

DOCKET NO. 2022-0763-UCR-E

IN THE MATTER OF THE	§	BEFORE THE
REQUEST BY THE CITY OF AMES	§	
UNDER TEXAS WATER CODE	§	
§ 13.041 FOR AN EMERGENCY	§	TEXAS COMMISSION ON
ORDER TO COMPEL THE CITY	§	
OF LIBERTY TO PROVIDE	§	
SEWER SERVICE IN LIBERTY COUNTY	§	ENVIRONMENTAL QUALITY
TEXAS	§	

**CITY OF LIBERTY’S RESPONSE BRIEF TO AMES’ INITIAL BRIEF
TO MODIFY THE COMMISSION’S EMERGENCY ORDER**

COMES NOW, the City of Liberty, Texas, (“Liberty”), and files this Response Brief to the City of Ames’ (“Ames”) Initial Brief to Modify the Texas Commission on Environmental Quality’s (“TCEQ’s”) Emergency Order dated June 29, 2022 (the “Emergency Order”) (collectively, “Ames’ Brief”). In a letter accompanying the Emergency Order, TCEQ provided Liberty and Ames an opportunity to brief TCEQ on requests to affirm, modify, or set aside the Emergency Order by July 15, 2022, with response briefs to initial requests due by July 29, 2022. Therefore, this brief is timely filed. Liberty files this Response Brief to request TCEQ deny Ames’ proposed modifications to the Emergency Order, and in support thereof, shows as follows:

I. Ames’ Brief attempts to distract TCEQ from the core problem: Ames’ neglected sewer system.

Ames’ Brief attempts to distract from the underlying issue at hand: Ames’ continued neglect of its collection system and the resulting excess wastewater flows Ames continues to send Liberty. Instead of addressing TCEQ’s regulatory interest in lasting solutions to Ames’ infrastructure failures, it instead distracts with a strawman request. As such, TCEQ should decline Ames’ invitation to: (1) ask TCEQ to wade into the waters of a contract dispute issue (which is the subject of ongoing litigation); and (2) force a tangential Certificate of Convenience and Necessity

(“CCN”) issue onto the Emergency Order regarding Ames’ own service obligations to a portion of its current customers (i.e., those sewer customers that are located within the Ames-Minglewood Water Supply Corporation (“WSC”) separate water CCN (the “Customers at Issue”)). The focus of the Emergency Order should be limited to TCEQ’s statutory charge for such issues: “ensuring . . . environmental protection.” Tex. Water Code § 13.041(a) (“The commission may regulate water and sewer utilities within its jurisdiction to ensure safe drinking water and environmental protection.”). TCEQ should maintain its focus on regulatory compliance and issue an Emergency Order that supports compliance with state and federal law and points to ongoing Texas Pollutant Discharge Elimination System (“TPDES”) permit compliance. In doing so, TCEQ need not entertain the distractions and contract-related issues requested in Ames’ Brief.

II. Ames’ contorted argument asks TCEQ to make a contract determination and ignore TCEQ’s own requirements in the Emergency Order.

In order for TCEQ to adopt Ames’ proposed modifications to the Emergency Order, TCEQ would first need to make a determination on a dispute involving the *Liberty-Ames Waste Water Disposal Contract (As Amended)* (the “Contract”).¹ Specifically, TCEQ would be required to accept Ames’ argument that there is no longer a live Contract between Liberty and Ames (despite TCEQ’s Emergency Order requiring Liberty to continue accepting flows, as required under the Contract), and then as a result, speculate on which of Ames’ current retail sewer customers might *Ames* decide to cut off, under the theory that Ames would no longer have an obligation to serve such retail customers in the absence of a Contract. Ames also ignores the fact that Liberty is obligated to continue receiving Ames’ wastewater flows, as expressly required by the Emergency Order.

¹ Ames is asking TCEQ to decide a contract dispute, an issue that is before the district court. The TCEQ has jurisdiction over wastewater. Tex. Water Code §§ 26.011; 26.027(a).

The underlying fictions at the root of Ames' proposed modifications are exposed below, but Ames' Brief requires the TCEQ to accept the fundamental premise that *Ames* will shut off its own retail customers.² Such a threat runs counter to TCEQ's interest in finding solutions for long term environmental protection and compliance with Chapter 26 of the Texas Water Code. In short, Ames purports to hold hostage the Customers at Issue for no other reason than to jettison them from Ames' retail customers and send them over to Liberty, using a TCEQ Emergency Order to help facilitate such plan. Ames' trick-shot request is neither convincing nor productive to a permanent solution needed for environmental protection and permit compliance.

Although TCEQ need not step into the shoes of the judiciary to exercise its regulatory authority, because Ames' Brief calls upon an analysis of the Contract and the parties' actions under such Contract, it is necessary to unveil the fragile underpinnings of Ames' position.

First, Liberty never terminated the Contract, and it remains valid and in effect. Liberty's January 5, 2022 suspension notice is a remedy available under the Contract (the other remedy is termination of the Contract itself).³ The Contract remains in full force and effect.

² Ames' Brief would have TCEQ accept the following syllogism: (1) Ames can only provide service to the Customers at Issue so long as the Contract is valid (because in the Contract, Liberty assents to Ames' retail service to the Customers at Issue); (2) Ames now declares the Contract invalid because Liberty issued a service termination notice to Ames; (3) Ames will *sua sponte* cut off the Customers at Issue from Ames' sewer collection system; therefore: (4) TCEQ should step in now – because of such a hypothetical Ames service cut-off – and force new obligations on Liberty. The strained logic is built upon several “what-ifs” and calls into question whether Ames plans to cause its own environmental harm and service disruptions.

³ Liberty's Br. to Modify Emergency Order Ex. A, at 15 (“Failure to act expeditiously, as determined by the circumstances of each instance, to cure the material non-conformance following notice of such non-conformance shall constitute a material breach of this contract, for which LIBERTY may terminate this contract and seek all remedies at law or in equity to enforce this contract. . . **PROVIDED, HOWEVER, that should AMES be remiss in its duty to operate and/or maintain the system in accordance with this contract or in a manner consistent with sound engineering principles, and such failure to properly operate the system becomes a danger to the continued proper operation of any portion of the LIBERTY system, then immediately following such written notice of the foregoing circumstances LIBERTY may take whatever steps are necessary to preserve the integrity of its own system, including, but not limited to disconnecting service.** PROVIDED, HOWEVER, LIBERTY may assert a right to terminate or abridge service under this section of the contract following the above notice only after AMES has been afforded a reasonable opportunity to remedy such operational or maintenance related neglect or errors and re-establish the operation and maintenance of the system in a manner consistent with sound engineering principles and AMES has failed to do so.”) (emphasis added).

Secondly, Ames and Liberty are still operating under the Contract. Ames still sends its wastewater to Liberty. Liberty still accepts and treats Ames' wastewater flows. Ames still pays Liberty base rates for the flows.⁴ Furthermore, pursuant to TCEQ's Emergency Order, Liberty is **required** to continue accepting Ames' sewer flows. Ames' Brief would require TCEQ to ignore the effect of TCEQ's own Emergency Order compelling Liberty's continued acceptance of sewer flows from its wholesale customer.

The third Ames argument is that the Customers at Issue are at risk of service suspension. Ames provides wastewater service to the Customers at Issue, and while unstated, Ames' implied position is that **Ames** will cut them off from retail service based upon Ames' inaccurate and opportunistic misreading of the Contract. As described above, Ames still has authority under the Contract to continue its retail service to the Customers at Issue and Liberty has not released nor revoked Liberty's consent for Ames to serve such Customers at Issue. As such, TCEQ should not accept Ames' far-fetched premise that the Customers at Issue are at risk of service suspension.⁵

III. TCEQ's proposed Emergency Order is sufficient to cover Ames' request without any changes sought by Ames.

The existing Emergency Order is already sufficient to cover continued service of Ames' wastewater flows (irrespective of their source—from Customers at Issue or otherwise). The Emergency Order requires Liberty to continue to “provide to Ames continuous and adequate sewer service . . .” TCEQ's Emergency Order at 3. Under the Emergency Order as it stands, Ames will continue to collect and send flows from its collection system over to Liberty, and the Emergency

⁴ Ames is not paying Liberty for the rates associated with the Total Acceptable Volumes (“TAV”), but such nonpayment of TAV volumetric-based rates is the subject of the District Court litigation.

⁵ Ames also states (without citation or support) that “Liberty has made significant/detailed plans to provide retail sewer service to areas within Liberty's CCN that Ames is currently serving. . .” and then concludes that Liberty should “provide details on its plans to provide retail sewer service to areas within Liberty's CCN that Ames is currently serving.” Ames' Initial Br. to Modify the Comm'n's Emergency Order at 7. Such unsupported red herrings assume some Liberty plot to take over Ames' customers, which is both inaccurate and immaterial to the Emergency Order.

Order does not differentiate between Ames' own retail customers (nor should it). As such, the Emergency Order need not undergo additional changes tied to the Customers at Issue. Further delay and avoidance of Ames' needs to upgrade its infrastructure will not advance the parties' or TCEQ's interest in a long-term sewer system fix. Additionally, delays place at risk TPDES compliance and obligates Liberty to continue to shoulder the burden of Ames' excess flows. TCEQ should not entertain Ames' manufactured controversy over the Customers at Issue, and should accordingly decline Ames' request to modify the Emergency Order.

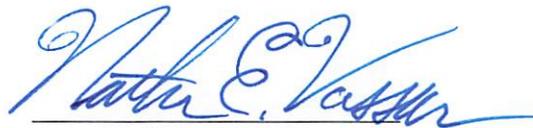
PRAYER

WHEREFORE, PREMISES CONSIDERED, Liberty respectfully requests the Commission deny Ames' Initial Request to Modify the TCEQ's Emergency Order. Instead, Liberty respectfully requests the TCEQ accept Liberty's proposed modifications to the Emergency Order and seeks any and all relief to which it may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been forwarded to the following attorneys via TCEQ's electronic filing case management system and electronic mail on the 29th day of July, 2022:

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