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PUC DOCKET NO. 49189  
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BEFORE THE STATE OFFICE  
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APPLICATION OF THE CITY OF	§	
AUSTIN DBA AUSTIN WATER FOR	§	
AUTHORITY TO CHANGE WATER	§	
AND WASTEWATER RATES FOR	§	
NORTH AUSTIN MUNICIPAL	§	
UTILITY DISTRICT NO. 1,	§	
NORTHTOWN MUNICIPAL UTILITY	§	OF
DISTRICT, TRAVIS COUNTY WATER	§	
CONTROL & IMPROVEMENT	§	
DISTRICT NO. 10, AND WELLS	§	
BRANCH MUNICIPAL UTILITY	§	
DISTRICT IN WILLIAMSON AND	§	
TRAVIS COUNTIES	§	ADMINISTRATIVE HEARINGS

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

COME NOW, 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 ("Districts") and file this Response to the City of Austin d/b/a Austin Water's Motion to Compel First Request for Information. The City of Austin d/b/a Austin Water ("City" or "AWU") filed its Motion to Compel First Request for Information ("Motion") on November 15, 2019. Pursuant to 16 Tex. Admin. Code § 22.144(f), "responses to a motion to compel shall be filed within five working days after receipt of the motion"; therefore, Districts' Response to AWU's Motion is timely filed. In support thereof, Districts respectfully show the following:

**I. BACKGROUND**

AWU filed its First Request for Information ("RFI") on November 8, 2019. In accordance with SOAH Order No. 9, the Districts filed both its objections and responses together within five days of receiving AWU's RFI on November 13, 2019. The responses included 109 pages of

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production.<sup>1</sup> The following day, the Districts supplemented its responses under oath providing preparation and sponsorship information and an additional 36 pages of production. In other words, the Districts have made the fullest responses they are able to and required to provide. AWU generally seeks information AWU already has, that does not exist, that does not exist in the format AWU is requesting or is equally available to AWU. AWU's Motion should be denied for the reasons set forth below.

## **II. ARGUMENT**

### **A. AWU's RFI 1-1(a) and RFI 1-1(b)<sup>2</sup>**

AWU's RFI and the Districts' original and supplemental response are as follows:

**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

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<sup>1</sup> Supplemental 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 District to City of Austin d/b/a Austin Water's First Request for Information to Districts (Nov. 14, 2019).

<sup>2</sup> AW 1-1(a) and (b) are substantially similar, with AW 1-1(a) asking about documents "reviewed" by experts and AW 1-1(b) asking about documents "provided by or for" the experts. As the Districts' objections, responses and supplemental responses to (a) and (b) are identical, it will not restate its argument relative to AW 1-1(b) herein.

Bates Stamp numbers); and

- c. The expert's current resume and bibliography.

**OBJECTION:** a. 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 [14<sup>th</sup> Dist.] 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 bates-stamped page of those documents, assuming there is bates-stamping, or return the City's own documents back to the City.

**RESPONSE:** a. Notwithstanding the foregoing and without waiving the objection, the Districts answer as follows: please see responsive information to AWU 1-1(a), produced as DISTS011 to DISTS056 on November 13, 2019, and p. 9, lines 1-13 of the Direct Testimony of Jay Joyce. Mr. Joyce also reviewed: 1) the native files that accompanied AWU's Rate Filing Package but did not contain Bates numbers; 2) most of AWU's responses to PUC Staff's discovery requests; 3) most of the native files that accompanied AWU's discovery responses but did not contain Bates numbers; and, 4) AWU's errata filing and the accompanying native files that did not contain Bates numbers.

Mr. Malish reviewed: 1) the Direct Testimony of Stephen J. Coonan and David Anders in this docket; 2) the Direct Testimony of Teresa Lutes in PUC Docket No. 42857; 3) Austin Water Utility Profile and Water Conservation Plan for Municipal and Wholesale Water Use (May 1, 2019); 4) City of Austin Water Audit Reports to the Texas Water Development Board ("TWDB") from 2014 to 2018; 5) TWDB, Water Loss Audit Manual for Texas Utilities, Report 367 (March 2008); 6) Historical Water Purchase and Use records for Northtown Municipal Utility District for fiscal years 2009-2019; 7) Historical Water Purchase and Use records for North Austin Municipal Utility District No. 1 for fiscal years 1995-2019; 8) Historical Water Purchase and Use records for Wells Branch Municipal Utility District for fiscal years 2006-2019; 8) Historical Water Purchase and Use records for Travis County Water Control and Improvement District No. 10 for fiscal years 2005-2019; 9) AWU Website: <https://data.austintexas.gov/Utilities-and-City-Services/Austin-Water->

