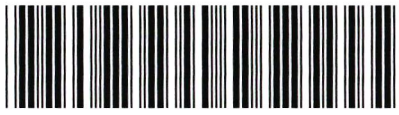

Control Number: 50788

Item Number: 36

Addendum StartPage: 0

SOAH DOCKET NO. 473-20-4071.WS
PUC DOCKET NO. 50788

RATEPAYERS APPEAL OF THE DECISION BY WINDERMERE OAKS WATER SUPPLY CORPORATION TO CHANGE WATER AND SEWER RATES	§ § § §	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

WINDERMERE OAKS WATER SUPPLY CORPORATION'S RESPONSE TO RATEPAYERS' MOTION TO COMPEL

Windermere Oaks Water Supply Corporation (WOWSC) files this Response to Ratepayers' Motion to Compel, and would respectfully show as follows:

I. PROCEDURAL HISTORY

Ratepayers of WOWSC (Ratepayers) served their First Request for Information (RFI) to WOWSC on August 26, 2020. WOWSC timely filed Objections to Ratepayers' First RFI[1] and served parties with notice of the filing on September 8, 2020, within the Commission's deadline for filing objections and accounting for the Labor Day holiday.[2] However, despite WOWSC's timely filing, the Public Utility Commission's (Commission or PUC) interchange shows a PUC filing stamp of September 9, 2020 with no specified time.[3]

Ratepayers filed their Motion to Compel WOWSC's response to Ratepayers' First RFI[4] and served WOWSC at 3:38 p.m. on September 15, 2020, two days after the deadline provided for this filing under Commission rules.[5]

WOWSC now timely files this Response to Ratepayers' Motion to Compel.[6]

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[1] Windermere Oaks Water Supply Corporation's Objections to Ratepayers' First Request for Information (Sept. 8, 2020) (WOWSC's Objections)

[2] *See* counsel of Windermere Oaks Water Supply Corporation's email correspondence to Ratepayers regarding notice of filing (Sept. 8, 2020) (attached as Exhibit A); *see also* 16 Texas Administrative Code (TAC) § 22.144(d).

[3] http://interchange.puc.texas.gov/Documents/50788_25_1085623.PDF.

[4] Windermere Oaks Water Supply Corporation Ratepayers Representatives' Motion to Compel Windermere Oaks Water Supply Corporation's First Request for Information (Sept. 15, 2020) (Ratepayers' Motion to Compel).

[5] *See* 16 TAC §§ 22.71(h), 22.144(b)(2), and 22.144(e).

36
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II. INTRODUCTION

In their Motion to Compel, Ratepayers claim that WOWSC misrepresented its statement regarding its attempts to negotiate a resolution to WOWSC's Objections.[7] Ratepayers claim that when WOWSC preferred to negotiate a resolution via telephone conference, Ratepayers preferred communicating via electronic email.[8] Ratepayers then claim that they:

> ...acknowledge the insurmountable continued legal expenses which are being passed onto the WOWSC Ratepayers and believe that email communication with the WOWSC Counsel would be best suited as opposed to extended conference calls which could create a further burden on the ratepayers for unnecessary legal fees which the WOWSC Ratepayers will inevitably have to assume.[9]

Ratepayers attached an exhibit to their pleading, purporting to be the complete email exchange between counsel for WOWSC and Ratepayers, alleging that "[t]he WOWSC Counsel never communicated their questions via electronic email and preferred communication via telephone conference. WOWSC's objections to RFI Nos. 1-1 and 1-2 could have easily be resolved via electronic email."[10]

However, Ratepayers omitted an email from WOWSC counsel to Ratepayers, which attempted to resolve the discovery objections by email, per Ratepayers' request. The complete email exchange is attached as Exhibit B.[11] WOWSC's counsel emailed a description of its objections to Ratepayers and offered to continue to negotiate a resolution before filing the RFI responses due September 15, 2020.[12] Counsel for WOWSC did not receive a response to this email before Ratepayers filed their Motion to Compel or WOWSC filed its RFI Responses.

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[6] *See* 16 TAC § 22.144(f).

[7] Ratepayers' Motion to Compel at 2.

[8] *Id.*

[9] *Id.*

[10] *Id*

[11] *See* counsel for Windermere Oaks Water Supply Corporation's email correspondence to Winderemere Oaks Water Supply Corporation Ratepayers regarding conference (Sept. 8, 2020) (attached as Exhibit B).

[12] *See* Exhibit B.

Ratepayers' description of WOWSC's efforts to resolve its discovery objections before filing is blatant misrepresentation of the facts of the matter. Counsel for WOWSC made several attempts to resolve the discovery objections. Additionally, Ratepayers' preference to resolve issues via email is misinformed, as it is most often just as timely, if not more so, to draft an email than to make a telephone call to resolve issues of vagueness and lack of particularity in an RFI. By refusing to engage with counsel for WOWSC on these objections, either by email or phone, Ratepayers have necessarily increased legal fees by requiring counsel to respond to these allegations.

Nevertheless, and notwithstanding the pending objections, WOWSC attempted to provide documents responsive to these RFIs, where possible.

III. ARGUMENT

A. Ratepayers' RFI Nos. 1-1 and 1-2

WOWSC objected to these RFIs on the basis that: (1) they do not identify with reasonable particularity the information, documents or material sought; (2) they would require WOWSC to create a document not in existence, and therefore, not within WOWSC's possession; and (3) creating document to respond would be unduly burdensome and expensive.

Ratepayers seek to compel WOWSC to provide the requested documents based on Ratepayers' claim that "...these requests can be easily accessed through WOWSC records and are already in existence and therefore the WOWSC objections are not valid..." and cite to WOWSC minutes as justification.[13]

While Ratepayers claim that the meeting minutes referenced in their Motion to Compel are somehow evidence that separate rate analyses exist for water and wastewater, they have not described anything that would suggest that separate studies exist. Conversely, Ratepayers even cite to evidence in the minutes that no separate invoices exist: "WOWSC Official Minutes

[13] Ratepayers' Motion to Compel at 3–4.

November 20, 2019 - referencing consideration of rate increase, specifically rate analysis for Water **and** Wastewater, **never mentioned separate reports**."[14] Those minutes, state: "Ask TRWA to do rate analysis. Rate analysis for **both** WTP and WWTP."[15] Ratepayers make WOWSC's argument for them. The minutes clearly show that separate studies were not conducted, which is the basis for WOWSC's objection to RFI Nos. 1-1 and 1-2. Requiring WOWSC to conduct new, separate rate analyses for water and waste water, which would require WOWSC to incur significant additional costs.

Additionally, Ratepayers did not address WOWSC's objections regarding the vagueness of the email correspondence requested. The request does not state with particularity to whom, by whom, or a date range for email correspondence. As such, WOWSC cannot provide responsive documents.

Notwithstanding these objections, on September 15, 2020, WOWSC provided responsive documents to what it believed Ratepayers were requesting in its Response to Ratepayers' First RFI.[16]

B. Ratepayers' RFI No. 1-3

Ratepayers argue that WOWSC's objection is "unfounded, preposterous, and simply a tactic to bully" them.[17] WOWSC reasserts its argument that the term "substantially decrease" is undefined, vague, and calls for subjective response. Ratepayers did not attempt to clarify or define this term in its Motion to Compel.

Notwithstanding these objections, WOWSC provided the base water and sewer rate if the 2019 legal fees were not included in the Rate Study/Rate Analysis in its RFI responses.

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[14] *Id* at 4 (emphasis added).

[15] https://www.wowsc.org/documents/778/2019-11-20_WOWSC_Board_Meeting_Minutes_Approved.pdf at 5, Item No. 7.b (emphasis added).

[16] Windermere Oaks Water Supply Corporation's Response to Ratepayers' First Request for Information (Sept. 15, 2020) (WOWSC's Response to Ratepayers' First RFI).

[17] Ratepayers' Motion to Compel at 5.

C. Ratepayers' RFI No. 1-7

Ratepayers clarify that they are seeking "all and every type of legal representation in 2019 which was billed to WOWSC."[18]

Notwithstanding this objection, WOWSC provided the total amount paid to legal counsel in 2019 in its RFI responses.[19] WOWSC admits that Ratepayers' Motion to Compel provides more clarity on what Ratepayers are seeking, but still objects on vagueness and lack of particularity the information, documents, or material sought. Ratepayers still do not identify whether they seek amounts billed for work in 2019 or for bills received in 2019. WOWSC does not want to incur additional legal fees expanding unnecessary time and expense to respond without receiving more clarity on what exactly Ratepayers are seeking.

D. Ratepayers' RFI No. 1-9

Ratepayers responded to WOWSC's objections by arguing that WOWSC waived its privilege under the "Offensive Use" doctrine.[20] Ratepayers use this doctrine to argue that WOWSC "is attempting to prevent discovery of information from ratepayers, discovery which the Ratepayers are relying on to support [their] claim for relief," and that WOWSC is "using their privilege under TRCE 503(d) as a sword rather than as a shield."[21] However, WOWSC is using the privilege exceptions as a shield and not a sword, and the offensive use doctrine does not apply here because: (1) asserting an affirmative defense does not constitute asserting affirmative relief; (2) the privileged information is not outcome determinative of the just and reasonableness of the rate increase; and (3) Ratepayers have not satisfied their burden of proof to prove that disclosure was the only means by which the Ratepayers could obtain the evidence.

