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SOAH DOCKET NO. 473-24-13127
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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 MOTION TO COMPEL DISCOVERY
RESPONSES FROM COMMISSION STAFF**

Texas Water Utilities, L.P. (TWU) moves to compel the responses of the Staff (Staff) of the Public Utility Commission of Texas (Commission) to Request for Information (RFI) Nos. TWU 1-5, 1-6, 1-7, 1-9, 1-10, 1-11, 1-14, 1-15, and 1-16. Pursuant to 16 Texas Administrative Code (TAC) § 22.144(e).

I. BACKGROUND

On June 5, 2024, TWU filed its first RFI to Commission Staff. On June 10, 2024, Commission Staff filed its objections to 11 of the 17 questions included in TWU's First RFI to Commission Staff. TWU now moves to compel the responses to nine of the 11 questions subject to Commission Staff's objections. Under SOAH Order No. 3 filed in this proceeding on April 3, 2024, a motion to compel discovery responses must be filed within three working days of the date the objection is filed.¹ Therefore, this motion is timely filed.

II. MOTION TO COMPEL

TWU does not wish to engage in unnecessary discovery disputes, so as to avoid the need for this motion, TWU used good faith efforts to negotiate with Commission Staff to come to an agreement regarding these objections but was unsuccessful. TWU now moves to compel Commission Staff's responses so that it may adequately prepare its rebuttal testimony, which is currently due on June 20, 2024. This case involves issues of first impression regarding a request for initial rates under Texas Water Code (TWC) § 13.3011, and the discovery in question was propounded by TWU to better understand Commission Staff's recommendation regarding this issue. Permitting TWU the opportunity to rebut Commission Staff in written testimony as

¹ SOAH Order No. 3 Scheduling Hearing on the Merits at 3 (Apr. 3, 2024).

opposed to live at the hearing on the merits has the real potential to conserve the parties' resources. Each RFI to which Commission Staff has objected is reproduced below along with the objection itself. TWU is not moving to compel responses to RFI Nos. TWU 1-12 and 1-17.

TWU 1-5 Reference the table in the direct testimony of James Harville at the bottom of page 11 and top of page 12 and the following billing comparison for a customer using 5,000 gallons per month.

Southern Horizons Current Rates	TWU's Requested Initial Rates
$32.20 + (3 * 3.18) = 41.74$	$48.37 + (2 * 6.48) + (3 * 7.98) = 85.27$

Please admit or deny that 63% of the \$45.53 difference in customer bills is attributable to the difference in gallonage rates as follows:

$$85.27 - 41.74 = 43.53$$

$$3 * 3.18 = 9.54$$

$$(2 * 6.48) + (3 * 7.98) = 36.90$$

$$36.90 - 9.54 = 27.36$$

$$27.36 / 43.53 = 0.63$$

Objection: Staff objects to this question, as it requests Staff to opine on calculations that are beyond the scope of Staff's direct testimony.

TWU 1-6 Reference the table in the direct testimony of James Harville at the bottom of page 11 and top of page 12 and the following billing comparison for a customer using 5,000 gallons per month.

Southern Horizons Current Rates	TWU's Villas of Willowbrook Phase 4 Rates
$32.20 + (3 * 3.18) = 41.74$	$31.17 + (2 * 3.70) + (3 * 6.33) = 57.56$

Please admit or deny that 106.5% of the \$16.85 difference in customer bills is attributable to the difference in gallonage rates as follows:

$$57.56 - 41.74 = 15.82$$

$$3 * 3.18 = 9.54$$

$$(2 * 3.70) + (3 * 6.33) = 26.39$$

$$26.39 - 9.54 = 16.85$$

$$16.85 / 15.82 = 1.065$$

Objection: Staff objects to this question, as it requests Staff to opine on calculations that are beyond the scope of Staff's direct testimony.

Commission Staff does not cite to any rule of evidence or procedure limiting discovery to the scope of direct testimony. Moreover, TWU was not required to propound RFI Nos. TWU 1-5 and 1-6 and instead could have reserved these questions for cross examination during the hearing on the merits. Under Texas Rule of Evidence 611(b), “a witness may be cross-examined on any relevant matter, including credibility.” 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.²

Here, Commission Staff witness James Harville has filed testimony recommending the “potential implementation” of initial rates that are lower than the initial rates requested by TWU.³ He opines that these lower rates could be “applied as a contingency to initial rates to alleviate rate shock for the current customers”⁴ Although Mr. Harville does not define or otherwise address what he means by “rate shock,” TWU is construing his testimony as referring to the amount of a customer’s bill at existing rates compared to the amount of a customer’s bill at TWU’s requested initial rates. Accordingly, both RFI Nos. TWU 1-5 and 1-6 present billing comparisons at 5,000 gallons of usage along with calculations demonstrating how much of the difference in bills is attributable to the difference in the gallonage charges (as opposed to the minimum monthly charge). These RFIs are not outside the scope of this proceeding and are intended to confirm calculations during discovery and avoid the need to do such calculations on the stand, expediting the hearing process.

