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SOAH DOCKET NO. 473-19-5831.WS
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FRANCIS GLENN

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 REPLY TO 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

COMES NOW the Staff of the Public Utility Commission of Texas (Staff), representing the public interest, and files this reply. 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 (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 October 17, 2019, Staff filed a motion to compel. On October 24, 2019, the District filed a response to that motion. This pleading, therefore, is timely filed.

II. REPLY

Staff agrees with Ratepayers’ reasoning in asserting that there is good-cause for the submission of this reply: the District raised new factual and legal arguments in its October 24, 2019 response. In that response, the District asserts that Staff’s Motion to Compel should be denied. These arguments are factually incorrect, unpersuasive, and not timely. As such, Staff respectfully requests that the Motion to Compel be granted.

A. The District can and should be compelled to produce the requested discovery

At issue in this case is whether the rates are just and reasonable, and whether the rates are sufficient, equitable, and consistent in application to each class of customers.¹ In responses filed on October 14, 2019, the District refused to provide responsive documents to Staff 3-2, which requested the District to provide documents and digital files of historical and projected “financial

¹ Preliminary Order at Issue to be Addressed No. 3 (Aug. 8, 2019).

statements, budgets, supporting budget schedules, calculations, and historical general ledgers provided to Willdan Financial Services Economics.com” used in preparing the rate study that was the basis for the change in rates charged to its customers.² Below, Staff responds to the District’s responses: Commission precedent supports Staff’s position, the District has access to the requested documentation, and that its untimely relevance argument should be struck.

Commission Precedent

The disclosure of a consultant’s rate-making methodology has come before the Commission and the State Office of Administrative Hearings before and is settled. In Docket No. 43695, Southwest Public Service Company argued that its consultant’s rate-making methodology and software could not be disclosed because it was proprietary, held by the consultant, and a trade secret.³ The Administrative Law Judge (ALJ) in that case granted the motion to compel and ruled that the utility must turn over the rate-making methodology no later than five working days of the order.⁴ The ALJ reasoned that the utility and the consultant “cannot . . . through a contract to which only they are parties, abridge in this rate case [a party’s] discovery rights.”⁵ Although that case regarded electric rate-making, it set a clear precedent: utilities cannot hide their rate-making behind the veil of a consultant contract.

In its response, the District asserted that Staff’s reliance Docket No. 49225 is not on point. Staff respectfully disagrees – the City of Celina made three arguments practically identical to those asserted by the District. First, the City of Celina objected to a similar request from Staff, stating that the files were in the possession of the consultant and that the information was confidential.⁶ Second, the City of Celina asserted that the claim that the documents were not in their “possession, custody, or control” was not an objection.⁷ Finally, the City of Celina asserted that the consultant had “declined to provide the native formats of its highly sensitive

² El Paso County Water Control and Improvement District No. 4’s Response to Commission Staff’s Third Request for Information Question Nos. Staff 3-1 Through Staff 3-4 (Oct. 14, 2019).

³ *Application of Southwest Public Service Company for Authority to Change Rates*, Docket No. 43695, SOAH Order No. 7 Consolidating Appeal, Denying Motion to Strike, and Granting Motion to Compel as Amended at 4-8 (Mar. 11, 2015).

⁴ About the ruling, the ALJ commented that it was not a “close call.”

⁵ Docket No. 43695, SOAH Order No. 7 at 5.

⁶ *Petition of Outside City Ratepayers Appealing the Water Rates Established by the City of Celina*, Docket No. 49225, City of Celina’s Responses to Commission Staff’s Request for Information 5-1 Through 5-3 at 3 (Sep. 23, 2019).

