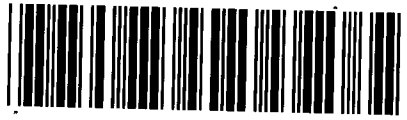


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APPLICATION OF SUBURBAN
UTILITY COMPANY, INC. FOR
AUTHORITY TO CHANGE RATES

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BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

PUBLIC UTILITY COMMISSION
FILING CLERK

**OFFICE OF PUBLIC UTILITY COUNSEL'S
MOTION TO COMPEL RESPONSE TO THIRD REQUEST FOR INFORMATION
TO SUBURBAN UTILITY COMPANY, INC.**

The Office of Public Utility Counsel (OPUC) files this motion to compel responses to OPUC's request for information (RFI) Nos. 3-12, 3-13, 3-15, 3-16 to Suburban Utility Company, Inc. (Suburban). OPUC submitted its RFIs on February 16, 2017; Suburban filed objections on March 14, 2017. Pursuant to 16 TAC § 22.144(e), this motion to compel is timely filed. For the reasons discussed herein, OPUC requests that the ALJ overrule Suburban's objections and compel Suburban to respond fully to OPUC RFI Nos. 3-12, 3-13, 3-15 and 3-16.

I. Background

In this proceeding, Suburban must prove that its operating expenses are just and reasonable.¹ Suburban must also prove that its affiliated expenses comply with the Commission's more stringent standard for such expenses, which requires that each item or class of items be found reasonable and necessary and not higher than charges to a third party or other affiliate for the same item or class of items.² Suburban is one of five utilities owned and operated by Michael Martin and Mitchell Martin, through their operating company, M.B.C. Water Systems, Inc.³ Additionally, both Michael Martin and Mitchell Martin hold positions for both Suburban and M.B.C. Water Systems, Inc. Although Suburban claims to have no

¹ TWC § 13.182(a).

² TWC § 13.185(e).

³ Suburban response to OPUC 1-29.

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employees, it pays at least \$75,400 in management salaries to Michael Martin and Mitchell Martin.⁴ Similarly, Michael Martin and Mitchell Martin own all the stock of M.B.C. Water Systems, Inc., Community Utility Company, Consumers Water Inc., Patton Village Water Co., Inc., Stone Hedge Utility Co., Inc. and Suburban Utility Company.⁵ Moreover, all of Suburban's records are kept at the offices of M.B.C. Water Systems, Inc.⁶ In addition, Schedule I-1 of its application shows that Suburban pays Michael Martin and Mitchell Martin a contract labor expense of \$328,820, through M.B.C. Water Systems, Inc.,⁷ and management salaries of \$75,400.⁸

As a result of these affiliated interests and transactions, it is necessary to ensure that the affiliated transactions comply with TWC § 13.185(e). To ensure that "the price to the utility is no higher than prices charged by the supplying affiliate to its other affiliates or divisions for the same item or items, or to unaffiliated persons or corporations," the Commission must review not only the price that M.B.C. Water Systems, Inc. charges Suburban, but also the amount it charges its other affiliates. In this case, those other affiliates are Community Utility Company, Consumers Water Inc., Patton Village Water Co., Inc., and Stone Hedge Utility Co., Inc.

The definition of an affiliate is broad and includes any person or corporation holding 5% or more stock in a utility, in any successive chain of ownership, directly or indirectly, or any corporation 5% or more of which is owned by the utility, and any person or corporation

⁴ Suburban response to OPUC 1-12.

⁵ Suburban response to OPUC 1-29 and 1-46.

⁶ Suburban response to OPUC 1-69 ("All operations, supplies, and documents for Suburban Utility Company are located in the offices of its operations contractor, M.B.C. Water Systems, Inc.").

⁷ Suburban response to OPUC 1-10, Attachment 1-6, and Operations Expense category of Attachment A to the rate application.

⁸ Suburban response to OPUC 1-12.

exercising substantial influence over the policies and actions of a utility.⁹ The Commission's power over affiliated interests is similarly broad:

The utility commission has jurisdiction over affiliated interests having transactions with utilities under the jurisdiction of the utility commission to the extent of access to all accounts and records of those affiliated interests relating to such transactions, including but in no way limited to accounts and records of joint or general expenses, any portion of which may be applicable to those transactions.

TWC § 13.341.¹⁰ The Commission may also "require the disclosure of the identity and respective interests of every owner of any substantial interest in the voting securities of any utility or its affiliated interest." TWC § 13.342.

