

**SOAH DOCKET NO. 582-10-1944  
TCEQ DOCKET NO. 2009-1925-UCR**

<p><b>APPEAL OF NAVARRO COUNTY WHOLESALE RATEPAYERS ON BEHALF OF ITS MEMBERS, MEN WATER SUPPLY CORP., RICE WSC, ANGUS WSC, CHATFIELD WSC, CORBET WSC, NAVARRO MILLS WSC, CITY OF BLOOMING GROVE, CITY OF FROST, CITY OF KERENS, AND COMMUNITY WATER CO., TO REVIEW THE WHOLESALE WATER RATE INCREASE OF THE CITY OF CORSICANA, TEXAS</b></p>	<p>§ § § § § § § § § § § §</p>	<p><b>BEFORE THE STATE OFFICE</b></p> <p><b>OF</b></p> <p><b>ADMINISTRATIVE HEARINGS</b></p>
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**THE CITY OF CORSICANA’S REPLY TO NCWR’S AND E.D.’S  
EXCEPTIONS TO THE PROPOSAL FOR DECISION**

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<b>APPEAL OF NAVARRO COUNTY</b>	<b>§</b>	
<b>WHOLESALE RATEPAYERS ON</b>	<b>§</b>	<b>BEFORE THE TEXAS COMMISSION</b>
<b>BEHALF OF ITS MEMBERS, MEN</b>	<b>§</b>	
<b>WATER SUPPLY CORP., RICE WSC,</b>	<b>§</b>	
<b>ANGUS WSC, CHATFIELD WSC,</b>	<b>§</b>	
<b>CORBET WSC, NAVARRO MILLS WSC,</b>	<b>§</b>	
<b>CITY OF BLOOMING GROVE, CITY OF</b>	<b>§</b>	<b>ON</b>
<b>FROST, CITY OF KERENS, AND</b>	<b>§</b>	
<b>COMMUNITY WATER CO., TO REVIEW</b>	<b>§</b>	
<b>THE WHOLESALE WATER RATE</b>	<b>§</b>	
<b>INCREASE OF THE CITY OF</b>	<b>§</b>	
<b>CORSICANA, TEXAS</b>	<b>§</b>	<b>ENVIRONMENTAL QUALITY</b>

**THE CITY OF CORSICANA’S REPLY TO NCWR’S AND E.D.’S  
EXCEPTIONS TO THE PROPOSAL FOR DECISION**

**TO THE HONORABLE CHAIRMAN AND COMMISSIONERS:**

**I.**

**SUMMARY OF CORSICANA’S RESPONSE TO NCWR’S AND ED’S EXCEPTIONS**

Petitioners, the ten members of Navarro County Wholesale Ratepayers (hereinafter “NCWR” or “Ratepayers”), have filed exceptions that fail to raise any substantive arguments that have not already been duly considered by Judge Newchurch and found to be irrelevant or unpersuasive, as explained in the Proposal for Decision (“PFD”). The arguments presented by the Petitioners involve sometimes novel interpretations of the Commission’s rules and legal precedent, strained readings of the Commission’s preamble to the public interest rules, and at their most basic, are nothing more than a thinly veiled attempt to interject into this public interest hearing Corsicana’s cost of service – which the Commission’s rules expressly make irrelevant when considering if a protested rate charged pursuant to a contract is adverse to the public interest.

The Executive Director (“ED”) concurred with the Administrative Law Judge’s (“ALJ’s”) Proposal for Decision (“PFD”), and suggested one correction to a typographical error in Finding of Fact (FOF) No. 79. Corsicana agrees that FOF 79 should be corrected as suggested by the ED.

The SOAH Judge, after presiding over five, often long, days of hearing, and carefully weighing the evidence, presented a thorough and well-reasoned Proposal for Decision including a Proposed Order which denies each of the Petitions with prejudice to refile. Corsicana respectfully urges the Commission to adopt the Order, with the correction to FOF 79 suggested by the ED and a correction to FOF 35, discussed below.<sup>1</sup>

## **II.** **SUMMARY OF MAJOR ISSUES**

The City of Corsicana implemented a water and sewer rate change for *all* of its customers, including both retail and wholesale, in August 2009. The water rates charged to the City's 21 Wholesale Customers are the same as the rates charged to the City's Class I – Residential and Commercial (Inside City Limits) Customers. With the August 2009 Rate Change, the City retained the same rate structure that it has always had, which includes a Base Rate based on meter size, with included gallons, and a volumetric rate. The base rate for each meter size increased with the August 2009 rate change, and the included gallons for the base rate was also changed to 1,000 gallons for *all* meter sizes. The volumetric rate was also changed from \$3.00 per 1,000 gallons for all water above the gallons included in the base rate, to an inclining block rate, where the charge per 1,000 gallons for 1,001 gallons to 10,000 gallons is \$3.00; the charge for 10,001 to 25,000 gallons is \$3.15; and the charge for 25,001 gallons and more is \$3.25.

Navarro County Wholesale Ratepayers (“NCWR”), an association, filed a Petition to Appeal the Water Rate on November 2, 2009, which was ultimately deemed insufficient to confer jurisdiction. After submitting two Amended Petitions, with the Second filed on April 16, 2010, the Appeal was allowed to proceed. The Petitioners recognized by the Judge include the following ten wholesale customers of Corsicana: M.E.N. Water Supply Corp., Rice Water Supply Corp., Angus Water Supply Corp., Chatfield Water Supply Corp., Corbet Water Supply corp., Navarro Mills Water Supply Corp., City of Blooming Grove, City of Frost, City of Kerens and Community Water Co. (Beaton Lake, Purdon & Retreat systems only). NCWR is *not* a party to the case. The ALJ found that jurisdiction attached as to all petitioners under Tex. Water

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<sup>1</sup> Corsicana urges the following changes to FOF 35 for the reasons explained in Section VIII. A. 1., below: Except for Blooming Grove, Kerens and Navarro Mills, the Ratepayers have contracts with Corsicana that require them to pay Corsicana for at least a minimum amount of water ~~even~~ if they obtain non-emergency water from another source.

Code §§ 11.036 and 11.041, and as to the three City wholesale customers, jurisdiction also attached under Tex. Water Code § 12.013. Judge Newchurch ruled that the Petitioners failed to establish jurisdiction under Tex. Water Code § 13.043(f).

The Second Amended Petition included many cost of service-related allegations, in keeping with the Petitioners argument that the Appeal should proceed directly to a cost of service hearing. Since the protested rate is charged pursuant to contracts, however, the ALJ denied that request and the case proceeded with the public interest hearing as required by Subchapter I of Chapter 291 of 30 TAC. Although there are four criteria under which a public interest case may proceed, as set out in 30 TAC § 291.133(a)(1) – (4), the Petitioners claims were limited to the abuse of monopoly power criterion found in 291.133(a)(3)(A) – (H). However, instead of focusing on the eight factors found in (A) through (H) that may be considered in determining if Corsicana abused monopoly power, the Petitioners relied upon a novel legal argument that originated from language in the Preamble adopting the Wholesale Water Rate rules. That new legal argument was that abuse of monopoly power could be established by showing that the City of Corsicana discriminated against the wholesale customers in comparison to the retail customers by adopting an inclining block volumetric rate. The factual allegations offered by Petitioners to support this new legal theory were: (1) the wholesale customers would pay the third tier volumetric rate for the vast majority of the water they purchased each month, while the average residential in-city customer would pay only the first tier volumetric rate; and (2) representatives of two of the Petitioners testified that the Mayor of Corsicana, Buster Brown, said that the City had adopted the inclining block rate because the wholesale customers “don’t vote.”

Corsicana argued, and the ALJ has agreed, that the Commission’s rules should not be read expansively to include discrimination (or disparity) between wholesale and retail customers, but instead the preamble language Petitioners rely upon for their legal theory, means what it says – the eight factors included in 291.133(a)(3) are sufficient to cover whether any disparity between retail and wholesale customers adversely affects the public interest. Contrary to the Ratepayers’ claim that the Judge erroneously refused to consider “discrimination”, the PFD correctly analyzes the two instances in which the Commission’s public interest rule permits inquiry into discriminatory rates: (1) 291.133(a)(3)(H) permits an inquiry into the seller’s rates to its retail customers compared to the retail rates the purchaser charges its customers as a result of the wholesale rate demanded by the seller unreasonably preferential, prejudicial or

discriminatory between the rates charged;<sup>2</sup> and (2) 291.133(a)(4) permits an inquiry to determine if the protested rate is unreasonably preferential, prejudicial, or discriminatory, compared to the wholesale rates the seller charges other wholesale customers.<sup>3</sup> Petitioners' legal theory would have impermissibly expanded these rules, and the Judge has correctly found Petitioners' novel legal argument is irrelevant.

As to the factual allegations advanced by the Petitioners in support of their claim that the rate discriminates against wholesale customers, Corsicana responded with evidence that persuasively demonstrated that nothing in the Petitioners' contracts entitled them to pay the same bill as an average in-city *residential* customer, but instead, the Standard Contracts require they be charged the same rate as inside city *retail* customers. Because wholesale customers are high-volume consumers, they have always been billed and paid more than the average residential customer in the city, who has lower consumption. Two analyses presented by Corsicana demonstrate there is no disparity in treatment in the City's rate structure that favors its retail customers over its wholesale customers. First, the revenues from wholesale customers are consistently lower on a per thousand gallon basis when compared to the revenues from retail customers. For each thousand gallon unit sold to the wholesale customers, the City generates only 64% of the revenues that would have been generated if that same thousand gallon unit had been sold to a retail customer. The second analysis compared the effective rate (that is the base and volume charge) per thousand gallons for average consumption by Corsicana's residential customers versus the average consumption by Corsicana's wholesale customers. That analysis demonstrates that the wholesale customers are paying *substantially less* per thousand gallons than the City's average residential customer. The Petitioners' effective rates per thousand gallons ranged from \$3.28 to \$3.81, while the average residential in-city customer pays \$5.43/1,000.