**Gallons-of-Water-Pumped-per-Capita/wfm8-s7zc/data; and,  
10) Travis County WCID No 10's Red Bud Pump Station Pressure  
Readings from January 2014 through September 2019.**

**SUPPLEMENTAL RESPONSE:**

- a. Notwithstanding the foregoing and without waiving the objection, the Districts answer as follows: please see supplemental responsive information to AWU 1-1(a) attached hereto.**

The Districts answered AWU first by explaining that what their experts reviewed was already identified with particularity in their prefiled direct testimony. On p. 9, lines 1-13 of Jay Joyce's Direct Testimony, he identified exactly what he reviewed in order to prepare his testimony and render opinions:

**Q. WHAT HAVE YOU REVIEWED IN ORDER TO PREPARE YOUR TESTIMONY AND RENDER YOUR OPINIONS?**

- A.** I reviewed AWU's pre-filed direct testimony and exhibits, which I assumed to be true and correct for purposes of my testimony and opinions. I reviewed AWU's responses to the Districts' discovery requests that were provided to me by counsel for the Districts. I reviewed the pleadings that have been filed in this matter. I reviewed data and reports that are available on the City's website. I also reviewed data gathered from the previous docket (Docket No. 42857) and from my participation in the Wholesale Involvement Committee ("WIC") during the development of the updated Raftelis Cost of Service Study in 2016 through 2018.

On p. 6, lines 14-22, Mr. Malish answered similarly:

**Q. WHAT HAVE YOU REVIEWED IN ORDER TO PREPARE YOUR TESTIMONY AND RENDER YOUR OPINIONS?**

- A.** I reviewed the City's pre-filed direct testimony and exhibits pertaining to Water Treatment Plant No. 4 ("WTP4") and the City's Reclaimed Water System. I reviewed the City's responses to Districts' discovery requests that were provided to me by counsel for the Districts. I reviewed the pleadings that have been filed in this matter. I reviewed data and reports that are available on the City's website. I also reviewed the City's testimony and exhibits that the City presented in Docket No. 42857 to try to justify its expenditures for WTP4 and the Reclaimed Water System. I also reviewed wholesale water purchase data from each of the Districts.

The Districts also elaborated in their response to AW 1-1(a) that Mr. Joyce reviewed AWU's native files accompanying the rate package, discovery answers and errata filing that did not contain bates numbers. The original and supplemental response relative to Mr. Malish's review was even more specific, identifying and providing AWU copies of water purchase, loss, and water pressure information. He not only referred to the City's testimony relative to WTP4 and reclaimed water but specified that he reviewed Messrs. Coonan and Anders' testimony.

The underlying problem with AWU's question is that it assumes the Districts' experts reviewed only specific parts of the documents they identified as having reviewed. This presumption is wrong, as is AWU's insinuation that the Districts have somehow held back and not "truly provided all documents that he has reviewed."<sup>3</sup> When Mr. Joyce stated that he reviewed AWU's answers to the Districts' discovery requests, pleadings, data and reports on the City's website, data gathered from Docket No. 42857 and information publicly produced by the City in the Wholesale Involvement Committee process ("WIC"), he reviewed 100% of those documents, not just specific pages. When Mr. Malish states that he reviewed Mr. Coonan's testimony, for example, he reviewed 100% of Mr. Coonan's testimony. This only stands to reason – Mr. Coonan is testifying on the narrow subject of reclaimed water. The Districts' responses are also entirely consistent with the tone and tenor of AWU's answers to a similar disclosure-type RFI propounded by the Districts in District's First RFI 1-3(4)(A) and 1-7:

**Districts 1-3** Please provide the following information for any testifying expert:

(4) If the expert is retained by, employed by, or otherwise subject to the control of the responding party:

(A) All documents, tangible things, report, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and

**RESPONSE:** Please see Austin Water's Application, direct testimonies, and accompanying attachments and schedules. Additionally, please see the explanation below, regarding each expert:

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<sup>3</sup> City of Austin d/b/a Austin Water's Motion to Compel First Request for Information at 5 (Nov. 15, 2019).

Richard D. Giardina:

In Mr. Giardina's Direct Testimony on Bates page no. 239, lines 19 and 20 and footnote no. 8, the text relates to the use of depreciation to allocate debt service. The footnote refers to page 60 of the MI Manual of Water Supply Practices. This page was not included in Attachment RDG-2 as described in the footnote. Please see AW 1-3(4)(A), Attachment 1 for the relevant document. Additionally, Mr. Giardina's Direct Testimony on Bates page no. 246, at lines 13-16, relates to the Base-Extra Capacity allocation method and refers the reader to the MI Manual of Water Supply Practices at Chapter III.2. The reference in the text and the footnote should instead cite to Chapter III.1. The full content of Chapter III.1 is provided in AW 1-3(4)(A), Attachment 1.

