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APPLICATION OF THE CITY OF § BEFORE THE STATE OFFICE
AUSTIN DBA AUSTIN WATER FOR § OF
AUTHORITY TO CHANGE WATER §
AND WASTEWATER RATES § ADMINISTRATIVE HEARINGS

**CITY OF AUSTIN D/B/A AUSTIN WATER'S
MOTION TO COMPEL FIRST REQUEST FOR INFORMATION**

COMES NOW, the City of Austin (City) d/b/a Austin Water (AW or Austin Water) and files this Motion to Compel First Requests for Information (RFI) to North Austin Municipal Utility District No. 1, Northtown Municipal Utility District, Travis County Water Control and Improvement District No. 10, and Wells Branch Municipal Utility District (Districts). On November 8, 2019, Austin Water filed and served its First RFI, seeking documents and other items supporting Districts' direct testimony in this matter. On November 13, 2019, Districts filed their Objections and Responses to Austin Water's First RFI.¹ Pursuant to 16 Texas Administrative Code (TAC) § 22.144(e), this Motion to Compel is timely filed. In support of its Motion to Compel, Austin Water provides the following arguments:

I. ARGUMENT

Under Texas Rules of Civil Procedure (TRCP) 193.1, when responding to written discovery, a party must make a complete response, based on all information reasonably available to the responding party or its attorney at the time the response is made. Under TRCP 193.5, if a party learns that the party's response to written discovery was incomplete or incorrect when made, or, although complete and correct when made, is no longer complete and correct, the party must amend or supplement the response. Districts have not provided a full response to Austin Water's RFIs, and therefore, Austin Water files this Motion to Compel.

¹ Objections and Responses of 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 to City of Austin d/b/a Austin Water's First Request for Information to Districts (Nov. 13, 2019).

Additionally, Districts have not complied with 16 TAC § 22.144(c)(2)(A), which requires each response to identify the preparer or person under whose direct supervision the response was prepared, and the sponsoring witness.

Districts have also not complied with 16 TAC § 22.144(c)(2)(F), which requires all responses to RFIs be filed under oath, unless the responding party stipulates in writing that responses to RFIs can be treated by all parties as if the answers were filed under oath. Districts have neither filed their responses under oath, nor stipulated that parties may treat the answers as filed under oath.

A. Districts' Objections to Austin Water's RFI 1-1(a)

The Districts made the following objections to Austin Water's RFI 1-1(a):

- AW 1-1: Please provide the following information for any testifying expert:
- a. All documents, tangible things, reports, models, or data compilations that have been reviewed by the expert in anticipation of the expert's testimony. For the rate filing package filed by Austin Water in this proceeding, do not provide the documents but instead list the portions of the rate filing package (including any updates) reviewed by the witness, including the specific pages reviewed (provide Bates Stamp numbers). For discovery responses that have been provided by Austin Water in this proceeding, do not provide the documents but instead list the discovery response, including the specific pages reviewed by the witness (provide Bates Stamp numbers);
 - b. All documents, tangible things, reports, models, or data compilations that have been provided by or for the expert in anticipation of the expert's testimony. For the rate filing package filed by Austin Water in this proceeding, do not provide the documents but instead list the portions of the rate filing package (including any updates) provided to the witness, including the specific pages provided (provide Bates Stamp numbers). For discovery responses that have been provided by Austin Water in this proceeding, do not provide the documents but instead list the discovery response, including the specific pages provided to the witness (provide Bates Stamp numbers); and
 - c. The expert's current resume and bibliography.

Districts' Objection to AW 1-1(a) and (b) are the same:

OBJECTION: The Districts object to this request on the following independent bases: the requests are unduly burdensome because they are unreasonably cumulative or duplicative of prefiled testimony already provided (*Walker v. Packer*, 827 S.W.2d 833, 843 (Tex. 1992)) and information requested is obtainable from other sources (i.e., prefiled testimony) that are more convenient, less burdensome and less expensive (*Brewer & Pritchard, P.C. v. Johnson*, 167 S.W.3d 460, 466 (Tex. App. – Houston [14thDist.] 2005, pet. denied)). Each expert testifies specifically in his prefiled testimony exactly what he reviewed and relied upon. In Mr. Joyce's case, he has reviewed dozens of City-produced documents (all identified in his testimony and exhibits attached thereto) over multiple years. It would be impossible to cite each specific bate-stamped page of those documents, assuming there is bate-stamping, or return the City's own documents back to the City.

