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PUBLIC UTILITY COMMISSION
THE CLERK

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

RESPONSE OF EL PASO COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NO. 4 TO STAFF'S MOTION TO COMPEL RESPONSES TO STAFF'S THIRD REQUEST FOR INFORMATION

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

COMES NOW Respondent El Paso County Water Control & Improvement District No. 4 ("District") and pursuant to 16 TEX. ADMIN. CODE § 22.144(f) files this response to Staff's Motion to Compel Responses to Staff's Third Request for Information ("Motion to Compel") and would respectfully show as follows:

I. INTRODUCTION

On September 10, 2019, Commission Staff filed its Third Request for Information, which included Question No. Staff 3-2 as set forth below:

Please refer to the District's Response to Ratepayers' First Request for Information, Bates pages DIST001619-DIST001689:

- a) Provide all documents and digital files, including but not limited to, historical and projected financial statements, budgets, supporting budget schedules, calculations, and historical general ledgers provided to Wildan Financial Services Economists.com. used in the preparation of the rate study referenced in that response. If the information has already been provided, please provide the corresponding Bates pages.
- b) Please provide Wildan Financial Services Economists.com electronic workpapers and digital native files used to create the rates and information in Bates pages DIST001616 through DIST001689 with enough detail to cross reference the amounts in the workpapers to the financial records provided in response to a. of this request. For the electronic workpapers and digital files please include any formulas

used to produce the rates in the proposed rate plan and the water/sewer cost of service model.¹

On October 14, 2019, following an extension of the District's deadline for a response, the District filed its response to this request for information.² With respect to subpart (a), the District referred staff to information previously provided at DIST002305 to DIST004124 (*i.e.*, information that the District had provided to Wildan Financial Services/Economists.com). With respect to subpart (b), which seeks the electronic workpapers and digital native files used by Wildan Financial Services/Economists.com in creating its 2015 rate analysis, the District is not in the possession, custody or control of such information and stated so in its response.

On October 17, 2019, without having sought to confer with counsel for the District, counsel for Commission Staff filed a Motion to Compel seeking an order compelling the District to produce this information.³ In support of its motion, Commission Staff argues as follows:

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. 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.

¹ Docket Item 50 at 5.

² Docket Item 68.

³ Docket Item 69.

II. Argument and Authorities

A. Counsel for Commission staff has failed to certify that a reasonable effort to resolve the dispute without the ALJ's intervention has been made and has failed.

Counsel for Commission Staff did not attempt consult with counsel for the District in an attempt to resolve this dispute prior to filing this motion to compel. *See* 1 TEX. ADMIN. CODE § 155.259 (“all discovery motions shall include a certificate of conference”); TEX. R. CIV. P. 191.2 (“all discovery motions . . . must contain a certification by the party filing the motion . . . that a reasonable effort has been made to resolve the dispute”). This motion may and should be denied on this ground alone.

B. A party cannot be compelled to produce items that are not in its possession, custody or control.

A person is not required to produce a document unless it is within that person's constructive or actual possession, custody, or control. *See* 16 TEX. ADMIN. CODE § 22.141. Because “possession, custody or control” simply defines the scope of a party's duty under the applicable rule, a party cannot be compelled to produce items which are not in its possession, custody of control. *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 138 (2d Cir. 2007). The party seeking production has the burden of proving that the relator has constructive possession or the right to obtain possession of the requested documents. *See GTE Commc'ns Sys. Corp. v. Tanner*, 856 S.W.2d 725, 729 (Tex. 1993) (orig. proceeding); *In re U-Haul Int'l*, 87 S.W.3d 653, 656 (Tex. App.–San Antonio 2002, mandamus denied). A party does not have possession, custody or control of information simply because a former consultant may have possession, custody or control over it.⁴

⁴ Contrary to Commission Staff's suggestion, the District's assertion that this information is not in its possession, custody or control is not an *objection* to a discovery request.

Commission Staff offers no support for its assertion that the District possesses or has the ability to obtain the electronic workpapers and digital native files used by Wildan Financial Services/Economists.com in creating its 2015 rate analysis.

The District does not have possession, custody or control of the electronic workpapers and digital native files used by Wildan Financial Services/Economists.com in creating its 2015 rate analysis. Wildan Financial Services/Economists.com is a third party and not an expert witness in this case. Dan Jackson, principal of Wildan Financial Services (who served as the District's rate consultant in 2015) has refused to turn over this information and takes the position that this information is his intellectual property and his highly proprietary work product, and that turning it over would be highly damaging to him and his company and would place him in a competitive disadvantage going forward.⁵ (He states that District's current rate expert in this case and ratepayers' rate expert are his competitors.)

