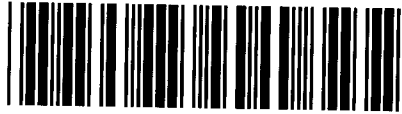




Control Number: 42867



Item Number: 67

Addendum StartPage: 0

SOAH DOCKET NO. 473-14-5138
PUC DOCKET NO. 42857

FILED
2014 OCT 28 PM 12:34
PUC OFFICE

PETITION OF NORTH AUSTIN § BEFORE THE STATE OFFICE
UTILITY DISTRICT NO. 1, §
NORTHTOWN MUNICIPAL UTILITY §
DISTRICT, TRAVIS COUNTY WATER §
CONTROL AND IMPROVEMENT §
DISTRICT NO. 10 AND WELLS § OF
BRANCH MUNICIPAL UTILITY §
DISTRICT, FROM THE RATEMAKING §
ACTIONS OF THE CITY OF AUSTIN §
AND REQUEST FOR INTERIM RATES §
IN WILLIAMSON AND TRAVIS §
COUNTIES § ADMINISTRATIVE HEARINGS

SOAH DOCKET NO. 473-14-5138
PUC DOCKET NO. 42867

PETITION OF NORTH AUSTIN § BEFORE THE STATE OFFICE
MUNICIPAL UTILITY DISTRICT NO. §
1, NORTHTOWN MUNICIPAL §
UTILITY DISTRICT, AND WELLS §
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DISTRICT FROM THE RATEMAKING § OF
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**CITY OF AUSTIN'S MOTION TO STRIKE PREFILED TESTIMONY OF
PETITIONERS NORTH AUSTIN MUD NO. 1, NORTHTOWN MUD, TRAVIS
COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NO. 10, AND WELLS
BRANCH MUD**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES:

COMES NOW, the City of Austin ("Austin"), Respondent in the referenced consolidated administrative appeal of Austin's 2013 wholesale water and wastewater rates to Petitioners, by and through its attorneys, Webb & Webb, Attorneys at Law, and files this, its Motion to Strike Prefiled Testimony of Petitioners North Austin Municipal Utility District No. 1 ("North

Austin”), Northtown Municipal Utility District (“Northtown”), Travis County Water Control and Improvement District No. 10 (“WCID No 10”), and Wells Branch Municipal Utility District (“Wells Branch”). In support thereof, Austin would respectfully state as follows:

I. BACKGROUND

1. On May 20, 2014, the Honorable Pratibha J. Shenoy, Administrative Law Judge (“ALJ”), issued Order No. 9 Memorializing First Joint Prehearing Conference, Consolidating Cases, Adopting Prehearing and Hearing Schedule, Setting Interim Water Rates and Granting City’s Motion to Compel; which established the schedule for the instant consolidated docket. In said Order, Petitioners were obligated to file Petitioners’ prefiled direct case on October 6, 2014.
2. On September 3, 2014 the Honorable Beth Bierman and the Honorable Pratibha J. Shenoy issued Order No. 10, Notice to Parties; that effective September 1, 2014 the above referenced contested case before the State Office of Administrative Hearings (“SOAH”) was transferred from the subject matter jurisdiction of the Texas Commission on Environmental Quality (“TCEQ”) to the jurisdiction of the Public Utility Commission of Texas (“PUC”). Among other notices in Order No. 10, the parties were advised that “all documents and pleadings filed in this case” must meet the PUC’s filing requirements found at P.U.C. Proc R. 22.71 (16 Texas Administrative Code, §22.71). The parties were specifically advised that a 3:00 p.m. filing deadline was in effect, and the Parties were directed to comply with that filing deadline.
3. On September 17, 2014 the ALJs’ convened a telephone prehearing conference and further advised the parties regarding the applicability of the PUC’s filing requirements.
4. On September 17, 2014 the Honorable Beth Bierman and the Honorable Pratibha J. Shenoy issued Order No. 11 Memorializing Second Joint Prehearing Conference and Granting Petitioners’ Motion to Compel. The order indicates that the filing requirements set forth in P.U.C. Proc. R. 22.71 govern this case. The order extended the deadline for Petitioners to file their direct case to October 10, 2014.

