

RESOLUTION NO. R-2011-5

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF TYLER, TEXAS FINDING THAT TALL TIMBERS UTILITY COMPANY, INCORPORATED, (TTUC) FAILED TO COMPLY WITH THE REQUIREMENTS OF RESOLUTION NO. R-2009-27; ORDERING TTUC TO PERMANENTLY PROVIDE UTILITY SERVICE TO CERTAIN SUBDIVISIONS LOCATED INSIDE TTUC'S CERTIFICATED SERVICE AREA AND WITHIN THE CITY OF TYLER; AND REQUIRING DELIVERY OF THIS RESOLUTION TO TTUC AND THE DEVELOPER.

WHEREAS, Tall Timbers Utility Company, Inc. (TTUC) holds Sewer Certificate of Convenience and Necessity (CCN) No. 20694, issued by the Texas Commission on Environmental Quality (TCEQ), which authorizes TTUC to be the exclusive provider of retail sewer utility service within part of the City of Tyler, and pursuant to state law, TTUC has filed a tariff with the City of Tyler specifying the terms and conditions on which TTUC will extend sewer utility service to new subdivisions located inside TTUC's certificated service area; and

WHEREAS, TTUC uses the public rights-of-way owned and controlled by the City of Tyler to provide sewer service to the Subdivisions and other customers inside the City of Tyler without a franchise agreement at the sufferance of the City of Tyler; and

WHEREAS, the City of Tyler is the regulatory authority having a statutory duty and Charter authorization to review, approve, interpret and enforce retail sewer utility tariffs within its municipal boundaries, including regulatory authority over TTUC; the City of Tyler is authorized by TTUC's tariff, the Charter and Ordinances of the City of Tyler, and state statutes to hear and resolve complaints and appeals brought by TTUC's customers, including developers, home builders and retail customers regarding TTUC's rates and services, including the terms and conditions upon which TTUC will extend sewer utility services to areas not previously served; and,

WHEREAS, Elk River Addition Unit 1 at Cumberland Gap and Harpers Ridge Addition Unit 3 at Cumberland Gap (Subdivisions) are residential subdivisions located inside TTUC's CCN boundaries and the City of Tyler's corporate boundaries; Subdivisions were developed by Geaux/Cumberland Gap Joint Venture No. 1 (Developer), who constructed a sanitary sewer collection system to serve the Subdivisions as part of the Developer's quest to obtain sewer utility service from TTUC; and,

WHEREAS, the City of Tyler issued building permits for the construction of five homes in the Subdivisions without knowledge that sewer service was unavailable to the Subdivisions; homes have been built and sold in the Subdivisions; Developer, builders and homeowners sought retail sewer service from TTUC, but TTUC refused to extend sewer service to these homes; once the Director of Public Utilities and Public Works (Director) became aware that TTUC was not providing service to the Subdivisions, the Director issued a moratorium on the issuance of building permits until the matter could be resolved; and,

WHEREAS, the Director received requests from citizens of Tyler, with interest in property located inside the Subdivisions, to review the charges being demanded by TTUC and the other reasons claimed by TTUC to justify its refusal to extend service to the Subdivisions; the Director decided to treat these requests as appeals of TTUC's requirements for extending service as authorized by TTUC's tariff; and,

WHEREAS, on September 9, 2009, the City of Council, after reviewing the findings of the Director, adopted Resolution No. R-2009-27 (Exhibit A), which ruled on the appeals, finding that TTUC was not authorized to charge "capacity fees," directing TTUC to prepare revised line extension agreements (LXAs) consistent with the resolution and submit the revised LXAs to the Director of Utilities (Director) on or before October 9, 2009, and directing TTUC to execute the revised LXAs after the completion of any appeal of the resolution to the Texas Commission on Environmental Quality (TCEQ); and

WHEREAS, TTUC began providing sewer service to the existing houses in the Subdivisions on an interim basis on or about September 9, 2009; and

WHEREAS, on October 14, 2008, TTUC appealed the decision of the City Council to the TCEQ seeking to overturn the City Council's order, but TTUC withdrew its appeal with prejudice on September 7, 2010, before TCEQ could affirm the decision of the City Council; and

WHEREAS, TTUC failed to submit revised LXAs to the Director by October 9, 2009, and has not executed revised LXAs with the Developer to extend service to the Subdivisions, which places TTUC in violation of the City Council's prior orders contained in Resolution No. R-2009-27, and

WHEREAS, the City of Tyler has incurred reasonable costs of \$31,400 for the services of rate consultants, accountants, auditors, attorneys, and engineers to investigate the complaints made against TTUC, and to advise and represent the City of Tyler during the investigation, decision and appeal to TCEQ; and

WHEREAS, it is the obligation of the City of Tyler to enforce its prior decision regarding the appeal despite TTUC's refusal to comply with the decision.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TYLER, TEXAS, THAT:

PART 1: All statements made above are hereby found to be true and correct and are incorporated in their entirety. The decision of the City Council of the City of Tyler is being made based on the information available to it, which does not include information requested from, but not supplied by, TTUC.

PART 2: The City Council finds that TTUC has failed to comply with the requirements of Resolution No. R-2009-27 by failing to submit revised LXAs to the Director for review and by failing to execute revised LXAs consistent with Resolution No. R-2009-27.

PART 3: The City Council orders TTUC to provide service to the Subdivisions on a permanent basis. TTUC must connect to all service locations (lots) in the Subdivisions when requested by the owner of the service location. No LXAs will be required or allowed as a condition of extending service and no further action is required by the Developer to obtain service.

PART 4: Any refusal by TTUC to connect qualified customers requesting service inside the Subdivisions will be considered to be a violation of this resolution and Resolution No. R-2009-27, a failure by TTUC to provide continuous and adequate service, a violation of Section 15-263 of the Code of Ordinances, City of Tyler, Texas, for the unauthorized use of public right-


of-way, and a violation of the Charter of the City of Tyler. Each day after the specified compliance date shall be considered a separate violation until TTUC comes into compliance.

PART 5: The City Council, pursuant to Texas Water Code §13.084, orders TTUC to reimburse the City of Tyler the amount of \$31,400 for the reasonable costs of services provided by experts in investigating, presenting evidence, advising and representing the City and assisting with litigation. This amount shall be paid to the City of Tyler by November 1, 2010, unless the City Manager authorizes a later date. Because TTUC withdrew its appeal before obtaining a ruling by TCEQ, the City Council disallows any recovery by TTUC of these costs through rates.

PART 6: Copies of this Resolution shall be sent to TTUC and the Developer.

PART 7: That this Resolution shall take effect immediately upon its adoption.

PASSED AND APPROVED this 26th day of January, 2011.


BARBARA BASS, MAYOR OF
THE CITY OF TYLER, TEXAS

ATTEST:


CASSANDRA BRAGER, CITY CLERK



APPROVED:


GARY C. LANDERS, CITY ATTORNEY