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CITY OF MIDLOTHIAN'S NOTICE OF § BEFORE THE STATE OFFICE  
INTENT TO SERVE AREA §  
DECERTIFIED FROM MOUNTAIN §  
PEAK SPECIAL UTILITY DISTRICT IN §  
ELLIS COUNTY § ADMINISTRATIVE HEARINGS

**MOUNTAIN PEAK SPECIAL UTILITY DISTRICT'S  
RESPONSES TO CITY OF MIDLOTHIAN'S OBJECTIONS AND MOTION TO  
STRIKE DIRECT TESTIMONY OF RANDEL KIRK AND DONALD G. RAUSCHUBER**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

Mountain Peak Special Utility District ("Mountain Peak"), files these Responses to the City of Midlothian's Objections and Motion to Strike the Testimony of Randel Kirk and Donald G. Rauschuber pursuant to Order No. 5.

**I. GENERAL RESPONSE TO OBJECTIONS**

The City of Midlothian ("Midlothian") objected and moved to strike portions of the testimony of Randel Kirk and Donald G. Rauschuber on grounds of relevance and hearsay. For the reasons set forth below, Mountain Peak respectfully requests that each of Midlothian's objections be overruled.

Midlothian seeks to strike as irrelevant any evidence which tends to disprove Midlothian's position. However, relevant evidence is not limited to evidence that supports one party. Relevant evidence is any evidence that tends to make any fact of consequence more or less probable.<sup>1</sup> However, the fact offered does is not required to completely prove the fact of consequence to the proceeding.<sup>2</sup> As one court explained, "to determine relevancy, the court must look at the purpose of offering the evidence. There must be some logical connection either directly or by inference between the fact offered and the fact to be proved."<sup>3</sup> The facts of consequence in this proceeding are any facts relating to whether specific property belonging to Mountain Peak has been rendered useless or valueless due to the decertification of the approximately 97.7-acre property (the "Park Property") decertified from Mountain Peak's CCN

<sup>1</sup> Tex. R. Evid. 401 ("TRE").

<sup>2</sup> See *Transportation Ins. v. Moriel*, 879 S.W.2d 10, 24-25 (Tex. 1994).

<sup>3</sup> *Rhey v. Redic*, 408 S.W.3d 440, 460 (Tex.App.—El Paso 2013, no pet.).

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in PUC Docket No. 44394. Because the testimonies of Mr. Kirk and Mr. Rauschuber tend to make facts related to identifying Mountain Peak’s property which has been rendered useless or valueless more or less probable, it is relevant and admissible.

Hearsay is a statement that the declarant does not make while testifying at the current trial or hearing and a party offers in evidence to prove the truth of the matter asserted in the statement.<sup>4</sup> However, exceptions exist to the rule against hearsay, including an exception for “Then-existing mental, emotional, or physical condition. A statement of the declarant’s then-existing state of mind (such as motive, intent, or plan) . . . .”<sup>5</sup> Moreover, the rule against hearsay does not prohibit a declarant from making a statement while testifying at the current trial or hearing.

**A. Specific Responses to Objections to Randel Kirk’s Testimony**

1. Page 4, Lines 20-26

The testimony cited in this selection contains background testimony regarding the proceeding and the witness’ understanding of the proceeding. First, the testimony is relevant to understanding the remainder of Mr. Kirk’s testimony. It is part of Mr. Kirk’s description of the background of this case and his understanding of the purpose of this specific proceeding. Second, it is relevant to determining what property belonging to Mountain Peak has been rendered useless or valueless. Midlothian argues through its own witnesses that the fact that the property was decertified is evidence that none of Mountain Peak’s property has been rendered useless or valueless. Mr. Kirk’s testimony establishes that Mountain Peak disagrees with the PUC’s findings in Docket No. 44394 and calls into question reliance on that docket for concluding that no property has been rendered useless or valueless.

2. Page 9, Lines 17-22 and Page 10, Lines 23-26

Mountain Peak presented testimony through Mr. Kirk to establish that costs have been incurred related to the planning, design, or construction of physical assets which Mountain Peak contends were rendered useless or valueless by the decertification. This testimony is directly relevant to determining what property – including intangible property – belonging to Mountain Peak has been rendered useless or valueless. The costs identified by Mr. Kirk are intangible property that has been rendered useless or valueless by the decertification of the Park Property.

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<sup>4</sup> TRE 801.

<sup>5</sup> TRE 803(3).

Therefore, this testimony is relevant. In the second phase of this proceeding, Mr. Kirk or others will provide testimony to establish the amount of those costs.

