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PETITION BY OUT OF DISTRICT § PUBLIC UTILITY COMMISSION
RATEPAYERS APPEALING THE §
WATER RATES ESTABLISHED BY § OF TEXAS
THE EL PASO WATER CONTROL §
AND IMPROVEMENT DISTRICT NO. 4 §

**RATEPAYERS' MOTION TO COMPEL DISCOVERY
FROM EL PASO WATER CONTROL AND IMPROVEMENT DISTRICT NO. 4**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

The Out-of-District Ratepayers ("Ratepayers") of the El Paso Water Control and Improvement District No. 4 ("the District") seek an order compelling the District to produce discoverable materials in its possession.

I. Factual Background

On September 3, 2019, Ratepayers' filed a motion for summary decision asking for a finding that the District's rate differential for in- and out-of- district ratepayers was unjust, unreasonable, preferential, and prejudicial.¹ In that same motion, Ratepayers also sought interim rates.² In its response to Ratepayers' motion, the District relied on expert testimony to assert its rates were just and reasonable.³ Ratepayers' motions for summary decision and interim rates were denied in part because of this testimony.⁴

On September 24, 2019 Ratepayers filed its second request for information to the District. That request sought all models produced, used, or relied on by Mr. Evan Loy, for the expert

¹ Out-of-District Ratepayers' Motion for Partial Summary Decision and Request for Interim Rates (Sept. 3, 2019).

² Id.

³ Response of El Paso County Water Control and Improvement District No. 4 to Mesa Del Norte Ratepayers' Motion for Partial Summary Decision and Request for Interim Rates at pg. 9, (Sept. 20, 2019).

⁴ SOAH Order No. 10 Denying Motions for Summary Disposition and Request for Interim Rates, at pgs. 2 and 5 (Sept. 27, 2019).

testimony he provided in support of the District's response to the Ratepayers' motions for summary decision and interim rates.⁵ On October 14, 2019 the District provided its response to Ratepayers' request and asserted the "requested models are not in the possession, custody, or control of the District. The District has not contracted with Mr. Loy to obtain these models in any format."⁶

II. Arguments

a. Legal Standard

A state agency before which a contested case hearing is pending may order a party to produce documents that are in its possession, custody, or control that are not privileged and contains, or is reasonably calculated to contain evidence that is material to a matter involved in the contested case. Tex. Gov. Code §2001.091(a)(1). "Possession, custody, or control" does not limit discovery to those materials in the physical possession of the party from whom discovery is sought. An entity is also in "possession, custody, and control" of documents and tangible things "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." 16 TAC §22.141.

This understanding of the phrase "possession, custody, or control" has long been recognized under Texas Law. In *GTE Communications Systems Corp. v. Tanner*, the Texas Supreme Court held "possession, custody, or control ... includes not only actual physical possession, but constructive possession, and the right to obtain possession from a third party, such as an agent or representative." *GTE Commc'ns Sys. Corp. v. Tanner*, 856 S.W.2d 725, 729 (Tex. 1993). The District acknowledges it can obtain the requested models from its expert. It cannot therefore skirt its obligations under the discovery rules because of the terms of a contract it voluntarily entered.

⁵ Ratepayers' Second Request for Information to El Paso Water Control and Improvement District No. 4, No. 1 (Sept. 24, 2019).

⁶ El Paso Water Control and Improvement District No. 4's Response to Ratepayers' Second Request for Information, No. 1 (Oct. 14, 2019).

b. The District cannot contract its way out of providing discoverable material

The models requested by Ratepayers' are clearly evidence of materials at issue before the Public Utility Commission and the State Office of Administrative Hearings. In this pending rate appeal, the District has the burden of showing its rates are reasonable, necessary, and not prejudicial or preferential. Tex. Water Code §13.043(j); 16 TAC §24.101(i). The District has relied on the models, and testimony based on these models, of Mr. Evan Loy to assert that its rates are just, reasonable, not prejudicial or preferential, and therefore that it can meet its burden.⁷ This alone renders Mr. Loy's models discoverable. Tex. R. Civ. Proc. 194.2(f)(4) (allowing a party to request any models created by an expert in anticipation of testimony); 16 TAC §22.141(a) (stating that parties may obtain discovery on any matter not privileged or exempted by the Texas Rules of Civil Procedure).

