposits, and include those funds in its revenue calculations. If it cannot, then be prepared to suffer the consequences and penalties. .

B. Ratepayers' Request for Information No 1-10 through 1-13

Ratepayers 1-10 Provide a copy of each Board of Directors meeting minutes in which the subject of Ratepayer Deposits was listed as an Agenda item and discussed (for the years 2015 through 2020).

Ratepayers 1-11 Provide a copy of each Board of Directors meeting Agenda in which the subject of Ratepayer Deposits was listed as a topic for discussion (for the years 2015 through 2020).

Ratepayers 1-12 State why you have continually denied Director Deborah Fato's multiple requests to place a discussion on the topic of 'Deposits' on the monthly Board of Directors meeting agenda, especially after President Herman Stork denied the last request at the August 18, 2020 board meeting by stating "We don't need to talk about that."

Ratepayers 1-13 State what 'other things' the SUD uses any forfeited or otherwise not refunded Ratepayer deposit money for, as explained by President Herman Stork to Director Deborah Fato at the August 18, 2020 Board of Directors' meeting when he said "We use that money for other things," one example of which was said to pay water bills of other non-paying Ratepayers.

BCSUD Response to RFI 1-10 through 1-13

Bear Creek objects to this Request on grounds of relevance, as it seeks information that will not be helpful to determining any facts at issue in this proceeding. Deposits are not used for covering the costs of the utility's

services or Bear Creek's operating budget. *See* Tex. R. Civ. P. 192.3(a) (discovery must be "relevant to the subject matter of the pending action." Tex. R. Evid. 401 (evidence is relevant if it relates to facts that are "of consequence in determining the action"); Tex. R. Evid. 403 (permitting a court to exclude relevant evidence if it will confuse the issues, mislead the jury, or cause prejudice).

Bear Creek objects to the request as disproportional to the needs to this case, as the likely benefit from discovery of the information is very small compared with the burden and expense of producing the information. Tex. R. Civ. P. 192.4.

Bear Creek objects to this Request as mischaracterizing or taking out of context its statements to Ratepayers. Tex. R. Civ. P. 192.4.

Ratepayers Response:

When Ms. Fato asked on many occasions at board meetings to place a discussion of Deposits on the next board meeting agenda, each and every request has, and continues to be, denied. When President Herman Stork said "We don't' need to talk about that" it emphasizes the lack of transparency and unwillingness to address this topic of contention, and is extremely relevant to these Petition proceedings because it is an attempt to hide a source of revenue for the BCSUD that it otherwise looks to Ratepayers to provide. This is a direct quote and is not mischacterizing or take out of context what was said to Ms. Fato.

It would not be unduly burdensome to provide any BCSUD board meeting minutes or agendas reflecting the number of times that deposits have been discussed at meetings. In fact, there have only been two occasions in the past 6 years that is known to Ms. Fato. The first being when the BCSUD engaged new counsel following the death of prior counsel (Angela Stepherson of the Coats Rose firm), and this new counsel, Attorney Wilson of a Plano firm, persuaded the BCSUD board to transfer deposit monies into one account (rather than five bank accounts), and the board voted approval of same.

The second instance of the subject of deposits being on the board agenda was after Attorney Wilson was no longer engaged by the BCSUD, and in that board meeting, the board reversed its earlier decision and transferred all deposit monies back into the original five bank accounts (where they are comingled with other monies ascribed for other purposes).

In short, the BCSUD does not intend to place a discussion of its deposit refund policies or procedures on the agenda because it does not wish to make known its questionable source of revenue when it fails to return a deposit to a Ratepayer who has closed its account yet failed to leave a forwarding address.

C. Ratepayers' Request for Information No 1-14 through 1-30.

Ratepayers 1-14 For the calendar year 2005, state
(1) how many ratepayer accounts were closed;
(2) how many ratepayers received a refund of some or all of their deposit;
(3) how many ratepayers did not receive a refund; and
(4) how many forfeited deposits were sent to the Texas State Comptroller.

Ratepayers 1-15 For the calendar year 2006, state
(1) how many ratepayer accounts were closed;
(2) how many ratepayers received a refund of some or all of their deposit;
(3) how many ratepayers did not receive a refund; and
(4) how many forfeited deposits were sent to the Texas State Comptroller.

Ratepayers 1-16 For the calendar year 2007, state
(1) how many ratepayer accounts were closed;
(2) how many ratepayers received a refund of some or all of their deposit;
(3) how many ratepayers did not receive a refund; and
(4) how many forfeited deposits were sent to the Texas State Comptroller.

Ratepayers 1-17 For the calendar year 2008, state
(1) how many ratepayer accounts were closed;
(2) how many ratepayers received a refund of some or all of their deposit;
(3) how many ratepayers did not receive a refund; and
(4) how many forfeited deposits were sent to the Texas State Comptroller.

Ratepayers 1-18 For the calendar year 2009, state
(1) how many ratepayer accounts were closed;
(2) how many ratepayers received a refund of some or all of their deposit;
(3) how many ratepayers did not receive a refund; and
(4) how many forfeited deposits were sent to the Texas State Comptroller.

Ratepayers 1-19 For the calendar year 2010, state
(1) how many ratepayer accounts were closed;
(2) how many ratepayers received a refund of some or all of their deposit;
(3) how many ratepayers did not receive a refund; and
(4) how many forfeited deposits were sent to the Texas State Comptroller.

Ratepayers 1-20 For the calendar year 2011, state
(1) how many ratepayer accounts were closed;
(2) how many ratepayers received a refund of some or all of their deposit;
(3) how many ratepayers did not receive a refund; and
(4) how many forfeited deposits were sent to the Texas State Comptroller.

Ratepayers 1-21 For the calendar year 2012, state
(1) how many ratepayer accounts were closed;
(2) how many ratepayers received a refund of some or all of their deposit;
(3) how many ratepayers did not receive a refund; and
(4) how many forfeited deposits were sent to the Texas State Comptroller.