Under the "Offensive Use" doctrine, the court in *Republic Ins. Co. v. Davis* required that the following three factors must be met:

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[18] Ratepayers' Motion to Compel at 6.

[19] WOWSC's Response to Ratepayers' First RFI at 69.

[20] Ratepayers' Motion to Compel at 6–7.

[21] Ratepayers' Motion to Compel at 7.

1. The party asserting the privilege must seek affirmative relief;
2. The privileged information must be such that, if believed by the fact finder, it would in all probability be outcome determinative of the cause of action asserted; it must go to the very heart of the affirmative relief sought; and
3. Disclosure of the confidential communication must be the only means by which the aggrieved party may obtain the evidence.[22]

If any of these requirements is lacking, the trial court must uphold the privilege.[23] Additionally, an offensive use waiver of privilege should not be lightly found.[24] The rationale behind offensive use waiver is that "[a] plaintiff cannot use one hand to seek affirmative relief in court and with the other lower an iron curtain of silence against otherwise pertinent and proper questions which may have a bearing upon his right to maintain his action."[25]

After WOWSC satisfied its burden of proof for establishing its objections and claims of privilege, Ratepayers have not even attempted to satisfy the burden of proof on any element of their offensive use claim, other than asserting: "We conclude the WOWSC have met all three of the elements of the offensive use doctrine and therefore the privilege has been waived and unredacted 2018 and 2019 legal invoices are discoverable."[26] Ratepayers failed to provide any arguments or evidence that WOWSC has met any of these prongs such that it would waive its privilege under the offensive use doctrine.

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[22] *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 163 (Tex. 1993) (emphasis added).

[23] *Id.*

[24] *Krug v Caltex Petroleum Corp.*, 05-96-00779-CV, 1999 WL 652495, at *3 (Tex. App.—Dallas Aug. 27, 1999, no pet.); *Republic Ins Co* , 856 S.W.2d at 163.

[25] *Krug v. Caltex Petroleum Corp.*, 05-96-00779-CV, 1999 WL 652495, at *3 (Tex. App.—Dallas Aug. 27, 1999, no pet.)

[26] Ratepayers' Motion to Compel at 7.

1. WOWSC has not made a claim for affirmative relief.

The analysis of the offensive use doctrine should begin and end at the first prong. The offensive use doctrine only applies on to claims made by parties seeking affirmative relief.[27] To qualify as a claim for affirmative relief, a defensive pleading must allege that the defendant has a cause of action, independent of the plaintiff's claim, on which he could recover benefits, compensation or relief, even though the plaintiff may abandon his cause of action or fail to establish it.[28] The Texas Supreme Court has ruled that an affirmative defense is not a request for affirmative relief.[29] Therefore, a defendant can assert affirmative defense and assert a privilege to block discovery of the facts relating to the defense.[30] Further, a defendant who asserts matters of a defensive nature is not requesting affirmative relief for purposes of determining whether the offensive use doctrine applies.[31]

WOWSC has not sought affirmative relief by claiming privileges related to its affirmative defense against Ratepayers' appeal. Further, WOWSC's claims of privilege are completely defensive in nature. As detailed in its objections and claims of privileges, WOWSC has defensively claimed privilege when fielded similar Public Information Act (PIA) requests and during ongoing litigation.[32] Ratepayers' appeal, and this discovery dispute continues to be a matter of defensive nature for WOWSC, not an affirmative cause of action and relief sought by WOWSC. Finally, WOWSC's attempt to increase water and wastewater rates to recover attorneys' fees does not constitute affirmative relief.[33]

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[27] *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 163 (Tex. 1993).

[28] *Gen. Land Office of State of Tex. v OXY U.S.A., Inc.*, 789 S.W.2d 569, 570 (Tex. 1990).

[29] *Republic Ins Co.*, 856 S.W.2d at 164.

[30] *Id.*

[31] *Krug v. Caltex Petroleum Corp* , 05-96-00779-CV, 1999 WL 652495, at *3 (Tex. App.—Dallas Aug. 27, 1999, no pet.); *Marathon Oil Co v. Moye*, 893 S.W.2d 585, 592 (Tex. App.—Dallas 1994, no writ).

[32] *See* WOWSC's Objections at 7.

[33] *See Krug v Caltex Petroleum Corp.*, 05-96-00779-CV, 1999 WL 652495, at *3-*4 (Tex. App.—Dallas Aug. 27, 1999, no pet.).

WOWSC is not asserting privileges as a sword, but instead as a shield from Ratepayers' repeated requests for the privileged documents through several avenues. WOWSC is not the petitioner in this matter. Further, all of the legal expenses incurred, for which WOWSC has been forced to raise its rates, have resulted from legal challenges and PIA requests initiated by Ratepayers or individuals related to Ratepayers. As explained in WOWSC's Objections, WOWSC has already successfully withheld these invoices under the claimed privileges. Due to the personal marital and business connections between and among Ratepayer Representatives and the plaintiffs in the ongoing litigation, if WOWSC is required to release the legal invoices to Ratepayers, it would waive the attorney-client privilege in WOWSC's ongoing litigation.

Additionally, courts have discouraged the application of the offensive use doctrine to engage in "fishing expeditions" into privileged matters.[34] Ratepayers' discovery requests in this matter are their latest attempt for a fishing expedition into privileged WOWSC matters related to ongoing litigation. Releasing the privileged documents to Ratepayers would undermine the pending settlement agreement WOWSC and the Attorney General of Texas regarding the PIA requests,[35] merely because Ratepayers brought this matter before the Commission. Such a fishing expedition is precisely the scenario to which the offensive use doctrine should not apply.

2. The information sought is not outcome determinative; there is no affirmative defense.

Because the first prong is not met, the inquiry into whether the privilege is waived by the offensive use doctrine is complete. However, WOWSC also fails the second prong of the *Republic* test.

The administrative law judge (ALJ) in *In re El Paso Elec. Co.*, specified that the "*Republic* test requires that the privileged information must be such that, if believed by the fact finder, in all probability would be outcome determinative of the cause of action asserted."[36]

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[34] See Ginsberg v. Fifth Court of Appeals, 686 S.W.2d 105, 108 (Tex. 1985).

[35] See WOWSC's Objections at 7.

[36] In Re El Paso Elec. Co., 19 Tex. P.U.C. Bull. 2278 (Apr. 6, 1994) (attached as Exhibit C).

Further, mere relevance is insufficient, and a contradiction in position without more is insufficient.[37] Importantly, the confidential communication must go to the very heart of the affirmative relief sought.[38] The ALJ described how cases implementing the offensive use test further evidences "how rigorously the standards for offensive use waivers are applied," and that "[i]n each of the cases involving attorney-client or attorney work product privileges the court found that the privilege had not been waived."[39]

In *In re El Paso Elec. Co.*, the subject matter concerned the Commission's determination of whether certain acquisitions by an electric utility were consistent with the public interest.[40] This determination required Commission consideration of the reasonable value of the property, facilities, or securities to be acquired.[41] The information at dispute included attorney-client and/or attorney work product documents related to the valuation of a generation unit involved in the acquisition bid.[42] The ALJ determined that this information, while relevant, would be one of many factors that would be considered in making the public interest finding.[43] The ALJ, therefore, concluded that the information sought would not be outcome determinative of the request for a public interest finding and therefore, the privileges were not waived.[44] The Commission signed an order, upholding the ALJ's decision at the open meeting on April 28, 1994.[45]

In the matter at hand, Ratepayers make no attempt to flesh out the details necessary to satisfy the "rigorous" standard of the second prong of the *Republic* test. While the privileged

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[37] *Id.*

[38] *Id*

[39] *Id.*

[40] *Id*

[41] *Id.*

[42] *Id*

[43] *Id.*

[44] *Id*

[45] *Id.*

documents, concerning attorney invoices, are relevant to WOWSC's rates, relevance alone is insufficient. The attorney invoices are one of many factors considered to determine whether WOWSC's rate increase is just and reasonable, under Texas Water Code § 13.043 and 16 Texas Administrative Code § 24.101. Therefore, the privileged information sought is not outcome determinative of the Ratepayers' appeal of WOWSC's rate increase, and therefore, WOWSC did not waive its privileges.

3. Disclosure of the privileged materials is not the only means by which Ratepayers may obtain the evidence.

The *In re El Paso Elec. Co.* case also provides Commission precedent that the party claiming the offensive use doctrine waiver has the burden of proof to prove that disclosure was the only means by which the party could obtain the evidence.[46] The Commission in that case determined that the party claiming the offensive use doctrine did not address the burden, and therefore failed to satisfy the third prong of the *Republic* test.

Similarly, in this case, Ratepayers have not addressed the burden, and have not made any effort to explain their reasoning for the application of the *Republic* test. Therefore, Ratepayers have not satisfied the elements of the *Republic* test, and WOWSC has not waived its privileges.

