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To the City Council of the City of Texarkana, Texas:

Dear Councilmembers:

The question has arisen whether the acquisition of the TexAmericas Center-East Water System as described in the proposed "Economic Development Water System Transfer Contract" with TexAmericas Center implicates Article XVI, Section 1 of the City Charter. (The current working draft of that contract is enclosed.)

In my opinion, as the term "public utility" is used in Article XVI, Section 1 of the City Charter, TexAmericas Center is not a "public utility", nor is the TexAmericas Center-East Water System a "public utility". Therefore, the proposed "Economic Development Water System Transfer Contract" with TexAmericas Center and the acquisition of the TexAmericas Center-East Water System does not implicate the provisions of Article XVI, Section 1 of the City Charter.

## Texas Law

Texarkana is a "Home Rule" city. *See Wiggins v. City of Texarkana*, 239 S.W.2d 212, 213 (Tex.Civ.App.—Texarkana 1951), *aff'd* 246 S.W.2d 642 (Tex. 1952). Home Rule cities are afforded broad powers under the Texas Constitution and statutes. TEX. CONST. art. XI § 5; TEX. LOC. GOV'T CODE § 51.072 (West 2008); *Proctor v. Andrews*, 972 S.W.2d 729, 733 (Tex. 1998). Home Rule cities have all the powers of self-government; they look to the State Legislature not for grants of power, but for limitations on it. *Dallas Merchs. & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 490-91 (Tex. 1993).

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Accordingly, they have all the powers of the state not inconsistent with the state Constitution, the state general laws, or the city's charter. *City of Galveston v. State*, 217 S.W.3d 466, 469 (Tex. 2007).

Generally, for a city to act in an official capacity, all that is required is a vote of its city council. *City of Big Spring v. Bd. of Control*, 404 S.W.2d 810, 813 (Tex. 1966); *see also City of Coppell v. General Homes Corp.*, 763 S.W.2d 448, 452 (Tex. App.—Dallas 1988, writ denied). There is no inherent right to hold an election on municipal policy. *Parks v. Elliot*, 465 S.W.2d 434, 438 (Tex. App.—Houston [14th Dist.] 1971, writ ref'd n.r.e.).

Municipalities have broad powers to own, operate, purchase, and construct their water supply and distribution systems. TEX. LOC. GOV'T CODE §§ 552.001-.002 (West 2005 & Supp. 2010). Neither Sections 552.001-.002 require a city-wide vote. *Id.* Sections 552.012 and 552.014 outline the power of a municipality to contract with non-profits corporation and water districts to construct and purchase water supply systems. TEX. LOC. GOV'T CODE §§ 552.012 & .014. Neither of these sections require a city-wide vote. *Id.* Certain sections in Chapter 552 do require city-wide votes, *see* TEX. LOC. GOV'T CODE §§ 552.016, .018-.020, but these sections are inapplicable to the proposed TexAmericas Center acquisition since they deal with either the city contracting with a water district or private corporation for the supply of water to the city, or turning over ownership and control of the city's ~~its~~ water system to another entity.

While Sections 552.001, 552.002, 552.012, and 552.014 of the Local Government Code contain certain powers for a city to acquire a water system, broader authority is granted for such acquisition under Section 791.026 of the Texas Government Code, which is a section contained within the Interlocal Cooperation Act. That section provides,

**Sec. 791.026. CONTRACTS FOR WATER SUPPLY AND WASTEWATER TREATMENT FACILITIES.**

(a) A municipality, district, or river authority of this state may contract with another municipality, district, or river authority of this state to obtain or provide part or all of:  
(1) water supply or wastewater treatment facilities; or (2) a lease or operation of water supply facilities or wastewater treatment facilities.

(b) The contract may provide that the municipality, district, or river authority obtaining one of the services may not obtain those services from a source other than a contracting party, except as provided by the contract.

(c) If a contract includes a term described by Subsection (b), payments made under the contract are the paying party's operating expenses for its water supply system, wastewater treatment facilities, or both.

(d) The contract may: (1) contain terms and extend for any period on which the parties agree; (2) require the purchaser to develop alternative or replacement supplies prior to the expiration date of the contract and may provide for enforcement of such terms by court order; and (3) provide that it will continue in effect until bonds specified by the contract and any refunding bonds issued to pay those bonds are paid.

