



Control Number: 49189



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SOAH DOCKET NO. 473-19-6297.WS
PUC DOCKET NO. 49189

APPLICATION OF THE CITY OF
AUSTIN DBA AUSTIN WATER FOR
AUTHORITY TO CHANGE WATER
AND WASTEWATER RATES

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BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

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SOAH ORDER NO. 5
RULING ON DISTRICTS' MOTIONS TO COMPEL AUSTIN WATER TO RESPOND
TO DISTRICTS' FIRST, SECOND, THIRD, FOURTH, AND FIFTH RFIS; AND
SETTING DEADLINE FOR OBJECTIONS TO THE CITY OF AUSTIN'S DIRECT
TESTIMONY

On September 19, 2019, the Districts¹ filed a motion to compel Austin Water² to respond to their First and Second Requests for Information (RFIs).³ On September 26, 2019, Austin Water filed its response to the motion to compel.⁴ On September 23, 2019, the Districts filed a motion to compel Austin Water to respond to their Third, Fourth, and Fifth Corrected RFIs.⁵ On October 2, 2019, Austin Water filed its response to the motion to compel.⁶ The motions to compel are **GRANTED IN PART** and **DENIED IN PART**, as set forth below.

Discovery Disputes Relating to 16 Texas Administrative Code (TAC) § 22.144(h)(4)

The Districts' Motion to Compel regarding their First and Second RFIs relate to 16 TAC § 22.144(h)(4), a Public Utility Commission of Texas (Commission) rule requiring submission of

¹ North Austin Municipal Utility District No. 1, Northtown Municipal Utility District, Travis County Water Control & Improvement District No. 10, and Wells Branch Municipal Utility District (collectively, Districts or Intervenors).

² City of Austin d/b/a Austin Water (Austin Water).

³ North Austin Municipal Utility District No. 1, Northtown Municipal Utility District, Travis County Water Control & Improvement District No. 10, and Wells Branch Municipal Utility Districts' Motion to Compel City of Austin to Respond to Intervenors' 1st and 2nd Requests for Information as Required by Commission Rules (Sep. 19, 2019).

⁴ City of Austin d/b/a Austin Water's Response to Districts' Motion to Compel Responses to Districts' First and Second Requests for Information (Sept 26, 2019).

⁵ North Austin Municipal Utility District No. 1, Northtown Municipal Utility District, Travis County Water Control & Improvement District No. 10, and Wells Branch Municipal Utility Districts' Reply to City of Austin d/b/a Austin Water's Response to Intervenors' 3rd, 4th, and 5th Corrected Request for Information as Required by Commission Rules (Sept. 23, 2019).

⁶ City of Austin d/b/a Austin Water's Response to Districts' Second Motion to Compel Responses to Districts' Corrected Third, Fourth, and Fifth Requests for Information (Oct 2, 2019).

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a detailed index when a response to an RFI is voluminous within the meaning of § 22.144. Section 22.144(h)(4) states:

The party providing the voluminous material shall file with its response a detailed index of the voluminous material responsive to a particular question and shall organize the responses and material to enable parties to efficiently review the material, including labeling of material by request for information number and subparts and sequentially numbering the material responsive to a particular question. The index shall include:

- (A) information sufficient to locate each individual document by page number, file number, and box number;
- (B) the date of each document;
- (C) the title of the document, or, if none exists, a description of the document;
- (D) the name of the preparer of each document; and
- (E) the length of each document.

The Districts object that, regarding responses to their First and Second RFIs that Austin Water labeled as voluminous, Austin Water did not provide the detailed index required by § 22.144(h)(4).

Austin Water responds that 16 TAC § 22.144(e) “states that a motion to compel is generally due no later than five working days after the objectionable information is received.” Austin Water argues the motion to compel was not timely filed. The ALJs disagree. The rule actually states: “The party seeking discovery shall file a motion to compel no later than five working days after the objection is received. Absence of a motion to compel will be construed as an indication that the parties have resolved their dispute.” Here the RFI response was voluminous; Austin Water failed to file the index expressly required by the rule when Austin Water responded to the RFI; and no party asserts Austin Water notified the Districts, or sought their agreement, before failing to file the index as required. Under these circumstances, the ALJs find the Districts did not unreasonably delay filing the motion to compel.

Austin Water contends that the motion to compel should be denied because Austin Water made concessions that made the voluminous RFI responses more usable than the rule requires. Austin Water explains:

In accordance with 16 TAC § 22.144(h)(3), Austin Water retains the discretion to make voluminous material available for inspection and copying in a voluminous room in Austin. Instead, Austin Water has provided all of the requested information in digital format, in an effort to make the information more accessible than the Commission rules require. Additionally, Austin Water sent a link to the voluminous material via our large file transfer system, in a format that is capable of being searched. All documents were also provided via the Commission's Interchange. Each document is designated with a date and title.

The ALJs note that actually, 16 TAC § 22.144(h)(2) and (3) require that voluminous information provided in response to an RFI be made available at a designated location in Austin:

- (2) Subject to paragraph (3) of this subsection, the responding party shall make available all voluminous material provided in response to a request for information at a designated location in Austin.
- (3) A party will be released from its obligation to make available the requested voluminous material at a designated location in Austin, only if the volume of the material exceeds eight linear feet. In that event, the party shall make the material available where the material is located.

The party seeking discovery and the party responding to discovery may *agree* to waive a requirement in the Commission's discovery rules,⁷ including to obtain concessions by the other party, and should seek to avert or resolve discovery disputes by entering into such agreements. A party does not have discretion unilaterally to ignore a requirement in a Commission discovery rule. The ALJs conclude that, unless the parties agree otherwise in writing (including by email), for any response to an RFI that is voluminous within the meaning of § 22.144, the rule requires the responding party to produce the index as described in the rule. Accordingly, regarding the disputes relating to this rule requirement, the Districts' motion to compel regarding their First and Second RFIs is **GRANTED**.

⁷ Pursuant to 16 TAC § 22.141(c), the parties may, by written agreement, agree to extensions of time to respond to or object to a discovery request and otherwise modify the procedures set out in the Commission's discovery rules.

Definition No. 5

The Districts filed a motion to compel regarding Definition No. 5 in their Corrected Third, Fourth, and Fifth RFI. Definition No. 5 reads:

“Describe” or “describe in detail” means to give a complete and full description concerning the matter about which the inquiry is made, including the full name, address, and telephone number(s) of the person(s) involved, dates, times, places, and other particulars, including all relevant documents and observations which make the answers to these written discovery requests fair and meaningful.

Citing 16 TAC § 22.142(a) and Texas Rules of Civil Procedure 192.4, Austin Water objected to this definition as unduly burdensome, unreasonable, and harassing. Austin Water stated it would instead respond using “the commonly understood meaning” of “describe” or “describe in detail.” The Districts respond that Austin Water’s position would “leave the determination of what is actually responsive to the City’s biased interpretation.” The ALJs conclude that Definition No. 5 is overly broad. Such phrases as “other particulars.” and “fair and meaningful,” do not lend any qualification to those words that give an objective reader notice of what information is sought. Accordingly, the ALJs find that this definition is unduly burdensome, unreasonable, and harassing and the City’s objection is **SUSTAINED**.

Definition No. 10

The Districts filed a motion to compel regarding Definition No. 10 in their Corrected Third, Fourth, and Fifth RFIs. Definition No. 10 reads:

To “identify” a document means the following: (i) to identify all files in which it and all copies of it are found; (ii) to identify its author; (iii) to identify its addresses, if any; (iv) to identify those persons who received a copy thereof; (v) to identify its current custodian or the person that had last known possession, custody, or control thereof; (vi) to state the date of its preparation; and (vii) to state its general subject matter giving a reasonably detailed description thereof.

Citing 16 TAC § 22.142(a) and Texas Rules of Civil Procedure 192.4, Austin Water objected to this definition as unduly burdensome, unreasonable, and harassing. Austin Water

stated it would instead respond using “the commonly understood meaning” of “identify.” The Districts state that they offered to modify this definition to track the Commission’s requirements for indices of voluminous materials found in 16 TAC § 22.144(h)(4), but Austin Water did not agree to that change. The Districts ask that the ALJs overrule Austin Water’s objections or, in the alternative, order Austin Water to provide the index described in § 22.144(h)(4) to any response to an RFI in their Third, Fourth, Fifth and Sixth RFIs that is voluminous. The ALJs conclude Definition No. 10 is unduly burdensome, unreasonable, or harassing and the City’s objection is **SUSTAINED**.