II. Suburban's Objections Are Legally Invalid

As the party objecting to a discovery request, Suburban bears the burden of proving the objection.¹¹ Further, under the Commission's rules, "[a]ll arguments upon which the objecting party relies shall be presented in full in the objection."¹² In its objection, Suburban simply states that its affiliates are not subject to discovery and that the requested information is not within its possession or control, but provides no explanation or authority to support its assertion. Additionally, Commission rules specifically provide that "Parties shall negotiate diligently and in good faith concerning any discovery dispute prior to filing an objection."¹³ Suburban did not confer with OPUC on these discovery requests. Suburban's objections fail to provide a certificate of conference, and as such, is legally inadequate. Accordingly, Suburban has not complied with the standard for asserting an objection, and its objections should be denied.

⁹ TWC § 13.002(2)(A), (B), (C), (D), (F) & (G).

¹⁰ See also TWC § 13.132(a)(1) and (5).

¹¹ See *General Motors Corp. v. Tanner*, 892 S.W.2d 862, 863 (Tex.1995) (orig. proceeding) (per curiam).

¹² 16 TAC § 22.144(d)(1).

¹³ 16 TAC § 22.144(d).

III. Suburban's Objections Are Without Merit.

Moreover, as discussed below, Suburban's objections are without merit and should be overruled.

OPUC Requests for Information:

- 3-12. Please provide the total management compensation paid during the Test Year to Mike Martin by the following:
 - a. Community Utility Company
 - b. Consumers Water, Inc.
 - c. Patton Village Water Co., Inc.
 - d. Stone Hedge Utility Co.

- 3-13. Please provide the total management compensation paid during the Test Year to Mitch Martin by the following:
 - a. Community Utility Company
 - b. Consumers Water, Inc.
 - c. Patton Village Water Co., Inc.
 - d. Stone Hedge Utility Co.

- 3-15. Please indicate the person(s) and company(ies) responsible for the management and policies of the following:
 - a. MBC Water Systems
 - b. Suburban Utility Company
 - c. Community Utility Company
 - d. Consumers Water Inc.
 - e. Patton Village Water Co., Inc.
 - f. Stone Hedge Utility Co.

- 3-16. Please provide the names of the officers of the following:
 - a. MBC Water Systems
 - b. Suburban Utility Company
 - c. Community Utility Company
 - d. Consumers Water Inc.
 - e. Patton Village Water Co., Inc.
 - f. Stone Hedge Utility Co.

Suburban does not object to providing the requested information with respect to Suburban and M.B.C. Water Systems, Inc. Rather Suburban objects to responding with respect to Community Utility Company, Consumers Water Inc., Patton Village Water Co., Inc., and

Stone Hedge Utility Co., Inc., because, it alleges, they are not the applicant, they are not affiliated entities, and Suburban does not have the information.

RFIs 3-12 and 3-13 ask how much Michael Martin and Mitch Martin charge for management compensation to their other affiliated utilities. This is directly relevant to assessing whether the amount charged by Michael Martin and Mitchell Martin to Suburban is reasonable and necessary under TWC § 13.185(e). OPUC 3-15 and 3-16 asks for the names of the persons or companies responsible for the management policies of the affiliated companies and the names of the officers of the affiliated companies. This is relevant to establishing affiliation under TWC § 13.002(3)(e).¹⁴ This is particularly important where, as here, Suburban has alternatively admitted *and* denied affiliation with M.B.C. Water Systems, Inc., Consumer Water, Inc., and Community Utilities Company, Inc.

First, Suburban objects by claiming that Suburban is the applicant under 16 TAC § 22.2(5) – a matter not in dispute. However, nothing about Suburban’s status as an applicant insulates its affiliates or officers, owners, or directors from discovery requests. Suburban claims that Michael/Mitchell Martin is “not the Applicant in this case and is not individually subject to the jurisdiction of the Administrative Law Judge nor the State Office of Administrative Hearings, and SUBURBAN does not have control nor access to any documents or information possessed by Mr. Martin and cannot provide documents owned and controlled by him.”¹⁵ Nevertheless, each of Suburban’s discovery responses in this proceeding to date have included Michael Martin and Mitchell Martin as sponsors/preparers.¹⁶ Moreover, Suburban’s service contract with

¹⁴ See also TWC § 13.182 (“The utility commission may require the disclosure of the identity and respective interests of every owner of any substantial interest in the voting securities of any utility or its affiliated interest.”).

¹⁵ See Suburban objection to OPUC RFI Nos. 3-12 and 3-13.

¹⁶ See, e.g., Interchange Items 238 at 3 (response to OPUC’s 1st RFIs), and 281 at 3 (response to Staff’s 1st RFIs), 282 at 3 (response to OPUC’s 2nd RFIs).