Ratepayers 1-22 For the calendar year 2013, state
(1) how many ratepayer accounts were closed;
(2) how many ratepayers received a refund of some or all of their deposit;
(3) how many ratepayers did not receive a refund; and
(4) how many forfeited deposits were sent to the Texas State Comptroller.

Ratepayers 1-23 For the calendar year 2014, state
(1) how many ratepayer accounts were closed;
(2) how many ratepayers received a refund of some or all of their deposit;
(3) how many ratepayers did not receive a refund; and
(4) how many forfeited deposits were sent to the Texas State Comptroller.

Ratepayers 1-24 For the calendar year 2015, state
(1) how many ratepayer accounts were closed;
(2) how many ratepayers received a refund of some or all of their deposit;
(3) how many ratepayers did not receive a refund; and
(4) how many forfeited deposits were sent to the Texas State Comptroller.

Ratepayers 1-25 For the calendar year 2016, state
(1) how many ratepayer accounts were closed;
(2) how many ratepayers received a refund of some or all of their deposit;

(3) how many ratepayers did not receive a refund; and
(4) how many forfeited deposits were sent to the Texas State Comptroller.

Ratepayers 1-26 For the calendar year 2017, state
(1) how many ratepayer accounts were closed;
(2) how many ratepayers received a refund of some or all of their deposit;
(3) how many ratepayers did not receive a refund; and
(4) how many forfeited deposits were sent to the Texas State Comptroller.

Ratepayers 1-27 For the calendar year 2018, state
(1) how many ratepayer accounts were closed;
(2) how many ratepayers received a refund of some or all of their deposit;
(3) how many ratepayers did not receive a refund; and
(4) how many forfeited deposits were sent to the Texas State Comptroller.

Ratepayers 1-28 Admit or deny that the Lavon Water Supply Corporation has ever tendered any unclaimed or forfeited Ratepayer deposit monies to the Texas State Comptroller.

Ratepayers 1-29 Admit or deny that the Lavon Special Utility District has ever tendered any unclaimed or forfeited Ratepayer deposit monies to the Texas State Comptroller.

Ratepayers 1-30 Admit or deny that the Bear Creek Special Utility District has ever tendered any unclaimed or forfeited Ratepayer deposit monies to the Texas State Comptroller.

BCSUD Response to RFI No. 1-14 through 1-30

Bear Creek objects to this Request on grounds of relevance, as it seeks information that will not be helpful to determining any facts at issue in this proceeding. The proceeding will focus on Bear Creek's 2018 rate setting, so Bear Creek also objects that the Request is irrelevant as it seeks information that is not within the time period applicable to the evaluation of Bear Creek's rates. Deposits are not used for covering the costs of the utility's services or Bear Creek's operating budget. *See* Tex. R. Civ. P. 192.3(a) (discovery must be "relevant to the subject matter of the pending action." Tex. R. Evid. 401 (evidence is relevant if it relates to facts that are "of consequence in determining the action"); Tex. R. Evid. 403 (permitting a court to exclude relevant evidence if it will confuse the issues, mislead the jury, or cause prejudice).

Bear Creek objects to the request as disproportional to the needs to this case, as the likely benefit from discovery of the information is very small compared with the burden and expense of producing the information. Tex. R. Civ. P. 192.4.

Bear Creek objects to this Request as mischaracterizing or taking out of context its statements to Ratepayers. Tex. R. Civ. P. 192.4.

Bear Creek further objects to this Request as overly burdensome. Tex. R. Civ. P. 192.4.

Ratepayers Response:

It is no wonder that BCSUD would object to answering these questions. The reason is simple. In all the years that General Manager Camille Reagan has been working at the BCSUD (first as an office manager, then simply promoting herself into the General Manager position following the death of her predecessor/boss, General Manager Gary Fox in 2012) for the past 15 years, from 2005 to 2020, NOT ONCE EVER has any deposit refunds, which were not sent to the Ratepayer whose account was closed, had been tendered to the Texas State Comptroller.

These RFIs were intended to elicit a response as to whether or not any monies during Camille Reagan's employment at BCSUD had been sent to the State Comptroller as required by law. The questions are relevant because this revenue should have been considered in the setting of the 2018 rate increase. The fact that BCSUD objects to answering same speaks volumes.

The fact that BCSUD considered this set of questions to be overly burdensome illustrates how such revenue was categorized as 'miscellaneous income' and not truly accounted for properly would make calculating just how much revenue was gleaned from supplanting the 'exemption' understanding would indeed make it a seemingly impossible task to ascertain an amount cumulative over a 15 year period. Ratepayers estimate it to be a significant amount of revenue.

Ratepayers' Request for Information No 1-31 through 1-54

Ratepayers 1-31 For the new development of Abston Hills, please state how much in total deposit money you anticipate to collect once all 6,000 connections are established.

Ratepayers 1-32 For the new development of Abston Hills, please state how much in total meter sales you anticipate to collect once all 6,000 connections are established.

Ratepayers 1-33 For the new development of Lakepointe (Single Family), please state how much in total deposit money you anticipate to collect once all 630 connections are established.

Ratepayers 1-34 For the new development of Lakepointe (Single Family), please state how much in total meter sales you anticipate to collect once all 630 connections are established.

Ratepayers 1-35 For the new development of Lakepointe (Multiple Family), please state how much in total deposit money you anticipate to collect once all 150 connections are established.

Ratepayers 1-36 For the new development of Lakepointe (Multiple Family), please state how much in total meter sales you anticipate to collect once all 150 connections are established.

Ratepayers 1-37 For the new development of Crestridge Meadows, please state how much in total deposit money you anticipate to collect once all 274 connections are established.

Ratepayers 1-38 For the new development of Crestridge Meadows, please state how much in total meter sales you anticipate to collect once all 274 connections are established.

