

Control Number: 46120



Item Number: 76

Addendum StartPage: 0

CITY OF MIDLOTHIAN NOTICE OF § BEFORE THE STATE OFFICE COMMISSIONER  
INTENT TO PROVIDE WATER § FILING CLERK  
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 TEMPORARILY ABATE PENDING PUC COMMISSIONERS'  
DECISION IN PUC DOCKET NO. 45848**

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 Temporarily Abate, Pending PUC Commissioners' Decision in PUC Docket No. 45848 ("Motion to Abate").<sup>1</sup> Mountain Peak filed its motion pursuant to PUC Procedural Rules [16 TAC §§] 22.77 and 22.79. Midlothian received Mountain Peak's motion on January 31, 2017. This response is therefore timely. Midlothian asserts that the Motion to Abate should, in all respects, be denied, respectfully showing as follows:

**I. INTRODUCTION**

Over seven months ago, on July 1, 2016, the City of Midlothian filed its Notice of Intent to serve water to the 97.7-acre tract of land (the "Park Property") that was decertified from Mountain Peak's water CCN in PUC Docket No. 44394.<sup>2</sup> The filing of the Notice of Intent to serve automatically initiated this *expedited proceeding* so that Mountain Peak can be compensated for property that was rendered useless or valueless as a result of the decertification, if any.<sup>3</sup>

<sup>1</sup> 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, "APA" for Texas Administrative Procedure Act "TAC" for the Texas Administrative Code, "TWC" for the Texas Water Code, and "PFD" for Proposal for Decision.

<sup>2</sup> *Petition of City of Midlothian to Amend Mountain Peak Special Utility District's Certificate of Convenience and Necessity by Expedited Release in Ellis County*, Docket No. 44394 (May 1, 2015).

<sup>3</sup> TWC § 13.254(d); 16 TAC § 24.113(i).

76

This proceeding is one of the first cases of this type to be referred to SOAH because, in July 2016 the Commission implemented a bifurcated process to first determine whether any of the decertified utility's facilities have been rendered useless or valueless under TWC § 13.254(d) and 16 TAC § 24.113(h).<sup>4</sup> Referral was appropriate because the "first phase" inquiries were expected to be fact-intensive and issuance of a proposal for decision (PFD) after an expedited hearing would generate recommendations to determine what property, if any, has been rendered useless or valueless in the decertification process.<sup>5</sup> The first phase ends when the Commission makes findings as to what property, if any, was rendered useless or valueless.<sup>6</sup>

On January 27, 2017, in PUC Docket No. 45848, two SOAH ALJs issued the first PFD issued for a case of this type reaching the end of the first phase.<sup>7</sup> In support of its present (and third) Motion to Abate, Mountain Peak argues that this proceeding should be abated until the Commissioners can weigh in on that PFD.<sup>8</sup> More specifically, Mountain Peak contends that the PUC Commissioners' ruling in PUC Docket No. 45848 will directly impact this case as it relates to (1) the burden of proof and the associated case presentation procedures; and (2) the breadth of the definition of property and associated evidentiary and other decisions.<sup>9</sup> As set forth more fully below, each of Mountain Peak's arguments is without merit.

## II. BURDEN OF PROOF ARGUMENT FAILS

First, Midlothian argues that because this Honorable ALJ's ruling with regard to the burden of proof differs from that in the PFD at issue, this case should be abated.<sup>10</sup> In the PFD issued in Docket No. 45848, the ALJs recommend that the decertified retail public utility "has

---

<sup>4</sup> See Tex. Pub. Util. Comm'n, *Zipp Road Utility Road Company LLC's Notice of Intent to Provide Sewer Service to Are Decertified from Guadalupe-Blanco River Authority in Guadalupe County*, Docket No. 45679 (*Zipp*), 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 (*Celina*), Preliminary Order (July 20, 2016).

<sup>5</sup> *Zipp*, Docket No. 45679, Order of Referral (July 26, 2016); *Celina*, Docket No. 45848, Order of Referral (July 7, 2016).

<sup>6</sup> The second phase, if needed, determines the compensation, if any, that may be due to the decertified utility through the use of appraisers as set forth in section 13.254(e) and 16 TAC § 24.113(i).

<sup>7</sup> *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, Proposal for Decision at 9 (Jan. 27, 2017).

<sup>8</sup> Motion to Abate at 2 (January 31, 2017).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 2-3.

the burden to prove what property is rendered useless or valueless.”<sup>11</sup> The ALJs presiding over Docket No. 45848 did not draw a distinction between the burden of proof and the burden of persuasion.<sup>12</sup> Accordingly, in Docket No. 45848, the decertified utility (Mountain Peak here) would have appear to have *both* the burden of production and the burden of persuasion.

