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**COMPLAINT OF JOHN BLALOCK
AGAINST MERCY WATER SUPPLY
CORPORATION**

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**PUBLIC UTILITY COMMISSION

OF TEXAS**

**REPLY IN SUPPORT OF MERCY WATER SUPPLY CORPORATION'S
MOTION FOR SUMMARY DISPOSITION**

COMES NOW Mercy Water Supply Corporation ("Mercy") and files this Reply in support of its Motion for Summary Disposition ("Reply") and in support respectfully shows as follows:

Introduction

On July 12, Mercy filed its Motion for Summary Disposition ("Motion") pursuant to Chapter 16, Texas Administrative Code, Section 22.182, requesting that the Administrative Law Judges ("ALJ") issue a proposal for decision recommending judgment in Mercy's favor as a matter of law. Mercy's basis for the Motion is that Blalock cannot and has not carried his burden to establish that he is entitled to water service from Mercy and that there is therefore no genuine issue of material fact remaining in dispute. The deadline for Mercy's reply in support of its Motion is August 4, 2021.¹ This Reply is timely filed.

Three responsive pleadings were filed regarding Mercy's Motion: Blalock filed a response,² Commission Staff filed a response,³ and Blalock filed a response to Commission Staff's response.⁴ Commission Staff agrees that there is no genuine dispute of material fact and that Mercy is entitled to judgement as a matter of law.⁵

¹ SOAH Order No. 7 – Ruling on Motion to Strike and Objection to Direct Testimony; Extending Time to File Responses to Summary Disposition Motion at 2 (July 26, 2021).

² John Blalock's Response to Mercy's Motion for Summary Disposition (July 29, 2021) ("Blalock Response").

³ Commission Staff's Response to Mercy WSC's Motion for Summary Disposition (July 29, 2021) ("Commission Staff's Response").

⁴ John Blalock's Response to Commission Staff's Response to Mercy WSC's Motion for Summary Disposition (Aug. 2, 2021) ("Response to Commission Staff") (together with Blalock Response, "Blalock's Responses" or the "Responses").

⁵ Mercy's Motion was filed before Blalock late-filed his direct testimony, but his direct testimony failed to establish that he is entitled to water service, as Mercy demonstrates in this Reply.

Legal Standard

Blalock, as Complainant in this proceeding, bears the burden of proof to establish that his water service was improperly terminated. That is, he bears the burden of establishing by a preponderance of the evidence that he is entitled to receiving water service from Mercy, even though he undisputedly is not and has never been a member and did not take the necessary steps to transfer a membership to his name.⁶

As the party opposing Mercy's Motion, Blalock has the burden of "show[ing], by affidavits, materials obtained by discovery or otherwise, admissions, matters officially noticed, or evidence of record, that there is a genuine issue of material fact for determination at the hearing, or that summary decision is inappropriate as a matter of law."⁷ The Texas Supreme Court, interpreting Texas Rule of Civil Procedure 166(i) governing civil summary judgment, which may be instructive, states that conclusory evidence "is insufficient" to meet the non-movant's burden in that context.⁸ The Court has also held, "A genuine issue of material fact exists if the evidence 'rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.'"⁹

Argument

Blalock has failed to establish that there is any genuine issue of material fact in this case because the arguments he makes are not grounded in appropriate evidence, and he also fails to support his legal arguments, which are contradicted by existing law.

⁶ Under 16 Texas Administrative Code ("TAC") §24.12, "In any proceeding involving any proposed change of rates, the burden of proof shall be on the provider of water and sewer services to show that the proposed change, if proposed by the retail public utility, or that the existing rate, if it is proposed to reduce the rate, is just and reasonable. In any other matters or proceedings, the burden of proof is on the moving party." As Complainant in this proceeding, Which is not a rate appeal, Blalock is the moving party and bears the burden of proof.

⁷ 16 TAC § 22.182(c).