5. On September 25, 2014 the Honorable Beth Bierman and the Honorable Pratibha J. Shenoy issued Order No. 12 Granting Petitioners' Second Motion to Compel. The Order extended Petitioners' deadline "to file their direct case" to Friday, October 17, 2014.
6. On October 17, 2014 at approximately 4:15 p.m., Austin's counsel was advised that a copy of Petitioners' Prefiled Testimony was in route to Austin's counsels' office. At approximately 4:58 p.m. a courier arrived with a compact disc ("CD") that allegedly contained Petitioners' Prefiled Testimony. (*See*, Affidavit of Casey Powell, attached as Exhibit "A" to this pleading, and incorporated herein for all purposes.)
7. Also, on Friday, October 17, 2014, when Austin's counsel attempted to retrieve data from the CD that supposedly contained Petitioners' Prefiled Testimony, Austin's counsel discovered that the CD was, in fact, blank.
8. Again on Friday, October 17, 2014, upon discovering the blank CD, Austin's counsel Gwendolyn Hill Webb telephoned Amy Loera, the legal assistant of Petitioners' counsel John Carlton, to advise Petitioners of the blank CD and to inquire when Austin would be receiving Petitioners' Prefiled Testimony. Later, Mr. Carlton called Ms. Webb and represented to Ms. Webb that Petitioners would courier another CD to Austin's counsel's office. Mr. Carlton also referred Ms. Webb to the PUC's exchange website to review Petitioners' prefiled testimony presumably until Petitioners would provide Austin with a copy of their prefiled testimony. (*See*, Affidavit of Gwendolyn Hill Webb, attached as Exhibit "B" to this pleading, and incorporated herein for all purposes.)
9. On October 17, 2014 at approximately 6:10 p.m., an assistant from Petitioners' counsel's office, Amy Loera, arrived at Austin's counsel's office with a CD that contained Petitioners' Prefiled Testimony. On Monday, October 20, 2014 Austin's counsel received a duplicative CD of Petitioners' Prefiled Testimony in the US Mail. (*See* Affidavit of Casey Powell, attached as Exhibit A to this pleading.)
10. Petitioners' filing on the PUC exchange and on the CD's provided to Austin contains no certificate of service of any kind. Moreover, Austin is unable to determine when Petitioners' uploaded their filing to PUC's exchange and whether Petitioners filed any

hard copies of their filing with PUC's docket clerk, including the correct number of hard copies, as ordered by Order No. 11.

II. ARGUMENT

Petitioners' prefiled testimony should be stricken in its entirety because it was not filed timely, and also because the filing is non-complaint with PUC procedural rules in addition to the procedural Orders governing this case. Under P.U.C. Proc. R. §§22.71(i) and 22.74(a), Petitioners were obligated to file their prefiled testimony with the PUC docket clerk *and the parties* on or before 3:00 p.m. on October 17, 2014. Therefore, Petitioners' prefiled testimony was either late; non-compliant both because it was not filed with Austin, and because it was not filed before 3:00 p.m. on October 17, 2014. Petitioners' prefiled testimony as further non-complaint under P.U.C. Proc. R. §22.74(d) because it did not contain a certificate of service of any kind as is required for all documents and pleadings filed *in this case*. In fact, what Petitioners' filing was lacking in any transmittal document that is signed by an attorney of record on behalf of Petitioners [P.U.C. Proc. R. §22.71(e)] and has not yet been formally offered as testimony on behalf of the Petitioners.

Presumably, Petitioners were aware of their grievances with the City of Austin Cost of Service which was developed with their knowledge and consent long before their direct case was due—otherwise they would never have invoked State of Texas wholesale water rate oversight in the first place. Therefore, if the ALJs are going to impose time requirements that are outside the record and contrary to PUC procedural rules on Austin, they must at the very least apply the existing PUC procedural rules and the explicit deadlines in their own orders to Petitioners. To do otherwise would be to insist on addressing Petitioners' concerns while at the same time expressly failing and refusing to provide due process to Austin.

All Austin ratepayers—including Petitioners—are entitled to seek enforcement of the rules of this case that have been imposed on Austin. The parties were specifically warned by the ALJs over a month before Petitioners' deadline that PUC's filing requirements were in effect and would control the case. Austin is entitled to rely on the ALJs' statements and Orders and should not be compelled to conduct discovery on the statements and factual bases thereon contained in

Petitioners' pre-filed testimony unless it must, in order to defend its position in this case. Thus far, Austin has not received very much cooperation from Petitioners, Petitioners delivered a blank disk to Austin's counsel immediately before a weeklong vacation after expiration of their "quiet period". Petitioners' late filed and non-compliant testimony is only the latest example of Petitioners' disregard of the administrative process¹. Therefore, Petitioners' direct case should be stricken in its entirety to save the further expense of this case.

