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PETITION OF THE
RATEPAYERS OF THE
RIVER PLACE WATER AND
WASTEWATER SYSTEMS
APPEALING THE RETAIL WATER
AND WASTEWATER RATES OF THE
CITY OF AUSTIN

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~~BEFORE THE~~

STATE OFFICE OF

ADMINISTRATIVE HEARINGS

PETITIONERS' REPLY TO THE CITY OF AUSTIN'S MOTION TO COMPEL

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES:

COME NOW, the Ratepayers of the River Place Water and Wastewater Systems ("Ratepayers" or "Petitioners") and file this their Reply to the City of Austin's ("City") Motion to Compel ("City's Motion"), and in support thereof, would respectfully show the following:

I. INTRODUCTION AND BACKGROUND

1. The City filed its First Request for Admissions and Second Request for Information (City's Discovery") on June 25, 2015.
2. On July 6, 2015, before filing their objections and responses, counsel for Petitioners negotiated diligently and in good faith regarding their perceived dispute with the City's discovery requests. The City refused to withdraw the objectionable questions, and the Petitioners filed their objections and responses thereafter.
3. The City filed its Motion to Compel Discovery Responses from Petitioners ("Motion") on July 13, 2015.
4. Petitioners' reply is due July 20, 2015, within five (5) working days of the City's Motion.¹ Petitioners have filed this reply timely.

¹ P.U.C PROC. R. 22.123(a)(4).

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II. ARGUMENT

A. GENERAL REPLY

The City's discovery is comprised primarily of questions relating to how the Ratepayers are organized and which representatives may execute any future settlement agreement.² This information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in a hearing about whether the City's water and wastewater rates are just and reasonable, based on the cost of service for the River Place Water and Wastewater Systems. The City nevertheless maintains that Petitioners' organization is important to "confirm the existence (or lack thereof) of facts supporting the *jurisdiction* of this body over this appeal."³ The City has had multiple bites of the proverbial jurisdictional apple. The City has filed the following:

- 1) a Motion to Dismiss based on the alleged lack of jurisdiction of the State Office of Administrative Hearings ("SOAH") and the Commission;
- 2) Additional Jurisdictional Argument and Evidence;
- 3) multiple City staff affidavits intending to support same;
- 4) a Reply to Petitioners' Response to City's Motion to Dismiss for Lack of Jurisdiction;
- 5) a Reply to Commission Staff's Response to City of Austin's Motion to Dismiss;
- 6) a Preliminary Response to Petitioners' Motion for Partial Summary Decision, which repeated many of its prior jurisdictional arguments;
- 7) an opportunity for oral argument at two (2) prehearing conferences preceding Order No. 6 in which the Administrative Law Judges ("ALJs") found jurisdiction over both the October and November 2014 rate increases;
- 8) an Appeal of SOAH Order No. 6;
- 9) a Motion for Reconsideration; and finally
- 10) after the Commission's effective denial of its Appeal, a Motion for Reconsideration of the Commission's Denial of the City of Austin's Appeal of SOAH Order No. 6.

² While the contents of these negotiations are confidential pursuant to TEX. R. EVID. 408, it is relevant to note that the parties are actively engaged in settlement discussions with meetings, offers and counter offers occurring on at least four occasions and these discussions are ongoing.

³ City's Motion at 2 (emphasis added).

The City has tried and failed repeatedly to convince the relevant tribunals that those agencies lack jurisdiction over this matter. The City's First Request for Admissions and Second Request for Information is a transparent attempt to repeat the settled jurisdictional argument. Or, it is simply a fishing expedition for information to use in its civil lawsuit appealing the ALJs and Commission's jurisdictional rulings in this case.⁴ Or maybe it is just an attempt to get a leg up on Petitioners in the ongoing settlement discussions. Whatever the purpose, the City's discovery is not reasonably calculated to lead to admissible evidence in a case in which the City must show the rates charged Petitioners are just and reasonable, based on the cost of service for the River Place Water and Wastewater Systems.

B. SPECIFIC REPLY

Request for Admission No. 1: Admit or deny that all Petitioners are residents of River Place Municipal Utility District ("MUD").

Answer: After a reasonable inquiry, Petitioners are unable to admit or deny the request due to lack of information or knowledge or that any information known or easily obtained by Petitioners was insufficient to enable them to admit or deny Petitioner's Request for Admission pursuant to TRCP 198.2(b).

