



Control Number: 46120



Item Number: 26.

Addendum StartPage: 0

RECEIVED

P.U.C. DOCKET NO. 46120
SOAH DOCKET NO. 473-16-5823.WS

2016 OCT 20 PM 2:42

PUBLIC UTILITY COMMISSION
HEARING CLERK

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 MOTION TO COMPEL RESPONSES TO FIRST SET OF
REQUESTS FOR INFORMATION AND REQUESTS FOR ADMISSION
TO MOUNTAIN PEAK SPECIAL UTILITY DISTRICT**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

The City of Midlothian ("Midlothian") files this Motion to Compel Mountain Peak Special Utility District ("Mountain Peak") to respond to Midlothian's First Set of Requests for Information and Requests for Admission. Midlothian received Mountain Peak's Objections to Midlothian's First Request for Information and Request for Admission on October 14, 2016. This motion is timely filed pursuant to 16 TAC § 22.144(e). The parties continue to confer on discovery matters, however, this motion to compel addresses pending objections to the requests identified below.

**I.
SUMMARY OF MATTER**

In Docket No, 44394, an approximately 97.7-acre tract of land (the "Park Property") owned by Midlothian was decertified from Mountain Peak's water CCN.¹ The instant proceeding focuses on identifying: (1) "What property, if any, has been rendered useless or valueless to Mountain Peak by the decertification granted in Docket No. 44394;" and, (2) "a determination of compensation based on the value of property the Commission has determined to have been rendered useless or valueless."² The Water Code and PUC Substantive Rules identify factors that

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, "RFA" for request for admission, "CCN" for certificate of convenience and necessity, "TAC" for the Texas Administrative Code, "TWC" for the Texas Water Code, and "TRCP" for the Texas Civil Rules of Procedure.

² Preliminary Order (September 23, 2016)

20

should be considered in making these determination in TWC § 13.254(g) and 16 TAC § 24.113(h-k).

II. ARGUMENTS & AUTHORITIES

The rules of discovery permit a party to obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action.³ It is not a ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.⁴ Because this case revolves around facts specific to Mountain Peak's water system, discovery by Midlothian is essential to the development of its case.

The Texas Supreme Court has explained that the "ultimate purpose of discovery is to seek the truth, so that disputes may be decided by what the facts revealed, not by what facts are concealed."⁵ Likewise, requests for production must be "reasonably tailored to include only matters relevant to the case."⁶ However, "[a] reasonably tailored discovery request is not overbroad merely because it may include some information of doubtful relevance."⁷ Midlothian has taken significant steps to tailor discovery tied closely to matters relevant to this proceeding. The Texas Supreme Court has specifically recognized that parties must be allowed some latitude in creating discovery requests.⁸

III. REQUESTS FOR INFORMATION ARE RELEVANT AND APPROPRIATE

Mountain Peak's objections to Midlothian's requests for information are generally, either: A) that the information sought is not relevant; or B) that the request requires Mountain Peak to marshal its evidence. Midlothian will address these by type of objection. As discussed, neither has any merit.

³ TRCP R. 192.3(a)

⁴ *Id.*

⁵ *Jampole v. Touchy*, 673 S.W.2d 569, 573 (Tex. 1984).

⁶ *In re Nolle*, 265 S.W.3d 487, 491-92 (Tex. App.—Houston [1st Dist.] 2008).

⁷ *Id.*

⁸ *Id.* (quoting *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813, 815 (Tex.1995)).

A. RELEVANCE OBJECTIONS (RFI NOS. 1-3, 1-4, 1-7, 1-11):

Midlothian asserts that RFI No. 1-3 is clearly and specifically tailored to elicit discoverable information relevant to this case.

Request for Information No. 1-3. If you cannot unequivocally admit the foregoing request (RFA No. 1-3), identify each financial rating allegedly affected by decertification of the Park Property, including the date of such change, and provide documents evidencing such changes.

Mountain Peak's Objection: This Request is not relevant and not reasonably calculated to lead to the discovery of admissible evidence and thus is beyond the scope of discovery authorized by the PUC's procedural rules and the Texas Rules of Civil Procedure.

In an attempt to efficiently narrow the potential issues in this case, including the types of property that Mountain Peak claims might be rendered useless or valueless, RFI No. 1-3 is expressly contingent upon Mountain Peak's response to a request for admission (RFA No. 1-3).⁹ If Mountain Peak unequivocally *admitted* the fact (that its financial ratings were unaffected by the decertification), then no response to RFI No. 1-3 would be required. If it denied or equivocated regarding whether decertification affected any financial ratings, then Midlothian is entitled to discover facts regarding those effects.