III. REQUEST FOR RELIEF

WHEREFORE PREMISES CONSIDERED, the City of Austin respectfully requests that the Direct Testimony of David Malish, Direct Testimony of Thomas C. Arndt, Direct Testimony of Jay Joyce, and Petitioners' Exhibits 1-4, which was presumably filed on behalf of North Austin Municipal Utility District No. 1, Northtown Municipal Utility District, Travis County Water Control and Improvement District No. 10, and Wells Branch Municipal Utility District be stricken in its entirety. Austin further requests such other and further relief that Austin may show itself entitled.

¹ Contrary to the agreed upon procedural schedule, Petitioners filed a letter notifying the parties that counsel for Petitioners would be "on vacation" from October 18, 2014 to October 26, 2014, and again from December 19 to December 28, 2014, attempting thereby to deprive Austin of the agreed upon discovery period. Had Austin not immediately notified Petitioner after hours on October 17, 2014 of the difficulty with the Prefiled Testimony CD, Austin might not have been able to obtain the documents until today.

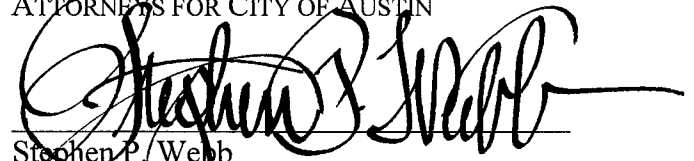
Respectfully submitted,

KAREN KENNARD,
City Attorney

D. CLARK CORNWELL
Assistant City Attorney

WEBB & WEBB
712 Southwest Tower
211 East Seventh Street
Austin, Texas 78767
Tel: (512) 472-9990
Fax: (512) 472-3183
ATTORNEYS FOR CITY OF AUSTIN

By:



Stephen P. Webb
State Bar No. 21033800
s.p.webb@webbwebblaw.com

Gwendolyn Hill Webb
State Bar No. 21026300
g.hill.webb@webbwebblaw.com

Attachments:

Exhibit A- Affidavit of Casey Powell; and
Exhibit B- Affidavit of Gwendolyn Hill Webb

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served via hand delivery, facsimile, electronic mail, overnight mail, US mail and/or Certified Mail Return Receipt Requested on all parties whose names appear on the mailing list below on this 28th day of October, 2014.

FOR THE PUBLIC UTILITY COMMISSION:

1701 N. Congress Avenue, 7th Floor
PO Box 13326
Austin, Texas 78711-3326
Via Electronic Upload and Hand Delivery

FOR THE ADMINISTRATIVE LAW JUDGES:

Honorable Pratibha J. Shenoy
Administrative Law Judge

Honorable Beth Bierman
Administrative Law Judge

State Office of Administrative Hearings
300 W. 15th Street, Suite 504
Austin, Texas 78701
Phone: 512-475-4993
Fax: 512-322-2061
Via Electronic Upload

FOR THE SOAH DOCKET CLERK:

Ms. Monica Luna, Docketing Clerk
State Office of Administrative Hearings
300 W. 15th Street, Suite 504
Austin, Texas 78701
Phone: 512-475-4993
Fax: 512-322-2061
Via Electronic Upload

FOR PETITIONERS:

Mr. Randall B. Wilburn, Attorney at Law
3000 South IH 35, Suite 150
Austin, Texas 78704
Phone: 512-535-1661
Fax: 512-535-1678
rbw@randallwilburnlaw.com

Mr. John Carlton, Attorney at Law
The Carlton Law Firm, PLLC
2705 Bee Cave Road, Suite 200
Austin, Texas 78746
Phone: 512-614-0901
Fax: 512-900-2855
john@carltonlawaustin.com

FOR THE PUC STAFF:

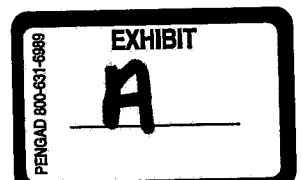
Mr. Hollis Henley, Attorney-Legal Division
Public Utility Commission of Texas
1701 N. Congress Avenue
PO Box 13326
Austin, Texas 78711-3326
Phone: 512-936-7230
Fax: 512-936-7268
Hollis.henley@puc.texas.gov


STEPHEN P. WEBB

PETITION OF NORTH AUSTIN	§	BEFORE THE STATE OFFICE
UTILITY DISTRICT NO. 1,	§	
NORTHTOWN MUNICIPAL UTILITY	§	
DISTRICT, TRAVIS COUNTY WATER	§	
CONTROL AND IMPROVEMENT	§	
DISTRICT NO. 10 AND WELLS	§	OF
BRANCH MUNICIPAL UTILITY	§	
DISTRICT, FROM THE RATEMAKING	§	
ACTIONS OF THE CITY OF AUSTIN	§	
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IN WILLIAMSON AND TRAVIS	§	
COUNTIES	§	ADMINISTRATIVE HEARINGS

PETITION OF NORTH AUSTIN § BEFORE THE STATE OFFICE
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ACTIONS OF THE CITY OF AUSTIN §
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IN WILLIAMSON AND TRAVIS §
COUNTIES § ADMINISTRATIVE HEARINGS

3. I am a paralegal to legal counsel representing Respondent, City of Austin, in the above referenced water rate appeal and wastewater rate appeal.



