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Addendum StartPage: 0

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

SOAH ORDER NO. 10
RULING ON OBJECTIONS CITY OF MIDLOTHIAN'S THIRD REQUEST FOR
INFORMATION AND MOUNTAIN PEAK SPECIAL UTILITY DISTRICT'S REQUEST
TO ABATE PROCEEDING

I. OBJECTIONS TO CITY OF MIDLOTHIAN'S THIRD REQUEST FOR
INFORMATION

On January 25, 2017, Mountain Peak Special Utility District (Mountain Peak) filed objections to the City of Midlothian's (City) Third Request for Information (RFI). On January 30, 2017, the City filed a motion to compel and on February 2, 2017, Mountain Peak filed its response. This order rules on Mountain Peak's objections to the RFI.

Question No. 3-1

Mountain Peak objected to the following question posed by the City on the grounds that the question, by requiring the collection of the requested data by pressure zone for each year from 2006 through the present, is overly broad and unduly burdensome:

RFI 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.

The City contends that this request is relevant because Mountain Peak witness Donald G. Rauschuber based at least portions of his testimony regarding stranded capacity and costs on the number of connections. As such, the City contends that an entity such as Mountain Peak, whose

77

sole goal is to provide water, would track this information and have it readily available. The City also contends that this information relates to other assets that Mountain Peak argues have been rendered useless or valueless, such as Mountain Peak's 2.06 acre tract and its FM 6663 water line improvement project. Mountain Peak responds by stating that it does not have the requested information and that requiring it to create the requested information would be contrary to the rules of discovery.

The ALJ notes that Mountain Peak did not object to this question on the grounds of relevance, nor could it. The information sought is relevant. Having made that observation, however, the ALJ further notes that if a party does not possess the information requested it cannot be required to create the information. Mountain Peak has represented that it does not possess the information requested in the form requested. The objection is sustained.

Question No. 3-3

Mountain Peak objected to the following question posed by the City on the grounds that the question is vague and ambiguous, is irrelevant, and is overly broad and unduly burdensome:

RFI 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.

In its objections, Mountain Peak states that it "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."¹ In its motion to

¹ Mountain Peak's Objections at 1.

compel, the City states that "Mountain Peak's interpretation of the request is correct, except that it also requests Mountain Peak to produce Service Application (and amendments/attachments thereto)."² Mountain Peak then stated that it appears that the objections have, for the most part, been resolved through the objections and motion to compel,³ but nevertheless goes on to argue in support of its objection.

It appears to the ALJ that the dispute now centers on the request to produce service applications and related documents.

The City argues that the requested information is relevant to support the testimony offered by Mountain Peak witness Donald G. Rauschuber regarding stranded assets that have been rendered useless or valueless. According to the City, 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.

Mountain Peak responds by stating that it has provided the requested documents to the City because they also identify the developments and the estimated number of connections associated with the development at or near the time of the service application, to the extent such information exists.

As the ALJ finds that the dispute centers on service agreements, and Mountain Peak represents that it has already provided those service agreements, the ALJ finds that there exists nothing on which to issue a ruling with respect to this question.

Question No. 3-8

Mountain Peak objected to the following question posed by the City on the grounds that the question is irrelevant and is overly broad and unduly burdensome:

² City Motion to Compel at 5.

³ Mountain Peak Response to Motion to Compel at 3.

RFI 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.

The City argues that 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 property. Further, it argues that the request is reasonably tailored in terms of time since 2006) because 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.

Mountain Peak argues that it reads the request more broadly than the City. It reads the request as asking for Mountain Peak to pour through over ten years of reports and all documents related to each report even if none of those reports will contain the information the City contends is relevant. Under that reading, Mountain Peak argues that the request is overly broad and burdensome.

The ALJ believes that the scope of the City’s request is accurately stated in its motion to compel. It is asking for only TCEQ compliance investigation reports resulting from compliance investigations commenced within the past ten years. As such, the request is reasonable, relevant, and sufficiently narrowly tailored, rendering the objections insufficient. To the extent the request asks for more, the objection is sustained.

II. MOUNTAIN PEAK’S REQUEST TO ABATE THE PROCEEDING

On January 31, 2017, Mountain Peak filed a motion to temporarily abate this proceeding until the Commission had ruled on the proposal for decision issued in Docket No. 45848.⁴

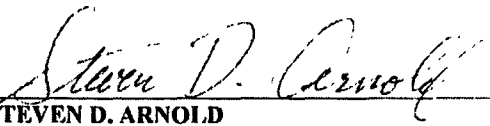
⁴ *City of Celina’s Notice of Intent to Provide Water and Sewer Service to Area Decertified from Aqua Texas, Inc., in Denton County*, SOAH Docket No. 473-16-5011.WS, PUC Docket No. 45848, Proposal for Decision (Jan. 27, 2017).

Mountain Peak argues the Docket No. 45848 proposal for decision assigns the burden of proof differently than it is assigned in this case and that the decision in Docket No. 45848 as to the definition of property that is rendered useless or valueless could be instructive in the present case. Mountain Peak represents that Staff is not opposed to its motion.

The City filed a response in opposition on February 6, 2017. It argues that although the burden of proof in Docket No. 45848 is assigned to a party different than this case, the effect is negligible. Accordingly to the City, in the present case the ALJ, in assigning the burden of proof, distinguished between the burden of persuasion and the burden of going forward with the evidence. The burden of persuasion was assigned to the City and the burden of going forward with the evidence was assigned to Mountain Peak. The City argues that this makes the argument urged by Mountain Peak of far less consequence (especially since the City has the burden of persuasion).

The ALJ believes this is an extremely close call. The assignment of the burden of persuasion to one party and the burden of production to the other renders some of the arguments urged by Mountain Peak, if not moot, at least less effectual. Nevertheless, it is important that a case proceed with the burden of proof properly assigned. Once the Commission rules in Docket No. 45848, the question of who bears the burden of proof will be settled. The ALJ finds that it is appropriate to abate this proceeding on a temporary basis until the Commission issues a final order in Docket No. 45848. Within one week after the Commission order in Docket No. 45848 becomes final and appealable, the parties shall confer and file a pleading with three agreed dates for a prehearing conference to discuss a procedural schedule going forward in this docket.

SIGNED February 10, 2017.



STEVEN D. ARNOLD
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS