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

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PUBLIC UTILITY COMMISSION
BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

**CITY OF MIDLOTHIAN'S MOTION TO COMPEL
RESPONSES TO THIRD SET OF REQUESTS FOR INFORMATION
AND REQUEST 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 Third Set of Requests for Information and Requests for Admission. Midlothian received Mountain Peak's Objections to Midlothian's Third Set of Requests for Information and Request for Admission on January 25, 2017. This motion is timely filed pursuant to '16 TAC § 22.144(e) and the SOAH Order No. 2.¹ 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. 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 should be considered in making these determination in TWC § 13.254(g) and 16 TAC § 24.113(h-k).

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 at 2-3 (September 23, 2016).

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II. ARGUMENTS & AUTHORITIES

Midlothian asserts that each RFI addressed in this Motion to Compel discovery responses is appropriate and necessary discovery for Midlothian to develop its testimony and arguments in this case.

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

For these reasons and others set forth herein, Mountain Peak's objections to Midlothian's requests for information are without merit and Mountain Peak should be ordered to provide responses.

III. REQUESTS FOR INFORMATION MERIT RESPONSES

A. Midlothian's Argument In Support Of Motion To Compel RFI No. 3-1:

RFI No. 3-1: Please provide the annual number of total and active retail water service connections in each of Mountain Peak SUD's three pressure zones from 2006 to 2016 and as of today, and identify the meter size of each connection.

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)).

Objection: Mountain Peak objects to this Request because it is overly broad and unduly burdensome to require Mountain Peak to collect the requested data by pressure zone for each year from 2006 through the present.

Donald G. Rauschuber provided testimony on behalf of Mountain Peak that used connections to calculate stranded capacity:

“Based on this, I estimate that 6.3 percent (calculated as 261 single family equivalent water connections in the Park Property, divided by 4,167 water connections well supply capacity times 100 for percent) of Mountain Peak SUD's groundwater supply capacity has been rendered useless or valueless as a result of the decertification of the Park Property.”⁹ (emphasis added).

Midlothian's request seeks information that may can be used to support or refute this opinion, which is critical to Mountain Peak's argument regarding stranded capacity and costs.

This request is neither overly broad nor unduly burdensome in that it is narrowly tailored to be limited by time, type of document, and subject matter.¹⁰ This information should be readily available due to its importance to internal operation monitoring customers and demand. It is also reasonable to assume that an entity whose sole goal is to provide water, such as Mountain Peak, would tract whether or not any connections are active, and have that information easily on hand.

Information regarding all three pressure zones is required because Mr. Rauschuber testified that water from the upper pressure zone, which allegedly includes the Park Property, can be used to feed the other two pressure zones (and therefore customers in other two pressure zones):

“Q. Under emergency operating conditions can Mountain Peak transfer water from its upper pressure to its mid and lower pressure zones?

A. Yes. Under emergency operating conditions, Mountain Peak SUD can transfer water by opening pressure reducing-isolation valves to transfer water from its upper pressure zone to its middle pressure zone and from its middle pressure zone to its lower pressure zone, but not visa-versa.”¹¹

The request is limited by time to 2006-2016, which encompasses the time when the City started looking for parkland, the time this Property was purchased, and the decertification order.

⁹ Direct Testimony of Donald G. Rauschuber Page 18 line 5-9.

¹⁰ See *In re National Lloyds Ins.*, 449 S.W.3d 486, 489 (Tex.2014); *In re Allstate Cty. Mut. Ins.*, 227 S.W.3d 667, 670 (Tex.2007); *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813, 815 (Tex.1995); *In re Patel*, 218 S.W.3d 911, 915 (Tex.App.—Corpus Christi 2007, orig. proceeding).

¹¹ Direct Testimony of Donald G. Rauschuber, Page 15 line 22 – Page 16 line 1

Mountain Peak has alleged their reliance on a development plan for the Property has gone back as far as 2004, when the Non-Standard Service Application and Agreement for the development of the Lawson Property was executed.¹² Mountain Peak has also alleged several assets were rendered at least partially useless which date back father than 2006 such as the Mountain Peak's 2.06-Acre Tract (2005), FM 663 Water Line Improvement (2005) Project. Mountain Peak's development history and whether or not those developments came to fruition going back at least this far, may lead to admissible evidence of what Mountain Peak relied on when planning and expending funds for their water system they are now alleging were substantively due to the Park Property. In sum, this request is not overbroad or unduly burdensome.

B. Midlothian's Argument In Support Of Motion To Compel RFI No. 3-3

RFI No. 3-3: Please list all residential developments in Mountain Peak service area for which Mountain Peak has entered a service application and agreement since 2006, including, for each development, the Service Application (and amendments/attachments thereto), the estimated number of connections associated with the development, the estimated number of and types of connections in the development actually receiving water service from Mountain Peak, and the current status of the Development.

Objection: Mountain Peak objects to this Request because it is vague and ambiguous. Mountain Peak understands this request to seek a list of all residential developments, a list of associated service applications and amendments/ attachments, a list of the estimated number of connections associated with the development at or near the time of the service application or agreement, the estimated number and type of connections actually receiving water service as of January 2017, and the status of the development.