Corrected RFI No. 3-1

Corrected RFI No. 3-1 reads: “Please identify and produce all documents that demonstrate, justify, provide the basis for, explain, or in any way document the cost of planning, developing, and constructing Water Treatment Plant No. 4 to completion.” Austin Water objects to the RFI on the basis it is not relevant to the subject matter of this proceeding, as required by 16 TAC § 22.141(a). Austin Water argues it is under no obligation to seek Commission approval of its invested capital (*i.e.*, rate base) and there is no prudence review for cash flow method utilities. The City is concerned that “if the Districts were permitted to review the prudence of the utility’s investment, that scope would theoretically include the entirety of Austin Water’s invested capital, including certain facilities that have been in service for over sixty years.” The Districts argue that corrected RFI No. 3-1 is relevant to the prefiled direct testimony of Austin Water witness David A. Anders, which states at 39-40:

The Handcox WTP is a critical component of providing water service to all of AW’s customers. During the previous proceedings in Docket No. 42857, the Handcox WTP was still under construction and was not yet used and useful. Since November 2014, the Handcox plant has continuously been used and useful to AW’s water system. . . . The Handcox WTP costs benefit all customer classes including wholesale customers, and therefore a portion of the O&M and capital costs associated with the plant have been properly allocated to wholesale customers.

Although the ALJs agree that the review of the City’s rates differs from traditional investor-owned utilities, the ALJs find that corrected RFI No. 3-1 meets the discovery standard for relevance

regarding the above-quoted portion of Mr. Anders's direct testimony. Accordingly, the motion to compel regarding that RFI is **GRANTED**.

Corrected RFI Nos. 3-3 and 3-4

Corrected RFI No. 3-3 reads:

Please identify and produce all documents that relate to, evidence, memorialize, or concern any communications, meetings, or reports, or relays of data or information, whether written, video, or telephonic, informal or formal, regarding the City's existing water or wastewater service contracts with the Districts, that occurred within the City, or between the City and any other party, including Districts, at any time from January 1, 2016, to the present.

Corrected RFI No. 3-4 reads:

Please identify and produce all documents that evidence, memorialize, or concern any communications, meetings, reports, or relays of data or information, whether written, video, or telephonic, informal or formal, regarding the renewal of the City's water or wastewater service contracts with the Districts, that occurred within the City, or between the City and any other party, including Districts, at any time from January 1, 2016, to the present.

Austin Water objects to these RFIs on the basis they are not relevant to the subject matter of this proceeding, as required by 16 TAC § 22.141(a). Austin Water states that it provided the wholesale contracts for the Districts in Schedule II-C-4 of its application, and its witness Mr. Anders testified that each contract states the relevant rate will be as set by the City of Austin, or in the context of this case, the Commission; in other words, the contracts do not set rates in themselves. The Districts argue that the requested documents meet the discovery standard for relevance "City's documentation in response to this request would reveal City's internal and external discussions regarding its obligations under its contracts with Intervenor and the issues the City is concerned with in complying with those contracts. Those records are relevant to this matter because City claims to be allocating costs properly to the Intervenor." Austin Water contends it provided the contracts in its application "to provide complete context for this case, but the rates to be established will arise from the record evidence in this proceeding, not from any

contract language negotiated between Austin Water and the Districts. Communications, meeting reports, and the like, regarding the Districts' current or potential future water and wastewater contracts can have no impact on any issue properly before the Commission in this case." The ALJs agree that the information requested in corrected RFI Nos. 3-3 and 3-4 is not relevant to this proceeding. The connection between the rates set in this case and the City's internal and external discussions regarding its obligation under its contracts with the intervenors is too attenuated. Accordingly, the City's objection to corrected RFI Nos. 3-3 and 3-4 is **SUSTAINED**.