A related argument advanced by Petitioners is that the Standard Contracts allow Corsicana to charge the wholesale customers the: "minimum inside city retail water rate," and since the wholesale customers pay the third tier rate for the majority of the water they purchase, the inclining block rate structure is in violation of the contract. The evidence demonstrates that the minimum inside city retail water rate is the base rate plus the volumetric rate. All customers

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<sup>2</sup> See, Section VIII. H., below

<sup>3</sup> Partial summary judgment was granted on this issue. PFD at 12, FOF 23.

pay the 1<sup>st</sup> tier rate for water consumed each month that is more than 1,000 gallons and less than 10,000 gallons – including the wholesale customers. Similarly, all customers who consume more than 10,000 gallons in a month pay the 2<sup>nd</sup> tier rate, and all customers who consume more than 25,000 gallons in any given month pay the 3<sup>rd</sup> tier rate. There are 689 retail customers who pay the 3<sup>rd</sup> tier rates; and out of the 50 highest consuming customers, 21 are retail customers. In other words, the wholesale customers are charged the minimum inside city retail water rate, which means they pay \$3.00 per thousand up to 10,000 gallons, \$3.15 per thousand up to 25,000 gallons and \$3.25 per thousand for all water consumed over 25,000 gallons in a month.

With respect to the allegations regarding Mayor Brown's statement to two wholesale customers during a meeting that occurred sometime after the City Council adopted the new Rate Ordinance,<sup>4</sup> the City Manager, Ms. Connie Standridge, testified that while she was present at the meeting where the statement was purportedly made, she did not hear Mayor Brown make the statement attributed to him by Mr. Ivey and Mr. Metcalfe.<sup>5</sup> She testified that she was willing to assume he made the statement attributed to him, but she does not believe it was a serious comment.<sup>6</sup> Whether the Mayor was serious or joking, Corsicana asserts that such a comment is irrelevant. The only way the City can act is through the vote of its council, and during Corsicana Council's deliberations on the 2009 Rate Change, there was never any discussion about wholesale ratepayers' voting rights, or lack thereof.<sup>7</sup>

The mayor's opinion – if the statement is to be taken seriously and actually reflected his opinion – cannot be attributed to the entire City Council, which is the only body with the authority to implement the rate change that gave rise to this Appeal. It is well-settled law that the governing authority of a city can express itself and bind the city only by acting together in a meeting duly assembled. *Stirman v. City of Tyler*, 443 S.W.2d 354, 358 (Tex. Civ. App. – Tyler 1969, writ ref'd n.r.e.). A city council can transact a city's business only by resolution or ordinance, and by majority rule of the council. *Stirman*, 443 S.W.2d at 358; *First Nat. Bank of Marlin v. Dupuy*, 133 S.W.2d 238, 240 (Tex.Civ.App.--Waco 1939, writ dismiss'd, judg. cor.). A

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<sup>4</sup> NCWR Ex. I (Metcalfe) at 22:5-8; NCWR Ex. K (Stowe) at 7:8-13, and 30:13 – 16.

<sup>5</sup> While Petitioners' counsel questioned why Mayor Brown was not called as a witness, he did not depose the Mayor nor conduct any kind of discovery related to the alleged discriminatory intent the Ratepayers attributed to the Mayor's statement.

<sup>6</sup> Tr. 763:6 – 12, and 764:4 – 14 (“my first reaction when I heard that they had said that, was that he [Mayor Brown] was just joking, it wasn't a serious comment. The mayor does that from time to time – or it was just an offhand comment.”)

<sup>7</sup> Tr. 648:18 – 649:12( Standridge).

city can act by and through its governing body; statements of individual council members are not binding on the city. *Alamo Carriage v. City of San Antonio*, 768 S.W.2d 937, 941-42 (Tex.App.--San Antonio 1989, no writ).

Similarly, Texas courts have ruled that an individual city council member's mental process, subjective knowledge, or motive is irrelevant to a legislative act of the city, such as the passage of an ordinance. For example, in *City of Corpus Christi v. Bayfront Assocs., Ltd.*,<sup>8</sup> the court wrote that "an individual city council member's mental process, subjective knowledge, or motive is *irrelevant* to a legislative act of the city, such as the passage of an ordinance" [emphasis added]. Assuming the Mayor's comment was intended to be taken seriously, it could only reveal the Mayor's mental process, subjective knowledge, or motive, and therefore it would be irrelevant to the legislative act – adoption of Ordinance 2625 – that represents the action by the City enacting the 2009 rate change. Accordingly, assuming *arguendo* that the Mayor's statement represented his opinion, the statement is irrelevant and cannot be the basis for finding that the City implemented the inclining block rate to discriminate against its wholesale customers.

In sum, Petitioners failed to carry their burden of proof that Corsicana abused monopoly power by implementing the Rate Change in August 2009. The remainder of these Replies to Exceptions are presented in accordance with the Table of Contents for the PFD (including the same Roman Numerals, for ease of reference), and with reference to the pages in NCWR's Exceptions to which the reply pertains.

## **VI. THE REQUIRED PUBLIC INTEREST DETERMINATION AND ITS SCOPE (PFD at 9 – 24)**

Judge Newchurch devotes 15 pages to his analysis to the Petitioners' legal arguments concerning the factors to be considered in determining if the protested wholesale rates adversely affect the public interest. He correctly concludes that Commission rule 30 TAC § 291.133(a) establishes the factors to be considered in determining whether the public interest is

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<sup>8</sup> 814 S.W.2d 98, 105 (Tex.App.-Corpus Christi 1991, writ denied). This is a settled point in Texas law. See also, *Mayhew v. Town of Sunnyvale*, 774 S.W.2d 284, 298 (Tex.App.-Dallas 1989, writ denied) (quoting *Sosa v. City of Corpus Christi*, 739 S.W.2d 397, 405 (Tex.App.-Corpus Christi 1987, no writ)), *aff'd* after remand, 964 S.W.2d 922 (Tex.1998). It is important to note that the *Sosa* case affirmed by the Texas Supreme Court dealt with city council members rather than state legislators.

affected by a protested wholesale rate,<sup>9</sup> and that the public interest inquiry is limited to the factors set out in 30 TAC § 291.133(a)(1)-(4), which do not include a comparison of the protested rate's impact on wholesale and retail customers.<sup>10</sup> He also concludes that cost of service evidence is not relevant to determining whether rates affect the public interest,<sup>11</sup> even if there is evidence that supports the cost of service arguments.<sup>12</sup>

**A. Disparate Impact of the Rates on Retail and Wholesale Customers is Not Relevant to the Determination of the Public Interest under 30 TAC § 291.133(a)**

The Petitioner Ratepayers repeat in their Exceptions the arguments advanced in their Closing Arguments, specifically alleging that the PFD applies an incorrect legal standard by determining that evidence of discrimination may not be considered in the public interest analysis.<sup>13</sup> The factual basis of this argument is NCWR's claim that the inclining block volumetric rate adopted by Corsicana in 2009 has a disparate impact on the wholesale customers in comparison to Corsicana's average retail customers. The legal analysis accompanying NCWR's argument on this point rests on a challenge to the public interest rules and to a portion of the Commission's preamble adopting the rules.

First, NCWR argues that Texas Water Code § 11.036(b) *requires* the Commission to determine if the rate charged for state-owned water is just, reasonable and without discrimination. According to NCWR, "when state-owned water is being sold pursuant to a contract, '[t]he price and terms of the contract shall be just and reasonable and without discrimination.'" Petitioners assert since the rate is discriminatory, that is proof that the rate is against the public interest.<sup>14</sup> The Ratepayers' Exceptions fail to quote the complete sentence of Water Code § 11.036(b) upon which they rely. That omission could be misleading. The first sentence of Water Code § 11.036(b) provides in its entirety: "The price and terms of the contract shall be just and reasonable and without discrimination, and the contract is subject to the same revision and control as provided in this code for other water rates and charges." In other words, the statute requires contracts that cover the sale of "state-owned" water are to be treated the same

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<sup>9</sup> Conclusion of Law (COL)16.

<sup>10</sup> COL 17.

<sup>11</sup> PFD at 16 – 18.

<sup>12</sup> PFD at 18 – 22.

<sup>13</sup> NCWR Exceptions at p. 3.

<sup>14</sup> NCWR Exceptions at 3-4.

as other water sale contracts, and Petitioners' argument that a unique review standard must apply cannot be reconciled with the plain meaning of the statute.

The ALJ considered and rejected Petitioners' argument after analyzing the Commission's public interest rules, the case law that caused the Commission to adopt the rules, and subsequent cases upholding the public interest review process. The public interest hearing is a necessary prerequisite to an examination of a wholesale rate set pursuant to a contract because the Texas Constitution limits the state's ability to pass laws that impair contracts. This Commission correctly determined in adopting the rules that before reaching the issues of the seller's cost of service, which would be an issue only if a contract was abrogated, it must first conduct a hearing to determine if the protested wholesale rate adversely affects the public interest, which could include an inquiry as to whether the protested wholesale rate is unreasonably preferential, prejudicial, or discriminatory when compared to other wholesale rates charged by the seller.<sup>15</sup> As Judge Newchurch also explains in the PFD, in *Canyon Regional Water Authority v. Guadalupe-Blanco River Authority*, the court upheld the Commission's public-interest rules and specifically *rejected* arguments that requiring the party protesting a contractual rate to first show that the protested rate adversely affects the public interest is contrary to Water Code §§ 11.036(b) and 12.013.<sup>16</sup> In other words, NCWR's argument on this point has already been expressly rejected by a Texas Court of Appeals.

