

SOAH DOCKET NO. 582-09-2557  
TCEQ DOCKET NO. 2009-0048-UCR

APPEAL OF MULTI-COUNTY WATER  
SUPPLY CORPORATION TO REVIEW  
THE WHOLESALE WATER RATE  
INCREASE IMPOSED BY THE CITY  
OF HAMILTON, CERTIFICATE OF  
CONVENIENCE AND NECESSITY NO.  
11525, AND REQUEST FOR INTERIM  
RATES IN HAMILTON COUNTY,  
APPLICATION NO. 36280-M.

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BEFORE THE TEXAS COMMISSION

ON

ENVIRONMENTAL QUALITY

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THE EXECUTIVE DIRECTOR'S RESPONSE TO EXCEPTIONS TO THE PROPOSAL  
FOR DECISION

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TO THE HONORABLE COMMISSIONERS OF THE TCEQ:

COMES NOW, the Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) and files the following Response to Exceptions to the Administrative Law Judge's (ALJ) Proposal for Decision (PFD) in the above captioned matter.

**I. THE ALJ HAS APPROPRIATELY RECOMMENDED DENIAL OF MULTI-COUNTY'S PETITION.**

The Executive Director reviewed Multi-County Water Supply Corporation's (Multi-County) petition and all information provided by the parties, including discovery responses and pre-filed testimony. Based on that information, the Executive Director recommended in his pre-filed testimony that the petition be denied. The ALJ agreed and concluded that Multi-County's wholesale water rate appeal should be denied because the rate increase is not adverse to the public interest. As the Petitioner has the burden of proof, this reply to exceptions will focus on the exceptions to the PFD filed by Multi-County.

*A. The ALJ correctly found that there is not an abuse of the bargaining power between Multi-County and the City of Hamilton.*

In its exceptions to the PFD, Multi-County continues to argue that there is a disparity in bargaining power between Multi-County and the City of Hamilton due to an exclusivity clause in the wholesale contract. Multi-County asserts that it had a viable alternative for obtaining water but the City of Hamilton refused to let Multi-County obtain water elsewhere.<sup>1</sup>

As the ALJ found in the PFD, there was limited, if any, disparity in bargaining power between Multi-County and the City of Hamilton.<sup>2</sup> This is evident by the fact that Multi-County considered obtaining water from several different sources before it decided to enter into a wholesale contract with the City of Hamilton.<sup>3</sup> Multi-County “entered into the Contract, including the exclusivity provision, of its own free will after consideration including the advice of an attorney and with full knowledge that other sources [of water] were available.”<sup>4</sup> Multi-County had the option to obtain water from a source other than the City of Hamilton if Multi-County was not amenable to accepting the terms of the wholesale contract. The ALJ found that Multi-County was not coerced into the Contract.<sup>5</sup>

Moreover, Multi-County’s assertion that the exclusivity clause in the contract creates disparate bargaining is unfounded. Multi-County claims that it was denied the opportunity to obtain water from alternative sources because the City of Hamilton held Multi-County to the sole source provision in the wholesale water contract. However, the exclusivity clause is not as restrictive as Multi-County claims. As pointed out by the ALJ, there is a “very important caveat to the [exclusivity] clause which allows [Multi-County] to develop other water sources to the extent that the City lacks the ability to provide.”<sup>6</sup> The clause clearly allows Multi-County to obtain water from an alternative source if Multi-County can show, through an independent engineer, that the City of Hamilton cannot provide all the water that Multi-County needs.<sup>7</sup> The undisputed evidence proved that Multi-County never hired an independent engineer to conduct a

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<sup>1</sup> Multi-County’s exceptions to the PFD, Pg. 3.

<sup>2</sup> PFD at 16.

<sup>3</sup> City of Hamilton (“COH”) Ex. 35 at 25.

<sup>4</sup> PFD at 13.

<sup>5</sup> *Id.*

<sup>6</sup> PFD at 14.