Corrected RFI No. 3-34

Corrected RFI No. 3-34 reads: "Please provide the mapping of AW's chart of accounts into the NARUC chart of accounts." Austin Water objects to this RFI because it seeks information that is not relevant to the issues presented in this matter and is not reasonably calculated to lead to the discovery of admissible evidence as required by 16 TAC § 22.141(a). Austin Water states that it did not provide the National Association of Regulatory Utility Commissioners (NARUC) chart of accounts in its application because Austin Water does not use the NARUC chart of accounts for its own accounting. Austin Water contends, however, that its chart of accounts provides a level of detail consistent with the NARUC system. The City states that the Districts fail to explain "why the accounting framework used by Austin Water is insufficient, why the NARUC chart of accounts is necessary to this case, or why Austin Water should be required to translate the former into the latter." It is not clear from the discovery request whether the Districts seek a document in existence; however, it appears from the City's response that it has not yet mapped its accounting system to the NARUC system of accounts. The ALJs agree that the Districts have not sufficiently explained why or how this mapping is relevant or whether it will lead to the discovery of admissible evidence. Accordingly, the City's objection to corrected RFI No. 3-34 is **SUSTAINED** with the caveat that if the City has already performed the exercise of mapping its accounting system to NARUC's, or intends to do so in support of its application, it shall provide it.

Corrected RFI Nos. 4-6, 5-4, and 5-5

Corrected RFI No. 4-6 reads: "Please provide the revenue requirements for each of the Intervenor based on re-running the AW Water COS Model Docket 49189.xlsx using the classifications of 24" and greater as Transmission Mains and less than 24" as Distribution Mains." Corrected RFI No. 5-4 reads: "Please provide the revenue requirements for each of the Intervenor based on re-running the AW Water COS Model Docket 49189.xlsx changing the depreciable life of all treatment facilities to 5 years." Corrected RFI No. 5-5 reads: "Please provide the revenue requirements for each of the Intervenor based on re-running the AW Water COS Model Docket 49189.xlsx changing the depreciable life of all distribution mains to 100 years."

Austin Water objects that these RFIs would require Austin Water to create documents not in existence, and thus not within Austin Water's possession. The ALJs agree in large part with Austin Water that the requested documents are not discoverable under 16 TAC § 22.141(a), which states: "A person is not required to produce a document or tangible thing unless it is within the person's constructive or actual possession, custody, or control." Accordingly, regarding these RFIs, the motion to compel is **DENIED**, with one exception. The Districts state: "Intervenor understand that City will respond to Intervenor Corrected Fourth Requests for Information by acknowledging its mistake in altering the classification of distribution versus transmission mains based upon a 16" or greater line size compared to the 24" or greater line size used in the prior rate case and producing new calculations." If, but for its mistake, Austin Water would have included in its application the revenue requirements requested in Corrected RFI No. 4-6, Austin Water shall respond to that RFI.

Pending and Future Discovery Disputes

Regarding any pending or future discovery dispute in this case, unless the parties have agreed otherwise, the ALJs expect each party to comply with the Commission's discovery rules as written. A party should not cause an opponent to delay receiving discovery or to have to file a pleading or the ALJs to rule on a dispute that arises only because the party failed to comply with a Commission discovery rule.

16 TAC § 22.144(d) requires: “Parties shall negotiate diligently and in good faith concerning any discovery dispute prior to filing an objection. The objections shall include a statement that negotiations were conducted diligently and in good faith.” In this case, the Districts have filed motions to compel regarding their First, Second, Third, Fourth, Fifth, Sixth, Seventh, and Eighth RFIs. In the ALJs’ experience, it is not common in large Commission rate cases for every set of RFIs to generate a motion to compel. Often a discovery dispute is narrowed or resolved even after objections or a motion to compel are filed. The parties shall engage in good faith negotiations to attempt to resolve pending and future discovery disputes, and promptly file a brief statement notifying the ALJs if a dispute is narrowed or resolved after filing of a motion to compel.

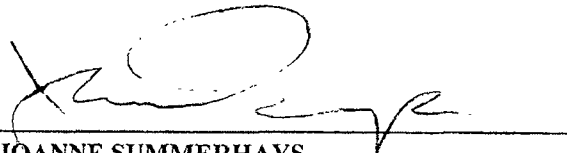
Deadline for objecting to City of Austin’s Direct Testimony

The procedural schedule originally adopted in this case omitted setting a deadline for objections to the City of Austin’s Direct Testimony. On September 27, 2019, representatives for the Districts and the City of Austin filed competing requests for setting a deadline to object to its direct testimony. The City of Austin proposes October 25, 2019, a week after intervenor testimony is due; the Districts propose a deadline of November 1, 2019, two weeks after its testimony is due. The ALJs set the deadline of **November 1, 2019**, to object to the City’s direct testimony.

SIGNED October 9, 2019.



CHRISTIAAN SIANO
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS



JOANNE SUMMERHAYS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS