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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 AGENCY; CITY OF BEE § OF
CAVE, TEXAS; HAYS COUNTY, §
TEXAS; AND WEST TRAVIS §
COUNTY MUNICIPAL UTILITY §
DISTRICT NO. 5 § ADMINISTRATIVE HEARING

OF

ADMINISTRATIVE HEARING

**WEST TRAVIS COUNTY PUBLIC UTILITY AGENCY'S
OBJECTIONS TO AND MOTION TO STRIKE
REBUTTAL TESTIMONIES OF JAY JOYCE, JAY ZARNIKAU,
AND JOSEPH DIQUINZIO**

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TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

West Travis County Public Utility Agency ("*WTCPUA*") files these objections and motion to strike portions of the rebuttal testimony of Jay Joyce, Jay Zarnikau, and Joseph DiQuinzio filed on behalf of Travis County Municipal Utility District No. 12 ("*TCMUD 12*"). Pursuant to SOAH Order No. 14, these objections and this motion are timely filed.

I. INTRODUCTION

Testifying on behalf of TCMUD 12, witnesses Mr. Jay Joyce, Mr. Joseph A. DiQuinzio, Jr., and Dr. Jay Zarnikau attempt to rebut testimonies presented by WTCPUA and Public Utility Commission ("*PUC*" or "*Commission*") witnesses, addressing whether the WTCPUA's wholesale water treatment rate, as adopted by the Board of Directors of WTCPUA on November 21, 2013 (the "*Protested Rate*"), charged to TCMUD 12 under a certain "Wholesale Water Services Agreement" ("*Wholesale Agreement*"), as amended and assigned to WTCPUA, violates two

aspects of the public interest criteria, specifically P.U.C. SUBST. R. 24.133(a)(3)(A) and (C) (collectively, the “*Contested Issues*”). These two subsections provide the following:

- (a) The commission shall determine the protested rate adversely affects the public interest if after the evidentiary hearing on public interest the commission concludes at least one of the following public interest criteria have been violated:...
- (3) the protested rate evidences the seller’s abuse of monopoly power in its provision of water or sewer service to the purchaser. In making this inquiry, the commission shall weigh all relevant factors. The factors may include:
 - (A) the disparate bargaining power of the parties, including the purchaser’s alternative means, alternative costs, environmental impact, regulatory issues, and problems of obtaining alternative water or sewer service;...
 - (C) the seller changed the computation of the revenue requirement or rate from one methodology to another;...¹

However, significant portions of TCMUD 12’s rebuttal testimonies stray far afield from the Contested Issues, contain hearsay and rampant speculation, and do not rebut any portion of direct testimony presented by WTCPUA or the PUC Staff. Therefore, these portions of the testimonies should not be admitted into the record of this proceeding. To the extent any of the portions of the testimony objected to contain or reference exhibits, WTCPUA objects to and moves to strike, the exhibits as well. WTCPUA objects to the following described portions of TCMUD 12’s witnesses’ prefiled rebuttal testimonies, and requests that such objected-to portions be struck under P.U.C. PROC. R. 22.221(a) and Tex. R. Evid. 401, 402, 602, 613, 701, 702, 703, and 802, as set forth herein.

¹ P.U.C. SUBST. R. 24.133(a)(3)(A) and (C) (2015).

II. STANDARD OF REVIEW

The standard for evaluating objections and motions to strike evidence and exhibits in a contested case hearing before the PUC is found in P.U.C. PROC. R. 22.221(a). This rule provides the following:

- (a) Rules of civil evidence apply. The Texas Rules of Civil Evidence as applied in nonjury civil cases in the courts of Texas shall be followed in contested cases. Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. When necessary to ascertain facts not reasonably susceptible of proof under the Texas Rules of Civil Evidence, evidence not admissible under those rules may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs.

Pertinent Texas Rules of Evidence provide the following:

RULE 401. DEFINITION OF "RELEVANT EVIDENCE"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

RULE 402. RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE

All relevant evidence is admissible, except as otherwise provided by Constitution, by statute, by these rules, or by other rules prescribed pursuant to statutory authority. Evidence which is not relevant is inadmissible.

RULE 602. NEED FOR PERSONAL KNOWLEDGE

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to provide personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

RULE 613. WITNESS'S PRIOR STATEMENT AND BIAS OR INTEREST

(a) Witness's Prior Inconsistent Statement.

(3) *Opportunity to Explain or Deny.* A witness must be given the opportunity to explain or deny the prior inconsistent statement.

(4) *Extrinsic Evidence*. Extrinsic evidence of a witness's prior inconsistent statement is not admissible unless the witness is first examined about the statement and fails to unequivocally admit making the statement.²

RULE 701. OPINION TESTIMONY BY LAY WITNESSES

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

RULE 702. TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

RULE 703. BASES OF OPINION TESTIMONY BY EXPERTS

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. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

RULE 802. HEARSAY RULE.

Hearsay is not admissible except as provided by statute or these rules or by other rules prescribed pursuant to statutory authority. Inadmissible hearsay admitted without objection shall not be denied probative value merely because it is hearsay.

III. OBJECTIONS TO REBUTTAL TESTIMONY OF JAY JOYCE

A. Relevance

1. Cost of Service Issues Are Not Relevant.

Like his direct testimony, portions of Mr. Joyce's rebuttal testimony and accompanying exhibits solely address his analysis of WTCPUA's cost of service, and are thus irrelevant to the Commission's inquiry in the public interest phase of this proceeding concerning the Protested

² Tex. R. Evid. 613 was amended effective April 1, 2015.

Rate under P.U.C. SUBST. R. 24.133(b). Specifically, the cited portions of Mr. Joyce's rebuttal testimony and corresponding exhibits in this Subsection are his analysis of the methodology employed by WTCPUA in allocating its revenue requirement to TCMUD 12 and other customers for wholesale water treatment services, not the methodology used to determine the WTCPUA's revenue requirement upon which the Protested Rates are based. Mr. Joyce's testimony and exhibits go well beyond the scope of proper and admissible testimony in this phase of the hearing and therefore constitute irrelevant evidence under Tex. R. Evid. 402.

Because the Protested Rate is a wholesale rate charged pursuant to a written contract, TCMUD 12 is first required under P.U.C. SUBST. R. 24.131(b), 24.132(a), and 24.133(a) to demonstrate that the Protested Rate somehow violates certain "public interest criteria," which are expressly enumerated in P.U.C. SUBST. R. 24.133(a). Then, in the event that TCMUD 12 is able to meet its burden of proof, a second phase commences regarding whether WTCPUA's wholesale water treatment rate is just and reasonable, through a review of its cost of service, under P.U.C. SUBST. R. 24.134.

As clarified by the Administrative Law Judge ("*ALJ*") in Order No. 2, the first phase of this case concerns "whether WTCPUA's protested wholesale rates adversely affect the public interest."³ Under P.U.C. SUBST. R. 24.133(b), "[t]he [C]ommission shall not determine whether the protested rate adversely affects the public interest based on an analysis of the seller's cost of service." Thus, the relevant inquiry in this first phase is whether the Protested Rate violates P.U.C. SUBST. R. 24.133(a). By specifically listing the public interest criteria in P.U.C. SUBST. R. 24.133(a), and following that list with the prohibition in P.U.C. SUBST. R. 24.133(b) that "the Commission shall not determine whether the protested rate adversely affects the public interest

³ Order No. 2 Granting Motion for Clarification at 1 (July 1, 2014), citing 30 Tex. Admin. Code ("TAC") §§ 291.133 and 291.134.

based on an *analysis of the seller's cost of service*,” the Commission has determined that cost of service-based information is not relevant.⁴

As Your Honor ruled in a previous case, P.U.C. SUBST. R. 24.133(b)⁵ “specifically, clearly, and unambiguously renders [the seller’s] cost of service legally irrelevant to determining whether the public interest will be adversely affected by [the seller’s] rates.”⁶ Through this rule, the Commission has placed cost of service evidence “completely off the table” and “all cost-of-service evidence is irrelevant in the public-interest hearing.”⁷

In this docket, the distinction between public interest issues and cost of service issues has also been recognized in Orders Nos. 6 and 8 sustaining WTCPUA’s objections to discovery inquiring into cost of service issues.⁸ Specifically and most importantly, portions of Mr. Joyce’s rebuttal testimony address the very issues that TCMUD 12’s Requests for Information (“*RFI*”) Nos. 3-7 and 3-8 attempted to discover from WTCPUA. WTCPUA objected to these discovery requests on the grounds that such RFIs sought cost of service information and were thus irrelevant to this matter. WTCPUA’s relevancy objections were sustained in Order No. 8. These RFIs are as follows:

TCMUD 12 RFI 3-7: What is the PUA’s assumed raw water loss percentage *allocated* to TCMUD No. 12 for water transported between the LCRA intake point and the water treatment plant? Please provide any documents supporting that raw water loss assumption. If the assumed percentage for raw water loss has

⁴ P.U.C. SUBST. R. 24.133(b).