Both TWC § 13.254(g) and 16 TAC § 24.113(k) list identical factors that should be used in determining the appropriate compensation for personal property (if any) rendered useless or valueless because of decertification. These include "any demonstrated impairment of service or increase of cost to consumers of the retail public utility remaining after the decertification." Changes to financial ratings¹⁰ can affect the *cost to consumers* because they may affect, e.g., the utility's interest and borrowing costs, bonding capacity, or likelihood an entity might be provided a loan or grant, etc. Ultimately, this discovery is tied closely to a factor affecting the compensation Midlothian might pay to Mountain Peak as a result of this case. Therefore, changes to any financial ratings associated with the decertification of the Park Property are both relevant and narrowly tailored to matters addressed in this case.

⁹ RFA No. 1-3 seeks to verify claimed effects of the decertification: "Admit that Mountain Peak's financial ratings have been unaffected by the decertification of the Park Property."

¹⁰ In conference with counsel for Mountain Peak, we discussed meaning and intent of "financial rating," as including bond ratings, credit ratings, or other similar measures that might be used by financial institutions or other agencies, such as the US Department of Agriculture. Mountain Peak does not claim that the question is vague.

Mountain Peak asserts a relevance objection as to part (c) of two requests, RFI Nos. 1-4 and 1-7. Midlothian asserts that **RFI Nos. 1-4(c) and 1-7(c)** are specifically tailored to elicit discoverable information relevant to this case.

Request for Information No. 1-4. Identify any water service facilities of Mountain Peak located *within* the Park Property, including for each facility:

- a. A description and the location;
- b. Any service requests, studies, reports or other documents establishing the need for the facility;
- c. The dates of Mountain Peak's decision to build, of construction, and of placement into service;
- d. The costs of design and of construction;
- e. The date(s), purpose(s) and design/construction costs of any expansion(s);

Request for Information No. 1-7. Identify any water service facilities of Mountain Peak located *within 1000 feet* of (but not on or within) the Park Property, including for each facility:

- a. A description and the location;
- b. Any service requests, studies, reports or other documents establishing the need for the facility;
- c. The dates of Mountain Peak's decision to build, of construction, and of placement into service;
- d. The costs of design and of construction;
- e. The date(s), purpose(s) and design/construction costs of any expansion(s);

Mountain Peak's Objection (identical): Mountain Peak objects to subpart (c) and the request for dates of Mountain Peak's decision to build and of construction of its water facilities. These dates are not relevant or reasonably calculated to lead to the discovery of admissible evidence regarding identifying the property rendered useless or valueless or the compensation owed for the property rendered useless or valueless.

These two questions are directly related to an assessment of Mountain Peak property located on and within the immediate proximity of the Park Property. Significantly, no objection is made as to the underlying questions, including parts (a), (b), (d) and (e) of each, all of which ask for other pertinent information similar to that which is requested in part (c) as to each facility: "The dates of Mountain Peak's decision to build, of construction, and of placement into service."

The dates of Mountain Peak's decisions to build, the dates of construction, and the dates of placement of its facilities into service are relevant because they related to the facilities most

likely to be claimed by Mountain Peak to have been rendered useless or valueless through the decertification – the facilities on or within 1000 feet of the Park Property. This data, together with unobjected-to information produced in response to the rest of the same RFIs, will indicate, or lead to an indication of, basis and/or purpose(s) of each specific water facility and Mountain Peak's actions to place any facilities or property in use. To the extent Mountain Peak intends to prove that the purpose or value of a facility within or near the Park Property was adversely affected by decertification, the requested data may substantiate or refute the claim. In addition, the facts may demonstrate that a facility's construction or use was incidental to water service other than the Park Property and, therefore, it cannot reasonably be deemed useless or valueless after decertification.

Midlothian believes that timing of Mountain Peak's actions will be relevant in this proceeding, since the Park Property was un-platted farmland when it was purchased in 2010 and absolutely nothing changed through the date of decertification in 2015. Midlothian has no ability to know this data absent discovery from Mountain Peak. Therefore, this request seeks admissible evidence or information that may lead to admissible evidence of the usefulness or value of the Mountain Peak facilities. Any objection for these two RFIs should be overruled and Mountain Peak should be compelled to fully respond.