**Districts 1-7:** Please produce all documents relevant to this matter that were provided, reviewed or created by or relied upon by any testifying expert.

**RESPONSE:** Please see Austin Water's Application and direct testimonies and Austin Water's Response to Districts' RFI No. 1-3(4)(A). Additionally, please see the responsive information in AW 1-7, Attachment 1.

When asked a similar question by the Districts, AWU provided a general answer – see application,<sup>4</sup> testimony and attachments. The only specificity provided was to correct an error or omission.

As Mr. Joyce testified in his prefiled direct testimony, the data and documents that he reviewed are the type that rate consultants generally rely upon when determining the reasonableness of the cost of service prepared for a utility.<sup>5</sup> Moreover, as AWU knows, both experts also testified on behalf of the Districts in Docket No. 42857. And in Mr. Malish's case, he has worked on behalf of various clients of AWU's counsel's law firm in other matters in the past. Thus, neither of the Districts' experts are unknown to AWU. However, if AWU is still concerned with the "validity and accuracy of their testimony,"<sup>6</sup> it certainly has the opportunity to question their expertise and credibility on cross examination at the hearing on the merits.

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<sup>4</sup> Note, AWU does not specify which parts of the 3,731-page application each of its experts provided, reviewed or created.

<sup>5</sup> See Direct Testimony of Jay Joyce on Behalf of Districts, Exhibit Dist-1 at 9, lines 11-13 (Nov. 7, 2019).

<sup>6</sup> City of Austin d/b/a Austin Water's Motion to Compel First Request for Information at 4 (Nov. 15, 2019).

**B. AWU's RFI 1-2**

**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 [14<sup>th</sup> Dist.] 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.

**RESPONSE:** Notwithstanding the foregoing and without waiving the objection, the Districts answer as follows: see Response to AW 1-1(a).

The City is making a mountain out of a mole hill. All workpapers have already been identified and produced with the Direct Testimony. Had there been additional workpapers, the Districts would have provided them.

**C. AWU's RFI 1-3**

**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:** a. 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 [14<sup>th</sup> Dist.] 2005, pet. denied)).

**RESPONSE:** Notwithstanding the foregoing and without waiving the objection, the Districts answer as follows: see Response to AWU 1-3(a), produced as DISTS057 to DISTS119 on November 13, 2019. Additionally, Mr. Malish provided testimony in PUC Docket No. 42857 and in SOAH Docket No. 582-16-1492, TCEQ Docket No. 2015-1264-MWD relating to DMS Real Tree, LLC.

Non-utility related testimony is not relevant to this docket and has no bearing on the Districts' experts' credibility on utility rate appeals generally or this case in particular. Other than a blanket statement declaring that they are, AWU does not make the case for relevancy. Regardless, Mr. Joyce provided a thorough six 6-page list of representative projects going back to 1989. Mr. Joyce's list not only included docket numbers, for which AWU complains, but a description of the particular case and tribunal, which is actually more than what AWU requested. The Districts also produced his various articles, speeches and power point presentations. There is nothing further to produce relative to Mr. Joyce. The Districts also identified 2 cases for which Mr. Malish provided testimony, including a wastewater discharge matter before the Texas Commission on Environmental Quality ("TCEQ"). In a more than 30-year career, Mr. Malish has simply not prepared a list of testimony, peer review materials and the like. The Districts are under no obligation to create one.

**D. AWU's RFI 1-4**

**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 [14<sup>th</sup> Dist.] 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.**

Any reference material responsive to AWU RFI 1-4 was previously identified in Mr. Joyce’s prefiled testimony. The Districts objected because it is unduly burdensome to produce information that is equally available to AWU like the U.S. Supreme Court case, *Federal Power Commission et al. v. Hope Natural Gas Co.* or the James C. Bonbright book, *Principles of Public Utility Rates*.

### **III. PRAYER**

WHEREFORE, PREMISES CONSIDERED, Districts, 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, pray that the Administrative Law Judges DENY the City of Austin d/b/a Austin Water’s Motion to Compel First Request for Information and grant Districts other such relief to which they may be entitled.

Respectfully submitted,



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John J. Carlton

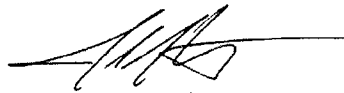
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**ATTORNEYS FOR DISTRICTS**

**CERTIFICATE OF SERVICE**

I hereby certify that I have served or will serve a true and correct copy of the foregoing document via hand delivery, facsimile, electronic mail, overnight mail, U.S. mail and/or Certified Mail Return Receipt Requested to all parties on this the 22<sup>nd</sup> day of November, 2019.



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John J. Carlton