By contrast, in SOAH Order No. 5, this Honorable ALJ distinguished between the burden of proof and the burden of persuasion, finding that the party seeking to provide service to the tract bears the burden of persuasion, but once that party has presented its position, the burden of going forward with the evidence shifted to the decertified utility.<sup>13</sup>

Indisputably, under *either* holding, Mountain Peak has the burden of *production*. In essence, Mountain Peak now contends that because in this case the Honorable ALJ has relieved Mountain Peak of the initial burden of persuasion, should the Commissioners’ ruling differ, the ALJ “may want to revisit this issue to avoid a remand and rehearing due to this error.”<sup>14</sup> In support, Mountain Peak argues that “Texas Courts have held that placing the burden of proof on the wrong party can be reversible error.”<sup>15</sup> *Can* is the operative word in Mountain Peak’s argument—placing the burden on the wrong party *can* be reversible error when it is done so in a jury charge.<sup>16</sup> All of the cases cited by Mountain Peak are dealing with misplacement of the burden of proof in the jury charge, which misguides the jury in deciding the case.<sup>17</sup> Because there will never be a jury charge in this case, Mountain Peak’s argument is misplaced. This

---

<sup>11</sup> *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, Proposal for Decision at 9 (Jan. 27, 2017).

<sup>12</sup> See *id.* See also § 3:2. Burden of Proof, 1 Tex. Prac. Guide Evid. § 3:2 (citing Ray, 1 Law of Evidence § 41, at 48 (Texas Practice 3d. 1980)) (“The term “burden of proof” is used to mean either the burden of persuasion or the burden of introducing evidence (burden of production)”).

<sup>13</sup> SOAH Order No. 5 at 1 (December 12, 2016).

<sup>14</sup> Motion to Abate at 3 (January 31, 2017).

<sup>15</sup> *Id.*

<sup>16</sup> 71 Tex. Jur. 3d Trial and ADR § 244 (“It is normally reversible error *for the charge* to place the burden of persuasion on the wrong party. It should be so framed as to place on the plaintiff the burden of proving all facts necessary to establish his or her right to recover; and having given the rule as to the burden of proof of the plaintiff’s alleged cause of action, it should then apply the same burden to his or her adversary’s defenses. To place the burden of proof properly, the instruction must be worded so that an affirmative answer indicates that the party with the burden of persuasion on a fact established the fact by a preponderance of the evidence.”)(internal citations omitted) (emphasis added).

<sup>17</sup> *USX Corp. v. Union Pacific Resources Co.*, 753 S.W.2d 845, 855 (Tex.App.—Fort Worth, 1988, no writ) (“Placing the burden as to a material issue upon the wrong party is generally reversible error.”) (citing *C. & R. Transport, Inc. v. Campbell*, 406 S.W.2d 191, 194 (Tex. 1996)); *Golaz v. Golaz*, 77 S.W.2d 829, 881 (Tex. Civ. App.- Fort Worth 1934), no writ history.

Honorable ALJ, as both the trier of fact and of law, is perfectly capable of appropriately distinguishing the applicable “burden of proof.”

Furthermore, under Mountain Peak’s argument, it would be Midlothian, if anyone, who has “erroneously” been asked to carry the burden of persuasion—it would be Midlothian who could attempt to show harmful error on appeal.<sup>18</sup> As explained further below, Midlothian does not believe that any error has been made or, based upon the timing of the cases involved, will be made. Any risk of remand or appeal is exaggerated by Mountain Peak.

## II. NO NEED TO WAIT FOR ORDER IN DOCKET NO. 45848

As its second reason supporting its Motion to Abate, Mountain Peak points out that in Docket No. 45848 the ALJs recommend that the definition of “property” be read broadly, to include the items that are listed in TWC § 13.254(g).<sup>19</sup> Mountain Peak complains that although it has repeatedly asked that the TWC § 13.254(g) factors be considered in the first phase of this proceeding, the ALJ has indicated that the factors are to be considered only in the *second* phase of this proceeding.<sup>20</sup> If the case were abated, Mountain Peak argues, the ALJ may reconsider his previous rulings and may rule accordingly on evidentiary matters.<sup>21</sup>

In support of its contention that it has “repeatedly asked” that the factors in subsection (g) be considered, Mountain Peak cites to its List of Issues to Be Addressed<sup>22</sup> and its Motion to Broaden the Scope of the Proceeding.<sup>23</sup> However, in its Issues to be Addressed, Mountain Peak urged the Commission to have a single hearing instead of the bifurcated process, and thus the subsection (g) factors should be additional issues to be addressed.<sup>24</sup> Similarly, in its Motion to Broaden the Scope of this first phase, Mountain Peak requested “an order permitting presentation of evidence on the additional compensation factors set forth in § 13.254(g), *which may not be*

---

<sup>18</sup> *Turk v. Robles*, 810 S.W.2d 755, 759 (Tex. App.—Houston [1<sup>st</sup>] 1991, writ denied) (citing *Trevino v. Brookhill Capital Resources*, 782 S.W.2d 279, 283 (Tex. App.—Houston [1<sup>st</sup>] 1989, writ denied); Tex. R. App. P. 81(b)(1)) (“Error is deemed to be reversible only if, when viewed in light of the totality of these circumstances, it amounted to such a denial of the rights of the complaining party that it was reasonably calculated to cause and probably did cause the rendition of an improper judgment.”).

