



Control Number: 46120



Item Number: 53

Addendum StartPage: 0

RECEIVED

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

2017 JAN -4 PM 4:08

CITY OF MIDLOTHIAN NOTICE OF
INTENT TO PROVIDE WATER
SERVICE TO LAND DECERTIFIED
FROM MOUNTAIN PEAK SPECIAL
UTILITY DISTRICT

§
§
§
§
§

BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

**CITY OF MIDLOTHIAN'S RESPONSE TO
MOUNTAIN PEAK SPECIAL UTILITY DISTRICT'S
MOTION TO RECONSIDER STAY OF PROCEEDING PENDING APPEAL AND
ALTERNATIVE MOTION TO BROADEN SCOPE OF PROCEEDING**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

The City of Midlothian ("Midlothian") files this Response to Mountain Peak Special Utility District's ("Mountain Peak") Motion to Reconsider Stay of Proceeding Pending Appeal and Alternative Motion to Broaden Scope of Proceeding ("Motion to Reconsider").¹ Mountain Peak filed its Motion pursuant to PUC Procedural Rule [16 TAC §] 22.77. Midlothian received Mountain Peak's motion on December 29, 2016. This response is therefore timely. Midlothian asserts that the Motion to Reconsider must, in all respects, be denied, respectfully showing as follows:

I.

**MOUNTAIN PEAK'S BASELESS MOTION TO RECONSIDER
STAY OF PROCEEDING PENDING APPEAL**

In SOAH Order No. 3 this Honorable Administrative Law Judge agreed with Midlothian and Commission Staff to find that "Mountain Peak provided no substantive grounds supporting its request for stay and granting such a stay would unnecessarily delay this proceeding."² By its own admission in its Motion to Reconsider, "Mountain Peak's identified grounds were, *and remain*, to preserve the resources of the parties and of the agencies."³ Because Mountain Peak

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 SOAH Order No. 3 at 1 (November 22, 2016).

³ Mountain Peak's Motion to Reconsider at 3 (emphasis added).

53

fails to offer any new (or substantive) grounds for requesting a stay, Midlothian incorporates by reference its original response on file in connection with this proceeding.⁴

In addition, Mountain Peak's motion should be denied as being both improper and untimely. Although Mountain Peak cites PUC Proc. Rule 22.77, it ignores the Commission's rules regarding appeals of interim orders, particularly PUC Proc. Rule 22.123. While Mountain Peak seeks reconsideration of SOAH Order No. 3—clearly, an interim order in this proceeding,⁵ -- Rule 22.123(a)(2) provides:

Any appeal to the commission from an interim order shall be filed within ten days of the issuance of the written order. [Emphasis added.]

Thus, if it wished to appeal the denial of its prior motion, Mountain Peak should have appealed to the Commission by December 1, 2016. Properly raised before the Commission, the parties would have the benefit of a quick determination as to whether the appeal might be taken up and the matter reconsidered.⁶ In contrast, Mountain Peak *adds* to the resource burden and invites further delays within this proceeding by bringing this request more than a month after the order's issuance, contrary to the spirit of the Commission's rules for handling appeals of interim orders.

For these reasons, Mountain Peak's baseless Motion to Reconsider the ruling in SOAH Order No. 3 must be denied.

II. ALTERNATIVE MOTION TO "BROADEN SCOPE" ALSO WITHOUT MERIT

Mountain Peak alternatively requests an order "permitting presentation of evidence on the additional compensation factors set forth in § 13.254(g), which may not be directly tied to 'property' that 'has been rendered useless or valueless.'"⁷ This request is procedurally premature and presents yet another tactic to increase the cost and potential delays to administrate this case. Again, denial is most appropriate.

⁴ Midlothian's Response to Mountain Peak's Motion to Stay Proceeding Pending Appeal (November 14, 2016) ("original response").

⁵ See PUC Proc. R. 22.122(a) ("The presiding officer shall issue interim orders covering procedural and discovery matters, requests for interim relief, and such other matters as may aid in the conduct of the hearing and the efficient and fair disposition of the proceeding. Interim orders shall be written or stated orally on the record.").

⁶ See PUC Proc. R. 22.123(a)(7) (an appeal is deemed denied if after ten days no commissioner has placed the appeal on the agenda of an open meeting).