4. Upon receipt of a compact disc ("CD") at 4:58 p.m. on October 17, 2014 from a courier containing Petitioners' Prefiled Testimony, I inserted the CD into four (4) different office computers. Each computer indicated that the CD was blank.

5. Upon direction from Ms. Webb, who spoke to counsel for Petitioners, I located and downloaded the files that Petitioners' counsel uploaded to the Public Utility Commission ("PUC") exchange website. Each exhibit that Petitioners' uploaded, was "secured" and unable to print with the required date stamp numbering.

6. At approximately 6:10 p.m. on October 17, 2014, an assistant to Petitioners' counsel, who identified herself as Amy Loera, delivered another CD to Austin's counsel. Ms. Loera requested that she take the blank CD back to Petitioners' counsel's office.

7. On Monday, October 20, 2014, Austin's counsel's office received another CD from Petitioners in the US mail.

8. I have read the City of Austin's Motion to Strike Prefiled Testimony of Petitioners attached to this Affidavit and all statements of fact concerning my review of Petitioners' CD contained within Austin's motion are true and accurate.

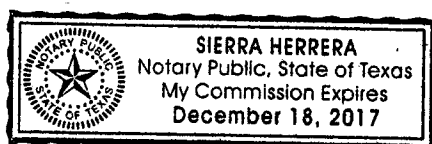
FURTHER AFFIANT SAYETH NAUGHT



Casey Powell, Affiant

IN THE COUNTY OF TRAVIS, STATE OF TEXAS:

SWORN TO and SUBSCRIBED before me by Casey Powell on the 27th day of October, 2014.

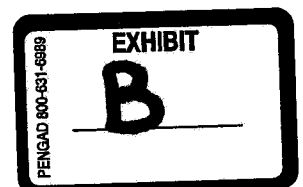


Notary Public for the State of Texas

PETITION OF NORTH AUSTIN § BEFORE THE STATE OFFICE
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PETITION OF NORTH AUSTIN	§	BEFORE THE STATE OFFICE
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ACTIONS OF THE CITY OF AUSTIN	§	
AND REQUEST FOR INTERIM RATES	§	
IN WILLIAMSON AND TRAVIS	§	
COUNTIES	§	ADMINISTRATIVE HEARINGS

1. My name is Gwendolyn Hill Webb. I am more than 21 years of age, and capable of making this Affidavit. The matters contained herein are true and correct and are within my personal knowledge.
2. I am of sound mind and am fully competent to make this Affidavit.

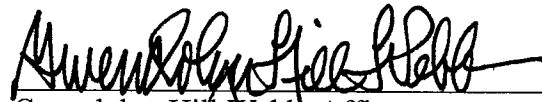


3. I am an attorney licensed in the State of Texas.
4. I am co-counsel representing Respondent, City of Austin, in the above referenced water rate appeal and wastewater rate appeal.
5. The following events occurred on the afternoon of Friday, October 17, 2014, in connection with Petitioners' Prefiled Testimony in the referenced rate appeals:
 - a. My staff informed me that Petitioners' had not provided our office with their prefiled testimony as of approximately 3:30 p.m. on Friday, October 17, 2014 when I returned to the office. I was concerned because the Public Utility Commission ("PUC") has a filing deadline of 3:00 p.m.
 - b. Also, in every previous instance of Petitioners' filing of pleadings, discovery, and even vacation letters with the PUC, where Petitioners' counsel has uploaded documents to the PUC exchange website, Petitioners' legal assistant, Amy Loera, has informed all counsel that the documents were uploaded to the PUC exchange. In this case, Petitioners did not serve the parties with documents which were uploaded to the PUC exchange website.
 - c. A little after 4:15 p.m., my staff informed me that Petitioners' assistant, Amy Loera, called our office to state that she was working with the prefiled testimony and would send it with a courier shortly.
 - d. At approximately 4:35 p.m., I received the attached email from Amy Loera stating that a compact disk ("CD") including a digital copy of the prefiled testimony was being provided, and that "[a] courier is currently in route to your office." The email also attached a transmittal letter for the CD from counsel for Petitioners to me and my co-counsel.
 - e. At approximately 4:58 p.m., a courier arrived at Webb & Webb offices and purported to deliver a CD containing a digital copy of Petitioners' prefiled testimony. While I anxiously awaited the opportunity to download the CD and forward its contents to Austin Water Utility staff, my staff attempted to

download the CD contents to several office computers without success. The computers indicated that the CD provided was blank.

