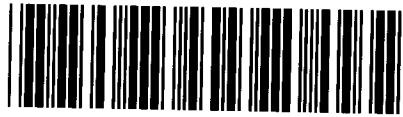




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BEFORE THE STATE OFFICE

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
REBUTTAL TESTIMONY 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 Rebuttal Testimony 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 Objections and Motion to Strike portions of TCMUD 12’s rebuttal testimony on Wednesday, April 8, 2015. Pursuant to agreement of the parties and SOAH Order No. 12, the deadline to file responses to objections and motions to strike prefiled rebuttal evidence is Wednesday, April 15, 2015. This Response is therefore timely filed. In this Response, TCMUD 12 demonstrates that the identified portions of the TCMUD 12’s prefiled rebuttal 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 REBUTTAL TESTIMONY OF JAY JOYCE

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

1. Cost of Service Issues are Relevant

Much of WTCPUA's argument on pages 6 to 10 of its objections and motion to strike TCMUD 12's rebuttal testimony is taken directly from its objections and motion to strike TCMUD 12's direct testimony. In fact, much of the argument in the objections to TCMUD 12's rebuttal testimony is a verbatim recitation of the WTCPUA's arguments in its objections to TCMUD 12's direct testimony. Rather than restating its earlier arguments, TCMUD 12 incorporates by reference its response to WTCPUA's objections to TCMUD 12's direct testimony. In addition, TCMUD 12 points out that the ALJ has already heard and considered these arguments, supported by the same citations to the same legal precedents, and with three exceptions, overruled WTPUA objections.

Page 17, lines 1 through 9 of Mr. Joyce's rebuttal testimony is part of a larger discussion in which Mr. Joyce rebuts Mr. Stowe's assertion that the only two methodologies relevant to a public interest determination are the utility basis and the cash basis methodologies. The AWWA manual cited to by Mr. Joyce at this portion of his testimony addresses alternate methodologies for calculating cost of service, which as noted by Your Honor in previous cases, is synonymous with calculating revenue requirements.

Page 18, line 8 through page 19, line 8 of Mr. Joyce's rebuttal testimony is a graphic representation of the methodological steps taken to compute the TCMUD 12 minimum bill. This highlights the changes in the formulas used to reach the TCMUD 12 cost of service or revenue requirement. Because the testimony goes directly to the change in the methodology used to compute the revenue requirement and the TCMUD 12 minimum bill, it is relevant to this proceeding.

2. Testimony Addressing Future Rates is Relevant

The rebuttal testimony identified by WTCPUA in this objection goes to the impact and significance of the change in methodology. TCMUD 12 is conscious of and acknowledges the ALJ's ruling on future rates at the April 13, 2015 prehearing, but this testimony is not offered to

protest or contest the future rates but rather, is offered to address the impact of the current methodology adopted by the WTCPUA. A change in methodology is a factor in determining whether or not a seller has abused its monopoly power. TCMUD 12 should not be foreclosed from showing how the change in methodology is abusive, which is an issue that is directly relevant to this proceeding. This testimony is not offered to prove these will be the rates, but to show that the PUA stated these were the rates that were likely to result from the new methodology adopted in 2013, that went into effect in 2014. Accordingly, the testimony identified by the WTCPUA in its Objection is relevant to this proceeding and the Objection should be overruled. See also, Section IV.B.3(13) in which TCMUD 12 address this issue in response to an objection to Mr. DiQuinzio's rebuttal testimony.

3. Identified Testimony Not Addressing Protested Rates is Relevant

The following pieces of testimony are relevant to this proceeding for various reasons. Each portion of testimony objected to by WTCPUA will be addressed separately unless the testimony may be easily groups for sake of brevity.

