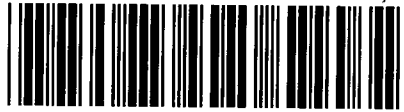




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APPLICATION OF SUBURBAN § BEFORE THE STATE OFFICE
UTILITY COMPANY, INC. FOR §
AUTHORITY TO CHANGE RATES § ADMINISTRATIVE HEARINGS

**OFFICE OF PUBLIC UTILITY COUNSEL'S
OBJECTIONS TO SUBURBAN UTILITY COMPANY, INC.'S
FIRST DISCOVERY REQUESTS**

The Office of Public Utility Counsel (OPUC) files these Objections to Suburban Utility Company, Inc.'s (Suburban) First Discovery Request. OPUC received Suburban's First Set of Discovery Requests on February 17, 2017. Suburban agreed to extend the time for OPUC to file its objections to these requests, and therefore, OPUC's objections are due on March 9, 2017.

I. STATEMENT REGARDING NEGOTIATIONS

Counsel for OPUC and Suburban negotiated these objections in good faith, but have not been able to reach an agreement. Therefore, OPUC is filing these Objections.

II. OBJECTIONS TO INSTRUCTIONS

OPUC generally objects to the "Definitions" and "Instructions" preceding the Suburban's RFIs to the extent that they seek to expand OPUC's obligations under the relevant procedural rules. Specifically, OPUC objects to Suburban's Instruction Nos. 1 and 4 as overbroad.

- 1. With respect to each request, in addition to supplying the information requested, you are to identify all documents that support, refer to or evidence the subject matter of each request and your answer thereto.**

To "identify all documents that support, refer to or evidence the *subject matter of each request*," would require OPUC to do research on behalf of the Applicant and is overbroad, vague, and burdensome. Even a narrower reading, that would require OPUC only to "identify all documents that support, refer to or evidence the *subject matter of . . . your answer thereto*," also does not identify with reasonable particularity the information sought and as such is vague, overbroad, and unduly burdensome. 16 TAC §§ 22.142(a)(1)(D) & 22.144(b)(1). To the extent

that such an overbroad and vague instruction encompasses privileged matters (Tex. R. Civ. Evid. 501) or matters not within the scope of discovery (Tex. R. Civ. P. 192.3), such as documents subject to the attorney-client (Tex. R. Civ. Evid. 503) or attorney work product (Tex. R. Civ. P. 192.5) privileges or the identity, mental impressions, or opinions of consulting experts whose mental impressions or opinions have not been reviewed by a testifying expert (Tex. R. Civ. P. 192.3(e)), OPUC objects to the instructions and asks the honorable Administrative Law Judge to limit the scope of the instruction.

4. Any answer stating the requested document or information will be provided only in prefiled testimony is insufficient and violates the discovery rules covering these proceedings. SUBURBAN is interested in learning what documents or information underlies and supports the opinions and facts the Opposing Party will be presenting at trial in its prefiled testimony. This information must be presented before prefiled testimony and supplemented up to the trial

This instruction claims that “stating the requested document or information will be provided only in pre-filed testimony is insufficient and violates the discovery rules covering these proceedings,” and that the documents or information underlying and supporting the opinions and facts that OPUC will be presenting, “must be presented before pre-filed testimony and supplemented up to the trial.” The breadth and scope of this instruction is unique and highly unusual, particularly given the timing of the request: before a procedural schedule has been set, before Suburban has itself filed any pre-filed testimony, and before OPUC has filed testimony. Suburban cites no authority for demanding inchoate drafts, legal theories, and positions in a rate case before a party has filed its pre-filed testimony, nor for its assertion that failing to do so violates discovery rules. The Instruction demands OPUC to provide a response before it has had the opportunity to fully review the applicant’s application, discovery responses, and testimony. Further, the instruction is overbroad, vague, and does not seek to limit privileged information or information not otherwise within the scope of discovery.

