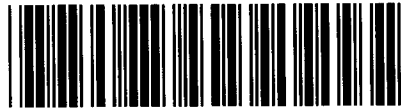




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THE STATE OFFICE

ADMINISTRATIVE HEARINGS

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**SOAH DOCKET NO. 473-14-5144.WS
PUC DOCKET NO. 42866**

PETITION OF TRAVIS COUNTY	§	BEFORE THE STATE OFFICE
MUNICIPAL UTILITY DISTRICT NO. 12	§	
APPEALING CHANGE OF	§	
WHOLESALE WATER RATES	§	
IMPLEMENTED BY WEST	§	
TRAVIS COUNTY PUBLIC UTILITY	§	OF
AGENCY, CITY OF BEE CAVE, TEXAS	§	
HAYS COUNTY, TEXAS AND WEST	§	
TRAVIS COUNTY MUNICIPAL	§	
UTILITY DISTRICT NO. 5	§	
		ADMINISTRATIVE HEARINGS

**TRAVIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 12'S RESPONSE TO
WEST TRAVIS COUNTY PUBLIC UTILITY AGENCY'S
OBJECTIONS TO AND MOTION TO STRIKE THE PREFILED
DIRECT TESTIMONYS OF JAY JOYCE, JAY ZARNIKAU,
AND JOSEPH A. DIQUINZIO, JR.**

COMES NOW Travis County Municipal Utility District No. 12 ("TCMUD 12 or District") and in accordance with SOAH Order No. 12 timely files this Response to West Travis County Public Utility Agency's ("WTCPUA's") Objections to and Motion to Strike the Prefiled Direct Testimonies of Jay Joyce, Jay Zarnikau, and Joseph A. DiQuinzio, Jr. ("Objection"), and in support thereof would respectfully show the following:

I. INTRODUCTION

WTCPUA filed its Motion to Strike portions of TCMUD 12's prefiled testimony on Tuesday, March 17, 2015. Pursuant to agreement of the parties and SOAH Order No. 12, the deadline to file responses to objections and motions to strike prefiled Direct evidence is Tuesday, March 31, 2015. This Response is therefore timely filed. In this Response, TCMUD 12 demonstrates that the identified portions of the TCMUD 12's prefiled testimony are admissible under the Texas Rules of Civil Evidence and P.U.C. PROC. R. 22.221 and WTCPUA's Motion to Strike should be denied in each instance.

II. RESPONSES CONCERNING WTCPUA’S OBJECTIONS TO PREFILED DIRECT TESTIMONY OF JAY JOYCE

A. WTCPUA’s Objections that Cost of Service Issues Are Not Relevant – TRE 402

WTCPUA objects to portions of Mr. Joyce’s testimony based on their claim that Mr. Joyce’s “testimony and exhibits go well beyond the scope of proper and admissible testimony because they are solely concerned with an analysis of cost of service and allocation issues, and therefore constitute irrelevant evidence under Tex. R. Evid. 402.”¹

At the core of WTCPUA’s argument is the assertion that P.U.C. SUBST. R. 24.133(b), which prevents the Commission from determining whether the protested rate adversely affects the public interest based on an analysis of the seller’s cost of service, prohibits any examination of the sellers cost of service methodology. The legal underpinnings for this argument cited by WTCPUA – certain rulings in the *Corsicana* case, certain evidentiary rulings in this case, changes between the cash needs basis and the utility basis, and the distinction between “cost of service” and “revenue requirement” – do not support the argument which the WTCPUA has built upon them.² Each of WTCPUA’s Relevance-related arguments is addressed in the following four subsections of this Reply. In addition, in subsection five below, TCMUD 12 identifies portions of Mr. Joyce’s testimony listed in this part of WTCPUA’s Objections, which are not germane to WTCPUA’s relevance-related arguments.

1. The *Corsicana* Rulings Cited by WTCPUA Are Not Applicable in This Case.

In support of its argument, WTCPUA cites to certain rulings in the *Corsicana* case and claims that those rulings provide precedential guidance in this case.³ The portions of the *Corsicana* PFD cited by WTCPUA, however, clearly and expressly address an argument raised by the Petitioners in the *Corsicana* case that has not been raised by TCMUD No. 12 in this case. As such, the *Corsicana* PFD does not support the WTCPUA’s argument or provide guidance in this matter.

¹ WTCPUA Objection at 5; see p. 8 – 10 of WTCPUA’s Objection for the specific portions of Mr. Joyce’s testimony which are the subject of the Relevance Objection.

² *Id.* at 5–6.

³ *Id.* at 6.

In support of its argument, WTCPUA cites pages 16 and 17 of the *Corsicana* PFD.⁴ Page 16 of the *Corsicana* PFD begins with the opening line, “Throughout the case, Ratepayers have claimed that the protested rates are not based on Corsicana’s cost of service.”⁵ In the next paragraph, the ALJ reiterates that point, stating that “The Ratepayers contend that Corsicana’s rates exceed the reasonable cost of serving them and evidence Corsicana’s abuse of monopoly power.”⁶ The significance of this point is laid out succinctly on the second page of the *Corsicana* PFD, where the ALJ explains that the rationale behind the Public Interest Rule’s prohibition against cost of service arguments was to keep purchasers from making arguments that the public interest was violated because the rates exceeded the seller’s cost of service:

When it adopted its wholesale-service rules, the Commission explained them in detail in its preamble. The Commission chose to end a policy that had nearly automatically cancelled rates set by contract and substituted rates based on cost of service. It instituted the public-interest review process to give deference to the contractual agreements between the purchaser and seller. In doing so, the Commission sought to balance the parties’ constitutional right to contract with the Commission’s statutory authority to review wholesale rates. The Commission favored a conservative approach when evaluating evidence regarding the public-interest criteria to determine whether to cancel a rate that was set pursuant to a contract. The Commission stated its legal conclusion that the *public interest does not demand that a wholesale rate equal the seller’s cost of service. That is why the Commission decided that it would not consider the seller’s cost of services in the public-interest hearing.*⁷

In light of this passage in the *Corsicana* PFD and the Public Interest Rule’s preamble, the ALJ concluded that the Public Interest Rule prohibited *Corsicana* Petitioners’ claim that the protested rate violated the public interest because the rate exceeded Corsicana’s cost of service. But TCMUD 12 makes no such claim. TCMUD No. 12 has *not* argued that the rate protested herein exceeds WTCPUA’s cost of service, but instead has presented evidence that the

⁴ WTCPUA Objection pg 6, citing *Appeal of Navarro County Wholesale Ratepayers to Review the Wholesale Rate Increase Imposed by the City of Corsicana, Certificate of Convenience and Necessity No. 10776, in Navarro County*, (“*Corsicana*”) SOAH Docket No. 582-10-1944; TCEQ Docket No. 2009-1925-UCR, Proposal for Decision (“PFD”) at 16-17 (Aug. 17, 2011).

⁵ *Corsicana* PFD at 16.

⁶ *Id.*

⁷ *Id.* at 17. (emphasis added).

methodology used to compute the WTCPUA's revenue requirements and rates has changed.⁸ Change of methodology is one of several factors the Commission may consider in making a public interest determination under P.U.C. SUBST. R. 24.133(a)(3)(C). The Public Interest Rule does not preclude an examination of the seller's cost of service methodology – it declares the Commission will not entertain an examination of whether a protested rate is based on an analysis of the seller's cost of providing service.⁹ The Public Interest Rule expressly allows an analysis of the methodologies used to set the revenue requirement and rates to determine if a change has occurred.¹⁰ Because the Petitioners in the *Corsicana* case claimed that the protested rate exceeded the Seller's cost of service, while TCMUD 12 has presented evidence of changes to revenue requirement and rate methodologies, the portions of the *Corsicana* PFD cited by the WTCPUA do not support the WTCPUA's objections, and TCMUD 12 urges the ALJ to overrule them and deny the motion to strike.

2. Previous Evidentiary Rulings in This Case Do Not Support the WTPUA's Motion

WTCPUA claims that “the distinction between public interest issues and cost of service issues has also been recognized in [SOAH] Orders Nos. 6 and 8.”¹¹ The most significant aspect of WTCPUA's argument on this point is what WTCPUA fails to discuss about the Orders: SOAH Order No. 6 was overturned by the Commission on an interim appeal, and SOAH Order No. 8 was issued prior to the Commission's ruling overturning SOAH Order No. 6.

In its Interim Appeal of SOAH Order No. 6, TCMUD 12 was seeking to compel WTCPUA to respond to discovery that requested information concerning the computation methodology of the rates or revenue requirement, which TCMUD 12 argued is relevant to the public interest proceeding, and the fact that same information may also be relevant in a cost of service proceeding does not make the information irrelevant in the public interest proceeding.¹² Specifically, TCMUD 12 brought its Interim Appeal of SOAH Order No. 6 to obtain the

⁸ A shorthand description of TCMUD 12's evidence is that the formulas, not the dollar amounts used to populate the formulas, has changed.

⁹ P.U.C. SUBST. R. 24.133(b).

¹⁰ P.U.C. SUBST. R. 24.133 (a)(3)(C).

¹¹ WTCPUA Objections at 6.

¹² TCMUD 12's Interim Appeal of SOAH Order No. 6, at 6.

formulae and methodology used by the WTCPUA to calculate certain rates and revenue requirements. The relevant portions of the requests at issue read as follows:

1-1 Provide in electronic spreadsheet form, with all links and formulae intact, all workpapers for the PUA "Final Report – Wholesale Cost of Service and Rate Design Study" dated October 11, 2012, prepared by Water Resources Management, LLC,

1-2 Provide any other supporting documents, including drafts, not included in the response to the previous question related to the "Final Report – Wholesale Cost of Service and Rate Design Study" dated October 11, 2012.

1-4 Provide all workpapers supporting the Minimum Bill Calculation for TCMUD 12 for FY 2014 dated August 22, 2013 ... in electronic spreadsheet form, with all links and formulae intact.

1-5 Provide any other supporting documents not included in the response to the previous question related to the Minimum Bill Calculation for TCMUD 12 for FY 14 dated August 22, 2013.

1-6 Provide all workpapers supporting the Volumetric Rate calculation for TCMUD 12 for FY 14 dated September 10, 2013 ... in electronic spreadsheet form, with all links and formulae intact.

1-7 Provide any other supporting documents not included in the response to the previous question related to the Volumetric Rate calculation for TCMUD 12 for FY 14 dated September 10, 2013.¹³

In response to TCMUD 12's appeal of SOAH Order No. 6, WTCPUA argued that formulae are relevant only to the determination of the cost of service and are not relevant to the public interest test.¹⁴ The WTCPUA further argued that the workpapers and spreadsheets were properly excluded pursuant to P.U.C. SUBST. 24.133(b) as relevant only to the cost of service and not relevant to the public interest determination.¹⁵ As support for its position, the WTCPUA cited the same two pages of the *Corsicana* PFD that are addressed in the preceding section of this Response. The Commission agreed with TCMUD 12's position, granted the Appeal, and

¹³ *Id.* at Appendix 1.

¹⁴ Response of West Travis County Public Utility Agency to Travis County Municipal Utility District No. 12's Interim Appeal of SOAH Order No. 6 at 6–7.

¹⁵ *Id.*

overturned SOAH Order No. 6. In making the same argument here with the same legal analysis, WTCPUA ignores the Commission's Order Granting TCMUD 12's Appeal of SOAH Order No. 6, and accordingly, WTCPUA's objections is contrary to the proper interpretation of the rules applicable to this case, and should be overruled, and the motion to strike should be denied.

Due to the timeframes of the procedural process, including the time required for TCMUD 12 to file a Motion to Compel and subsequently file an interim appeal of SOAH Order No. 6, the Commission issued its Order that materials responsive to the requests must be provided to TCMUD 12 *after* TCMUD 12 filed its direct case.¹⁶ When TCMUD 12 filed its direct testimony, which is the testimony to which WTCPUA is objecting, TCMUD 12 had not received the materials at issue in the Interim Appeal of Order No. 6. Consequently, the evidence presented in TCMUD 12's direct case should be viewed in light of the Commission's Order Granting TCMUD 12's Appeal of SOAH Order No. 6 and WTCPUA's objection that relies on SOAH Order No. 6 should be overruled.

The Commission issued its Order on Appeal of Order No. 6 on November 24, 2014. SOAH Order No. 8 was issued on October 17, 2014. Accordingly, the ALJ did not have guidance from the Commission on what the Commission considered evidence relevant to a public interest proceeding at the time Order No. 8 was issued. In addition, because TCMUD 12 chose not to appeal Order No. 8 it was not considered by the Commission. Order No. 6 *was* considered by the Commission and was overturned. It is improper to suggest that Order No. 8 should be given the same weight as an Order that has been considered on an interim appeal and overturned.

The WTCPUA argues that Jay Joyce's testimony at page 10, lines 26 – 29 addresses information sought in RFIs 3-7 and 3-8, which Order No. 8 found irrelevant.¹⁷ Mr. Joyce's testimony at page 10, lines 26 – 29 is based on the figures used in the WTCPUA FY 2014 Rate Study and not on the water loss assumptions requested by RFIs 3-7 and 3-8 and is therefore not the same information sought by those RFIs as WTCPUA claims.¹⁸

¹⁶ Even then, after the Commission ordered the information in question be provided to TCMUD 12, WTCPUA sought a delay which forced another ruling from the ALJ and delayed the production of the responsive materials until January 9, 2015. SOAH Order No. 10.

¹⁷ WTCPUA Objections, at 6.

¹⁸ *Id.*

Furthermore, the legal bases for WTCPUA's relevancy claims with respect to RFIs 3-7 and 3-8 were squarely addressed in the Commission's Order Granting TCMUD 12's Appeal of Order No. 6 and subsequently, in SOAH Order No. 13 Denying Part of WTCPUA's Motion for Partial Summary.¹⁹ In its Response to the Motion to Compel on RFIs 3-7 and 3-8, the WTCPUA argued that the information is irrelevant because cost of service issues are irrelevant under the *Corsicana* case and cited to SOAH Order No. 6 in this case to support that argument.²⁰ As pointed out above, the *Corsicana* PFD is distinguishable from this case and does not support the WTCPUA's argument and SOAH Order No. 6 was overturned by the Commission. The WTCPUA also argued that RFIs 3-7 and 3-8 are irrelevant because the information sought by those RFIs does not address a change from the cash basis methodology to the utility basis methodology, which the WTCPUA claimed are the only two methodologies at issue in a wholesale water rate appeal, "Rather, a change in the computation of the revenue requirement or rate from one methodology to another refers to looking at the revenue requirement on a cash basis or utility basis."²¹

WTCPUA's argument is contrary both to the ruling in the *Corsicana* PFD and, as is discussed in the next subsection, to the ruling in SOAH Order No. 13 in this case which states, "Reading § 24.133(a)(3)(C) in context, the Administrative Law Judge (ALJ) agrees with District 12 that changes in computation methodologies that could adversely affect the public interest are not legally limited to changes between the cash and utility bases for calculating cost of service, and consequently revenue requirement and rates."²² For each of these reasons, TCMUD 12 respectfully urges the ALJ to overrule WTCPUA's relevance objections that are based upon its arguments related to previous rulings and deny the motion to strike.

3. Changes in Methodology Is Not Limited to Changes Between The Cash Needs Basis and The Utility Basis

WTCPUA claims that TCMUD 12 has admitted that the WTCPUA did not change the computation of the revenue requirement or rate methodology from the cash needs basis to the

¹⁹ SOAH Order No. 13 (Mar. 24, 2015).

²⁰ WTCPUA's Response to TCMUD 12's Motion to Compel the WTCPUA's Responses to TCMUD 12's Third Request for Information, at 3-4.

²¹ *Id.* at 11-12.

²² SOAH Order No. 13, at 1.

utility basis, or vice versa and that as a result of this admission, TCMUD 12 is now prohibited from introducing evidence of a change of methodology. WTCPUA's argument rests on its very narrow interpretation of change of methodology under which only a change from the cash needs basis to the utility basis (or vice versa) may be considered a change in methodology under the rule. In support of this argument, WTCPUA cites to its own Motion for Partial Summary Decision²³ which put this issue squarely before the ALJ. WTCPUA's argument was considered and rejected in SOAH Order No. 13, in which the ALJ ruled: "Reading § 24.133(a)(3)(C) in context, the Administrative Law Judge (ALJ) agrees with District 12 that changes in computation methodologies that could adversely affect the public interest are not legally limited to changes between the cash and utility bases for calculating cost of service, and consequently revenue requirement and rates."²⁴ SOAH Order No. 13 is consistent with the ALJ's ruling on the same issue in the *Corsicana* PFD in which, citing the *McAllen* and *MultiCounty* cases²⁵, he wrote: "However, nowhere in those cases [*McAllen* and *Multi-County*] did the Commission conclude that switches between the Cash and Utility Bases were the only methodological changes that might indicate monopoly abuse."²⁶

There is no legal basis for WTCPUA's objections that Mr. Joyce's testimony and exhibits are not relevant because they do not address the narrow issue of a change in the computation of the revenue requirement or rate methodology from the cash needs basis to the utility basis. Accordingly, TCMUD 12 respectfully urges the ALJ to overrule the objections and deny the motion to strike based on this argument.

4. "Cost Of Service" Methodology and "Revenue Requirement" Methodology are the Same Methodology.

The WTCPUA also claims that Mr. Joyce's testimony and exhibits on revenue requirement methodology actually address cost of service methodology and are therefore not relevant: "It is uncontested that there has not been a change in the computation of the revenue

²³ WTCPUA Objections, pg. 7 at fn. 11.

²⁴ SOAH Order No. 13, at 1.

