



Control Number: 51023



Item Number: 824

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2021 MAY -7 AM 9:12

APPLICATION OF THE CITY OF SAN ANTONIO ACTING BY AND THROUGH THE CITY PUBLIC SERVICE BOARD (CPS ENERGY) TO AMEND ITS CERTIFICATE OF CONVENIENCE AND NECESSITY FOR THE PROPOSED SCENIC LOOP 138-KV TRANSMISSION LINE	§ § § § § § § §	BEFORE THE STATE OFFICE. OF ADMINISTRATIVE HEARINGS
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ANAQUA SPRINGS HOMEOWNERS’ ASSOCIATION’S RESPONSE TO SAVE HUNTRESS LANE AREA ASSOCIATION’S BRIEF IN SUPPORT OF PRIVILEGE

I. SAVE HUNTRESS LANE MISCHARACTERIZES THE SCOPE OF THE RFIS

Save Huntress Lane Area Association’s (“SHLAA”) brief mischaracterizes the scope of Anaqua Springs Homeowners’ Association’s (“Anaqua Springs HOA” or “Anaqua Springs”) Requests for Information (“RFIs”) in two fundamental ways. First, the RFIs are not limited in time to after the formation of SHLAA. Second, SHLAA fails to include the complete instructions to the RFIs that detail what to do in the event a privilege is claimed.

Contrary to SHLAA’s assertions, the RFIs are not limited in time to after the formation of SHLAA.¹ They ask for any communications between and among any individual member or representative of SHLAA and Ms. Cody or Mr. Rangel. They are not limited to “after the formation of SHLAA.” The simple fact that the RFI references members is for ease of reference rather than listing all members. SHLAA’s argument that they are somehow limited is simply untrue. So that the Administrative Law Judges can review the RFIs in their entirety, a complete copy of the propounded RFIs is attached as Exhibit 1 to this response, and a copy of SHLAA’s cover pleading and the response to 2-5 and 2-6 are attached as Exhibit 2. Any communications

¹ If SHLAA only provided documents for *in camera* inspection that post-date the formation of SHLAA, they have not provided a complete response to the RFIs.

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simply means that—communications between or among those people, unlimited to time. Any communications prior to the formation of SHLAA are included within the scope of that RFI.

SHLAA also fails to note that it did not comply with the instructions to complete the RFIs. Exhibit 1 shows the complete definitions and instructions for responding to the RFIs. Instruction number 3 states: “If you object to any portion of a request on the ground of privilege, answer the nonprivileged portion of the Request by providing such non-privileged information as is responsive.” This instruction is directly responsive to the Administrative Law Judges’ comment at the hearing that the non-privileged portions should have been produced. Furthermore, instruction number 11 specifies that any document withheld from production pursuant to a claim of attorney client privilege shall be identified and segregated, and a list shall be furnished of the privileged documents.² Neither instruction was complied with. These instructions are consistent with the Commission’s procedural rules that require any objection to be filed in a separate pleading, and when the objection is founded upon a claim of privilege, directs the objecting party to file a privilege log within two working days of the filing of the objection.³

II. SHLAA DID NOT OBJECT ON THE BASIS OF ATTORNEY CLIENT OR WORK PRODUCT PRIVILEGE

RFI 2-5 asked for the identities and addresses of SHLAA members who own property abutting or within 300 feet of Substation Site 7. SHLAA provided one name and address for Ms. Sally Cody. Then, RFI 2-6 asked for all communications between or among any individual member or representative of SHLAA and the individuals identified in response to RFI 2-5. The response to 2-6 was straightforward: “There were no electronic or written communications.”⁴

² Exhibit 1.

³ 16 Tex. Admin. Code §22.144(d).

⁴ Exhibit 2.