Response to Motion to Compel: Petitioners' answer is not disingenuous. Despite the City's repeated attempts to equate the Ratepayer Petitioners with the River Place MUD, the Petitioners are not the MUD. As indicated above, Petitioners simply do not know or have any way of knowing whether all Petitioners are residents of the MUD – that is a question more appropriately directed to the political subdivision that keeps this information pursuant to chapter 552 of the Texas Government Code, the Texas Public Information Act – the River Place MUD. Moreover, in its various pleadings regarding jurisdiction, the City already claimed that Petitioners were all residents of the MUD, including a statement that the MUD transferred Petitioners' accounts to the City and that Petitioners were new customers of the City.⁵ The City filed various affidavits and lists of all customers for which the City began providing service in lieu of the MUD on October 1, 2014.⁶ The City is, in fact, in a better position than Petitioners to know whether the customers the City is serving are the former customers of the MUD for which the City began

⁴ See Cause No. D-1-GN-15-000513, *City of Austin, Texas vs. Public Utility Commission of Texas et al*, in the 200th Judicial District of Travis County, Texas – the City has a history of appealing decisions with which it disagrees.

⁵ City's Motion to Dismiss at 2.

⁶ City's Motion to Dismiss, Attachment 2 to Exhibit B; see also City's Additional Jurisdictional Argument and Evidence, Attachments 1 and 2.

providing service on October 1, 2014. The City's Request is to harass Petitioners, who clearly lack the same level of resources the City has to engage in endless discovery disputes,

Request for Admission No. 4: Admit or deny that the retail residential water and wastewater rates charged to River Place Petitioners are the same rates charged to all City of Austin retail residential Petitioners.

Answer: After a reasonable inquiry, Petitioners are unable to admit or deny the request due to lack of information or knowledge or that any information known or easily obtained by Petitioners was insufficient to enable them to admit or deny Petitioner's Request for Admission pursuant to TRCP 198.2(b).

Response to Motion to Compel: Petitioners stand by their answer. It is impossible to know what the City is actually charging **ALL OTHER** customers. Petitioners could only rely on and repeat any of the information the City produced previously in the course of this hearing – which seems to change with each new pleading. The City is the entity billing and collecting payments and is therefore in the best position to know what it is charging each of its customers.

Request for Information No. 6: Please provide the names of Petitioners' representatives with authority to enter into and bind the Petitioners and/or Petitioners' group or organization to any agreement with the City of Austin regarding water and wastewater rates.

Objection: Petitioners object to this request for information as irrelevant to the subject matter of the proceeding (i.e., whether the City of Austin based its rates charged to the ratepayers of the River Place water and wastewater systems on the cost of providing service via the River Place water and wastewater systems) (P.U.C. Proc. R. 22.144(d)) and not reasonably calculated to lead to the discovery of admissible evidence (K-Mart Corp. v. Sanderson, 937 S.W.2d 429, 431-32 (Tex. 1996); Tex. R. Civ. P. 192.3) since Petitioners are ratepayers receiving bills, they have standing to appeal the subject rates pursuant to sections 13.043 of the Texas Water Code. This request also seeks evidence that is subject to confidential settlement negotiations pursuant to Tex. R. Evid. 408. Furthermore, the undefined term(s) "group or organization" is vague, ambiguous, and subject to multiple meanings.

Response to Motion to Compel: Petitioners stand by their answer. The Ratepayers of the River Place Water and Wastewater Systems already have standing to appeal the City's rates, and the ALJs found jurisdiction proper. Who may execute any future settlement agreement on behalf of Petitioners, if this case settles, has nothing to do with the subject rate appeal before SOAH. The names of representatives with authority to settle this case have no connection to whether the City's water and wastewater rates are just and reasonable. The City's question is improper.

Request for Information No. 7: Please state whether or not [sic] Petitioners Lee Wretland, Scott Crosby, and Wick Tobias are authorized to enter into an agreement with the City of Austin resolving this rate dispute, and, also, binding "the Petitioners of the River Place Water and Wastewater Systems" to the terms and conditions of any such agreement.

