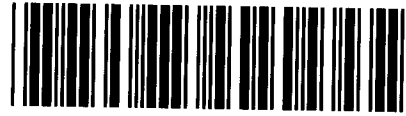




Control Number: 43175



Item Number: 51

Addendum StartPage: 0

SOAH DOCKET NO. 473-15-2274.WS
PUC DOCKET NO. 43175

2015 NOV -2 AM 9:32
PUBLIC UTILITY COMMISSION
CLERK

APPLICATION OF COMMUNITY §
WATER SERVICE, INC. AND WALTER § PUBLIC UTILITY COMMISSION
J. CARROLL FOR SALE, TRANSFER, §
OR MERGER OF FACILITIES AND §
CERTIFICATE RIGHTS IN ELLIS § OF TEXAS
COUNTY (37981-S) §

APPLICANT WALTER J. CARROLL COMPANY, INC.'S
MOTION FOR SANCTIONS AND A SHOW CAUSE ORDER

Comes now Walter J. Carroll Water Company, Inc. ("Applicant") and files the above-referenced Motion and in support thereof states as follows:

I. PROCEDURAL BACKGROUND

1. On October 5, 2015 Applicant filed *Applicant's Motion to Compel Discovery Responses from the City of Red Oak, Texas*, which sought an order compelling the City of Red Oak, Texas (the "City") to respond to Applicant's Requests for Production of Documents to the City of Red Oak, Texas and Requests for Disclosure.

2. As evidenced in the Motion to Compel, Applicant's discovery sought information relevant to the Application forming the basis of the above-referenced cause as well as information relevant to the City's expert's (John W. Birkhoff) affidavit filed herein in support of the City's objection or contest to Applicant's Application on or about June 15, 2015.

3. John W. Birkhoff is the sole witness for which pre-filed testimony was submitted by the City, and thus, Birkhoff's testimony is essentially the sole witness from the City's perspective who might offer a reason to deny Applicant's requested relief.

4. Applicant's discovery was specifically designed to efficiently and effectively prepare Applicant's cross-examination of John W. Birkhoff in a deposition or at trial.

51

Specifically, Applicant sought all materials and information of the City's expert witnesses set forth in Rule 194.2(c), (e), (f), and (i) of the Texas Rules of Civil Procedure.

5. The discovery responses from the City was due in July 2015. The City failed and continues to refuse to respond.

6. The trial in this matter is set for December 8, 2015.

7. On October 14, 2015, the Administrative Law Judge ("ALJ") granted Applicant's Motion to Compel and ordered, in part, as follows:

Red Oak SHALL respond to the discovery requests propounded on June 23, 2015, on or before October 23, 2015. Abuse of the Discovery process and failure to obey an order are grounds for sanctions pursuant to 16 Texas Administrative Code § 22.161 . . ."

8. As of the date of this filing, the City has wholly failed to comply with the ALJ's Order; thus, violating the ALJ's Order and again violating the Texas Rules of Civil Procedure and the Texas Administrative Code, among other legal, professional and ethical concepts imbedded within the Texas Judicial and Administrative Law systems.

9. Pursuant to Texas Administrative Code § 22.161, the Texas Rules of Civil Procedure, Rule 215 and other Texas law, and given the City's intentional, deliberate, and repeated refusal to comply with the laws of the State of Texas and the orders of this ALJ, Applicant moves that the ALJ sanction the City as the ALJ deems appropriate and justified and as hereinafter requested.

II. STATEMENT OF AUTHORITY FOR SANCTIONS AND SHOW-CAUSE ORDER

10. "An administrative law judge, on the administrative law judge's own motion or on the motion of a party, after notice and an opportunity for a hearing, may impose appropriate sanctions against a party or its representative for: . . . (2) abusing the discovery process in

seeking, making or resisting discovery; (3) failing to obey an order of an administrative law judge or the commission.” *See* 16 TEX. ADMIN. CODE § 22.161(b)-(b)(3).

11. A motion for sanctions may be filed at any time during the proceeding and shall be verified by affidavit. Upon receipt of the motion, a hearing shall be held on the motion. Any order regarding sanctions issued by a presiding officer shall be appealable pursuant to § 22.123 of this title (relating to Appeal of an Interim Order and Motions for Reconsideration of Interim Order Issued by the Commission). Any sanction imposed by the presiding officer shall be automatically stayed to allow the party to appeal the imposition of the sanction to the commission. *See* 16 TEX. ADMIN. CODE § 22.161(e).