SHLAA asserted no objections to the RFIs.⁵ When preparing for hearing, counsel for Anaqua Springs noticed that the answer to RFI 2-5 was incomplete in that it excluded an individual who also owns property within 300 feet of Substation Site 7. As a result, counsel for Anaqua Springs emailed counsel for SHLAA, that email is attached as Exhibit 3 and is the last email in the chain. In response to that email, counsel for SHLAA for the first time notes that he assumes Anaqua Springs is not looking for privileged information and indicates that they misunderstood the RFI, are unsure whether Mr. Rangel is within 300 feet but will provide the information. That email is the second to last in the chain of emails attached as Exhibit 3. Anaqua Springs' response to that email notes that no attorney client communications are sought but further notes that Ms. Grimes may not be able to cloak her communications as attorney-client.⁶ In response, counsel for SHLAA provided the identity of Mr. Rangel and indicated there are no unprivileged communications with him.

At that point in this proceeding, April 28, 2021, the responses to the RFIs can be summarized as follows:

There are two landowners abutting or within 300 feet of substation site 7, Ms. Cody and Mr. Rangel. There are no responsive documents for Ms. Cody and no objections to the RFI regarding her on any basis. There are responsive documents with respect to Mr. Rangel, but they are all cloaked in attorney client privilege. No other objections or claims of privilege were asserted.

Then, at the hearing on the merits, SHLAA's witness indicated there are WhatsApp chats among SHLAA members, including Ms. Cody, and Mr. Rangel. So, if those chats existed at the time, they should have been produced. If they did not exist at the time, the RFI should have been

⁵ *Id*

⁶ Exhibit 3, top of page 2.

supplemented. Because SHLAA did not assert any objection, much less a privilege objection, they have waived it.

III. SHLAA’S MISCHARACTERIZATION OF THE ATTORNEY-CLIENT PRIVILEGE IS OVERLY BROAD

If the ALJs determine that SHLAA has not waived the privilege and properly responded to the RFIs, the privileges asserted are not as broad as SHLAA contends. Although SHLAA’s brief in support of the asserted privileges discusses the concepts of “client representatives” and the “subject matter test” under TRE 503, it glosses over the key operative language: “made to facilitate the rendition of professional legal services to the client.” TRE 503(B)(1). Thus, straightforward communications between and among Ms. Cody, Mr. Rangel, and other members of SHLAA regarding purely factual matters are not cloaked by the privilege. Even the caselaw cited by SHLAA concedes this point: “the purpose of the attorney client-privilege is to secure the free flow of information *between attorney and client on legal matters*, without the fear that details of their communication will be disclosed. *In re Monsanto*, 998 S.W.2d 917, 922 (Tex. App.—Waco 1999). For example, in deciding that communications were privileged in *Monsanto* the court noted that the communications “ask for suggestions, review, and input” from the attorneys.⁷ Thus, to the extent that the ALJ’s *in camera* review reveals that some of the communications are not regarding legal issues, legal advice, or legal strategy—for example if landowners talk purely about the expected impact on their own land—then those communications are not privileged under the attorney-client privilege.

The first time SHLAA asserted work product privilege was in its brief regarding privilege. SHLAA never asserted it, and again, the PUC Procedural Rules direct that a party must file objections in a separate document to discovery, and then submit a privilege log if they assert the documents contain privileged information. SHLAA did not assert that privilege with

⁷ *Monsanto* at 930-931.

respect to either Ms. Cody or Mr. Rangel. Even if the privilege was properly asserted, which it was not, the work-product privilege applies to communications “made in anticipation of litigation.” Again, to the extent that the *in camera* review reveals communications regarding purely factual matters as opposed to litigation strategy and legal issues, those communications are not protected by the privilege.