1. Joyce Rebuttal, Page 25, lines 1-32; page 26, lines 4-12; and page 31, line 10 through page 32, line 8: Mr. Stowe claims in his testimony that the terms *revenue requirement* and *cost of service* have distinct and separate meanings. The testimony in question provides examples of instances in which the terms have been used interchangeably by either Mr. Stowe (Page 25, lines 1-32; page 26, lines 4-12) or by ALJs in contested proceedings before SOAH (page 31, line 10 through page 32, line 8). The terms *revenue requirement* and *cost of service* are used throughout the utility regulatory arena including the gas, telecommunications, and electricity industries as well as in water cases that do not address public interest issues. Testimony or cases in which the same general rate setting principles are used provide guidance on the meaning of fundamental terms such as "revenue requirement" or "cost of service." It should be noted that the public interest rule drew heavily on the court's decision in the *High Plains*¹ case, which was a natural gas case rather than a water case. Testimony and orders from other types of utilities are

¹ *High Plains Natural Gas Company v. Railroad Commission of Texas*, 467 S.W. 2d 532 (Tex.Civ.App – Austin, 1971, writ ref'd n.r.e.).

- relevant to a discussion on the meaning of general rate setting terms and concepts. The WTCPUA's objection to these section of Mr. Joyce's rebuttal testimony should be struck.
2. Joyce Rebuttal, Page 45, line 28 to page 46, line 10; page 48, lines 4-7. The WTCPUA uses the fact that it had wholesale customer meetings to show that it did not exercise bargaining power. These sections of Mr. Joyce's rebuttal testimony contrast the customer meetings held by the WTCPUA with the meetings held by another water utility. The issue is not whether the WTCPUA had meetings, but whether those meetings afforded the wholesale customers a meaningful opportunity to impact the rate setting decisions of the WTCPUA. The tenor of the meetings and WTCPUA's treatment of the wholesale customers is described at page 48, lines 4-11 including lines 4-7. This testimony is relevant to the abuse of monopoly power and the WTCPUA's objection to this testimony should be overruled.
 3. Joyce Rebuttal, Page 50, lines 5-12, and page 54, lines 10-14. The composition of the WTCPUA Board and the WTCPUA's position on retail customers goes to the willingness of the WTCPUA to negotiate and the exercise of its monopoly power. This testimony is relevant to the abuse of monopoly power and the WTCPUA's objection to this testimony should be overruled.

B. WTCPUA's Objection Concerning TRE 613

The WTCPUA claims that the identified portions of Mr. Joyce's testimony violate Texas Rules of Evidence Rule 613(a)(3) and (4).² TRE 613 applies to situations in which an attorney is examining a witness about the witness's prior statements. TRE 613(a)(1). In this instance, Mr. Joyce is addressing Mr. Stowe's previous statement in his rebuttal testimony. TRE 613 is not applicable, and the WTCPUA's objection based on TRE 613 is improper and should be overruled.

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

² See, TRE 613(a). By order dated March 10, 2015, in Misc. Docket No. 15-9048, the Supreme Court of Texas made revisions to the Texas Rules of Evidence rules and issued the final version of the rules effective April 1, 2015.

1. Quotes of Staff Witnesses and Don Rauschuber

Joyce Rebuttal, Page 29, Line 19 through Page 30, Line 15 and Page 27, Line 1 through Page 29, Line 18. The WTCPUA objects to Mr. Joyce citing to the testimony of Staff witnesses Debi Loockerman and Tammy Benter and to the testimony Don Rauschuber. The WTCPUA's objection is based on the fact that the cited testimony was offered in a different case and therefore inadmissible hearsay. Under TRE Rule 703, an expert such as Mr. Joyce may base his opinion on facts or data that need not be admissible so long as experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject. In forming an opinion on Mr. Stowe's assertion that the terms "revenue requirement" and "cost of service" may not be used interchangeably, Mr. Joyce looked to how those terms were being used in previous proceedings. Rate experts in the utility field reasonably rely on information from administrative proceeding in which such issues are discussed by other rate experts. Mr. Joyce's testimony cites the testimony of the Ms. Lookerman, Ms. Benter and Mr. Rauschuber to form the basis for his opinion. The WTCPUA objections to portion of Mr. Joyce's rebuttal testimony should be overruled.

Joyce Rebuttal, Page 27, Line 1 through Page 29, Line 18: WTCPUA's objects to Mr. Joyce's references to Mr. Rauschuber's testimony on the grounds that they violate TRE 613. This objection on this basis should be overruled for the same reason its objection to the references to Mr. Stowe's testimony based on a TRE 613 violation should be overruled: TRE 613 is not applicable to Mr. Joyce's rebuttal testimony.