As to Mountain Peak's objection to **RFI No. 1-11**, Midlothian also asserts that the RFI is specifically tailored to elicit discoverable information relevant to this case.

Request for Information No. 1-11. If you cannot unequivocally admit the foregoing request (RFA No. 1-10), identify each instance since 1995 when a developer has not been required to pay all costs of any improvements to Mountain Peak's system necessary for Mountain Peak to provide service to a proposed subdivision and produce the documents waiving or reducing requirement for the developer.

Mountain Peak's Objection: This Request is not relevant and not reasonably calculated to lead to the discovery of admissible evidence and thus is beyond the scope of discovery authorized by the PUC's procedural rules and the Texas Rules of Civil Procedure.

In an attempt to efficiently narrow the potential issues in this case, including the types of property that Mountain Peak claims might be rendered useless or valueless, RFI No. 1-11 is expressly contingent upon Mountain Peak's response to a request for admission (RFA No. 1-

10).¹¹ If Mountain Peak unequivocally *admitted* the fact (that a developer is required to pay improvement costs for its proposed subdivision), then no response to RFI No. 1-11 would be required. If Mountain Peak denied or equivocated regarding whether developers are required to pay subdivision improvement costs, then Midlothian, *which purchased the Park Property from a developer*, is entitled to discover facts associated with how subdivisions, generally, are developed in preparation of its case with regard to the Park Property.

The developer/seller of the Park Property is not a party to this case. Facts associated with any developer's payment to *Mountain Peak* (or waiver of that payment by Mountain Peak) for facilities and other property that ultimately becomes part of the Mountain Peak will confirm how Mountain Peak prepares its system for new development, which may lead to information regarding how it prepared its system for the development proposed by the developer/seller of the Park Property, including information indicating which facilities that Mountain Peak may argue are associated with the Park Property, as well as some indication of property rendered useless or valueless by the decertification of the Park Property. These facts are plainly relevant and this request is reasonably calculated to lead to Midlothian's discovery of admissible evidence or lead to the discovery of other admissible evidence as to Mountain Peak's real or personal property related to the Park Property was developed as of decertification.

None of Mountain Peak's relevance objections is meritorious. As such, Mountain Peak should be compelled to provide responses.

B. "MARSHALLING" OBJECTIONS (RFI NOS. 1-1, 1-6, 1-29, 1-30 & 1-31):

Mountain Peak objected to the following requests with the identical objection for each;

Mountain Peak's Objection (identical): This Request improperly requires Mountain Peak to marshal its evidence and the evidence it intends to offer at trial in violation of Tex. R. Civ. P. 197.

Notably, Mountain Peak does not object as to the *relevance* of any of these questions. Midlothian disagrees that RFI Nos. 1-1, 1-6, 1-29, 1-30 and 1-31 improperly require Mountain

¹¹ RFA No. 1-10 seeks to verify basic facts relevant to this case: "Admit that a developer is required to pay costs of any improvements to Mountain Peak's system necessary for Mountain Peak to provide service to a proposed subdivision."

Peak to marshal its evidence, and instead asserts that the requests are properly tailored to elicit discoverable information consistent with Rule 197.1, Tex. R. Civ. Proc. (“TRCP”).¹²

The following are Midlothian’s RFIs:

Request for Information No. 1-1. If you cannot unequivocally admit the foregoing request (RFA No. 1-1), identify the real property rendered useless or valueless to Mountain Peak, in whole or part, as a result of the decertification in Docket No. 44394, including, for each parcel, the date and purchase price of the property, any current or planned uses for the property, any appraisals related to the property, and information on remaining debt service for loans or bonds to acquire the same.

Request for Information No. 1-6. If you cannot unequivocally admit the foregoing request (RFA No. 1-5), explain the factual basis for your belief that the usefulness or value of the facilities has decreased as a result of the decertification, identifying specifically which facilities were affected and the amount of any decrease in usefulness or value.

Request for Information No. 1-29. If you contend that any intangible property is rendered useless or valueless, in whole or in part, by the decertification of the Park Property, state the legal and factual basis for your claim(s), identify each type of intangible property affected and amounts paid for the intangible property and the claimed reduction in value or usefulness of the intangible property, and produce any document relied upon in making such claim(s).

Request for Information No. 1-30. Identify any facility or other property Mountain Peak claim was rendered useless or valueless, in whole or in part, as the result of decertification of the Park Property, including, for each facility or other property:

- a. A description and the location of each;
- b. The dates of construction and of placement into service;
- c. The costs of construction and of design; and
- d. Information on remaining debt service for loans or bonds to finance design and/or construction as of May 1, 2016.

