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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
SECOND REQUESTS FOR INFORMATION AND REQUESTS FOR ADMISSION**

The City of Midlothian ("Midlothian") files this Response to Mountain Peak Special Utility District's ("Mountain Peak") Motion to Compel Responses to Second Request for Information and Request for Admission to City of Midlothian ("Motion to Compel").¹ Midlothian received Mountain Peak's Motion to Compel on December 5, 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 responses to Second Request under Legal Standard Heading.

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.

GENERAL STATEMENT OF OBJECTION ON RELEVANCE

In its objections to Mountain Peak's Second RFIs and RFAs, 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 all of the requests 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: (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."⁶ The Water Code and PUC Substantive Rules identify factors that should be considered in making these determinations in TWC § 13:254(g) and 16 TAC § 24.113(h-k). 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 or plans of Midlothian or the funding of those actions and plans.

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.

III.

SPECIFIC RESPONSES

Mountain Peak's RFA 2-1 and RFI 2-1.

In Midlothian's response it admitted to RFA 2-1, subject to relevance objection which Midlothian hereby withdraws, and will admit without objection.

Midlothian continues to assert a relevance objection to RFI 2-1 which seeks the deed or contract demonstrating the transfer of ownership of the Subject Tract to Midlothian. The means and methods used to transfer ownership in are irrelevant to the instant proceeding and nothing

⁶ Preliminary Order (September 23, 2016).

therein 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, or would lead to evidence which would."⁷

Mountain Peak's RFA 2-2, 2-3, 2-4, RFI 2-2, 2-3, 2-4, 2-6, 2-7, and 2-8.

Midlothian hereby withdraws its objections to RFA 2-2, 2-3 and 2-4. Midlothian continues to assert its objections to RFI 2-2, 2-3, 2-4, 2-6, 2-7, and 2-8.

Mountain Peak has argued that the public funds or bonds expended in relation to the Subject Tract is somehow relevant because Midlothian "opened the door to the issues in pleadings," and therefore Mountain Peak is allowed discovery regarding those matters. This "bootstrapping" argument fails because it is based upon a faulty premise. Moreover, the production of such information cannot reasonably 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."⁸

Midlothian hasn't "opened" any "door," as alleged by Mountain Peak. The context of the Midlothian's statements, conveniently ignored by Mountain Peak, is critical. Mountain Peak's Motion to Stay Proceedings Pending Appeal required the consideration and argument of a different set of facts and law than is at issue under this Docket; specifically, Mountain Peak requested abatement of this case citing its pending appeal of the decertification order of May 1, 2015 in Docket No. 44394. Mountain Peak in its Motion to Stay, directly implicated the legal and factual actions of the parties *after* decertification and outside the issues to be decided in the instant Docket. Information used in Midlothian's defense to the Motion to Stay does not magically become relevant to the ultimate issues of *this* case, initiated more than *one year after the decertification order* to determine whether any property of Mountain Peak rendered "useless or valueless" *by the decertification order*. Neither the Motion to Stay, nor Midlothian's Response to the Motion to Stay, changed the issues to be ultimately determined under this Docket, nor did they change the facts of consequence at issue under this Docket and therefore Mountain Peak's bootstrapping attempt fails.

⁷ *In re National Lloyds Ins.*, 449 S.W.3d at 489 (emphasis added).

⁸ *Id.*

Further, Mountain Peak also argues these requests are relevant despite the Motion to Stay and Response to Motion to Stay because they could indicate capacity needs and therefore what property “*could have been used by Mountain Peak to Serve the Property.*” Motion to Compel at page 5. Midlothian’s funding, cost, design plans or schemes have no bearing on what Mountain Peak property was rendered useless or valueless at the time of decertification in May 2015. What Mountain Peak *could have used* to serve the Park Property is not relevant: the Commission in Docket No. 44394 concluded that, irrespective of Midlothian’s funding or design plans, the Park Property was an unplatted tract of land that was *not receiving service* from Mountain Peak.⁹ Finally, Midlothian’s choice of funding doesn’t change Mountain Peak’s property as of May 1, 2015; or its value if it were somehow determined to be rendered useless or valueless.

Any capacity figures used by Midlothian in their decision making (much of it done *after* decertification) might be relevant to if there was an application for service made, fees paid, and details regarding capacity needs disclosed before decertification that resulted in some specific actions of Mountain Peak. At decertification the Subject Tract was undeveloped and no request for service had been made by Midlothian. Decertification was effectuated pursuant to TWC § 13.254(a-5), which meant that the Commission determined that the Park Property was simply not receiving service, therefore, the information requested cannot be “of consequence” under these facts. In addition, Midlothian’s actions or knowledge *after* decertification do not change Mountain Peaks’ property, or its value, as may have been affected by the decertification.

Subject to the foregoing arguments that these requests are irrelevant and improper discovery in this case, RFI 2-2 and 2-4 are also unduly burdensome as they would require Midlothian to scour its records over a period of several years for any document referencing water and/or funding evaluations. Because Midlothian is in the business of supplying water, this results in a large number of documents that need evaluating.

Subject to the foregoing arguments that these requests are irrelevant and improper discovery in this case, RFI 2-7 and 2-8 are also unduly burdensome as they would require scouring through years of records and trying to determine an inventory of any facility, consultant fee, other fee that has anything to do with Midlothian’s water system that may be involved with

⁹ See Midlothian’s Notice of Intent to Provide Water Service to Land Decertified from Mountain Peak, Exhibit B (Order in PUC Docket No. 44394 at pp 2-4 (discussing standard under TWC §13.254(a-5)), Finding of Fact Nos. 47 & 48, Conclusion of Law Nos. 8, 10, 11 & 17)).

acquisition or delivery of water to the Subject Tract, and to identify the individual cost for each item on that inventory.

Mountain Peak's RFI No. 2-5.

In this request Mountain Peak is seeking Midlothian's plans and designs for facilities to provide water to the subject tract. Midlothian's means and methods for delivering water to the Subject tract can have no bearing on Mountain Peaks' property rendered useless or valueless, or its value. As further demonstrated in this response, the Subject Tract was undeveloped during the time period at issue for analyzing Mountain Peak's property under this Docket. Released from Mountain Peak's service area under TWC § 13.254(a-5), the Commission has determined that this property was "not receiving water service" from Mountain Peak, irrespective of any plans or actions of Midlothian. Circumstances have changed since decertification, and now, more than one year after decertification, Midlothian is seeking to supply water to parkland which has been developed. The information requested has nothing to do with the Commission's determination of the existence of any real or personal property of Mountain Peak that was rendered useless or valueless by decertification in Docket No. 44394, if any.

Subject to the foregoing arguments as to relevance, RFI 2-5 is overly broad and unduly burdensome as the planning and design of facilities is not limited in time (i.e., as of the date of decertification) or scope. Certain facilities may have been designed over several years, but others were planned and designed *after* the date of decertification in 2015. Also, the request broadly includes any planning and design of any facility that is used in the conveyance and distribution of water from the point of the water's entry into Midlothian's system to its ultimate destinations within the Park Property.

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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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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 December 8, 2016, via facsimile and email:


Richard Lindner