3. Page 11, Lines 7-10 and Page 12, Line 24 through Page 14, Line 17

Mountain Peak presented testimony through Mr. Kirk to establish the increase in costs to customers and the impairment of service caused by the decertification of the Park Property and to establish the existence of legal expenses and professional fees incurred due to the decertification of the Park Property. First, these costs establish intangible property losses suffered by Mountain Peak as a result of the decertification of the Park Property. Because these costs relate directly to intangible property rendered useless or valueless, testimony regarding their existence is relevant to this proceeding. Second, these are costs that are required to be evaluated by the Texas Water Code.<sup>6</sup> Thus, Mountain Peak seeks to introduce evidence into the record to establish that these costs have been incurred. The amount of these costs will be addressed during the second phase of this proceeding.

**B. Specific Responses to Objections to Donald Rauschuber's Testimony**

1. Page 6, Lines 10-11

Midlothian objects to this testimony on the grounds that it is related to the compensation factors in Section 13.254(g) of the Texas Water Code and is therefore irrelevant to this proceeding. This is an inaccurate description of Mr. Rauschuber's testimony. Mr. Rauschuber is identifying intangible property which he believes has been rendered useless or valueless to Mountain Peak due to the decertification of the Park Property. For this reason, it is relevant to this proceeding.

2. Page 10, Lines 9-19

Midlothian objects to Mr. Rauschuber's definition of "property" as irrelevant to this proceeding. The focus of this phase of this proceeding is whether any of Mountain Peak's "property" has been rendered useless or valueless.<sup>7</sup> Although Midlothian may disagree with Mr. Rauschuber's definition of "property" – a term that is not defined in statute or relevant agency rules – this disagreement does not make Mr. Rauschuber's expert opinion irrelevant. Rather, it is an opinion which goes to the very heart of this proceeding.

3. Page 11, Line 1 through Page 14, Line 2

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<sup>6</sup> Tex. Water Code § 13.254(g).

<sup>7</sup> Preliminary Order at 2 (Sept. 23, 2016).

Mr. Rauschuber provides testimony regarding the history of the Park Property and its intended development which serves as the basis for his opinion regarding what property – both tangible and intangible – belonging to Mountain Peak was rendered useless or valueless on May 1, 2015, when the Park Property was decertified from Mountain Peak’s CCN. Midlothian objects to this testimony as irrelevant contending that this testimony has no bearing on what property in existence as of May 1, 2015, was rendered useless or valueless. Again, the fact that Midlothian disagrees with Mr. Rauschuber’s expert opinion and calculations does not render those opinions and calculations irrelevant. Mr. Rauschuber relies, in his expert opinion, on previous plans for development of the Park Property to identify Mountain Peak’s property which was rendered useless or valueless by the decertification of the Park Property. Thus, his discussion of those previous plans and how those plans impacted Mountain Peak are relevant to this proceeding.

4. Page 19, Lines 15-25

In this selection, Midlothian contends that certain intangible property identified by Mr. Raushuber as having been rendered useless or valueless should be stricken from the record. Mr. Rauschuber provided his expert opinion regarding what constitutes “property” and included intangible property. In these lines, Mr. Rauschuber is identifying that intangible property. Because the purpose of this phase is to identify all of Mountain Peak’s property which has been rendered useless or valueless, this testimony is relevant.

5. Page 20, Line 20 through Page 21, Line 3

Midlothian objects to this selection which relates to water line which would have been constructed but for the decertification of the Park Property and would have served to create beneficial loop in Mountain Peak’s system. First, Mountain Peak again contends that this is intangible property. This contention is supported by Mr. Rauschuber’s testimony on these pages. The intangible property lost is not the future asset; instead it is the benefit from that asset. This lost intangible property represents an increase in costs to customers and an impairment of service, which must be compensated to Mountain Peak under the Texas Water Code.<sup>8</sup> Thus, this testimony is presented in support of the existence of these increased costs and impairment of service. The value of these increased costs and impairment of service will be addressed in the second phase of this proceeding.

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<sup>8</sup> Tex. Water Code § 13.254(g).

6. Page 21, Lines 15-28

Midlothian contends this testimony relates to future facilities. However, as identified in Mr. Rauschuber's testimony, this paragraph relates to an existing waterline constructed in 2005. This is tangible property in existence prior to the decertification of the Park Property and is relevant to this phase of this proceeding.

7. Page 22, Line 1 through Page 23, Line 15

Mr. Rauschuber provides testimony regarding intangible property rendered useless or valueless to Mountain Peak by the decertification of the Park Property. Again, the costs associated with the construction and engineering of specific facilities constitute intangible property which has been rendered useless or valueless. And, the attorney and professional fees associated with the decertification and compensation dockets are also intangible property belonging to Mountain Peak that has been rendered useless or valueless, in Mr. Rauschuber's expert opinion. The fact that Midlothian disagrees with these opinions does not make them irrelevant to this proceeding.