Ratepayers 1-39 For the new development of Traditions at Grand Heritage, please state how much in total deposit money you anticipate to collect once all 97 connections are established.

Ratepayers 1-40 For the new development of Traditions at Grand Heritage, please state how much in total meter sales you anticipate to collect once all 97 connections are established.

Ratepayers 1-41 For the new development of Traditions at Grand Heritage West, please state how much in total deposit money you anticipate to collect once all 84 connections are established.

Ratepayers 1-42 For the new development of Traditions at Grand Heritage West, please state how much in total meter sales you anticipate to collect once all 84 connections are established.

Ratepayers 1-43 For the new development of Bear Creek Phase 3, 4, 5, please state how much in total deposit money you anticipate to collect once all 454 connections are established.

Ratepayers 1-44 For the new development of Bear Creek Phase 3, 4, 5, please state how much in total meter sales you anticipate to collect once all 454 connections are established.

Ratepayers 1-45 For the new development of Cameron Family Trust, please state how much in total deposit money you anticipate to collect once all 148 connections are established.

Ratepayers 1-46 For the new development of Cameron Family Trust, please state how much in total meter sales you anticipate to collect once all 148 connections are established.

Ratepayers 1-47 For the new development of Moores Lake, please state how much in total deposit money you anticipate to collect once all 39 connections are established.

Ratepayers 1-48 For the new development of Moores Lake, please state how much in total meter sales you anticipate to collect once all 39 connections are established.

Ratepayers 1-49 For the new development of Lavon Farms, please state how much in total deposit money you anticipate to collect once all 150 connections are established.

Ratepayers 1-50 For the new development of Lavon Farms, please state how much in total meter sales you anticipate to collect once all 150 connections are established.

Ratepayers 1-51 For the new development of MUD No. 5, please state how much in total deposit money you anticipate to collect once all 896 connections are established.

Ratepayers 1-52 For the new development of MUD No. 5, please state how much in total meter sales you anticipate to collect once all 896 connections are established.

Ratepayers 1-53 For the new development of Lavon 678 Development, please state how much in total deposit money you anticipate to collect once all 300 connections are established.

Ratepayers 1-54 For the new development of Lavon 678 Development, please state how much in total meter sales you anticipate to collect once all 300 connections are established.

BCSUD Response to RFI No. 1-31 through 1-54

Bear Creek objects to this Request on grounds of relevance, as it seeks information that will not be helpful to determining any facts at issue in this proceeding. The amount of deposit money that Bear Creek will collect once

the [...] development is fully developed is irrelevant to the cost Bear Creek anticipated to incur is 2018 when it set the rates that are the subject of this appeal. The proceeding will focus on Bear Creek's 2018 rate setting, so Bear Creek also objects that the Request is irrelevant as it seeks information that is not within the time period applicable to the evaluation of Bear Creek's rates. Deposits are not used for covering the costs of the utility's services or Bear Creek's operating budget. *See* Tex. R. Civ. P. 192.3(a) (discovery must be "relevant to the subject matter of the pending action." Tex. R. Evid. 401 (evidence is relevant if it relates to facts that are "of consequence in determining the action"); Tex. R. Evid. 403 (permitting a court to exclude relevant evidence if it will confuse the issues, mislead the jury, or cause prejudice).

Bear Creek objects to the request as disproportional to the needs to this case, as the likely benefit from discovery of the information is very small compared with the burden and expense of producing the information. Tex. R. Civ. P. 192.4.

Bear Creek objects to this Request as being a 'fishing expedition," in that it seeks information beyond the scope of this proceeding. Tex. R. Civ. P. 192.4.

Bear Creek further objects to this Request as overly burdensome. Tex. R. Civ. P. 192.4.

Ratepayers Response

Ratepayers' RFIs No. 1-31 through 1-54 are not a 'fishing expedition'. They are designed to illustrate the amount of money the BCSUD will eventually collect in revenues as the city of Lavon and its surrounding areas of developments and subdivisions grow. It is not irrelevant to the rate increase in that the 'service fee' increase to the Ratepayers did not account for the surge in revenue, in a total eventual amount of nearly Sixty Five Million Dollars, that the BCSUD will reap from sources other than Ratepayers' payment of the increased 'service fee'.

The questions also serve to illustrate how the BCSUD sets rates that are 'gouging' and 'excessive' by comparison to other like kind sized water companies in the North Texas area.

The information sought with regard to meter sales for the new developments was already provided in Ratepayers' Objections to Camille Reagan's Direct Testimony filed in August 2020, provided again below for ready reference.

This amount charged by BCSUD is considered by many to be higher than most developers are usually charged by other water companies in other North Texas areas. Multiplying the number of new homes (**9,339)** by the meter charge (allegedly $6,800 per meter connection) implies that the revenue income due to the water company is estimated well in excess of **$63,505,200**.

New Development	**Meter Sale x ~$6,800**	**~Revenue from Meter Sales**
Abston Hills	6,000	$40,800,000
Lakepointe Development	630 Single Family	$ 4,284,000
	150 Multiple Family	$ 1,020,000
Crestridge Meadows	274	$ 1,863,200
Traditions at Grand Heritage	97	$ 659,600
Traditions at Grand Heritage West	84	$ 571,200
Traditions at Grand Heritage Phase 2	111	$ 754,800
Bear Creek Phase 3, 4, 5	454	$ 3,087,200
Cameron Family Trust	148	$ 1,006,400
Moores Lake	39	$ 265,200
Lavon Farms	150	$ 1,020,000
President Boulevard Extension	1	$ 6,800
7-11 Store	3	$ 20,400
O'Reilly's Auto Store	2	$ 13,600
MUD No. 5	896	$ 6,092,800
Lavon 678 Development	300	$ 2,040,000
TOTAL:	**9,339**	**$63,505,200**

The anticipated revenue the District is expected to gain from its meter connections fees, upwards of Sixty-Three Million Dollars, which does not come from the Ratepayers, and is marked as 'Miscellaneous Income', should be brought into account when discussing whether or not the

District's rate increase, especially in the amount of the monthly 'service fee', are reasonable and necessary.