⁵ Previously 30 TAC § 291.133(b).

⁶ *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*, SOAH Docket No. 582-10-1944; TCEQ Docket No. 2009-1925-UCR, Proposal for Decision (“PFD”) at 16-17 (Aug. 17, 2011).

⁷ *Id.* at 22.

⁸ For example, WTCPUA’s objections were sustained to TCMUD 12’s Requests for Production Nos. 1-18, 3-3, 3-6(d), 3-7, 3-8, and 3-11, requesting production/information concerning sensitivity analyses of the variables and assumptions used to develop wholesale water rates, water loss percentages, market value of the WTCPUA’s water system, and growth projections.

changed or was different at certain times, please identify each assumed raw water loss percentage and the dates during which that assumed percentage was used. (Emphasis added.)

TCMUD 12 RFI 3-8: What is the PUA's assumed treated water loss percentage allocated to TCMUD No. 12 for water transported between the water treatment plant and TCMUD No. 12's delivery point? Please provide any documents supporting that treated water loss assumption. If the assumed percentage for treated water loss has changed or was different at certain times, please identify each assumed treated water loss percentage and the dates during which that assumed percentage was used. (Emphasis added.)

TCMUD 12 has admitted that the WTCPUA did not change the computation of the revenue requirement methodology from the cash needs basis to the utility basis, or vice versa, or the rate methodology from a minimum monthly fee and a volumetric rate; and, thus, TCMUD 12's testimony is understandably silent as to those issues.⁹ In fact, TCMUD 12 has failed to identify any revenue requirement or rate methodology change focusing instead on *allocation* issues. However, having no evidence to provide regarding any change in methodology of calculating the revenue requirement or rate does not give TCMUD 12 license to insert an analysis of WTCPUA's cost of service or cost allocation into this first phase of the matter, in direct violation of P.U.C. SUBST. R. 24.133(b).

The terms "revenue requirement" and "cost of service" are not synonymous; they have separate and distinct meanings. WTCPUA's revenue requirement is the amount of money it must receive through its rates to meet its needs, and its cost of service for TCMUD 12 is the manner in which the revenue requirements are allocated to, and collected from, TCMUD 12. It is uncontested that there has not been a change in the computation of the revenue requirement

⁹ See WTCPUA's Motion for Partial Summary Decision, and attachments thereto (Mar. 6, 2015).

“from one methodology to another”;¹⁰ Mr. Joyce’s attempts to frame his cost of service analysis as a revenue requirement analysis are unavailing.

The portions of Mr. Joyce’s rebuttal testimony that address his analysis of the WTCPUA’s cost of service and cost allocation methodology for the Protested Rates should be struck as irrelevant evidence under Tex. R. Evid. 402. These portions are:

- **Page 17, Lines 2-9:** Mr. Joyce provides a quote from the AWWA Financial Management textbook that merely addresses cost-of-service studies, which is irrelevant to this case.
- **Page 18, Line 9 through Page 19, Line 8.** The chart and the attachments to Mr. Stowe’s testimony referenced are the cost of service study itself. Mr. Joyce’s testimony addressing this cost of service study is irrelevant.

2. Testimony Addressing Future Rates Is Irrelevant.

Mr. Joyce repeatedly testifies as to what the WTCPUA’s rates may be at various points in time in the future. Such testimony is not only wholly speculative, but also completely irrelevant to this case. Future rates that *might* be charged by the WTCPUA in the future are not relevant to the determination of whether the Protested Rates actually *set by the WTCPUA on November 21, 2013*, and subject of the protest are adverse to the public interest under P.U.C. SUBST. R. 24.133(a)(3)(A) or (C). In fact, the ALJ has previously determined that future rates are not relevant to this proceeding, sustaining WTCPUA’s objection to TCMUD 12’s RFP seeking information on future rates.¹¹ Therefore, the following portions of Mr. Joyce’s testimony regarding speculative future rates should be struck under Tex. R. Evid. 402:

- Page 38, Line 15 through Page 39, Line 10
- Page 49, Lines 13-15.
- Page 49, Lines 25-28 (beginning “Mr. Rauschuber implies...”).

¹⁰ P.U.C. SUBST. R. 24.133(a)(3)(C).

¹¹ SOAH Order No. 6 Granting in Part and Denying in Part Motion to Compel (Sept. 30, 2014).

- Page 50, Line 24 through Page 53, Line 30.

3. Testimony Not Addressing Protested Rates Is Irrelevant.

WTCPUA objects to portions of Mr. Joyce's rebuttal testimony and accompanying exhibits, and moves to strike such rebuttal testimony and exhibits, as irrelevant under Tex. R. Evid. 402 because neither the testimony nor the exhibits pertain to the Protested Rate. Such portions are listed below:

- **Page 25, Lines 1-32 and Page 26, Lines 4-12:** Mr. Joyce is testifying about electric rate cases filed by Denton Municipal Electric, Texas-New Mexico Power, Garland Power & Light, and TNP. These electric rate cases are subject to different laws and regulations, and are in no way relevant to the public interest test for a wholesale water rate appeal under P.U.C. SUBST. R. 24.133(a)(3)(A) or (C). Further, Mr. Joyce fails to explain their relevance in this proceeding.
- **Page 31, Line 10 through Page 32, Line 8:** Neither the San Saba case nor the Chisholm Trail cases referenced by Mr. Joyce were appeals of wholesale water rates in a public interest test proceeding under P.U.C. SUBST. R. 24.133(a)(3)(A) or (C). Instead, these cases were retail rate appeals regarding whether the rates were just and reasonable, which is akin to the analysis in the second phase of a wholesale water rate appeal.
- **Page 45, Line 28 to Page 46, Line 10:** Meetings held by a municipality in the furtherance of developing some type of water rate are completely irrelevant to whether the Protested Rates set by the WTCPUA in 2014 are adverse to the public interest under P.U.C. SUBST. R. 24.133(a)(3)(A) or (C).
- **Page 48, Lines 4-7:** Mr. Joyce seeks to prejudice the ALJ against WTCPUA by including irrelevant allegations that the WTCPUA's rate consultant reprimanded Mr. Joyce. Such allegations are completely unrelated to the inquiry in this proceeding – whether the Protested Rates are adverse to the public interest.
- **Page 50, Lines 5-12 (ending with "further increases"):** Testimony regarding the composition of the Board of Directors of the WTCPUA and a statement by the Board President regarding retail rates is not relevant to whether the Protested Rate charged TCMUD 12 violates P.U.C. SUBST. R. 24.133(a)(3)(A) or (C).
- **Page 54, Lines 10-14:** Testimony regarding the composition of the Board of Directors of the WTCPUA and a statement by the Board President regarding retail rates is not relevant to whether the Protested Rate charged TCMUD 12 violates P.U.C. SUBST. R. 24.133(a)(3)(A) or (C).