4. Conclusion

For the foregoing reasons, the offensive use doctrine does not apply here because (1) asserting an affirmative defense does not constitute asserting affirmative relief, (2) the privileged information is not outcome determinative of the just and reasonableness of the rate increase, and (3) Ratepayers have not satisfied their burden of proof to prove that disclosure was the only means by which the Ratepayers could obtain the evidence.

Because of the sensitive nature of the relevant legal invoices, if the ALJ determines that reviewing them is necessary to make a determination on the appeal, WOWSC again respectfully urges the ALJ to review the legal invoices in camera in order to prevent waiver of the attorney-

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[46] *Id.* (citing Transamerican Natural Gas Corp. v. Hon. Manuel Flores, 37 Tex.Sup.Ct.J. 494 (Feb. 2, 1994 *per curiam*)).

client privilege of the same documents in the district courts. Simply put, releasing the privileged documents to Ratepayers would prejudice WOWSC's other pending matters in district court.

E. Ratepayers' RFI No. 1-12

Ratepayers do not respond to WOWSC's Objections that responding to this RFI would require WOWSC to create a document not in existence, and therefore, unduly burdensome and expensive.[47] Therefore, WOWSC reasserts its objections and restates that creating this document would require WOWSC to expend considerable time and resources and would result in an expensive, undue burden on WOWSC.

Notwithstanding this objection, WOWSC provided a responsive document in its Response to Ratepayers First RFIs.

IV. PRAYER

WOWSC respectfully requests Ratepayers' Motion to Compel be denied, that WOWSC's objections be sustained, and that it be granted any other relief to which it may show itself justly entitled.

[47] Ratepayers' Motion to Compel at 8.

Respectfully submitted,

LLOYD GOSSELINK ROCHELLE & TOWNSEND, P.C.
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(512) 322-5800
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ATTORNEYS FOR WINDERMERE OAKS WATER SUPPLY CORPORATION

CERTIFICATE OF SERVICE

I certify that, unless otherwise ordered by the presiding officer, notice of the filing of this document was provided to all parties of record via electronic mail on September 22, 2020, in accordance with the Order Suspending Rules, issued in Project No. 50664.

JAMIE L. MAULDIN

3870/04/8124476

Jessica Shipley

From: Jessica Shipley
Sent: Tuesday, September 8, 2020 12:59 PM
To: 'CentralRecords@puc.texas.gov'
Cc: Jamie Mauldin; Patrick Dinnin
Subject: Docket No. 50788: WOWSC's Objections to Ratepayers' First RFI
Attachments: 50788 WOWSC's Objections to Ratepayers' First RFI.pdf

Attached please find Windermere Oaks Water Supply Corporation's Objections to Ratepayers' First Request for Information, e-filed in Docket No. 50788. The tracking number for the e-filing has been highlighted in yellow, below.

Since this filing is over 50 pages, we are also sending a hard copy today via USPS.

Please let me know if anything else is needed in order for this filing to be accepted.

Thank you,

Jessica

Lloyd Gosselink
ATTORNEYS AT LAW

JESSICA A. SHIPLEY
Legal Secretary to Georgia Crump, Thomas Brocato,
Jamie Mauldin, and Chris Brewster
512-322-5819 Direct
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From: noreply@puc.texas.gov
Sent: Tuesday, September 8, 2020 12:52 PM
To: Jessica Shipley
Subject: PUC Filing submission confirmation.

Filing Complete

Next Steps:

YOU HAVE COMPLETED THE ELECTRONIC PORTION OF YOUR FILING, HOWEVER, IN ORDER FOR THE PUC TO BE ABLE TO PROCESS YOUR FILING, YOU MUST SUBMIT THE FOLLOWING INFORMATION TO THE CENTRAL RECORDS EMAIL (CentralRecords@puc.texas.gov) :

1. AN ATTACHMENT OF THE FILING TO BE PRINTED BY CR STAFF
2. AN ATTACHMENT OF THE GENERATED TRACKING NUMBER SHEET

WE APPRECIATE YOUR COOPERATION AND PATIENCE DURING THIS TIME.

Central Records: (512) 936-7180

Tracking Number: YDJEPZZW

Filing Submitted on	**9/8/2020 12:51:51 PM**
Control Number	50788 RATEPAYERS APPEAL OF THE DECISION BY WINDERMERE OAKS WATER SUPPLY CORPORATION TO CHANGE WATER AND SEWER RATES
Filing Party	WINDERMERE OAKS WATER SUPPLY CORPORATION
Filing Type	REQUEST FOR INFORMATION
Description	Windermere Oaks Water Supply Corporation's Objections to Ratepayers' First Request for Information
Documents	50788 WOWSC's Objections to Ratepayers' First RFI.pdf
Addendum Included	No
Submitted By	Jessica Shipley 816 Congress Avenue, Suite 1900 Austin, TX 78701 5123225800 jshipley@lglawfirm.com

****ATTENTION TO PUBLIC OFFICIALS AND OFFICIALS WITH OTHER INSTITUTIONS SUBJECT TO THE OPEN MEETINGS ACT ****

A "REPLY TO ALL" OF THIS EMAIL COULD LEAD TO VIOLATIONS OF THE TEXAS OPEN MEETINGS ACT. PLEASE REPLY ONLY TO LEGAL COUNSEL.

Jessica Shipley

From: Jessica Shipley
Sent: Tuesday, September 8, 2020 1:56 PM
To: 'ratepayersrepjosiefuller@gmail.com'; 'merritt.lander@puc.texas gov'; 'erin.hurley@soah.texas.gov'
Cc: Jamie Mauldin; Patrick Dinnin
Subject: Docket No. 50788: WOWSC's Objections to Ratepayers' First RFI; WOWSC's Motion for Entry of Protective Order
Attachments: 50788 WOWSC's Objections to Ratepayers' First RFI.pdf; 50788 WOWSC's Motion for Entry of Protective Order.pdf

Attached please find **Windermere Oaks Water Supply Corporation's Objections to Ratepayers' First Request for Information**, and **Windermere Oaks Water Supply Corporation's Motion for Entry of Protective Order**, which were e-filed in Docket No. 50788 today.

Thank you,

Jessica

Lloyd Gosselink
ATTORNEYS AT LAW

JESSICA A. SHIPLEY
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Jessica Shipley

From: Jamie Mauldin
Sent: Tuesday, September 8, 2020 10:08 AM
To: 'Josie Fuller'
Cc: Patrick Dinnin; '03870_0004 _Windermere Oaks Water Supply Corporation_PUC Rate Appeal_ E_mails'
Subject: RE: Docket 50788 [IWOV-PROD_LGDMS.FID512667]

Follow Up Flag: Follow up
Flag Status: Flagged

Josie and Patti,

Thank you. We will get the Motion for Protective Order filed today.

Regarding objections, we are on a bit of time crunch and will need to file those by 1 pm today. Therefore, I think it would be speedier to have a brief phone chat to go over our objections this morning, but we can always file and continue to work on the objections and hopefully come to a resolution before the RFIs are due.

Our objections are for the following RFIs:

1-1
1-2
1-3
1-7
1-9
1-12

Most of the objections are because the wording is vague and we don't really understand exactly what you are asking for with specificity. Let me know if you are okay talking through these to perhaps come to an understanding so that we can get you what you want.

Thanks!
Jamie Mauldin

Lloyd Gosselink
ATTORNEYS AT LAW

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From: Josie Fuller <ratepayersrepjosiefuller@gmail.com>
Sent: Tuesday, September 8, 2020 9:48 AM
To: Jamie Mauldin <jmauldin@lglawfirm.com>
Cc: Patrick Dinnin <pdinnin@lglawfirm.com>
Subject: Re: Docket 50788 [IWOV-PROD_LGDMS.FID512667]

Jamie,

We are not opposed to your filing of a protected order, simply wanting to know which RFI's you feel rise to the level of a protected order, legal invoices?

Regarding your questions on possible objections the WOWSC may have to some of our RFI's or to get better clarity on our request, we feel that these can easily be resolved via email communication and it is not necessary to have a telephone conference. We are deeply concerned with the excessive legal expenses by the WOWSC Board and believe it would be in the best interest of the ratepayers to keep your legal fees to a minimum. Thanks

Josie and Patti

On Fri, Sep 4, 2020 at 5:10 PM Jamie Mauldin <jmauldin@lglawfirm.com> wrote:

Hi there-

The protective order is a blanket order for all confidential materials. What it does is prevent confidential information that is filed in response to the RFIs from being posted on the Commission interchange. Parties who sign the protective order will receive all of the confidential documents.

I would still like to chat about some objections WOWSC will have to your RFIs in hopes that we can agree on some language and get clarity as to what you are wanting. Are you available to discuss Tuesday morning?

Thanks,

Jamie

Lloyd Gosselink
ATTORNEYS AT LAW

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816 Congress Ave., Suite 1900, Austin, TX 78701
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From: Josie Fuller <ratepayersrepjosiefuller@gmail.com>
Sent: Friday, September 4, 2020 5:01 PM
To: Jamie Mauldin <jmauldin@lglawfirm.com>
Cc: Patrick Dinnin <pdinnin@lglawfirm.com>
Subject: Re: Docket 50788 [IWOV-PROD_LGDMS.FID512667]

Jamie,

Please advise on which RFI(s)# the protected order is for along with any additional questions you may have for us. We don't foresee an issue with the protected order being filed, just wanting to know which RFI(s)# it will refer to. Thanks and have a good holiday weekend.