Likewise, the amount of money to be collected in deposits is simple math. BCSUD charges $200 for a deposit, plus another $50 'Administrative Fee' for a Ratepayer to open an account. Although the deposit fee is (supposed to be) held in trusts, the $50 Administrative Fee represents a significant amount of income. Multiplying $50 times 9,339 anticipated new connections is $466,950, or nearly a half million dollars of revenue. This money was not considered when the 2018 rate increase was passed.

The main reason given for the rise in the 'service fee' from $25 to $35 was that the BCSUD would need that money to pay for a loan obtained to fund the buildout of a new 2,000,000 gallon water tank. That loan was for over Seven Million Dollars. BCSUD did not include anticipated revenues from new development meter sales and deposit administrative fees when passing that service fee rate increase, stating that its only source of revenue was Ratepayer money. That was simply not true.

Ratepayers' Request for Information No 1-55 through 1-58

Ratepayers 1-55	For the President Boulevard Extension, state how much in total meter sales was or will be paid to establish that 1 connection.
Ratepayers 1-56	For the O'Reilly's Auto Store, state how much in total meter sales was or will be paid to establish those 2 connections.
Ratepayers 1-57	For the 7-Eleven Store, state how much in total meter sales was or will be paid to establish those 3 connections.
Ratepayers 1-58	State the reason why you continue to charge the $35 'service fee' to an account which has been closed, and you wait for up to 45 days and then deduct the last month's 'service fee' from any deposit refunded to a Ratepayer who did provide a forwarding address.

CONCLUSION

The BCSUD assertion that the Ratepayers RFIs are irrelevant and will not be helpful to determining any facts at issue in this proceeding is merely an attempt to spitefully thwart the Ratepayers argument of unjust and unreasonable rates. If the Ratepayers are prevented from doing a checks and balances to ensure our rates are just and reasonable then the public's best intertest has been subverted.

Ratepayers request that BCSUD be moved to compel its answers, especially with respect to citing the authority upon which it relies to escape the criminal penalties of the Texas Water Code when deposits are not returned to Ratepayers, as is the case with BCSUD's practices for the entire duration of its (and its predecessors-in-interest) existence.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Ratepayers request these motions to compel be permitted requiring the BCSUD to provide responses to Ratepayers RFIs. The Ratepayers also request any other relief to which it may show itself justly entitled.

Respectfully submitted,

Signed this 21st day of September 2020 in Lavon, Texas.

Deborah G. Fato

Deborah G. Fato
In her individual capacity as
Petition Co-Representative and Ratepayer

SOAH DOCKET NO. 473-19-5674.WS
DOCKET NO. 49351

CERTIFICATE OF SERVICE

I certify that a copy of this document will be served on all parties of record as listed in the Service List on this the 21st day of September, 2020 in accordance with 16 TAC § 22.74.

Deborah G. Fato

EXHIBIT A

Email from Attorney John Carlton
(only 29 minutes from 2:26 email, 2:29 call/voicemail, and 2:55 email sending filing of objections)

From: **John Carlton** <john@carltonlawaustin.com>
Date: Mon, Sep 14, 2020 at 2:26 PM
Subject: Ratepayers' 1st RFIs - Objections
To: Deborah Fato <deb.fato@gmail.com>
Ms. Fato

This correspondence is regarding Ratepayers' First Set of Requests for Information. Bear Creek plans to file objections to the RFIs today. If you can clarify the following issues, it may be helpful in resolving Bear Creek's objections to the RFIs more efficiently and with less cost to the parties.

RFI 1-1 through 1-9
RFIs 1-1 through 1-9 relate to Bear Creek's refund practices regarding deposit monies when a Ratepayer neglects to leave a forwarding address, and Bear Creek's status as an entity governed by the Texas Utility Code. Bear Creek intends to object to these RFIs as irrelevant to any fact at issue in the proceeding because they will not lead to admissible evidence regarding Bear Creek's 2018 rate-setting procedure. Is there a reason why these requests are relevant to Berar Creek's 2018 rate-setting procedure and whether Bear Creek's rates are "just and reasonable"?

Bear Creek also intends to object that RFIs 1-1 through 1-9 mischaracterize Bear Creek's prior statements.

RFI 1-10 through 1-13
RFIs 1-10 through 1-12 relate to information regarding ratepayer deposits and their discussion at Board Meetings between 2015-2020. Bear Creek intends to object to these RFIs as irrelevant to any fact at issue in the proceeding because they will not lead to admissible evidence regarding Bear Creek's 2018 rate-setting procedure. Is there a reason why these requests are relevant to Bear Creek's 2018 rate-setting procedure and whether Bear Creek's rates are "just and reasonable"?

Bear Creek further objects to this Request as mischaracterizing or taking out of context its statements to Ratepayers. Tex. R. Civ. P. 192.4.

RFIs 1-14 through 1-30
RFIs 1-14 through 1-30 all seek information relating to customer deposits and refunds and forfeits of those deposits from 2005 through 2018. Bear Creek intends to object to these RFIs as irrelevant to any fact at issue in the proceeding because they will not lead to admissible evidence regarding Bear Creek's 2018 rate-setting procedure. Is there a reason why these requests are relevant to Bear Creek's 2018 rate-setting procedure and whether Bear Creek's rates are "just and reasonable"?

Bear Creek also intends to object to these RFIs as disproportionate to the needs of the case and overly burdensome. Is there a reason why these requests are needed to Bear Creek's 2018 rate-setting procedure and whether Bear Creek's rates are "just and reasonable"?

RFIs 1-31 through 1-54
RFIs 1-31 through 1-54 all relate to deposits and meter sales that Bear Creek will collect in the future from developments that are, at this time, incomplete. Bear Creek intends to object to these RFIs as irrelevant to any fact at issue in the proceeding because they will not lead to admissible evidence regarding Bear Creek's 2018 rate-setting procedure. Is there a reason why these requests are relevant to Bear Creek's 2018 rate-setting procedure and whether Bear Creek's rates are "just and reasonable"?