Second, Petitioners argue that all three cases they rely on "unequivocally hold that unreasonable rate discrimination adversely affects the public interest."<sup>17</sup> The holdings in the cases refer to the requirement that before governmental agency may abrogate a rate set by Contract, it must make a finding that the rate adversely affects the public interest, which could be demonstrated by proof that the contractual rate is: "unlawful," or "where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory;" or "unjust, unreasonable, unduly discriminatory, or preferential." However, none of the cases find that the contract rate was unreasonably discriminatory and therefore Petitioners mis-state the holdings in their Exceptions. Because none of the cases address "discrimination," there is no analysis of what facts the regulatory

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<sup>15</sup> PFD at 10 – 11, citing *Texas Water Commission v. City of Ft. Worth, High Plains Natural Gas Co. v. Railroad Commission, and Federal Power Commission v. Sierra Pacific Power Co.*

<sup>16</sup> PFD at 11.

<sup>17</sup> NCWR Exceptions at 4

agencies would consider to prove “discrimination” or whether the party challenging the rate would have to prove the contractual rate was “unreasonably discriminatory.”

In *Federal Power Commission v. Sierra Pacific Power Co.*, a public utility providing power to a distributor under a contract attempted to increase its rate to the distributor by filing a rate schedule with the Commission. The public interest issue there was whether the rate set in the contract yielded a return that was too low, which might have indicated it would impair the ability of the utility to continue providing the service, but there were no factual or legal allegations that the rate was discriminatory. The Supreme Court, in ordering the remand of the case to the FPC, held: “the purpose of the power given the Commission by § 206(a) is the protection of the public interest, as distinguished from the private interests of the utilities.”

In *High Plains Natural Gas Co. v. Railroad Commission*, a gas utility sought to have the Railroad Commission set a new city gate rate for the sale of natural gas to a municipal corporation, which rate was the subject of a contract. The Railroad Commission refused to do so, finding it did not have jurisdiction. The district court held, with the Austin Court of Appeals affirming the judgment, the Commission did have jurisdiction to review the sales price covered by a contract, but before it could revise a contract rate, it must determine the modification was in the public interest. The *High Plains* decision, as in *Sierra Pacific Power*, rested on a claim that the rate impaired the ability of the gas utility to continue its service. The words “unduly discriminatory” appear in the opinion, but that reference is clearly *dicta*.

In *Texas Water Commission v. City of Fort Worth*, the central issue was whether Fort Worth could charge the City of Arlington for its proportional share of the overall wastewater treatment plant flow. The Commission took jurisdiction over the case, over the objection of the City of Fort Worth, and set a new, lower, rate, finding that the *new* rate was just and reasonable. However, the Austin Court held that the Commission failed to address Fort Worth’s contractual rate or why it was unjust, unreasonable, preferential, prejudicial or discriminatory, and thus needed modifying, and reversed the Commission.

In each of these cases, while discrimination is referenced, the facts did not involve complaints alleging discrimination and hence there is no direct holding that discrimination automatically leads to a finding that the protested rate adversely affects the public interest. Another important distinction between the cases relied upon by Petitioners and this Appeal, is that here the Commission has adopted rules which address how it will analyze a claim that a

contractual rate is against the public interest because it is “discriminatory,”<sup>18</sup> but Ratepayers failed to allege any facts under those rule provisions that would demonstrate Corsicana’s rate is discriminatory.

Petitioners’ second and third arguments are closely tied. The third argument<sup>19</sup> is premised on a portion of the Preamble to the public interest rules<sup>20</sup> that states: “The public interest inquiry under paragraph § 291.133(a)(3) should sufficiently cover whether any *disparity* in treatment between retail and wholesale customers adversely affects the public interest.”<sup>21</sup> As the Judge explains, the quoted preamble language was the Commission’s response to comments concerning *a different* subsection of the rule, (a)(4), which as originally proposed would have provided that the public interest was violated if “the protested rate appears to discriminate between the purchaser and others who purchase water . . . service from the seller and the seller does not provide reasonable support for such discrimination.” The Commission agreed to change subsection (a)(4) in response to comments that the standard should be *unreasonable* discrimination and should only focus on *wholesale* customers. The rule as adopted includes as one factor to be considered whether the protested rate is unreasonably preferential, prejudicial or discriminatory compared to the wholesale rates charged by the seller to other wholesale customers.<sup>22</sup> Judge Newchurch concludes that this demonstrates the Commission specifically chose to *narrow* the public interest inquiry and refused to consider if there was discrimination favoring retail over wholesale customers – which is the crux of the Ratepayers’ argument. The PFD correctly concludes that the preamble language relied upon by NCWR limited, rather than expanded, the public interest criteria.

Petitioners’ arguments on this point fail in large part because they have taken the preamble language completely out of context and attempted to craft an entirely new factor for determining if a protested rate adversely affects the public interest. Notwithstanding Petitioners’ allegations to the contrary, the PFD addresses discrimination, as it is found in two criteria under 30 TAC 291.133(a) – and Petitioners failed to present persuasive evidence to support a finding of discrimination under either of these criteria. First, 291.133(a)(4) provides that a rate would be

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<sup>18</sup> See, discussion below concerning 30 TAC §§ 291.133(a)(4) and 291.133(a)(3)(A).

<sup>19</sup> NCWR Exceptions at 5 – 8.

<sup>20</sup> 9 Tex. Reg. 6229 (1994), NCWR Ex. 58 (copy of Preamble).

<sup>21</sup> Emphasis added. Petitioners argue that the word “disparity” found in this section of the preamble means either “discrimination” or “unduly or unreasonably preferential or discriminatory.”

<sup>22</sup> 19 Tex. Reg. 6229 (middle column).

contrary to the public interest if it is unreasonably preferential, prejudicial or discriminatory, *compared to the wholesale rates the seller charges other wholesale customers*. Since Corsicana charges all its wholesale customers the same rate, this “discrimination” criteria is inapplicable to the facts of this case.<sup>23</sup> Second, 291.133(a)(3)(A) refers to *disparate bargaining power* (addressed below) which, as the Judge explains, is not synonymous with *disparate rate impact* on wholesale versus retail customers.<sup>24</sup> Petitioners’ argument that, as wholesale customers, they suffer rate discrimination compared to the impact the protested rate has on Corsicana’s *average retail residential* customer is, as the Judge found, simply *not relevant* under 30 TAC § 291.133(a)(4).<sup>25</sup> Finally, the Judge correctly concluded that the only proper analysis of rates that should be undertaken in this public interest hearing is to compare the rates Corsicana charges to its retail customers against the Ratepayers’ retail rates to their customers that *result* from the wholesale rate, as discussed in Section VIII. H. of the PFD and below.

NCWR’s final exception related to the scope of the public interest hearing is that by determining that rate discrimination cannot be considered, the PFD misapplies the law to the facts and fails to consider important evidence.<sup>26</sup> However, neither the Judge nor the Commission’s rule ignore unreasonably discriminatory wholesale rates, as Petitioners allege. Instead, the Commission has determined that the only relevant inquiry related to unreasonable discrimination is the comparison of rates charged by the Seller to each of its wholesale customers, but not a comparison between the rates charged by the Seller to its retail versus wholesale customers. Corsicana charges all of its wholesale customers the same rates, and those rates (base and volumetric) are also the same rates charged to Corsicana’s inside-city retail customers (based on meter size). The Ratepayers did not claim that the protested rates are unreasonably preferential, prejudicial or discriminatory, compared to the wholesale rates Corsicana charges other wholesale customers, and hence the ALJ granted Corsicana’s motion for partial summary disposition on that (and two other) points.<sup>27</sup> The Commission is required to follow its own rules unless and until those rules are changed.<sup>28</sup> The Judge has correctly applied the public interest rules as written, and as interpreted by the Commission and Courts, and

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<sup>23</sup> PFD at 14.

<sup>24</sup> PFD at 13 – 14.

<sup>25</sup> PFD at 14.

<sup>26</sup> NCWR Exceptions at p. 8

<sup>27</sup> PFD at 12 and FOF 21 - 23.

<sup>28</sup> PFD at 17.

concluded that the Ratepayers' arguments related to alleged discrimination between the rates Corsicana charges its average residential customer and the wholesale customers would impermissibly broaden the public interest inquiry. Corsicana respectfully urges the Commission to include proposed Conclusion of Law 17 in its order.

### **B. Cost of Service is Not Relevant to Determining Whether Rates Affect the Public Interest**

The Ratepayers' original Petition, as well as their First and Second Amended Petitions<sup>29</sup> are premised on their argument that the protested rates are not supported by an adequate cost of service study, and the Commission should proceed with a cost of service rather than a public interest hearing. However, because the protested rate is charged pursuant to a contract, the Judge correctly found that the public interest hearing was required under 30 TAC § 291.131(b). Throughout the public interest hearing, and in Closing Arguments, the Ratepayers persisted in presenting evidence and arguments that were based upon cost of service issues, notwithstanding 30 TAC § 291.133(b) which states: "The commission *shall not* determine whether the protested rate adversely affects the public interest based on an analysis of the seller's cost of service."

Judge Newchurch explains his approach to admission of the cost of service evidence offered by the Ratepayers<sup>30</sup> during the hearing and his conclusion that at least 12 of the Ratepayers' arguments which arise from that evidence and which they claim are proof that Corsicana's rates will adversely affect the public interest, are *legally irrelevant*.<sup>31</sup> In their Exceptions, the Ratepayers complain Judge Newchurch applied the rule excluding cost of service evidence too narrowly in one instance and too broadly in other instances.<sup>32</sup> Corsicana replies below<sup>33</sup> to the Ratepayers' Exceptions<sup>34</sup> related to the Judge's conclusion that the \$1 million shortfall in the City's Utility Fund was a changed condition that formed a reasonable basis for increasing the water rates.

Many of the Ratepayers' cost of service arguments included in their Exceptions rely upon parts of one or more versions of the McLain Study, which, as discussed below, the Judge

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<sup>29</sup> See, Corsicana's Initial Post-Hearing Brief at III. (p. 7 – 10) which summarizes the Ratepayers' cost of service legal arguments in its numerous pleadings.