²⁵ *Order Denying City of McAllen's Appeal of the Wholesale Water Rate Increase of Hidalgo County WID No.3*, SOAH Docket No. 582-02-2470; TCEQ Docket No. 200101583-UCR (Apr. 23,2003); and *Order Denying Multi-County WSC's Appeal of the Wholesale Water Rate Increase Imposed by the City of Hamilton*; Application No. 36280-M; TCEQ Docket No. 2009-0048-UCR; SOAR Docket No. 582-09-2557 (Jun. 17,2010).

²⁶ *Corsicana* PFD at 55-56.

requirement ‘from one methodology to another’; Mr. Joyce's attempts to frame his cost of service analysis as a revenue requirement analysis are unavailing.”²⁷ The first assertion that “It is uncontested that there has not been a change in the computation of the revenue requirement ‘from one methodology to another’” has been addressed by SOAH Order No. 13 in which the ALJ determined that a factual dispute did, in fact, exist regarding this point: “[the ALJ] also agrees that District 12’s pleadings, discovery responses, and prefiled evidence show that there are genuine issues of material fact concerning whether WTCPUA has changed other computational methodologies that might ultimately lead the PUC to conclude that the protested rates adversely affect the public interest.”²⁸

WTCPUA’s second allegation that Mr. Joyce is impermissibly attempting to frame a cost of service analysis as a revenue requirement analysis is premised on the idea that the computation of the “revenue requirement” is somehow distinct from the computation of the “cost of service.” This distinction, however, is not supported by the law. In fact, precedent provides guidance to the opposite conclusion: that in evaluating the methodology for computing a cost a service or a revenue requirement, the terms “cost of service” and “revenue requirement” are synonymous. The ruling in SOAH Order No. 13 suggests that methodology for computing cost of service is tied to the methodology for computing the revenue requirement, “changes in computation methodologies that could adversely affect the public interest are not legally limited to changes between the cash and utility bases *for calculating cost of service, and consequently revenue requirement and rates.*” The ruling on this issue in the *Corsicana* case is clearer: “The terms ‘cost of service’ and ‘revenue requirement’ are synonymous, and the Cash Basis and Utility Basis are methods used to compute them.”²⁹

Without a legal distinction between “cost of service” and “revenue requirement,” the WTCPUA’s argument that Mr. Joyce is addressing cost of service issues rather than revenue requirement issues unravels. Despite the WTCPUA unsupported assertions to the contrary, Mr.

²⁷ WTCPUA Motion at 8.

²⁸ SOAH Order No. 13 at 1 – 2.

²⁹ *Corsicana* PFD at 51 (August 17, 2011). The *Corsicana* PFD also clarifies that while Cash Basis and Utility Basis “are methods used to compute” cost of service and revenue requirements, the Cash Basis and Utility Basis are *not* the *only* methods used to compute them. *See, also, In Re: Application of North San Saba Water Supply Corporation to Change its Water Rates Under Certificate of Convenience and Necessity No. 11227 in San Saba County*, TCEQ Docket No. 2008-1481-UCR; SOAH Docket No. 582-09-0660, Proposal for Decision at 4-5 (March 25, 2010) (in which the ALJ used the terms interchangeably in the PFD as well as referring to the “*cost of service or revenue requirement.*”)

Joyce's testimony and exhibits that WTCPUA labels as "cost of service issues" are in fact, an examination of the methodology used by the seller to compute the revenue requirement, which is expressly allowed by the Public Interest Rule. Mr. Joyce has not strayed into the specific cost of service analysis prohibited by PUC Subst. R. 24.133(b), does not present testimony that the protested rate violates the public interest on the grounds that it exceeds the seller's cost of service, but rather his testimony focuses on the change to the revenue requirement methodology and is relevant and admissible.

The WTCPUA also argues that Mr. Joyce's testimony impermissibly addresses how rates are designed.³⁰ This issue is also addressed in the PFD in the *Corsicana* case: "Given the common meaning of methodology and the AWWA Manual's use of the term 'methodology' when referring to rate designs, the ALJ concludes that 30 TAC § 291.133(a)(3)(C) is broad enough to include changes in the method of computing a rate design."³¹ In its Motion for Partial Summary Decision, the WTCPUA also argued that no genuine issues of material fact existed with regard to the rate methodology used by the WTCPUA for the Prior Rate and Protested Rate because both the Prior Rate and Protested Rate consisted of a minimum monthly fee and a volumetric rate.³² In its Response to WTCPUA's Motion, TCMUD 12 explained the apparent changes in the methodology used to set the Protest Rates and argued that genuine issue of material fact did exist.³³ In SOAH Order No. 13, the ALJ wrote that he agreed that "District 12's pleadings, discovery responses, and prefiled evidence show that there are genuine issues of material fact concerning whether WTCPUA has changed other computational methodologies that might ultimately lead the PUC to conclude that the protested rates adversely affect the public interest. Accordingly, as to the § 24.133(a)(3)(C) criteria, WTCPUA's motion is denied."³⁴

There is no legal distinction between "cost of service" and "revenue requirement," and the changes to rate methodologies has been determined to be an issue of material fact relevant to this proceeding. Accordingly, TCMUD 12 urges the ALJ to overrule WTCPUA's relevance objections and deny the motion to strike based on these arguments.

³⁰ WTCPUA Objections at 8.

³¹ *Corsicana* PFD at 56.

³² WTCPUA Motion for Partial Summary Decision at 11-12.

³³ TCMUD 12's Response to WTCPUA Motion for Partial Summary Decision at 5-7.

³⁴ SOAH Order No. 13 at 1-2.

5. Some of the Portions of Mr. Joyce's Testimony Identified by the WTCPUA are not Germane to WTCPUA's Relevance (Cost of Service) Objections.

