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SOAH DOCKET NO. 473-19-5831.WS
PUC DOCKET NO. 49367

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PUBLIC UTILITY COMMISSION
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PETITION BY OUT OF DISTRICT § BEFORE THE STATE OFFICE
RATEPAYERS APPEALING THE §
WATER RATES ESTABLISHED BY § OF
THE EL PASO WATER CONTROL §
AND IMPROVEMENT DISTRICT NO. § ADMINISTRATIVE HEARINGS
4 §

**COMMISSION STAFF’S MOTION TO COMPEL RESPONSES TO STAFF’S THIRD
REQUEST FOR INFORMATION**

COMES NOW the Staff (Staff) of the Public Utility Commission of Texas (Commission), representing the public interest, and files this Motion to Compel. In support thereof, Staff would show the following:

I. BACKGROUND

On March 22, 2019, out-of-district ratepayers (Ratepayers) of El Paso Water Control and Improvement District No. 4 (the District) filed a petition contesting a rate action that was effective January 1, 2019. The petition was filed pursuant to Tex. Water Code (TWC) § 13.043.

On September 10, 2019, Staff filed its Third Request for Information (RFI) Question Nos Staff 3-1 Through Staff 3-4. On September 30, 2019, the District filed a Notice of Extension of Discovery Deadline. On October 14, 2019, the District filed its Responses to Staff’s Third RFI. This pleading, therefore, is timely filed.

II. MOTION TO COMPEL

A party may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action, and may obtain discovery of information that is reasonably calculated to lead to the discovery of admissible evidence.¹ Additionally, to the extent a party has an objection to a discovery request, a party must state specifically the legal or factual basis for its objection and the extent to which the party is refusing to comply with the discovery request.² The Commission's Procedural Rules also require a party objecting to

¹ Tex. R. Civ. Proc. 192.3; 16 TAC § 22.141(a).

² Tex. R. Civ. Proc. 193.2(a).

discovery to object specifically to a particular RFI.³ Additionally, the Commission's procedural rules also require that "[a]ll argument upon which the objecting party relies shall be presented in full in the objection."⁴

In its October 14, 2019 response, the District objected, stating that the material responsive to Staff's Third RFI Question 3-2 was "outside the City's possession, custody, or control". "Possession, custody, or control" does not only include documents that are within the actual physical possession of the District, but also documents within the District's constructive possession or documents that the District has a right to obtain from a third party.⁵ "The right to obtain possession is a legal right based on the relationship between the party responding to the discovery and the person or entity that has actual possession."⁶

Here, the District has the ability to obtain Staff's requested documentation, which it needs to examine the underlying data, methodologies, and assumptions made about the rate classes and rates charged. That the documentation responsive to Staff's request is in the hands of an outside consultant is not a bar to production of such documentation. In a ratepayer protest, pursuant to TWC § 13.043, the Commission must determine if the rates being charged are just and reasonable.⁷ Included in the present inquiry is the onus to examine if the rates are sufficient, equitable, and consistent in application to each class of customers.⁸

A recent order from a Commission administrative law judge (ALJ) supports Staff's motion to compel. That order granted Staff's motion to compel, the subject of which was the disclosure of rate study spreadsheets over a similar objection.⁹ In that order, the ALJ stated, "[t]he city's assertion that the data requested is not within its possession, custody, or control is

³ *In re Exmark Mfg. Co.*, 299 S.W.3d 519, 524 (Tex. App. – Corpus Christi 2009) (citing *In re Host, Inc.*, 92 S.W.3d 514, 516-17) (Tex. 2002)).

⁴ 16 TAC § 22.144(d)(1).

⁵ *In re James Summersett III*, 438 S.W.3d 74, 81 (Tex. App.—Corpus Christi—Edinburg 2013) (citing *GTE Commc'ns Sys. Corp. v. Tanner*, 856 S.W.2d 725, 729 (Tex. 1993)).

⁶ 438 S.W.3d 74, 81

⁷ See TWC § 13.043(j) (West 2008 & Supp. 2016); see also *Tex. Water Comm'n v. City of Fort Worth*, 875 S.W.2d 332, 335-36 (Tex. App.—Austin 1994) (applying TWC § 13.043(j) in an appeal under § 13.043(f)).

⁸ Preliminary Order at Issues to be Addressed 3(c) (Aug. 8, 2019).

⁹ *Petition by Outside City Ratepayers Appealing the Water Rates Established by the City of Celina*. Docket No. 49225, Order No. 5 Granting Motion to Compel Responses to Commission Staff's Fifth Requests for Information at 1 (Oct. 7, 2019) (pending).

unpersuasive. The city cannot conceal the data underlying its rates by making an arrangement with its contractor to effectively conceal that data from scrutiny.”¹⁰

III. CONCLUSION

Staff respectfully requests the entry of an order consistent with the foregoing motion to compel.

Dated: October 17, 2019

Respectfully submitted,

**PUBLIC UTILITY COMMISSION OF TEXAS
LEGAL DIVISION**

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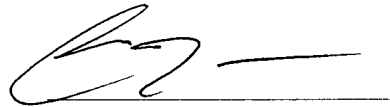
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¹⁰ *Id.*

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CERTIFICATE OF SERVICE

I certify that a copy of this document was served on all parties of record on this the 17th of October 2019 in accordance with the requirements of 16 TAC § 22.74.

A handwritten signature in black ink, appearing to read 'Creighton R. McMurray', is written over a horizontal line.

Creighton R. McMurray