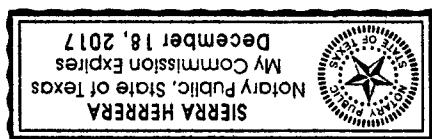
- f. At approximately 5:15 p.m., I called Amy Loera to note that the CD was blank and to note that our office had hand delivered our prefiled testimony, which included hard paper copies of testimony and CDs of voluminous documents to both counsel for Petitioners at their separate offices on the date it was due. Ms. Loera stated that Petitioners' prefiled testimony was over 4,000 pages and therefore no paper copies would be provided.
 - g. At approximately 5:21 p.m., I emailed Amy Loera with the attached message, stating that the CD was blank and that, therefore, Petitioners had failed to timely provide their prefiled testimony.
 - h. Shortly after the email was sent, counsel for Petitioners, John Carlton, called stating that Petitioners would deliver a working CD of the prefiled testimony.
 - i. After 6:10 p.m., I was called on my cell phone stating that a working digital copy of Petitioners' prefiled testimony had been delivered.
6. The documents received from Petitioners as their designated prefiled testimony were not accompanied by a Certificate of Service.

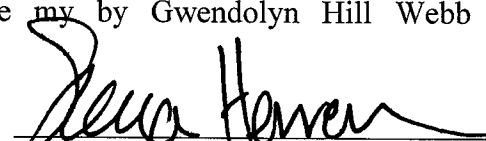
FURTHER AFFIANT SAYETH NAUGHT


Gwendolyn Hill Webb, Affiant

IN THE COUNTY OF TRAVIS, STATE OF TEXAS:

SWORN TO and SUBSCRIBED before me by Gwendolyn Hill Webb on the 27th day of October, 2014.




Notary Public for the State of Texas

Casey Powell

From: Amy Loera [amy@carltonlawaustin.com]
Sent: Friday, October 17, 2014 4:35 PM
To: Gwen Webb; Stephen Webb; clark.cornwell@austintexas.gov; hollis.henley@puc.texas.gov
Cc: John Carlton; Kelli Carlton; Randall B. (Randy) Wilburn
Subject: SOAH Docket No. 473-14-5138; PUC Docket Nos. 42857 & 42867; Prefiled Testimony & Exhibits
Attachments: Transmittal letter to G. Webb enc prefiled testimony.pdf; image001.jpg

Gwen/Stephen –

Please see the attached correspondence regarding our prefiled testimony and exhibits. Due to the size of the attachments, we are providing you with a CD. A courier is currently in route to your office.

Please let me know if you have any questions or have difficulty opening the attached.

Amy L. Loera



Legal Assistant
The Carlton Law Firm, P.L.L.C.
2705 Bee Cave Road, Suite 200
Austin, Texas 78746
(512) 614.0901
(512) 900.2855 (fax)
amy@carltonlawaustin.com
www.carltonlawaustin.com

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Kayla Hemingway

From: Gwen Webb
Sent: Friday, October 17, 2014 5:21 PM
To: Amy Loera; Stephen Webb; clark.cornwell@austintexas.gov; hollis.henley@puc.texas.gov
Cc: John Carlton; Kelli Carlton; Randall B. (Randy) Wilburn
Subject: RE: SOAH Docket No. 473-14-5138; PUC Docket Nos. 42857 & 42867; Prefiled Testimony & Exhibits

Dear Ms. Loera;

The computer disc, which was the only copy of the prefiled testimony (which we received at 4:58 p.m. this afternoon), cannot be opened or read by our computers. It turns out that the CD we received is blank. The City of Austin considers the delivery of this blank disk Petitioner's failure to timely file prefiled testimony.

ghw

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Gwen Webb

Webb & Webb, Attorneys at Law

211 East Seventh Street, Suite 712

Austin, Texas 78701

Phone: 512/472-9990 - Fax: 512/472-3183

From: Amy Loera [<mailto:amy@carltonlawaustin.com>]

Sent: Friday, October 17, 2014 4:35 PM

To: Gwen Webb; Stephen Webb; clark.cornwell@austintexas.gov; hollis.henley@puc.texas.gov

Cc: John Carlton; Kelli Carlton; Randall B. (Randy) Wilburn

Subject: SOAH Docket No. 473-14-5138; PUC Docket Nos. 42857 & 42867; Prefiled Testimony & Exhibits

Gwen/Stephen –

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Amy L. Loera