In section III. A of WTCPUA's Motion, it argues that Mr. Joyce's "testimony and exhibits go well beyond the scope of proper and admissible testimony because they are solely concerned with an analysis of cost of service and allocation issues, and therefore constitute irrelevant evidence under Tex. R. Evid. 402."³⁵ On pages 8 through 10 of its Objections and Motion, however, the WTCPUA lists portions of Mr. Joyce's testimony and exhibits that contain no references to cost of service/revenue requirement or allocation and accordingly are not properly considered within this objection. There is nothing in the sections of testimony identified below that is germane to the stated objection or the legal bases for the objection. If the WTCPUA wished to object to these portions of Mr. Joyce's testimony or exhibits on other grounds, it could have done so, but it is impermissible for the WTCPUA to simply include them in a list testimony and exhibits without any logical connection to the objection being made or the legal basis for that objection.

Exhibit JJJ-11 Page 43. This is an email from Don Rauschuber, the WTCPUA General Manager, to the wholesale customers indicating no additional wholesale customer meetings will be held. This page of Exhibit JJJ-11 has no analysis by Mr. Joyce, is an Admission of a Party Opponent under TRE 801(e)(2), and addresses disparate bargaining power.³⁶

Exhibit JJJ-11 Pages 44 through 46. These pages consist of communications between WTCPUA's general manager and rate analyst, and TCMUD 12 representatives related to scheduling of future meetings to discuss the wholesale rates rather than the wholesale rates themselves. These pages address the issue of disparate bargaining power and are unrelated to the change of revenue requirement and rate methodology.

Exhibit JJJ-11 Page 47, text of section 1 and 3. These select portions of an email exchange between Mr. Rauschuber and Mr. DiQuinzio including responses from Mr. Rauschuber, regarding repairs to the master meter on highway 71 and watering restrictions and have nothing to do with WTCPUA's argument that the testimony is irrelevant because it is allegedly addressing impermissible cost of service analysis. These sections of the email are relevant to the issue of disparate bargaining power.

Exhibit JJJ-11 Pages 80 –81. These pages are part of an email chain that concludes on page 79 (to which WTCPUA has not objected in Section III.A.). They are communications that address

³⁵ WTCPUA Motion at 5.

³⁶ J. Joyce Direct at p. 23, ln. 5, reference to Exhibit JJJ-11 is in Section VI. The WTCPUA Exercises Disparate Bargaining Power Against Its Wholesale Customers.

the scheduling of future meetings and discussions regarding the wholesale rates rather than the wholesale rates themselves, and are relevant to the issue of disparate bargaining power.

Exhibit JJJ-13, Portion of page 1. Page 1 of Exhibit JJJ-13 is an email exchange among and between representatives of TCMUD 12 and WTCPUA. The specific portion objected to by WTCPUA is an email from Don Rauschuber to Joe DiQuinzio reporting the WTCPUA Board's action concerning changes to "Impact Fees" and contains no analysis related to allegedly irrelevant cost of service matters.

B. WTCPUA's Objection that Testimony Not Addressing Protested Rates is Irrelevant – TRE 402

In Section III. B. of the WTCPUA's Objections, titled "Testimony Not Addressing Protested Rates is Irrelevant" the WTCPUA objects to Mr. Joyce's testimony on page 22, lines 5 through 9.³⁷ In that portion of his testimony, he provides a narrative and a table regarding the future minimum monthly bills of the WTCPUA. The WTCPUA also objects to Exhibit JJJ-11, page 41, sections 1 and 3 of the email text on that page. Both of these sections are also part of WTCPUA's objections in Section III. A, and are discussed above.

1. Testimony Addressing Impact of Methodology Used to Set Protested Rates.

Mr. Joyce's testimony at page 22, lines 5 through 9 shows the impact of the adopted methodology. Despite WTCPUA's assertions, these are not hypothetical future rates. The rates listed in this testimony were the rates that WTCPUA indicated would result from its implementation of the new revenue requirement and rate methodology adopted in 2013. TCMUD 12 is not seeking a review of these rates; they are offered for the limited purpose of demonstrating the impact of the change in methodology WTCPUA advised TCMUD 12 would occur, providing a sense of the significance and magnitude that would result from the change of methodology, and highlighting the need for TCMUD 12 to appeal the Protested Rate which implemented the new methodology. Because WTCPUA stated that these significantly higher rates would result from the new methodology adopted in 2013 (for 2014), TCMUD 12 was concerned that it may be without recourse to appeal wholesale rates based on the new methodology after the initial year. Accordingly, TCMUD 12 urges the ALJ to overrule the relevance objection to Mr. Joyce's testimony on page 22 (lines 5-9) and to deny the motion to strike.

³⁷ WTCPUA does not object to the line in the table for FY 2013. WTCPUA Objection at p. 10.

2. Testimony Addressing Other Matters.

The WTCPUA objects to Mr. Joyce's Exhibit JJJ-11, page 41, paragraphs 1 and 3 on the grounds that it is not related to the WTCPUA's revenue requirement or rate methodologies for the Protested Rate and is therefore not relevant. Exhibit JJJ-11 is intended to support Mr. Joyce's testimony regarding the relationship of the WTCPUA and TCMUD 12 at the time the protested rates were being set, which TCMUD 12 contends, and Mr. Joyce testifies, evidenced WTCPUA's disparate bargaining power. As such, JJJ-11 includes discussion of matters other than WTCPUA's revenue requirement and rate methodologies. The cited portion of Exhibit JJJ-11 addresses information under discussion between wholesale customers and WTCPUA in the months leading up to the changes to the wholesale rates that are the subject of this Appeal and is relative to the issue of WTCPUA's disparately greater bargaining power. The specific communication on page 41 and the response from the WTCPUA on page 43 illustrate the give and take of critical information during the discussions between the wholesale customers, including TCMUD 12 and the WTCPUA. This goes to the bargaining power of the parties, and as noted above, Exhibit JJJ-11 is cited in the Section VI. of Mr. Joyce's testimony in which he addresses WTCPUA's exercise of disparate bargaining power. Exhibit JJJ-11, including page 41 is relevant to that issue and the WTCPUA's objection and motion should be denied.