⁷ Docket No. 49225, Response of the City of Celina to Commission Staff’s Motion to Compel Staff’s Request for Information 5-1 Through 5-3 at 1 (Oct. 4, 2019).

confidential spreadsheets to Celina, despite Celina's requests."⁸ The ALJ in that matter ruled in favor of Staff and was not swayed by the arguments made by the City of Celina. In the order, the ALJ responded to the City of Celina's arguments, stating, "[t]he city's assertion that the data requested is not within its possession, custody, or control is unpersuasive. The city cannot conceal the data underlying its rates by making an arrangement with its contractor to effectively conceal that data from scrutiny."⁹

Further, the District's reliance on *Shcherbakovskiy v. Da Capo Al Fine, Ltd.* is unpersuasive.¹⁰ This case came before the Court of Appeals for the Second Circuit and involved a motion to compel documents from an individual employed by a Russian corporation. A Russian government official had claimed that the documents may contain sensitive technological information, and, if the documents were turned over, the individual may be charged with treason.¹¹ The case bears little to no factual similarity to the present matter and should be considered unpersuasive.

Thus, Commission precedent supports Staff's position, and the District's case law may be distinguished.

The District failed to prove that it does not have actual or constructive possession, custody, or control of the requested documents

Additionally, the District has previously possessed an electronic copy of Willdan's rate model and has the right to possess an electronic copy of that model by contract. In its response to the Ratepayer's Third Request for Information, request No. 4c, filed October 25, 2019, the District provided a letter between Willdan and the District.¹² The signed and countersigned letter includes terms of the agreement for the rate study.¹³ Therein, term three states, "[a] binder containing a hardcopy and an electronic copy of the District's rate model will be provided to the District."¹⁴ The District did not provide any other contracts or contract terms that would contradict this agreement in response to the Ratepayers' request. The District, by contract with

⁸ *Id.*

⁹ *Id.*, Order No. 5 Granting Motion to Compel Responses to Commission Staff's Fifth Requests for Information at 1 (Oct. 7, 2019).

¹⁰ *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 138 (2d Cir. 2007).

¹¹ *Id.* at 134.

¹² El Paso County Water Control and Improvement District No. 4's Response to Ratepayers' Third Request for Information at 14-15 (Oct. 25, 2019).

¹³ *Id.* at 15.

¹⁴ *Id.*

Willdan, has the right to possess the electronic rate model. Staff has included the relevant pages of the letter at the end of this reply.

The District's relevance objection is untimely

Finally, the District claims that the discovery request is not relevant to this proceeding. Please Staff moves that this argument should be struck for not being timely. Any objections to requests for information – including relevance objections – must be filed within ten calendar days of the receipt of the request for information.¹⁵ The District has attempted to raise a relevancy objection forty-four days after the filing of the request for information. As such, the objection is not timely and should be struck.

B. Commission Staff and the District previously communicated about the discovery motion

Staff acknowledges its failure to include a certificate of conference in its Motion to Compel regarding its communications with the District. Staff has communicated with both the District and the Ratepayers regarding this reply, with the District objecting to its filing.

Despite the lack of certificate of conference filed with its Motion to Compel, Staff had discussed its intent to file a motion to compel with the District. During a telephonic conversation in which the District requested an extension in its time to respond to Staff's third set of requests for information, Staff informed counsel for the District if the requested digital files were not produced, then Staff would pursue a motion to compel production of the requested documents. In that conversation, counsel for the District did not definitively indicate whether the files would be forthcoming. Thus, the District's assertion that Staff "did not attempt consult with counsel [*sic*]"¹⁶ is incorrect.

If counsel for the District has inadvertently forgotten that conversation, Staff would further assert that the onus for communication was on the District, not Staff. On September 22, 2019, Willdan Financial Services (Willdan) informed the District that it declined to provide the digital native files in question.¹⁷ At no time between receiving that email and filing responses to Staff's requests for information on October 14, 2019 did the District contact Staff to discuss

¹⁵ 16 TAC § 22.144.

¹⁶ 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 at 3 (Oct. 24, 2019).

¹⁷ *Id.* at 8 (Oct. 24, 2019).

Willdan's response, nor did it attempt to negotiate other means of providing responsive documents.

Additionally, Willdan indicated in its email that it might provide the files with a nondisclosure agreement in place.¹⁸ More than three weeks passed without communication of this caveat to Staff. By failing to communicate these facts, the District, for the second time in this case,¹⁹ has failed to engage in diligent and good faith negotiations and caused unnecessary delays in discovery.