<sup>30</sup> PFD at 8 – 22.

<sup>31</sup> PFD at 19 – 21. Corsicana acknowledges that it also offered some cost of service evidence, but did so only in response to the evidence offered by Petitioners.

<sup>32</sup> NCWR Exceptions at 11.

<sup>33</sup> Reply to Exceptions Section VIII. B.

<sup>34</sup> NCWR Exceptions at 12.

determined should be given no evidentiary weight. Remarkably, the Ratepayers also argue in their Exceptions that “Because [they] do *not claim* that the 2009 Rate Increase is an abuse of monopoly power because it is not based on Corsicana’s cost of service, the PFD should not generally attribute such arguments to the Ratepayers.”<sup>35</sup> This argument cannot be reconciled with the evidence advanced by and the arguments made in Ratepayers’ Original Petition, First Amended Petition, Second Amended Petition, or Closing Arguments. The multiple cost of service arguments made by the Ratepayers in support of their ultimate contention that the protested rate is an abuse of monopoly power are listed, with citations to the record, at pages 19 – 20 of the PFD. In the same paragraph of their Exceptions, Ratepayers claim that “Corsicana’s cost of service is unknown”<sup>36</sup> which is a new and puzzling argument that cannot be reconciled with their assertions throughout the case that, e.g., the protested rates are 40% above the cost of providing water; the rates as implemented are not cost-based rates; the water rates shift a shortfall in wastewater service revenue to the wholesale customers, etc.. If the Ratepayers position is now that Corsicana’s cost of service is *unknown*, none of these arguments can possibly be persuasive. Other than attempting to abandon their primary cost of service arguments, the Ratepayers have not raised any other arguments related to cost of service issues that have not already been considered, analyzed and rejected by the Judge as beyond the proper scope of this proceeding. In that regard, Corsicana respectfully urges the Commission to adopt Conclusion of Law 18.

Judge Newchurch has carefully analyzed the Ratepayers’ arguments and correctly concludes that many of them are grounded in, or cannot be characterized as anything other than, cost of service arguments which are irrelevant to this proceeding. Corsicana replies to the Ratepayers’ Exceptions related to the Judge’s refusal to adopt their cost-of-service arguments in the following sections, arranged in accordance with the table of contents for the PFD.

**VII.**  
**MCLAIN STUDY AND DRAFTS SHOULD HAVE NO**  
**EVIDENTIARY WEIGHT(PFD at 24 – 25)**

After explaining why many of the Ratepayers’ arguments are irrelevant cost of service arguments that are entitled to no weight in determining if the protested rate is adverse to the

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<sup>35</sup> NCWR Exceptions at 18.

<sup>36</sup> NCWR Exceptions at 18.

public interest, the PFD explains why the many versions of the McLain Study are entitled to no evidentiary weight.<sup>37</sup> Many of the Ratepayers' Exceptions rely on various tables and excerpts from the McLain study, just as the Ratepayers' arguments at hearing relied on this cost of service analysis. What the Ratepayers persist in failing to acknowledge is that NCWR's own expert witness, Mr. Stowe, testified in response to the Judge's question that the Judge should not rely on the McLain Study for anything.<sup>38</sup> The Petitioners fault Corsicana for failing to call Mr. McLain as a witness, but that argument is a red herring. The Ratepayers, not Corsicana, have the burden of proof, and Corsicana's position throughout this case has been that cost of service arguments are irrelevant to the public interest determination. It therefore is unreasonable and unrealistic to suggest, as the Ratepayers do, that the City should have called Mr. McLain, who had performed the cost of service study, as a witness.

In light of Corsicana's argument that use of the McLain study to address cost of service issues is irrelevant and the Judge's agreement on that point, the Commission may be curious as to how the McLain study came into the case. The five versions of the McLain Studies were produced by Corsicana in response to the following Request for Production from NCWR:

If you contend that any changed conditions have increased the cost of providing water to Corsicana's customers, all documents related to such changed conditions in any way related to the 2009 Rate Increase.

NCWR prefiled only the August 16, 2009 version of the McLain rate study as part of its direct case,<sup>39</sup> and relied upon it in Mr. Stowe's prefiled testimony<sup>40</sup> where he opined that a reference to a subsidy in McLain's study evidenced discrimination against the wholesale customers. Based upon Corsicana's objection, that prefiled testimony was struck and NCWR Ex. 24 was admitted for the limited purpose of demonstrating changed conditions – which was the reason it had been produced by Corsicana in the first instance. In addition, several other versions of that rate study were admitted over the course of the hearing as NCWR focused on the cost of service issues included in the McLain study. NCWR offered the July 17, 2009 version of the rate study tables, which provided the opportunity for extensive discussions about Table 1.7 (the revenue shifting table). Corsicana Ex. 32, which is the July 17, 2009 Rate Study that was available to the City

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<sup>37</sup> PFD at 24 – 25.

<sup>38</sup> Tr. 1247 – 1248.

<sup>39</sup> NCWR Ex. 24.

<sup>40</sup> NCWR Ex. K at 32 - 33

Council at the time of its August 4, 2009 vote on the Rate Ordinance, was also admitted into evidence. In the final hour of the hearing, Mr. Stowe produced another version of McLain's Table 4.1, which was ultimately identified as being an extract from the June 18, 2009 Draft version of McLain's rate study, and admitted as NCWR Ex. 69. In the final analysis, the Judge, after having admitted these exhibits and weighed the evidence, determined that they were entitled to no evidentiary weight.

**VIII.**  
**ABUSE OF MONOPOLY POWER (PFD at 25 – 70)**

The Petitioners' rely solely on 30 TAC § 291.133(a)(3) in attempting to prove that the protested rate adversely affects the public interest. That section of the rule requires the Petitioners to prove that Corsicana has *abused monopoly power* in its provision of water service to the Ratepayers. There are eight factors in this section of the rule which the Judge addresses in the PFD.<sup>41</sup> Corsicana agrees with the conclusion reached in the PFD that the Ratepayers failed to prove that Corsicana abused its monopoly power, *if* it has such power, and therefore the petitions must be denied.

**A. Disparate Bargaining Power of the Parties (PFD at 25 – 48 and FOF 24-25)**

The Commission may consider the disparate bargaining power of the parties, including the Ratepayers' alternative means, alternative costs, environmental impact, regulatory issues and problems of obtaining alternative water service, in determining if Corsicana abused its monopoly power.<sup>42</sup>

**1. Ratepayers' Alternative Means of Obtaining Water (PFD at 25 – 45 and FOF 26 – 36)**

The ALJ finds that the Ratepayers have few or no alternatives to Corsicana for obtaining water.<sup>43</sup> Corsicana agrees that some of the Ratepayers have alternative sources of water, even if some of those options are not as desirable or economical as purchasing water from Corsicana.<sup>44</sup>

As part of this analysis, the PFD addresses arguments raised by the Petitioners related to some Ratepayers' efforts to obtain water from TRWD ten years prior to the initiation of this

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<sup>41</sup> PFD at 25 – 70.

<sup>42</sup> 30 TAC § 291.133(a)(3)(A).

<sup>43</sup> PFD at 25; see also PFD at 28 (The ALJ concludes that the Ratepayers generally have few alternatives to Corsicana for obtaining water.)

<sup>44</sup> See, Corsicana's Initial Brief at 16 – 17 (describing the alternative water supplies identified in the 2011 Region C Water Plan [Corsicana Ex. 31] for six of Corsicana's wholesale customers)

case. The Judge concludes that while TRWD is not a source of water available to the Ratepayers, TRWD's decision ten years ago to not supply water to Rice, M.E.N. and Chatfield does *not* indicate Corsicana was abusing its disparate bargaining power. Instead, the Judge correctly concludes that *for reasons of its own, TRWD chose not to supply water to those three ratepayers.*

Next, the PFD examines Ratepayers' arguments that the existing Standard Contract<sup>45</sup> evidences Corsicana's abuse of monopoly power.<sup>46</sup> The Judge thoroughly describes and analyzes the evidence on this issue, which supports his findings that the Standard Contract: (1) was created as a joint effort of Kenneth Petersen, Jr. an attorney acting on behalf of some of the Petitioners, and the City; (2) is in the general interest of all the wholesale customers and the City; and (3) was not unilaterally imposed by Corsicana on its customers. Instead, Judge Newchurch arrived at the only reasonable conclusion supported by the persuasive evidence, which is that the Standard Contracts were negotiated by the City and its wholesale customers with the intent of balancing the interests of Corsicana and its wholesale customers.<sup>47</sup>

Another issue related to the Standard Contract concerns Section 4.03(d) of those Contracts, which the Ratepayers continue to insist is a "sole source" and "penalty" provision, which evidences Corsicana abuse of monopoly power. The PFD analyzes and rejects each of the Ratepayers' arguments, which are repeated in their Exceptions,<sup>48</sup> and concludes with respect to Section 4.03(d) of the Standard Contract:

- (1) Three of the Ratepayers' contracts do not contain a provision like 4.03(d) [Blooming Grove, Kerens and Navarro Mills] and therefore as to those three, the evidence cannot support a finding of disparate bargaining power or monopoly abuse;<sup>49</sup>
- (2) Ratepayers' characterization of this section as a "sole source" provision is not persuasive, and 4.03(d) is not a sole source provision;<sup>50</sup> and
- (3) The section is not a penalty provision but rather is an *alternative minimum payment* provision that only applies if the Purchaser obtains non-emergency water from another

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<sup>45</sup> Entered into with all but three of the Petitioners. See PFD at 34 – 35.

<sup>46</sup> See FOF 42 – 63.

<sup>47</sup> PFD at 37.

<sup>48</sup> NCWR Exceptions at 20, 22.

<sup>49</sup> PFD at 38.