Josie and Patti

On Fri, Sep 4, 2020 at 1:26 PM Jamie Mauldin <jmauldin@lglawfirm.com> wrote:

Ms. Fuller and Ms. Flunker,

I left both of you voice messages but wanted to follow up regarding the Motion to Enter a Protective Order I wrote you about earlier this week. WOWSC anticipates filing confidential information in response to your RFIs and so would like to have the judge enter a protective order into the docket. Please let me know if you are unopposed. We will be filing on Monday.

Additionally, WOWSC would like to confer with you about possible objections to Ratepayers' RFIs and see if we can resolve some of the issues. Could one of you give me a call on my cell to discuss?

Thanks,

Jamie

Lloyd Gosselink
ATTORNEYS AT LAW

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****ATTENTION TO PUBLIC OFFICIALS AND OFFICIALS WITH OTHER INSTITUTIONS SUBJECT TO THE OPEN MEETINGS ACT ****

A "REPLY TO ALL" OF THIS EMAIL COULD LEAD TO VIOLATIONS OF THE TEXAS OPEN MEETINGS ACT. PLEASE REPLY ONLY TO LEGAL COUNSEL.

Exhibit C

19 Tex. P.U.C. Bull. 2278, 1994 WL 479513 (Tex.P.U.C.)

Re El Paso Electric Company

Docket No. 12700

Texas Public Utility Commission

April 06, 1994

Before Gee, chairman, Rabago and Goodfriend, commissioners, and Trostle, Administrative judge.

BY THE COMMISSION:

April 6, 1994 Order No. 16

April 28, 1994 Commission's Order on Appeal

On appeal, Commission affirmed order granting in part and denying in part motion to compel attorney-client communications and attorney work product.

PROCEDURE — PREHEARING MATTERS — DISCOVERY — PRIVILEGES — WAIVER Offensive waiver of privilege occurs if (1) party asserting privilege is seeking affirmative relief; (2) privileged information, if believed by fact finder, would determine outcome of cause of action, *i e.*, information goes to very heart of affirmative relief sought; and (3) disclosure of confidential communication is only means by which aggrieved party may obtain evidence sought. (Page 2283) In PURA § 63 proceeding, utilities did not waive attorney-client and attorney work product privileges under offensive use doctrine when privileged information involving risk factors associated with characterization of nuclear facility leases is but one of many matters to be considered in making public interest finding, *i e.*, such information is not outcome determinative on public interest issue. (Page 2287) PROCEDURE — PREHEARING MATTERS — DISCOVERY — PRIVILEGES — BURDEN OF PROOF Party asserting offensive waiver of privilege bears burden of proving that disclosure is only means by which it can obtain privileged information. (Page 2287) PROCEDURE — PREHEARING MATTERS — DISCOVERY — PRIVILEGES — WAIVER In PURA § 63 proceeding, utilities did not waive attorney-client and attorney work product privileges under offensive use doctrine when (1) party asserting offensive waiver of privilege failed to prove that disclosure is only means by which it can obtain privileged information, and (2) requested information is available in legal briefs and other portions of record in bankruptcy proceeding involving utilities. (Page 2287) PROCEDURE — PREHEARING MATTERS — DISCOVERY — EXPERT WITNESSES In PURA § 63 proceeding, utility holding company's vice president of mergers and acquisitions as expert witness in area of mergers and acquisitions of electric utilities when (1) his prefiled testimony includes specialized information and opinions concerning proposed acquisition of utility, all of which is intended to assist Commission in understanding such acquisition and determining whether it is in public interest, and (2) his expertise in such area appears to be acquired from his special skill, experience, and training. (Page 2293) When prefiled testimony of utility holding company's vice president of mergers and acquisitions involves both specialized, technical information and expression of opinion with respect to characterization of risk factors associated with nuclear facility leases, such testimony is expert opinion testimony, rather than lay opinion testimony, because (1) subject matter falls within witness's area of expertise, and (2) privileged documents in witness's possession are type of information an expert in mergers and acquisitions would rely upon in making decisions concerning possible acquisition of utility. (Pages 2294, 2295) PROCEDURE — PREHEARING MATTERS — DISCOVERY — PRIVILEGES — WAIVER PROCEDURE — PREHEARING MATTERS — DISCOVERY — EXPERT WITNESSES By designating employee as expert witness, party waives any privilege it might assert with respect to specific matters that expert witness relied upon as basis of his/her testimony. (Page 2296) PROCEDURE — PREHEARING MATTERS — DISCOVERY — PRIVILEGES — BURDEN OF PROOF Party seeking to avoid discovery bears burden of pleading basis for privilege or exemption and producing evidence (*e g.*, affidavit, testimony) to support privilege or exemption. (Page 2296) PROCEDURE — PREHEARING MATTERS — DISCOVERY — PRIVILEGES — WAIVER If expert witness testifies on matters claimed to be

privileged, such testimony constitutes waiver of privilege analogous to disclosure to third party. (Page 2296) PROCEDURE — PREHEARING MATTERS — DISCOVERY — PRIVILEGES — WAIVER Party's failure to segregate privileged documents according to those which do and do not form basis of expert witness's testimony waives privileges applicable to documents in expert witness's possession. (Page 2297)

ORDER NO 16 RULING ON GENERAL COUNSEL'S MOTION TO COMPEL CSW AND EPEC TO RESPOND TO GENERAL COUNSEL'S FOURTH RFI, QUESTION CEJ-83

I. Procedural Background

On February 22, 1994, CSW and EPEC (the Companies) filed objections to General Counsel's Fourth RFI, Question No. CEJ-83. That RFI reads as follows·

Please reference the Direct Testimony of Thomas Shockley, G.H. King, Gary R. Hedrick, Stephen McDonnell, Wendy Hargus, William Johnson, David Epstein, James Dyer, Samuel Hadaway, David Carpenter, Michael Blough, David Harrell, James Bruggeman, Edward Kolodziej, Pedro Serrano and/or Ronald Luke regarding the risk factors associated with the legal status of Palo Verde Nuclear Generating Station as a lease of real property, a lease of personal property or financing transaction: a. Please produce all documents, including but not limited to studies, memoranda or legal opinions, which were reviewed by the referenced witnesses on behalf of Central South West Corporation and El Paso Electric Company. b. Please produce all documents, including but not limited to studies, memoranda or legal opinions, which were reviewed by any member of the Board of Directors or the Management of Central South West Corporation and El Paso Electric Company. For each document produced in response to this RFI, please identify each witness, board member or member of management that reviewed the document.

The objection is based on a claim of attorney-client privilege and attorney work product exemption. The Companies filed indices of privileged documents as required by Commission rule.

On March 1, 1994, General Counsel filed a motion to compel. On March 8, 1994, the Companies submitted the documents to the Administrative Law Judge (ALJ) for *in camera* inspection. The documents submitted for *in camera* inspection, as listed on the indices, include:

1. 26 documents from Milbank Tweed Hadley & McCloy 2. 24 documents from Redford, Wray & Woolsey 3. 1 document from Broyles & Pratt 4. 2 documents from Sullivan & Worcester 5. 5 documents from Central and South West Corporation 6.1 document from Morgan Stanley & Co. 7. 22 documents submitted by EPEC

On March 9, 1994, the Companies filed a response to the motion to compel.

II. Objections Concerning Subpart a of RFI

A Overview of Parties' Arguments and Scope of Controversy

The Companies' objection to subpart a of the question is limited to those witnesses who filed testimony addressing the risk factors associated with the legal status of the Palo Verde Nuclear Generating Station (PVNGS). Based on Companies' discussions with General Counsel regarding subpart a of the question, it appears that General Counsel does not seek materials reviewed by witnesses who do not testify about the risk factors associated with PVNGS. The witnesses who filed testimony concerning the risk factors are G.H. King, David Epstein, and James Dyer. The Companies assert that Messrs. Epstein and Dyer are expert witnesses and the Companies 'will provide all documents reviewed by them in the course of the preparation of their testimony and analysis in this case which pertain to the matter that is the subject of Question No. CEJ-83.'[1] The Companies also state that these expert witnesses have not reviewed any of the documents for which Companies are asserting a privilege claim.[2]

With respect to Mr. King, the Companies assert that he is a fact witness, and therefore object 'to the provision of documents, such as the requested legal opinions, which are attorney-client communications and/or attorney work product, and which *may* have been reviewed by Mr. King during the normal course of business.'[3] In the Companies' response to the motion to compel, they distinguish between the CSW and the EPEC privileged documents The Companies assert that 'Mr. King did not have access to [the *EPEC* privileged] documents. He did not review any of this material. None of this material formed the basis for any of his testimony.'[4] The index of privileged documents prepared by *EPEC* and filed on February 24, 1994, does not list Mr. King as the preparer, custodian, or recipient of any of the 22 documents listed. However, a review of the indices of privileged documents submitted by CSW shows that Mr. G.H. King was the recipient of most of the documents submitted for *in camera* review by *CSW*.[5]