TWU 1-7 Please admit or deny that TWU’s application has not been amended or supplemented-i.e., has not changed-since Commission Staff filed its Recommendation on Approval of the Transaction on July 17, 2023. If the response is anything other than an unqualified admit, please explain.

Objection: Staff objects to this question, as it requests Staff to locate easily accessible publicly available information. Further, TWU is or should be aware of any amendments or supplements to its application since July 17, 2023. Staff suggests that TWU continue to visit the Commission’s Interchange available at <https://interchange.puc.texas.gov>.

² Tex. R. Evid. 401.

³ Direct Testimony of James Harville at 12–13 (May 30, 2024) (Harville Direct).

⁴ *Id.* at 12.

Commission Staff's objection amounts to the assertion that the record speaks for itself. That is a moot point. The purpose of a request for admission is to ask an opposing party to admit the truth of any matter within the scope of discovery, including statements of opinion or fact.⁵ Staff has not asserted that the presence or absence of filings made by TWU within a specific time frame are not within the scope of discovery. Further, by declining to respond to this question, Commission Staff is depriving TWU of the opportunity (1) to determine whether Commission Staff's view of facts related to filings made in this proceeding is the same or different from TWU's; and (2) in the event Commission Staff's view differs, to understand how and why their view differs. Consequently, Commission Staff should be compelled to respond to this question not only because it constitutes a proper request for admission but also to prevent prejudicing TWU's ability to prepare its rebuttal testimony.

TWU 1-9 Reference the direct testimony of James Harville at 12:1-14:2. Please explain why Mr. Harville's recommendation regarding TWU's request for initial rates under Texas Water Code (TWC) § 13.3011 has changed from the recommendation provided in the memorandum of James Harville filed with Commission Staff's Recommendation on Approval of the Transaction on July 17, 2023.

Objection: Staff objects to this question, as it presupposes Staff's response to TWU 1-8 and thus appears to be propounded for the sole purpose of being argumentative and not reasonably calculated to lead to the discovery of admissible evidence.

Commission Staff is objecting to the premise of RFI No. TWU 1-9, which is not a proper objection under the Commission's procedural rules or the Texas Rules of Evidence or Texas Rules Civil Procedure. If Commission Staff intends to respond to TWU 1-8 with a denial and supporting explanation, then Commission Staff can simply respond to TWU 1-9 with the statement, "Please see the response to TWU 1-8." Commission Staff also has the option to respond to TWU 1-9 with a statement that the recommendation in Mr. Harville's testimony regarding TWU's request for initial rates has not changed from the recommendation provided in his memorandum filed on July 17, 2023. Neither of these approaches would be unduly burdensome or require a significant amount of Commission Staff resources. Accordingly, Commission Staff's objection should be overruled.

⁵ 16 TAC § 22.144(j); Tex. R. Civ. P. 198.1.

TWU 1-10 Reference the direct testimony of James Harville at 12:1-14:2. Please admit or deny that “rate shock” is not a defined term in the Texas Water Code, 16 TAC Chapter 24, or Commission precedent addressing applications filed by water and wastewater utilities. If anything other than an unqualified admit, please explain.

Objection: Staff objects to this question, as it requests Staff to locate easily accessible publicly available information. Staff suggests that TWU review the Texas Water Code, 16 TAC Chapter 24, and the Commission’s Interchange at <https://interchange.puc.texas.gov/>.

Whether the Texas Water Code, Commission rules under 16 TAC Chapter 24, or documents establishing Commission precedent are publicly available to TWU does not relieve Commission Staff from responding to this question. Like RFI No. TWU 1-7, this question is asking Commission Staff to admit the truth of a matter within the scope of discovery. More specifically, this RFI is asking Staff to admit to the truth of a statement that is critical to understanding the meaning of the term “rate shock,” which is utilized in the Direct Testimony of James Harville as follows:

However, Texas Water has optional phased-in rate schedules in its tariff which could be applied as a contingency to initial rates to alleviate rate shock for the current customers and ratepayer parties in this docket. Therefore, I recommend the potential implementation of the following phased rate schedule[.]⁶

Under Tex. R. Civ. P. 192.3(e)(4), a testifying expert’s “mental impressions and opinions formed or made in connection with the case in which discovery is sought, and any methods used to derive them” are discoverable. Mr. Harville does not opine further as to what rate shock means, what standard he used to determine rate shock would result from the rates TWU has requested, why or how the rates he recommends would alleviate rate shock, etc. Accordingly, a request that Commission Staff admit or deny the truth of a factual statement about the existence of water statutes or rules defining rate shock or Commission precedent arising from a case involving a water utility defining rate shock is a proper request for admission and is within the scope of discovery for this expert testimony.

TWU 1-11 Reference the direct testimony of James Harville at 12:1-14:2. Please define the term “rate shock” as used by Mr. Harville and explain the basis for this definition.

⁶ Harville Direct at 12–13.

Objection: Staff objects to this question, as it requests Staff to make a legal conclusion regarding the definition of “rate shock”. TWU 1-10 requests Staff to search the Water Code, Texas Administrative Code, and Commission precedent for a legal definition of “rate shock”. Therefore, Staff additionally objects to this question, as it requests Staff to review easily accessible publicly available information.