B. Violations of Texas Rule of Evidence 613.

Mr. Joyce provides numerous quotations from WTCPUA expert witness Jack Stowe from other proceedings without providing any foundation for the admissibility of these statements. Mr. Joyce's quotations from Mr. Stowe are alleged to be inconsistent with Mr. Stowe's testimony in this case. Mr. Stowe is a witness in this case and before extrinsic evidence of a witness' prior inconsistent statement may be introduced, the witness must be told the contents of such statement and the time and place and the person to whom it was made, and must be afforded an opportunity to explain or deny such statement. Tex. R. Evid. 613(a)(3) and (4). By including these statements in his rebuttal testimony, Mr. Joyce is depriving Mr. Stowe of that opportunity. The introduction through Mr. Joyce of the extrinsic evidence of such statement violate the provisions of Tex. R. Evid. 613(a)(3) and (4). The following portions should be struck on this basis:

- Page 14, Lines 6-28.
- Page 24, Lines 18-27.
- Page 25, Line 1-Page 26, Line 26.
- Page 30, Line 16 through Page 31, Line 3.
- Page 40, Line 20 through Page 42, Line 16.
- Page 48, Lines 12-25.

C. Inadmissible Hearsay

Rule 703 of the Texas Rules of Evidence allows an expert witness to base an opinion or inference on hearsay, also known as "expert hearsay."¹² However, the hearsay that may form the basis for an opinion or inference must be "of a type reasonably relied upon by experts in the

¹² Tex. R. Evid. 703.

particular field in forming opinions or inferences upon the subject.”¹³ 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.”¹⁴ Therefore, any hearsay relied upon by Mr. Joyce must be shown to be of a type reasonably relied upon by experts in his particular field.

1. Mr. Joyce’s Quotes of Staff Witnesses Are Improper Hearsay.

Mr. Joyce includes quotations from Staff witnesses Debi Loockerman and Tammy Benter from other cases without providing any foundation for the admissibility of these statements. The testimony of these Staff witnesses are inadmissible hearsay.

- Page 29, Line 19 through Page 30, Line 15.

2. Mr. Joyce’s Quotes of Mr. Rauschuber Are Inadmissible Hearsay and Violate Tex. R. Evid. 613.

Mr. Joyce quotes numerous portions of testimony previously given by Mr. Rauschuber in prior cases without providing any foundation for the admissibility of these statements. Mr. Rauschuber was not representing the WTCPUA in any of these prior cases where Joyce quotes his testimony. This testimony of a third party is inadmissible hearsay because it does not fall within the Rule 801 hearsay exceptions of an opposing party’s statement. These attempts to include allegedly inconsistent prior statements of the witness also violate Tex. R. Evid. 613(a)(3) and (4) as set forth above with regard to quotations of Mr. Stowe’s prior statements. The following portions of Joyce’s testimony should be struck on this basis:

- Page 27, Line 1 through Page 29, Line 18.

¹³ *Id.*

¹⁴ Direct Testimony of Jay Joyce at 4, lines 6-9.

3. Other Out of Court Statements Offered for the Truth of the Matter Asserted

- **Page 44, Lines 22** (beginning with “This reflects”) – **24** (ending with “year’s rates”): Mr. Joyce purports to know what impression the customers were under regarding meetings with WTCPUA. Mr. Joyce does not provide any foundation for the admissibility of this statement. It is an out of court statement by the customers being offered for the truth of the matter asserted. Therefore it is improper hearsay that does not fall within any of the hearsay exceptions.
- **Page 46, Lines 1-3:** The testimony and report attached as JJJ Exhibit R29¹⁵ is hearsay. Mr. Joyce offers the testimony and document without any foundation for its admissibility. The document is an out of court statement by the City of Austin offered for the truth of the matter asserted that does not fall within any of the hearsay exceptions.

D. Improper Rebuttal Testimony

Rebuttal evidence is permitted only to “disprove facts already in evidence by an adverse party.” *In re Bledsoe*, 41 S.W.3d 807, 813 (Tex. App.—Fort Worth 2001, no pet.). A rebuttal witness cannot be used to prove an essential element of the case not addressed by another party and cannot merely bolster the rebutting party’s case. Rather, rebuttal is limited to the issues that were placed in conflict by the other party’s evidence. P.U.C. PROC. R. 22.225 provides that the judge may exclude testimony if there is a showing that the supplemental testimony raises new issues or unreasonably deprives opposing parties the opportunity to respond. Numerous portions of TCMUD 12’s rebuttal testimony merely repeats TCMUD 12’s direct testimony and responds to the direct testimony of other TCMUD 12 witnesses.¹⁶ The following portions of Mr. Joyce’s rebuttal testimony raise new issues and do not disprove facts presented into evidence by either WTCPUA or the PUC Staff. Therefore, the following portions should be struck:

- **Page 17, Lines 10-18:** The statements Mr. Joyce cites from Mr. Stowe’s testimony in his Section E do not address what Mr. Joyce is actually talking about in this portion of Joyce’s testimony. Mr. Joyce merely testifies that Mr. Stowe listed other revenue

¹⁵ WTCPUA believes Mr. Joyce’s reference to JJJ Exhibit R26 to be an error. WTCPUA believes the reference should be to JJJ Exh. R29 which is in fact the Joint Committee on Austin Water Utility’s Financial Plan-Committee Final Recommendations to which he is referring.

¹⁶ See e.g. Direct Testimony of Dr. Jay Zarnikau at 3, line 26.

requirement methodologies rather than rebutting the Stowe's finding that there was no change in methodology. Additionally, Mr. Stowe's testimony does not assert that the listed five additional methodologies are not other methodologies, nor does his testimony assert that there are no other revenue requirement methodologies other than the cash basis or utility basis.

- **Page 16, Lines 20-31:** This portion of Mr. Joyce's testimony does not rebut Mr. Stowe. Mr. Stowe did not claim that there was only one treatise that is recognized or that there are only two methodologies that are recognized.
- **Page 17, Line 19 through Page 18, Line 2:** Mr. Joyce provides a public policy argument. However, neither Mr. Stowe, nor the other witnesses, provided policy arguments in their direct case to which Mr. Joyce could be responding. Therefore, this is improper rebuttal testimony seeking to bolster Mr. Joyce's direct testimony.
- **Page 20, Lines 1 through Page 21, Line 25:** This testimony regarding various reports to the WTCPUA Board, memos to the Board, and other letters should have been included in Mr. Joyce's direct case. It is not rebutting any testimony provided by other witnesses in this case.
- **Page 50, Line 16 through Page 54, Line 3:** This is not proper rebuttal testimony. No other WTCPUA or PUC Staff witness offered testimony regarding the potential future rates that WTCPUA may charge TCMUD 12. In particular, Mr. Rauschuber addressed the 2012-2013 and 2013-2014 time frames because those were known rates. Therefore, Mr. Joyce's testimony goes well beyond rebutting the testimony presented by Mr. Rauschuber or any other WTCPUA or PUC Staff witness.
- **Page 54, Lines 4-23:** Mr. Joyce's discussion of the Board of Directors of WTCPUA is not rebutting the cited direct testimony of Mr. Stowe. Mr. Joyce merely speculates that the WTCPUA now has the opportunity to shift its future cost increases to the wholesale customers. This testimony is not proper rebuttal, but instead is pure speculation and does not address Mr. Stowe's conclusion that there was not an abuse of monopoly power when the rates were set, as discussed in Subsection III.E., below.