<sup>50</sup> PFD at 38 – 39.

source and reasonably balances the risks of that alternative purchase between Corsicana and the wholesale customer.

In light of the third conclusion, Corsicana respectfully urges the Commission to modify FOF 35 as follows: “Except for Blooming Grove, Kerens and Navarro Mills, the Ratepayers have contracts with Corsicana that require them to pay Corsicana for at least a minimum amount of water ~~even~~ if they obtain non-emergency water from another source.”

Finally, the PFD concludes that the course of contractual dealings between Corsicana and the Ratepayers as summarized in Attachment A to Corsicana’s Initial Post-Hearing Brief demonstrates that the differences between the earlier contracts and the Standard Contract do not demonstrate Corsicana’s abuse of monopoly power; many of the changes from the earlier contracts found in the Standard Contract are either beneficial to the Ratepayers or equally beneficial to them and Corsicana; and while Section 4.03(d) confers some benefit on Corsicana, it is reasonable and not abusive.<sup>51</sup> Petitioners’ arguments in Exceptions that the contract terms have become “more substantially unfavorable over time” and therefore evidence disparate bargaining power<sup>52</sup> have been considered and rejected by the Judge.

## **2. Alternative Costs (PFD at 45 – 46 and FOF 37 – 41)**

The Judge analyzes the evidence concerning the cost of alternative sources of water and reaches the only reasonable conclusion, which is that the alternative water sources currently available, or that were considered in the past, would cost the Ratepayers substantially more than the effective rate<sup>53</sup> charged by Corsicana.<sup>54</sup> Rice’s water supply contract with Ennis has an effective rate of \$5.50 per 1,000 gallons, compared to Corsicana’s effective rate of \$3.389 per 1,000 gallons to Rice. If TRWD had been willing to sell Rice, M.E.N., and Chatfield water ten years ago, it would have cost those three Ratepayers \$3.72 per 1,000 gallons at a time when they could have continued purchasing water from Corsicana for the substantially lower rate of \$2.09 per 1,000 gallons. If the cost of TRWD’s water ten years ago is compared to the effective rate per 1,000 charged by Corsicana today, Corsicana’s rate is still significantly less than those three ratepayers would have paid to TRWD. The Judge concludes that this evidence does not indicate Corsicana abused monopoly power. The Ratepayers continue to argue in Exceptions,

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<sup>51</sup> PFD at 42 – 45.

<sup>52</sup> NCWR Exceptions at 20.

<sup>53</sup> Effective Rate is the rate per 1,000 gallon units calculated by adding the base rate and the volumetric rate and dividing by the average gallons purchased.

<sup>54</sup> PFD at 45 – 46.

nonetheless, that the current rate is discriminatory and evidence of abuse of monopoly power.<sup>55</sup> This argument is thoroughly addressed by the Judge, and is not supported by the persuasive and credible evidence.

### **3. Other Disparate Bargaining Power Factors (PFD at 47 and FOF 64)**

The PFD finds no significant evidence related to environmental impact and regulatory issues, and NCWR did not file exceptions on this point.

### **4. Disparate Bargaining Power Conclusions (PFD at 47 – 48)**

Although the Judge finds that Corsicana has disparate bargaining power over the Ratepayers due to the wholesale customers' lack of alternative sources of water, he concludes that the evidence does not support a finding that Corsicana abused its disparately greater bargaining power.<sup>56</sup> Ultimately, Judge Newchurch found there was no need to determine if Corsicana has monopoly power, because the Ratepayers failed to prove Corsicana had abused such power, *assuming* it existed.

The Judge goes beyond that, however, and expresses concern that an economist was not called as a witness, which he explained hindered his ability to determine if Corsicana possesses monopoly power.<sup>57</sup> The Judge's concern about the lack of an economist should be viewed in light of the Commission's rule which places the burden of proof for this public interest hearing solely on Petitioners. Ratepayers argue in Exceptions that the Judge should have found the disparate bargaining power was evidence of monopoly power.<sup>58</sup> However, Ratepayers did not offer testimony from an economist and therefore failed in their burden of proof and persuasion. Corsicana supports the conclusion reflected in the PFD, that it is unnecessary to decide if the City possesses monopoly power because the Ratepayers failed to carry their burden of proof to establish *abuse* of monopoly power, even when given the benefit of the doubt as to the existence of such monopoly power. The Judge has proposed COL 22: "The Ratepayers have failed to show under the factors set out in 30 TAC § 291.133(a)(3) that Corsicana's protested rates evidence Corsicana's abuse of monopoly power in its provision of water service to them." Corsicana submits that proposed Findings of Fact 24 through 63 provide reasoned support for

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<sup>55</sup> NCWR Exceptions at 30.

<sup>56</sup> PFD at 47.

<sup>57</sup> PFD at 48.

<sup>58</sup> NCWR Exceptions at 20.

this Conclusion of Law, and therefore fully addresses and appropriately disposes of the Ratepayers' claims.

**B. Changed Conditions on Which the Rate Change is Based (PFD at 48 – 50 and FOF 65 - 68)**

Under 30 TAC § 291.133(a)(3)(B), the Commission may consider if the seller failed to reasonably demonstrate the changed conditions that are the basis for the change in rates in order to decide if the seller abused monopoly power. Although Judge Newchurch rejected portions of the evidence presented by Corsicana that proved the City had reasonably demonstrated the changed conditions that were the basis for the change in rates, he ultimately concluded that the \$1 million shortfall in the City's Utility Fund constituted a changed condition that established a reasonable basis for increasing its water rates.

Ratepayers' argue in their Exceptions that Corsicana's alleged need for additional operating reserves (*i.e.*, to reverse the Utility Fund shortfall) is a cost of service issue, which the Judge should have rejected as proof of a changed condition.<sup>59</sup> The Commission should reject this argument which rests on the faulty assumption that any evidence that has a dollar amount associated with it is a "cost of service" matter. Corsicana submits that the Utility Fund shortfall, along with evidence of other changed conditions with dollar amounts associated with them, reasonably demonstrated that Corsicana justified the rate increase. The cost associated with those changed conditions was not offered to prove the costs were just and reasonable, which would be the standard in a cost of service review, but rather to illustrate the reason the changed conditions justified a rate increase.

Ratepayers' exceptions on this point also highlight the inconsistencies in their arguments. It was NCWR that offered into evidence the McLain Report which was provided to them to demonstrate changed conditions, and which was admitted for that limited purpose. Their argument in Exceptions that the evidence of changed conditions, which is found in their own exhibits, should now be disregarded because it is "cost of service", is simply not persuasive.

The following excerpts from the McLain Rate Study<sup>60</sup> demonstrate the changed conditions that formed the basis for the change in rates:

- **The water and wastewater enterprise fund is in poor financial condition.** The

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<sup>59</sup> NCWR Exceptions at 12.

<sup>60</sup> NCWR Ex. 24, Section 1.3 – Executive Summary.

finance department estimates the City ended FY 2008 with only \$92,246 in operating reserves. This equates to only 3 days of expenditures. Furthermore, it is estimated that the City will end FY 2009 with a negative operating balance. The City should strive to maintain at least 90 days of expenditures in the operating reserve balance at all times.

- **This will require that revenues will need to increase over the next three years in order to strengthen the financial condition.** These rate increases are as follows: 10/01/2009 – 15%; 10/01/2010 – 4%; 10/01/2011 – 2%. This will have the effect of increasing operating reserves to 34 days by 09/30/2010, to 62 days by 09/30/2011, and finally to the targeted reserve level of 90 days by 09/30/2012. (Actually it will be 92 days).
- **However, the recommended rate design (Alternative 3) will increase revenues slightly differently over the next three years.** These overall rate increases are as follows: 10/01/2009 – 9.54% \* \* \* This will have the effect of increasing operating reserves to 16 days by 09/30/2010.
- **Table 1.1<sup>61</sup> Key Findings – Required Rate Increases Necessary.** Illustrates the need to increase revenues from rates based on existing and planned debt payments and to achieve the targeted operating reserves.

The remainder of the McLain rate studies that were admitted into evidence – which makes up the vast majority of those studies – deal with cost allocation and rate design issues, which are cost of service matters that are expressly irrelevant to this public interest proceeding,<sup>62</sup> as Judge Newchurch explains in the PFD. Based upon the Judge’s agreement with Mr. Stowe’s assessment that the McLain Rate Study should be given no evidentiary weight, the following summary of evidence offered by the Ratepayers at hearing, that is *in addition* to the McLain Studies, is provided to support the Judge’s conclusion that the Utility Fund shortfall is persuasive and credible evidence that Corsicana reasonably demonstrated the changed conditions that are the basis for increasing the City’s water rates. Corsicana also submits that the following evidence provides *additional* support for concluding that Corsicana reasonably demonstrated the changed conditions that are the basis for increasing the City’s water rates.

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<sup>61</sup> NCWR Ex. 24 at 5.

<sup>62</sup> 30 TAC § 291.133(b)

At a July 30, 2009 Town Hall Meeting, Corsicana presented information to all customers concerning the changed conditions that necessitated a rate change.<sup>63</sup> Foremost among the reasons for the rate change was the Utility Fund budget shortfall of \$1 million. In the six years prior to 2009, revenues in the Utility Fund<sup>64</sup> had increased 34% while expenses had increased 46%. The failure to increase water rates (base and volumetric) from 2000 to 2006<sup>65</sup> placed the City in “catch-up mode.” In 2008, even though the City implemented a 15% across-the-board rate increase, reduced departmental budget, eliminated one employee, and made no capital purchases, the revenues in the Utility Fund still did not cover expenses. In addition water use had been declining, with the highest consumption occurring in 2006, but had declined or been flat since 2007.<sup>66</sup> Corsicana hired Mr. McLain to *advise* the City on what rates would be necessary to allow expenses to be covered, but it was the Council that set the rates, not Mr. McLain. It is important to note that Ms. Standridge recommended to the Council that the rates be *less than McLain* recommended, but still sufficient to provide the necessary revenues to the City’s Utility Fund.<sup>67</sup> While Corsicana reduced Utility Fund expenses as much as possible, it was explained at the Town Hall meeting that the City had to maintain sufficient staff and supplies to run the 24/7 water and sewer treatment operations.