C. WTCPUA's Objection that Testimony is Inadmissible Hearsay – TRE 703 & 802

WTCPUA objects to Mr. Joyce's Exhibit JJJ-11 pages 39 and 41, claiming that it is not "expert's hearsay" under TRE 703, and is hearsay under TRE 802.³⁸ As discussed above, Exhibit JJJ-11 is referenced in Section VI of Mr. Joyce's testimony regarding the dealings between TCMUD 12 and the WTCPUA during the time leading up to the protested rate's adoption by the WTCPUA. The pages of JJJ-11 objected to here (and page 38 which was not objected to) are part of an email conversation on June 3, 2013 between representatives of the WTCPUA, Nelissa Heddin and Don Rauschuber, and representatives of the wholesale customers, including Mr. Joyce. Pages 39 and 41 contain questions from other wholesale customer representatives to either Ms. Heddin or both Ms. Heddin and Mr. Rauschuber and each contain a request or recommendation that the WTCPUA hold another meeting with the Wholesale Customers. In both instances, other wholesale customer representatives, including

³⁸ WTCPUA Objection at 11-12.

Mr. Joyce, were copied on the emails. The import of the emails is that wholesale customer representatives brought up similar concerns and were trying to arrange another meeting with the WTCPUA. At page 43 of JJJ-11 is the WTCPUA's response on June 4, 2013, in which Mr. Rauschuber sends a message to the wholesale customer representatives, including Mr. Joyce, thanking them for their input but informing them that no further meetings were planned at the time. When viewed in this context, pages 39 and 41 of Exhibit JJJ-11 are properly viewed as informing Mr. Joyce's opinion concerning WTCPUA's disparate bargaining power.

As the WTCPUA points out, Mr. Joyce is presented by TCMUD 12 as an expert in "utility pricing and rate matters; cost of service and revenue requirement issues; cash working capital studies; customer and weather normalization; and other gas, electric, water, and wastewater related matters."³⁹ Experts in that field routinely engage in electronic communications between a utility and customer groups of that utility and it is entirely reasonable under TRE 703 for Mr. Joyce to rely on email chains including pages 39 and 41 of Exhibit JJJ-11, in forming his opinion about WTCPUA's disparate bargaining power. These emails support Mr. Joyce's testimony on page 24, lines 9 through 14 which was not objected to by the WTCPUA, as well as his opinion on bargaining power on page 22, lines 16 to 18. The portions of Mr. Joyce's Exhibit JJJ-11 identified by the WTCPUA are admissible as "expert's hearsay" under TRE 703 and alternatively, are of the type of evidence commonly relied upon by reasonably prudent persons in the conduct of their affairs and are admissible under P.U.C. PROC. R. 22.221(a). TCMUD 12 respectfully urges the ALJ to overrule WTCPUA's Objections to the two pages of Exhibit JJJ-11 and deny the Motion to Strike.

III. RESPONSES CONCERNING WTCPUA'S OBJECTIONS TO PREFILED TESTIMONY OF DR. JAY ZARNIKAU

A. WTCPUA's Objection that Testimony is an Unqualified Opinion – TRE 702⁴⁰

The WTCPUA objects to Dr. Zarnikau's testimony at page 10, lines 3-4 regarding the time and investment needed to construct a wholesale water service supply, arguing that he has not been shown to be an engineer or to otherwise have any training or expertise in the construction or financing of water systems. The testimony in question, however, is based upon

³⁹ Prefiled Direct Testimony of Jay Joyce at 4, lines 6-9; WTCPUA Objections at fn. 17.

⁴⁰ WTCPUA Objections at 12-13.

facts and data reviewed by and made known to Dr. Zarnikau by Mr. DiQuinzio, as discussed in Dr. Zarnikau's Direct Testimony at page 8, lines 17– 24. The objection to this testimony under TRE 702 is without merit because it ignores the significant qualification to TRE 702 found in TRE 703 which states: "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by, or made known to the expert at or before the hearing." Dr. Zarnikau's testimony at page 10, lines 3-4 is based upon information made known to him by Mr. DiQuinzio prior to the hearing and is therefore not an unqualified opinion. Additionally, the second sentence included in WTCPUA's objection, states Dr. Zarnikau's opinion that during the time needed to construct a substitute system, the Suppliers would continue to enjoy monopolist status. WTCPUA acknowledges Dr. Zarnikau is an expert economist and Suppliers' status as a monopoly is squarely within his area of expertise. For both of these reasons, TCMUD 12 respectfully urges the ALJ to overrule this objection and deny the motion to strike this portion of Dr. Zarnikau's testimony.

The WTCPUA also objects to Dr. Zarnikau's testimony at page 17, lines 3-21 as unqualified opinion testimony under TRE 702. Once again Dr. Zarnikau is relying on both information made known to him through a discovery response supplied by WTCPUA (included as JZ Exhibit 5),⁴¹ and information and data made known to him by Mr. Joyce before the hearing. The testimony that is the subject of the WTCPUA's second objection under TRE 702 misconstrues the evidentiary rule and should be overruled because it ignores the significant qualification found in TRE 703 which states: "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by, or made known to the expert at or before the hearing." Dr. Zarnikau's testimony at page 17, lines 3-21 is based upon an admission by WTCPUA and information made known to him by Mr. Joyce prior to the hearing and is therefore not an unqualified opinion. The objection is also over-inclusive inasmuch as it includes Dr. Zarnikau's opinion that Suppliers abused their monopoly power, which is an opinion that WTCPUA does not dispute he is qualified to render. For each of these reasons, TCMUD 12 respectfully urges the ALJ to overrule WTCPUA's objection to page 17, lines 3 – 21 of Dr. Zarnikau's Direct Testimony and to deny the motion to strike same.

⁴¹ WTCPUA objects to JZ Exhibit 5 as Inadmissible Hearsay under Subsection C of its Objections; for the reasons explained in TCMUD 12's Response to that objection below, JZ Exhibit 5 is *not hearsay* under TRE 801(e)(2) *Admission by party-opponent*.

B. WTCPUA's Objection that Testimony is Irrelevant – TRE 402⁴²

The WTCPUA objects to Dr. Zarnikau's testimony at page 16, line 4 through page 17, line 2 in which he explains why, in his opinion, TCMUD 12 could not avoid paying WTCPUA's wholesale water services rate, based upon the experience of two other wholesale customers, and in which he also opines that the same facts confirm LCRA is not an alternative supplier.