Furthermore, the Public Utility Commission of Texas has previously discussed the scope of discovery in Commission hearings prior to the filing of pre-filed testimony. In Docket No. 19265,¹ the Commission stated that “in Commission hearings parties generally file testimony and

¹ *Application of Central and South West Corporation and American Electric Power Company, Inc. Regarding Proposed Business Combination*, Docket No. 19265, Order on Appeal of Order No. 42 (Mar 11, 1999).

are then subject to discovery. In such a proceeding, there is no need for designation of witnesses prior to the filing of testimony to allow the parties to conduct discovery.”² The Commission announced a “straight-forward rule” regarding whether an expert is a testifying expert or a consulting expert in the time period prior to filing written testimony: “...upon filing testimony or by designation by the party, an expert shall be a testifying expert subject to discovery. Neither contract provision providing that an expert will testify nor the preparation of draft testimony is sufficient to cause classification as a testify expert.”³ The Commission concluded that requiring the discovery of information protected by the consulting expert privilege, would “severely restrict a party’s counsel from investigating or developing legal strategies in concert with its consulting experts. While a party may intend for an expert to be a witness at one point in time, after further investigations or due to other developments a party’s intentions may change. The Commission concludes that the testifying characteristic irrevocably attaches after the filing of testimony or after designation as such, but not before.”⁴

Additionally, to the extent that such an overbroad and vague instruction encompasses privileged matters (Tex. R. Civ. Evid. 501) or matters not within the scope of discovery (Tex. R. Civ. P. 192.3), such as documents subject to the attorney-client (Tex. R. Civ. Evid. 503) or attorney work product (Tex. R. Civ. P. 192.5) privileges or the identity, mental impressions, or opinions of consulting experts whose mental impressions or opinions have not been reviewed by a testifying expert (Tex. R. Civ. P. 192.3(e)), OPUC objects to the instructions and asks the honorable Administrative Law Judge to limit the scope of the instruction.

OPUC will provide responses consistent with the Commission’s rules, the Texas Rules of Civil Procedure, the Administrative Procedure Act, and the Protective Order, as applicable. The Commission’s Procedural Rules permit discovery of information that is “not privileged or exempted under the Texas Rules of Civil Evidence, the Texas Rules of Civil Procedure, or other law or rule, that is relevant to the subject matter in the proceeding.” 16 TAC § 22.141.

² Docket No. 19265, Order on Appeal of Order No. 42 at 3.

³ *Id.*

⁴ *Id.* at 3-4.

III. SPECIFIC OBJECTIONS

OPUC objects to the following discovery requests:

REQUEST NO. 13:

Provide the sources of funding that the OPUC and its Staff claim are available to SUBURBAN in order for the company to pay for the water system improvements, upgrades and repairs as set forth in its water system improvement plans, if the OPUC and its Staff claim this instant rate change application should not be granted to SUBURBAN.

Objection:

OPUC objects to this request as vague, burdensome, calls for OPUC to speculate as to what sources may be available to Suburban, attempts to improperly shift the burden of proof from the Applicant to an Intervenor (TWC § 13.184(c); 16 TAC § 24.12.) and to the extent it seeks OPUC to conduct surveys or otherwise engage in activities to ascertain an answer. It is the Applicant's burden to prove that its rates are just and reasonable, including the identification of any sources of funding, if necessary. Additionally, Suburban, not OPUC, is singularly suited to determine what sources of funding may be available to it in its commercial endeavor. Suburban, not OPUC, has the custody and control of the requisite financial, technical, or other information needed to undertake a review of particular sources of funding, and therefore, is "obtainable from some other source that is more convenient, less burdensome, or less expensive" than from OPUC. (See Tex. R. Civ. P. 192.4(a)). Further, the terms "the sources of funding" and "available" are vague and broad terms. See *In re Nat'l Lloyds Ins. Co.*, 449 S.W.3d 486, 488 (Tex. 2014); *In re Allstate Cnty. Mut. Ins. Co.*, 227 S.W.3d 667, 669-70 (Tex. 2007) (per curiam); 16 TAC § 22.141(a).

Subject to the above objection, OPUC reserves the right to identify alternative sources of funding in its pre-filed testimony, or at the appropriate time when discovered in this proceeding.

REQUEST NO. 14:

Please identify any and all persons and experts that the OPUC has conferred with and/or used to review SUBURBAN's rate change application and to assist the OPUC is [sic] formulating discovery sent to SUBURBAN by the OPUC.