⁷ Mountain Peak's Motion to Reconsider at 4.

First, there has been no interim order determining what property has been rendered useless or valueless under the two-phase process outlined in the Preliminary Order. Section 13.254(d) of the Texas Water Code requires that, prior to a utility providing service to an area that has been decertified, the Commission must determine whether any of the decertified utility's property has been rendered useless or valueless as a result of the decertification. *After* that determination is made, and *if* the Commission identifies property that has been rendered useless or valueless, *then* the parties can submit evidence regarding the appropriate compensation for the property under TWC § 13.254 (e)-(g). As the Commission set out in several other "notice of intent to serve" cases,⁸ Phase I will determine what property, if any, has been rendered useless or valueless because of the decertification.⁹ The evidence Mountain Peak is seeking permission to present in its alternative motion is evidence on compensation relates to the second phase, Phase II. If no property was rendered useless or valueless, then Mountain Peak is not entitled to *any* compensation and the entire issue is moot and efforts here would be needlessly wasted.¹⁰

Second, Mountain Peak prematurely posits an *evidentiary* argument made to look like a decision appropriate for an interim order. The issue Mountain Peak is trying to explore is whether or not the compensation evidence they are seeking to present can be shoe-horned into Phase I. Normally, a relevance argument is raised and ruled upon during presentation of specific evidence. Mountain Peak's strategy may be to consume time and resources, and perhaps delay these proceedings by creating an appealable interim order "other than an evidentiary ruling."¹¹ An appeal and further delays of the proceeding will certainly complicate the administration of the case, cause Midlothian financial hardship, and possibly further delay what was meant to be an expedited proceeding.

⁸ See, e.g., Tex. Pub. Util. Comm'n, *Zipp Road Utility Road Company LLC's Notice of Intent to Provide Sewer Service to Area Decertified from Guadalupe-Blanco River Authority in Guadalupe County*, Docket No. 45679; Preliminary Order (July 20, 2016) and *City of Celina's Notice of Intent to Provide Water and Sewer Service to Area Decertified from Aqua Texas, Inc. in Denton County*, Docket No. 45848, Preliminary Order (July 20, 2016).

⁹ Preliminary Order at 2.

¹⁰ Without acknowledging the merits of the request, Mountain Peak's alternative motion may more appropriate for hearing, if and when the case is returned to SOAH for the second phase and a supplemental preliminary order addressing that phase is established.

¹¹ See PUC Proc. R. 22.123(a)(1) ("Appeals are available for any order of the presiding officer that immediately prejudices a substantial or material right of a party, or materially affects the course of the hearing, *other than evidentiary rulings*") (emphasis added).

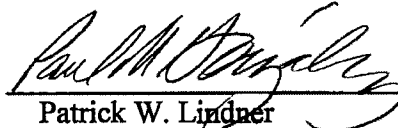
In sum, TWC § 13.254(d) is clear. Compensation is only due only for property determined by the Commission to have been rendered useless or valueless. Or, stated another way, the section 13.254(g) factors are not relevant unless section 13.254(d) is satisfied. Mountain Peak's specious alternative motion should therefore be denied.

III. CONCLUSION

Midlothian respectfully requests that the Honorable Administrative Law Judge expeditiously deny Mountain Peak's Motion to Reconsider Stay of Proceeding Pending Appeal and Alternative Motion to Broaden Scope of Proceeding and requests any and all other relief to which it is justly entitled.

Respectfully submitted,

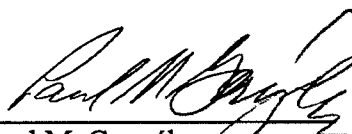
DAVIDSON, TROILO, REAM & GARZA, P.C.
601 NW Loop 410, Suite 100
San Antonio, Texas 78216
Telephone: (210) 349-6484
Facsimile: (210) 349-0041

By: 
Patrick W. Lindner
plindner@dtgrlaw.com
State Bar No. 12367850
Paul M. González
pgonzalez@dtgrlaw.com
State Bar No. 00796652
Richard Lindner
State Bar No. 24065626
rlindner@dtgrlaw.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 January 4, 2017, in the following manner: by e-mail.


Paul M. González