



## **Filing Receipt**

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**PUC DOCKET NO. 55274**

<b>PETITION OF FORT BEND COUNTY</b>	<b>§</b>	<b>PUBLIC UTILITY COMMISSION</b>
<b>MUNICIPAL UTILITY DISTRICT NO.</b>	<b>§</b>	
<b>222 APPEALING THE WHOLESALE</b>	<b>§</b>	<b>OF TEXAS</b>
<b>WATER RATES ESTABLISHED BY</b>	<b>§</b>	
<b>THE CITY COUNCIL OF THE CITY</b>	<b>§</b>	
<b>OF FULSHEAR, TEXAS</b>	<b>§</b>	

**CITY OF FULSHEAR’S RESPONSE TO AMENDED PETITION OF  
FORT BEND COUNTY MUNICIPALITY UTILITY DISTRICT NO. 222**

The City of Fulshear (“Fulshear”) files this response to the amended petition filed on September 18, 2023, by Fort Bend County Municipal Utility District No. 222 ( the “District” or “Petitioner”) appealing Fulshear’s wholesale rates. Pursuant to SOAH Order No. 2, this response is timely filed.

**I. BACKGROUND**

On December 18, 2020, Fulshear entered into a Water and Wastewater Facilities Agreement (the “Facilities Agreement”)<sup>1</sup> with the developers of a residential subdivision in Fulshear’s extraterritorial jurisdiction (“ETJ”). The Facilities Agreement was subsequently assigned by the developers to District.<sup>2</sup> Pursuant to the Facilities Agreement, Fulshear agreed to provide potable water to the District on a wholesale basis provided that the District constructed the necessary infrastructure to deliver water from Fulshear’s existing facilities to facilities being constructed by the District including a trunk water line, booster pump and ground storage tank facilities. Additionally, the Facilities Agreement requires, prior to the interconnection of facilities and the initiation of wholesale water service, that Fulshear and the District “agree upon the rates to be charged the District for such service.”<sup>3</sup>

By early 2022, the developer had completed construction of the interconnection facilities and requested that Fulshear begin providing water for construction purposes (not for resale), and Fulshear agreed to provide such service on an interim basis. Because no agreement had been reached regarding a rate for the water being provided on an interim basis, Fulshear began providing water service on a retail rather than wholesale basis to the developer. The rate charged the District

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<sup>1</sup> Petitioner’s Amended Petition and Response to Order No. 3 (Attachment A) (“Amended Petition”).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

is the applicable rate for service to a retail customer located outside of Fulshear's city limits. It is Fulshear's understanding that the District is now providing retail service to customers within the District. Once Fulshear and the District reach agreement on a wholesale rate, Fulshear will begin providing wholesale service at the agreed upon rate.

## II. RESPONSE

### A. Commission Does Not Have Jurisdiction Under TWC § 13.044

The District asserts that its appeal is subject to TWC § 13.044. The bases for the District's assertion are:<sup>4</sup>

- ☐ The rate Fulshear is charging the District is a "rate charged by a municipality for water . . . service;"
- ☐ The District is located within Fulshear's ETJ;
- ☐ The "resolution, ordinance, or agreement of the municipality consenting to the creation of the district *requires the district to purchase water . . . service*" from Fulshear.

Fulshear agrees that the rate it is charging the District is a rate for water service charged by a municipality and that the District is located within Fulshear's ETJ. Fulshear, however, strongly disagrees that Fulshear's consent to the creation of the District *required* the District to purchase water service from Fulshear. The document consenting to the creation of the District does not require the District to purchase water service from Fulshear. Moreover, no other document associated with the consent requires the District to purchase water from Fulshear. At most, these documents reflect the District's desire to purchase water service from Fulshear and Fulshear's agreement to provide such service. The District was free to use any available source of water but chose to use Fulshear as its source.

The Amended Petition contains Fulshear Resolution No. 2020-496,<sup>5</sup> which is the resolution consenting to the creation of the district. The resolution contains two conditions on Fulshear's consent: (1) that Fulshear be allowed to review all plans and specifications for infrastructure within the District and that such infrastructure meet Fulshear's standards and specifications; and (2) that the developers enter into a development agreement with Fulshear pursuant to Texas Local Government Code § 212.172.<sup>6</sup> Neither of these conditions require that the District purchase water service from Fulshear. This should be the end of the matter.

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<sup>4</sup> *Id.* at 5-6.

<sup>5</sup> Petitioner's Amended Petition and Response to Order No. 3 (Attachment D1).

<sup>6</sup> Fulshear Resolution No. 2020-496 at § 3.

The District acknowledges that the consent resolution does not require the District to purchase water from Fulshear. Instead, the District argues that the Development Agreement<sup>7</sup> required by the consent resolution requires the District to enter into a Facilities Agreement,<sup>8</sup> which is the agreement that requires the District to purchase water from Fulshear. The District, however, points to no language in the Development Agreement or in the Facilities Agreement that requires the District to purchase water from Fulshear.<sup>9</sup> The District cannot point to such language because Fulshear did not require that the District purchase water from Fulshear. The choice to purchase water from Fulshear was made by the developers on behalf of the District.