Objection: Petitioners object to this request for information as irrelevant to the subject matter of the proceeding (i.e., whether the City of Austin based its rates charged to the ratepayers of the River Place water and wastewater systems on the cost of providing service via the River Place water and wastewater systems) (P.U.C. Proc. R. 22.144(d)) and not reasonably calculated to lead to the discovery of admissible evidence (K-Mart Corp. v. Sanderson, 937 S.W.2d 429, 431-32 (Tex. 1996); Tex. R. Civ. P. 192.3) since Petitioners are ratepayers receiving bills, they have standing to appeal the subject rates pursuant to sections 13.043 of the Texas Water Code. This request also seeks evidence that is subject to confidential settlement negotiations pursuant to Tex R. Evid. 408.

Response to Motion to Compel: Petitioners objected to Request for Information No. 7 for the same reasons as they objected to No. 6. These questions go to confidential settlement negotiations that do not bear on the jurisdiction question and are not germane to the water and wastewater rates at issue in this case.

Request for Information No. 9: Please disclose and describe all participation by both the officers and membership of the River Place Residential Community Association, Inc. and the officers and directors of the River Place MUD in organizing, promoting or assisting in the instant water and wastewater rate appeals.

Objection: Petitioners object to this request for information as irrelevant to the subject matter of the proceeding (i.e., whether the City of Austin based its rates charged to the ratepayers of the River Place water and wastewater systems on the cost of providing service via the River Place water and wastewater systems) (P.U.C. Proc. R. 22.144(d)) and not reasonably calculated to lead to the discovery of admissible evidence (K-Mart Corp. v. Sanderson, 937 S.W.2d 429, 431-32 (Tex. 1996); Tex. R. Civ. P. 192.3) since Petitioners are ratepayers receiving bills, they have standing to appeal the subject rates pursuant to sections 13.043 of the Texas Water Code. This request also seeks evidence that is subject to confidential settlement negotiations pursuant to Tex R. Evid. 408. Petitioners further object to the form of this compound question.

Response to Motion to Compel: Petitioners object to Request for Information No. 9 because participation of any of the groups or individuals noted is simply not relevant to the subject of this docket nor likely to lead to the discovery of admissible evidence. Moreover, as explained previously and defined by rule, the ratepayers are all those individuals receiving utility bills from the City. They are not the same entity as the River Place Residential Community Association, Inc. or River Place MUD, neither of which is defined in the City's definitions. The burden or expense that the Ratepayers would incur to develop this information outweighs any benefit, and is, therefore, improper under TRCP 192.4.

Request for Information No. 10: Do you assert that the current rates that are applicable to the Petitioners are different from the water and wastewater rates charged to other outside city residential customers? If the answer is yes, please explain your understanding of the difference in the water and wastewater rates.

Objection: Petitioners object to this request for information as irrelevant to the subject matter of the proceeding (i.e., whether the City of Austin based its rates charged to the ratepayers of the River Place water and wastewater systems on the cost of providing service via the River Place water and wastewater systems) (P.U.C. Proc. R. 22.144(d)) and not reasonably calculated to lead to the discovery of admissible evidence (K-Mart Corp. v. Sanderson, 937 S.W.2d 429, 431-32 (Tex. 1996); Tex. R. Civ. P. 192.3) since rates charged to other customers are not germane to rates charged to Petitioners. Petitioners further object to the form of this compound question. Subject to the foregoing objection, however, Petitioners answer as follows:

Answer: See Petitioners' Response to Austin's Request for Disclosures.

Response to Motion to Compel: Petitioners objected to this Request on relevancy grounds and this objection is still correct. The City claims this information is “highly relevant” to key jurisdictional facts, but the ALJs and Commission have already ruled on jurisdiction related to whether Petitioners meet the statutory threshold. The bases of Petitioners’ beliefs that the City’s rates are not just and reasonable are set out at length in their disclosures to which Petitioners point out to the City in their answer. Again, the rates that are germane in this proceeding are those imposed on the Ratepayers of the River Place Water and Wastewater Systems, not other customers. Finally, Petitioners only have access to the erroneous and later “corrected” rate schedules provided by the City, so any more specific answer would be conjecture at best.

Request for Information No. 11: Please provide a copy of the attorney engagement agreement between Petitioners and their attorneys pertaining to this rate appeal.

Objection: Petitioners object to this request for information to the extent it seeks information protected from disclosure by the attorney-client, work product, party communications, and consulting expert privileges and/or exemptions from discovery, including all subparts of Texas Rules of Evidence Rule 503(b).