At the outset, the ALJ notes that the motion to compel, as far as it concerns subpart a of the RFI, addresses only documents reviewed by Mr. King. The General Counsel does not dispute the Companies' assertion that only three witnesses address the risk factors in their testimony and that with respect to the expert witnesses, Messrs. Dyer and Epstein, all documents reviewed by them will be produced. The scope of the controversy concerning subpart a of the RFI has therefore been limited to the 52 documents reviewed by Mr. King that were submitted by CSW for *in camera* review. There is no dispute that the documents are privileged under Texas Rule of Civil Evidence (TRCE) 503. General Counsel's position is that the privilege has been waived under the doctrine of offensive use and, in the alternative, that Mr. King is an expert witness, and therefore the underlying basis for his opinion testimony is discoverable [6]

B. Offensive Use Waiver

1. *Legal Precedent*

The doctrine of offensive use was first discussed in *Ginsberg v Fifth Court of Appeals*, 686 S.W. 2d 105 (Tex. 1985), a case involving the psychotherapist-patient privilege. In that case the Court explained that:

A plaintiff cannot use one hand to seek affirmative relief in court and with the other lower an iron curtain of silence against otherwise pertinent and proper questions which may have a bearing upon his right to maintain his action.

686 S.W.2d at 108. More recently, the Texas court specifically held that the offensive use waiver applies to the attorney-client privilege, *Republic Insurance Co v Hon Paul Davis*, 856 S.W.2d 158, 163 (Tex. 1993), and attorney work-product privilege. *National Union Fire Insurance Co. of Pittsburgh, Pa v Hon. Rogelio Valdez*, 863 S.W.2d 458 (Tex. 1993), and *Transamerican Natural Gas Corp v Hon Manuel Flores*, 37 Tex.Sup.Ct.J. 494 (Feb. 2, 1994 *per curiam*). In *Republic*, the court enunciated a three part test for application of the offensive use doctrine.

First, before a waiver may be found the party asserting the privilege must seek affirmative relief. Second, the privileged information sought must be such that, if believed by the fact finder, in all probability it would be outcome determinative of the cause of action asserted. Mere relevance is insufficient. A contradiction in position without more is insufficient. The confidential communication must go to the very heart of the affirmative relief sought. Third, disclosure of the confidential communication must be the only means by which the aggrieved party may obtain the evidence. If any one of these requirements is lacking, the trial court must uphold the privilege.

856 S.W. 2d at 163. The court itself characterizes these tests as 'rigorous'. *Id.* The court's holding in these cases further evidences how rigorously the standards for offensive use waiver are applied. In each of the cases involving attorney-client or attorney work product privileges the court found that the privilege had not been waived.

In *Republic*, an insurance company had filed a declaratory judgment action concerning reinsurance proceeds that were owed to two competing claimants. The court held that Republic's declaratory judgment action was not an action for affirmative relief and therefore the attorney-client privilege was not waived.

In *National Union Fire* there were two actions by an injured worker, Haynes, against National Union, a workers' compensation carrier. One was a compensation case which Haynes ultimately prevailed on, and the second was a bad faith claim for failure to pay benefits After paying the compensation judgment in full and obtaining a judgment release from Haynes, National Union moved for summary judgment in the bad faith case based on the judgment release signed in the compensation case. Haynes sought in discovery the records of the compensation case held by National Union's law firm claiming the files may contain a memo bearing on National Union's understanding of the scope of the release. The court held that National Union was not seeking affirmative relief, but was relying on the information in the law firm files only to avoid Haynes' claim. The court therefore found that there was no offensive waiver of the attorney work product privilege.

In *Transamerican* the discovery dispute arose out of a claim of a conspiracy to manipulate gas prices in a purchase agreement between TransAmerican and Coastal Valero was alleged to be part of the conspiracy. The discovery dispute arose when Valero requested certain documents that TransAmerican claimed were protected by the attorney-client, work product, and/or party communication privileges. The court found that the first part of the *Republic* test was met because TransAmerican was seeking affirmative relief by virtue of a counterclaim against Valero. The court's review of the documents indicated that they may have been relevant to Valero's defense of limitations, but the court pointed out that 'mere relevance is not sufficient to waive TransAmerican's privilege.' 37 Tex.Sup.Ct.J. at 495. The court stated:

It is difficult for us to conclude that, even if believed by the fact finder, in all probability, these documents would determine the outcome of Valero's case. *Id.* Furthermore, Valero has not proved that the disclosure of the confidential communication is the only means by which the aggrieved party may obtain that evidence.

Id.

2 Parties' Arguments on Offensive Use Waiver

In General Counsel's motion to compel, he neither cites *Republic*, nor addresses the three part test for offensive use waiver enunciated therein His entire argument is as follows:

The Companies are clearly attempting to use the Palo Verde lease 'risk factors' to seek affirmative relief, i.e., because of the risk factors, reacquisition of Palo Verde Nuclear Generating Units 1 and 2 ' is consistent with the public interest and that for ratemaking purposes the reacquired leased Palo Verde assets be included in EPEC's rate base ' (footnote cites to page 6 of the Application). The Companies' request for an affirmative finding, combined with the testimony of G.H. King, clearly falls within the rim (sic) of 'offensive use' and subject to waiver of the attorney-client/work product privilege. Without the documents reviewed by Mr. King, the parties are unable to cross-examine Mr. King regarding the perceived risk factors, thereby allowing the Companies to 'lower an iron curtain of silence' surrounding the basis for Mr. King's conclusions regarding the Palo Verde leases.

Motion to Compel at 3-4

In the Companies' response to the motion to compel, they question whether the reporting of the proposed acquisition under PURA § 63 constitutes the seeking of affirmative relief, but focus their arguments on the remaining two *Republic* tests. The Companies point out that General Counsel does not even suggest in his motion to compel that the legal analyses of the characterization of the Palo Verde leases are outcome determinative of the cause of action asserted. As indicated in the quote from *Republic* above, mere relevance is insufficient to produce a waiver. In this case, the Companies argue that the cause of action is a request that the Commission find both the proposed acquisition of EPEC by CSW and the reacquisition of the

leased assets is in the public interest. The Companies argue that the documents in question, in and of themselves, are not determinative of the outcome of this docket. The documents, they aver, would be one of many factors that would be considered in making a public interest determination. The Companies claim there is 'substantial' prefiled testimony, independent of the legal characterization of the leases, that pertains to the reacquisition They conclude that the documents that are in dispute will not even be determinative of the subissue of the characterization of the Palo Verde leases.

With respect to the third *Republic* test, the Companies also argue that 'General Counsel does not even make a bare contention that the legal analyses prepared by the Companies' attorneys are the only means by which the Commission staff can analyze the risk factors associated with various characterizations of the Palo Verde leases.' Response at 6. The Companies point out that in *Transamerican* the court held that it is the *party claiming waiver*, i.e. the General Counsel in this docket, that must prove that disclosure is the only means by which that party can obtain the evidence. The Companies then discuss the various places where evidence concerning the lease characterization issues, and the potential liabilities associated therewith, can be obtained. Specifically, the Companies state that all facts and relevant legal theories related to those issues were briefed and argued 'at great length' in the bankruptcy proceeding, and the record of that proceeding is available to any party to this docket in the Companies' Austin voluminous room. This assertion is supported by the affidavit of Mr. G.H. King filed on March 9, 1994.

3. Ruling on Offensive Use Waiver

The ALJ concludes that as to the 52 documents in dispute under subpart a of the RFI, the attorney-client and attorney work product privileges have not been waived under the offensive use doctrine. Under *Republic*, if any one of the three tests is not satisfied, the privilege must be upheld. The Companies do not fully develop their position concerning the first *Republic* test, that the party asserting the privilege must be seeking affirmative relief before waiver will be considered, and therefore this Order will not address that issue. The ALJ concludes for the reasons discussed below that the privileged information sought in this discovery request would not be outcome determinative of the Section 63 cause of action. The ALJ also concludes, as explained in greater detail below, that General Counsel has not proven that disclosure of the privileged communications is the only means by which he can obtain the evidence. The motion to compel the production of documents requested in subpart a of the RFI based on the offensive use waiver is therefore *DENIED*.