III. CONCLUSION

Staff respectfully requests for the ALJ to grant its motion to compel, as the District's arguments are incorrect, unpersuasive, and untimely.


Dated: October 31, 2019

Respectfully submitted,

**PUBLIC UTILITY COMMISSION OF TEXAS
LEGAL DIVISION**

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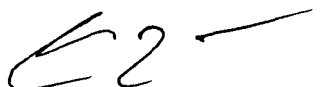
¹⁸ *Id.*

¹⁹ See Commission Staff's Response to Motion to Abate Discovery and Motion to Compel at 3 (Jul. 10, 2019).

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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 31st of October 2019 in accordance with the requirements of 16 TAC § 22.74.



Creighton R. McMurray

July 22 2015

Mr. Mike Terrazas
General Manager
El Paso County Water Control & Improvement District #4
117 E. Main St.
Fabens, TX 79838

Dear Mr. Terrazas:

Thank you for allowing **Willdan Financial Services/Economists.com** the opportunity to present this proposal to provide an update to our water and wastewater rate study and long-term financial plan for the El Paso County Water Control and Improvement District #4 ("The District"). We are an economic and financial consulting firm with primary offices in Dallas, Texas and Portland, Oregon. Our principal clients are national, state and local governments. Our firm contains professionals with decades of experience in water and wastewater utility operations and economic/financial management. Our specific services include:

- **Water and Wastewater Rate Studies**
- Sanitation Rate Studies
- Economic evaluation of water resources
- Water Planning and Management
- Connection and Impact Fee Studies
- Privatization Analysis
- Expert Witness Testimony on Reasonableness of Rate Structure
- Resource Allocation Studies
- Economic Impact and Development Studies

As you are aware, Economists.com was acquired by Willdan in April 2015. This provides us the opportunity to both expand our client base and offer a wider range of services. However, the same project team that has been providing service to the District for the past decade will be utilized for this engagement. More information on our acquisition and our new company is available at our web site, www.willdan.com.

I will manage and have primary responsibility for preparing this study for the District. I will be assisted by Ms. Becky Schafer, Senior Manager in our firm's Dallas office.

It is our understanding that the District is interested in reviewing and updating its water and wastewater rate forecast in light of changes to growth and financing assumptions. As you are aware, Economists.com prepared the prior rate studies for the District in 2007,

2009 and 2011. The purpose of this study will be to update the District's water rate plan with current volume, budget and account data, as well as updated grant and loan financing assumptions.

As part of this engagement we will provide the following specific assistance:

- 1) A detailed analysis and comparison of the District's current and proposed rates to the state average as well as other surrounding communities.
- 2) An update of the District's forecast water rates over the next ten years using the most recently available growth and cost data. The same methodology and spreadsheet models will be used as in the prior studies to ensure consistency.
- 3) A PowerPoint presentation summarizing the results of the analysis and the project team's recommendations. A binder containing a hardcopy and electronic copy of the District's rate model will be provided to the District.
- 4) We will meet with the District's Board of Directors one time to discuss our findings and recommendations and their impact on the ratepayers.

We propose to complete this scope of services for professional fees and expenses not to exceed \$7,000. Should additional Board meetings or a Town Hall meeting be requested (beyond the single meeting contained in this scope of services), each additional meeting will be conducted for professional fees and expenses not to exceed \$1,500.

Willdan/Economists.com reserves the right to invoice for services on a monthly basis. Payment is requested 30 days after receipt of each invoice.

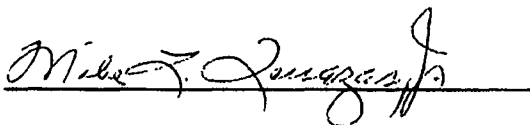
If this proposal is acceptable to you, please execute one copy of this letter and return it to our Dallas office. Thank you for this opportunity; we look forward to working with you on this important engagement.

Respectfully submitted,
WILLDAN FINANCIAL SERVICES



Dan V. Jackson
Vice President

ACCEPTED BY:



08/07/15
Date