The Town Hall Meeting handout also demonstrated the expected change in annual revenue based on the rate proposal as of July 20, 2009, by customer type.<sup>68</sup> For water services, the projected increase in revenue was 9% for wholesale customers, nursing homes/assisted living facilities, commercial customers (200,000 gallons), and industrial (6” meter) customers; 10% or higher for industrial (10”), schools, residential irrigation sprinkler, and commercial customers (50,000 gallons), and apartment complexes; and 3-4% for residential customers. By contrast, the other source of revenue for the Utility Fund - wastewater rates - were projected to increase much more significantly (12% to 32%).

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<sup>63</sup> NCWR Ex. 23.

<sup>64</sup> As explained in the Citizen’s Guide for the July 30, 2009 Town Hall Meeting, the Utility Fund is a separate accounting system for water and sewer services provided by Corsicana. It allows the City to track the revenue and cost of providing service, and to study and justify the rates charged to both the residents of the City and the wholesale customers.

<sup>65</sup> NCWR Ex. 23 at NCWR 000179.

<sup>66</sup> NCWR Ex. 23 at NCWR 000177 and Corsicana Ex. 1 (Standridge Direct) at 5:17.

<sup>67</sup> NCWR Ex. 23 at NCWR 000175.

<sup>68</sup> NCWR Ex. 23 at NCWR 000183.

In addition to this evidence sponsored by the Ratepayers, Corsicana City Manager Connie Standridge testified that among the “changed conditions” that were the basis for the 2009 Rate Change, was the fact that the Utility Fund revenues had not covered expenses in three of the previous six years, and in years when that was positive, it was only by a narrow margin.<sup>69</sup> All the evidence concerning the changed conditions is subsumed under this overarching underfunding problem. Ms. Standridge’s testimony is supported by the Utility Fund data found in the information packet handed out at the July 30, 2009 Town Hall Meeting.<sup>70</sup> In 2008, the year prior to the rate increase, Utility Fund *expenses exceeded revenues* by \$793,164.<sup>71</sup> In 2009, the City was also faced with water consumption that was, at best flat (not changing), existing debt service that would increase through 2011<sup>72</sup> and proposed additional debt of \$18,100,000,<sup>73</sup> The existing debt included the cost of construction of a 36” raw water line from the Richland Chambers Reservoir to Lake Halbert at a cost of approximately \$13,630,000.<sup>74</sup> Also included in the proposed debt at the time of the 2009 Rate Change was the cost of designing the expansion of the Lake Halbert Treatment Plant, at a cost of approximately \$2,000,000. Finally, the Corps of Engineers unilaterally<sup>75</sup> undertook work at the Navarro Mills Reservoir using Federal Stimulus funds, and informed Corsicana that its share of the cost for that work would be \$2,600,000.<sup>76</sup> Although the City hoped it would not have to pay the Corps for that work, it has been unsuccessful in overturning the Corps’ decision that it must pay for the work and the bonds to cover that were issued at the end of May 2011.<sup>77</sup> Corsicana must meet the needs of its wholesale

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<sup>69</sup> Corsicana Ex. 1 at 5: 11-25. The narrow margin was evident in 2008-09 when revenues exceeded expenses by only \$27,470. NCWR Ex. 23 at 3 (\$13,326,429 minus \$13,298,959).

<sup>70</sup> NCWR Ex. 23 at 3.

<sup>71</sup> NCWR Ex. 23 at 3 (2007-08 revenues = \$11,911,140 compared to expenses = \$12,704,304); and Corsicana Ex. 1 at 5:15-16.

<sup>72</sup> Corsicana Ex. 32 at p. 28 (Table 2.14 Components of the Cost of Service, Existing Water & Wastewater Supported Debt) Totals in last column.

<sup>73</sup> Corsicana Ex. 32 at 29 (Table 2.15 Recap of Planned Revenue Debt): \$2,100,000 in Series 2010 debt with annual debt service payments of \$292,878 beginning in 2011; and \$16,000,000 in Series 2015 Debt, with annual debt service of \$1,338,869 beginning in 2016.

<sup>74</sup> Corsicana Ex. 1 (Standridge) at 3: 6 – 10; see also Corsicana Ex. 32 at p. 28 (“C.O. Series 2007, with debt service starting at \$1,292,067 in 2008 and increasing above that amount through 2016).

<sup>75</sup> Tr. 633 (Standridge) (“the Corps of Engineers began a project at Navarro Mills Reservoir for which Corsicana had no control and they delivered a bill to pay for that work.”)

<sup>76</sup> Tr. 648 (Standridge) (“Also a changed condition was the notification by the Corps of Engineers that they had received stimulus funding in the amount of about \$10 million to do work on unplanned maintenance on the Navarro Mills Reservoir. We were notified by them that our portion of that would be 25 percent pursuant to our agreement with the Corps of Engineers, and that amount would be about \$2.6 million.”)

<sup>77</sup> Tr. 709 (Standridge).

and retail customers, in accordance with applicable TCEQ regulations.<sup>78</sup> That requires capital investment to meet capacity requirements as its wholesale obligations increase over time – at the request of its wholesale customers.<sup>79</sup> The Protested Rate was needed to generate sufficient revenue to enable Corsicana to make capital improvements necessary to meet its contractual obligations to its wholesale customers and the requirements of its retail customers and continue to meet its regulatory obligations<sup>80</sup> even as conditions changed.<sup>81</sup>

In 2009, Corsicana was faced with utility revenues that did not cover utility expenses, existing debt service that would be increasing, proposed additional debt to enable it to meet its wholesale water contractual obligations and serve its retail water customers, while experiencing declining water consumption. For each of these reasons, which reasonably demonstrate the changed conditions known to Corsicana at the time of the 2009 Rate Change, the rates were increased.<sup>82</sup>

Ratepayers continue to argue in their Exceptions, as they did at hearing and in closing arguments, that the McLain Rate Studies establish the existence of a subsidy from the City's water services for the benefit of the City's wastewater service. It is inescapable, however, that the only way to determine if there is such a subsidy is to undertake a cost of service analysis which would allow the examination of the allocation of common utility expenses and operating reserves between the City's water and wastewater services. As the Judge has found, that line of inquiry is simply not permitted in this public interest hearing. Petitioners argue in Exceptions that the Judge got it wrong in excluding evidence related to "wastewater" cost of service evidence because the exclusion should be limited to water service costs. This argument ignores the fact that municipal utilities have common costs that have to be allocated between water and wastewater, and cost allocation is a cost of service or revenue requirement process. This argument also ignores the obvious – in order for Petitioners to begin to analyze whether there was a subsidy, they would have to examine the costs and revenues of *both* water and wastewater services – and costs and revenues are cost of service matters. Ratepayers' argument would lead to the absurd result of admitting evidence concerning wastewater cost of service while excluding

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<sup>78</sup> Corsicana Ex. 2 (Mullins Direct) at 7: 21-22.

<sup>79</sup> Corsicana Ex. 2 (Mullins Direct) at 7:22 – 24.

<sup>80</sup> Corsicana Ex. 2 (Mullins Direct) at 7:14-16.

<sup>81</sup> Corsicana Ex. 2 (Mullins Direct) at 7:24 – 28.

<sup>82</sup> Corsicana Ex. 1 at 5: 9 – 25.

evidence concerning water cost of service during the public interest hearing on a wholesale water rate appeal. The Commission's rule should not be interpreted to lead to this outlandish result.

The PFD examines each argument presented by Ratepayers in Closing Arguments and the Exceptions rehash and present slight variations on those same arguments. The ALJ has thoroughly analyzed and rejected Petitioners' arguments; accordingly, Corsicana respectfully urges the Commission to adopt the PFD and enter an Order finding that Corsicana reasonably demonstrated the changed conditions that were the basis for the change in rates.

**C. Revenue Requirement and Rate Computation Methodology Changes (PFD at 50 – 58 and FOF 69 – 73)**

The third factor that may be considered in determining whether the seller abused monopoly power is if the seller changed the computation of the revenue requirement or rate from one methodology to another. Although the ALJ found that Corsicana did not change its revenue requirement methodology, he found that the City's adoption of an inclining block volumetric rate was a change in rate design that equates to a change in rate computation methodology which he concluded was not abusive.<sup>83</sup> The Ratepayers argue in Exceptions that the Judge should have found the change in rate design evidences abuse of monopoly power.<sup>84</sup> Corsicana urges the Commission to reject that argument because it rests on the misguided notion that the protested rate demonstrates wholesale customers are being discriminated against in comparison to the average residential in-city ratepayer – which is a legal theory rejected by the Judge, as discussed elsewhere in these Replies.

Corsicana did not file exceptions on this issue because the ALJ's ultimate conclusion that there is no abuse of monopoly power is correct. However, the City does not agree that it changed the computation of the revenue requirement or rate from one methodology to another.<sup>85</sup> The rates charged by Corsicana to its wholesale customers pre- and post-2009 include a base rate and a volumetric rate, the same as the City charges its inside-city retail customers. The base rate continues to be determined by meter size and includes the gallonage reflected in the Rate Ordinance, and the volumetric rate applies to all usage above and beyond the gallons included in the base rate. Although the volume of water included in the base rate changed for all customers except those with 5/8" or 3/4" meters, that indicates the rate, not the methodology, for determining

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<sup>83</sup> PFD at 50 and FOF 69.

<sup>84</sup> NCWR Exceptions at 26.