Objections:

OPUC objects to this request to the extent it impermissibly seeks privileged attorney-client communications, attorney work product, and attorney core work product, or information regarding the mental impressions or opinions of consulting experts. Tex. R. Evid. 503; Tex. R. Civ. P. 192.5 and 192.3(3). The work product privilege extends to “any material prepared or mental impressions developed” or “communications made” “in anticipation of litigation or for trial by a party or a party’s representatives,” including attorneys, consultants, employees or agents. Tex. R. Civ. P. 192.5(a)(2). Requesting the identity of persons or experts who are not testifying and whose work product has not been reviewed by a testifying expert with whom OPUC has conferred in reviewing the application and developing discovery requests falls squarely within these privileges. Similarly, conversations by and between OPUC attorneys and its client to facilitate the rendition of professional legal services is clearly protected under Tex. R. Civ. Evid. 503.

The Public Utility Commission of Texas has previously discussed the scope of discovery in Commission hearings prior to the filing of pre-filed testimony. In Docket No. 19265,⁵ the Commission stated that “in Commission hearings parties generally file testimony and are then subject to discovery. In such a proceeding, there is no need for designation of witnesses prior to the filing of testimony to allow the parties to conduct discovery.”⁶ The Commission announced a “straight-forward rule” regarding whether an expert is a testifying expert or a consulting expert in the time period prior to filing written testimony: “...upon filing testimony or by designation by the party, an expert shall be a testifying expert subject to discovery. Neither contract provision providing that an expert will testify nor the preparation of draft testimony is sufficient to cause classification as a testify expert.”⁷ The Commission concluded that requiring the discovery on information protected by the consulting expert privilege, would “severely restrict a party’s counsel from investigating or developing legal strategies in concert with its consulting experts. While a party may intend for an expert to be a witness at one point in time, after further investigations or due to other developments a party’s intentions may change. The Commission

⁵ *Application of Central and South West Corporation and American Electric Power Company, Inc. Regarding Proposed Business Combination*, Docket No. 19265, Order on Appeal of Order No. 42 (Mar 11, 1999).

⁶ Docket No. 19265, Order on Appeal of Order No. 42 at 3.

⁷ *Id.*

concludes that the testifying characteristic irrevocably attaches after the filing of testimony or after designation as such, but not before.”⁸

To the extent that the request for information encompasses privileged matters (Tex. R. Civ. Evid. 501) or matters not within the scope of discovery (Tex. R. Civ. P. 192.3), such as documents subject to the attorney-client (Tex. R. Civ. Evid. 503) or attorney work product (Tex. R. Civ. P. 192.5) privileges or the identity, mental impressions, or opinions of consulting experts whose mental impressions or opinions have not been reviewed by a testifying expert (Tex. R. Civ. P. 192.3(e)), OPUC objects to the RFI.

Furthermore, to the extent this request asks OPUC to identify “any and all” persons and experts with whom it has conferred to “review” the application and/or to assist in “formulating” discovery, OPUC objects that this request is overly broad, vague, and on the basis of relevance. *See In-re Nat’l Lloyds Ins. Co.*, 449 S.W.3d 486, 488 (Tex. 2014); *In re Allstate Cnty. Mut. Ins. Co.*, 227 S.W.3d 667, 669-70 (Tex. 2007) (per curiam); 16 TAC § 22.141(a). The terms “any and all” is not limited in any manner and is so expansive it could include a variety of people, such as administrative assistants. Furthermore “reviewing” the application and “formulating” discovery is vague and it is unclear how these acts would likely yield relevant information under Tex. R. Civ. Evid. 403 when not tied to any issue in the case. Simply because OPUC may have conferred with an individual, does not necessarily mean that the conversation is likely to lead to admissible evidence and could include mundane irrelevant office matters. For example, the discovery request is broad enough to encompass communications OPUC attorneys could have with administrative staff to copy testimony or help format discovery responses.

REQUEST NO. 15

Please identify any and all communications that the OPUC and its Staff, including its attorneys, have had with any persons, any water and sewer utilities and districts of any kind and nature and their representatives, with any attorneys either individually or who represent persons or entities or agencies, with any state and local agencies, with any state or local elected officials, and with any other entities and persons that in any way mention, reference, relate to and pertain to this rate change application by SUBURBAN and any issues involved in this proceeding, and that in any way relate, refer and pertain to SUBURBAN and its affiliates during the past two (2) years.