⁸ *Draughon v. Johnson*, No. 20-0158, 2021 WL 2387430 (Tex. June 11, 2021); *see also, e.g., Coastal Transp. Co. v. Crown Cent. Petro. Corp.*, 136 S.W.3d 227, 232 (Tex. 2004) ("Opinion testimony that is conclusory or speculative is not relevant evidence, because it does not tend to make the existence of a material fact 'more probable or less probable.'").

⁹ *Skrastina v. Breckinridge-Taylor Design, LLC*, No. 05-17-00796-CV, 2018 WL 3078689 (Tex. June 20, 2018) (mem. op.) (quoting *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 220 (Tex. 2017)).

Blalock's Responses make unsubstantiated factual and legal arguments that should be disregarded.¹⁰ For example, Blalock claims that Mercy knew that his mother had passed away in 2015 and "had known . . . for over 5 years" when Mercy ceased water service to the Northern Tract.¹¹ He cites no evidence and no explanation as to why Mercy would "know," without being informed, of the death of one of its members. In fact, Kelley Allbright, Mercy's Office Manager, has stated in her sworn affidavit that "unless Mercy is informed or notified by a landowner, it will not know whether a landowner has passed."¹²

Similarly, Blalock argues with no legal support, that Mercy's actions in failing to terminate water service "created a duty to act . . . and inform Mr. Blalock of the paperwork and policies relevant to membership and account transfer."¹³ He complains that this affirmative duty, which he has fabricated, has been overlooked by the Parties, arguing that Commission Staff is "leaving out Mercy's duty to act to inform" and that "it would be unjust to victimize Mr. Blalock due to Mercy's failure to act."¹⁴ Blalock claims that homeowners' associations are held to a duty to notify new homeowners and that Mercy "should be treated no different."¹⁵ He states that Mercy treated him as a "member and a customer" and must therefore continue to do so.¹⁶ Continuing in the same vein, Blalock argues that he had a "verbal contract" with Mercy, and that Mercy violates "State Law," including the common-law Statute of Frauds, by not providing him with water service at Mercy's expense.¹⁷ Blalock essentially argues that the fact that he received water service when he should not have proves that he is entitled to continue receiving water service without becoming a member of Mercy.¹⁸ In his direct testimony, he is somewhat contradictory, indicating that he knew Mercy's membership requirements before filing the informal complaint that initiated this proceeding, but simply did not want to follow them or pay membership or transfer fees.¹⁹

¹⁰ Because Blalock makes similar arguments in both Responses, Mercy addresses his arguments in both pleadings together.

¹¹ Blalock Response at 2.

¹² See Mercy's Response to Complaint (Sept. 24, 2020) at Ex. B (Affidavit of Kelley Allbright) ¶ 14.

¹³ Blalock Response at 7.

¹⁴ Response to Commission Staff at 2.

¹⁵ Blalock Response at 2.

¹⁶ Response to Commission Staff at 3.

¹⁷ *Id.*

¹⁸ *Id.* at 2-3.

¹⁹ Complainant's Direct Testimony at 2 (July 12, 2021) ("Following the aforementioned shut-off of service, members of my household and myself tried to work with Mercy to find a *solution that did not involve us paying* for a new meter[.]") (emphasis added).

Mercy operates under Chapter 67 of the Texas Water Code (“TWC”). The chapter imposes no “duty to inform” on a water supply corporation (“WSC”)—in fact, to the contrary, the TWC is clear that those who receive water service must meet the WSC’s membership requirements.²⁰ Blalock has not provided any evidence that a WSC is charged with an affirmative duty to inform residents of its membership requirements. Blalock never fulfilled Mercy’s membership requirements and never applied to have a membership transferred to him.²¹ As regards a any “verbal contract,” Blalock’s direct testimony does not establish that any contract existed and nor do his Responses. On the contrary, Kelley Allbright stated in her affidavit, “I have not entered into a verbal agreement on behalf of Mercy to permit to provide water service to Mr. Blalock[, and] I have also not found any records indicating any agreement or discussion with Mr. Blalock involving his continued use of the account without transferring it to his name.”²² Moreover, even if a verbal contract existed, which it did not, TWC § 67.015(c) provides

The corporation may cancel a person’s or other entity’s stock, membership, or other right of participation if the person or entity fails to:

(1) meet the conditions for water or sewer service prescribed by the corporation’s published rates, charges, and conditions of service; or

(2) comply with any other condition placed on the receipt of water or sewer service under the stock, membership, or other right of participation.²³

In sum, Blalock has failed to demonstrate that Mercy improperly shut off water service to his residence because is not and has never been a member of Mercy, which as a WSC, does not have a duty to inform and does have the right to terminate service if its membership requirements are not met.

²⁰ Mercy has found no legal support for Blalock’s arguments that homeowner’s associations are subject to an affirmative duty to inform in a search of Texas law, but WSCs and homeowners’ associations are not analogous, and homeowners’ associations are not governed by the TWC.

²¹ Mercy’s Response to Complaint at 23-24 & at Ex. B (Affidavit of Kelley Allbright) ¶¶ 10-12.

²² Mercy Water Supply Corporation’s Response to Complaint (Aug. 5, 2020) at 140, Ex. B (Affidavit of Kelley Allbright) ¶ 11.

²³ TWC § 67.015(e).

For the second time,²⁴ Blalock argues again that the meter to the Southern Tract was meant to serve his residence on the Northern Tract. He provides no evidence to support his claim.²⁵ Mercy's contractor, Randall Baker, who installs Mercy's meters and installed the meter on the Southern Tract, has testified that he installed the meter in question on the Southern Tract.²⁶ Mercy's practice to place the meter on the property it was meant to serve, and that the meter on the Southern Tract was placed there to serve the Southern Tract.²⁷ Blalock's bare assertion to the contrary should be disregarded, particularly because, again, he has not met the threshold requirement to receive water service from Mercy.

Blalock makes additional complaints, including that he did not know how to become a member of Mercy and that all he thought was required was proof of ownership,²⁸ and insists that confusion is "a failure on the part of the office manager[s] of Mercy to inform potential members and customers of the proper process."²⁹ He argues that his employment history supports that "he has a willingness to meet requirements set forth by policy/regulation/law,"³⁰ seeming to say that had Mercy informed him of its membership/transfer requirements, his employment history proves that he would have fulfilled the requirements. None of these conclusory assertions constitute competent summary-disposition evidence, and they should be disregarded.

Not only does Mercy not have a duty to inform Blalock of its membership requirements, it is undisputed that even though Blalock has known of Mercy's membership requirements at least since this dispute began in 2020, he still has not fulfilled them, preferring instead to sue Mercy for

²⁴ See John Blalock's Response to Mercy Water Supply Corporation's Response to Order #3 in Docket 51224 at 2 (Sep. 17, 2020).

²⁵ Blalock Response at 4-5.

²⁶ See Response to Commission Staff's Recommendation Regarding Whether Water Service Should Be Restored and Request for Reconsideration to Order No. 3 Requiring Mercy Water Supply Corporation to Restore Service (Sept. 17, 2020) at 22, Ex. D (Affidavit of Randall B Baker) (testifying that the meter is installed at the "specific location" where "Mercy's existing water line crosses Bowen Loop adjacent to the [S]outhern [T]ract."); see also Mercy Water Supply Corporation's Response to Complaint (Aug. 5, 2020) at 140, Ex. B (Affidavit of Kelley Allbright) ¶ 12. In fact, Blalock only received water from the meter on the Southern Tract through an improper waterline that was not authorized by the owner of the Southern Tract—the Northern Tract requires the installation of a meter before it can receive service.

²⁷ See Mercy Water Supply Corporation's Responses to Staff's First Request for Information at 7 (Dec. 4, 2020) ("It is Mercy's practice to place the meter at a location where the customer requests, unless that location is infeasible. . . . Mercy would not have placed the meter at its current location on the Southern Tract unless the applicant specifically requested it to be placed there.").

²⁸ Blalock Response at 1-2.

²⁹ *Id.* at 2.