E. Speculation.

Witnesses are permitted to testify as to their own personal knowledge pursuant to Tex. R. Evid. 602. Expert witnesses are permitted to go beyond that personal knowledge and give their expert opinions pursuant to Tex. R. Evid. 703. However, mere speculation as to facts is not permitted, even by expert witnesses. The following portions of Mr. Joyce's rebuttal testimony are mere speculation that should be struck:

- **Page 8, Lines 3** (beginning with “Neither witness”) -**4** (ending with “revenue requirement”): Mr. Joyce guesses as to whether Mr. Stowe or Ms. Graham “considered” or “evaluated” an issue.
- **Page 44, Lines 22** (beginning with “This reflects”) -**24** (ending with “next year’s rates”): Mr. Joyce speculates as to what impression the wholesale customers were all under.
- **Page 44, Lines 30** (beginning with “Either the”) -**31**: Mr. Joyce cannot claim to know what the WTCPUA wanted to do or thought.
- **Page 45, Lines 1-2**: Mr. Joyce speculates as to what makes a formal consensus-building meeting.
- **Page 45, Lines 11** (beginning with “so the”) – **13** (ending with “methodology”): Mr. Joyce speculates as to who could comprehend the rate methodology.
- **Page 46, Line 22** (beginning with “He conveniently”) - **23** (ending with “rate methodology”): Mr. Joyce speculates as to Mr. Rauschuber’s intent.
- **Page 46, Lines 27 through Page 47, Line 4**: Mr. Joyce provides no foundation for having such knowledge and further speculates as to what the WTCPUA would do with its rates charged to wholesale customers other than TCMUD 12.
- **Page 47, Lines 10** (beginning with “The ability”) – **15 and Lines 23-24**: Mr. Joyce speculates as to what value the amendment had to the WTCPUA and TCMUD 12’s ability to treat a portion of the water it purchases from LCRA in the future and is speculating as to what Mr. Rauschuber is emphasizing .
- **Page 48, Lines 1** (beginning with “and that meeting”) – **2** (ending with “methodology”): Mr. Joyce is speculating as to why additional meetings were not held.
- **Page 48, Lines 8-11**: Mr. Joyce is speculating that the WTCPUA was attempting to “punish”.
- **Page 49, Lines 13-15**: Mr. Joyce’s testimony is speculating that the lowering of rates was an “enticement”.
- **Page 49, Lines 25** (beginning with “Mr. Rauschuber implies”) - **28**: Mr. Joyce claims that Rauschuber’s testimony implies that TCMUD 12 is “crazy”. Mr. Joyce has no basis for such and claim and is merely speculating as to what Mr. Rauschuber’s testimony intended to state.
- **Page 50, Lines 12** (beginning with “Because”) - **15**: Without any underlying basis, Mr. Joyce speculates as to what the WTCPUA intended to do, claiming that WTCPUA sought to load all of the future rate increases onto the wholesale customers.

- **Page 50, Lines 21** (beginning with “Mr. Rauschuber”) – **23**: Mr. Joyce characterizes the WTCPUA’s actions as misleading.
- **Page 52, Line 6**: Mr. Joyce is speculating as to what the rates will be in the future.

F. Providing an Unqualified Legal Opinion

In TCMUD 12’s objections to the testimony presented by WTCPUA witnesses, TCMUD 12 objected to certain portions of the testimony of Jack Stowe, claiming that Mr. Stowe was not testifying as a legal expert and thus any testimony where Mr. Stowe offered his interpretation of a regulation should be struck.¹⁷ If TCMUD 12’s objections as to Mr. Stowe’s interpretation of regulations are sustained, the following objections to Mr. Joyce’s testimony should also be sustained because Mr. Joyce is not a legal expert. His expert opinions are limited by Tex. R. Evid. 702, to the areas of Mr. Joyce’s specialized knowledge, and he is not held out as a legal expert. To the extent he is providing opinions as a lay witness, Tex. R. Evid. 701 only allows opinions that are (1) based on his perceptions and (2) helpful to a clear understanding of the testimony or the determination of a fact issue. The following portions of his testimony are merely unqualified legal conclusions that are improper under Tex. R. Evid. 701 and 702:

- Page 6, Lines 1 -5.
- Page 9, Lines 1-14.
- Page 9, Lines 26-30.
- Page 10, Lines 25-30.
- Page 10, Lines 32-33.
- Page 21, Line 32 (beginning with “In the context”) through Page 22, Line 2.
- Page 22, Line 31 (beginning with “There is no”) through Page 23, Line 7.

¹⁷ TCMUD 12 Objections and Motion to Strike Portions of West Travis County Public Utility Agency’s and Commission Staff’s Direct Testimony at 2-3 (Mar. 17, 2015).

- Page 23, Line 24 through Page 24, Line 10.
- Page 32, Lines 18 (beginning with “as shown above”) - 20.
- Page 32, Line 29 (beginning with “If Mr. Stowe”) through Page 33, Line 2.
- Page 39, Lines 2-10.

Regardless of whether the objections to the testimony of Mr. Stowe and Mr. Joyce discussed above are sustained, the following two portions of Joyce’s testimony go well beyond Mr. Joyce’s expertise. In these two portions of his testimony, Mr. Joyce presents his legal interpretation of case law and the rules that are far outside his expertise. These are egregious violations of Tex. R. Evid. 701, 702, and 703 and should be struck:

- Page 33, Lines 3-13 and Lines 25-33.
- Page 35, Line 18 through Page 37, Line 7.

G. The Headings in Mr. Joyce’s Testimony Are Improper.

Beginning on Page 43, the headings in Mr. Joyce’s rebuttal testimony for Section V are inappropriate for prefiled testimony. The headings themselves are inappropriate testimony, argumentative, speculative, inflammatory, and prejudicial. Without providing a basis for the claims made in the headings, Mr. Joyce includes conclusory statements that are entirely improper (and inaccurate). Many of the statements ascribe motives to the WTCPUA when Mr. Joyce has no personal knowledge of the WTCPUA’s motives. The following headings are in violation of Tex. R. Evid. 602 and 703:

- Page 43, Lines 25-26.
- Page 46, Lines 11-15.
- Page 47, Lines 16-18.
- Page 48, Lines 26-28.
- Page 49, Lines 7-9.

III. **OBJECTIONS TO REBUTTAL TESTIMONY OF JAY ZARNIKAU**

A. **Unqualified Opinion Testimony.**

As addressed in WTCPUA's objections to Dr. Zarnikau's Direct Testimony, Dr. Zarnikau is offered by TCMUD 12 as an economist to address whether WTCPUA operates as a monopoly, not as a rate consultant or ratemaking expert, nor as a water system engineer. TCMUD 12 witness DiQuinzio's description of Dr. Zarnikau's testimony also limits his expertise: "Dr. Zarnikau is an Economist and testifies regarding monopoly, market power, and the exercise of market power, also referred to as abuse of monopoly power."¹⁸ Under Tex. R. Evid. 702, Dr. Zarnikau's opinions must be based on his knowledge, skill, experience, training, or education. On several occasions, however, Dr. Zarnikau offers opinions that are outside his expertise. TCMUD 12 also objected to the testimony of WTCPUA witness Richard Baudino, claiming that portions of Mr. Baudino's testimony were unqualified legal opinion.¹⁹ To the extent TCMUD 12's objections to Mr. Baudino's testimony are sustained, WTCPUA's objections to Dr. Zarnikau's testimony should also be sustained. No foundation has been provided for the following unqualified opinions, and they must be struck:

- **Page 4, Line 11** (beginning with "Nor is it") **through Page 5, Line 6** (ending with "appropriate standard"): Dr. Zarnikau expresses his unqualified legal opinion as to the definition of monopoly in case law and legal proceedings and its use in PUC SUBST. R. 24.133.
- **Page 19, Lines 23** (beginning with "In this proceeding") – **25** (ending with "in 2008-09"): Dr. Zarnikau makes a conclusory statement that there was only one alternative wholesale service providers without laying any foundation for such a claim. Dr. Zarnikau has no personal knowledge of these facts and such a determination is beyond his expertise.

¹⁸ Prefiled Direct Testimony of Joseph A. DiQuinzio, Jr. at 3, lines 19-20 (Oct. 31, 2014).

¹⁹ TCMUD 12 Objections and Motion to Strike Portions of West Travis County Public Utility Agency's and Commission Staff's Direct Testimony at 12-13 (Mar. 17, 2015).