Bear Creek also intends to object to these RFIs as disproportionate to the needs of the case and overly burdensome. Is there a reason why these requests are needed to Bear Creek's 2018 rate-setting procedure and whether Bear Creek's rates are "just and reasonable"?

RFI 1-55 through 1-57
RFI 1-55 through 1-57 relate to the cost Bear Creek paid to establish connections. Bear Creek intends to object to these RFIs as irrelevant to any fact at issue in the proceeding because they will not lead to admissible evidence regarding Bear Creek's 2018 rate-setting procedure. Is there a reason why these requests are relevant to Bear Creek's 2018 rate-setting procedure and whether Bear Creek's rates are "just and reasonable"?

Bear Creek also intends to object to these RFIs as disproportionate to the needs of the case and overly burdensome. Is there a reason why these requests are needed to Bear Creek's 2018 rate-setting procedure and whether Bear Creek's rates are "just and reasonable"?

RFI 1-58
RFI 1-58 asks a question about Bear Creek's practices that is factually incorrect, as well as being irrelevant. Bear Creek intends to object to the RFI as irrelevant. Is there a reason why the request is relevant to Bear Creek's 2018 rate-setting procedure and whether Bear Creek's rates are "just and reasonable"?

I look forward to discussing these with you and will be giving you a call shortly.

Sincerely,
--

John J. Carlton

4301 Westbank Drive, Suite B-130
Austin, Texas 78746

john@carltonlawaustin.com

(512) 614-0901(o)
(512) 785-8355(m)
(512) 900-2855(f)

EXHIBIT B

Memorandum Opinion – "Tower Lease Litigation"

REVERSE and RENDER; and Opinion Filed August 22, 2014.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-13-00370-CV

TIERONE CONVERGED NETWORKS, INC., Appellant

V.

LAVON WATER SUPPLY CORPORATION, Appellee

On Appeal from the County Court at Law No. 5
Collin County, Texas
Trial Court Cause No. 005-00055-2013

MEMORANDUM OPINION

Before Justices Bridges, Francis, and Lang-Miers
Opinion by Justice Lang-Miers

This is an appeal of a judgment awarding possession of leased premises to the landlord in a forcible detainer case. Appellant TierOne Converged Networks, Inc., the tenant, argues that the trial court erred by awarding possession of the property to Lavon Water Supply Corporation, the landlord, because TierOne exercised its option to renew the lease and was entitled to possession of the property. Because all dispositive issues are settled in law, we issue this memorandum opinion. TEX. R. APP. P. 47.2(a), 47.4. We reverse and render.

BACKGROUND

On July 10, 2006, Lavon signed a lease agreement with Lavon Internet and Computer Services (Lavon Internet) for "the collocation of wireless communications equipment on the

water towers owned and operated by" Lavon. In September 2009, TierOne assumed the lease by assignment from Lavon Internet and agreed to comply with all terms and provisions of the lease.[1] The lease provided that "[t]he systems shall generally consist of four (4) sector antennas and wireless radios for wireless internet distribution and two (2) backhaul antennas and radios for the main feed of internet access" and that "Lessee's equipment to be installed shall be subject to reasonable approval of the Lessor."

Paragraph 2 of the lease stated:

> The initial term of this Letter Agreement for a wireless communication system shall be for a period of five (5) years beginning on the date of execution of this Letter Agreement. Provided Lessee is not in default, the lease term may be renewed by Lessee for subsequent te[r]ms of (5) years each, provided, however, that from and after the third (3) such renewal term, Lessor may terminate this lease by providing Lessee extra ninety (90) days prior written notice before any renewal term.

Paragraph 19 of the lease allowed Lavon to terminate the lease if TierOne committed an "event of default," including (1) not making payments within ten days of their due date and not remitting the payments within five days of receiving notice from Lavon and (2) not complying with any other term of the lease after receipt of written notice from Lavon, and not curing or commencing to cure that failure within thirty days of receiving notice and completing the cure within ninety days of the written notice. In addition, paragraph 20 provided that, at the termination of the lease, if TierOne was not in default, TierOne would have ninety days to remove its equipment and return the premises to its original condition. Paragraph 22 provided that, after five years, Lavon would give TierOne at least ninety days' written notice "in the event that the hardware should be removed and services terminated."

[1] Lavon asserts that, in 2008 and 2009, TierOne delayed in acknowledging the terms and obligations of the lease and did not make timely rental payments during numerous months. These alleged defaults are not at issue here.

The lease also required that "[a]ll notices, requests, claims, demands, and other communications hereunder shall be in writing and shall be deemed to have been duly given if delivered personally" by certain methods and addressed to the party.

On May 11, 2011—two months before the initial lease term expired on July 10, 2011—Lavon notified TierOne by letter that TierOne was over ten days late in paying Lavon $1,800 and that Lavon would exercise its right to terminate under paragraph 19 of the lease if TierOne did not send payment to Lavon within five days. Lavon's office manager, Camille Reagan, testified that TierOne paid Lavon the outstanding rent. In the May 11 letter, Lavon also notified TierOne that Lavon "may exercise its right" under paragraph 22 of the lease to terminate the lease ninety days after the expiration of the initial term, on October 8, 2011. Lavon stated that it would be soliciting bids for the right to lease its water towers for wireless communications and that TierOne would have the opportunity to bid, provided that it was not in default under the lease at the time that bids were taken.

On June 16, 2011, TierOne's chief financial officer Ron Celmer sent an e-mail to Herman Stork at Lavon regarding "Renewal of leases" and told him TierOne wanted to "begin new lease discussions[.]" He attached diagrams of the water towers and equipment on the towers. On July 7, 2011, Celmer sent two e-mails with a "proposed lease to replace the existing lease which expires on July 10, 2011" and diagrams of the towers. The negotiations were unsuccessful and the parties did not execute a new lease. After the end of the initial five-year term in July 2011, TierOne continued to make monthly payments of rent to Lavon and continued in possession of the leased property.