<sup>7</sup> The exclusivity clause states that “during the primary term of this contract Purchaser shall not obtain water from any source other than the City unless Purchaser can show by written opinion of a recognized independent engineer that the City is unable to supply water and then only to the extent such supply fails to meet demand.” COH Ex. 4 at 9

study to determine the City of Hamilton's ability to provide water to Multi-County.<sup>8</sup> "As a result, [Multi-County] has failed to meet a condition precedent to a contractual right that forms the basis for its argument that disparate bargaining power exists."<sup>9</sup>

Additionally, Multi-County alleges in its exceptions to the PFD that there is disparate bargaining power between it and the City of Hamilton because the City tried to force Multi-County to enter into a new contract with provisions that Multi-County did not wish to accept.<sup>10</sup> However, Ms. Rice, the Manager of Multi-County, testified that Multi-County's board of directors did not sign the new contract and that the board was sophisticated enough to know that it did not want to agree to the new terms.<sup>11</sup> The fact that Multi-County's board did not sign the new contract is evidence that there is not a disparity in bargaining power. Multi-County was obviously not forced into signing a contract that it felt was not beneficial.

Accordingly, the ALJ correctly found that there was limited, if any, disparity in bargaining power between Multi-County and the City of Hamilton; and that the City did not abuse that limited disparate bargaining power it might have over Multi-County.<sup>12</sup>

*B. The ALJ appropriately found that the rate increase resulted from demonstrated changed conditions.*

Multi-County reargues in its exceptions to the PFD that the City of Hamilton failed to demonstrate the reason for the change in rates because the City did not calculate its operation and maintenance expenses after it began receiving treated water. However, the City of Hamilton informed Multi-County of the reason for the fourteen cent increase in a letter from Mayor Rumsey to Multi-County President Jack Wall.<sup>13</sup> In that letter the City of Hamilton stated that the ".14 is based upon the same increase to the City from Upper Leon River Municipal Water District."<sup>14</sup> This statement clearly identifies the changed conditions that are the basis for the City of Hamilton's rate increase. The increase to Multi-County results from the same increase in rate by Upper Leon River Municipal Water District (Upper Leon) to the City of Hamilton. The ALJ agreed and found that the "City provided ample evidence that the increase was simply a pass-

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<sup>8</sup> Tr. at 75.

<sup>9</sup> PFD at 14.

<sup>10</sup> Multi-County's exceptions to PFD, Pg. 4.

<sup>11</sup> Tr. at 114-115.

<sup>12</sup> PFD at 16.

<sup>13</sup> MC Ex. 26

<sup>14</sup> *Id.*

through of Upper Leon's fourteen cent increase for treated water."<sup>15</sup> The ALJ also noted that even Ms. Rice acknowledged that the rate increase was merely a pass-through from Upper Leon.<sup>16</sup> Therefore, the City of Hamilton demonstrated to Multi-County the changed condition that resulted in the change in rate.

Furthermore, Multi-County's arguments for this factor are based on a cost of service analysis. Multi-County's claim that the City of Hamilton has not correctly calculated Multi-County's rate based on the operation and maintenance expenses is directly related to the City of Hamilton's cost of service. As the ALJ correctly stated in the PFD, "matters dealing with the cost of service are expressly excluded from consideration by 30 TAC § 291.133(b)."<sup>17</sup> Therefore, Multi-County's arguments are outside the scope of this public interest hearing.

Accordingly, the ALJ appropriately found that the City of Hamilton's letter to Multi-County's President demonstrated the changed condition which resulted in the fourteen cent rate increase to Multi-County; and that Multi-County failed to meet its burden of proof on this factor.<sup>18</sup>

*C. The ALJ correctly found that the City of Hamilton's methodology did not change.*

Multi-County argues that the fourteen cent rate increase speaks only of the "increase in the cost of water from Upper Leon and fails entirely to mention any of the other factors that the City contends comprise the rate increase."<sup>19</sup> However, Multi-County's arguments are not focused on proving that there was a change in the City's methodology. Multi-County's arguments relate to cost fluctuations within the three major components that make up the City of Hamilton's methodology. In fact, as the ALJ notes in the PFD, Ms. Rice describes a change in conditions, not a change in methodology, when she testified that Multi-County contests "a demonstrable increase or decrease in the cost of three of those items, which was a cost of water, any increase or decrease in the cost of bonds, or any increase or decrease in O&M."<sup>20</sup> The City did not reformulate its rate - the same fourteen cent increase imposed on the City of Hamilton translated into a fourteen cent increase to Multi-County. This pass through of the cost increase is merely a price fluctuation in one of the components of the methodology, i.e. the charge the city

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<sup>15</sup> PFD at 17.