2. Other Statements

The WTCPUA objects to the sentence in Mr. Joyce's rebuttal testimony beginning at page 44, line 22, where, after discussing the level of participation by the customer group in certain meetings, he states: "This reflects that most of the wholesale customers had the impression that these meetings were to be only informational meetings for the PUA to present next year's rates." This is his opinion on the participation of the customer group and is based on his own participation in other utility customer groups. Utility rate experts often participate in similar groups on behalf of their clients and are allowed to draw inferences based on their familiarity with those groups. TRE 703. The WTCPUA's motion should be overruled.

Mr. Joyce's testimony at page 46, lines 1-3 discusses the voting of the City of Austin's 2014 Joint Committee on Austin Water Utility's Financial Plan. Exhibit JJJ-29 is an example of such a vote. The Joint Committee was convened by the City Council and was asked to make

recommendations to the Council. The work of the Committee and its recommendations (Exhibit JJJ-29) are public records of the City of Austin and fall under the hearsay exception at TRE 803(8). The WTCPUA's motion should be overruled.

D. WTCPUA's Objection that Testimony is Improper Rebuttal Testimony

WTCPUA's objections in this section to Mr. Joyce's Rebuttal rest on two assertions: first, that the identified portions are not proper rebuttal because they are "supplemental testimony raising *new issues*" under PUC Proc R. 22.225; or second, the rebuttal is used to prove an essential element of the case not addressed by another party and/or are used to bolster TCMUD 12's direct case.

WTCPUA's reliance on P.U.C. Proc. R. 22.225(c) is misplaced. That rule is not applicable to prefiled rebuttal testimony, but rather by its express terms applies only to supplementation of prefiled testimony. To the extent that WTCPUA is suggesting that it should have the opportunity to respond to TCMUD 12's rebuttal, that argument must be rejected as inconsistent with the burden of proof carried by TCMUD 12, which entitles Petitioner to open and close the evidence,^[1] and because the Commission's rules explicitly permit TCMUD 12 to present its rebuttal after all parties have presented their direct cases.^[2]

Secondly, as to the objection that the following testimony is not responding to another party's direct case and is therefore not proper rebuttal, TCMUD 12 submits the following responses, including references to PUA's testimony, to refute each of WTCPUA's arguments.

1. Joyce Rebuttal, page 17, lines 10-18: This testimony is a continuation of the line of questions started on page 16 of Mr. Joyce's rebuttal testimony in which he addresses Mr. Stowe's identification of the cash basis and utility basis as the relevant methodologies in a public interest proceeding. Mr. Joyce's testimony directly rebuts Mr. Stowe's and the WTCPUA's objection to this testimony should be overruled.
2. Joyce Rebuttal, page 16, lines 20-31: Mr. Stowe's testimony identifies the AWWA M1 manual and the cash basis and utility basis methodologies as central to his analysis. Mr.

^[1] P.U.C. Proc. R. 22.203(b)(1)

^[2] P.U.C. Proc. R. 22.203(b)(3).

Joyce's testimony rebuts the significance that Mr. Stowe's places on the AWWA M1 manual. Accordingly, the objection should be overruled.

3. Joyce Rebuttal, page 17, line 19 through page 18, line 2: Mr. Stowe's opinion is that so long as the WTCPUA continued using the cash basis methodology, no change in methodology took place.³ Mr. Joyce is squarely addressing this issue and pointing out the flaws with Mr. Stowe's position. The fact that Mr. Joyce makes a public policy argument to address this issue when WTCPUA witnesses have not done so has no bearing on the admissibility of Mr. Joyce's testimony. Mr. Joyce's testimony is responsive to the WTCPUA's testimony and the objections to this testimony should be overruled.
4. Joyce Rebuttal, page 20, line 1 through page 21, line 25: Mr. Stowe's opinion is that the WTCPUA did not change its methodology between the prior rate and the protested rate.⁴ In this testimony, Mr. Joyce rebuts Mr. Stowe's assertion by pointing out that despite Mr. Stowe's opinion, the WTCPUA and its representatives acknowledged that the WTCPUA did, in fact, change the methodology used to set the revenue requirement and the rate. WTCPUA's objection to this portion of Mr. Joyce's testimony should be overruled.
5. Joyce Rebuttal, page 50, line 16 through page 54, line 3: Mr. Joyce's testimony in this section of his rebuttal testimony describes the significance or impact of the methodology change employed by the WTCPUA. Mr. Rauschuber's testimony addresses the impact the methodology will have on wholesale customers and Mr. Joyce directly rebuts Mr. Rauschuber's testimony in this portion of his testimony. WTCPUA's objection should be overruled.
6. Joyce Rebuttal, page 54, lines 4-23: This portion of Mr. Joyce's testimony rebuts the opinion of Mr. Stowe that the WTCPUA did not abuse its monopoly power and provides Mr. Joyce's opinion as to the abusiveness of the WTCPUA's methodology.

