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CITY OF MIDLOTHIAN'S NOTICE OF §
INTENT TO SERVE AREA §
DECERTIFIED FROM MOUNTAIN §
PEAK SPECIAL UTILITY DISTRICT IN §
ELLIS COUNTY §

BEFORE THE STATE OFFICE
PUBLIC UTILITY COMMISSION
OF FILING CLERK
ADMINISTRATIVE HEARINGS

**MOUNTAIN PEAK SPECIAL UTILITY DISTRICT'S
OBJECTIONS TO PREFILED DIRECT TESTIMONY OF THE CITY OF
MIDLOTHIAN**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

Mountain Peak Special Utility District ("Mountain Peak"), files these Objections to the Prefiled Testimony of the City of Midlothian pursuant to Order No. 5.

I. OBJECTIONS TO THE PREFILED TESTIMONY OF MICHAEL ADAMS

The City of Midlothian ("Midlothian") prefiled testimony of two witnesses: Michael Adams and Victoria Harkins. Dr. Harkins was identified as an expert, but Mr. Adams was not. Mountain Peak requests that certain lines in Mr. Adams' testimony and Exhibit MA-1 be stricken because it relates to matters which Midlothian represented were not relevant to this proceeding and because it improperly includes expert opinions or lay witness opinions which do not meet the requirements of the Texas Rules of Evidence ("TRE"). In addition, these opinions are duplicative of those of Dr. Harkins.

A. Specific Objections to Michael Adams' Prefiled Testimony

1. Page 5, Line 16-19 and Exhibit MA-1

In response to Mountain Peak's first request for a stay in this proceeding, Midlothian referenced a bond program for its proposed park.¹ Mountain Peak followed up with discovery requests seeking information about this bond program, including a request for "all documents related to the Park Facilities Bond Program which also relate to the provision of water to the Subject Tract."² Midlothian objected to those requests on the grounds that they were irrelevant

¹ See City of Midlothian's Response to Mountain Peak SUD's Motion to Stay Proceeding Pending Appeal (Nov. 14, 2016).

² See Mountain Peak SUD's Second Set of RFIs and RFAs to the City of Midlothian, Texas, RFI 2-4 and RFA 2-2 and 2-3 and RFI 2-2 and 2-3 (Nov. 23, 2016).

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to this proceeding.³ In response to Mountain Peak's motion to compel, Midlothian argued that simply because the information was relevant to a response to a motion for a stay did not make them relevant to this proceeding.⁴ That was one of the reasons Midlothian's objections were sustained.⁵ Now, however, Midlothian has included some of this information in Mr. Adams' testimony:

Attached as Exhibit MA-1 is a true and correct copy of the information pamphlet on the bond measures set for voter consideration on May 13, 2006, including Proposition No. Three, funding the Park Facilities Bond Program.⁶

Exhibit MA-1 is a copy of the bond pamphlet related to the Park Facilities Bond Program which would have been responsive to Mountain Peak's RFI 2-4.

Before any evidence can be admitted, including the testimony of a witness, it must be relevant.⁷ Midlothian has itself argued that this very information is irrelevant. Thus, under TRE 402, Mountain Peak respectfully requests that Page 6, Lines 16-19 and Exhibit MA-1 be stricken from Mr. Adams' testimony.

2. Page 8, Lines 8-12, 13-17

In response to Mountain Peak's Request for Information No. 16 regarding its testifying experts, Midlothian produced the resume of Dr. Victoria Harkins.⁸ Midlothian did not produce a resume for Mr. Adams or otherwise designate Mr. Adams as a testifying expert in this proceeding.⁹ Mr. Adams' prefiled testimony only very briefly outlines his professional background and does not attach a resume and fails to qualify him as an expert witness.¹⁰

TRE 701 provides: "If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; and (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue."¹¹ By contrast, an expert witness is one "who is qualified as an expert by knowledge, skill, experience, training,

³ See City of Midlothian's Objections to Mountain Peak SUD's Second RFIs and RFAs (Nov. 30, 2016).

⁴ See City of Midlothian's Response to Mountain Peak SUD's Motion to Compel Responses to its Second RFIs and RFAs at 4 (Dec. 8, 2016).