Districts' first basis for its objections is that "the requests are unduly burdensome because they are unreasonably cumulative or duplicative of prefiled testimony already provided," however, Districts' only explanation for how they would be burdened is essentially that they would have to cite to their witness' direct testimony. This is not considered a burden under any standard.

Under 16 TAC § 22.141, "[p]arties may obtain discovery regarding any matter, 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." Under Texas Rules of Evidence (TRE) 703, an expert may base an opinion on facts or data in the case that the expert has been made aware of, reviewed, or personally observed. Austin Water has requested documents that have been reviewed by the expert in anticipation of the expert's testimony and documents that have been provided by or for the expert in anticipation of the expert's testimony. In this context, Austin Water's request does not seek anything further than what Districts' witnesses are allowed to base their opinions upon under TRE 703.

Districts claim that it would be impossible to cite the bate-stamped page for City-produced documents, but this argument confuses Austin Water's request; Austin Water has only requested specific bate-stamped pages for documents within Austin Water's rate filing

package in this case and Austin Water's RFI responses. Austin Water's request that Districts simply refer to the Application² or RFI response pages actually saves Districts the burden and expense of producing the documents.

Additionally, if Districts do not want to return the City's own documents back to the City, it must, at the very least, cite to which City documents its witnesses reviewed or were provided. Under 16 TAC § 22.144(c)(2)(D),

[w]here the response to a request for information may be derived or ascertained from local public records, the responding party shall not be obligated to produce the documents for the requesting party. It shall be sufficient answer to identify with particularity the public records that contain the requested information.

The purpose of Austin Water's RFI is not to force Districts to provide a City-produced document that the City may already have, but to determine which documents the Districts' witnesses considered in the preparation of their testimony, in order to determine the validity and accuracy of their testimony. To the extent that any City-produced documents were reviewed by or provided to the Districts' witnesses, outside of what was described and provided in the witness' testimony, Districts should have to identify the information in that document with particularity.

In Districts' RFI No. 2-6 to Austin Water, Districts requested "...all correspondence between the Districts and the City..." Districts' request obviously asked for something that both parties have in their possession. In contrast, Austin Water's RFI No. 1-1 asks for everything reviewed by Districts' witnesses, not knowing whether the witnesses reviewed information was readily available to Austin Water. Districts' objection presents a self-created problem; Districts could simply refer to Austin Water documents with reasonable particularity, rather than object to the request.

² Application of the City of Austin d/b/a Austin Water for Authority to Change Water and Wastewater Rates (Apr. 15, 2019).

Districts' objections, and its response indicate that Mr. Joyce has reviewed or was provided more documents over the last seven years than what was provided in his direct testimony and exhibits. Districts' own response to AW's RFI No. 1-1 indicates that Mr. Joyce reviewed information outside of what he disclosed in his testimony. Everything in the list that follows "Mr. Joyce also reviewed:" consists of documents which Mr. Joyce reviewed that were not described or provided in his testimony. If more documents exist outside of Mr. Joyce's direct testimony and Districts' response to AW's RFI No. 1-1, Austin Water is entitled to discovery of such documents. If Mr. Joyce had truly provided all documents that he has reviewed or been provided in his direct testimony, there would be no need for Districts to object to Austin Water's RFI, and Districts could have simply responded with a reference to his direct testimony and exhibits. Austin Water requests the Administrative Law Judges (ALJs) compel Districts' to produce such documents.

Additionally Districts' response to AW RFI No. 1-1(a) that "Mr. Joyce also reviewed ... 2) most of AWU's responses to PUC Staff's discovery requests; 3) most of the native files that accompanied AWU's discovery responses..." does not provide Austin Water with specific enough of a response. Districts' response does not indicate what Mr. Joyce actually reviewed, but only that he reviewed "most" of the information.

For these reasons, Austin Water requests the ALJs overrule Districts' objections, and compel Districts to provide a full and accurate response to Austin Water's RFI.

AW 1-2: If not provided with your direct testimony in this case, please provide, in native format, all workpapers and documents supporting the testimony of each witness filing testimony on your behalf in this proceeding.

OBJECTION: The Districts object to this request on the following independent bases: the requests are unduly burdensome because they are unreasonably cumulative or duplicative of prefiled testimony already provided (*Walker v. Packer*, 827 S.W.2d 833, 843 (Tex. 1992)) and information requested is obtainable from other sources (i.e., prefiled testimony) that are more convenient, less burdensome and less expensive (*Brewer & Pritchard, P.C. v. Johnson*, 167 S.W.3d 460, 466 (Tex. App. – Houston [14thDist.] 2005, pet. denied)). Each expert testifies specifically in his prefiled testimony

exactly what documents support his testimony. In Mr. Joyce's case, his review of dozens of City-produced documents (all identified in his testimony and exhibits attached thereto) over multiple years supports his testimony and producing the City's own documents back to the City would be unduly burdensome and harassing.

Districts' objection ignores the very premise of Austin Water's RFI No. 1-2: "[i]f not provided in your direct testimony in this case, please provide...." Producing additional workpapers, other than what was included in his direct testimony is not the same as "producing the City's own documents back to the City." To the extent that Districts' witnesses have not provided the workpapers and documents supporting their testimony, Austin Water requests the ALJs compel Districts to provide such materials.

Additionally, Districts' objection seems to repeat its objection to AW's RFI No. 1-1, however, AW's RFI No. 1-2 concerns witnesses' workpapers and documents that support their testimony. Workpapers are different than other documents which were provided to Mr. Joyce, or were reviewed by him. Districts provide no argument as to why producing any workpapers—outside of what he has already provided in direct testimony and in Districts' response to AW RFI No. 1-2—would be burdensome, unreasonably cumulative or duplicative, or obtainable from other sources that are more convenient, less burdensome or expensive.

If additional workpapers exist outside of Mr. Joyce's direct testimony and Districts' response to AW's RFI No. 1-1, Austin Water is entitled to discovery of such workpapers. If Mr. Joyce had truly already provided all workpapers that support his direct testimony, there would be no need to object to Austin Water's RFI, and Districts could have simply responded with a reference to his direct testimony and exhibits.

AW 1-3: For each of your testifying experts in this case, please provide (to the extent not provided earlier):
a. Copies of all prior testimony, articles, speeches, published materials and peer review materials written by the testifying expert, from 2013 to the present.

OBJECTION: The Districts object to this request on the following independent bases: testimony, articles, speeches and other published material on all non-utility cases are not relevant to the subject matter of this

docket and the request seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence (*K-Mart Corp. v. Sanderson*, 937 S.W.2d 429, 431-32 (Tex. 1996); see also Tex. R. Civ. P. 192.3). The request is also overbroad and not properly limited in time, scope or relation to the facts at issue in this proceeding since the requests are for non-utility information over six (6) years. Finally, the request is unduly burdensome because it is unreasonably cumulative or duplicative of prefiled testimony already provided (*Walker v. Packer*, 827 S.W.2d 833, 843 (Tex. 1992)) and information requested is obtainable from other sources (i.e., prefiled testimony) that are more convenient, less burdensome and less expensive (*Brewer & Pritchard, P.C. v. Johnson*, 167 S.W.3d 460, 466 (Tex. App. – Houston [14thDist.] 2005, pet. denied)).

Texas Rules of Evidence 401 provides that evidence is relevant if “(a) it has a tendency to make a fact more or less probably than it would be without the evidence; and (b) the fact is of consequence in determining the action.”³

Districts object that Austin Water’s RFI No. 1-3 requests irrelevant information. Testimony, articles, speeches and other published material on matters that are not utility related are still relevant to the subject matter of this proceeding. The requested information, while potentially not directly related to water or wastewater, could still be relevant to Austin Water for the purpose of challenging Districts’ witnesses’ credibility and their conclusions.

