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CITY OF MIDLOTHIAN NOTICE OF § BEFORE THE STATE OFFICE
INTENT TO PROVIDE WATER §
SERVICE TO LAND DECERTIFIED § OF
FROM MOUNTAIN PEAK SPECIAL §
UTILITY DISTRICT § ADMINISTRATIVE HEARINGS

**CITY OF MIDLOTHIAN'S RESPONSE TO
MOUNTAIN PEAK SPECIAL UTILITY DISTRICT'S
MOTION TO COMPEL RESPONSES TO ITS FIRST REQUEST FOR INFORMATION**

The City of Midlothian ("Midlothian") files this Response to Mountain Peak Special Utility District's ("Mountain Peak") Motion to Compel Responses to First Request for Information to City of Midlothian ("Motion to Compel").¹ Midlothian received Mountain Peak's Motion to Compel on October 10, 2016. This Response is therefore timely. Midlothian's discovery objections are valid. As such, Midlothian asserts that the Motion to Compel must be denied.

**I.
INTRODUCTION**

Midlothian concurs with the "Legal Standard" on relevance outlined in Mountain Peak's Motion to Compel.² However, the Texas Supreme Court has put reasonable and necessary limits on the liberal bounds of discovery: requests must be calculated to lead to the discovery of evidence that has a tendency "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable."³ The *facts of consequence* in this docket are very limited.

The Preliminary Order identified a two-phase process that recognizes that Mountain Peak and its own utility decisions are the focus. Under the first phase, the issue presented is: "What

¹ In addition to those terms or abbreviations defined in this filing, abbreviations and acronyms utilized include: "Commission" or "PUC" for the Public Utility Commission of Texas, "SOAH" for the State Office of Administrative Hearings, "RFI" for request for information, "TAC" for the Texas Administrative Code, and "TWC" for the Texas Water Code.

² Mountain Peak's Motion to Compel at notes 5-8 and accompanying text.

³ *In re National Lloyds Ins.*, 449 S.W.3d 486, 489 (Tex. 2014).

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property, if any, has been rendered useless or valueless to Mountain Peak by the decertification granted in Docket No. 44394?”⁴ The focus during this phase of the inquiry is *Mountain Peak* and *its* property affected by the Park Property’s decertification, and *not*, for example, the actions, plans or statements of Midlothian (or others), or facilities owned or operated by any entity other than Mountain Peak, especially those that did not instigate changes to Mountain Peak’s system. The facts of consequence in this phase relate to the existence, state, use, capacity and/or potential use of Mountain Peak’s property, nothing more. Any discovery propounded must either make those facts more probable or less probable, or lead to discovery that will.

The Preliminary Order notes that, if the Commission’s interim order concludes that some property of Mountain Peak was rendered useless or valueless as a result of the first phase, the second phase will be “a determination of compensation based on the value of property the Commission has determined to have been rendered useless or valueless.”⁵ This phase is again limited to a very narrow issue as it only seeks to put a price on the property identified in the first phase. Therefore, the facts of consequence in this phase are limited to those which bear on the standards and factors identified in TWC § 13.254(g) and 16 TAC § 24.113(h) or which will lead to information which will make those facts more or less probable. While these factors may explore information outside the pure value of the property, they do not include information on the actions, plans or statements of Midlothian or any entity other than Mountain Peak, or facilities owned or operated by any entity other than Mountain Peak.

Mountain Peak’s objectionable requests identified below will provide no assistance to the Honorable Administrative Law Judge or the Commission in making a determination as whether *any property of Mountain Peak* was rendered useless or valueless *as a result of the decertification* of the park property in Docket No. 44394, nor will it lead to information which would be of assistance.

⁴ Preliminary Order at 2 (September 23, 2016) (footnote omitted).

⁵ *Id.*

II.
OBJECTION: GENERAL STATEMENT OF RELEVANCE

In response to Mountain Peak's RFIs Nos. 1-6, 8-9 and 11-12, Midlothian specifically incorporated the following "General Statement of Objection on Relevance," which is likewise reproduced here as part of Midlothian's responses to the Motion to Compel:

As a threshold objection, Midlothian objects to several of the requests (RFI Nos. 1-6, 8, 9, 11 & 12) because they are outside the scope of discovery, particularly as it relates to the limited issues presented in this proceeding. The Preliminary Order identified the following issue to be addressed: "What property, if any, has been rendered useless or valueless to Mountain Peak by the decertification granted in Docket No. 44394? TWC § 13.254(d); 16 TAC § 24.113(h)." The focus of the inquiry is *Mountain Peak and its property* as of the date the subject property was decertified, and *not*, for example, the actions, plans or statements of Midlothian or others.