In April 2012, Lavon sent a proposed new lease agreement to TierOne and stated that if TierOne did not "respond to the contract" by June 10, 2012, TierOne must remove all equipment

from Lavon's premises.[2] A month later, TierOne requested a thirty-day extension to "respond to the Water Tower Lease renewal proposed by Lavon[.]"

On June 8, 2012—eleven months after the initial term of the lease expired on July 10, 2011—TierOne stated in a letter to Lavon that it "consider[ed] itself to be in contract with Lavon . . . under Paragraph 2 of the" lease. Six days later, on June 14, 2012, Lavon confirmed by letter that TierOne was "paid thru the end of June 2012 at th[at] point" but informed TierOne that it would not accept the last check that TierOne submitted as rental payment until TierOne and Lavon reached an agreement on the new lease.[3] TierOne responded on August 9, 2012 that it was TierOne's "belief and position that TierOne Networks [was] not in breach" of the lease and that the lease was "still in full force and effect." On August 17, 2012, Lavon stated by letter that TierOne "ha[d] in fact breached the Agreement on numerous occasions" and that, based on TierOne's letter from August 9, "it appears that [TierOne was] once again in violation of Paragraph 18 of the Agreement."[4] Lavon also stated that, "[i]n any event," Lavon had notified TierOne by letter in May 2011 "of its intent to exercise its rights [to terminate the lease] under Paragraph 22" and that, "pursuant to Paragraph 22 of the Agreement, Lavon WSC hereby terminates the Agreement as of November 15, 2012" and "[p]ursuant to Paragraph 20 of the Agreement," TierOne must remove its equipment from the towers by November 15, 2012.

On November 16, 2012, Lavon notified TierOne that it must vacate the premises. Lavon stated that "the initial term of the Lease expired on July 10, 2011, and the Lease was not renewed." Lavon stated that "[t]hereafter, TierOne became a month-to-month tenant of the Premises." Lavon gave TierOne three days to vacate the premises.

---

[2] Beginning with the April 2012 letter, correspondence to and from Lavon referred to Lavon Special Utility District. As Lavon's witness Reagan explained, Lavon was "changing from a utility district from a [water supply corporation] at some point."

[3] Lavon's office manager Camille Reagan testified that TierOne continued to pay its rent to Lavon each month after June 2012, but that Lavon did not cash those checks.

[4] Paragraph 18 limited TierOne's right to assign the lease without Lavon's permission.

After TierOne did not vacate the property, Lavon filed a forcible detainer lawsuit in justice court seeking possession of the property. Lavon's complaint stated that "[t]he Lease was not renewed prior to its expiration and expired by its terms on July 10, 2011" and that "[t]hereafter, TierOne continued in possession of the Premises, making monthly rental payments to Lavon WSC." The justice court entered judgment for TierOne and Lavon appealed to the county court at law. After a bench trial, the county court at law entered judgment in favor of Lavon, granting Lavon immediate possession of the property. TierOne appealed.

In one issue, TierOne argues that "[t]he trial court erred by awarding possession of the property to Lavon based on an expired lease because TierOne exercised its option to renew the lease for five years."

STANDARD OF REVIEW AND APPLICABLE LAW

When an appellant attacks the legal sufficiency of an adverse finding on an issue on which it did not have the burden of proof, the appellant must demonstrate there is no evidence to support the adverse finding. *See Exxon Corp. v. Emerald Oil & Gas, Co.*, 348 S.W.3d 194, 215 (Tex. 2011). We will sustain a no-evidence challenge on appeal if the record shows (1) a complete absence of evidence of a vital fact, (2) the court is barred by the rules of law or evidence from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence conclusively establishes the opposite of a vital fact. *Serv. Corp. Int'l v. Guerra*, 348 S.W.3d 221, 228 (Tex. 2011). "Evidence is legally sufficient if it 'would enable reasonable and fair-minded people to reach the verdict under review.'" *Exxon Corp.*, 348 S.W.3d at 215 (quoting *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005)).

In a bench trial where no findings of fact or conclusions of law are requested or filed, the judgment implies all findings of fact necessary to support it. *Johnson v. Oliver*, 250 S.W.3d 182,

186 (Tex. App.—Dallas 2008, no pet.). But if the appellate record includes a clerk's record and a reporter's record, those implied findings are not conclusive and may be challenged for legal sufficiency on appeal. *Id.*

Additionally, when parties disagree over the meaning of an unambiguous contract, we must determine the parties' intent by considering and examining the entire writing in an effort to give effect to the parties' intentions as expressed in the contract. *Seagull Energy E&P, Inc. v. Eland Energy, Inc.*, 207 S.W.3d 342, 345 (Tex. 2006); *Ascendant Anesthesia PLLC v. Abazi*, 348 S.W.3d 454, 459 (Tex. App.—Dallas 2011, no pet.). "No single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument." *Tawes v. Barnes*, 340 S.W.3d 419, 425 (Tex. 2011) (quoting *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983)). Only if a contract is first determined to be ambiguous may a court consider the parties' interpretation and admit extraneous evidence to determine the true meaning of the instrument. *Nat'l Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995) (per curiam).