IV. SHLAA CANNOT USE THE PRIVILEGE AS A SWORD AND A SHIELD

SHLAA’s membership consists of people with significantly differing impacts depending on route selection. Altair in the south is touched only by Segment 57. The Canyons development is bordered by several different segments, but its residents in the north are impacted differently than the residents in the south and the ones in the east are also impacted differently. Ms. Cody and Mr. Rangel are closest to Substation Site 7, which is on the northern routes. These individuals living in some cases more than two miles apart are impacted differently, yet SHLAA contends they have all willingly agreed to take one position. An inquiry into the communications with two individuals who are most directly impacted by the route supported by SHLAA, and one they say all of their member support is relevant. SHLAA says they all support it. SHLAA cannot then use the attorney client privilege to cloak their assertion that everyone, including those most impacted, agreed to the route.

V. CONCLUSION

SHLAA has attempted to thwart the discovery process. First, they only partially answered the discovery request, contending that the questions related to habitable structures, which they did not. They then responded there were no electronic or written communications. They did not object on grounds of attorney client or work product privilege or any other basis. When their lack of production was called into question, they then asserted attorney client and work product privilege. Then, in their brief on privilege, they attempt to argue that the RFIs are

somehow limited in time to after the formation of SHLAA. They are not. This type of abuse of the discovery process should not be rewarded. For these reasons and the reasons stated above, Anaqua Springs HOA respectfully requests that the ALJs order the production of the withheld documents.

Respectfully submitted,

By: Wendy K. L. Harvel
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**ATTORNEYS FOR ANAQUA SPRINGS
HOMEOWNERS' ASSOCIATION**

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of May 2021, notice of the filing of this document was provided to all parties of record via the PUC Interchange in accordance with SOAH Order No. 3.

Wendy K. L. Harvel
Wendy K. L. Harvel

**SOAH DOCKET NO. 473-21-0247
PUC DOCKET NO. 51023**

APPLICATION OF THE CITY OF SAN ANTONIO ACTING BY AND THROUGH THE CITY PUBLIC SERVICE BOARD (CPS ENERGY) TO AMEND ITS CERTIFICATE OF CONVENIENCE AND NECESSITY FOR THE PROPOSED SCENIC LOOP 138-KV TRANSMISSION LINE § **BEFORE THE STATE OFFICE** § **OF** § **ADMINISTRATIVE HEARINGS** §

**ANAQUA SPRINGS HOMEOWNERS’ ASSOCIATION
SECOND REQUEST FOR INFORMATION TO
SAVE HUNTRESS LANE AREA ASSOCIATION**

Pursuant to 16 Tex. Admin. Code § 22.144 and SOAH Order No. 3, Anaqua Springs Homeowners’ Association (“Anaqua Springs HOA”) requests Save Huntress Lane Area Association (“SHLAA”) provide, within 10 days, the information requested in the attached Exhibit A.

Respectfully submitted,

By: Wendy K. L. Harvel
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**ATTORNEYS FOR ANAQUA SPRINGS
HOMEOWNERS’ ASSOCIATION**

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March 2021, notice of the filing of this document was provided to all parties of record via the PUC Interchange pursuant to SOAH Order No. 3 issued in this docket.



Wendy L. Harvel

EXHIBIT A

I. DEFINITION OF TERMS

The singular herein includes the plural and vice versa; the words “and” and “or” shall be construed as “and/or” in order to bring all information within the scope of the Request. The words, “each,” “all,” and “any,” mean “any and all” or “each and every.”

“Anaqua Springs and/or HOA” refers to Anaqua Springs Homeowners’ Association, a homeowners association owning real property that may be impacted by the proposed transmission routes.

“Application” means the Application filed as PUC Docket No. 51023.

“Commission” shall mean the Public Utility Commission of Texas.

“Communication” shall include all meetings, telephone calls, conversations, discussions, letters, memoranda, notes, and other forms of communication.