Section 3.04(a) of the Development Agreement requires that the developers provide for a water distribution system to serve the development and that “[t]he City *may provide* water . . . service to the Property in accordance with the Utility Agreement.”<sup>10</sup> The use of the verb “may” demonstrates that Fulshear did not require the District to purchase water from Fulshear.

The Facilities Agreement also does not “require” the District to purchase water from Fulshear.

#### Facilities Agreement Recitals

The City has a significant amount of water supply available in its facilities and desires to provide wholesale water service to the District. The District is agreeable to acquiring and constructing a water distribution system to connect to the City’s water supply system so the District can purchase wholesale water from the City and provide retail water service to residents of the District.<sup>11</sup>

In order to assure the continuing and orderly development of the Property, Owners and Horton desire to enter into this Agreement on behalf of the District whereby the City will provide water supply and the District will acquire or construct improvements, facilities, equipment and appliances necessary for a water distribution and sanitary sewer collection and treatment system, as provided in this Agreement in order that all of the current and future land in the District will be placed in the position to receive adequate water and sanitary sewer services.<sup>12</sup>

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<sup>7</sup> Amended Petition, Attachment D-2.

<sup>8</sup> Amended Petition, Attachment A-1.

<sup>9</sup> Amended Petition at 5.

<sup>10</sup> Amended Petition, Attachment D-2 at § 3.04(a) (emphasis added).

<sup>11</sup> Amended Petition, Attachment A-1 at 2.

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

This language shows that the Facilities Agreement sets out that Fulshear has water available to sell and that the District desires to purchase that water, as well as the terms for the sale of that water to the District.

Nothing in the Development Agreement or the Facilities Agreement “requires” that the District purchase water from Fulshear. Fulshear’s agreement to serve does not demonstrate that the District was “required” to purchase from Fulshear. Additionally, nothing in the documents prohibits the District from obtaining water from another source.

Commission precedent holds that TWC § 13.044 applies “only if the municipality’s resolution, ordinance, or agreement consenting to the creation of a district includes the requirement that the district must purchase the district’s water or sewer service from the City.”<sup>13</sup> Here the consent document does not include a requirement that the District purchase water service from Fulshear; nor do any of the documents referenced in the consent document. The Commission does not have jurisdiction under TWC § 13.044 to review Fulshear’s rate.

**B. Commission Should Forward the Petition to SOAH for a Hearing on Public Interest or Abate to Allow Court to Determine if Rate Set Pursuant to Written Contract**

Under Commission rules, if the petition is for a rate that is “charged pursuant to a written contract,” the Commission forward the petition to SOAH for an evidentiary hearing on public interest.<sup>14</sup> If the seller and the buyer do not agree that the protested rate is charged pursuant to a written contract, the administrative law judge is directed to abate the proceedings until the contract dispute over whether the protested rate is part of the contract has been resolved by a court of proper jurisdiction.<sup>15</sup>

In this instance, the Commission should find that the protested rate is a “rate that is charged pursuant to a written contract.” The District is challenging the rate being charged by Fulshear as a rate for wholesale service.<sup>16</sup> To the extent that Fulshear is providing wholesale service to the District, Fulshear is doing so solely pursuant to the Facilities Agreement. Fulshear has no obligation other than the Facilities Agreement to provide wholesale service, and Fulshear’s ability to charge the District for wholesale service arises solely from the Facilities Agreement. The fact

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<sup>13</sup> Order on Rehearing of Interim Appeal at 3-4, Docket No. 49448 (Jan 28, 2020).

<sup>14</sup> 16 TAC § 24.307(b).

<sup>15</sup> 16 TAC § 24.307(d).

<sup>16</sup> If the rate appealed is, in fact, a retail rate, the Commission lacks jurisdiction to hear the appeal because the District has failed to demonstrate that the petition was signed by the lesser of 10,000 or 10 percent of those ratepayers whose rates have been changed. Tex. Water Code § 13.043(c).

that Fulshear and the District did not agree on initial rates for wholesale service does not matter for purposes of the analysis. The Facilities Agreement sets out a procedure for establishing initial rates, but the Facilities Agreement also provides Fulshear with the ability to change the rates charged under the Facilities Agreement. Section 3.05(a) of the Facilities Agreement directs Fulshear and the District to agree upon initial rates. Section 3.05(b) of the Facilities Agreement allows Fulshear to change the Facilities Agreement rates after providing the District with 60-day notice of the change. To the extent that Fulshear is providing wholesale service, the rate it is charging is set pursuant to Section 3.05 of the Facilities Agreement.