(e) Where a contract sets forth explicit expiration provisions, no continuation of the service obligation will be implied.

(f) Tax revenue may not be pledged to the payment of amounts agreed to be paid under the contract.

(g) The powers granted by this section prevail over a limitation contained in another law.

Chapter 791 of the Government Code is the cited authority in the proposed "Economic Development Water System Transfer Contract" with TexAmericas Center. Section 791.026 does not require a city-wide election prior to acquiring such a system.

### **City Charter**

City charters may impose additional limitations on the exercise of municipal power not otherwise contained in Texas state law. *See Ayala v. City of Corpus Christi*, 507 S.W.2d 324, 326 (Tex. App.—Corpus Christi 1974, no writ). *See also* Texarkana, Tex., City Charter art. I § 2.

Article XVI, Section 1 of the City Charter describes the power of the City to own and operate whatever public utilities the Council may deem wise. Texarkana, Tex., City Charter art. XVI § 1 (1960). However, the Charter limits this power by providing that, before acquiring or constructing the "public utility", a city-wide election must be held. *Id.* Thus, a vote of the City's electorate is a prerequisite to acquiring or constructing any "public utility" as that term is used in the Charter. This begs the question: what is the interpretation to be given to the term "public utility" as used in the Article XVI, Section 1 of the City Charter?

Provisions of a city charter are construed according to the rules governing the interpretation of statutes generally. *Rossano v. Townsend*, 9 S.W.3d 357, 363 (Tex. App.—Houston [14th Dist.] 1999, no pet.). Matters of statutory construction (i.e., interpretation) are questions of law. *Johnson v. City of Fort Worth*, 774 S.W.2d 653, 656 (Tex.1989). In interpreting municipal legislative acts that reference state law, referenced state law may be viewed in interpreting the municipal act. *See San Antonio v. Schneider*, 787 S.W.2d 459, 462-63 (Tex. App.—San Antonio 1990, writ denied).

The source law referenced for Article XVI, Section 1 of the City Charter reads,

**State law reference**— Authority of city to operate public utilities, Vernon’s Ann. Civ. St. art. 1175(13).

Accordingly, article 1175(13) should be construed to determine the interpretation of “public utility” as used in the Charter.

Another rule of statutory interpretation is that statutes are construed in the light of the entire body of law existing at the time of their enactment. *City of Ingleside v. Kneuper*, 768 S.W.2d 451, 454 (Tex. App.—Austin 1989, writ denied). Therefore, interpreting or construing Article XVI, Section 1 of the City Charter should be analyzed in light of the legal meaning of “public utility” as used in 1960 when the City Charter was adopted.

Article 1175 — the statute referenced in Article XVI, Section 1 of the City Charter — was originally enacted by the Texas Legislature in 1913, one year after the Home Rule Constitutional Amendment to the Texas Constitution. The Home Rule Amendment generally provides that Texas cities have all the powers of self government not reserved to the federal or state governments. TEX. CONST. art. XI § 5. Article 1175 specifically enumerated some of the powers that the Texas Legislature wanted to expressly grant to Home Rule municipalities. As originally enacted, article 1175 was not divided into numbered subdivisions. Act of April 9, 1913, ch. 147, 1913 Tex. Gen. Laws 307 (repealed and reenacted 1963). However, when the Texas civil statutes were codified in 1925 by Vernon’s Revised Civil Statutes, article 1175 was divided into numbered subdivisions 1 through 36. V.R.C.S. art. 1175 (Vernon’s 1925). The statute was not amended or recodified until 1963; thus, the 1925 codification was the version of article 1175 in effect when the City Charter (and, correspondingly, Article XVI, Section 1 of the Charter), was adopted. *See* V.T.C.S. art. 1175, Historical Notes (West 2010).

