



DETROIT
**Water & Sewerage
Department**

Water Board Building
735 Randolph Street
Detroit, MI 48226

Office of General Counsel
Phone: 313-224-4758
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November 2, 2018

HAND DELIVERED

Ms. Sue McCormick
Chief Executive Officer
Great Lakes Water Authority
735 Randolph Street
Detroit, MI 48226

RE: Great Lakes Water Authority's Notice of and Demand for Arbitration under Regional
Water Supply System Lease

Dear Ms. McCormick,

Please find enclosed City of Detroit's Answer and Counter Notice of and Demand for
Arbitration Under Regional Water Supply System Lease.

Thank you for your attention.

Very truly yours,

Debra N. Pospiech, Esq.
Chief Administrative Officer and General Counsel

DNP

Enclosure

cc: Bill Wolfson, Chief Information and Compliance Officer, GLWA
Randal Brown, General Counsel, GLWA

GREAT LAKES WATER AUTHORITY

Claimant and Counter-Respondent,

And

CITY OF DETROIT, through its Water and
Sewerage Department,

Respondent and Counter-Claimant

CITY OF DETROIT'S
ANSWER AND COUNTER NOTICE OF AND DEMAND FOR ARBITRATION UNDER
REGIONAL WATER SUPPLY SYSTEM LEASE

TO: Great Lakes Water Authority
735 Randolph Street
Detroit, MI 48226
Attention: Sue McCormick, Chief Executive Officer

ANSWER

BACKGROUND AND AUTHORITY'S DEMAND:

On October 19, 2019, the Great Lakes Water Authority (the "Authority"), served upon the Detroit Water and Sewerage Department ("DWSD") a notice of and demand for arbitration (the "Demand") pursuant to Sections 7.2 and 7.3 of the Water and Sewer Services Agreement ("WSSA") between the City of Detroit (the "City") and the Authority and Section 8.2 of Regional Water Supply System Lease ("the Lease") between the City and Authority.

Respondent DWSD states the following as its answer to the Authority's Demand:

The Demand seeks arbitration to "finally resolve which 24-inch and larger water mains are the City's responsibility to operate and maintain as Detroit Local Water Facilities because those mains support the Local Water System only." The Authority seeks relief in the form of (a) an amendment to the Lease, changing the scope of the Leased Water Facilities to conform to the "actual use" of the Leased Water Facilities by the Authority; (b) a requirement that the City

pay all costs associated with the maintenance and operation of the Detroit Local Water Facilities, including any mains and facilities transferred to the City by the requested arbitration, from January 1, 2016; and (c) a determination that the Authority has the right to use the Detroit Local System to serve wholesale customers without cost, except for the violation of Performance Standards.

ANSWER:

1. The Authority's Demand and both Section 7.2 of the WSSA and Section 8.2 of the Lease require any arbitration to be conducted in accordance with the Uniform Arbitration Act, Act 371, Public Acts of Michigan, 2012. (Act "371"). Act 371 requires any demand for arbitration to be accompanied by a complaint. MCL 691.1685(2). The notice filed with the City failed to include a complaint. The City does not waive that requirement.

2. Further, although the Demand refers to arbitration provisions under the Lease and Section 7.2 of the WSSA, the Demand made is for arbitration under the provisions of Section 7.3 of the WSSA, which contemplates appointment of an engineering arbitration panel for disputes arising from physical, technical and mechanical issue, while the relief sought is an amendment of the Lease to change the definition of Leased Water Facilities.

In the Lease, the Leased Water Facilities are defined, in pertinent part, to include: "collectively, all of the City's right, title and interest in and to that portion of the real and personal property comprising a part of the Water System and owned by the City and providing service to wholesale customers of the Regional Water System and Retail Water Customers up to the point of connection to the Detroit Local Water Facilities, including without limitation the land, buildings, water intakes, pump stations, storage facilities and other structures, fixtures

(including meters and transmission mains) and improvements...all as more fully set forth in Schedule A attached hereto....” [emphasis added].

Section 3.3 of the Lease provides:

“In order to allow the Authority to acquire the Regional Water System under Act 233 [Act No. 233, Public Acts of Michigan, 1955, as amended. MCL 124.281, et seq.] and in consideration of the Lease Payment and other terms of this Lease, the City leases the Leased Water Facilities to the Authority and the Authority leases the Leased Water Facilities from the City for the Term. By virtue of this Lease, the City intends to convey to the Authority by lease a leasehold interest in all of the City’s right, title and interest in and to the Leased Water Facilities in order to enable the Authority to operate the Leased Water Facilities as provided herein. The City and the Authority acknowledge that the description of the Leased Water Facilities set forth in Schedule A has been compiled with the best available information, has been reviewed by their and DWSD’s respective staff and consultants and is believed to be reasonably complete and accurate. The City and the Authority agree to cooperate in continuously reviewing the use and description of the Leased Water Facilities and in the event that it is determined that it is determined that the description of the Leased Water Facilities needs to be amended to **conform to the actual use** of the Leased Water Facilities or to correct or update the description of the Leased Water Facilities to make it more accurate, the [parties] are authorized to modify Schedule A as necessary by executing an amendment thereto to accomplish any of the foregoing purposes and such amendment shall become part of the Lease; provided that **no such amendment shall be delivered if the effect of such amendment is to impair the ability of the Authority to operate the Leased Water Facilities as provided herein.**” [emphasis added]. The relief sought in the Demand falls squarely under the terms of the Lease. As a threshold matter, the Authority

seeks a modification of terms of the Lease and an interpretation of the term “actual use” in the context of transmission lines, which were all leased to the Authority under the terms of the Lease. The arbitration provisions of the Lease do not contemplate the use of an engineering arbitration panel to resolve disputes under the Lease.

