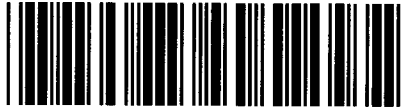




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Item Number: 49

Addendum StartPage: 0

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PETITION OF TRAVIS COUNTY § BEFORE THE STATE OFFICE
MUNICIPAL UTILITY DISTRICT §
NO. 12 APPEALING CHANGE OF §
WHOLESALE WATER RATES §
IMPLEMENTED BY WEST §
TRAVIS COUNTY PUBLIC §
UTILITY AGENCY, CITY OF BEE § OF
CAVE, TEXAS, HAYS COUNTY, §
TEXAS AND WEST TRAVIS §
COUNTY MUNICIPAL UTILITY §
DISTRICT NO. 5 § ADMINISTRATIVE HEARINGS

**WEST TRAVIS COUNTY PUBLIC UTILITY AGENCY'S
RESPONSE TO TRAVIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 12'S
MOTION TO COMPEL THE WEST TRAVIS COUNTY PUBLIC UTILITY AGENCY
RESPONSES TO TCMUD 12'S FIRST REQUEST FOR PRODUCTION NO. 1-13**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

West Travis County Public Utility Agency ("WTCPUA") files this its Response ("Response") to the aforementioned Motion to Compel filed by Travis County Municipal Utility District No. 12 ("TCMUD 12"), seeking to compel responses by the WTCPUA to TCMUD 12's First Request for Production No. 1-13. TCMUD 12's Motion to Compel was filed on or around October 3, 2014. This response is timely filed.

Justification for TCMUD 12's Motion to Compel is incorrectly premised upon the fact that WTCPUA did not request an *in camera* inspection after filing its Index of Privileged Documents under Procedural Rule 22.144(g) of the Public Utility Commission ("PUC"). Further, TCMUD 12 also challenges the WTCPUA's claim of the work-product privilege. However, the motion should be denied because the Procedural Rules of the PUC do not apply to TCMUD 12's First Requests for Production, as expressly stated by the Administrative Law Judge ("ALJ") in his Order No. 4 in this contested case hearing, and the WTCPUA's assertion of the work-product privilege is proper.

I. Request for *In Camera* Inspection Not Required

The ALJ's Order No. 4, dated September 17, 2014, memorialized the prehearing conference held on September 11, 2014, in which the transition of jurisdiction over this docket from the Texas Commission on Environmental Quality ("***TCEQ***") to the PUC was addressed. That Order states that, except as provided in the Order, the procedural rules of the PUC, Chapter 22 of the PUC's rules, were to govern the case from that date forward. One specific exception provided in Order No. 4 was: "*Discovery that was propounded and responded to before September 1, 2014, remains subject to the TCEQ's prior discovery rules.*"¹ TCMUD 12 propounded its First Request for Production to the WTCPUA on July 14, 2014, and responses were provided by WTCPUA on August 13, 2014. Therefore, under Order No. 4, this set of discovery remained subject to the TCEQ's prior discovery rules.

The relevant TCEQ discovery rules are found at 30 Tex. Admin. Code §§ 80.127 and 80.151, which provide that "[t]he Texas Rules of Civil Evidence, as applied in nonjury civil cases in the district courts of this state, shall be followed" and "[d]iscovery shall be conducted according to the Texas Rules of Civil Procedure."² Accordingly, under the Texas Rules of Civil Procedure, a party upon whom discovery has been propounded who wishes to assert a privilege may withhold the privileged materials from the discovery response, but must state that information or material has been withheld, and state the privilege asserted.³ WTCPUA complied with this rule; its response to TCMUD 12's Request for Production 1-13 included the following:

Withholding Statement: Certain information responsive to this Request for Production 1-13 is being withheld under the Attorney-Client Privilege. Certain information responsive to this Request for Production No. 1-13 is being withheld under the Work Product Privilege, TRCP 192.5.

¹ Order No. 4, p. 2 (September 17, 2014) (emphasis added).

² 30 Tex. Admin. Code §§ 80.127 and 80.151 (2014)

³ Tex. R. Civ. Proc. 193.3(a).

