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PUBLIC UTILITY COMMITTEE

APPLICATION OF THE CITY OF	§	BEFORE THE STATE OFFICE
SAN ANTONIO TO AMEND ITS	§	
CERTIFICATE OF CONVENIENCE	§	OF
AND NECESSITY FOR THE	§	
SCENIC LOOP 138-KV TRANSMISSION	§	ADMINISTRATIVE HEARINGS
LINE IN BEXAR COUNTY	§	

**CPS ENERGY’S RESPONSE TO THE  
MOTION TO COMPEL FILED BY ANAQUA SPRINGS HOA**

COMES NOW the City of San Antonio, acting by and through the City Public Service Board (CPS Energy) and files this, its Response to Anaqua Springs Homeowners’ Association’s (Anaqua Springs HOA’s) Motion to Compel Responses to Anaqua Springs HOA’s Third Request for Information (RFI). Pursuant to 16 Tex. Admin. Code § 22.144(f), this Response is timely filed.

**I. BACKGROUND**

On February 4, 2021, Anaqua Springs HOA served its Third RFI on CPS Energy, which requested cost, length, and habitable structure information regarding “a modified Route R,” as well as a cost comparison to existing Route R[1]. The modified route proposed by Anaqua Springs HOA includes two modified and renamed segments, identified as “43a” and “38a,” which are distinct from the segments included in either CPS Energy’s original application or its amended application in this proceeding. On February 19, 2021, CPS Energy filed its responses to the RFI, indicating that because these modified segments were not included in CPS Energy’s original application or amended application, CPS Energy has not identified, evaluated, or compiled data associated with these modified segments. Therefore, CPS Energy was unable to provide information responsive to the RFI.

In its Motion to Compel, Anaqua Springs HOA claims that CPS Energy is “clearly able to provide” this information due to its ability to modify another segment, specifically Segment 26, and because CPS Energy is “in the best position to be able to provide this information.”<sup>1</sup> Further,

<sup>1</sup> *Application of the City of San Antonio to Amend its Certificate of Convenience and Necessity for the Scenic Loop 138-kV Transmission Line in Bexar County*, Docket No. 51023, Motion to Compel CPS to Respond to Anaqua Springs Homeowners’ Association’s Third Request for Information at 2–3 (Feb. 26, 2021).

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Anaqua Springs HOA contends that because CPS Energy did not object to the RFI, it should be compelled to respond. As set forth below, CPS Energy has already provided a complete response to Anaqua Springs HOA's Third RFI based on the information currently within its possession, custody, and control and, thus, requests that Anaqua Springs HOA's Motion to Compel be denied.

## II. ARGUMENT

As stated above, Anaqua Springs HOA's Third RFI seeks information on a new routing option that was created by Anaqua Springs HOA and contains two modified segments which are not included in CPS Energy's application or amended application. CPS Energy has not analyzed these new modified segments sufficiently to determine the specific data requested by the RFI and therefore does not have information regarding their respective estimated costs, lengths, and/or habitable structure counts. In particular, Anaqua Springs HOA's Third RFI would require CPS Energy to evaluate a multitude of factors related to the modified segments, including, but not limited to, existing and newly started habitable structures, distance interior from parcel and actual property lines, geographic relief, vegetation cover, streambeds, golden-cheeked warbler habitat, and recent parcel sales, all of which are relevant to the data requested for the proposed modified segments. Creating the information requested in the Anaqua Springs HOA's Third RFI would require CPS Energy to make site visits, develop data, and create documents not currently in existence or within CPS Energy's possession, custody, or control.

Pursuant to 16 Tex. Admin. Code § 22.141(a), which specifies the appropriate scope of discovery requests, "[a] person is not required to produce a document or tangible thing unless it is within that person's constructive or actual possession, custody, or control."<sup>2</sup> Under the Commission's rules, "[a] person has possession, custody or control of a document or tangible thing as long as the person has a superior right to compel the production from a third party and can obtain possession of the document or tangible thing with reasonable effort."<sup>3</sup>

Here, CPS Energy has provided hundreds of pages of documentation regarding its analysis of the routing options, cost estimates, and habitable structures within the study area relevant to this

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<sup>2</sup> See also *Application of the City of Austin DBA Austin Water for Authority to Change Water and Wastewater Rates*, Docket No. 49189, SOAH Order No. 5 at 8 (Oct. 10, 2019) (stating that RFIs that require a party to create documents not in existence, and thus not within their possession, are not discoverable under 16 Tex. Admin. Code § 22.141(a)).