Finally, as a general rule, where a lease does not require any notice for renewal, a lessee's continued possession and payment of rent in accordance with the lease after the expiration of the primary term constitutes an election by the lessee to renew. *Willeke v. Bailey*, 189 S.W.2d 477, 481 (Tex. 1945); *Haltom City State Bank v. King Music Co.*, 474 S.W.2d 9, 11 (Tex. Civ. App.—Fort Worth 1971, writ ref'd n.r.e.); *see Fisher v. Church & Akin, L.L.C.*, No. 07-11-0495-CV, 2012 WL 5059548, at *3 (Tex. App.—Amarillo Oct. 16, 2012) (mem. op.), *rev'd in part on other grounds, Lubbock Cnty. Water Control & Improvement Dist. v. Church & Akin, L.L.C.*, No. 12-1039, 2014 WL 2994645, at *3–9 (Tex. July 3, 2014). But this general rule applies only "in the absence of an express or implied agreement to the contrary." *Haltom City*, 474 S.W.2d at 11; *see Willeke*, 189 S.W.2d at 481; *see also Nortex Foods, Inc. v. Burnett*, 278 S.W.2d 485, 487

(Tex. Civ. App.—Dallas 1955, no writ) (stating "general rule" that, when lease provides for notice to renew, "such notice is necessary to effect the renewal").

Arguments of the Parties

TierOne's Arguments

TierOne contends that it exercised its option to renew the lease for an additional five-year term under paragraph 2 of the lease and established its right to possession of the property because the lease did not contain a holding over provision or a provision requiring TierOne to submit notice to exercise the option to renew and because it was "undisputed" that TierOne remained in possession and paid its rent and that Lavon accepted the rent for a year after the end of the initial term. TierOne also argues that it was entitled to renew if it was not in default and there was no evidence that TierOne was in default at the time of renewal. TierOne contends that Lavon did not allege that TierOne was in default, but rather pleaded that the lease expired, and the trial court cannot award judgment based on an unpleaded theory.

In addition, TierOne argues that the notice provision in the lease only governs the form of notices already required by the lease. And TierOne contends that, because the lease did not require notice to renew, the general notice requirement governing the form of notices does not apply.[5]

TierOne additionally states that Lavon's monthly invoices were not evidence that the parties had a month-to-month agreement because Lavon invoiced TierOne monthly both during and after the initial term and the invoices "simply reflect[ed] that the rent was paid monthly[.]" And TierOne argues that negotiations between the parties concerning the terms of a new lease

[5] TierOne also argues that, even if the notice provision in the lease applied, TierOne exercised the option by continuing to pay rent in writing by check and because TierOne notified Lavon in writing that it had renewed the lease.

were not evidence that the initial lease was not renewed or in effect and that nothing in the record supports Lavon's argument that the parties agreed that the lease was not renewed.

Lavon's Arguments

Lavon argues that TierOne was in default of the lease at the time the first term expired because it "monopolized" available space on the towers "by doubling and tripling the amount of allowable equipment on the towers" without Lavon's approval as required by the lease. Lavon states that diagrams that TierOne provided in June 2011 and testimony by TierOne's former chief financial officer Celmer demonstrate that "TierOne had installed significantly more equipment on the towers than what was listed in the lease." It contends that Lavon's primary witness, Camille Reagan, testified that TierOne did not seek approval prior to placing additional equipment on the towers and that, although TierOne's witness "vaguely contradicted" this testimony, the contradicting testimony "is of no consequence for purposes of this Court's review" because this Court must resolve any inconsistency in testimony in favor of the trial court's judgment if a reasonable person could do so. Lavon contends that, as a result of this default, TierOne "never had the legal right to exercise the option to renew" because the lease allowed TierOne to renew the lease only if it was not in default.

Lavon also argues that TierOne's "mere payment of rent" after the initial term expired did not renew the lease because the lease contained a "broad and all-encompassing notice provision" that required any notice under the lease to be in writing and delivered personally to Lavon by certified mail, fax, or courier. Lavon contends that, because the renewal clause in the lease provided that the lease "may" be renewed, "the lease indicates that TierOne must take some action in order to renew the lease" and, "[a]t a minimum," the action "included informing Lavon that TierOne was exercising its option to renew the lease."

Lavon argues that there was more than a scintilla of evidence that Lavon and TierOne agreed that TierOne's continued possession and payment of rent would not renew the lease but rather that "TierOne would become a temporary month-to-month tenant while the new lease negotiations continued." Lavon states that it "sent TierOne a monthly invoice for temporary occupancy of the water towers during the lease negotiation process" and that "[e]ach invoice included a notation that TierOne's payment of the invoice would allow TierOne to continue to occupy the water towers for an additional thirty (30) days" and "TierOne would then submit payment after accepting the terms of the invoice."

Lavon contends that evidence supports this implied-in-fact agreement, including that TierOne did not mention renewal of the lease in its correspondence with Lavon towards the end of the initial term or during the year after expiration of the initial term. Lavon argues that it was an "abrupt change" when TierOne informed Lavon almost a year "after the expiration of the original lease" that TierOne considered the original lease renewed. Lavon states that, in response, it "immediately stopped accepting payments" from TierOne although it acknowledged that TierOne was paid through June 2012 "in keeping with the parties' temporary arrangement." Lavon argues that, because whether an agreement existed between the parties is generally a question of fact, and because the evidence was conflicting, we must presume that the trial court decided that "the parties reached an agreement that TierOne was not renewing the lease by continuing in possession or by making rental payments after the lease expired," and instead that they agreed that TierOne "would become a temporary month-to-month tenant while the new lease negotiations continued." Lavon argues that, as a result, the lease was not renewed and Lavon was entitled to immediate possession of the leased property.

Analysis

Was Notice Required?

TierOne contends the lease did not expire because it renewed the lease by continuing to pay rent and staying in possession. And Lavon argues the lease expired because the general notice provision in paragraph 24 and the renewal provision in paragraph 2 of the lease must be read together and required TierOne to give Lavon notice of renewal. We do not agree with Lavon.