<sup>85</sup> Corsicana Ex. 1 at 6:2-20.

the base rate changed. While the rate design for the volumetric rate now includes an inclining block or tiered rate, the *methodology* of computing the volumetric rate did not change. The wholesale customers' contracts require that the wholesale rate be the same as the rate charged to retail customers residing inside Corsicana, and that methodology continues to be honored by the City with the 2009 Rate Ordinance, and hence, Corsicana respectfully disagrees with the Judge's conclusion that it reflects a change in methodology.<sup>86</sup>

The inclining block or tiered volumetric rate is charged to all customers based upon consumption. NCWR's argument that Corsicana changed the rate methodology rests on the erroneous assumption that the Appellants are entitled to be charged the same rate as *residential* customers which is contrary to both the contracts and historical practice. That this is NCWR's argument is highlighted by the following passage from Mr. Ivey's testimony:

for years [Ratepayers] had accepted a rate equal to Corsicana's retail customers, but now the Ratepayers are paying more than most of Corsicana's retail customers. The Ratepayers pointed out that their own retail customers would now be required to pay volumetric rates as high as \$5 or \$6 per 1,000 gallons, compared to the \$3 that most of Corsicana's retail customers enjoyed.<sup>87</sup>

The problem with Mr. Ivey's argument is that the wholesale Ratepayers were charging their retail customers volumetric rates more than – and in some instances *much more than* -- \$3.00 prior to the 2009 Rate Change.<sup>88</sup> In other words, the inclining block rate did *not* result in the disparity between Corsicana's average residential customer's volumetric rate and the retail volumetric rate charged by the wholesale customers – that disparity already existed. The 2009 Rate Ordinance which changed the rates to an inclining block did not change *methodology* but only changed the rate. Changing the rate does not evidence abuse of monopoly power.

#### **D. Other Valuable Consideration Received Incident to the Contracts (PFD at 58 – 59 and FOF 74)**

The PFD reflects the ALJ's conclusion that the Ratepayers did not address whether they or Corsicana received other valuable consideration incident to the contract and therefore failed to carry their burden of proving that Corsicana abused monopoly power. The Judge also finds that

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<sup>86</sup> Id.

<sup>87</sup> NCWR Ex. J at 18: 1-5.

<sup>88</sup> See, Corsicana Ex. 30. (the Pre-2009 Volumetric Rates charged to retail customers were as follows: Angus \$5.45; Blooming Grove - \$4.97; Chatfield - \$4.69; Corbet - \$4.90 to \$5.10; Frost - \$8.21; Kerens - \$6.50; MEN - \$5.00 to \$5.50; Navarro Mills - \$6.33; Rice - \$4.96; and Community Purdon & Retreat - \$4.32 and Beaton Lake - \$3.62).

Corsicana's arguments on this point are too general to allow him to conclude that the Ratepayers received valuable consideration. While Corsicana does not quarrel with the Judge's conclusion on this factor, the Judge's analysis concerning the Standard Contract<sup>89</sup> highlights the valuable consideration received by those Ratepayers who signed the Standard Contract. For example, the Ratepayers repeatedly sought and obtained the contract term and volume of water they wanted from the City;<sup>90</sup> Section 4.03(d) permits the Ratepayers to obtain water from another source;<sup>91</sup> the Standard Contract limits Corsicana's ability to change its rates to no more frequently than annually, which is a much more favorable provision for the wholesale customers than earlier contracts;<sup>92</sup> and the Standard Contract extends the time for payment to 25 days after issuance of the bill, which contrasts with the original or earlier contracts which gave the wholesale customers only 10 days to pay.<sup>93</sup> Corsicana submits this analysis would support additional findings that the Ratepayers received valuable consideration incident to the contracts, which further supports the ultimate conclusion that Corsicana did not abuse monopoly power.

**E. Incentives Necessary to Encourage Regional Projects or Water Conservation (PFD at 59 – 60 and FOF 75 – 77)**

The fifth factor that may be considered in determining if the seller has abused monopoly power is incentives necessary to encourage regional projects or water conservation measures.<sup>94</sup> The Judge finds that the protested rates did not encourage regional projects, but the inclining block volumetric rates encourage water conservation, including encouraging wholesale customers to search for and repair leaks, which is consistent with TCEQ and Texas Water Development Board policy. The PFD concludes that Corsicana did not abuse monopoly power by adopting the inclining block rates.

Ratepayers argue in Exceptions that the 2009 Rate Increase does not encourage conservation for wholesale customers.<sup>95</sup> It is important to remember when analyzing this factor that Corsicana's wholesale rates are the same as its inside city retail rates – in accordance with most of the Contracts and the parties' historical course of dealings. So, when the City adopted

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<sup>89</sup> PFD at 42 – 43.

<sup>90</sup> FOF 53 and PFD at 42

<sup>91</sup> FOF 54.

<sup>92</sup> PFD at 42.

<sup>93</sup> PFD at 43.

<sup>94</sup> 30 TAC § 291.133(a)(3)(E).

<sup>95</sup> NCWR Exceptions at 30.

an inclining block volumetric rate, which no one disputes encourages conservation among high volume retail customers (to the extent their demand is elastic), the wholesale customers were required to be charged the same rate structure. While Corsicana conceded it would be difficult for the wholesale customers to conserve enough (or encourage their retail customers to conserve enough) to reduce their usage to the first or second tier volumetric rate, the higher rates did encourage the wholesale customers to search for and repair leaks, as explained in the PFD. The Judge correctly concludes that reducing line losses is a conservation measure, and therefore the evidence does not support finding that Corsicana's inclining block volumetric rate evidences abuse of monopoly power.

**F. Corsicana's Obligation to Meet Federal and State Drinking Water Standards (PFD at 61-62 and FOF 78)**

The sixth factor that may be considered in determining whether Corsicana abused monopoly power is the seller's obligation to meet federal and state drinking water standards. The PFD fairly describes Corsicana's argument and evidence concerning its need to meet minimum water system capacity requirements.<sup>96</sup> However based upon the Judge's overarching conclusion that anything associated with cost of service is outside the scope of the proceedings, he declines to find that the City's efforts to adhere to the Commission's minimum capacity requirements<sup>97</sup> supports his conclusion that Corsicana did not abuse monopoly power. No party filed exceptions as to this issue, but the analysis in the PFD provides ample grounds for entering findings of fact – even without mentioning costs – that would further support the conclusion that Ratepayers failed to prove Corsicana abused monopoly power.

**G. Rates Charged in Texas by other Sellers of Water for Resale (PFD at 62 – 63 and FOF 79 – 82)**

The seventh factor that may be considered in determining whether Corsicana abused monopoly power is the rates charged in Texas by other wholesale sellers of water. As the ALJ explains in the PFD,<sup>98</sup> the persuasive evidence demonstrates that Waxahachie's volumetric rate for wholesale customers is \$3.45 per 1,000 gallons, or \$0.20 higher than Corsicana's third tier volumetric rate, \$3.25. Lake Granbury Surface Water and Treatment System provides wholesale

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<sup>96</sup> PFD at 61 – 62.

<sup>97</sup> In response to TCEQ's finding that Corsicana was not in compliance with the 0.6 gpm per connection rule, prior to implementation of the 2009 Rate Change, Corsicana prepared and planned the construction of a new water treatment plant at Lake Halbert (LHTP).

<sup>98</sup> PFD at 62 – 63.

treated water at an average rate of \$3.97 per 1,000, also significantly higher than Corsicana's third tier volumetric rate. Rice buys water from Ennis at an effective rate of \$5.50 per 1,000 gallons, which is substantially higher than the effective rate Rice pays to Corsicana, \$3.389 per 1,000 gallons. In other words, the rates charged by other sellers of water for resale in Texas do not support a finding that Corsicana abused monopoly power by adopting the 2009 Rate Change.

Ratepayers' argue that the rates charged by other sellers of water does not support the 2009 Rate Increase.<sup>99</sup> That argument misses the point. The rule is clear – the rates charged by other sellers of water when compared to Corsicana's rate, cannot support a finding that Corsicana abused monopoly power. Ratepayers' Exceptions would seem to invite an inquiry into the reasonableness and justness of Corsicana's rates – which is not surprising since that is a cost of service matter, which is outside the scope of this proceeding. Corsicana avers that the Ratepayers' Exceptions on this point should be denied, and instead the Commission should adopt the PFD and the proposed order submitted by the ALJ.

#### **H. Comparison of Corsicana's Retail Rates and Ratepayers' Retail Rates Due to Corsicana's Wholesale Rates (PFD at 63 – 69 and FOF 83 – 92)**

The final factor that may be considered in determining if the seller has abused monopoly power is to compare Corsicana's rates for water service charged to its retail customers to the rates the purchaser charges its retail customers *as a result of* the wholesale rate the seller demands from the purchaser, in order to determine if the rate impacts the retail customer less.<sup>100</sup> The rate comparison relied upon by the Judge under this factor was calculated by determining the average cost per 1,000 gallons that a Ratepayer would have to recover from its average retail customer due to the protested rate charged by Corsicana, which was then compared to what Corsicana's retail customers pay Corsicana for the same amount of water. That rate analysis demonstrates that Corsicana's retail customers pay an average of \$5.43 per 1,000 gallons, while the Ratepayers' retail customers pay only \$3.45 or less per 1,000 gallons *due to* the wholesale rate Corsicana charges its wholesale customers. The Judge concludes that this straightforward apples-to-apples rate comparison directly addresses the 30 TAC § 291.133(a)(3)(H) concern and does not indicate an abuse of monopoly power by Corsicana.

The Ratepayers' argue in their Exceptions that the PFD incorrectly analyzes §

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<sup>99</sup> NCWR Exceptions at 32.

<sup>100</sup> 30 TAC § 291.133(a)(3)(H) and PFD at 64.