<sup>3</sup> 16 Tex. Admin. Code § 22.141(a); see also *Application of Texas-New Mexico Power Company for Authority to Change Rates*, Docket No. 48401, Order No. 4 at 3-4 (Aug. 1, 2018).

proceeding based on route alternatives that CPS Energy has requested the Commission to consider for approval. Anaqua Springs HOA's Third RFI request information requiring analysis that CPS Energy has not performed, creation of data that does not exist, on routing alternatives that are not included in CPS Energy's application in this proceeding. CPS Energy is not required to produce such information because it does not exist and thus, the information requested is not within CPS Energy's constructive or actual possession, custody, or control. Further, as described above, Anaqua Springs HOA's Third RFI require much more than "reasonable effort," as it would necessitate site visits and significant analysis of the modified segments, including further evaluation by CPS Energy's engineering team and routing consultants to determine impacts from the modified segments, such as any potential impact to habitable structures, vegetation, surface and groundwater, wetlands, soil, wildlife or endangered species' habitats, aesthetic values, historical values, and natural resources.

Texas case law and the Texas Rules of Evidence do not require CPS Energy to create documents or information not within its possession, custody, or control. Under Texas Rule of Evidence 192.3 a person is only "required to produce a document or tangible thing that is within the person's possession, custody, or control."<sup>4</sup> The terms "possession, custody, and control" are further defined to mean "that the person either has physical possession of the item or has a right to possession of the item that is equal or superior to the person who has physical possession of the item."<sup>5</sup> In interpreting these rules, the Texas Supreme Court has concluded that a document that does not exist is not within a party's possession, custody, or control.<sup>6</sup> The Texas Court of Appeals recently added that "one cannot be forced to create a document that does not exist solely to comply with a request for production."<sup>7</sup> CPS Energy cannot be compelled in this proceeding to create information that does not exist and is therefore not in its possession, custody, or control.

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<sup>4</sup> Tex. R. of Evid. 192.3(b).

<sup>5</sup> Tex. R. of Evid. 192.7(b).

<sup>6</sup> *In re Colonial Pipeline Co.*, 968 S.W.2d 938, 942 (Tex. 1998); *see also McKinney v National Union Fire Insurance Co.*, 772 S.W.2d 72, 73 n. 2 (Tex. 1989) (stating "this rule cannot be used to force a party to make lists or reduce information to tangible form")

<sup>7</sup> *In re Preventative Pest Control Houston, LLC*, 580 S.W.3d 455, 460 (Tex. App.—Houston [14th Dist.] 2019); *see also In re Guzman*, 19 S.W.3d 522, 525 (Tex. App.—Corpus Christi 2000) (stating "The rules do not permit the trial court to force a party to create documents which do not exist, solely to comply with a request for production"); *In re Jacobs*, 300 S.W.3d 35, 47 (Tex. App.—Houston [14th Dist.] 2009) (stating "Further, the relators are not required to create affidavits in a format of what would have been provided to a lender, but are required only to produce documents in response to the McCoys' request for production that already exist");.

Anaqua Springs HOA's contention that CPS Energy somehow waived its arguments to resisting production by not objecting to its Third RFI is simply illogical. The RFI on its face was not objectionable. If CPS Energy had the requested information within its possession, custody, or control, it very likely would have simply produced the information. But, as CPS Energy does not have the requested information it fully provided a response to the valid request. A response that CPS Energy does not have the requested information is not an objection; it is a proper response and one that does not require an objection. CPS Energy was not required to object to make such a response, and it was not required to object to now assert its right under the rules to not be forced to create information or documents it does not have in its current "possession, custody, or control."

### **III. CONCLUSION**

Anaqua Springs HOA asks the Administrative Law Judges to force CPS Energy to conduct site visits and analyses in order to develop data that is not related to CPS Energy's application in this proceeding. The data requested does not exist and is therefore not currently in CPS Energy's possession, custody, or control. Such is not a proper use of discovery and CPS Energy should not be forced to develop data and create documents that do not exist. The Anaqua Springs HOA motion to compel is directly contrary to both the Texas Rules of Evidence and the Commission's Procedural Rules at 16 Tex. Admin. Code § 22.141(a). CPS Energy requests that Anaqua Springs HOA's Motion to Compel be denied and that it be granted any other relief to which it may be entitled.

Respectfully submitted,

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**ATTORNEYS FOR CPS ENERGY**

**CERTIFICATE OF SERVICE**

I certify that a copy of this document was served on all parties of record on this date via the Commission's Interchange in accordance with SOAH Order No. 3.

/s/ Kirk D. Rasmussen

Kirk D. Rasmussen