WTCPUA's argument rests on a mis-characterization of the testimony by focusing on Dr. Zarnikau's recounting of the experience of the two wholesale customers who did not agree to transfer their contracts to WTCPUA, as though that portion of the testimony was offered as the entire opinion. To the contrary, that portion of Dr. Zarnikau's testimony is the basis for his opinions that WTCPUA controls prices in this market, which is relevant to the issue of abuse of monopoly power. The objection to Dr. Zarnikau's testimony at page 16, line 4 through page 17, line 2 as irrelevant does not withstand reasoned analysis. TCMUD 12 urges the ALJ to overrule the objection and deny the motion to strike this portion of the testimony.

C. WTCPUA's Objection that Testimony is Hearsay – TRE 802 and TRE 703⁴³

WTCPUA objects to Dr. Zarnikau's testimony at JZ Exhibit 5, an 8 page document that bears TCMUD 12 Bates numbers 93 – 100, as well as WTCPUA Bates numbers ending in 8854, 8855, 8860, 8861, and 9057 – 9060. WTCPUA's objection is that the documents that make up JZ Exhibit 5 are emails between WTCPUA's rate consultant (N. Heddin) and others, and that Dr. Zarnikau fails to provide a foundation for the admissibility of these portions of the document even if they are "experts hearsay" under TRE 703. The objection is not well-grounded because the documents attached are *not hearsay* under TRE 801(e)(2)(C) & (D), Admission by Party-Opponent. The emails consist of communications from WTCPUA's acknowledged rate consultant, Ms. Heddin, and were supplied to TCMUD 12 (*i.e.*, to Dr. Zarnikau) as part of WTCPUA's Discovery responses as evidenced by the WTCPUA Bates numbers on each page. The statements of Ms. Heddin are offered against WTCPUA and are statements by a person authorized by the party to make the statement concerning the subject matter, as well as statements by WTCPUA's agent or servant concerning a matter within the scope of the agency

⁴² WTCPUA Objection at 13-14.

⁴³ WTCPUA Objection at 14 – 15.

or employment, made during the existence of the relationship and are therefore TRE 801(e)(2) Admissions by a Party Opponent. TCMUD 12 urges the ALJ to overrule the objection and deny the motion to strike this portion of the testimony pursuant to TRE 801(e)(2)(C) & (D) because the entire Exhibit is an Admission by a Party-Opponent.

IV. RESPONSES CONCERNING WTCPUA'S OBJECTIONS TO PREFILED TESTIMONY OF JOSEPH A. DIQUINZIO, JR.

A. WTCPUA'S Objection that Testimony is Inadmissible Lay Opinion and Irrelevant⁴⁴

WTCPUA first objects to page 11, line 11 of Mr. DiQuinzio's testimony in which the witness responds to the Question: "Did TCMUD 12 protest the PUA's increase to the Connection fee?" by testifying (italicized portion is the subject of the objection): "No, we did not protest the PUA's decision in November 2012 to increase the Connection Fee *even though the PUA did not have authority under the Transfer Agreement to change that Fee.*" WTCPUA's objections are that this testimony constitutes an inadmissible lay opinion under TRE 701 because it is beyond Mr. DiQuinzio's perception and is not helpful in a determination of any fact in issue and is therefore irrelevant under TRE 402. Mr. DiQuinzio is the representative of the Districts (one of the parties to the Transfer Agreement) and describes the critical provisions of the Transfer Agreement at page 10, *without objection from WTCPUA*. This portion of his testimony on page 11, line 11, is based upon his perception in participating in the drafting of the Transfer Agreement, and is therefore helpful to a clear understanding of his testimony. Although TCMUD 12 did not protest WTCPUA's decision changing the Connection Fee, the fact that its decision was unauthorized under the express terms of the Transfer Agreement is relevant to the issue of disparate bargaining power, which is a fact at issue that will be determined in this case, and therefore it is relevant. Mr. DiQuinzio's description of the terms of the Transfer Agreement and why the WTCPUA's change to the Connection Fee was unauthorized, has a tendency to make the existence of the WTCPUA's disparate bargaining power more probable than it would be without the evidence, and the evidence is relevant as that term is defined in TRE 401 and is admissible under TRE 402. Accordingly, the testimony is permissible opinion testimony of a lay witness and TCMUD 12 requests that the objection under TRE 701 and TRE 402 be overruled and the motion to strike line 11 on page 11 of Mr. DiQuinzio's testimony be denied.

⁴⁴ WTCPUA Objection at 15 – 16.

WTCPUA's next objection is that Mr. DiQuinzio's Direct Testimony at page 14, line 31 ("The cost") through page 15, line 2, is unqualified lay opinion under TRE 701. Mr. DiQuinzio's company, JadCo Management, Inc. is the General Manager of TCMUD 12 and as is clear from his Direct Testimony, he was involved in and largely responsible for all aspects of obtaining raw water for the Districts, and wholesale water services from LCRA⁴⁵ and, on behalf of Rough Hollow, wholesale water services from Lakeway MUD. Mr. DiQuinzio's opinion is rationally based on his perceptions as General Manager for the Districts, and the testimony in question is helpful to a clear understanding of his testimony concerning the lack of any alternatives to WTCPUA. Earlier in his Direct Testimony he discusses costs related to construction of an alternative WTP and associated facilities, to which WTCPUA has not objected.⁴⁶ His opinion that the cost would be prohibitive to construct an alternative Water Treatment Plant and associated facilities, and that such an undertaking would include abandonment of the District's \$1,500,000 initial investment in the West Travis County System, is relevant to the determination of WTCPUA's disparate bargaining power, which is a factor demonstrating abuse of monopoly power under P.U.C. Subst. R. 24.133(a)(3)(A). Accordingly, TCMUD 12 respectfully urges the ALJ to overrule WTCPUA's TRE 701 objection and to deny the motion to strike this portion of Mr. DiQuinzio's testimony.