³⁰ *Id.* at 2.

not providing him with water service at Mercy's expense. In addition to being contrary to the TWC, any ruling to this effect would signal to residents who desire water service that they may ignore Mercy's membership requirements, or seek not to be aware of them, and then sue Mercy for free water service, an inequitable outcome with no basis in state law.

Mercy acted appropriately under the law in discontinuing Blalock's water service because Blalock has never fulfilled the requirements to become a member of Mercy. As he is not and has never been a member, Mercy "should not be compelled to restore water service to the Northern Tract, nor install a new meter at no cost to Mr. Blalock."³¹ Mercy agrees with Commission Staff that, "if Mr. Blalock desires to obtain water service from Mercy WSC that he apply for membership and complete the requisite steps and pay the associated charges, as provided for in Mercy WSC's Tariff," of which Blalock is unquestionably aware.³²

In its response, Commission Staff supported Mercy's Motion and recommended that it be granted.³³ Mercy agrees with Commission Staff's Response that Mercy "has demonstrated the absence of genuine issues of material fact, and as a result, has met its burden for summary disposition."³⁴ Mr. Blalock is not a member of Mercy and is currently ineligible for service.³⁵ Even considering the evidence in the light most favorable to Blalock and indulging every reasonable inference and resolving any doubts in his favor, Blalock's Responses or direct testimony fail to raise a genuine issue as to any material fact regarding his entitlement to water service without first completing the necessary requirements to become a member of Mercy. As resolving that issue is

³¹ Commission Staff's Supplemental Statement of Position at 7 (Feb. 8, 2021).

³² Blalock also argues that the meter to the Southern Tract was meant to serve his residence on the Northern Tract. He provides no evidence to support his claim. Randall Baker, who installs Mercy's meters and installed the meter on the Southern Tract, has stated that he installed the meter in question on the Southern Tract and that the meter is installed at the "specific location" where "Mercy's existing water line crosses Bowen Loop adjacent to the [S]outhern [T]ract." See Response to Commission Staff's Recommendation Regarding Whether Water Service Should Be Restored and Request for Reconsideration to Order No. 3 Requiring Mercy Water Supply Corporation to Restore Service (Sept. 17, 2020) at 22, Ex. D (Affidavit of Randall B Baker).

³³ See Commission Staff's Response at 3 (noting that "no party to this proceeding disputes that Mercy WSC's membership requirements have not been met"); 4 ("As the facts indicate, Mr. Blalock was not entitled to service").

³⁴ *Id.* at 5. Mercy continues to oppose mediation, which Commission Staff suggests as an alternative recommendation.

³⁵ See, e.g., Commission Staff's Supplemental Statement of Position at 2-6 (Feb. 8, 2021) ("Mr. Blalock has not complied with the [Texas Water Code] or Mercy WSC's Tariff to effectuate either the establishment of a new membership nor transfer of [another] membership to himself. As such, he cannot be considered a member and is therefore not entitled to water service from Mercy WSC at the Northern Tract.").

the resolves the only material dispute in this proceeding, Mercy thus requests the ALJ grant Mercy's Motion for Summary Disposition.

Prayer

In conclusion, Mercy respectfully requests that the ALJs issue a proposal for decision, without a hearing, recommending that summary disposition be rendered in Mercy's favor as Blalock cannot meet his burden of proof, that Order No. 3, requiring Mercy to supply Blalock with temporary water service, be withdrawn; and that Blalock's complaint should be dismissed with prejudice. Alternatively, Mercy requests Order No. 3 be reconsidered and withdrawn. Mercy also requests all other relief in law or equity to which it may be entitled.

Respectfully submitted,

By: _____

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ATTORNEYS FOR MERCY WATER
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CERTIFICATE OF SERVICE

I hereby certify that I have served or will serve a true and correct copy of the foregoing document via hand delivery, facsimile, electronic mail, overnight mail, U.S. mail and/or Certified Mail Return Receipt Requested to all parties on this the 4th day of August 2021.

A handwritten signature in black ink, appearing to read 'JC', is written above a horizontal line.

John Carlton