- **Page 22, Lines 9-18 and 19-22:** Dr. Zarnikau provides his unqualified legal interpretation of the “No Competition” provision in the agreement among the WTCPUA participants. The ALJ has previously concluded that details about this agreement are irrelevant to this case in discovery disputes between the parties.²⁰ WTCPUA was not required to respond to TCMUD 12 RFPs 1-20, 1-21, or 3-6, all of which sought information about the purchase agreement.
- **Page 23, Line 13 through Page 24, Line 2:** Dr. Zarnikau provides his legal interpretation of the Texas Water Code and whether the WTCPUA falls within certain provisions of the Water Code. Dr. Zarnikau is not a lawyer and not qualified to express a legal opinion.
- **Page 25, Lines 12-15:** Dr. Zarnikau states his unqualified opinion that TCMUD 12’s options are severely limited. His expertise does not lie in this field and he provides no basis foundation for reaching this conclusion.
- **Page 25, Lines 21-24** (beginning with “Even if”): Dr. Zarnikau provides his conclusory opinion that a new system would be a significant addition and provides the suppliers with greater bargaining power. Dr. Zarnikau has not provided any foundation for this knowledge.
- **Page 25, Line 29** (first full sentence): Dr. Zarnikau purports to know what issues are relevant to this proceeding, which is a legal conclusion that he is not qualified to make.

B. Irrelevant Testimony.

As previously discussed, the first phase of this case concerns “whether WTCPUA’s protested wholesale rates adversely affect the public interest.”²¹ Information that is not relevant to that inquiry is improper and should be struck under Tex. R. Evid. 402. The following portions of Dr. Zarnikau’s testimony are irrelevant to this proceeding:

- **Page 16, Line 9 through Page 17, Line 5:** Dr. Zarnikau engages in a lengthy discussion related to franchise agreements. The WTCPUA does not have a franchise for its services, and it is not required under any law to secure a franchise to provide wholesale water treatment services to TCMUD 12 and charge TCMUD 12 for such services. This entire discussion is irrelevant to a wholesale water rate appeal and whether WTCPUA’s rates adversely affect the public interest.

²⁰ SOAH Order No. 6, Granting in Part and Denying in Part Motion to Compel (Sept. 30, 2014); SOAH Order No. 8 Denying Motion to Compel (Oct. 17, 2014).

²¹ Order No. 2 Granting Motion for Clarification at 1 (July 1, 2014), citing 30 Tex. Admin. Code (“TAC”) §§ 291.133 and 291.134.

- **Page 17, Lines 6-17:** Dr. Zarnikau discusses the PUC's regulation of electric rates in ERCOT that has absolutely no bearing on this proceeding. The franchise agreements electric utilities obtain from cities relate to the utility's authority to place poles and wires within city rights of way. The WTCPUA does not and is not required to obtain such franchise agreements with cities. Franchise agreements do not have any relevance to the question to be answered here: whether the rates adversely affect the public interest under P.U.C. SUBST. R. 24.133(a)(3)(A) or (C).
- **Page 17, Line 18 through Page 18, Line 2:** Dr. Zarnikau continues to discuss utility franchise agreements which have no relevance to this proceeding.
- **Page 19, Lines 6-19:** Dr. Zarnikau discusses alternative fuel sources for the generation of electricity and alternatives to natural gas. These alternatives are irrelevant to a determination of whether the WTCPUA's rates adversely affect the public interest.
- **Page 20, Lines 4-10:** Dr. Zarnikau discusses WTCPUA's drought surcharge implemented after the date the Protested Rates were adopted by the Board of Directors of the District. The drought surcharge is not at issue in this proceeding and irrelevant to a determination of whether the Protested Rates adversely affect the public interest.
- **Page 25, Lines 6-11:** Dr. Zarnikau continues discuss utility franchise agreements that have no relevance to this proceeding.

C. Improper Rebuttal Testimony.

Rebuttal evidence is permitted only to "disprove facts already in evidence by an adverse party." *In re Bledsoe*, 41 S.W.3d 807, 813 (Tex. App.—Fort Worth 2001, no pet.). A rebuttal witness cannot be used to prove an essential element of the case not addressed by another party and cannot merely bolster the rebutting party's case. Rather, rebuttal is limited to the issues which were placed in conflict by the other party's evidence. P.U.C. PROC. R. 22.225 provides that the judge may exclude testimony if there is a showing that the supplemental testimony raises new issues or unreasonably deprives opposing parties the opportunity to respond. Rebuttal testimony cannot merely repeat a witness' direct testimony and cannot respond to the direct testimony of other witnesses testifying for the same party.²² The following portions of

²² See e.g. Direct Testimony of Dr. Jay Zarnikau at 3, line 26.

Dr. Zarnikau's rebuttal testimony raise new issues and do not disprove facts presented into evidence by witnesses for either WTCPUA or the PUC Staff.

- **Page 5, Lines 7-13 (including JZ R1, JZ R2, JZ R3):** As noted by Dr. Zarnikau, his testimony and accompanying exhibits merely restate and bolster his direct testimony and do not respond to the testimony presented by other parties in this case.
- **Page 6, Line 22 through Page 7, Line 16:** Dr. Zarnikau presents quotations (attached as exhibits) from various treatises that were not included in his direct testimony and do not rebut any facts placed into evidence by WTCPUA or PUC Staff witnesses. These quotations and the accompanying exhibits should have been included in Zarnikau's direct testimony so that WTCPUA could respond to such evidence. TCMUD 12 should not be permitted to bolster its case after WTCPUA has provided its prefiled testimony, as WTCPUA will be unable to respond to such new evidence.
- **Page 7, Line 20 through Page 12, Line 8 and Lines 20-26 (including JZ R4, JZ R5):** Dr. Zarnikau presents a discussion of case law that was not presented in his direct case or addressed by the WTCPUA or PUC Staff witnesses. Support for Dr. Zarnikau's definition of monopoly should have been included in his direct testimony, as he addressed that definition on pages 5-13, of his direct testimony. Therefore, Dr. Zarnikau's rebuttal testimony and accompanying exhibits merely seek to bolster his direct testimony.
- **Page 12, Lines 10-17:** Dr. Zarnikau describes why he believes he is qualified to interpret statutes and case law. WTCPUA and PUC Staff witnesses did not attack Dr. Zarnikau's ability to interpret statutes and case law in their direct testimony. Therefore, this discussion is not rebutting any facts introduced into evidence by either WTCPUA or the PUC Staff.
- **Page 14, Lines 1-6:** Dr. Zarnikau's testimony expressly states that it is explained by "Mr. Joe DiQuinzio" and not rebutting testimony of witnesses of WTCPUA or the PUC. Therefore, the testimony is not proper rebuttal.
- **Page 18, Lines 3-13:** Dr. Zarnikau testifies that he agrees with Mr. Baudino that barriers to entry should be examined. However, Dr. Zarnikau then proceeds to opine further about barriers to entry in an attempt to bolster his direct testimony rather than rebutting any witnesses. Therefore, it is not proper rebuttal testimony.
- **Page 18, Line 27 through Page 20, Line 3:** Dr. Zarnikau engages in a lengthy discussion regarding alternative suppliers that does not disprove any facts already placed into evidence by WTCPUA or the PUC Staff. This testimony is improper rebuttal that should have been included in Zarnikau's direct testimony.

- **Page 20, Lines 4-10:** Dr. Zarnikau discusses the WTCPUA's drought plan that was not previously discussed by any witnesses for the WTCPUA or the PUC Staff. Therefore, the testimony is improper rebuttal.
- **Page 24, Lines 18-25:** Dr. Zarnikau offers his definition of "disparate bargaining power" and repeats his irrelevant discussion of franchise agreements. However, this information is not presented to rebut any testimony provided by the WTCPUA or the PUC Staff and is improper rebuttal.
- **Page 26, Lines 7-26.** In these portions of his rebuttal testimony, Dr. Zarnikau is bolstering his testimony and not responding to any testimony of WTCPUA or the PUC Staff. In fact, his answer in lines 10-18 responds to a question regarding the direct and rebuttal testimonies of Mr. DiQuinzio, a witness for TCMUD 12, and his answer in lines 23-27 is based upon prior statements from him and Mr. Joyce, another TCMUD 12 witness. Such testimony is improper rebuttal testimony.