<sup>19</sup> Motion to Abate at 3 (January 31, 2017).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Mountain Peak SUD’s Threshold Issues and List of Issues to be Addressed (Sept. 6, 2016).

<sup>23</sup> Mountain Peak SUD’s Motion to Reconsider Stay or Proceeding Pending Appeal or, in the Alternative, Motion to Broaden Scope of Hearing (Dec. 29, 2016).

<sup>24</sup> Mountain Peak SUD’s Threshold Issues and List of Issues to be Addressed at 4 (Sept. 6, 2016).

*directly tied to "property"* that has been rendered useless or valueless.<sup>25</sup> These filings demonstrate that Mountain Peak has sought to conflate the two phases and prematurely introduce evidence relevant only to compensation.<sup>26</sup> As with the prior two motions to abate, nothing presented by Mountain Peak can guarantee that the PFD in Docket No. 45848 is rightly decided on this point or that this Court should "reconsider" any prior rulings.<sup>27</sup>

While it is certainly true that the *Commission's* decision in Docket No. 45848 may be instructive as to questions of law, each proceeding is factually distinct. There is simply no reason to delay the factual development of this case. Pursuant to SOAH Order No. 5, the hearing on the merits on this first phase is set for March 7, 2017.<sup>28</sup> Post-hearing briefing is anticipated even while giving the Commission considers the PFD in Docket No. 45848. Thus, the proposal for decision in this case can still be informed and guided by the Commissioners' ruling in PUC Docket No. 45848. If this Honorable ALJ wishes to "revisit" the burden of proof issue (or any other issue) as a result of the Commission order, he may re-open the hearing or request supplemental briefing to focus on that issue prior to issuing a PFD. Likewise, after a PFD is sent to the Commission, the parties have the opportunity to submit written exceptions so that the Commission (or the ALJ) can take further action, including, as to the Commission, remanding the case to SOAH for anything deemed necessary to support a Commission determination under TWC § 154.254(d).

Finally, throughout its Motion to Abate, Mountain Peak argues that the requested two month stay would not unduly delay this proceeding, would preserve the parties' resources, and would not harm Midlothian. Respectfully, we disagree. In Docket No. 45848, there was a three month gap between the hearing on the merits and the ALJs' issuance of the PFD. There is no guarantee as to when the PUC will rule on the PFD. There is also no indication that the Commission will agree with Mountain Peak on any particular point relied upon in support of the Motion to Abate. Further, once that order is decided, will Mountain Peak be back to argue that

---

<sup>25</sup> Mountain Peak SUD's Motion to Reconsider Stay or Proceeding Pending Appeal or, in the Alternative, Motion to Broaden Scope of Hearing at 4 (Emphasis added).

<sup>26</sup> Preliminary Order at 2.

<sup>27</sup> SOAH Order No. 9 at 2-4 (February 3, 2017).

<sup>28</sup> Mountain Peak also contends that rulings on Mountain Peak's Motion to Strike certain pre-filed testimony may be impacted by the Commissioners' order in PUC Docket No. 45848. Since the filing of its Motion to Abate, this Honorable ALJ ruled on both parties' objections to pre-filed testimony. SOAH Order No. 5 at 2.


further abatement until a “final and non-appealable” order exists? In Midlothian’s experience, Mountain Peak has sought to delay and complicate all matters related to Park-related proceedings.<sup>29</sup> Midlothian need not show some special or imminent injury in pursuing this *expedited* proceeding. In the Preliminary Order the Commission requested that the case be expedited to the extent possible.<sup>30</sup> The law contemplates this expedited process, and although Midlothian is harmed by further delay,<sup>31</sup> some good and sufficient cause must be demonstrated to negate that mandate. Mountain Peak utterly fails in providing such good cause.

**IV. CONCLUSION**

Wherefore, premises considered, Midlothian respectfully requests that the Honorable Administrative Law Judge expeditiously deny Mountain Peak’s Motion to Temporarily Abate Pending PUC Commissioners’ Decision in PUC Docket No. 45848 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](mailto:plindner@dtgrlaw.com)  
State Bar No. 12367850  
Paul M. González  
[pgonzalez@dtgrlaw.com](mailto:pgonzalez@dtgrlaw.com)  
State Bar No. 00796652  
Richard Lindner  
State Bar No. 24065626  
[rlindner@dtgrlaw.com](mailto:rlindner@dtgrlaw.com)  
ATTORNEYS FOR CITY OF MIDLOTHIAN

---


<sup>29</sup> Ironically, the PFD in the underlying decertification proceeding (Docket No. 44394) made a recommendation in favor of Mountain Peak to deny Midlothian’s petition, but the Commission, after fully considering the case, *granted* decertification.

<sup>30</sup> See Preliminary Order at 1.

<sup>31</sup> See Midlothian’s Response to Motion Mountain Peak’s Motion to Stay Proceeding Pending Appeal (November 13, 2016) (PUC Interchange Item No. 35). Midlothian re-asserts its prior arguments without re-producing them here.

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of this document was served on all parties of record in this proceeding on February 6, 2017, in the following manner: by e-mail.

  
Paul M. González