These are costs and expenses that are required to be evaluated by the Texas Water Code.<sup>9</sup> Thus, Mountain Peak seeks to introduce evidence into the record to establish that these costs and expenses have been incurred. The amount of these costs and expenses will be addressed during the second phase of this proceeding.

8. Page 25, Line 8 through Page 26, Line 17

In this selection, Mr. Rauschuber is providing his expert opinion regarding the impacts of the failure to adequately compensate Mountain Peak for property rendered useless or valueless. This testimony will assist the trier of fact in deciphering which specific property has been rendered useless or valueless by providing overall context for the compensation process. Because this testimony assists the trier of fact to determine which property has been rendered useless or valueless and makes facts in issue – which property has been rendered useless or valueless – more or less probable, it is relevant to this proceeding.

9. Exhibit DGR-5

Mountain Peak re-asserts several of its relevance objections to Exhibit DGR-5. In Exhibit DGR-5, Mr. Rauschuber summarizes his opinion of which specific assets belonging to Mountain Peak have been rendered useless or valueless to Mountain Peak as a result of the

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<sup>9</sup> Tex. Water Code § 13.254(g).

decertification. Midlothian contends that some of the items listed are not “property” or are actually addressing compensation factors in Texas Water Code § 13.254(g). However, as set forth above, Mountain Peak, and Mr. Rauschuber, contends that each of the listed items is in fact property – either tangible or intangible.

10. Exhibit DGR-2

Midlothian objects to Exhibit DRG-2, a map on which Mr. Rauschuber relied in forming his expert opinions. As Mr. Rauschuber testified on Page 11, Lines 2-17, Exhibit DGR-2 is a map showing the preliminary subdivision utility plan for the subdivision in which the Park Property was located as prepared by the developer of the Park Property with green hatching prepared by engineers for Mountain Peak to outline the Park Property. Mr. Rauschuber then personally confirmed the accuracy of the map by reviewing platting and utility maps associated with the Park Property and a map of the Park Property itself. As such, the map is no different than if it were prepared by Mr. Rauschuber himself. As an expert, Mr. Rauschuber is permitted to rely on hearsay to support his opinions. Thus, his reliance on platting and utility maps to confirm the information in Exhibit DGR-2 is permissible. Because Mr. Rauschuber is available to testify, Exhibit DGR-2 is not an out-of-court statement triggering the hearsay rule. In addition, maps are admissible into evidence if they are helpful to the trier of fact and are an accurate representation of that which they are claimed to represent.<sup>10</sup> Exhibit DGR-2 is helpful to understanding the location of the Park Property in relation to the planned subdivision and to understand Mr. Rauschuber’s expert opinion regarding the number of single-family units which were anticipated by Mountain Peak to be constructed on the Park Property.

In the alternative, the preliminary plat presented on Exhibit DGR-2 is not being offered for the truth of the information shown on the plat but instead for the understanding Mountain Peak held regarding the development of the Park Property and to help the trier of fact understand Mr. Rauschuber’s testimony. For this reason, it falls within the exception to the hearsay rule set out in TRE 803(3).

Finally, Mr. Rauschuber has already testified that the map is in fact what he claims it is which resolves any authentication concerns.<sup>11</sup>

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<sup>10</sup> *Tennessee Gas Transmission Co. v. Moorhead*, 405 S.W.2d 81, 84 (Tex.Civ.App.—Corpus Christi 1971, writ ref’d n.r.e.) (admitting into evidence a map not prepared by the witness after the witness testified as to the accuracy of the map).

<sup>11</sup> See TRE 901.

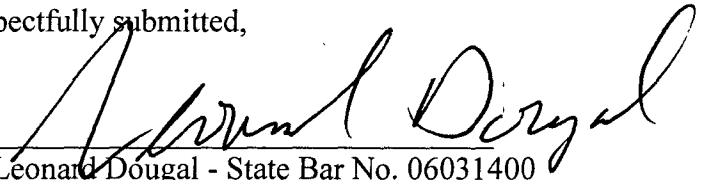
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## II. CONCLUSION

Mountain Peak respectfully requests that each of Midlothian's objections be overruled. Midlothian's relevance objections are meritless. The test of relevancy is not limited to whether Midlothian agrees with the evidence. And, the testimonies of Mr. Kirk and Mr. Rauschuber provide facts and opinions which are directly related to determining whether facts of consequence in this proceeding are more or less probable. In addition, Mr. Rauschuber's Exhibit DGR-2 is not hearsay because he, as an expert, relied on other information in confirming the accuracy of the information included in the exhibit and will be available and subject to cross examination.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that on the 27th 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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