The second *Republic* test requires that the privileged information must be such that, if believed by the fact finder, in all probability would be *outcome determinative* of the cause of action asserted. The cause of action in this docket arises under PURA § 63. That section requires the Commission to investigate the acquisition by CSW of 100 percent of the common stock of EPEC and the reacquisition by EPEC of the leased PVNGS Units 2 and 3 assets to determine whether the acquisitions are consistent with the public interest. In reaching its determination, the Commission is required to take into consideration the reasonable value of the property, facilities, or securities to be acquired. The parties' arguments and therefore the ALJ's analysis narrows the focus to whether the privileged information would be outcome determinative of the request for a public interest finding concerning only the reacquisition of the PVNGS leased assets. The information at dispute in this instance includes attorney-client and/or attorney work product documents related to the risk factors associated with the legal status of the PVNGS as a lease of real property, a lease of personal property or financing transaction. The information sought was created to assist CSW in deciding how to treat the lease interests as part of its bid to acquire EPEC. This information may be relevant to these proceedings, however, the ALJ agrees with the Companies that this information will be only one of many factors that will be considered in making the public interest finding. The ALJ therefore concludes that the information sought would not be outcome determinative of the request for a public interest finding and therefore the privileges are not waived. The third *Republic* test requires that disclosure of the confidential communication must be the only means by which the aggrieved party may obtain the evidence. In *Transamerican* the court placed the burden on the party claiming the waiver to prove that disclosure was the only means by which that party could obtain the evidence. The General Counsel does not address this burden, and therefore fails to satisfy the third test for waiver. Moreover, the ALJ also finds that the requested information is available in legal briefs, and other portions of the record filed in the bankruptcy proceeding all of which is available to General Counsel in the Companies' voluminous room. The ALJ therefore concludes that disclosure of the confidential communication is not the only means by which General Counsel may obtain the evidence requested and therefore the privileges have not been waived.

C. Fact Witness v. Expert Witness

1. Parties' Arguments

In their objection to the RFI, the Companies narrowed the focus of the dispute to documents reviewed by three witnesses who will testify about the risk factors associated with the legal status of PVNGS. Of those three witnesses, the Companies agreed two were expert witnesses but asserted that the third witness, Mr. King, was a fact witness. In the objection, the Companies included the following statements related to the issue of fact versus expert witnesses:

While it may be argued that Tex. R. Civ. Proc. 166b.2.e. requires production of materials otherwise covered by the attorney-client privilege or designated as attorney work product by allowing discovery of the facts known by a testifying expert which relate to or form the basis of the mental impressions and opinions held by the experts, no such requirement is imposed regarding privileged information known by fact witnesses.[7] Applicants request that their objections be sustained, and that they not be required to produce attorney-client communications or attorney work product, *except to the extent such documents were reviewed by expert witnesses* and pertain to the matters upon which they opine as experts in this case.[8]

The specific testimony that gave rise to the RFI is found at page 44 line 11 through page 46 line 24 of Mr. King's prefiled testimony.[9] Mr King begins that testimony by indicating the treatment of the leases under bankruptcy was far from clear and that Mr. Epstein, an expert in bankruptcy law, discusses the characterization of the leases in his testimony.[10] Mr. King then goes on to describe the consequences of the three possible characterizations of the leases, and the issue of lease-rejection damages.

General Counsel's second argument in favor of disclosure of the privileged documents reviewed by Mr. King is that Mr. King is not a fact witness. General Counsel argues that Mr. King's testimony concerning the risk factors is opinion testimony which does not satisfy the requirement of Tex R. Civ. Evid 701. That rule allows lay witnesses to testify in the form of opinions if the opinion is rationally based on the perception of the witness. General Counsel argues that Mr. King's testimony is not based on his personal perceptions or observations, but on the documents he reviewed that are listed on the indices filed by CSW. General Counsel concludes that Mr. King must be relying on these documents because 'Mr. King does not, in his testimony or elsewhere, state that he has personally researched the risk factors.'[11]

General Counsel also argues that Mr. King qualifies himself as an expert with specialized knowledge regarding acquisitions. General Counsel asserts that the characterization of the PVNGS leases is one of the terms that formed the basis of the merger plan. Therefore, the General Counsel concludes, the underlying basis for Mr. King's opinion testimony is discoverable.

In response to the motion to compel, the Companies argue that while Mr. King is an expert in many areas of utility operation and regulation, he is not an expert on the risk factors associated with the characterization of the PVNGS leases, and he makes no attempt to opine on that issue. In the alternative, the Companies state that if his testimony addressing the lease issue is construed to be an expression of opinion, then it is offered and should be deemed to be testimony of a lay witness under Tex. R. Civ. Evid. 701.

The Companies next argument is that the designation of a witness as an expert lies wholly within the offering party's discretion. The Companies cite several cases in support of this position, *Werner v Miller*, 579 S.W.2d 455 (Tex. 1979), *Jones & Laughlin Steel, Inc v Schattman*, 667 S.W.2d 352 (Tex. App. — Ft. Worth 1984, orig. proceeding), and *Green v. Lerner*, 786 S.W.2d 486 (Tex. App. — Houston [1st Dist.] 1990, orig. proceeding).

2. Discussion and Conclusions

a Is Mr King an expert or a fact witness ?

Having read all of Mr. King's testimony and reviewed the 52 documents submitted for *in camera* inspection of which he was a recipient, the ALJ comes to several conclusions. First, Mr. King is an expert in the area of mergers and acquisitions of electric utility companies. Second, the testimony concerning the risks associated with characterization of the PVNGS leases includes specialized factual and opinion testimony. Third, the opinion testimony is not lay opinion testimony. Fourth, the characterization of the leases is an issue within the area of Mr. King's expertise. Fifth, the privileged documents related to the PVNGS leases constitute the type of data reasonably relied upon by business people involved with mergers and acquisitions in deciding whether to go forward with a contemplated acquisition.

The determination of whether Mr. King is an expert witness is complicated by the practice at this Commission of not requiring parties to formally qualify and designate a witness as an expert.[12] The practice at this Commission is to prefile all direct testimony and if anyone believes the testimony is inadmissible opinion testimony outside the scope of the witness' expertise or is inadmissible because the witness is a fact witness, that objection is handled in pretrial motions to strike testimony.

Outside the administrative law field the determination of whether a witness is a fact or expert witnesses is much more direct. The cases reviewed by the ALJ in researching this area of law usually involved personal injury suits, in which the 'fact' witness was a person who actually observed an accident and the 'expert' witness was someone hired to testify as to manufacturing defects in the product that caused the injury.

In the utility regulatory context, the issues are by their very nature technical. Witnesses appearing in Commission proceedings are not usually called upon to give testimony about everyday occurrences that were perceived by them.[13] In most Commission proceedings, the witnesses' testimony covers a mixture of fact and opinion concerning topics such as how the utility operates and the reasonableness of its expenses. Certain issues, such as rate of return, unquestionably call for expert testimony. Expert testimony is not limited to opinion testimony but often encompasses other specialized factual information.[14] When the witness is an outside consultant, he is usually an expert hired solely for the purpose of providing testimony in a Commission proceeding. However, when the witness is an employee of the utility, that fact alone does not assist in determining if he or she is an expert or a fact witness.[15]

Tex. R. Civ. Evid. 702 governs the admissibility of expert testimony and describes its purpose:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Similarly, Tex. R Civ. Evid. 701 governs opinion testimony by lay witnesses:

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

The Companies' argument that designation of a witness as an expert lies wholly within the offering party's discretion misconstrues the holdings in the cases cited. The question in each of those cases was whether an expert would be called as a witness or was a consulting expert and when that determination had to be made by the sponsoring party.[16] The question presented by this dispute is much different. That is, whether *witness* King is testifying as an expert or as a layman. In *Barker v Dunham*, 551 S.W.2d 41 (Tex. 1977), the defendant manufacturer had not designated its vice president as an expert, and had not disclaimed intention to call him as a witness. The court found, based on the deposition testimony of the vice president[17] , that he was an expert and held that he could be deposed with respect to his observations and opinions. Because Mr. King's

testimony is already on file the ALJ need not rely on the offering party's characterization of him as a fact witness, but can read his testimony and, as in *Barker*, decide if he is a fact or expert witness.

Mr King is the Vice President of Mergers and Acquisitions for CSW, a position he has held since November 1993. In 1989 he was given responsibility for implementing a utility merger and acquisition program at CSW. He holds a Bachelor of Science degree in Electrical Engineering from Texas A & M University and is a Professional Engineer. He has been associated with CSW since 1960.[18] His 33 year electric industry career has given him 'a broad-based electric utility background, with in-depth experience in negotiations and regulatory matters.'[19] The purpose of his prefiled testimony is to discuss·

(1) the proposed acquisition by CSW of EPEC; (2) CSW's approach to the acquisition of EPEC; (3) the process which led to a consensual agreement by EPEC's creditors and interest holders to the Plan; (4) the terms of the Plan under which EPEC will emerge from bankruptcy as a wholly owned subsidiary of CSW; and (5) the treatment of various Classes under the Plan.[20]

The ALJ finds, after reading Mr. King's prefiled testimony that it includes specialized information and opinions concerning the proposed acquisition that is intended to assist the Commission in understanding the CSW acquisition and determining whether the acquisition is in the public interest. Mr. King's expertise in this area appears from his testimony to have been acquired from his special skill, experience and training. The ALJ therefore concludes that he is an expert witness in the area of mergers and acquisitions of electric utility companies.

Even though at page 44 of his testimony there is a self-serving description of Mr. King's testimony concerning the characterization of the PVNGS leases as that of a 'lay businessperson', Mr. King goes on to give the following testimony related to the risk factors arising from the characterization of the PVNGS leases:

CSW concluded that, given the amounts at stake, the sophistication and resources of the parties involved and the potential effects on other transactions of any ruling on the character of the leases, litigation of the issues would: (1) be extremely costly; (ii) be fraught with unreasonable and unnecessary risk; and (iii) would compound and unduly prolong the rehabilitation of EPEC and its emergence from bankruptcy. Accordingly, CSW concluded that a settlement with the Lease Obligation Bondholders was critical to any realistic hope of allowing EPEC to emerge from bankruptcy in a timely manner.