C. The requested information is not expected to be relevant to this proceeding.

In this proceeding, the Commission is to hear the appeal of the District's rate decision *de novo* and shall consider information that was available to the District's Board of Directors at the time the Board made its decision. *See* TEX. WATER CODE § 13.043(e); 16 TEX. ADMIN CODE § 24.101(e). Moreover, and as the Administrative Law Judge has previously held in this proceeding, "nothing in Texas Water Code § 13.043(e) would prohibit the Commission from considering evidence subsequently obtained or developed by [the] District, as long as such evidence is based on information that was available to the District at the time that it made its rate

⁵ *See* Email from Dan Jackson to Drew Miller (dated Sept. 22, 2019) (attached at Tab A).

decision – even if the District did not avail itself of that information at the time of the rate decision.”⁶

Commission Staff should not be able to force the District to rely on the 2015 rate analysis by Wildan Financial Services/Economists.com in this proceeding. The District has retained a new expert, Mr. Chuck Loy of GDS Associates, Inc. When the District files its direct testimony, it expects to present a *new* rate analysis (based on information that was available to the District at the time that it made its rate decision) performed by Mr. Loy and his company. When it does so, the District expects to timely make available the spreadsheets and formulas – *i.e.*, the electronic workpapers and digital native files – used by Mr. Loy in reaching his conclusions. The District is entitled to not rely on Wildan Financial Services/Economists.com’s 2015 rate analysis, and instead to rely on testimony presented and analyses performed by Mr. Loy. The Wildan Financial Services/Economists.com’s 2015 rate analysis is not expected to be relevant to this proceeding.

D. The Order in the City of Celina proceeding is off-point.

Finally, in support of its motion to compel, Commission Staff cites to an order on a motion to compel issued in another docket.⁷ As Commission Staff notes, Order No. 5 in the City of Celina case rejected the city’s assertion that the data requested was not within its possession, custody or control, stating that “[t]he city cannot conceal the data underlying its rates by making an arrangement with its contractor to effectively conceal that data from scrutiny.” In this case, there has been no allegation or evidence presented that the District has made an arrangement with its former rate consultant to conceal data from scrutiny. Rather, and as set forth above, Mr. Jackson

⁶ Docket Item 63 at 2.

⁷ Motion to Compel at 2-3 (citing and quoting Petition by Outside City Ratepayers Appealing the Water Rates Established by the City of Celina, Docket 49225, Order No. 5 Granting Motion to Compel Responses to Commission Staff’s Fifth Request for Information (Oct. 7, 2019)).

of Wildan Financial Services has refused to turn over the requested information, asserting that it is proprietary and confidential.

VI. CONCLUSION AND PRAYER

For the reasons stated above, the District requests that the Administrative Law Judge deny Commission Staff's Motion to Compel and further requests that the Administrative Law Judge grant all other relief to which the District is entitled.

Respectfully submitted,

By: 

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**ATTORNEYS FOR EL PASO
COUNTY WATER CONTROL
AND IMPROVEMENT DISTRICT
NO. 4**

CERTIFICATE OF SERVICE

I hereby certify that I have served or will serve a true and correct copy of the foregoing document (including all attachments) via hand delivery, facsimile, electronic mail, overnight mail, U.S. mail and/or Certified Mail/Return-Receipt Requested to counsel for all parties on this 24th day of October, 2019, including:

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Andrew S. "Drew" Miller

Drew Miller

From: Dan Jackson <DJackson@willdan.com>
Sent: Sunday, September 22, 2019 10:08 AM
To: Drew Miller
Subject: RE: request for information

**** EXTERNAL EMAIL ****

Dear Mr. Miller:

Thank you for September 20, 2019 email, requesting an electronic, executable copy of Willdan's internationally-recognized water and wastewater rate design model. Respectfully, I must decline your request to provide this software. I base this decision on the following factors:

- 1) The rate model requested by PUC staff is high proprietary and represents the intellectual property of Willdan Financial Services. Consulting firms are in the business of selling time and unique expertise, and detailed financial models and software are a core component of this expertise. The requested model has been used as the basis for over 300 rate studies for clients in the USA and seven foreign nations and US territories. Willdan's model provides us with a distinct competitive advantage in the marketplace, and to protect this advantage, our firm's general policy is to not share it with outside parties. While a version of this internationally-recognized model was used in our 2015 rate analysis for EPCWCID #4, to my knowledge the District does not possess an executable copy of it.
- 2) It is my understanding that the petitioners in these proceedings have engaged NewGen Strategies and Solutions to assist them. NewGen and Mr. Christopher Ekrut are direct competitors of Willdan. It is reasonable to conclude that if I released our proprietary model to PUC staff, it would eventually end up in the possession of our most significant competitors. This would be extremely harmful to Willdan.
- 3) It is my further understanding that there is no procedural schedule or Discovery guidelines in these proceedings at this time. At a minimum, I would not be willing to release our proprietary software without guidelines and nondisclosure agreements in place that would protect my company's intellectual property.
- 4) Information sufficient to conclude that EPCWCID #4's outside rates are fair, just and reasonable can be found in Mr. Charles Loy's September 20, 2019 affidavit. Mr. Loy very effectively points out that higher rates for outside customers are common ratemaking practice, that many of Mr. Ekrut's own clients follow the same policy, that a simple cost analysis supports the obvious conclusion that the per unit cost to serve EPCWCID #4's outside customers is significantly higher, and that the setting of equal rates would financially harm the District and require higher rates for inside customers. Given the evidence provided by Mr. Loy, I fail to see how release of my proprietary software will provide additional information required to confirm the appropriateness of EPCWCID #4's policy.

If these proceedings continue to a full hearing; if a formal procedural schedule is adopted; and if guidelines and agreements are adopted that protect the proprietary nature of our intellectual property, then I may be willing to revisit my decision. However, I make no assurances at this time.

Please contact me if you have any questions.

Dan V. Jackson
Vice President

Willdan Financial Services
Comprehensive. Innovative. Trusted.

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