Due to the very narrow scope of issues in this proceeding and the fact that any such determination is based upon the actions and property of Mountain Peak, the information sought is not admissible in this Docket, is not reasonably tailored to include only matters relevant to this Docket, and is not reasonably calculated to lead to the discovery of admissible evidence. The requests will provide no assistance to the Honorable Administrative Law Judge or the Commission in making a determination as whether *any property of Mountain Peak* was rendered useless or valueless *as a result of the decertification* of the park property in Docket No. 44394, nor will it lead to information which would be of assistance. [Footnote omitted]

III.
SPECIFIC RESPONSES

1. Mountain Peak RFI Nos. 1-4:

Mountain Peak propounded the following objectionable requests, grouped together for a common response:

Request No. 1: Please produce the December 16, 2013, Memorandum prepared by Freese and Nichols related to the Midlothian Community Park Water Assessment, including all exhibits and attachments.

Request No. 2: Please produce all documents related to the December 16, 2013 Memorandum prepared by Freese and Nichols related to the Midlothian Community Park Water Assessment (the "Memorandum"), including, but not limited to, all

communications with Freese and Nichols, all drafts or earlier versions of the Memorandum or any part thereof, and all documents reflecting any information supplied to Freese and Nichols in preparing the Memorandum.

Request No. 3: Please produce all evaluations, assessments, written communications, or reports relating to the provision of water service to the Subject Tract, including, but not limited to, any updates of the December 16, 2013 Memorandum prepared by Freese and Nichols related to the Midlothian Community Park Water Assessment.

Request No. 4: Please produce all correspondence, notes and documents of any kind reflecting or relating to communications between You and Mountain Peak relating to the provision of water service to the Subject Tract.

After failing to resolve objections through good faith negotiations among counsel, Midlothian propounded the following objection to each of the foregoing requests:

OBJECTION: Midlothian specifically objects to this request as it is not calculated to lead to the discovery of evidence related to the issues in this case. The General Statement of Objection on Relevance, above, is incorporated herein. The request is not relevant to the PUC's determination of the existence of any real or personal property of Mountain Peak that was rendered useless or valueless by Commission decertification in Docket No. 44394, if any. For the same reasons, the information is equally irrelevant to a determination of the compensation due to Mountain Peak in this proceeding.

In its Motion to Compel, Mountain Peak admits that it has the report prepared by Midlothian's consultant (Freese & Nichols) in 2013.⁶ However, as established in Docket No. 44394, Midlothian acquired the approximately 104 acres (including the 97.7-acres decertified in that docket ("Park Property")) in 2010, three years before the 2013 report was commissioned. It has never been disputed by Mountain Peak that the Park Property was still, as of decertification in 2015, un-platted farmland. It was undisputed in Docket No. 44394 that Midlothian never applied or paid for service to the Park Property. Ultimately, the Commission concluded that the Park Property was not "receiving service," thereby justifying decertification under Tex. Water Code § 13.254(a-5)-(a-6). Midlothian respectfully requests judicial notice of the Commission's proceedings in Docket No. 44394, including its Order of May 1, 2015.

⁶ Mountain Peak Motion to Compel at 4. Indeed, it was also produced in Docket No. 44394 and in this proceeding, as part of Midlothian's response to RFI No. 22.

Mountain Peak is the utility that may have (or may not have) developed or acquired property that was rendered useless or valueless as a result of decertification in 2015. Midlothian is prepared to compensate Mountain Peak the just and adequate amount determined through this process. However, *no action by Midlothian* (including any updates to the 2013 report) can be relevant to this proceeding: Midlothian simply did not request or cause any system changes. These questions do not develop any facts “of consequence” to the proceeding.⁷

If the motion is sustained, Mountain Peak’s specious focus on Midlothian actions (that neither requested nor paid for Mountain Peak service to the Park Property) will needlessly cloud issues and infuse matters irrelevant to the determination here: what (if any) *Mountain Peak* property was rendered useless and valueless upon decertification of the Park Property. Mountain Peak may be trying to use the discovery process in this proceeding to supplement or circumvent the administrative appeal process underway with regard to PUC Docket No. 44394, which Mountain Peak challenges in Travis County District Court.