12. One method of sanctions is to hold the violating party in contempt to the same extent as a district court. *See id.* at § 22.161(c)(6)

13. Rule 692 of the Texas Rules of Civil Procedure provides as follows:

Disobedience of an injunction may be punished by the court or judge, in term time or in vacation, as a contempt. In case of such disobedience, the complainant, his agent or attorney, may file in the court in which such injunction is pending or with the judge in vacation, his affidavit stating what person is guilty of such disobedience and describing the acts constituting the same; and thereupon the court or judge shall cause to be issued an attachment for such person, directed to the sheriff or any constable of any county, and requiring such officer to arrest the person therein named if found within his county and have him before the court or judge at the time and place named in such writ; or said court or judge may issue a show cause order, directing and requiring such person to appear on such date as may be designated and show cause why he should not be adjudged in contempt of court. On return of such attachment or show cause order, the judge shall proceed to hear proof; and if satisfied that such person has disobeyed the injunction, either directly or indirectly, may commit such person to jail without bail until he purges himself of such contempt, in such manner and form as the court or judge may direct.

14. Under Texas Rule of Civil Procedure 215, the refusal to comply with a court order is a contempt of court. In a civil contempt order, the court exerts its contempt power to persuade the contemnor to obey a previous order, usually through a conditional penalty.

15. Because the contemnor, here the City, could have avoided punishment by obeying the ALJ's order, the City is said to have "carr[ied] the keys of imprisonment in [its] own pocket." *See Cadle Co. v. Lobingier*, 50 S.W.3d 662, 667 (Tex. App.—Fort Worth 2001, no pet.).

III. SANCTIONS AND SHOW CAUSE RELIEF REQUESTED BY APPLICANT

16. Pursuant to 16 TEX. ADMIN. CODE § 22.161(c), and to the extent the ALJ finds sanctions are appropriate and justified, Applicant requests that the ALJ sanction the City in all, or alternatively one or more of the following ways:

- (1) Strike the Affidavit of John W. Birkhoff filed by the City via the Notice of Filing by City of Red Oak, Texas bearing a Certificate of Service dated June 15, 2015. *See id.* at § 22.161(c)-(c)(8).
- (2) Strike John W. Birkhoff as a witness here and refuse to allow the City to oppose Applicant's Application by or through the testimony of John W. Birkhoff, the City's purported expert engineer. *See id.* at § 22.161(c)(5), (8).
- (3) Exclude evidence and testimony that may be offered by or through John W. Birkhoff, the City's purported expert engineer. *See id.* at § 22.161(c)(5).
- (4) Deny, in whole, the City's request that Applicant's pending Application for transfer of the CCN forming the basis of this proceeding (the "Application") be denied. *See id.* at § 22.161(c)(5).
- (5) Disallow further discovery of any kind by the City. *See id.* at § 22.161(c)(1).
- (6) Punish the City and/or its representative for contempt to the same extent as a district court. *See id.* at § 22.161(c)(6).
- (7) Charge all Applicant's expenses of discovery against the City and/or its representative. *See id.* at § 22.161(c)(2).
- (8) Require the City and/or its representative to pay, at the time ordered by the ALJ, the reasonable expenses, including attorney's fees, incurred by Applicant because of the City's sanctionable behavior. *See id.* at § 22.161(c)(7).

17. Applicant further asks that the ALJ Order the City or its designated representative to appear and show cause why the City or its representative should not be held in contempt of this administrative court for the City's repeated, deliberate and on-going failures to comply with Texas law and this ALJ's Orders.

IV. REQUEST FOR RELIEF AND PRAYER

WHEREFORE, PREMISES CONSIDERED, Applicant Walter J. Carroll Water Company, Inc. request that upon hearing, this SOAH Judge order the relief requested above in Part III, in whole or in part, including, but not limited to, to:

1. Order the City and its representative to appear and show cause why they should not be held in contempt of this administrative court for failing to comply with the ALJ's orders and Texas law as described;
2. Order that the City's designated municipal representative, after notice and hearing, be held in contempt of court;
3. Order that a writ of attachment be issued for the City's designated municipal representative;
4. Order the City's designated municipal representative be confined to jail as the ALJ deems appropriate and just, with or without bond;
5. Order that the City to pay reasonable expenses incurred by Applicant in making this motion and obtaining an order for contempt;
6. Order the City pay all costs of court incurred by Applicant; and
7. that Applicant be granted all further relief to which Applicant may be entitled, at law or equity.

Respectfully submitted,

WEYCER, KAPLAN, PULASKI & ZUBER, P.C.



CORY HALLIBURTON
State Bar No. 24041044
3030 Matlock Road, Suite 201
Arlington, TX 76015
Telephone: (817) 795-5046
Facsimile: (866) 248-4297
challiburton@wkpz.com
ATTORNEYS FOR WALTER J. CARROLL
WATER CO., INC.

VERIFICATION

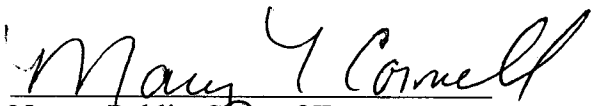
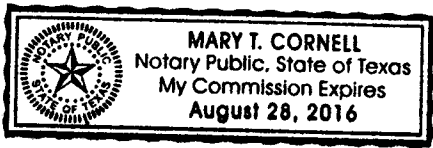
STATE OF TEXAS §
 §
COUNTY OF TARRANT §

BEFORE ME, the undersigned Notary Public, on this day personally appeared CORY HALLIBURTON of the law firm of Weycer, Kaplan, Pulaski & Zuber, P.C., who, being by me duly sworn on oath deposed and said that he is an attorney for Applicant Walter J. Carroll Water Co., Inc., and that he has read the above Motion; and that every statement of fact contained therein is within his personal knowledge and is true and correct to the best of his knowledge.