⁸ *Id.* at 3-4.

Objection:

This Request seeks identification of “any and all communications” between OPUC and “any persons” relating “to SUBURBAN and its affiliates” for the past two years. The Discovery requests defines “communication” to include “any oral or written utterance.” OPUC objects to this request on the basis that it is overly broad and unduly burdensome. *See In re Nat’l Lloyds Ins. Co.*, 449 S.W.3d 486, 488 (Tex. 2014); *In re Allstate Cnty. Mut. Ins. Co.*, 227 S.W.3d 667, 669-70 (Tex. 2007) (per curiam); 16 TAC § 22.141(a). Requesting “any and all” communications [oral or written] with “any person” “of any kind and nature” that “in any way mention, reference, relate to this rate change application” “during the past two (2) years,” is so broad as to capture any type of communication from or to OPUC from or to any entity whatsoever, including any filings with Central Records, privileged attorney-client communication, work product, and attorney core work product. The request would require OPUC to track down every responsive communication during the last two years, without regard to whether that communication relates to the instant case, and log it, including, under the duty to supplement, to log any such communications as this case proceeds.

Additionally, OPUC objects to this request on grounds that the information sought is neither relevant to the matters at issue in this rate proceeding nor are the requests reasonably calculated to lead to the discovery of admissible evidence. *K-Mart Corp. v. Sanderson*, 937 S.W.2d 429, 431-32 (Tex.1996); Tex. R. Civ. P. 192.3(a); 16 TAC § 22.141(a). OPUC further objects to the relevance of this request insofar as it requests communications during the past two years, when this case was filed on December 29, 2016. The request is not specific or reasonably tailored to include only matters relevant to the case and, as such, OPUC objects that this request constitutes nothing more than an impermissible “fishing expedition.” *See Texaco, Inc. v. Sanderson*, 898 S.W.2d 813, 814-815 (Tex. 1995).

Moreover, OPUC objects to this request to the extent it impermissibly seeks potential privileged attorney-client and allied litigant communications, attorney work product, attorney core work product, or information regarding the mental impressions or opinions of consulting experts: Tex. R. Evid. 503(b)(1)(A) & (C); Tex. R. Civ. P. 192.5, and 192.3(3). The request asks for any communication that “OPUC, its Staff, including its attorneys, have had with any persons [and] . . . with any attorneys . . . that in any way mention, reference, relate to and pertain to this

rate change application” The breadth of such language includes attorney-client communications and attorney-attorney communications *relating to this application*.

Work product includes any “any material prepared or mental impressions developed” or “communications made” “in anticipation of litigation or for trial by a party or a party’s representatives,” including attorneys, consultants, employees or agents. Tex. R. Civ. P. 192.5(a)(2). Such communications are privileged. Tex. R. Civ. P. 192.5(b).

REQUEST FOR PRODUCTION NO. 1

Provide copies of all documents, tangible items and other demonstrative evidence to be used by the OPUC at the final hearing in this case, [sic] trial.

Objection:

OPUC objects to this request because it asks for production of attorney core work product and other work product which is not discoverable. *In re Bexar Cty. Criminal Dist. Attorney's Office*, 224 S.W.3d 182, 187 (Tex. 2007); Tex. R. Civ. P. 195.5(b)(1). OPUC further objects that the request is overly broad and unduly burdensome.

REQUEST FOR PRODUCTION NO. 23

Please provide any and all documents that relate to the OPUC's and its Staff's responses to the following numbered SUBURBAN Request for Information listed above; these documents to include, but not be limited to, any document, report, memoranda, email messages and any other written or electronic materials that the OPUC and its Staff reviewed, used and/or know or presume that relate and/or were used to support or were reviewed in the process of the OPUC Staff attorney's testimony and/or stated positions as well as the OPUC's and its Staff's responses to the Request for Information listed above.

Objections:

To the extent this Requests seeks the production of documents that are subject to pending objections, namely, Objections to Requests Nos. 13, 14, and 15 above, OPUC objects to this request for the reasons stated within those objections.