IV. **OBJECTIONS TO REBUTTAL TESTIMONY OF JOSEPH A. DIQUINZIO, JR.**

A. **Inadmissible Lay Opinion.**

Mr. DiQuinzio offers inadmissible lay opinions throughout his testimony, in violation of Tex. R. Evid. 701. Mr. DiQuinzio is not an attorney, therefore his testimony regarding the legal implications of specific language in a contract in the form of his opinion or inference is not admissible. Furthermore, Mr. DiQuinzio is a lay witness whose testimony cannot go beyond his personal knowledge. Opinions and speculation are not permitted of a lay witness such as Mr. DiQuinzio.

1. **Legal Conclusions and Unqualified Expert Opinion.**

The following objections regarding Mr. DiQuinzio's legal conclusions should be sustained.

- **Page 4, Lines 23** (beginning with "Our purchase") – **24** (ending with "opines): Mr. DiQuinzio claims that TCMUD 12's contract for the purchase of raw water from LCRA did not make LCRA a sole provider. Mr. DiQuinzio is not qualified to render an expert opinion as an economist under Tex. R. Evid. 701. His lay opinion goes beyond his perception, and is not helpful in a determination of any fact in issue.

- **Page 6, Line 23** (beginning with “Bargaining power” ending with “alternatives”): DiQuinzio provides his definition of bargaining power. However, he is a lay witness offering an expert opinion as to the definition of this term. Mr. DiQuinzio is not qualified to render an expert economist opinion under Tex. R. Evid. 701. His lay opinion goes beyond his perception, and is not helpful in a determination of any fact in issue.
- **Page 11, Line 25 through Page 12, Line 2**: Mr. DiQuinzio states his legal conclusion that there was disparate bargaining power and an abuse of monopoly power. This is an impermissible legal interpretation of a contract by a lay witness. Mr. DiQuinzio is not qualified to render such opinion under Tex. R. Evid. 701. His lay opinion goes beyond his perception, and is not helpful in a determination of any fact in issue.
- **Page 13, Lines 1** (beginning with “it exercised”) -**3**: Mr. DiQuinzio offers an unqualified economist expert opinion that WTCPUA exercised disparate bargaining power as a monopoly provider. Mr. DiQuinzio is not qualified to render such opinion under Tex. R. Evid. 701. His lay opinion goes beyond his perception, and is not helpful in a determination of any fact in issue.
- **Page 14, Lines 1-7**: DiQuinzio offers his unqualified legal opinion interpreting the contract, characterizing the agreement. Mr. DiQuinzio is not qualified to render such opinion under Tex. R. Evid. 701. His lay opinion goes beyond his perception, and is not helpful in a determination of any fact in issue.
- **Page 14, Lines 16** (beginning with “First, WTCPUA”) – **22** (ending with “as well”): DiQuinzio provides his unqualified legal opinion interpreting the contract. Mr. DiQuinzio is not qualified to render such opinion under Tex. R. Evid. 701. His lay opinion goes beyond his perception, and is not helpful in a determination of any fact in issue.
- **Page 14, Lines 24** (beginning with “It is impossible” – **27** (ending with “transfer”): DiQuinzio provides his unqualified legal opinion interpreting the Installment Purchase Agreement. Mr. DiQuinzio is not qualified to render such opinion under Tex. R. Evid. 701. His lay opinion goes beyond his perception, and is not helpful in a determination of any fact in issue.
- **Page 15, Lines 13** (beginning with “It didn’t take” – **15** (ending with “heavily in”): DiQuinzio provides his unqualified legal opinion interpreting the contract. Mr. DiQuinzio is not qualified to render such opinion under Tex. R. Evid. 701. His lay opinion goes beyond his perception, and is not helpful in a determination of any fact in issue.
- **Page 15, Lines 22** (beginning with “No” – **26** (ending with “consent to the transfer”): Mr. DiQuinzio provides his unqualified legal interpretation of the Installment Purchase Agreement with LCRA and the terms of that agreement. Mr. DiQuinzio is not qualified to render such opinion under Tex. R. Evid. 701. His lay opinion goes beyond his perception, and is not helpful in a determination of any fact in issue.

- **Page 17, Line 17 through Page 19, Line 15:** Mr. DiQuinzio provides his unqualified legal interpretation of the Wholesale Water Services Agreement. Mr. DiQuinzio is not qualified to render such opinion under Tex. R. Evid. 701. His lay opinion goes beyond his perception, and is not helpful in a determination of any fact in issue.
- **Page 18, Lines 13** (beginning with “Second,” – **25** (ending with “12”): Mr. DiQuinzio provides his unqualified legal opinion interpreting the contract. Mr. DiQuinzio is not qualified to render such opinion under Tex. R. Evid. 701. His lay opinion goes beyond his perception, and is not helpful in a determination of any fact in issue.
- **Page 19, Lines 5** (beginning with “Here again,”) – **9** (ending with “the PUA”): DiQuinzio provides his unqualified legal opinion interpreting the contract. Mr. DiQuinzio is not qualified to render such opinion under Tex. R. Evid. 701. His lay opinion goes beyond his perception, and is not helpful in a determination of any fact in issue.

2. Speculation.

WTCPUA incorporates and reasserts the substantive portion of its objections regarding speculation from its objections to Joyce and Zarnikau rebuttal testimony into this Subsection.

- **Page 5, Lines 2** (beginning with “In addition”) – **5** (ending with “large”): Mr. DiQuinzio’s rebuttal testimony is speculative and he provides no foundation for his statements regarding alternative water treatment facilities. His lay opinion goes beyond his perception, and is not helpful in a determination of any fact in issue.
- **Page 5, Lines 9** (beginning with “LCRA ultimately”) – **14** (ending with “mismanaged”): DiQuinzio’s rebuttal testimony is speculative and he provides no foundation for his statements regarding LCRA’s plans for water treatment facilities. He claims that LCRA has unlimited financial resources and that LCRA was exploring expansion of its water service area. However, DiQuinzio provides no basis for these assertions. His lay opinion goes beyond his perception, and is not helpful in a determination of any fact in issue.
- **Page 7, Lines 24-28:** Mr. DiQuinzio offers his unqualified expert opinion as to what is and is not an economically viable and economically feasible contract. His claims are mere speculation. His lay opinion goes beyond his perception, and is not helpful in a determination of any fact in issue.

- **Page 8, Lines 10** (beginning with “That cannot”) – **16** (ending with “storage facilities”): DiQuinzio claims to know whether a connection could be “simply or inexpensively” done. Without a proper foundation, DiQuinzio cannot testify as to whether disconnection would be simple or inexpensive. Mr. DiQuinzio is not an engineer, and therefore not qualified to render such opinion under Tex. R. Evid. 701. His lay opinion goes beyond his perception, and is not helpful in a determination of any fact in issue.
- **Page 8, Lines 15** (beginning with “The PUA system”) – **18** (ending with “TCMUD 12”): Mr. DiQuinzio has laid no foundation for the statement that the PUA system has existing adequate storage at the proper elevations to enable TCMUD 12 to operate without additional storage facilities. Mr. DiQuinzio is not qualified to render such opinion under Tex. R. Evid. 701. His lay opinion goes beyond his perception, and is not helpful in a determination of any fact in issue.
- **Page 8, Lines 19-26:** Mr. DiQuinzio opines about The Highlands’ ability to support a bond issuance. However, he is not a bond expert and cannot provide his unqualified opinion as to a possible bond issuance. His lay opinion goes beyond his perception, and is not helpful in a determination of any fact in issue.
- **Page 10, Lines 12** (beginning with “Based on my”) – **17** (ending with “alternatives existed”): Mr. DiQuinzio again speculates as to what LCRA was thinking and possibly would have considered. He provides no foundation for having such personal knowledge. His lay opinion goes beyond his perception, and is not helpful in a determination of any fact in issue.
- **Page 10, Lines 17** (beginning with “I’ve also”) – **21** (ending with “at the chance”): Mr. DiQuinzio’s rebuttal testimony claims that Lakeway MUD does not have capacity to provide services for the Highlands, without providing any foundation for knowing such facts. Mr. DiQuinzio is not qualified to render such opinion under Tex. R. Evid. 701. His lay opinion goes beyond his perception, and is not helpful in a determination of any fact in issue.
- **Page 12, Lines 3-9:** Mr. DiQuinzio states his unqualified opinion regarding sole suppliers. Mr. DiQuinzio is not qualified to render such opinion under Tex. R. Evid. 701. His lay opinion goes beyond his perception, and is not helpful in a determination of any fact in issue.
- **Page 12, Lines 17** (beginning with “It is nonsensical”) – **18** (ending with “not explore”): Mr. DiQuinzio states his unqualified opinion that Mr. Baudino’s conclusion is “nonsensical”. Mr. DiQuinzio is not an expert. He is therefore not qualified to render an opinion regarding a qualified expert’s testimony. His lay opinion goes beyond his perception, and is not helpful in a determination of any fact in issue.