E. WTCPUA's Objection that Testimony is Speculation

The WTCPUA objects to certain portions of Mr. Joyce's testimony as speculation, for the reasons below the specific portions of his testimony are not speculation.

³ Stowe Direct, pg. 15, lines 28-31.

⁴ Id.

1. Joyce Rebuttal, page 8, lines 3-4: The statement that neither Mr. Stowe or Ms. Graham considered or evaluated the computation of the revenue requirement is a fair reading of their testimony in which both witnesses state that such analysis is not to be done in a public interest proceeding⁵ or outside the boundaries of the Public Interest Rule.⁶ Because Mr. Joyce's testimony is not speculation but based on statements of Mr. Stowe and Ms. Graham, the WTCPUA's objection should be overruled.
2. Joyce Rebuttal, page 44, lines 22-24: The WTCPUA objects to the sentence in Mr. Joyce's rebuttal testimony beginning at page 44, line 22, where, after discussing the level of participation by the customer group in certain meetings, he states: "This reflects that most of the wholesale customers had the impression that these meetings were to be only informational meetings for the PUA to present next year's rates." This is his opinion on the participation of the customer group and is based on his own participation in other utility customer groups. Utility rate experts often participate in similar groups on behalf of their clients and are allowed to draw inferences based on their familiarity with those groups. TRE 703. Mr. Joyce's testimony is not speculation and WTCPUA's objection should be overruled.
3. Joyce Rebuttal, page 44, lines 30-31: This portion of Mr. Joyce's testimony offers two explanations of the why the wholesale customer issues were not tracked and are his opinion based on his course of dealings with the WTCPUA. Mr. Joyce's testimony is not speculation and WTCPUA's objection should be overruled.
4. Joyce Rebuttal, page 45, lines 1-2: This is not speculation, but rather, his opinion that a sign-in sheet does not evidence that a meeting is a formal consensus-building meeting. As an expert rate analyst that has attended many such meetings in the course of his career Mr. Joyce may offer his opinion on the nature of the meeting. Mr. Joyce's testimony is not speculation and WTCPUA's objection should be overruled.
5. Joyce Rebuttal, page 45, lines 11-13: Mr. Joyce's statement that he was the only rate analyst in the room and thus, was the only person uniquely qualified to understand the true effect of the methodology change is based on his expert opinion working with customer groups in the past.

⁵ Graham Direct, at p. 11, lines 13 – 17.

⁶ Stowe Direct, at p. 25, lines 13 – 14.

6. Joyce Rebuttal, page 46, 22-23: Mr. Joyce's comment on Mr. Rauschuber's statement does not address Mr. Rauschuber's intent but points out that Mr. Rauschuber does not address a significant issue related to subject matter he is addressing. Mr. Joyce's testimony is not speculation and WTCPUA's objection should be overruled.
7. Joyce Rebuttal, page 46, line 27 to page 47, line 4: This portion of the testimony address an issue that is not specific to TCMUD 12 but common to all wholesale customers, thus Mr. Joyce has personal knowledge of how WTCPUA was treating certain debt. Mr. Joyce's testimony is not speculation and WTCPUA's objection should be overruled.
8. Joyce Rebuttal, page 47, lines 10-15 and 23-24: This is an improper objection, linking two very different pieces of testimony together under the same objection.

The first portion of the objection cites to page 47, lines 10 (beginning with the words "the ability" through line 15. The testimony in question is laid out in full below:

The ability to change the maximum day quantity would leave TCMUD 12 with no possibility of ever treating a portion of the water it must purchase from the Lower Colorado River Authority, as rebutted in Mr. DiQuinzio's testimony. The specified change in the rate methodology in the proposed amendment only benefitted the PUA. So, clearly the amendment had no value to TCMUD 12 and considerable value to the PUA.