“Document” or “Documents” is used in the broadest sense possible and shall mean documents within the possession, custody or control of SHLAA, and includes, but is not limited to, every writing or record of every type and description, such as drafts, corrections, memoranda, letters, tapes, stenographic or handwritten notes, studies, publications, work papers, books, pamphlets, diaries, desk calendars, interoffice communications, records, reports, analyses, bills, receipts, checks, check stubs, checkbooks, invoices, requisitions, papers and forms filed with a court or governmental body, notes, transportation and expense logs, work papers, contracts, statistical and financial statements, corporate records of any kind, charts, graphs, pictures, photographs, photocopies, films, voice recordings, and any other written, recorded or graphic material, however denominated, by whomever prepared, and to whomever addressed, which are in your possession, custody or control. The term “document” also includes all electronic and magnetic data, including e-mail. The term “document” includes all copies of every such writing or record that are not identical copies of the original or that contain any commentary, notes, or markings that do not appear on the original.

“Including” means “including but not limited to” and “including without limitation.”

“Identify” means to state as much information as you now have or that is now subject to your control, or that you may hereafter come to have or that hereafter becomes subject to your control, including the following:

- a. when used in reference to a natural person, state the person’s full name, title, present (or last known) address, telephone number, occupation, present business affiliation or employer, business address, and exact duties and responsibilities of such individual;
- b. when used in reference to an entity, state the full name of the company, organization, association, partnership, or other business enterprise; and

- c. when used in reference to a document, state the date and title of the document and, if already produced in this case, the Bates-number of such document.

“Relate” or “relating to” includes referring to, mentioning, reflecting, containing, pertaining to, evidencing, involving, describing, discussing, responding to, supporting, opposing, constituting or being a draft, copy or summary of, in whole or in part.

“You” and “Your” refers to “SHLAA”, and includes any individual members of SHLAA, employees, agents, attorneys, or consultants working directly or indirectly with SHLAA or any of its members, including, but not limited to, individuals, partnerships, associations, corporations or other legal or business entities, and any of the attorneys or law firms that purport to represent you in this case.

II. INSTRUCTIONS

1. Each request herein extends to any documents or information in your possession and the possession of any of the attorneys or law firms that purport to represent you in this case.
2. Each and every non-identical copy of a document, whether different from the original because of indications of the recipient(s), handwritten notes, marks, attachments, marginalia, or any other reason, is a separate document that must be produced.
3. If you object to any portion of a request on the ground of privilege, answer the nonprivileged portion of the Request by providing such non-privileged information as is responsive.
4. If you object to any portion of a request on any ground other than privilege, you should still provide documents responsive to the remaining non-objectionable portion.
5. Separately for each request to which you object in whole or in part, describe in detail and itemize each basis of your objection.
6. If the basis of an objection to any request, or any portion thereof, is a statute, contract or other agreement, or any other obstacle to production that you claim is based in the law, please identify the basis of that purported obstacle with specificity.
7. Each request herein shall be construed independently, and no request shall be viewed as limiting the scope of any other request. Please indicate where any portion of your document production in response to a request has been covered in your production in response to another request, and please specify the request numbers at issue.
8. If you claim that any document responsive to any request is lost or destroyed, (a) identify and describe such document, (b) describe how the document was lost or destroyed, and (c) identify when the document was lost or destroyed.
9. If you claim that any documents responsive to any request are already in the possession of Anaqua Springs, please identify the document with sufficient specificity to allow Anaqua Springs to locate the document.
10. The requests shall be deemed continuing so as to require additional answers if, after answering such requests, you obtain information upon the basis of which you determine that the answer was incorrect when made, or you become aware that the answer, though correct when made, is no longer true, and the circumstances are such that failure to amend the answer is in substance a knowing concealment.
11. Any document that is withheld from production pursuant to a claim of attorney/client, work product, party communication or investigative privilege shall be identified and shall be segregated and maintained for in camera submission, and a list identifying such withheld documents shall be furnished at the time and place of production. Such list shall state with respect to each document: (a) the privilege under which the document is being withheld; (b) a description of the type of document; (c) a description of the subject matter and purpose of the document; (d) the date the document was prepared; (e) the author and/or signatory

of the document; (f) the identity of the persons to whom the document was sent; and (g) the present custodian of the document.