CORY HALLIBURTON of Weycer,
Kaplan, Pulaski & Zuber, P.C., as attorneys
for Defendants

SUBSCRIBED AND SWORN TO before me on the 29th day of October, 2015 to certify which, witness my hand and official seal.


Notary Public, State of Texas


CERTIFICATE OF CONFERENCE

I certify that I made reasonable but unsuccessful attempts to confer with the attorney for The City of Red Oak, Texas, Robert Hager. On October 29, 2015 at 12:40p.m., I contacted Mr. Hager's office; I was told he had "stepped away from his desk" and that he would return my call. As of the filing of this Motion (on or after 4:00 p.m., October 29, 2015), I did not receive a call from Mr. Hager. Despite good faith effort, the undersigned was unable to connect with Mr. Hager before submitting this matter to the Judge for resolution. Given that the trial date in this matter is set for December 8, 2015, and given that the City has now, on multiple occasions, refused to follow the law and/or honor the professional commitments made directly to the undersigned attorney for Applicant, waiting more time for the City to decide whether it will comply with an ALJ order, or whether the City will agree to sanctions, simply puts Applicant's rights in this matter at further risk, and an emergency exists of such nature that further delay will tend to cause additional irreparable harm to Applicant as it prepares for the trial of this matter. Therefore, this matter is submitted to the ALJ for consideration.

/s/Cory Halliburton 
Cory Halliburton

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on this the 29th day of October, 2015, a true and correct copy of the forgoing Motion for Sanctions and For Show Cause Order has been forwarded to the parties listed on the service list below as indicated. I certify that this Certificate of Service complies with Title 1, Part 7, Chapter 155, Subchapter C, Rule § 155.103 of the Texas Administrative Code.

/s/Cory Halliburton 
Cory Halliburton

SERVICE LIST

<u>PARTIES</u>	<u>REPRESENTATIVE / ADDRESS</u>
SOAH	<p><u>CM/RRR#7011 1570 0002 4276 6722</u> The Honorable Lilo D. Pomerleau State Office of Administrative Hearings PO Box 13025 Austin, Texas 78711-3025</p>
PUBLIC UTILITY COMMISSION	<p><u>CM/RRR #7011 1570 0002 4276 6739</u> Mr. Doug M. Brown Attorney-Legal Division Public Utility Commission 1701 N Congress Ave., Ste 8-110 Austin, TX 78711</p>
Walter J Carroll Water Co., Inc.	<p>Mr. Walter Carroll Walter J. Carroll Water Co., Inc. 513 Winding Creek Trail Red Oak, TX 75154</p>
Community Water Service, Inc.	<p><u>CM/RRR#7011 1570 0002 4276 6746</u> Ms. Bonnie Frame Community Water Service, Inc. P.O. Box 850155 Mesquite, TX 75185</p> <p><u>VIA EMAIL</u> Consulting Environmental Engineers, Inc. 150 N. Harbin Dr., Ste. 408 Stephenville, TX 76401</p>
City of Red Oak	<p><u>CM/RRR#7011 3500 0003 3093 3987</u> Mr. Robert E. Hager NICHOLS, JACKSON, DILLARD, HAGER & SMITH, L.L.P. 1800 Ross Tower 500 North Akard Dallas, Texas 75201</p>

SOAH DOCKET NO. 473-15-2274.WS

PUC DOCKET NO. 43175

APPLICATION OF COMMUNITY	§	
WATER SERVICE, INC. AND WALTER	§	
J. CARROLL FOR SALE, TRANSFER,	§	PUBLIC UTILITY COMMISSION
OR MERGER OF FACILITIES AND	§	
CERTIFICATE RIGHTS IN ELLIS	§	
COUNTY (37981-S)	§	OF TEXAS

SHOW CAUSE ORDER AND ORDER FOR CONTEMPT

It is ORDERED that the clerk issue notice to the CITY OF RED OAK, TEXAS to appear by serving the CITY OF RED OAK, TEXAS at the following addresses:

200 Lakeview Pkwy.
Red Oak, TX 75154

It is FURTHER ORDERED that the CITY OF RED OAK, TEXAS is hereby ordered to appear before this Court on _____ at _____ a.m. to show cause why THE CITY OF RED OAK, TEXAS should not be held in contempt for disobedience of this Administrative Law Judge’s Order dated October 14, 2015, as alleged in the **attached** *Motion for Sanctions and for Show Cause Order* filed by Applicant, Walter J. Carroll Water Service Co., Inc. on or about October 29, 2015.

SIGNED on this the _____ day of _____, 2015.

JUDGE PRESIDING