Response to Motion to Compel: The City is clearly requesting documentation that is protected by the Attorney-Client and Work-Product privileges. There is a high threshold to breach these oldest of privileges.⁷ The City fails to show that Petitioners’ attorney engagement agreement is noncore work product (that is does not contain mental impressions, opinions, conclusions or legal theories), a substantial need exists for the document to prepare the City’s case, and there is an undue hardship to the City without it.⁸ The City merely states that it “needs to confirm” that the Ratepayers’ attorneys “are authorized,”⁹ which fails to reach the threshold to breach this privilege.

⁷ *In re XL Specialty Ins.*, 373 SW3d 46, 49 (Tex. 2012).

⁸ TEX. R. CIV. P. 192.5(b)(1) and (2); *In re Maher*, 143 SW3d 907, 912 (Tex. App. – Fort Worth 2004, orig. proceeding); *In re Monsanto Co.*, 998 SW2d 917, 930 (Tex. App. – Waco 1999, orig. proceeding).

⁹ City’s Motion at 8.

Request for Information No. 12: Please provide all reasons why the River Place Petitioners should not pay the retail residential water and wastewater rates agreed to between the City of Austin and the River Place MUD.

Objection: Petitioners object to this request for information as irrelevant to the subject matter of the proceeding (i.e., whether the City of Austin based its rates charged to the ratepayers of the River Place water and wastewater systems on the cost of providing service via the River Place water and wastewater systems) (P.U.C. Proc. R. 22.144(d)) and not reasonably calculated to lead to the discovery of admissible evidence (K-Mart Corp. v. Sanderson, 937 S.W.2d 429, 431-32 (Tex. 1996); Tex. R. Civ. P. 192.3). Subject to the foregoing objection, however, Petitioners answer as follows:

Answer: See Petitioners' Response to Austin's Request for Disclosures.

Response to Motion to Compel: As indicated previously, Petitioners are not the same entity as River Place MUD, are not in privity of contract with the City through the Strategic Partnership Agreement, and that Agreement does not preclude the Petitioners' statutory right to appeal the City's rates. The factual and legal bases for Petitioners' objections to the City's rates are thoroughly set out in their Disclosures and not a surprise. If additional grounds are identified later, Petitioners will supplement their answer as required. Petitioners do not understand what the City means by, "response does not provide a current response."¹⁰

Request for Information No. 13: Do you assert the right to be charged different retail residential water and wastewater rates from other Austin Water Utility residential water and wastewater Petitioners? If the answer is yes, on what bases do you assert such a right?

Objection: Petitioners object to this request for information as irrelevant to the subject matter of the proceeding (i.e., whether the City of Austin based its rates charged to the ratepayers of the River Place water and wastewater systems on the cost of providing service via the River Place water and wastewater systems) (P.U.C. Proc. R. 22.144(d)) and not reasonably calculated to lead to the discovery of admissible evidence (K-Mart Corp. v. Sanderson, 937 S.W.2d 429, 431-32 (Tex. 1996); Tex. R. Civ. P. 192.3). Subject to the foregoing objection, however, Petitioners answer as follows:

Answer: See Petitioners' Response to Austin's Request for Disclosures and Texas Water Code section 13.043(b)(3).

Response to Motion to Compel: Other Austin Water Utility residential rates, which may differ from those charged the River Place Ratepayers, are not the subject of this appeal and are not relevant. Petitioners have not challenged the other rates for the separate Austin Water and Wastewater System and are unaware whether those rates are just and reasonable for the other customers. Petitioners are aware of their burden to supplement and will do so if their disclosure is no longer accurate.

¹⁰ *Id.*

Request for Information No. 14: Do you assert the right to be charged different retail residential water and wastewater rates from other Austin Water Utility outside city residential water and wastewater Petitioners? If the answer is yes, on what bases do you assert such a right?

Objection: Petitioners object to this request for information as irrelevant to the subject matter of the proceeding (i.e., whether the City of Austin based its rates charged to the ratepayers of the River Place water and wastewater systems on the cost of providing service via the River Place water and wastewater systems) (P.U.C. Proc. R. 22.144(d)) and not reasonably calculated to lead to the discovery of admissible evidence (K-Mart Corp. v. Sanderson, 937 S.W.2d 429, 431-32 (Tex. 1996); Tex. R. Civ. P. 192.3). Subject to the foregoing objection, however, Petitioners answer as follows:

Answer: See Petitioners' Response to Austin's Request for Disclosures and Texas Water Code section 13.043(b)(3).