⁵ SOAH Order No. 7 ("The ALJ agrees with the City. The motion to stay involved a different set of facts and law than is at issue here. The fact that the City advanced an argument in response to the motion to stay does not make facts relevant to that argument relevant to issues in this docket.").

⁶ Prefiled Direct Testimony of Michael G. Adams at 5:16-19 (Jan. 17, 2017).

⁷ Tex. R. Evid. 402.

⁸ See City of Midlothian's Second Supplemental Responses to Mountain Peak SUD's First RFIs (Jan. 17, 2017).

⁹ *Id.*

¹⁰ See City of Midlothian's Direct Testimony of Michael G. Adams.

¹¹ Tex. R. Evid. 701.

or education” and who “may testify in the form of an opinion or otherwise, if the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.”¹² In *Reid Rd. Mun. Util. Dist. No. 2 v. Speedy Stop Food Stores, Ltd.*, the Texas Supreme Court explained that “when the main substance of the witness’s testimony is based on application of the witness’s specialized knowledge, skill, experience, training, or education . . . then the testimony will generally be expert testimony . . .”¹³

Mr. Adams provides expert opinion testimony without being designated as an expert:

None of Mountain Peak’s property has been rendered useless or valueless as a result of the Decertification Order of May 1, 2015. Not only has no water service ever been provided by Mountain Peak to the Park, nothing I have reviewed in this docket credibly demonstrates that Mountain Peak committed or used any property in furtherance to serve the Park. . . . Mountain Peak’s facilities or property were every bit as “used and useful” in providing its customers service *after* decertification of this unplatted farmland as they were on the day *before* decertification. Despite Mountain Peak’s assertions to the contrary, nothing was made useless or valueless based on decertification under TWC § 13.254(a-5) and (a-6).

The initial question, which asks whether “based on [his] professional knowledge and experience” he has an opinion to provide, belies the fact that his later answer will be an expert opinion.¹⁴ In the language quoted above, Mr. Adams provides this opinion which would require specialized knowledge and experience. As such, it constitutes an expert opinion. Because Mr. Adams was not designated as an expert and because there is an inadequate foundation establishing him as a qualified expert, Mountain Peak requests this expert opinion testimony be stricken.

Moreover, this testimony is not a permissible lay witness opinion. This testimony is not based on Mr. Adams’ personal perceptions. It is not a statement of objective facts which he personally observed. And, it is not helpful to understanding any other portion of his testimony or to determining a fact in issue in this proceeding. Finally, this testimony is duplicative of Midlothian’s designated expert’s opinions and serves only to attempt to bolster those opinions. Because this opinion testimony does not meet the requirements of TRE 701, Mountain Peak requests that it be stricken.

¹² Tex. R. Evid. 702.

¹³ 337 S.W.3d 846, 851 (Tex. 2011).

¹⁴ Prefiled Direct Testimony of Michael G. Adams at 8:1-2 (Jan. 17, 2017).

II. CONCLUSION

Midlothian objected to producing documents related to the Park Facilities Bond Program on the grounds that such documents were not relevant to this proceeding. It should not now be permitted to present testimony or introduce documents relating to this program into evidence. Because Mr. Adams has not been designated as an expert witness and has not been qualified as an expert witness, his testimony is that of a lay witness. As a lay witness, his opinions must be based on his personal perceptions and must be helpful to understanding his testimony or to determining a fact in issue. Mr. Adams' opinions do not meet this standard, are in fact expert opinions, and are duplicative of the opinions of Dr. Harkins.

Respectfully submitted,

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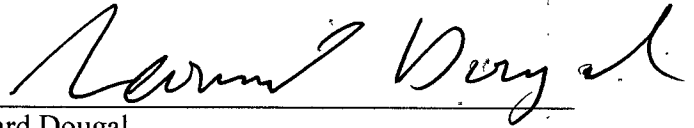
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CERTIFICATE OF SERVICE

This is to certify that on the 23rd day of January, 2017, a true and correct copy of the foregoing document and the prefiled testimony of Randel Kirk and Donald G. Rauschuber were served via email and by U.S. First Class Mail pursuant to Rule 22.74:

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