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**SOAH DOCKET NO. 473-24-13127
PUC DOCKET NO. 54617**

APPLICATION OF TEXAS WATER UTILITIES, L.P. AND SOUTHERN HORIZONS DEVELOPMENT, INC. FOR SALE, TRANSFER, OR MERGER OF FACILITIES AND CERTIFICATE RIGHTS IN LIBERTY AND MONTGOMERY COUNTIES	§ § § § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
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**TEXAS WATER UTILITIES, L.P.'S OBJECTION TO
OFFICE OF PUBLIC UTILITY COUNSEL'S EXHIBIT NOS. 1 AND 2 AND
COMMISSION STAFF'S EXHIBIT NOS. 3, 4, AND 5**

Texas Water Utilities, L.P. (TWU) files this objection to Exhibit Nos. 1 and 2 pre-filed by the Office of Public Utility Counsel (OPUC), and Exhibit Nos. 3, 4, and 5 pre-filed by the Staff (Staff) of the Public Utility Commission of Texas (Commission).

I. EXECUTIVE SUMMARY

To maintain a relevant record and for this proceeding that supports judicial economy, TWU respectfully objects to both of OPUC's exhibits and Commission Staff Exhibit Nos. 3, 4, and 5 as inadmissible. TWU objects to OPUC Exhibit Nos. 1 and 2 because they are statements of position filed pursuant to 16 Texas Administrative Code (TAC) § 22.124(a). Both the purpose of filing a statement of position under the Commission's procedural rules and previous State Office of Administrative Hearings (SOAH) orders confirm that statements of position are not evidence. The dangers of admitting statements of position as evidence also outweigh the benefits because: (1) it leads to circular arguments whereby a party is using a pleading stating its position as evidence of its position; and (2) it allows a party to admit evidence while escaping cross examination on that evidence. Along with its evidentiary objection, TWU objects to OPUC Exhibit No. 2 because it was not timely filed under the procedural schedule established for this proceeding or 16 TAC § 22.124(a).

TWU objects to Commission Staff Exhibit Nos. 3 and 4 because a party may not use its own discovery responses offensively.¹ Further, portions of Exhibit No. 3 and all of Exhibit No. 5 are irrelevant to this proceeding, and therefore inadmissible, because they include arguments that

¹ Tex. R. Civ. Proc. 197.3.

have already been overruled by the SOAH administrative law judge (ALJ), rather than facts related to issues of consequence in determining this proceeding. Admitting Commission Staff Exhibit Nos. 3, 4, and 5 does not serve any evidentiary purpose and could have the unintended consequence of muddying the record with information that will not aid in determining the contested issues in this proceeding. Based on the foregoing, TWU objects to the admission of OPUC Exhibit Nos. 1 and 2 and Commission Staff Exhibit Nos. 3, 4, and 5.

II. OBJECTION TO OPUC'S EXHIBITS

Pursuant to the following, TWU objects to the admission of OPUC's Exhibit Nos. 1 and 2. OPUC's list of exhibits for admission into the record includes only its Statement of Position and Supplemental Statement of Position, neither of which constitute evidence. Under 16 TAC § 22.124(a), the purpose of a statement of position is to set forth a party's position on the issues that the party intends to litigate. While it is true that OPUC could not participate in the hearing on the merits but-for the filing of its statements of position, that does not render these filings admissible as evidence.

In general, evidence is the facts or expert opinions a party relies on to support its position on an issue. In fact, this has been previously clarified by SOAH, "[a] statement of position clarifies a party's position but is not sworn-to, is not evidence, and is not subject to cross-examination."² Accordingly, the admission of a document that simply states a party's position would allow that party to then cite to that document as evidence supporting its position. In the absence of some independent source to support OPUC's position on the issues, admitting OPUC's exhibits would allow it to present a brief that is entirely circular in its reasoning. Stated another way, OPUC would be citing to a statement of its position on an issue to demonstrate that its position on the issue is supported by the evidentiary record in this case. Accordingly, OPUC's exhibits should be denied to prevent this type of specious argument.

Admitting statements regarding OPUC's position on an issue that are not supported by the testimony of an actual witness will also unfairly prejudice the other parties to this proceeding by denying them of the right to cross-examine OPUC. Conversely, denying the admission of

² *Application of Oncor Electric Delivery Company LLC to Amend its Certificate of Convenience and Necessity for the Exchange Switch-Keller Magnolia Substation 138-KV Transmission Line in Tarrant County*, Docket No. 55574, SOAH Order No. 1 (Oct. 10, 2023); *Application of Oncor Electric Delivery Company LLC to Amend its Certificate of Convenience and Necessity for the Exchange-Roanoke 138/345-KV Transmission Line in Tarrant and Denton Counties*, Docket No. 55575, SOAH Order No. 1 (Oct. 11, 2023).

OPUC's Statement of Position and Supplemental Statement of Position will not unfairly prejudice OPUC, because OPUC will still have the opportunity to present arguments on any disputed issue in this proceeding in post-hearing briefing.