This question is not asking for a legal definition of the term “rate shock” per se. As explained previously, this question is asking for the meaning of “rate shock” as used by Mr. Harville to support his recommendation regarding the initial rates the Commission should approve under TWC § 13.3011. In other words, it is asking for information about a mental impression or opinion Mr. Harville has formed or made in the case.⁷ It is not uncommon for Commission Staff to discuss previous Commission decisions as support for recommendations in their testimony. For example, a Commission Staff witness in the most recent rate case filed by Oncor Electric Delivery Company, LLC cited to a previous Commission decision regarding how to properly evaluate rate impacts to determine if a gradualism adjustment is warranted.⁸ Staff’s recommendation implies that the existence of rate shock is a fact that makes it more or less likely that the initial rates requested by TWU are in the public interest, and the public interest inquiry is fundamental in deciding this case. Therefore, discovery designed to obtain a better understanding of the basis for Mr. Harville’s one-sentence assertion regarding rate shock is relevant to this proceeding and Commission Staff’s objection should be overruled.

TWU 1-14 Please confirm that the dockets listed below are the only dockets in which Mr. Harville has filed a recommendation addressing a request for initial rates under TWC § 13.3011: Docket Nos. 54171, 54341, 55304, and 55817. If this is not a complete list, please provide the additional docket numbers.

Objection: Staff objects to this question, as it requests Staff to locate easily accessible publicly available information. Staff suggests that TWU continue to visit the Commission’s Interchange available at <https://interchange.puc.texas.gov>.

TWU 1-15 In any sale, transfer, or merger docket in which Mr. Harville has made a recommendation on the transaction, has Mr. Harvell ever recommended an initial rate that differs from the initial rate requested by the transferee? Please provide the docket number that contains each recommendation responsive to this question.

⁷ Tex. R. Civ. P. 192.3(e)(4).

⁸ *Application of Oncor Electric Delivery Company, LLC for Authority to Change Rates*, Docket No. 53061, Direct Testimony of Adrian Narvaez at 15–17 (Sept. 16, 2022).

Objection: Staff objects to this question, as it requests Staff to locate easily accessible publicly available information. Staff suggests that TWU continue to visit the Commission's Interchange available at <https://interchange.puc.texas.gov>.

Commission Staff does not cite to any rule of evidence or procedure as support for its objections to RFI Nos. TWU 1-14 and 1-15. The claim that the information needed to answer these questions is publicly available also does not explain why these are not proper discovery requests. Further, TWU did in fact use the publicly available information about dockets involving applications for a sale, transfer, or merger to compile the list of dockets included in this RFI No. TWU 1-14. Now, TWU is simply asking Commission Staff to review the list and add any dockets that are missing. Regarding the full universe of dockets, TWU is then inquiring about only those dockets in which Mr. Harville made a specific type of recommendation.

Both RFI Nos. TWU 1-14 and 1-15 are limited to only those dockets in which Mr. Harville has made a recommendation (as opposed to inquiring about any docket in which Commission Staff has filed a recommendation addressing a request for initial rates), and therefore, are not overly broad. They are also not unduly burdensome as Mr. Harville is in the best position to identify both the complete universe of proceedings in which he has opined on a request for initial rates under TWC § 13.3011 and the proceedings in which he recommended an initial rate that was not the initial rate requested in the application.

TWU 1-16 For each docket identified in response to TWU 1-15, please provide the analysis underlying Mr. Harville's decision to recommend an initial rate that differed from the initial rate requested by the transferee.

Objection: Staff objects to this question to the extent that it requests a summary or analysis of information beyond the scope of Staff's direct testimony and TWU's application. Staff additionally objects to this request to the extent that it requests confidential information related to Docket No. 54341.

Mr. Harville's direct testimony offers an opinion about the initial rates the Commission should approve in this proceeding, but provides almost no analysis to support this recommendation. The analyses Mr. Harville has used to evaluate requests for initial rates made in other proceedings could offer some insight into his approach in this case. In addition, Mr. Harville's recommendations in other proceedings constitute an opposing party's statement under Texas Rule of Evidence 801(e)(2), which is admissible evidence. Therefore, RFI No. TWU 1-16 is reasonably calculated to lead to the discovery of admissible evidence regardless of whether it

is in the scope of Mr. Harville's direct testimony,⁹ and Commission Staff's objection should be overruled.

III. CONCLUSION

TWU respectfully requests the entry of an order overruling Commission Staff's objections and compelling the responses to RFI Nos. TWU 1-5, 1-6, 1-7, 1-9, 1-10, 1-11, 1-14, 1-15, and 1-16. These RFIs are reasonably calculated to lead to the discovery of admissible evidence, address facts that are relevant to this proceeding, or are proper requests for admission. Additionally, TWU requests any further relief to which it may be justly entitled.

Respectfully submitted,

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⁹ Tex. R. Civ. P. 192.3(a).

CERTIFICATE OF SERVICE

I hereby 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 June 13, 2024, in accordance with the Order Suspending Rules, issued in Project No. 50664.


Eleanor D'Ambrosio
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