Paragraph 2 of the lease provided that, if TierOne is not in default, "the lease term may be renewed by Lessee for subsequent te[r]ms of (5) years each[.]" The general notice provision in paragraph 24 applied to all "notices . . . hereunder" and required that notices be in writing and delivered personally. The cases that Lavon cites involve lease provisions that required notice in order to renew or state the general rule that, in the absence of a formal notice provision, continuing in possession by paying rent constituted an election to renew. *See Willeke*, 189 S.W.2d at 481 ("Since the contract did not require formal notice, the fact that respondents so continued in possession was enough."); *Fisher*, 2012 WL 5059548, at *3 (noting that lease, like the lease in *Willeke*, did not require notice to exercise the option to extend); *Nortex Foods*, 278 S.W.2d at 487 (noting that lease provided for renewal '"at the same price and upon the same terms by notifying lessor thirty (30) days in advance of the termination date of such lease'"). But here, the notice provision in paragraph 24 did not state that it applied to the renewal provision in paragraph 2, and paragraph 2 did not include a notice requirement for TierOne to renew. We note that, in contrast, this same provision required lessor—after the third renewal term—to give lessee ninety days' prior written notice before a renewal term if it wanted to terminate the lease. The absence of any notice requirement in part of this paragraph and presence of a prior written notice requirement in another part indicates the difference was intentional. *See Seagull Energy*,

207 S.W.3d at 345 (stating that a court must determine the intent of the parties as expressed in a contract by examining and considering the entire writing in an effort to harmonize and give effect to all of the contract provisions); *Ascendant Anesthesia*, 348 S.W.3d at 459 ("The parties' intent must be taken from the agreement itself, and the agreement must be enforced as written.").

As a result, because the lease did not require any notice or involve any other "express or implied agreement to the contrary[,]" the general rule applies that TierOne's continued possession of the leased property and payment of rent in accordance with the lease after the expiration of the initial term constituted an election to renew. *Haltom City*, 474 S.W.2d at 11; *see Willeke*, 189 S.W.2d at 481.

Did Lavon Prove Default?

Lavon argues that we may affirm the judgment because TierOne was in default when the first term of the lease expired and it was not entitled to renew the lease. Lavon argues that TierOne was in default because it placed equipment on the towers without Lavon's approval. And TierOne argues that Lavon did not plead or prove it was in default, that it was not in default, and there was no evidence of default.[6]

The lease provided that "Lessee's equipment to be installed shall be subject to reasonable approval of the Lessor." Lavon contends that this language gave it the right to approve any additional equipment that might be installed on the water towers prior to installation and imposed a mandatory duty on TierOne to seek Lavon's approval prior to installing any additional equipment. TierOne argues that this language does not require approval prior to the installation of any additional equipment. We agree with TierOne.

The lease did not state that TierOne had to obtain approval prior to installing any additional equipment on the towers. Lavon offered Reagan's testimony that it was her

[6] Because of our resolution of this issue, we do not address TierOne's argument that Lavon did not plead that TierOne was in default.

"understanding" that "Tierone was supposed to ask for authorization before it installed equipment on Lavon WSC water towers" and that, "to [her] knowledge," TierOne did not "ever ask for permission" to install additional equipment on Lavon's water towers. But Reagan's understanding of the lease terms cannot supplant the plain language of the lease. *See Nat'l Union Fire Ins. Co.*, 907 S.W.2d at 520; *Ascendant Anesthesia*, 348 S.W.3d at 459. And the lease did not specify whether the approval had to be obtained prior to installation or could be sought after installation. Additionally, Reagan testified that, to her knowledge, TierOne did not ask for permission to install additional equipment before the installation, but she did not testify that TierOne did not obtain approval at some other time. We conclude that Lavon presented less than a scintilla of evidence that TierOne was in default at the time the initial term expired.

Was There an Implied Agreement for a Month-to-Month Term?

TierOne argues that it renewed the lease and the parties did not have an agreement that TierOne was a month-to-month tenant after the initial term. Lavon argues that there was more than a scintilla of evidence that Lavon and TierOne agreed that TierOne would become a month-to-month tenant during lease negotiations after the expiration of the initial term. Lavon states that it "sent TierOne a monthly invoice for temporary occupancy of the water towers during the lease negotiation process" and that the invoices included a notation that TierOne's payment "would allow TierOne to occupy the water towers for an additional thirty (30) days." But the record only contains invoices that Lavon sent to TierOne during the initial term for February 2009 and February through May 2011 and does not contain any invoices from the period after the initial lease term ended on July 10, 2011. These invoices during the initial term bill TierOne for a month's rent. Lavon's office manager Reagan testified that, after the initial term, Lavon also sent invoices to TierOne for a month's rent. Consequently, there is no evidence in the record that the parties' relationship changed after the initial term.

Lavon also cites general authority that an implied-in-fact contract arises from the parties' acts and conduct. *See Stewart Title Guar. Co. v. Mims*, 405 S.W.3d 319, 338 (Tex. App. Dallas 2013, no pet.). But Lavon has not cited any authority supporting its position that ongoing negotiations for a new lease are evidence that the current lease is not renewed or in effect.

We conclude that there is no evidence in the record to support Lavon's argument that the parties entered into an implied, temporary, month-to-month agreement after the expiration of the initial term of the lease.

We sustain TierOne's issue.

CONCLUSION

We reverse the judgment of the trial court and render judgment that Lavon take nothing in its forcible detainer claim against TierOne.

/Elizabeth Lang-Miers/
ELIZABETH LANG-MIERS
JUSTICE

130370F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

TIERONE CONVERGED NETWORKS, INC., Appellant

No. 05-13-00370-CV V.

LAVON WATER SUPPLY CORPORATION, Appellee

On Appeal from the County Court at Law No. 5, Collin County, Texas
Trial Court Cause No. 005-00055-2013.
Opinion delivered by Justice Lang-Miers, Justices Bridges and Francis participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and judgment is **RENDERED** that appellee Lavon Water Supply Corporation take nothing in its forcible detainer claim against appellant TierOne Converged Networks, Inc.

It is **ORDERED** that appellant TierOne Converged Networks, Inc. recover its costs of this appeal from appellee Lavon Water Supply Corporation.

Judgment entered this 22nd day of August, 2014.