Mountain Peak also objects to this Request because it seeks information which is not relevant or reasonably calculated to lead to the discovery of admissible evidence. Specifically, the first two subparts requesting a list of the residential developments in Mountain Peak's service area and the service applications and documents are not relevant to what property of Mountain Peak's has been rendered useless or valueless due to the decertification of the Park Property.

Mountain Peak also objects to this Request because it is overly broad and unduly burdensome to require Mountain Peak to collect the requested data by development for each year from 2006 through the present.

¹² See Direct Testimony of Donald G. Rauschuber, Page 13 line 27 – Page 14 line 2; see also Direct Testimony of Randel Kirk, Page 6, line 10 – 19.

Mountain Peak's interpretation of the request is correct, except that it *also* requests Mountain Peak to produce Service Application (and amendments/attachments thereto).

The request is relevant and is reasonably calculated to lead to the discovery of admissible evidence. Donald G. Rauschuber provided the following testimony on behalf of Mountain Peak:

"It is my opinion that Mountain Peak SUD's stranded assets are permanently stranded, since Mountain Peak SUD has lost 31.5-percent in terms of anticipated utility connections located within the Park Property footprint. As such, the loss of the 261 single family customer equivalents that were all but guaranteed are permanently stranded and can never be recovered by Mountain Peak SUD, since the Park Property will be provided water service by the City of Midlothian and not the District."¹³ (emphasis added).

Midlothian's request seeks information that may can be used to support or refute this opinion, which is critical to Mountain Peak's argument regarding stranded capacity and costs. The request may lead to admissible evidence showing a trend of how often anticipated developments actually result in connections, whether Mountain Peak is steadily growing customers, and if so, where those increases occur. As stated above, all three pressure zones are necessary due to ability for the upper zone to supply the lower two zones.

This request is neither overly broad nor unduly burdensome in that it is narrowly tailored to be limited by time, type of document, and subject matter.¹⁴ It seeks only data and one type of agreement, and only for residential developments. This information should be readily available due to its importance to internal operations of monitoring customers, demand and growth as development occurs. Asking for copies of the development agreements avoids a more burdensome request that inquires of specific data points. It is also reasonable to assume that Mountain Peak, whose main purpose is to provide water through connections, must be aware of which connections are active and which are not.

As argued above, seeking information back to at least 2006 is reasonably limited in time based on the development history of the Park Property.

¹³ Direct Testimony of Donald G. Rauschuber Page 7, line 18-23

¹⁴ See *In re National Lloyds Ins.*, 449 S.W.3d 486, 489 (Tex.2014); *In re Allstate Cty. Mut. Ins.*, 227 S.W.3d 667, 670 (Tex.2007); *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813, 815 (Tex.1995); *In re Patel*, 218 S.W.3d 911, 915 (Tex.App.—Corpus Christi 2007, orig. proceeding).

C. Midlothian's Argument In Support Of Motion To Compel RFI No. 3-8:

RFI No. 3-8: Please identify each water system compliance investigation commenced by the TCEQ within the past 10 years, and provide documents related to each, including any commencing or ending the investigation and communications between you and the TCEQ.

Objection: Mountain Peak objects to each subpart of this Request because it seeks information which is not relevant or reasonably calculated to lead to the discovery of admissible evidence. Further, it lacks sufficient specificity and therefore constitutes a "fishing expedition." *See Loftin v. Martin*, 776 S.W.2d 145, 148 (Tex. 1989).

Mountain Peak also objects to each subpart of this Request because it is overly broad and unduly burdensome to require Mountain Peak to collect the requested information for the past 10 years.

Compliance history is relevant as it may lead to the discovery of admissible evidence of the number, location and duration of water facilities which were not able to be legally used for the provision of water service and identify whether any improvements were constructed to address regulatory requirements instead of the Park.

This request does not constitute a "fishing expedition" as it is reasonably specific to a certain class of document regarding specific subject matters which are critically important to this proceeding.¹⁵ Further specificity is unreasonable and impossible, as Midlothian cannot reasonably ascertain whether or not Mountain Peak has been the subject of water system compliance investigations, and if so, what facilities were involved. The TCEQ will perform a comprehensive compliance investigation and attach its findings, recommendations and resolution, which would be considered by Midlothian to be fully responsive to the request. Inasmuch as Mountain Peak indicates that it is recognized as a "Superior" system, very few such compliance investigations would be anticipated for this limited time period.

As argued above, seeking information back to at least 2006 is reasonably limited in time based on the development history of the Park Property. This request is neither overly broad nor

¹⁵ *See Texaco, Inc. v. Sanderson*, 898 S.W.2d 813, 815 (Tex.1995).

unduly burdensome in that it is narrowly tailored to be limited by time, type of document, and subject matter.¹⁶

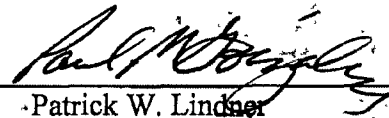
IV: CONCLUSION

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

Respectfully submitted,

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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 30, 2017, in the following manner: by facsimile.


Paul M. González

¹⁶ See *In re National Lloyds Ins.*, 449 S.W.3d 486, 489 (Tex.2014); *In re Allstate Cty. Mut. Ins.*, 227 S.W.3d 667, 670 (Tex.2007); *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813, 815 (Tex.1995); *In re Patel*, 218 S.W.3d 911, 915 (Tex.App.—Corpus Christi 2007, orig. proceeding).