To the extent that you have identified the facility or other property in response to RFI No. 1-4 or No. 1-7, no further response is solicited.

Request for Information No. 1-31. If you cannot unequivocally admit the foregoing request (RFA No. 1-14), explain the factual basis for your belief that

¹² TRCP R. 197.1 (stating, in pertinent part, that “An interrogatory may inquire whether a party makes a specific legal or factual contention and may ask the responding party to state the legal theories and to describe in general the factual bases for the party’s claims or defenses, but interrogatories may not be used to require the responding party to marshal all of its available proof or the proof the party intends to offer at trial”).

the usefulness and/or value of the facilities has decreased as a result of the decertification, identifying specifically which facilities were affected and the amount of any decrease in usefulness or value

Midlothian's requests consist of contention questions. Under TRCP R. 197, a request for information may ask whether the party makes *specific legal or factual contentions* and may ask the party to state its legal theories and to describe, in general, the factual bases for the party's claims or defenses.¹³ These requests do not seek Mountain Peak to describe in particularity "all" or "every" factual basis, and is therefore compliant with TRCP 197.1 by seeking to ascertain basic legal and factual claims. The marshalling objection should be overruled.

RFI Nos. 1-1, 1-6 and 1-31 are expressly contingent upon answers to requests for admission that are designed to identify Mountain Peak's contentions regarding specific types of property, respectively, RFA Nos. 1-1 (real property), 1-5 (facilities *within* the Park Property), and 1-14 (facilities within 1000 feet of—but not on—the Park Property). These cross-referenced RFAs are reproduced here in their entirety:

Request for Admission No. 1-1: Admit that no *real property* was rendered useless or valueless to Mountain Peak as a result of the decertification of the Park Property. [Emphasis added.]

Request for Admission No. 1-5: Admit that the usefulness or value of the facilities to Mountain Peak identified in response to RFI No. 1-4 ["water service facilities ... located *within the Park Property*"] has not decreased as a result of decertification of the Park Property.¹⁴

Request for Admission No. 1-14: Admit that the usefulness or value of the facilities to Mountain Peak identified in response to RFI No. 1-7 ["water service facilities ... located *within 1000 feet* of (but not on or within) the Park Property"] has not decreased as a result of decertification of the Park Property.¹⁵

¹³ See Comment 1 to TRCP 197.1 ("Interrogatories *about specific legal or factual assertions* - such as, whether a party claims a breach of implied warranty, or when a party contends that limitations began to run - are proper, but interrogatories that ask a party to state *all* legal and factual assertions are improper. As with requests for disclosure, interrogatories may be used to ascertain basic legal and factual claims and defenses but may not be used to force a party to marshal evidence. Use of the answers to such interrogatories is limited, just as the use of similar disclosures under Rule 194.6 is.") (emphasis added).

¹⁴ The emphasis is in the original RFI No. 1-4, which is reproduced in its entirety within this motion because Mountain Peak asserts that part (c) is not relevant. Mountain Peak has *not* raised the relevance or marshalling objections as to the rest of RFI No. 1-4.

¹⁵ The emphasis is in the original RFI No. 1-7, which is reproduced in its entirety within this motion because Mountain Peak asserts that part (c) is not relevant. Mountain Peak has *not* raised the relevance or marshalling objections as to the rest of RFI No. 1-7.

If Mountain Peak had *no* contention regarding the types of property described in each RFA, then it might provide an unqualified admission and allow the Commission, ALJ and parties to focus on other properties claimed to be rendered useless or valueless. Otherwise, the three RFIs elicit general information so that Midlothian can understand Mountain Peak's contentions. Either way, these questions address fundamental questions in this proceeding.¹⁶ None of the questions can reasonably be understood to improperly make Mountain Peak marshal its evidence, so its objection should be overruled.

The remaining requests, RFI Nos. 1-29 and 1-30 are likewise intended to elicit general information regarding *specific* property Mountain Peak may assert was rendered useless or valueless by the decertification of the Park Property.

RFI No. 1-29 asks about "intangible property." This is germane to the case because this proceeding is meant to identify if *any property* was rendered useless or valueless by the Park Property's decertification. In addition, TWC § 13.254(g) lists factors that should be used in determining the value of personal property, which include "the amount of debt allocable for service to the [Park Property]," "the value of [Mountain Peak's] contractual obligations allocable to the area in question," and "other relevant factors."¹⁷ Each of these factors can implicate intangible property. Indeed, Mountain Peak does not dispute the question's relevance, but instead objects to the marshalling of evidence. Mountain Peak has the ability to respond by cross-referencing to other questions that relate to its debt or contractual obligations that were not subject to any objection by Mountain Peak, but Midlothian has *no other practicable way* to timely assess what Mountain Peak might assert is intangible property fitting the "other factors" category. This type of contention interrogatory falls squarely within the scope of those allowed under TRCP 197.

RFI No. 1-30 requests basic information related to facilities or other property outside the Park Property (RFI No. 1-4) and beyond the 1000 foot radius utilized in RFI No. 1-7 that

¹⁶ See TWC § 13.254(d) (referring to compensation being based upon "any property that the utility commission determines is rendered useless or valueless to the decertified retail public utility as a result of the decertification") & (g) (referring to valuation of "real property" and "personal property").

¹⁷ *C.f.*, 16 TAC § 24.113(k) (providing list).

Mountain Peak claims was rendered useless or valueless as a result of decertification.¹⁸ Midlothian would generally assume that the number and type of facilities or properties that would arguably be adversely affected by the decertification should diminish with increased distance from the Park Property, but this question is meant to solicit Mountain Peak's contentions on the issue. Again, the objection should be overruled.

Finally, *as to all of these requests* opposed based upon the "marshalling" objection, Midlothian concludes with the following remarks:

The Commission's Procedural Rules do not expressly incorporate the Request for Disclosure under TRCP R. 194.2, available to litigants in state courts in order to elicit basic information into another party's legal theories and factual claims.¹⁹ Midlothian is making judicious use of these RFIs to discover Mountain Peak's contentions. As noticed in Comment 2 to TRCP R. 194.1:

Rule 194.2(c) and (d) permit a party further inquiry into another's legal theories and factual claims than is often provided in notice pleadings. *So-called 'contention interrogatories' are used for the same purpose.* Such interrogatories are not properly used to require a party to marshal evidence or brief legal issues. Paragraphs (c) and (d) are intended to require disclosure of a party's basic assertions, whether in prosecution of claims or in defense. [Emphasis added.]

As such, Midlothian is reasonably utilizing these RFIs in order to legitimately identify and narrow issues related to the fundamental questions in this proceeding.

Midlothian should be able to discover the real, personal or intangible property Mountain Peak is contending has been rendered useless or valueless in preparation of its arguments and written testimony. Midlothian does not know Mountain Peak's system, and therefore Midlothian is at a serious disadvantage in attempting to defend or contradict any of Mountain Peak's assertions that its properties are rendered useless or valueless by the Park Property's decertification. Without this discovery Midlothian is forced to wait until Mountain Peak unilaterally identifies such property, via expert testimony or otherwise, before it can begin to determine whether or not such contentions are accurate. This will almost certainly result in

¹⁸ The request is meant to minimize the burden on Mountain Peak by avoiding duplication of RFI Nos. 1-4 and 1-7: "To the extent that you have identified the facility or other property [responsive to RFI No. 1-30] in response to RFI No. 1-4 or No. 1-7, no further response is solicited."

¹⁹ See 16 TAC § 22.141(b) ("Parties may obtain discovery by requests for information, which include requests for inspection or production of documents or things, requests for admissions, and depositions by oral examination").

additional delays in resolving this matter, despite the short statutory deadlines, the Commission's request for expedited handling, and the public's need for water service at the Park Property, which is scheduled to open soon.

IV.
CONCLUSION

Midlothian respectfully requests that the Honorable Administrative Law Judge expeditiously grant this motion to compel and requests any and all other relief to which it is justly entitled.

Respectfully submitted,

DAVIDSON, TROILO, REAM & GARZA, P.C.
601 NW Loop 410, Suite 100
San Antonio, Texas 78216
Telephone: (210) 349-6484
Facsimile: (210) 349-0041

By: *Paul Gonzalez, with permission*
[Signature]
Patrick W. Lindner
plindner@dtrglaw.com
State Bar No. 12367850
Paul M. González
pgonzalez@dtrglaw.com
State Bar No. 00796652
Richard Lindner
State Bar No. 24065626
rlindner@dtrglaw.com

ATTORNEYS FOR CITY OF MIDLOTHIAN

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this document was served on all parties of record in this proceeding on October 20, 2016, in the following manner: by facsimile.

Paul Gonzalez, with permission
[Signature]
Paul M. González