12. As part of the response to each request for information, please state, at the bottom of the answer, the name and job position of each person who participated in any way, other than providing clerical assistance, in the preparation of the response. Please also state the name of the witness in this docket who will sponsor the answer to the request and may verify the truth of the response.

III. REQUESTS FOR INFORMATION

Anaqua Springs 2-1

Refer to page 23 of Mr. Hughes' testimony. With respect to the five additional habitable structures, please indicate which of those five were constructed between the time of the open house and the time of the Application Amendment.

Anaqua Springs 2-2

Please provide any analysis Mr. Hughes performed on the flood plain and risks of flooding on Substation Site 7.

Anaqua Springs 2-3

Please provide any communications with the property owner(s) who abut or are within 300 feet of Substation Site 7.

Anaqua Springs 2-4

Please provide any information regarding flooding on the property that is the location of Substation Site 7.

Anaqua Springs 2-5

Please provide the identities and addresses of any SHLAA members who own property abutting or within 300 feet of Substation Site 7.

Anaqua Springs 2-6

Please provide any and all communications between or among any individual member or representative of SHLAA and the individuals identified in response to RFI 2-5.

Anaqua Springs 2-7

Please provide any agreements relative to CPS's Application or Amended Application between or among SHLAA, Clearwater Ranch POA, and/or Bexar Ranch, including any agreements between the individual members.

Anaqua Springs 2-8

Please provide any agreements between SHLAA and CPS relative to the Application or Amended Application.

Anaqua Springs 2-9

Admit or deny that the property owners in the Altair Subdivision are not directly impacted by Segments 26a, 38, and 43.

Anaqua Springs 2-10

Admit or deny that there are no habitable structures within 300 feet of Segments 38 on SHLAA members' properties. If anything other than admit, please provide a map showing the location of those habitable structures.

SOAH DOCKET NO. 473-21-0247; PUC DOCKET NO. 51023

**APPL. OF THE CITY OF SAN ANTONIO §
TO AMEND ITS [CCN] FOR THE §
SCENIC LOOP 138-KV TRANS. LINE IN § STATE OFFICE OF
BEXAR COUNTY, TX § ADMINISTRATIVE HEARINGS**

**RESPONSE TO ANAQUA SPRINGS HOA’S
SECOND RFI TO SAVE HUNTRESS LANE AREA ASSOCIATION**

Save Huntress Lane Area Association (“SHLAA”), an intervenor, submits this response to the Second Request for Information (“RFI”) from Anaqua Springs Homeowners Association (“AS”), which was received on March 12, 2021, therefore this response is timely. Attached hereto and incorporated herein by reference are the written responses thereto. To the extent that any of the RFI instructions or definitions seek or purport to impose obligations or conditions or to expand the scope of permissible discovery beyond that which is established by the Commission’s procedural rules or any orders entered in this docket, the responses will comply with what is required under those rules or orders. Such responses are also made without waiver of the right to contest the admissibility of any such matters upon hearing. It is hereby stipulated that the responses may be treated by all parties as if they were filed under oath.

Respectfully submitted,

By: /s/ Thomas K Anson
Thomas K. Anson (SBN 01268200)
512-499-3608 / 512-536-5718 (fax)
TAnson@clarkhill.com
Clark Hill PLC
720 Brazos St. Suite 700, Austin, TX 78701

ATTORNEYS FOR SHLAA

Certificate of Service: I certify I served the foregoing under SOAH Order No. 3 on Mar. 22, 2021.

/s/ Thomas K Anson
Thomas K. Anson

PUC Docket No. 51023

SHLAA Response to AS's 2d RFI

AS-2-5 Please provide the identities and addresses of any SHLAA members who own property abutting or within 300 feet of Substation Site 7.

Response: Ms. Sally Cody, 9627 Huntress Lane, San Antonio, Texas 78255.