Districts have also objected that AW’s RFI No. 1-3 is overly broad and not properly limited in time, scope, or relation to the facts at issue in this proceeding. Districts have provided no basis for its objection and have no explanation for how Austin Water’s RFI is overly broad, not properly limited in time, scope, or relation to the facts at issue in this proceeding. Additionally, Districts have provided no explanation for how Austin Water could have better tailored its request. Austin Water has requested six (6) years of information from Districts, which is a reasonable amount of time to cover a range of prior testimony, articles, speeches, published materials, and peer review materials written by the witnesses. Austin Water’s request is specific enough for Districts to locate and produce all of the information requested.

³ Tex. R. Civ. Evid. 401.

Finally, Districts argue that AW's RFI No. 1-3 is unduly burdensome and more obtainable from other sources (i.e., prefiled testimony) that are more convenient, less burdensome and less expensive. Again, Districts make no attempt to explain how this request is overburdensome, and how Austin Water could obtain the information from other, more convenient, less burdensome, or expensive sources. Mr. Malish did not provide in his testimony all of the information requested until Districts provided its response to AW RFI No. 1-3, and still has not provided a response for subjects other than water and wastewater. Austin Water limited its response to six (6) years of information, which should not be burdensome to provide, especially in comparison to the extensive information which Districts requested from Austin Water.

Further, Districts' response to AW RFI No. 1-3 implies that Austin Water could obtain the documents by using the references to public dockets (one from the Commission, another from the Texas Commission on Environmental Quality), because they are public documents. However, Austin Water does not believe that Districts have described these documents with reasonable particularity in order for Austin Water to properly locate the documents. The Districts merely provide the docket number and mention that the witness has provided testimony in the matter. In any case, Austin Water does not have the ability to track down all of Districts' witnesses' testimony, articles, etc. for the non-utility-related matters which Districts have refused to disclose to any degree. Therefore, Austin Water requests the ALJs compel Districts to provide the requested information, or at the very least, identify with reasonable particularity where Austin Water can find any public records of the requested information.

AW 1-4: To the extent not provided in workpapers please provide copies of any articles, publications, regulatory decisions (outside of Texas), reference material, and documents cited in testimony or footnotes. If the referenced source is a book, please provide a copy of the relevant section of the book.

OBJECTION: The Districts object to this request on the following independent bases: the request is unduly burdensome because it is unreasonably cumulative or duplicative of prefiled testimony already provided (*Walker v. Packer*, 827 S.W.2d 833, 843 (Tex. 1992)) and

information requested is obtainable from other sources (i.e., prefiled testimony) that are more convenient, less burdensome and less expensive (*Brewer & Pritchard, P.C. v. Johnson*, 167 S.W.3d 460, 466 (Tex. App. – Houston [14thDist.] 2005, pet. denied)). For example, Mr. Joyce's references to a federal case, the City's own application, testimony and rate models, and the AWWA M-1 manual are equally obtainable by AWU.

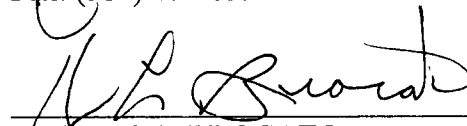
Austin Water agrees that it does not necessarily need Districts to provide documents which Austin Water has the ability to obtain. Austin Water simply requests that Districts identify any information, such as references to publicly available documents or documents cited by Austin Water in this matter, with reasonable particularity so that Austin Water can locate and obtain the documents. If the Districts' objection is taken to mean that it has already provided all copies of any requested materials, then Austin Water sees no need for Districts' objection. However, to the extent that any such materials have not already been provided, Austin Water requests the ALJs compel Districts to provide a response to Austin Water's RFI No. 1-4.

II. CONCLUSION AND PRAYER

For the foregoing reasons, Austin Water requests the ALJs overrule Districts' objections, and compel Districts to provide responses to Austin Water's RFIs.

Respectfully submitted,

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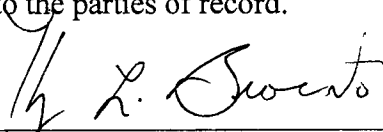
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ATTORNEYS FOR AUSTIN WATER

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2019, a true and correct copy of the foregoing document was transmitted by electronic mail to the parties of record.



THOMAS L. BROCATO