An analysis of article 1175 as it existed in 1960 together with judicial interpretation of the term “public utility” from that same time period demonstrates that the term does not include potable or fresh water systems. First, article 1175, subdivision 13, as it existed in 1960, addresses the acquisition of “public utilities” and expressly lists the types of entities to which reference is made; however, nowhere does the word “water” appear (nor any phrase which could even tangentially be interpreted as a water system). The statute does list “sewage plant”, but makes no reference to clean water supply. After the express listing of public utilities, the subdivision states that it applies to “any other public service or public utility”. The rule of statutory construction called *ejusdem generis* provides that when a general term follows specific terms, the general term should be interpreted of like kind with the specific terms that preceded it. *Ayala*, 507 S.W.2d at 327. And, upon closer examination, it becomes apparent why the Legislature left “water” out of article 1175(13): the acquisition of water works and water supply systems is addressed in a different section of article 1175. Subsection 11 is a separate subdivision of article 1175 which addresses the acquisition of water works and water supply systems; it outlines the ability of a city to own, operate, and improve its water supply system. V.R.C.S. art. 1175(11) (Vernon’s 1925). Had the Texarkana Charter drafters intended a fresh or potable water system to be included within the definition of a “public utility,” they could have easily referenced article 1175(11) along with article 1175(13) when adopting Article XVI, Section 1 of the Charter, but no such reference exists. Therefore, a court applying the rules of construction and interpretation would likely conclude that the Charter’s drafters did not intend “public utility” as used in Article XVI, Section 1 of the Charter, to apply to fresh or potable water systems.

Judicial interpretations in effect at the time of the Charter’s adoption hold that mere physical equipment is not sufficient to constitute a “public utility”. See *Moore v. Logan*, 10 S.W.2d 428, 434 (Tex. App.—Beaumont 1928, writ dismissed). Instead, courts from that time period (and still today) interpret “public utilities” as persons in the legal sense of the word. In other words, a public utility is an organization, a business, or another incorporated entity. See, e.g., *Ayala*, 507 S.W.2d 324, 327; see also 12 McQuillin Mun. Corp. § 34:78 (3d ed.) (explaining that the term “public utility” refers to the “entire business”). Thus, when a city attempted to regulate a gas pipeline within the municipal boundaries, the court held that it did not serve the public and was not a public utility as V.R.C.S. article 1175 contemplated that term. *City of San Benito v. Kinder Morgan Tejas Pipeline*, 411 F.Supp.2d 683, 687 (S.D. Tex. 2006). Additionally, and although Chapter 552 of the Local Government Code does not itself define “public utility,” definitions of “public utility” from other, analogous statutes reach the same result. For example, in the Texas Water Code, the definition of “public utility” specifically excludes equipment or facilities owned for treating and transporting water. TEX. WATER

CODE § 13.002(23) (West 2008 & Supp. 2010). Likewise, the Tax Code and Utility Code both define public utility to mean “a person.” TEX. TAX CODE § 182.025(e)(3) (West 2008 & Supp. 2010); TEX. UTILITY CODE § 51.002(8) (West 2007 & Supp. 2010). Finally, a defining characteristic of a public utility is that it is subject to public regulation and control. *GulfState Utilities v. State*, 46 S.W.2d 1018, 1027 (Tex. App.—Austin 1932, writ ref’d). The TexAmericas Center-East Water System does not have that characteristic.

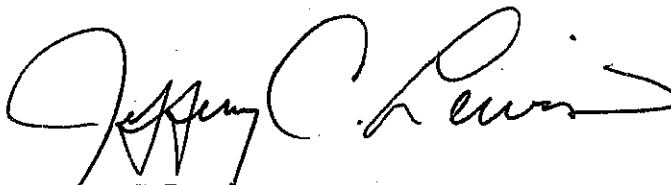
### Conclusion

An analysis of the source law for Article XVI, Section 1 of the Charter, together with judicial interpretation of the legal meaning of “public utility”, confirms that the term “public utility”, as used in Article XVI, Section 1 of the Charter, does not include the potable or fresh water system which the Council may consider acquiring when voting on the proposed “Economic Development Water System Transfer Contract” with TexAmericas Center, and therefore the City Charter provision in question is not implicated.

This opinion is only given for use under attorney-client privilege for the City Council of Texarkana, Texas, and its authorized officers and employees as the City Council shall designate. It is not intended to be relied upon by any other persons.

(This opinion letter has no bearing on the proposed sale of water to TexAmericas Center. The current working draft of that proposed contract is also enclosed.)

With regards,



Jeffery C. Lewis

### Enclosures

- draft of “Economic Development Water System Transfer Contract” with TexAmericas Center
- draft of “Water Supply Contract” with TexAmericas Center