- **Page 12, Lines 23** (beginning with “Yes, and”) – **24** (ending with “to LCRA”): Mr. DiQuinzio states his opinion that the witnesses are attempting to confuse and shift the focus to LCRA. As a fact witness, Mr. DiQuinzio cannot attempt to tell the judge what is an essential legal point in this proceeding. His lay opinion goes beyond his perception, and is not helpful in a determination of any fact in issue.
- **Page 15, Lines 13** (beginning with “It didn’t take”) – **15** (ending with “heavily in”): Mr. DiQuinzio’s testimony is mere speculation as to what the WTCPUA was trying to do. He provides no foundation for this testimony. His lay opinion goes beyond his perception, and is not helpful in a determination of any fact in issue.
- **Page 15, Line 27** (beginning with “Based on”) **through Page 16, Line 1** (ending with “the WTCPUA”): DiQuinzio offers speculation that WTCPUA *seems* to have been made whole. Mr. DiQuinzio has no personal knowledge and is not qualified to render such opinion under Tex. R. Evid. 701. His lay opinion goes beyond his perception, and is not helpful in a determination of any fact in issue.
- **Page 16, Line 5 through Page 17, Line 16**: The testimony provided by Mr. DiQuinzio regarding the future minimum monthly charge amounts is pure speculation.

B. Irrelevant.

As previously discussed, the first phase of this case concerns “whether WTCPUA’s protested wholesale rates adversely affect the public interest.”²³ Information that is not relevant to that inquiry is improper and should be struck under Tex. R. Evid. 402. The following portions of Mr. DiQuinzio’s testimony are irrelevant to this proceeding:

1. Testimony Relating to the 2008 Time Frame.

In TCMUD 12’s motion to strike the testimony of Baudino, TCMUD 12 objected to portions of Mr. Baudino’s testimony related to TCMUD 12’s dealings with LCRA in 2009. TCMUD 12 claimed that dealings dating back to this time frame had no relevance to the WTCPUA’s decision to change rates effective in 2014.²⁴ If this objection is sustained, then the portions of Mr. DiQuinzio’s testimony related to dealings with LCRA in the 2008-09 timeframe

²³ Order No. 2 Granting Motion for Clarification at 1 (July 1, 2014), citing 30 Tex. Admin. Code (“TAC”) §§ 291.133 and 291.134.

²⁴ TCMUD 12 Objections and Motion to Strike Portions of West Travis County Public Utility Agency’s and Commission Staff’s Direct Testimony at 10-11 (Mar. 17, 2015).

should also be struck under Tex. R. Evid. 401 and 402. The following portions of testimony address this irrelevant time frame:

- **Page 3, Lines 24** (beginning with “and also longer” – **25** (ending with “from LCRA”).
- **Page 4, Line 2 through Page 8, Line 18** (except Page 6, Line 27 (beginning with “In 2013”) through Page 7, Line 1 ending with “go elsewhere”).
- **Page 10, Lines 1-21.**

2. Testimony Related to Impact Fees.

Testimony related to impact fees or “connection fees” are not relevant to this proceeding. The connection fee is a separate charge for diversion, transportation, and treatment of water by the WTCPUA. Because this fee is not the subject of this proceeding, the Commission has no jurisdiction over this fee. Therefore, testimony regarding the connection fee should be struck under Tex. R. Evid. 402. The following portions of testimony discuss impact fees.

- **Page 6, Lines 2** (beginning with “That plan”) – **6** (ending with “2014.”).
- **Page 6, Lines 9-21.**

3. Other Relevance Objection.

Mr. DiQuinzio’s testimony addresses a number of other issues that are not relevant to the question to be answered in this proceeding – whether the rates set by the WTCPUA are adverse to the public interest under P.U.C. SUBST. R. 24.133(a)(3)(A) and (C). The following portions of testimony should be struck under Tex. R. Evid. 402:

- **Page 3, Lines 22** (beginning with “I discuss”) – **25** (ending with “from LCRA”): Mr. DiQuinzio states that he will discuss the lack of alternative service providers in 2014. The Protested Rates were changed in 2013, making the 2014 time period irrelevant. Therefore, Mr. DiQuinzio’s testimony is irrelevant to the issues to be decided in this proceeding and should be struck under Tex. R. Evid. 402.
- **Page 4, Lines 8** (beginning with “and there”) – **9** (ending with “providers”) **and Line 12** (“and is not now”): Mr. DiQuinzio states on line 8 that there “still aren’t any alternative providers.” Additionally, he states that LMUD “is not now” an alternative service

provider. Mr. DiQuinzio's claims are irrelevant to this case because they relate to a time period after the change in Protested Rates at issue in this proceeding. Whether there are currently alternatives is wholly irrelevant to whether there were alternatives available at the time at issue in this proceeding. Mr. DiQuinzio's testimony is thus irrelevant to the issues to be decided in this proceeding and should be struck under Tex. R. Evid. 402.

- **Page 7, Lines 27** (beginning with "and it")- **28** (ending with "or now"): Again, Mr. DiQuinzio's testimony about what is currently happening is irrelevant to this inquiry into the Protested Rates set in 2014 and should be struck under Tex. R. Evid. 402.
- **Page 8, Lines 19-20** (ending with "service facilities"): Whether TCMUD 12 is "still not" in a position to pay for alternative facilities is irrelevant to this case. The determination to be made is whether the rates that were set by the WTCPUA in 2013 are adverse to the public interest. What is happening now is irrelevant to that inquiry. Mr. DiQuinzio's testimony is thus irrelevant to the issues to be decided in this proceeding and should be struck under Tex. R. Evid. 402.
- **Page 8, Lines 23** (beginning with "TCMUD 12") – **25** (ending with "in 2015"): The bond sales by TCMUD 13 after the Protested Rates were adopted by the Board of Directors of WTCPUA are not relevant to this proceeding. Furthermore, TCMUD 13 is not a party in this proceeding and unrelated to the public interest inquiry concerning TCMUD 12. Mr. DiQuinzio's testimony is thus irrelevant to the issues to be decided in this proceeding and should be struck under Tex. R. Evid. 402.
- **Page 13, Lines 4-18**: DiQuinzio discusses a rate case filed by two of WTCPUA's participating entities, The City of Bee Cave and WTCMUD 5 in 2007. This case has no relevance to this proceeding. DiQuinzio merely seeks to introduce these facts to prejudice the ALJ against the WTCPUA by bringing irrelevant facts about the past into view.
- **Page 15, Line 27** (beginning with "Based on") **through Page 16, Line 1** (ending with "the WTCPUA"): Whether or not WTCPUA was made whole by non-consenting customers has no bearing on the public interest inquiry. Mr. DiQuinzio's testimony is thus irrelevant to the issues to be decided in this proceeding and should be struck under Tex. R. Evid. 402.
- **Page 16, Line 5 through Page 17, Line 16**: The testimony provided by Mr. DiQuinzio regarding the future minimum monthly charge amounts is not relevant to the rates at issue in this proceeding. The only rates at issue in this proceeding are the WTCPUA's Protested Rates set on November 21, 2013. Mr. DiQuinzio's testimony is thus irrelevant to the issues to be decided in this proceeding and should be struck under Tex. R. Evid. 402.