Finally, in addition to TWU's evidentiary objection to OPUC Exhibit No. 2 under 16 TAC § 22.124(a) explained above, TWU also objects to OPUC Exhibit No. 2 because it was not timely filed. The procedural schedule in SOAH Order No. 3 established May 9, 2024, as the deadline for intervenor statements of position.³ The default deadline for a statement of position per the Commission's rules is three business days before the hearing on the merits.⁴ The hearing on the merits is scheduled to begin on July 23, 2024, and OPUC's Supplemental Statement of Position was filed on July 19, 2024. If you include July 19th, there are only two business days between the date the Supplemental Statement of Position was filed and the beginning of the hearing on the merits. Therefore, OPUC's Supplemental Statement of Position should be stricken from the record altogether because it was not timely filed per SOAH Order No. 3 or 16 TAC § 22.124(a), and OPUC should be barred from litigating the issues addressed therein.

III. OBJECTION TO COMMISSION STAFF'S EXHIBITS

Based on the following, TWU objects to the admission of Commission Staff Exhibit Nos. 3, 4, and 5.

Exhibit Nos. 3 and 4 are inadmissible because allowing a party to admit its own discovery responses directly contravenes Tex. R. Civ. Proc. 197.3, which provides that "answers to interrogatories may be used only against the responding party."⁵ Admitting all of Commission Staff's responses to the discovery propounded by TWU would open the door to Commission Staff's offensive use of its responses, which is not permitted.⁶ Allowing the admission of a party's own discovery responses could also harm the integrity of the discovery process because it could encourage responses that go beyond the question asked knowing that the response can later be admitted as evidence and cited to in briefing.

³ SOAH Order No. 3 Scheduling Hearing on the Merits at 2 (Apr. 3, 2024).

⁴ 16 TAC § 22.124(a).

⁵ See *Maxwell v. Willis*, 316 S.W.3d 680, 685–686 (Tex. App.—Eastland 2010, no pet.) (holding that trial court erred in relying on the moving party's own interrogatory answer in grant the party summary judgment).

⁶ TWU acknowledges that it is seeking to admit its own discovery responses as Exhibit No. TWU-13. However, the admission of this exhibit is for the sole purpose of supporting stipulated findings of fact and conclusions of law on uncontested issues.

Exhibit No. 3 is also objectionable on the basis that several portions are not relevant evidence, and instead consist of argument by Commission Staff as to the objectionable nature of certain requests for information—objections that were overruled by the SOAH ALJ when he granted TWU’s Motion to Compel.⁷ The test for relevance is whether certain evidence has any tendency to make a fact that is of consequence in determining the action more or less probable than that fact would be without the evidence.⁸ The facts of consequence in determining this action are the facts that speak to the issues identified in the Commission’s Preliminary Order.⁹ The arguments raised in Commission Staff’s Response to TWU’s Motion to Compel are not relevant as: (1) they are not facts; and (2) they do not address the issues identified in the Preliminary Order. To avoid unnecessarily cluttering the record for this proceeding with documents that serve no evidentiary purpose, TWU objects to Commission Staff’s Exhibit No. 3.

TWU further objects to Commission Staff Exhibit Nos. 3 and 5. First and foremost, the SOAH ALJ has already overruled these objections, rendering the issues moot. To allow a party to admit an objection that has been overruled as evidence flies in the face of judicial economy. Moreover, as it relates to Exhibit No. 5, Commission Staff had the opportunity to explore the portion of Mr. Bahr’s testimony to which it objected through discovery, and did not. The admission of Commission Staff’s objection is not a proper procedural substitute for its failure to exercise its discovery privileges, and therefore, the admission of Commission Staff Exhibit No. 5 should be denied, in addition to Exhibit No. 3.

Finally, Commission Staff’s arguments as to why a portion of TWU witness Brian Bahr’s rebuttal testimony was not admissible is not relevant evidence. As stated previously, the test for relevance is whether certain evidence has any tendency to make a fact that is of consequence in determining the action more or less probable than that fact would be without the evidence,¹⁰ and the facts of consequence in determining this action are the facts that speak to the issues identified in the Commission’s Preliminary Order. Similar to the content of Exhibit No. 3, the arguments raised in Commission Staff’s objection to Mr. Bahr’s testimony are not relevant because: (1) they are not facts; and (2) they do not address the issues identified in the Preliminary Order.

⁷ Texas Water Utilities, L.P.’s Motion to Compel Discovery Responses from Commission Staff (Jun. 13, 2024); SOAH Order Granting Motion to Compel (Jun. 17, 2024).

⁸ Tex. R. Evid. 401.

⁹ Preliminary Order at 4–11 (Mar. 7, 2024).

¹⁰ Tex. R. Evid. 401.

To avoid unnecessarily cluttering the record for this proceeding with documents that serve no evidentiary purpose, TWU objects to Commission Staff Exhibit No. 5.


IV. CONCLUSION

TWU objects to OPUC Exhibit Nos. 1 and 2 and Commission Staff Exhibit Nos. 3, 4, and 5 and respectfully requests that the SOAH ALJ deny their admission into the evidentiary record for this proceeding. Additionally, TWU requests any further relief to which it has shown itself entitled.

Respectfully submitted,

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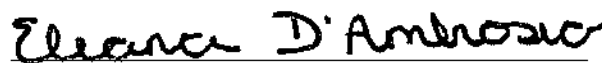
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CERTIFICATE OF SERVICE

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 July 22, 2024, in accordance with the Order Suspending Rules, issued in Project No. 50664.


Eleanor D' Ambrosio