The economic claim of the Lease Obligation Bondholders as of mid-1993 was around $825 million * * *. Their legal claims against EPEC could be substantially greater or less, depending on the outcome of the litigation involving the character of the leases and involving the ancillary claims asserted by the affected interests.

The $668.5 million * * * offered to the Lease Obligation Bondholders in full satisfaction of their claims in excess of $825 million represents a negotiated compromise * * * and is reasonable relative both to the economic value of what Class 12(a) contributed to the company and to the claims that the Class could assert.[21]

See also Mr. King's prefiled testimony at p. 50 ln. 25 through p.51 ln. 10.

The ALJ finds that Mr. King's testimony concerning the risks associated with the characterization of the PVNGS leases involves both specialized, technical information and the expression of opinion. If the opinion testimony is that of a lay witness, as the Companies claim, it must be 'rationally based on the *perception* of the witness.' Tex. R. Civ. Evid. 701. It is difficult for the ALJ to conceptualize how Mr King could 'perceive' the characterization of these leases. His opinion on this topic is not like the opinion of the accountant in *Teen-Ed v Kimball Int'l Inc.*, 620 F.2d 399, 403 (3rd Cir. 1980) cited by Companies on page 16 of their response to the motion to compel. *Teen-Ed* involved a breach of contract suit. The plaintiff sought to prove damages through the testimony of its accountant[22] whom the plaintiff had failed to list as an expert witness in accordance with a pretrial order. The trial court determined that the accountant's testimony involved expressions of opinion and assumed that this would constitute expert opinion testimony. The appellate court found that the opinion testimony in question should have been permitted

as lay opinion testimony because the accountant had *personal knowledge* of the plaintiff's books sufficient under Rules 602[23] and 701 to qualify him to testify. The ALJ concludes that the opinion testimony concerning the PVNGS leases presented by Mr King is not lay opinion testimony Unlike the accountant in *Teen-Ed*, Mr. King is not merely crunching numbers from books that he was responsible for preparing. His testimony concerns the very complicated process of evaluating a bankrupt utility's lease interests in a nuclear generating facility and determining how those leases will affect the possible acquisition of the utility. The ALJ also concludes that the testimony in question falls within the area of Mr. King's expertise. It is clear from Mr. King's testimony that the characterization of the leases and the risks attendant thereto were major issues in the acquisition proposal made by CSW. The ALJ further finds from a review of the privileged documents that they are the type of information that an expert in mergers and acquisitions would rely upon in making decisions concerning the possible acquisition of a utility.[24]

b Does designation of a person as an expert witness automatically waive all privileges ?

In their arguments on this issue the parties cite no legal authority for the proposition, initially advanced by the Companies, that if an expert witness reviews documents protected by the attorney-client or attorney work product privilege then the privilege is automatically waived. There is however, a case directly on point. *Aetna Casualty & Surety Company v Hon Robert Blackmon*, 810 S.W.2d 438 (Tex. App. — Corpus Christi 1991, orig. proceeding) was a mandamus action seeking to vacate a trial judge's order authorizing discovery. Aetna was being sued on various theories dealing with its allegedly negligent failure to defend in a prior suit pertaining to a claim for liability coverage. Aetna designated one of its employees as an expert witness concerning, among other things, Aetna's internal procedures for claims handling and Aetna's conduct in general relating to the original suit. The plaintiffs gave notice of their intention to depose the designated expert and included a subpoena *duces tecum* requesting him to bring, generally, all documents which in any way related to the matters made the basis of the negligence suit. Aetna objected and filed a motion to protect certain documents based on the attorney-client, work product and party communications privileges The documents were tendered to the trial court for *in camera* inspection, along with the expert's affidavit asserting the relevant privileges and claiming generally that none of the documents was prepared by him or for him in anticipation of his testimony.

At the hearing on the motion, the plaintiffs argued that Aetna's designation of the employee as an expert witness had the effect of waiving any of the privileges asserted to the documents that the expert relied upon in forming the basis of the opinions about which he would testify. The trial court agreed and denied Aetna's motion for protection

The Court of Appeals discussed the apparent conflict within Tex.R.Civ.P. 166b. Specifically, the conflict arises between Rule 166b(2)(e) and Rule 166b(3). Rule 166b(2)(e) in subparagraph (1) allows discovery of the subject matter on which an expert is expected to testify and the facts known to the expert which relate to or form the basis of the mental impressions and opinions held by the expert. Subparagraph (2) allows discovery of all documents and materials prepared by an expert or for an expert in anticipation of the expert's trial and deposition testimony. However, Rule 166b(3) excludes from discovery certain privileged information, including work product of an attorney, party communications, and matters covered by the attorney-client privilege. The court found that by designating this employee as an expert, Aetna waived any privilege it might have asserted to the specific matters that the witness relied upon as the basis for his testimony. The court also held that the designation of a person as an expert witness does not automatically waive all privileges. The burden is on the party seeking to avoid discovery to plead the basis for the exemption and to produce evidence (an affidavit or testimony) to support the exemption. Aetna therefore had the burden to segregate the documents as to the subjects which would or would not form the basis for Fernandez' expert testimony. Finally, the court found that if the expert testifies on the matters claimed to be privileged, it is analogous to disclosure to a third party and therefore results in waiver of the privilege.

The 52 privileged documents that Mr King received and which were reviewed by the ALJ cover the subject matter on which Mr King testifies. Tex R.Civ.P. 166b(2)(e)(1). The Companies have not offered any proof that any of the documents did not form the basis for Mr. King's testimony.[25] It is unclear if the information, which was prepared for Mr. King (and others) was prepared in anticipation of his trial testimony. Tex.R.Civ.P. 166b(2)(e)(2). Most of the information appears to the ALJ to have been prepared in order to assist Mr. King and other CSW personnel in making a decision as to whether and under what terms to go forward with the acquisition of EPEC. The ALJ finds that the 52 documents reviewed by Mr. King cover the subject

matter included in Mr. King's prefiled testimony and are therefore discoverable under Tex.R Civ.P 166b(2)(e)(1). Because the Companies failed to satisfy their burden to segregate the documents that do or do not form the basis of Mr. King's testimony the privileges have been waived as to all 52 documents he received. Finally, the ALJ finds that Mr. King's testimony on the risk factors and the lease characterization issues constitutes a waiver of the privilege, analogous to disclosure to a third party. The motion to compel the production of the 52 documents reviewed by Mr. King is therefore GRANTED. The Companies shall provide those documents within 10 working days of the issuance of this Order, subject to the stay granted in Section IV below.

III Objections Concerning Subpart b and the Last Clause of RFI

A. Parties' Arguments

Subpart b of the RFI asks for all documents reviewed by the board of directors or management of CSW or[26] EPEC. Although it is not expressly stated this way, it appears from the arguments advanced by both the Companies and General Counsel that this portion of the RFI is also limited to those documents concerning the risk factors referenced in the first clause of the RFI. The Companies' object to the production of attorney work product or attorney-client communications reviewed by *non-witnesses* and *witnesses whose testimony does not address the risk factors*. The Companies entire legal argument is that 'The rules of civil procedure and the rules of evidence clearly protect this information and do not provide for exceptions.'[27]

The last clause requests the *identity of any witness*, board member, or member of management that *reviewed* any document *produced* in response to the RFI. The companies object to the last clause of the RFI as being unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence The Companies point out that the previously filed indices of privileged documents contain lists of persons to whom each document was sent.[28] With respect to nonprivileged documents responsive to the RFI, the Companies argue that the identity of witnesses, board members and members of management that reviewed the document is not reasonably calculated to lead to the discovery of admissible evidence and that the Companies may be unable to compile that information, which is not maintained in the normal course of business.

The motion to compel combines the Companies' objections to these two parts of the RFI and treats them as though they were one objection. General Counsel asserts he is seeking the identity of persons and documents relied on by other potential fact witnesses. General Counsel argues that disclosure of the requested information is calculated to lead to persons with relevant knowledge regarding the risk factors. General Counsel emphasizes that the RFI 'is not limited to documents subject to the attorney client/work product privilege (but) also seeks other studies and memoranda related to the risk factors.'

B. Discussion and Conclusions

The Companies have not objected to the production of nonprivileged documents that were reviewed by any member of the board of directors or the management of CSW or EPEC. However, none of the pleadings indicate that any responses have been or will be made to that portion of the request. Therefore the Companies are hereby ORDERED to provide to General Counsel those nonprivileged documents related to the risk factors that were reviewed by members of the board or management of EPE or CSW, within 10 working days of the issuance of this Order, if they have not already done so.