Prepared By: Counsel
Sponsoring Witness: Cynthia Grimes

PUC Docket No. 51023

SHLAA Response to AS's 2d RFI

AS-2-6 Please provide any and all communications between or among any individual member or representative of SHLAA and the individuals identified in response to RFI 2-5.

Response: There were no electronic or written communications.

Prepared By: Counsel
Sponsoring Witness: Cynthia Grimes

From: Anson, Tom <TAnson@ClarkHill.com>
Sent: Wednesday, April 28, 2021 7:08 PM
To: Wendy Harvel <wendy.harvel@crtxlaw.com>
Subject: RE: Discovery clarification

Dear Wendy:

Thank you for your clarification.

The neighbor to the east of Ms. Cody is Mr. Manuel Rangel, at 9617 Huntress Lane. He is listed in the SHLAA motion to intervene of August 11, 2020, available at http://interchange.puc.texas.gov/Documents/51023_26_1080019.PDF. There are no communications with him that are not privileged under TRE 503 and TRCP 192.5.

Please advise if you want us to formally supplement our RFI response to the AS 2d RFI accordingly, or if this informal information is sufficient. Thanks.

Sincerely,

CLARK HILL Strasburger

Thomas K. Anson • Clark Hill Strasburger
720 Brazos Street, Suite 700, Austin, TX 78701
512.499.3608 • Fax 512.536.5718 • www.clarkhill.com

From: Wendy Harvel <wendy.harvel@crtxlaw.com>
Sent: Tuesday, April 27, 2021 12:08 PM
To: Anson, Tom <TAnson@ClarkHill.com>
Subject: RE: Discovery clarification

[External Message]

Thanks, Tom. Yes, the neighbor to the east of Ms. Cody is what I would like. AS 2-5 asks for members who own property abutting or within 300 feet of Substation Site 7 and does not reference habitable structures, so that neighbor should be included in your response. I am not seeking attorney client communications with that individual. However, I do not believe that Ms. Grimes can cloak her communications as attorney-client unless she was specifically providing legal advice.

Wendy

Wendy Harvel
512-879-0970
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From: Anson, Tom <TAnson@ClarkHill.com>
Sent: Tuesday, April 27, 2021 11:58 AM
To: Wendy Harvel <wendy.harvel@crtxlaw.com>
Subject: RE: Discovery clarification

I assume you are talking about the SHLAA responses to AS-2-5 and AS-2-6. I also assume you are not asking for any privileged communications. I further assume that we may not have understood your question properly given your clarification request.

With regard to both of the adjacent neighbors to Ms. Cody, your reference to 300 feet was understood to refer to habitable structures, so if we misunderstood I apologize. Because neither one of the adjoining neighbors abuts Substation Site 7 and neither one has a habitable structure within 300 feet of Substation Site 7, we thought we had responded as requested.

As for property boundaries, we think the property line of the neighbor on the west is definitely beyond 300 feet from the Substation Site 7, and we are uncertain as to whether the property line for the neighbor on the east is beyond 300 feet from the Substation Site 7. We can nevertheless provide you with information regarding that eastern neighbor if property line rather than habitable structure information was what you were focused upon in your request.

Please advise, thanks.

Sincerely,

CLARK HILL Strasburger

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From: Wendy Harvel <wendy.harvel@crtxlaw.com>
Sent: Friday, April 23, 2021 9:47 AM
To: Anson, Tom <TAnson@ClarkHill.com>
Subject: Discovery clarification

[External Message]

Good morning Tom,

I'm looking at your discovery answers related to individuals in SHLAA who own property that abuts substation site 7 or is within 300 feet of the site. You identified Sally Cody, who has property abutting the site, but you did not identify her adjacent neighbors to her east and west. The western neighbors may be more than 300 feet from the site, but the eastern neighbor looks to be much closer than that. Would you please check and provide that information if it needs to be supplemented, including any communications with that individual? Thanks.

Wendy

Wendy Harvel
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