In addition, Midlothian and Mountain Peak are neighbors. Portions of the Mountain Peak retail service area are (or, in the case of the Park Property, had been) inside Midlothian’s city limits. Portions of the certificated service areas of the two utilities are dually certificated, so they share service area. These entities have had countless interactions. To the extent Mountain Peak is preparing to argue that their entire water system is a large, indivisible unit that was adversely impacted by the decertification, basically any communication between the parties or any document relating to any part of their water systems is potentially responsive. The responsive information will also include communications, supplied information, assessments and reports involved assessment of items *other than Mountain Peak’s property*, which cannot be of consequence to this docket. In sum, these requests are not reasonably tailored to making facts of consequence in this docket more or less probable under *either* phase, or lead to information which will.

Requests must be calculated to lead to the discovery of evidence that has a tendency “to make the existence of any fact that is of consequence to the determination of the action more

⁷ If Mountain Peak made changes or acquired property despite the lack of any request or payment by Midlothian, we would hope and anticipate that other sound utility principles support that investment and, depending on the circumstances *demonstrated by Mountain Peak*, Midlothian may challenge whether any compensation could be considered “just.” Either way, Midlothian’s actions are not “of consequence” here.

probable or less probable.” As such, this is one circumstance where the presiding officer must put reasonable and necessary limits on discovery by denying Mountain Peak’s motion.

2. Mountain Peak RFI No. 5:

Mountain Peak propounded the following objectionable request:

Request No. 5: Please produce all documents relating to Midlothian's consideration of or decision to not obtain water service from Mountain Peak for Midlothian's proposed development on the Subject Tract.

After failing to resolve objections through good faith negotiations among counsel, Midlothian propounded the following objection to each of the foregoing requests:

OBJECTION: Midlothian specifically objects to this request as it is not calculated to lead to the discovery of evidence related to the issues in this case. The General Statement of Objection on Relevance, above, is incorporated herein. The request is not relevant to the PUC’s determination of the existence of any real or personal property of Mountain Peak that was rendered useless or valueless by Commission decertification in Docket No. 44394, if any. For the same reasons, the information is equally irrelevant to a determination of the compensation due to Mountain Peak in this proceeding.

For brevity, Midlothian incorporates its response to RFI Nos. 1-4 here.

In addition, we note that the decision whether or not to obtain water service from Mountain Peak is a business decision made by Midlothian. At no time did Midlothian apply or pay for service by Mountain Peak to the Park Property. Additionally, a landowner’s decision to exercise its statutory right under TWC § 13.254(a-5) is not an appropriate subject to discovery in the subsequent proceeding to determine compensation for any property rendered useless or valueless by decertification. Mountain Peak is challenging the Commission decision in Docket No. 44394, and this inquiry is irrelevant to the issues identified in the Preliminary Order: Mountain Peak’s decisions and facilities are the keys to this proceeding. Again, it appears Mountain Peak is trying to use the discovery process to supplement or circumvent the process in PUC Docket No. 44394. The motion to compel should be denied.

3. Mountain Peak RFI Nos. 8 & 9:

Mountain Peak propounded the following objectionable requests:

Request No. 8: Please describe the number of LUEs to be served as of the date of decertification on the Subject Tract.

Request No. 9: Please provide all documents relating to your response to RFI No. 8.

After failing to resolve objections through good faith negotiations among counsel, Midlothian propounded the following objection to each of the foregoing requests:

OBJECTION: Midlothian specifically objects to this request as it is not calculated to lead to the discovery of evidence related to the issues in this case. The General Statement of Objection on Relevance, above, is incorporated herein. The request is not relevant to the PUC's determination of the existence of any real or personal property of Mountain Peak that was rendered useless or valueless by Commission decertification in Docket No. 44394, if any. For the same reasons, the information is equally irrelevant to a determination of the compensation due to Mountain Peak in this proceeding.

For brevity, Midlothian incorporates its response to RFI Nos. 1-4 here.