Additionally, these proceedings have already been impacted by the assertions made based on the requested models. In SOAH Order Number 10 the ALJ found that there was no rules that would prevent the Commission from considering evidence, such as an expert opinion, that was developed *after* the District made its final rate decision "as long as such evidence is based on information that was available to the District at the time that it made its rate decision."⁸ (Ratepayers contend this conclusion misstates the law.) The Order also contains a finding that the District "now has provided expert support for its rate differential between customer classes."⁹ The only evidence presented by the District was the testimony of Mr. Evan Loy. The requested models are undeniably evidence of the questions at the center of this case. It is the Ratepayers' right in these proceedings to evaluate the inputs and truthfulness of the District's assertions that

⁷ Response of El Paso County Water Control and Improvement District No. 4 to Mesa Del Norte Ratepayers' Motion for Partial Summary Decision and Request for Interim Rates at pg. 9, (Sept. 20, 2019).

⁸ SOAH Order No. 10 Denying Motions for Summary Disposition and Request for Interim Rates, at pg. 2 (Sept. 27, 2019).

⁹ *Id* at 9.

these models are based on information in its possession at the time the rate decision was made and determine the accuracy of the modeling.

The requested models are also in the “possession, custody, and control” of the District. In its response to the Ratepayers’ request the District concluded that “[i]f and when the District provides its direct testimony in this case, the District may consider entering into an agreement with Mr. Loy to obtain access to such information.”¹⁰ The District’s response acknowledges that it has a superior ability to obtain the requested models from Mr. Loy whenever it pleases. Therefore, it is in constructive control of these models and is required to produce them for the Ratepayers and Staff to review.

The ALJ in *Petition by Outside Ratepayers Appealing the Water Rates Established by the City of Celina* reached this same conclusion. *Petition by Outside Ratepayers Appealing the Water Rates Established by the City of Celina*, PUC Docket No. 49225, Order Granting Motion to Compel (Oct. 7, 2019) (Attachment A). Just like the District’s response to Ratepayers’ request, the City of Celina contended it could not produce the excel spreadsheets showing the calculations it relied on in setting its rates because it had not contracted with its consultant to obtain the requested spreadsheets. *Id.* The ALJ determined the City of Celina “could not conceal data underlying its rates by making an arrangement with its contractor to effectively conceal that data from scrutiny.” *Id.*

Moreover, PUC rules provide that discovery is available at “any time after an application is filed.”¹⁶ TAC §22.144(a). The District should not be allowed to alter the timing of discovery based on private contracts with third parties.

¹⁰ El Paso Water Control and Improvement District No. 4’s Response to Ratepayers’ Second Request for Information, No. 1 (Oct. 14, 2019).

The requested models are critical evidence as to whether the District can meet its burden to show that its rates are reasonable, justified, and not preferential or prejudicial. It is in constructive possession of the requested models because it can contract with Mr. Loy to obtain them. The District cannot conceal relevant evidence from discovery in these proceedings by attempting to contract around its obligation. Ratepayers therefore ask that the District be ordered to produce these models.

c. The District should produce these models within 5 days of the ALJ's Order

When a motion to compel is granted, the presiding officer must set the time, place, and manner of compliance. Tex. Gov. Code §2001.091(b). Ratepayers ask that the ALJ order the District to produce the requested models within 5 days of the order's issuance. This case is set for mediation on November 12, 2019 in El Paso. To prepare for mediation, Ratepayers need sufficient time to review the requested models. Ratepayers submitted their Second Request for Information, which contained only the request for the models used by Mr. Loy to support his opinions, to the District on September 24, 2019. The District waited the full 20 days of the discovery period before it replied on October 14, 2019 that it was not in possession of the requested models and would not produce them. Ratepayers then had to take the time to research and write this motion and the District will have an additional 5 days to respond making the earliest date of a potential order late October. Ratepayers therefore ask that the District be ordered to produce these models within 5 days of an order issuing so that they may have the ability to review all the evidence available and relevant to this case prior to entering negotiations with the District.

III. Prayer

Ratepayers request a finding that the District is in constructive possession of models relied on by its expert in testimony used in these proceedings. Ratepayers ask that the District be ordered to produce the requested models within five days of the ALJ's order.

Respectfully submitted,

/s/ Jennifer N. Richards

Jennifer N. Richards

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CERTIFICATE OF SERVICE

I certify that a copy of this document was served on all parties of record on the 17th day of October 2019 as required by 16 TAC § 22.74.

By: /s/ Jennifer N. Richards

Jennifer N. Richards

ATTACHMENT A