In its Demand, the Authority is seeking a major modification of the terms of the Lease which used a general assumption that mains 24 inches and larger, regardless of location, would be treated as Regional Water Facilities. In the Lease negotiations, reassignments were contemplated to be the exception and based on functionality. The transmission lines in the City all constitute and are used as part of a regional network. They perform a variety of functions, including the provision of redundancy for water transportation, and uses under both normal and emergency operating conditions. If lines are abandoned, their character as Regional Water Facilities does not change. DWSD is not a wholesale customer of the Authority. The Detroit Retail Customers are customers of the Authority, as illustrated in the definition of Leased Water Facilities. Regardless of the nature of the customer relationship with Detroit users, there are several examples of GLWA transmission mains serving single wholesale customers, including NOCWA, Flint and Wixom. To assert that 24 inch mains located only in Detroit are not Regional Water Facilities runs counter to long-standing practice.

We deny as untrue the application of Section 7.3 of the WSSA to the dispute between the parties. The issues between the parties are not ripe or relevant for resolution through a WSSA Section 7.3 arbitration. The answer to the questions under the Lease will determine whether any disputes remain to be arbitrated pursuant to the WSSA.

3. Because DWSD disputes the Authority’s characterization of the Lease, it rejects any claim for reimbursement of any additional costs associated with the disputed transmission

lines relating back to January 1, 2016. In addition, in no way does the question of retroactive liability for costs of operating and maintaining transmission lines constitute a subject for arbitration by an engineering panel under Section 7.3 of the WSSA. Retroactive liability would be a question, if there is any, to be resolved only under the Lease or Sections 7.1 or 7.2 of the WSSA, and only after the threshold questions described above have been resolved.

4. The WSSA, in Section 3.4 of the WSSA, necessarily granted a license to the Authority to use DWSD distribution lines to supply water to wholesale customers of the Authority, such as the City of Highland Park, who are only served by the Authority through those distribution lines. Since the Detroit Retail Customers are customers of both the Authority and DWSD the Authority needed a license to supply water to that class. The Authority's Demand with respect to the license represents the flip side of the coin with respect to its Demand to recharacterize regional transmission lines as local distribution lines, masking the Authority's true intent to relieve itself of its negotiated obligation to bear the cost of operating and maintaining the regional transmission lines it intentionally leased from the City. Ironically, this Demand confirms that the Authority does "actually use" the lines for which it now wishes to shed responsibility.

COUNTER NOTICE OF, DEMAND FOR ARBITRATION UNDER REGIONAL WATER SUPPLY SYSTEM LEASE, AND COMPLAINT

Pursuant to Section 8.2 of the Lease, the City gives notice of and demands an arbitration award related to issues *that have precedence over* an arbitration of the purported disputes in Authority's Demand. The responses and statements of DWSD contained in the Answer are restated and incorporated in this Counter Notice, Demand and Complaint as if stated herein.

The City seeks an award that confirms that

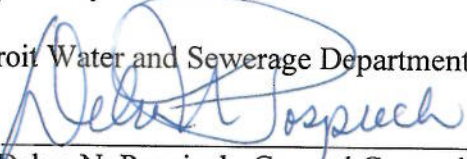
1. The Authority failed to pursue resolution of the purported disputes in its Notice and Demand for Arbitration in accordance with Section 8.1 of the Lease, or, if applicable, in accordance with Section 7.1 of the WSSA, in an equitable and good faith manner and failed to provide reasonable access to any and all non-privileged written records, information and data pertaining to the purported disputes pursuant to Section 8.1 of the Lease.
2. All transmission lines in the Water Supply System are Leased Water Facilities, and are actually used by the Authority if they function or functioned at some time as part of the regional water system transmission network regardless of whether they are wholly or partially located in the City.
3. DWSD requests discovery and the opportunity to seek the testimony of witnesses under oath.
4. DWSD reserves its right to amend or change its answer or its complaint.

From the date of this Notice, the Parties have fifteen (15) days to appoint an arbitrator with experience in the legal interpretation of contractual documents. The Parties' respective panelists will select the third panelist. The City is willing to appoint an arbitrator under Section 8.1 of the Lease to determine which issues are presently subject to arbitration and ripe for that purpose.

Respectfully submitted,

Detroit Water and Sewerage Department

By:


Debra N. Pospiech, General Counsel

Dated: November 2, 2018