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

<sup>17</sup> PFD at 18.

<sup>18</sup> *Id.*

<sup>19</sup> Multi-County's exceptions to PFD, Pg. 7.

<sup>20</sup> Tr. at 109; PFD at 19.

pays for water purchased from Upper Leon. The ALJ agreed and stated that “the evidence reflects that the fourteen cent rate increase was a change in one of the three components of the City’s methodology, not the methodology itself.”<sup>21</sup> Multi-County has not presented any evidence which demonstrates that the City’s methodology has changed.

Accordingly, the ALJ correctly found that Multi-County failed to meet its burden of proof on this matter and did not offer any evidence to support its contention that the City of Hamilton altered its methodology.<sup>22</sup>

*D. The ALJ correctly found that no other valuable consideration was received by a party incident to the wholesale water contract.*

Multi-County argues that when the City of Hamilton transferred the pipeline to Upper Leon, without retiring the debt, it should have resulted in some reduction in Multi-County’s obligation.<sup>23</sup> Multi-County asserts that without a corresponding reduction, it has lost its consideration for entering into the original contract.<sup>24</sup>

The City of Hamilton testified that the transfer of the pipeline has no relevance to the determination of other consideration received because the transfer was between Upper Leon and the City of Hamilton – not between the parties incident to this wholesale contract.<sup>25</sup> Furthermore, as Mr. Yanke testified, the City of Hamilton retains the obligation to service the debt<sup>26</sup> and even if the debt was transferred to Upper Leon, that debt service cost would be allocated to the City of Hamilton and thus incorporated in the rate charged to Multi-County.<sup>27</sup> Therefore, as the ALJ noted, “it makes no difference whether debt retirement is included in the rates charged [Multi-County] directly by the City or by Upper Leon to the City and then passed-through to [Multi-County].”<sup>28</sup> The City of Hamilton’s transfer of the pipeline did not result in a reduction in price for water purchased from Upper Leon. Thus, the City of Hamilton did not receive any other valuable consideration when it transferred the pipeline to Upper Leon. The ALJ agreed and found that Multi-County failed to meet its burden of proof on this factor.<sup>29</sup>

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<sup>21</sup> PFD at 18.

<sup>22</sup> PFD at 21.

<sup>23</sup> Multi-County’s exceptions to PFD, Pg. 7.

<sup>24</sup> *Id.*

<sup>25</sup> COH Ex. 36 at 18.

<sup>26</sup> *Id.* at 19.

<sup>27</sup> *Id.*

<sup>28</sup> PFD at 22.

<sup>29</sup> *Id.*

Accordingly, the ALJ correctly held that there was no other valuable consideration received by a party incident to the wholesale water contract.<sup>30</sup>

## II. CONCLUSION

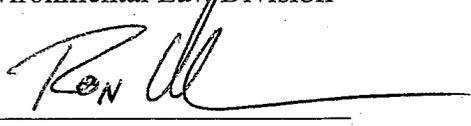
The ALJ's PFD is well-reasoned, follows the law, and appropriately recommends denial of Multi-County's wholesale rate appeal petition based on the evidence presented during the hearing on the merits. The petitioner must sustain its burden of proof in supporting its petition.<sup>31</sup> As the PFD states, Multi-County clearly failed to meet its burden in proving that the protested rate is adverse to the public interest. Accordingly, the ED recommends that the Commission adopt the ALJ's PFD and proposed order denying the petition.

Respectfully submitted,

Texas Commission on Environmental Quality

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REPRESENTING THE  
EXECUTIVE DIRECTOR OF THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

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<sup>30</sup> PFD at 21.

<sup>31</sup> 30 TEX. ADMIN. CODE § 291.136

## CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of May 2010, a true and correct copy of the foregoing documents have been sent via electronic mail and electronic filing to the persons on the attached Mailing List.

A handwritten signature in black ink, appearing to read "Ron Olson", written over a horizontal line.

Ron Olson, Staff Attorney  
Environmental Law Division

## MAILING LIST

Appeal of Multi-County Water Supply Corporation to review the wholesale water rate increase imposed by the City of Hamilton, CCN No. 11525 in Cooke County.

**SOAH Docket No. 582-09-2557**  
**TCEQ Docket No. 2009-0048-UCR**

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