According to the affidavits of Messrs. King and Rodriguez, the documents that were provided for *in camera* review were prepared, received or reviewed either by: (1) upper echelon EPE and/or CSW management; (2) legal counsel for EPE and/or CSW; (3) consultants retained by law firms or one or both of the Companies to assist in the rendition of legal services to EPE and/or CSW; or (4) persons authorized by EPE and/or management to control or take a substantial part in decisions about actions EPE and/or CSW may take upon the advice of legal counsel. These persons therefore fall within the purview of subpart b of the RFI, which requests documents reviewed by any member of the board of directors or management of CSW or EPE.

The assertion that these documents are subject to the attorney-client and/or attorney work product privileges is not challenged in the motion to compel. Although it is far from clear in the parties' pleadings, the ALJ has assumed that the legal arguments advanced by the parties concerning subpart a of the RFI, specifically attorney-client and attorney work product privileges as well as waiver of privilege based on the offensive use doctrine, are intended to apply to subpart b of the RFI

There are 81 documents that were submitted for *in camera* inspection. All but one of the 53 documents listed in items 1 through 4 on page 1 of this Order, were the subject of the dispute under subpart a of the RFI, discussed above. The one omission is Milbank Tweed Hadley & McCloy No. 21. As to those 52 documents, the ruling in part II. C. 2. of this order granting the motion to compel stands. As to the remaining 29 documents, based on the standards enunciated in *Republic*, the ALJ finds that the privileged documents would not be outcome determinative of the cause of action, and that disclosure of the documents is not the only means by which General Counsel may obtain evidence of the risk factors associated with the legal status of PVNGS. Finding that two *Republic* tests have not been satisfied, the ALJ concludes that the privileges asserted must be upheld. The motion to compel the production of the 29 other documents sought under subpart b of the RFI is therefore DENIED.

The Motion to Compel is GRANTED with respect to the last clause, which requests disclosure of the identity of witnesses, board members and members of management that reviewed any document produced in response to this RFI. The ALJ wishes to emphasize that the last clause of the RFI does not require the production of any documents, only the identity of persons within the three classes (witnesses, board members and management members) who reviewed any document otherwise produced under this RFI.

The Companies' first objection, that the information is not reasonably calculated to lead to the discovery of admissible evidence is not persuasive. As General Counsel argues in his motion to compel, the identity of potential fact witnesses is a legitimate goal of discovery. The second objection is that to compile the requested information would be burdensome. This claim is unsupported by affidavit. With respect to any documents for which a privilege is claimed, this information has apparently already been compiled as evidenced by the indices to privileged documents. With respect to all other documents, the Companies failed to indicate how many documents might be covered by this request, and how many persons (witnesses, board members and management members) would be involved.[29]

IV. Stay of Order

The operation of this order is STAYED for ten days to permit the parties an opportunity to file an appeal. Should an appeal be filed, the stay will continue while the appeal is pending before the Commission. Documents ordered produced herein shall be produced within 10 working days of receipt of written notification of denial of the appeal, either by Commission refusal to hear the appeal, or an order of the Commission denying the appeal.

SIGNED AT AUSTIN, TEXAS the 6th day of April 1994.

I will refer to both sets of Bonds as the 'Lease Obligation Bonds '

The rentals under the Palo Verde leases were pledged to the Indenture Trustees to secure the payment of the debt service on the Lease Obligation Bonds. The Lease Obligation Bonds were issued with different maturities and are retired over the life of the leases. As of January 8, 1992, the outstanding amount of these Bonds was approximately $698 million. Accrued pre-petition interest as of January 8, 1992, was $27 million.

Under bankruptcy, the treatment of the Lease Obligation Bonds is far from clear. The amount of the Lease Obligation Bondholders' claim depends on the characterization of the Palo Verde Leases In his testimony, Mr. Epstein discusses this matter based on his expertise in bankruptcy law. I will give you my understanding of this matter as a lay businessperson involved in the plan of reorganization negotiation process.

The critical questions concerning the treatment of the Lease Obligation Bondholders are generally: (i) whether they are creditors of EPEC since the bonds were issued by separate funding corporations; and (ii) if so, what kind of claims do they have. As to the first question, the documents called for rent payments to be passed on from the Owner Trustee to the funding corporations to the Indenture Trustees on behalf of the Lease Obligation Bondholders who had invested money. Thus, there is a basis for the position that the Lease Obligation Bondholders are creditors of EPEC since the Owner Trustee, funding corporations and Indenture Trustees received the rent essentially on their behalf. EPEC's practice of paying rent directly to the Indenture Trustees was consistent with and supportive of this position.

The second question, what kind of claims do the Lease Obligation Bondholders have depended on the characterization of the sale/leaseback transactions. The Palo Verde lease transactions could be characterized in one of three ways: (i) secured financing transactions; (ii) non-residential real property leases; or (iii) personal property leases. Each characterization would have different consequences in bankruptcy with different effects on the constituencies affected.

If the transactions are *secured financings*, they cannot be rejected, but would have to be modified through the plan negotiation process which has resulted in the modification under the Plan of EPEC's obligations to other Classes, such as Classes 1, 2, 3, 5, 6, 11 and 13.

If the transactions are *non-residential real property leases*, they could be rejected with statutory damages capped at three-years contract rent, which would be a general unsecured claim, plus a priority claim for administrative rent for the post-petition period through the date of rejection. In addition, the claimants could have general unsecured indemnity claims.

If the transactions are *personal property leases*, they could be rejected with unsecured claims for all future rent as contractually provided in the leases, less mitigation if the property were re-leased and less the fair market value of the property subject to the leases. The claimants would also have general unsecured indemnity claims and priority claims for rent measured by the fair market value of the use of the property during the post-petition period through the date of rejection.

The calculation of lease-rejection damages and the elements making up such damages were disputed. The range of damages which could be asserted ranging from a low of $28 million (if the LOC draws were off-sets) to over $1 billion. In addition to the lease-rejection damages, there were also issues related to potential indemnity claims against EPEC, and the participants in the leases, including the OPs, also asserted other claims against EPEC, including general contractual claims, the damages for which they asserted are not capped under the Bankruptcy Code.

ORDER UPHOLDING PRESIDING OFFICERS' ORDER NO. 16

In an open meeting at its offices in Austin, Texas, the Public Utility Commission of Texas considered the appeal of Presiding Officers' Order No. 16 filed by Central and South West and El Paso Electric. The appeal is DENIED and the Presiding Officer's ruling is UPHELD.

SIGNED AT AUSTIN, TEXAS this 28th day of April 1994.

Footnotes

1 Objection at p 3.

2 Objection at 4, f.n. 2.

3 Objection at 3 (emphasis added)

4 Response to motion to compel at 7 (emphasis added). *See also* p. 9 f.n.5.

5 Specifically, G.H. King is listed as a recipient of all but one of the 26 Milbank Tweed Hadley & McCloy documents (No. 21); all 24 Redford, Wray & Woolsey documents, the one Broyles & Pratt document; and both Sullivan & Worcester documents.

6 Motion to Compel at 4-6.

7 Objection at 4

8 Objection at 5-6 (emphasis added)

9 A copy of that testimony is included as Attachment A to this order.

10 David Epstein's Prefiled Testimony at 36-52.

11 Motion to Compel at 5.

12 Under TRCP 168(4) a party is required to disclose the identity of expert witnesses within 30 days in response to an interrogatory requesting a list of witnesses. Failure to do so may result in exclusion of the witness' testimony TRCP 215(5)

13 A notable exception occurs in complaint cases brought by utility customers, where the cause of action may depend on the observations of the customer.

14 Tex. R Civ. Evid 702 does not limit expert testimony to opinions; it allows testimony in the form of an opinion *or otherwise*.

15 'The rules draw no distinction between an expert who is a regular employee and one who is temporarily employed to aid in the preparation of a claim or defense '*Barker v Dunham*, 551 S W.2d 41. 43 (Tex 1977).

16 The identification, mental impressions, and work product of a true consulting expert whose work or ideas were not reviewed by a testifying expert are not discoverable. TRCP 166b(3)(b)

17 The vice president gave deposition testimony to the effect that there was no one more expert than he to have an opinion as to why the boom failed His attorney objected to further questions that attempted to elicit his opinions.

18 Prefiled testimony of G.H. King at 1-3.

FN19 *Id.* at 4.

20 *Id.*

21 Mr. King's prefiled testimony at 48.

22 The testimony was to be a calculation of lost profits by comparing the retailer's gross sales during 1975, with gross sales for the years following the termination of the contract A percentage was then calculated to arrive at the net profits lost each year.

23 Rule 602 requires all witnesses to have personal knowledge of the matter in order to testify.

24 Tex R Civ Evid. 703.

25 Although Mr. King filed an affidavit to support the claim of privilege, it does not address what use he made of the documents that he received

26 Although the RFI says 'Board of Directors or the Management of Central South West Corporation *and* El Paso Electric Company', the parties' arguments suggests that the conjunction should be 'or'.

27 Objection at 5

28 Actually, according to the affidavit of Mr Rodriguez filed on March 9, 1994, the index of documents submitted by EPEC lists all persons who prepared, received or *reviewed* the attorney-client communications.

29 With respect to CSW management and board members who may have reviewed the documents in question, apparently only a 'small group of CSW personnel' were involved in the merger and acquisition. Affidavit of G.H. King at 1