Midlothian's calculation of LUEs (if any) is another example of information "of no consequence" to the determination of what Mountain Peak property was rendered useless or valueless for precisely the same reasons the 2013 report and associated communications or updates are irrelevant. If Mountain Peak used LUEs prior to Midlothian's ownership of the Park Property, it has the information used to plan or design its own system: Midlothian never applied or paid for service at the Park Property. Again, it appears that Mountain Peak is simply trying to supplement or circumvent the administrative appeal process related to Docket No. 44394, where the Commission concluded that the Park Property was not receiving water service.

4. Mountain Peak RFI No. 11:

Mountain Peak propounded the following objectionable request:

Request No. 11: Please provide all documents related to the conveyance of the Subject Tract to Midlothian, including any and all communications related to water service between Midlothian and the seller of the Subject Tract.

After failing to resolve objections through good faith negotiations among counsel, Midlothian propounded the following objections to the foregoing request:

OBJECTION: Midlothian specifically objects to this request as it is not calculated to lead to the discovery of evidence related to the issues in this case. The General Statement of Objection on Relevance, above, is incorporated herein. The request is not relevant to the PUC's determination of the existence of any real or personal property of Mountain Peak that was rendered useless or

valueless by Commission decertification in Docket No. 44394, if any. For the same reasons, the information is equally irrelevant to a determination of the compensation due to Mountain Peak in this proceeding.

Midlothian also objects that this request is unreasonable and unduly burdensome under the circumstances of this case, as contemplated by Tex. R. Civ. P. 192.4(a) & (b).

For brevity, Midlothian incorporates its response to RFI Nos. 1-4 here.

Specifically, the “who, what, why and how” of the transaction to acquire the Park Property are completely independent of the facts at issue in this docket, even when “narrowed” to only documents and communication related to water service. Mountain Peak asserts in their Motion to Compel, this request “may contain information indicating the seller’s knowledge of property owned by Mountain Peak that was intended to be used to provide water service to the Amended Park Property.” The fact of what the seller may or may not have known, or what knowledge was or was not transferred to Midlothian, is of *no consequence* to what Mountain Peak property was rendered useless or valueless and any compensation owed as a result.

5. Mountain Peak RFI No. 12:

Mountain Peak propounded the following objectionable request:

Request No. 12: Please produce any development plans approved by Midlothian for the Subject Tract or for property of which the Subject Tract was a portion in the last 10 years.

After failing to resolve objections through good faith negotiations among counsel, Midlothian propounded the following objection to the foregoing request:

OBJECTION: Midlothian specifically objects to this request as it is not calculated to lead to the discovery of evidence related to the issues in this case. The General Statement of Objection on Relevance, above, is incorporated herein. The request is not relevant to the PUC’s determination of the existence of any real or personal property of Mountain Peak that was rendered useless or valueless by Commission decertification in Docket No. 44394, if any. For the same reasons, the information is equally irrelevant to a determination of the compensation due to Mountain Peak in this proceeding.

For brevity, Midlothian incorporates its response to RFI Nos. 1-4 here.

Docket No. 44394 establishes that the Park Property is unplatted farmland that is not receiving water service from Mountain Peak. Existence of even a final plat is no guarantee that

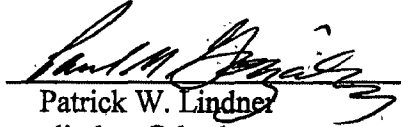
utility facilities will be planned or constructed. This question asks for "any" development plans approved by Midlothian, which are even of less consequence. Mountain Peak may or may not condition its planning based upon the status of a developer's plats, but it certainly expects an application for service and some form of payment. This inquiry is not relevant to what Mountain Peak decides, but, if it were, Mountain Peak would have equal or superior access to that information in their files. Finally, this request is especially irrelevant to the extent Mountain Peak is seeking plans after the date of decertification.

IV.
CONCLUSION

Midlothian respectfully requests that the honorable ALJ expeditiously deny Mountain Peak's Motion to Compel, and for such any and all other relief to which it is justly entitled.

Respectfully submitted,
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ATTORNEYS FOR CITY OF MIDLOTHIAN

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document is being served on counsel for the parties of record on October 17, 2016, via facsimile:


Paul M. González