The District argues that to be a rate charged pursuant to a written contract, the rate must be expressly stated in written contract.<sup>17</sup> This argument is contrary to the language of the Commission's rule and Commission precedent. The rule requires a public interest determination if the challenged rate "is charged pursuant to a written contract," not that the particular rate amount be expressed in the contract. Here, the sole basis for Fulshear to charge any rate to the District comes from the Facilities Agreement. Fulshear has no other legal obligation to serve the District. The wholesale relationship between Fulshear and the District is, therefore, a contractual matter that the Commission should set aside only if the contract provisions adversely affect the public interest.<sup>18</sup> The nature of Fulshear's rate is indistinguishable from the nature of the challenged rate in the *City of Fort Worth* case or the rates in any of the other appeals of rates charged pursuant to contract. In all of these cases the Commission has required a public interest showing.<sup>19</sup>

The District also appears to argue that it disagrees that the protested rate is charged pursuant to a written contract. The District, however, provides no explanation for the basis of the charge if not pursuant to the Facilities Agreement. If Fulshear is not providing water service pursuant to the Facilities Agreement, Fulshear has no obligation to provide service. Based on this lack of substantiation of its "disagreement," the Commission should refer this matter to SOAH to conduct an evidentiary hearing on the public interest. Alternatively, if the Commission believes that it is constrained by its rule (16 TAC § 24.307(d)) based on the District's "disagreement" regarding the

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<sup>17</sup> Amended Petition a t6-7.

<sup>18</sup> *Tex. Water Comm'n v. City of Fort Worth*, 875 S.W.2d 332, 336 (Tex. App.—Austin 1994, writ denied).

<sup>19</sup> In the *Petition of the Cities of Garland, Mesquite, Plano, and Richardson Appealing the Decision by North Texas Municipal Water District Affecting Wholesale Rates*, Docket No. 46662, the challenged rate was a formula rate that changed on an annual basis depending on customer water consumption and the seller's budget. In that matter, the Commission found that the rate was charged pursuant to a written contract and required a public interest showing before setting a new rate. Preliminary Order, Docket No. 46662 at 4-5 (June 29, 2017).

character of the rate, then the Commission should abate the matter so that a court can have the issue of whether the rate is part of the contract.

**C. Commission Does Not Have Jurisdiction to Determine Breach of Contract Claim**

Fundamentally, the District is asserting that Fulshear is in breach of the Facilities Agreement and is requesting that the Commission cure this breach by setting a rate consistent with the agreement. In the Amended Petition, the District attached a copy of Fulshear's agreement to provide water to Fort Bend County Municipal Utility District No. 216 ("MUD 216").<sup>20</sup> The District asks that the Commission to set the District's rate at the MUD 216 rate because that rate would be consistent with the statements in the Facilities Agreement that the rate should be equal to the rates charged to other similarly situated wholesale customers.<sup>21</sup> Essentially, the District is arguing that the rate being charged the District is a breach of the Facilities Agreement, and that the Commission should interpret the Facilities Agreement to require that Fulshear charge the MUD 216 rate (or something less).

While the Commission has the jurisdiction to find a contract rate to be adverse to the public interest<sup>22</sup> and set a just and reasonable rate, the Commission does not have the jurisdiction to adjudicate a breach of contract claim, or the jurisdiction to declare what wholesale rate would be consistent with the language of the Facilities Agreement.<sup>23</sup> If the District's believes that Fulshear is in breach of the Facilities Agreement, the District must seek relief for such claims in a court of proper jurisdiction.

**D. CONCLUSION/PRAYER**

Fulshear respectfully requests that the Commission determine, pursuant to 16 TAC § 24.307(b), that the District is appealing a rate that is charged pursuant to a written contract and send this matter to SOAH to conduct an evidentiary hearing on the public interest. Alternatively, if the Commission determines, pursuant to 16 TAC § 24.307(d), that the buyer and the seller do not agree that the protested rate is charged pursuant to a written contract, Fulshear requests that

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<sup>20</sup> Amended Petition at 3-4.

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

<sup>22</sup> The difference in rates charged MUD 216 versus MUD 222 is a factor that the Commission might consider in a public interest determination. 16 TAC § 24.311(b)(3)-(4).

<sup>23</sup> See *Pape Partners, Ltd. v. DRR Family Properties LP*, 645 S.W.3d 267, 272 (Tex. 2022) ("there is no presumption that administrative agencies are authorized to resolve disputes.")

the Commission abate the proceedings until the contract dispute is resolved by a court of proper jurisdiction.

**Filed: October 19, 2023**

Respectfully submitted,

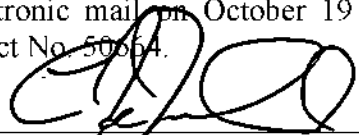


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ATTORNEYS FOR CITY OF FULSHEAR

**□ CERTIFICATE OF SERVICE**

I certify that, unless otherwise ordered by the presiding officer, notice of the filing of this document was provided to all parties of record via electronic mail on October 19 2023, in accordance with the Orders Suspending Rules filed in Project No. 50654.

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C. Joe Freeland