C. Inadmissible Hearsay.

Rule 703 of the Texas Rules of Evidence allows an expert witness to base an opinion or inference on hearsay, also known as “expert hearsay.”²⁵ However, the hearsay that may form the basis for an opinion or inference must be “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.”²⁶ Mr. DiQuinzio is presented by TCMUD 12 as a lay witness. Therefore, Mr. DiQuinzio is not permitted to rely on hearsay in his testimony. The following testimony is inappropriate hearsay testimony under Rule 703 of the Texas Rules of Evidence and should be struck:

- **Page 4, Lines 14** (beginning with “Second”) – **16** (ending with “cost”): Mr. DiQuinzio states what LCRA thought and decided regarding a water treatment plant, offered for the truth of the matter asserted.
- **Page 4, Line 28 through Page 5, Line 2** (ending with “Marble Falls”): Mr. DiQuinzio improperly testifies as to LCRA’s thoughts and intentions.
- **Page 5, Lines 9** (beginning with “LCRA ultimately”) – **14** (ending with “are mismanaged”): Mr. DiQuinzio makes numerous claims about what he believes LCRA was doing and thinking, offered for the truth of the matter asserted.
- **Page 5, Line 20** (beginning with “Once LCRA” and ending with “‘Highlands’ WTP”): Again, Mr. DiQuinzio claims to know what LCRA was thinking, stating that LCRA “abandoned the idea”, which is offered for the truth of the matter asserted.
- **Page 6, Lines 1** (beginning with “LCRA told”) – **2** (ending with “water services”): Mr. DiQuinzio claims to repeat what “LCRA told TCMUD 12.”
- **Page 7, Lines 20** (beginning with “Based on”) – **23** (ending with “permitting”) (**and Exhibit JAD R1**): Mr. DiQuinzio claims to repeat what TCMUD 12’s engineer stated which is based upon hearsay. Further, TCMUD 12 seeks to introduce its own RFI response with an out of court statement into evidence through DiQuinzio’s testimony. The testimony and accompanying exhibit are both inadmissible hearsay not subject to an exception.

²⁵ Tex. R. Evid. 703.

²⁶ *Id.*

- **Page 11, Line 20** (beginning with “LCRA told” and ending with “offer”): Mr. DiQuinzio testifies as to what “LCRA told” TCMUD 12, offered for the truth of the matter asserted.

D. Improper Rebuttal Testimony.

Rebuttal evidence is permitted only to “disprove facts already in evidence by an adverse party.” *In re Bledsoe*, 41 S.W.3d 807, 813 (Tex. App.—Fort Worth 2001, no pet.). A rebuttal witness cannot be used to prove an essential element of the case not addressed by another party and cannot merely bolster the rebutting party’s case. Rather, rebuttal is limited to the issues which were placed in conflict by the other party’s evidence. P.U.C. PROC. R. 22.225 provides that the judge may exclude testimony if there is a showing that the supplemental testimony raises new issues or unreasonably deprives opposing parties the opportunity to respond. The following portions of Mr. DiQuinzio’s testimony raise new issues and do not disprove facts presented into evidence by either WTCPUA or the PUC Staff.

- **Page 3, Lines 7** (beginning with “I am responsible”) – **9** (ending with “Boards of Directors”): Mr. DiQuinzio presents new testimony that he is responsible for filing the petition on behalf of TCMUDs 11, 12, and 13. Mr. DiQuinzio cites to no testimony that he is rebutting. No witness for WTCPUA or the PUC Staff presented any facts related to who was responsible for filing the petition. Therefore, this is new information that should have been included in DiQuinzio’s direct testimony. It is improper rebuttal testimony.
- **Page 4, Lines 14** (beginning with “Second,”) – **18** (ending with “detail below”): Mr. DiQuinzio again presents information that should have been included in his direct testimony. In fact, Mr. DiQuinzio does address this same point in his Direct Testimony at Page 14, Line 31 through Page 15, Line 2. The testimony does not respond to any issues raised by another party’s witnesses. Therefore, it is improper supplemental direct testimony.
- **Page 7, Lines 8-28**: Mr. DiQuinzio’s discussion of the approximation of the costs if TCMUD 12 had tried to construct its own WTP is not actually rebutting the testimonies of either the WTCPUA or PUC Staff Witnesses. Mr. DiQuinzio is merely bolstering his direct testimony on this same issue (see DiQuinzio Direct Testimony at page 5, lines 27-28; page 15, line 28). Furthermore, whether there are currently alternatives is completely irrelevant to the inquiry in this case, which focuses on what the circumstances were at the time of the rate change. Therefore, the testimony is both irrelevant and improper rebuttal.

- **Page 10, Lines 12** (beginning with “Based on my”) – **21** (ending with “the chance”): Mr. DiQuinzio’s testimony claims that Lakeway MUD does not have capacity to provide services for the Highlands, without providing any foundation for knowing such facts. Then Mr. DiQuinzio proceeds describe the alleged financial benefits that LMUD receives TCMUD 12. Neither the WTCPUA witnesses nor the PUC Staff witnesses addressed either of these claims. Mr. DiQuinzio’s testimony is supplemental direct testimony that does not address issues raised by other parties. Therefore, it is improper rebuttal testimony.
- **Page 10, Line 23 through Page 11, Line 11:** Mr. DiQuinzio’s testimony alleges disparate bargaining power. However, Mr. DiQuinzio fails to explain how this testimony is in any way providing facts that disprove evidence presented by the WTCPUA or the PUC Staff. His testimony merely bolsters TCMUD 12’s direct case without replying to any direct testimony of other parties.
- **Page 11, Line 25 through Page 12, Line 2:** Mr. DiQuinzio states his legal conclusion that there was disparate bargaining power and an abuse of monopoly power. DiQuinzio is not rebutting any testimony provided by WTCPUA or PUC Staff witnesses; rather, he merely restates Dr. Zarnikau’s testimony.
- **Page 12, Line 24** (beginning with “TCMUD 12” **through Page 13, Line 18** (ending with “retail or wholesale”): Mr. DiQuinzio engages in a lengthy discussion about the wholesale rates charged by LCRA before WTCPUA took over operation of the system. WTCPUA and PUC Staff witnesses did not argue that LCRA’s rates were monopolistic or abusive. Therefore, Mr. DiQuinzio’s testimony is not addressing any facts or issues raised by other parties. Mr. DiQuinzio’s testimony merely seeks to supplement his direct testimony rather than rebutting anything put into evidence by other parties. It is improper rebuttal.
- **Page 13, Lines 6** (beginning with “Two of the”) – **18** (ending with “retail or wholesale”): Mr. DiQuinzio’s discussion of two of WTCPUA’s participating entities’ actions is not proper rebuttal testimony. He is not rebutting any testimony presented by the WTCPUA or the PUC Staff. Furthermore, the testimony is not relevant to this case because the issue in this case is whether the rates are adverse to the public interest. The WTCPUA’s participating entities have no bearing on this inquiry.
- **Page 16, Line 10 through Page 17, Line 16:** Mr. DiQuinzio’s testimony does not rebut any facts presented into evidence by the WTCPUA or the PUC Staff. Instead, the testimony seeks to show that the minimum monthly charge for TCMUD 12 will increase in the future. These allegations do not disprove facts in evidence and should be struck.
- **Page 19, Lines 18-23:** Mr. DiQuinzio’s discussion of whether wholesale water treatment services are the only thing provided by WTCPUA to is not proper rebuttal testimony. The facts that WTCPUA provides TCMUD 12 with services other than wholesale water

treatment does not disprove any fact presented into evidence by WTCPUA or the PUC Staff. Therefore, the discussion should be struck.

V. CONCLUSION

For the foregoing reasons, WTCPUA respectfully requests that its Objections to the Rebuttal Testimonies of Jay Joyce, Jay Zarnikau, and Joseph DiQuinzio be sustained and that its motion to strike such testimony be granted. WTCPUA requests that it be granted such other relief to which it has shown itself entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was transmitted by e-mail, fax, hand-delivery and/or regular, first class mail on this 8th day of April 2015, to the parties of record.



DAVID J. KLEIN