M.B.C. Water Systems Inc., is signed by Mitchell Martin as Board President of both entities, and is attested to by Michael Martin as Board Secretary for both entities.¹⁷ As the sole operators and payees of Suburban's contract labor, through M.B.C. Water Systems, Inc.,¹⁸ and management salaries,¹⁹ Michael Martin and Mitchell Martin serve dually for both Suburban and M.B.C. Water Systems, Inc. Accordingly, Michael Martin and Mitchell Martin are subject to discovery requests in this docket.²⁰

Second, Suburban objects that it is not affiliated with any of the listed utilities, namely, Community Utility Company, Consumers Water Inc., Patton Village Water Co., Inc., and Stone Hedge Utility Co., Inc. However, Suburban fails to provide evidence that the companies are not affiliated. Suburban has admitted that it is owned by Michael Martin and Mitchell Martin,²¹ and that it is affiliated with M.B.C. Water Systems, Inc.²² Suburban has also admitted affiliation with Consumers Water, Inc.,²³ and Community Utility Company, Inc.,²⁴ but also denied affiliation with M.B.C. Water Systems,²⁵ Patton Village Water Company, Inc.,²⁶ and Stone Hedge Utility Company, Inc.²⁷ Suburban has admitted that the same persons own the stock in all

¹⁷ See Attachment 1-54 to Suburban response to OPUC 1-54.

¹⁸ See Operations & Expense, Attachment A to application; Suburban response to OPUC 1-10, attachment 1-6.

¹⁹ Suburban response to OPUC 1-12, Attachment 1-12; Management Compensation category of Attachment A to applications.

²⁰ See TWC § 13.341.

²¹ Suburban response to OPUC 1-46.

²² Suburban response to OPUC 1-29.

²³ Suburban response to OPUC RFA 1-2.

²⁴ Suburban response to OPUC RFA 1-3.

²⁵ Suburban response to OPUC RFA 1-1.

²⁶ Suburban response to OPUC RFA 1-4.

²⁷ Suburban response to OPUC RFA 1-5.

the listed utilities,²⁸ and has not claimed that any successive chain of ownership is less than 5%. As such, all of the listed utilities are affiliates under TWC § 13.002(2), and subject to discovery.

Finally, Suburban claims that it has no control or possession over any responsive documents. The phrase “possession, custody or control” includes not only actual physical possession, but constructive possession, and the right to obtain possession from a third party.²⁹ The right to obtain possession is a legal right based on the relationship between the party responding to discovery and the person or entity that has actual possession.³⁰ Commission rules provide that “A person has possession, custody or control of a document or tangible thing as long as the person has a superior right to compel the production from a third party and can obtain possession of the document or tangible thing with reasonable effort.”³¹ Suburban has not stated how it is unable to compel production of the documents from its affiliates nor that the effort to do so is unreasonable. On the contrary, Suburban has stated that all of its records are kept at M.B.C Water Systems, Inc.³² It has also admitted that Community Utility Company, Consumers Water Inc., Patton Village Water Co., Inc., Stone Hedge Utility Co., Inc. share the same office.³³ Suburban’s claim of lack of custody and control is the kind of fiction, legal or otherwise, that the Commission’s powers over affiliates are designed to eliminate.³⁴ Accordingly, Suburban’s claim of lack of possession or control is without merit and should be overruled.

²⁸ Suburban response to OPUC 1-29.

²⁹ *GTE Commc'ns Sys. Corp. v. Tanner*, 856 S.W.2d 725, 729 (Tex.1993).

³⁰ *Id.*

³¹ 16 TAC § 22.141.

³² Suburban response to OPUC 1-69.

³³ Suburban response to OPUC RFA 1-7.

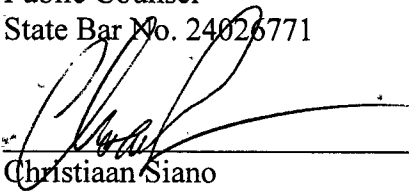
³⁴ See TWC § 13.341.

IV. Prayer

For the reasons discussed herein, OPUC requests that the ALJ deny Suburban's objections; grant OPUC's motion to compel Suburban to respond fully to OPUC RFI Nos. 3-12, 3-13, 3-15 and 3-16, and grant OPUC such further relief to which it may be entitled.

Dated: March 20, 2017

Respectfully submitted,
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CERTIFICATE OF SERVICE

SOAH DOCKET NO. 473-17-2457.WS
PUC Docket No. 46674

I hereby certify that today, March 20, 2017, a true copy of the Office of Public Utility Counsel's Motion to Compel Response to Third Request for Information to Suburban Utility Company, Inc., was served on all parties of record via hand delivery, facsimile, or United States First-Class Mail.



Christiaan Siano