B. WTCPUA's Objection that Testimony is Irrelevant – TRE 402⁴⁷

1. Connection Fee

WTCPUA objects to four portions of Mr. DiQuinzio's Direct Testimony claiming that it addresses the "Connection Fee" which WTCPUA argues is not the subject of any issue to be decided in the Public Interest phase of this case and is therefore irrelevant under TRE 402.

At page 7, line 14 through page 8, line 7, Mr. DiQuinzio has listed three of twelve relevant provisions of the Wholesale Water Services Agreement, which is the contract pursuant to which WTCPUA is charging the protested rates. The Wholesale Water Services Agreement establishes a methodology for rates and the revenue requirement, including provisions that the

⁴⁵ See, JAD Exhibit 1, MOU Regarding Shared Raw Water Supply and Water and Wastewater Capacity to which TCMUD 11, 12 and 13 are signatories.

⁴⁶ J. DiQuinzio Direct at p. 5, ln. 27 – p. 6, ln. 5.

⁴⁷ WTCPUA's Objection at 16.

Monthly Charge and Volume Rate are to be designed to recover costs *not recovered through the Connection Fee*. This portion of his testimony therefore has a tendency to make the existence of a fact that is of consequence to the determination of this case more probable than it would be without the evidence. The Wholesale Water Services Agreement is attached to Mr. DiQuinzio's testimony as JAD Exhibit 4, and WTCPUA has not objected to the admission of the contract itself, which makes the relevance objection to the cited portion of Mr. DiQuinzio's testimony questionable.

WTCPUA also objects that Mr. DiQuinzio's testimony at page 10, lines 26 – 30 is irrelevant. In this part of his testimony, TCMUD 12's General Manager is explaining that the District did not agree to allow WTCPUA to set (and hence to change) the Connection Fee when it entered into the Transfer Agreement. The testimony clarifies his testimony that directly precedes it on page 10, lines 19 – 23, to which WTCPUA has not objected. This testimony also leads to the testimony in which the witness explains that the PUA had no authority under the Transfer Agreement to change the Fee, which as explained above, is an issue relevant to WTCPUA's disparate bargaining power.

WTCPUA also objects to Mr. DiQuinzio's testimony at page 11, lines 1-11, and to Exhibit JAD-11⁴⁸ which explains the change to the Connection Fee that WTCPUA implemented in November 2012, and which, while unauthorized under the express terms of the Transfer Agreement, TCMUD 12 did not appeal. As with the other portions of his testimony to which WTCPUA objects in this part of its Objection, this testimony is probative evidence of WTCPUA's disparate bargaining power.

For each of these reasons, TCMUD 12 urges the ALJ to overrule WTCPUA's relevance objection to the four portions of Mr. DiQuinzio's testimony and to deny the motion to strike same.

2. Raw Water Supply

WTCPUA objects to Mr. DiQuinzio's testimony at page 4, line 24 through page 5, line 14 (ending with "by LCRA."), which addresses the raw water obtained by TCMUD 12 from LCRA, arguing it is irrelevant because the wholesale water services provided by WTCPUA are unrelated to the LCRA Raw Water Contract. The relationship between the Raw Water

⁴⁸ WTCPUA's November 2012 Order Adopting the Water Impact Fees [Connection Fee].

Contract⁴⁹ and the Wholesale Water Services Agreement, is readily evident because the latter contains *key* terms tied directly to the Raw Water Contract⁵⁰ and has numerous other references to the Raw Water Contract.⁵¹ The Raw Water Contract informs the terms of the Wholesale Water Services Agreement, and creates a limitation on TCMUD 12's ability to obtain potable water from any other source. The testimony objected to herein is therefore relevant the wholesale water services provided under the Wholesale Water Services Agreement, and also to the restrictions on TCMUD 12's ability to utilize alternative sources of potable water. For each of these reasons, TCMUD 12 requests that WTCPUA's relevance objection to this portion of Mr. DiQuinzio's testimony be overruled and that the motion to strike be denied.

V. CONCLUSION

WHEREFORE, PREMISES CONSIDERED, TCMUD 12 respectfully urges the Honorable Administrative Law Judge to overrule all of WTCPUA's objections, deny WTCPUA's Motion to Strike in its entirety, and for such further relief to which it may be entitled.

⁴⁹ JAD Exhibit 2 (to which WTCPUA has not objected) *Cf.* WTCPUA's Objection to Exhibit JAD-11 at p. 16, as well as the testimony (page 11, lines 1-11) at which that Exhibit is identified.

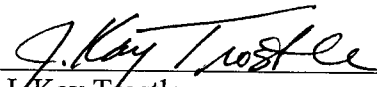
⁵⁰ JAD Exhibit 4, Wholesale Water Services Agreement at p. 7/27 (Sec. 3.01. "a. LCRA agrees to provide Wholesale Water Services to District No. 12 on behalf of the Districts for raw water purchased from LCRA pursuant to the Raw Water Contract in accordance with the terms provided in this Agreement. b. The Raw Water Contract currently provides for the reservation and/or purchase of 1,680 acre-feet per year of raw water. * * * Water made available under the Raw Water Contract and provided through the Wholesale Water Services provided by LCRA pursuant to this Agreement will be used by the Districts in order to provide potable water service within the District Service Area prior to the use of potable water obtained from any other source.")

⁵¹ JAD Exhibit 4, Wholesale Water Services Agreement at p. 2/27 (Recitals 2 and 4); at p. 5/27 (Definition of Raw Water Contract).

Respectfully Submitted,

SMITH TROSTLE & HUERTA LLP

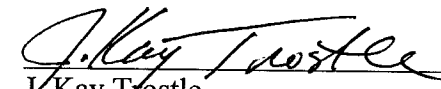
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CERTIFICATE OF SERVICE

I hereby certify that a on this 31st day of March a true and correct copy of the above and foregoing document is being served via electronic mail, facsimile, U.S. mail and/or hand delivery to all parties of record.


J. Kay Trostle