REQUEST FOR PRODUCTION NO. 25

Please provide copies of any and all correspondence, memoranda, letters, emails, documents, notes, messages, and any other materials received by and sent by the OPUC and any of its Staff, including its attorneys, from, with and to any other persons, any

water and sewer utilities and districts of any kind and nature, attorneys either individually or who represent persons or entities or agencies, any state and local agencies and departments, including, but not limited to, the Public Utility Commission of Texas and its staff, including attorneys, the Texas Commission on Environmental Quality and its staff, including attorneys, and any other state and local agencies and departments, any state or local elected officials, and any other entities and persons that in any way mention, reference, relate to and pertain to this rate change application by SUBURBAN and any issues involved in this proceeding, and that in any way relate, refer and pertain to SUBURBAN and its affiliates during the past three (3) years.

Objections:

This request seeks production of documents relating to communications between OPUC and other individuals relating “to SUBURBAN and its affiliates” for the past three years. Requesting “any and all” correspondence, etc., with and to “any other persons” “of any kind and nature” that “in any way mention, reference, relate to and pertain to this rate change application” “during the past three (3) years,” is so broad as to capture any type of correspondence from or to OPUC from or to any entity whatsoever, including any filings with Central Records, privileged attorney-client communication, work product, and attorney core work product. OPUC objects to the relevance of this request insofar as it requests communications during the past three years, when this case was filed on December 29, 2016. OPUC also objects to this request on the basis that it is overly broad and unduly burdensome. *See In re Nat'l Lloyds Ins. Co.*, 449 S.W.3d 486, 488 (Tex. 2014); *In re Allstate Cnty. Mut. Ins. Co.*, 227 S.W.3d 667, 669-70 (Tex. 2007) (per curiam); 16 TAC § 22.141(a). Additionally, OPUC objects to this request on grounds that the information sought is neither relevant to the matters at issue in this rate proceeding nor are the requests reasonably calculated to lead to the discovery of admissible evidence. *K-Mart Corp. v. Sanderson*, 937 S.W.2d 429, 431-32 (Tex.1996); Tex. R. Civ. P. 192.3(a); 16 TAC § 22.141(a). The request is not specific or reasonably tailored to include only matters relevant to the case, and as such OPUC objects that this request constitutes nothing more than an impermissible “fishing expedition.” *See Texaco, Inc. v. Sanderson*, 898 S.W.2d 813, 814-815 (Tex. 1995).

Moreover, OPUC objects to this request to the extent it impermissibly seeks privileged attorney-client and allied litigant communications, attorney work product, and attorney core work product, or information regarding the mental impressions or opinions of consulting experts. Tex. R. Evid. 503(b)(1)(A) & (C); Tex. R. Civ. P. 192.3(e) and 192.5. The request asks for any communication that “OPUC, any of its Staff, including its attorneys, . . . with and to any persons

[and] . . . with any attorneys . . . that in any way mention, reference, relate to and pertain to this rate change application” The breadth of such language includes attorney-client communications and attorney-attorney communications *relating to this application*. Work product includes “a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.” Tex. R. Civ. P. 192.5(a)(2). Such communications are privileged. Tex. R. Civ. P. 192.5(b).

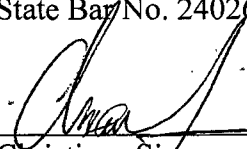
IV. PRAYER

WHEREFORE, OPUC prays that these Objections be sustained and that OPUC be relieved of responding to the Discovery Requests identified herein, and grant such other relief to which they may be entitled.

Dated: March 9, 2017

Respectfully submitted,

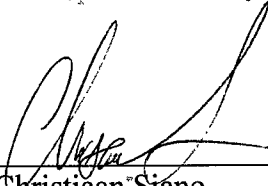
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CERTIFICATE OF SERVICE
SOAH DOCKET NO. 473-17-2457.WS
PUC DOCKET NO. 46674

I certify that today, March 9, 2017, a true copy of the Office of Public Utility Counsel's Objections to Suburban Utility Company, Inc.'s First Discovery Responses was served on all parties of record via United States First-Class Mail, hand-delivery or facsimile.



Christiaan Siano