Response to Motion to Compel: Petitioners objected to Request for Information No. 14 for the same reasons as No. 13. The only rates at issue in this proceeding are the unjust and unreasonable rates imposed on the Ratepayers of the River Place Water and Wastewater Systems in October and November 2014 based on the cost of providing service from the separate and stand-alone River Place Water and Wastewater Systems. The factual and legal bases for that position are set out in Petitioners' disclosures. Until those bases change and Petitioners' supplement their response, the City has all the responsive information that exists.

Request for Information No. 15: Do you seek a final order from the PUC that allows Austin to discriminate between the River Place Petitioners' rates and other retail residential water and wastewater Petitioners?

Objection: Petitioners object to this request for information as irrelevant to the subject matter of the proceeding (i.e., whether the City of Austin based its rates charged to the ratepayers of the River Place water and wastewater systems on the cost of providing service via the River Place water and wastewater systems) (P.U.C. Proc. R. 22.144(d)) and not reasonably calculated to lead to the discovery of admissible evidence (K-Mart Corp. v. Sanderson, 937 S.W.2d 429, 431-32 (Tex. 1996); Tex. R. Civ. P. 192.3). Subject to the foregoing objection, however, Petitioners answer as follows:

Answer: See Petitioners' Response to Austin's Request for Disclosures and Texas Water Code section 13.043(b)(3).

Response to Motion to Compel: Petitioners objected to Request for Information No. 15 for the same reasons as Nos. 13 and 14. The only rates at issue in this proceeding are those imposed on the River Place Ratepayers in October and November 2014. Petitioners' disclosures are the best answer to this question, notwithstanding the objection.

Request for Information No. 16: Do you seek a final order from the PUC that allows Austin to discriminate between the River Place Petitioners' rates and other outside city retail residential water and wastewater Petitioners?

Objection: Petitioners object to this request for information as irrelevant to the subject matter of the proceeding (i.e., whether the City of Austin based its rates charged to the ratepayers of the River Place water and wastewater systems on the cost of providing service via the River Place water and wastewater systems) (P.U.C. Proc. R. 22.144(d)) and not reasonably calculated to lead to the discovery of admissible evidence (K-Mart Corp. v. Sanderson, 937 S.W.2d 429, 431-32 (Tex. 1996); Tex. R. Civ. P. 192.3). Subject to the foregoing objection, however, Petitioners answer as follows:

Answer: See Petitioners' Response to Austin's Request for Disclosures and Texas Water Code section 13.043(b)(3).

Response to Motion to Compel: Petitioners objected to Request for Information No. 16 for the same reasons as Nos. 13, 14, and 15. The only rates at issue in this proceeding are those imposed on the River Place Ratepayers in October and November 2014. Petitioners' disclosures are the best answer to this question, notwithstanding the objection.

Request for Information No. 18: Please provide copies of all water and wastewater bills paid by all the Petitioners for the months of March and April, 2015.

Objection: Petitioners object to this request for information to the extent it is unduly burdensome and seeks information that is equally within the possession, custody or control or otherwise readily accessible to the City.

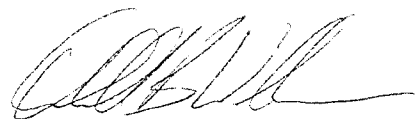
Response to Motion to Compel: Petitioners objected to Request for Information No. 18, because it is unduly burdensome. The City maintains an electronic database of each and every customer it bills, going back years. The City is the entity that billed Petitioners. Surely, the City knows how much it billed each customer. It simply defies logic that it would be easier for Ratepayers to collect bills from 350 signatories to the Petition or the 1,050 individual customers of the River Place Water and Wastewater Systems when the City could just "hit print." The intent of the City's Request appears to be to harass Petitioners and drive up the cost of litigation on those individuals who lack the same level of resources the City. The burden and expense of Petitioners attempting to gather all 700 plus or 2,100 plus bills outweighs any benefit, especially when the City is the entity that generated and mailed the bills to the River Place customers in the first place.

IV. PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioners pray that the ALJs deny the City's Motion to Compel and grant other such relief to which they may be entitled.

Respectfully submitted,

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By: _____

Randall B. Wilburn

ATTORNEYS FOR PETITIONERS

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, U.S. mail and/or Certified Mail Return Receipt Requested on all parties on the 20th of July 2015.



Randall B. Wilburn