291.133(a)(3)(H).<sup>101</sup> These exceptions rely on a comparison of the average *bills* charged by the Ratepayers to their retail customers versus Corsicana’s average *bill* to its residential customers. This analysis was considered and found to be “meaningless” by Judge Newchurch, because it does not allow a determination of what portion of the Ratepayers’ retail rate is *a result of* the protested wholesale rate. Stated another way, the Ratepayers must recover in their retail rates other costs, such as their own operation and maintenance costs and debt service, that do not *result from* the wholesale rate charged by Corsicana. Therefore, comparing what the Ratepayers charge to their customers simply does not conform to this rule factor.

In their Exceptions, the Ratepayers continue to argue that only the *volumetric* rates charged by Corsicana to its average residential customer, should be compared to the blended volumetric rate charged to the Ratepayers, because comparing the effective rate of the average residential customer who consumes 6,000 gallons to the wholesale customers who consume millions of gallons is, in their opinion, “illogical and does not aid the analysis.”<sup>102</sup> There are at least two reasons the Ratepayers’ argument fails to conform to the requirement of the rules and should be rejected: first, when the rule refers to the “rate” charged, that word must be given the meaning assigned to it in the definition section, which is that rate means “every compensation and charge demanded or charged for water service.”<sup>103</sup> Ratepayers simply ignore this provision by trying to remove the base rate from the analysis and including only on the volumetric rate. Second, this public interest factor requires a comparison of retail rates charged to Corsicana’s retail customers and the retail rate *resulting from* the wholesale rate that the Ratepayers’ charge to their retail customers. The Ratepayers’ argument fails to conform to this rule requirement because it compares the volumetric rate paid by the *average residential* customers, instead of the volumetric rate paid by the City’s retail customer, to the average volumetric rate charged to wholesale customers. As Corsicana maintained throughout the hearing, the wholesale customers are not now, and have never been, entitled to *pay* the same amount as the *average residential* customer. They are charged the same rates as inside city retail customers, and any comparison of what they pay must consider the volume of water purchased. An analysis of the volumetric rates charged to the City’s high volume retail customers shows that they, like the high volume wholesale customers, pay an average blended volumetric rate of \$3.25 per 1,000 gallons.

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<sup>101</sup> NCWR Exceptions at 32-33.

<sup>102</sup> NCWR Exceptions at 34; see also PFD at 68 – 69.

<sup>103</sup> See, 30 TAC s 291.3 (37) Definition of Rate.

However, that analysis is unnecessary under the rule. The Judge correctly analyzed the evidence under this factor and reached the only reasonable conclusion based upon the persuasive evidence – Ratepayers’ analysis is meaningless and should not be considered in determining if the protested rate adversely affects the public interest.<sup>104</sup>

**I. Monopoly Abuse and Public Interest Conclusion (PFD at 70 and COL 22 – 24)**

In support of his conclusion that the Ratepayers failed to carry their burden of proving that Corsicana’s rates evidence an abuse of monopoly power in its provision of water service, and hence that Ratepayers have failed to prove that the protested rate adversely affects the public interest, Judge Newchurch provides a summary of the key findings from the PFD,<sup>105</sup> including:

- Although the Ratepayers have few or no alternative sources of water, the evidence does not support a finding that the limited alternatives resulted from Corsicana’s abuse of monopoly power.<sup>106</sup>
- Corsicana reasonably demonstrated the changed conditions that are the basis for the change in rates.<sup>107</sup>
- Corsicana did not change its methodology for computing the revenue requirement, but the inclining block volumetric rate was an “apparent” change in rate design methodology, which does not evidence abuse of monopoly power.<sup>108</sup>
- The inclining block rates encourage conservation.<sup>109</sup>
- The average rate per 1,000 gallons charged to the Ratepayers are lower than the rates charged by other wholesale providers in the same region of Texas.<sup>110</sup>
- The Ratepayers’ average retail customer pays \$3.45 or less on average for 1,000 gallons of water *due to* Corsicana’s wholesale rates, while Corsicana’s average retail customer pays \$5.43 per 1,000.<sup>111</sup>

The Ratepayers’ Conclusion in Exceptions<sup>112</sup> re-hashes many of its earlier arguments, which were analyzed and rejected by the Judge, while continuing to assert matters that are

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<sup>104</sup> PFD at 69.

<sup>105</sup> PFD at 70.

<sup>106</sup> 30 TAC § 291.133(a)(3)(A).

<sup>107</sup> 30 TAC § 291.133(a)(3)(B).

<sup>108</sup> 30 TAC § 291.133(a)(3)(C).

<sup>109</sup> 30 TAC § 291.133(a)(3)(E).

<sup>110</sup> 30 TAC § 291.133(a)(3)(G).

<sup>111</sup> 30 TAC § 291.133(a)(3)(H).

<sup>112</sup> NCWR Exceptions at 34.

indisputably cost of service matters that are irrelevant to this public interest proceeding. Specifically, Ratepayers argue – without citations to evidence -- that Corsicana recovers only fixed costs in its base rates, and only variable costs in the volumetric rates. Based on that bald assertion, Ratepayers argue it should make no difference to Corsicana whether a customer purchases a thousand or a million gallons because “the payment for usage covers the cost.” From this unsubstantiated (cost of service) premise, the Ratepayers reiterate their now debunked legal theory that the tiered volumetric rate structure evidences discrimination against wholesale customers, because they don’t vote, and because the City intended to subsidize its retail water customers and wastewater service. The Judge has correctly concluded that this argument is meritless because the evidence persuasively demonstrates that the August 2009 rate change does not evidence the seller’s abuse of monopoly power under any of the eight factors listed in 30 TAC § 291.133(a)(3)(A), and therefore the Petitioners’ failed to carry their burden of proving the protested rate adversely affects the public interest.

**IX.**  
**TRANSCRIPTION COSTS**  
**(PFD at 71 – 72 and FOF 93 – 103)**

No party filed exceptions to Judge Newchurch’s recommendation that each party<sup>113</sup> pay 1/11<sup>th</sup> of the cost of the transcript and copies supplied to the SOAH Judge and the Commission. Attached is an affidavit from Kennedy Reporting, Inc. which indicates that the costs for the two transcripts totaled \$4,720.00. Corsicana respectfully requests that the Commission modify Finding of Fact 103 and Ordering Paragraph 2 to state that the 1/11<sup>th</sup> of the cost equals \$429.00.

**X.**  
**CONCLUSION**

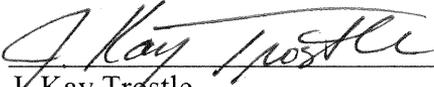
Each of the Ratepayers bears the burden of proof to establish that the protested rate adversely affects the public interest. The Petitioners chose to bring this Appeal based only on 30 TAC § 291.133(a)(3), which requires proof that the protested rate evidences Corsicana’s abuse of monopoly power in its provision of water service. The eight factors that may be considered under 291.133(a)(3), and the Ratepayers’ novel ninth factor, are thoroughly discussed in the PFD, Corsicana’s Initial and Reply Brief, and in these Replies to Exceptions. Judge Newchurch has prepared a thorough PFD that fairly and accurately reflects the evidence adduced at hearing

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<sup>113</sup> Corsicana and each of the ten Petitioners.

and reaches the well-reasoned conclusion that NCWR has failed to carry its burden of proof that Corsicana abused monopoly power by adopting the protested rate. Corsicana respectfully urges the Commission, upon consideration of the PFD, and the arguments of the parties, to adopt the Proposal for Decision and issue an Order finding that the protested rate does not adversely affect the public interest, and deny the Petitions with prejudice.

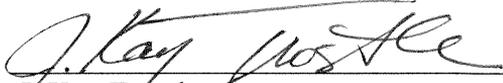
Respectfully Submitted,

By:   
\_\_\_\_\_  
J. Kay Trostle  
State Bar No. 20238300

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing document has been sent via facsimile, first class mail or by hand-delivery to Administrative Law Judge Newchurch, counsel for Petitioner Ratepayers, Office of Public Interest Council and the Commission's Executive Director on this 26<sup>th</sup> day of September, 2011.

  
\_\_\_\_\_  
J. Kay Trostle

**AFFIDAVIT OF  
LORRIE SCHNOOR**

STATE OF TEXAS                   §  
   §  
COUNTY OF TRAVIS           §

My name is Lorrie Schnoor. I am of sound mind, have never been convicted of a felony, am capable of making this affidavit, am over eighteen (18) years of age, and am fully competent to testify to the matters stated herein. I have personal knowledge of each of the facts stated herein, and each is true and correct.

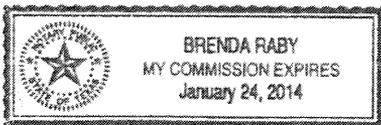
1. I am President and Owner of Kennedy Reporting Service. My business address is 8140 N. Mo-Pac Expressway, Suite 2-120, Austin, Texas 78759.
2. The total amount paid by the Navarro County Wholesale Ratepayers to Kennedy Reporting Service for an original and two copies of the transcript in SOAH Docket No. 582-10-1944 and TCEQ Docket No. 2009-1925-UCR for the five-day hearing held March 29 -31, April 1 and April 12, 2011 was \$6,986.25. This included the original transcript which was filed with the TCEQ Chief Clerk, an electronic copy for SOAH, and an electronic copy for the Terrill firm. The total charge included 1.25 hours of overtime, plus a \$27.50 administrative fee per volume. Our regular rate for additional copies is \$1.75 per page; therefore the cost of the original transcript provided to TCEQ and one copy provided to SOAH is \$4,720.00.

This concludes my statement.

*Lorrie Schnoor*  
[printed name] Lorrie Schnoor

STATE OF Texas                   §  
   §  
COUNTY OF Travis           §

SUBSCRIBED AND SWORN TO before me this 22<sup>nd</sup> day of September, 2011.



*Brenda Raby*  
Notary Public

(Notary Seal)

The City of Corsicana's Reply to NCWR's and E.D.'s Exceptions to the Proposal for Decision SOAH Docket No. 582-10-1944, TCEQ Docket No. 2009-1925-UCR