Under the Texas Rules of Civil Procedure, after receiving a response from a party responding to discovery that indicates that material has been withheld from production, the party seeking discovery may serve a written request that the withholding party identify the information and material withheld.⁴ TCMUD 12 made such request in its initial Motion to Compel filed on September 19, 2014, and WTCPUA complied with this requirement.⁵

The Texas Rules of Civil Procedure further provide that any party may at any reasonable time request a hearing on an objection or claim of privilege asserted under Tex. R. Civ. Proc. 193. If the court determines that an *in camera* review of some or all of the requested discovery is necessary, that material or information must be segregated and produced to the court in a sealed wrapper within a reasonable time following the hearing.⁶

Clearly, the WTCPUA was not, and is not, required under the Rules of Civil Procedure to file a request for an *in camera* inspection of the withheld materials in order to preserve the claim of privilege to TCMUD 12's Request for Production 1-13. The PUC's discovery rules do not apply to TCMUD 12's First Requests for Production by virtue of the special exception contained within Order No. 4. Rather, the burden is on TCMUD 12 to request a hearing on the claim asserted by the WTCPUA. Thus, TCMUD's request should be denied.

II. Work-Product Privilege

WTCPUA has fully set forth the support for its claim of the work-product privilege in its Response to TCMUD 12's initial Motion to Compel responses to TCMUD 12's First Requests

⁴ Tex. R. Civ. Proc. 193.3(b).

⁵ Further, in the current docket, the parties agreed at the September 11, 2014 Prehearing Conference that for TCMUD's first set of discovery requests, in the event any objection was based solely on a privilege objection and not also on a relevancy objection, the privilege log identifying the withheld materials would be filed by the WTCPUA on September 26, 2014. This agreement was not reflected in Order No. 4, but was stated orally at the preliminary hearing by counsel for the WTCPUA.

⁶ Tex. R. Civ. Proc. 193.4(a).

for Production, filed herein on September 26, 2014, and it reincorporates and reasserts such argument in this Response.

TCMUD 12 bases its argument on the calendar alone, arguing that because the materials were prepared before the WTCPUA board of directors made the decision to change the rates charged to TCMUD 12, and before the contested case was filed, then the litigation was not reasonably anticipated, and the work product privilege did not attach.⁷

However, as set forth in detail in the WTCPUA's response to TCMUD 12's initial Motion to Compel, the WTCPUA reasonably anticipated litigation to arise from the water rate changes on January 31, 2013, when representatives from TCMUD 12 challenged the cost basis for the WTCPUA's rates for the water system purchased from the Lower Colorado River Authority.⁸ Thus, the work-product privilege is fully supported, and an *in camera* review of these privileged documents is unnecessary.

III. Conclusion

TCMUD 12 is not correct when it asserts the applicability of the PUC's discovery rules to the First Request for Production. The applicability of the work-product privilege has been well established by the WTCPUA in its objection and response to Request for Production No. 1-13. Therefore, TCMUD 12's Motion to Compel should be denied, and an *in camera* review of these privileged documents is unnecessary.

WHEREFORE, PREMISES CONSIDERED, the WTCPUA requests that TCMUD 12's Motion to Compel the West Travis County Public Utility Agency Responses to TCMUD 12's First Request for Production 1-13 be denied and that an *in camera* review not be held for the

⁷ Motion to Compel, p. 2 (October 3, 2014).

⁸ See, WTCPUA Response to TCMUD 12's Motion to Compel the WTCPUA's Responses to TCMUD 12's First Requests for Production, pages 8-13, and specifically pages 10-12 that set forth the reasonableness of the belief that litigation was anticipated.

reasons stated herein. The WTCPUA also requests any other relief to which it may show itself justly entitled.

Respectfully submitted,

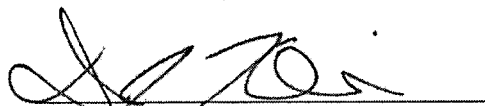
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ATTORNEYS FOR WEST TRAVIS COUNTY
PUBLIC UTILITY AGENCY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was transmitted by e-mail, fax, hand-delivery and/or regular, first class mail on this 7th day of October, 2014 to the parties of record.


DAVID J. KLEIN