The objection is that Mr. Joyce is speculating as the value the amendment had to the WTCPUA and to the TCMUD's ability to treat water. The first sentence is not speculation and clearly is resting on the testimony of Mr. DiQuinzio. Mr. Joyce's testimony concerns facts reviewed and known to him and is not speculation. The WTCPUA's objection is an overreach and should be overruled.

As to the value of the amendment, Mr. Joyce's statement are based on his opinion after reviewing the amendment and doing an analysis of the amendment's impact on TCMUD 12. This is well within the purview of the services a rate analyst performs for his client. Mr. Joyce's opinions are based on his own analysis and are not speculation. The WTCPUA's objection to this portion of the testimony should be overruled.

The final portion of testimony covered by the objection (page 47, lines 23-24) is a statement concerning Mr. Rauschuber's direct testimony. Mr. Joyce is free to comment on the WTCPUA witness's testimony. If the ALJ does sustain the objection he should strike only the

portion of the testimony in which Mr. Joyce's commentary is contained, i.e. from the word "presumably" to the end of that sentence.

9. Joyce Rebuttal, page 48, lines 1–2: The portion of Mr. Joyce's testimony objected to states "that meeting effectively shut down all future meetings concerning the new rate methodology" which is a factual statement known to Mr. Joyce. The objection should be overruled.
10. Joyce Rebuttal, page 48, lines 8–11; page 49, lines 13–15; page 50, lines 12–15: These portions of Mr. Joyce's testimony offer his opinion based on his course of dealings with the WTCPUA. Rate analysts and consultants negotiating with utilities rely on their course of dealings with the utility and their opinions are reasonably based on the course of those dealings. Mr. Joyce's testimony is not speculation and WTCPUA's objection should be overruled.
11. Joyce Rebuttal, page 49, lines 25 – 28: Mr. Joyce's opinion is based on his reading of Mr. Rauschuber's testimony. Should the ALJ sustain the objection, however, only the speculative portion of Mr. Joyce's statement should be struck and the factual portion beginning with the phrase "he fails to acknowledge..." should remain.
12. Joyce Rebuttal, page 50, lines 21–23: The WTCPUA's objection is that Mr. Joyce characterizes the WTCPUA's action as misleading. Mr. Joyce does not address the WTCPUA's intentions. The testimony is simply that the WTCPUA's actions were misleading, which is an opinion based on Mr. Joyce's review of the information reviewed in his analysis. The objection should be overruled.
13. Joyce Rebuttal, page 52, line 6: The rates used in Mr. Joyce's testimony are the rates that result from using the current methodology and as such are not speculation. This objection should be overruled.

F. WTCPUA's Objection that Testimony Offers Unqualified Legal Opinion

The following portions of Mr. Joyce's rebuttal testimony are not unqualified legal opinion for the following reasons:

1. Joyce Rebuttal, Page 6, Lines 1-5: This portion of Mr. Joyce's testimony is simply stating that the Public Interest Rule has a provision for an analysis of the rate methodology and is Mr. Joyce's understanding of the rule.

2. Joyce Rebuttal, Page 10, Lines 25-30: This portion of Mr. Joyce's testimony is describing the nature of disputed cases and the fact that most cases do not involve changes regarding a change from the cash basis to the utility basis or vice versa.
3. Joyce Rebuttal, Page 23, Line 24 through Page 24, Line 10: The first sentence of this testimony is a restatement of the Public Interest Rule and points out that the rules language, on its face, includes changes in methodology as a factor to consider. The first sentence is not a legal opinion and the objection to this sentence should be overruled.
4. Joyce Rebuttal, page 35, line 18: Mr. Joyce is asked whether he agrees with Mr. Stowe's contentions and answers "no". The fact that he disagrees with Mr. Stowe's contention is not a legal opinion and the objection should be overruled. If the ALJ sustains the objection to the entire answer, including the one word sentence at the beginning of response, the question on lines 14 through 17 should be removed as well.
5. Joyce Rebuttal, Page 9, Lines 1-14; page 9, and Lines 26-30; page 10, lines 32-33; Page 22, Line 31 (beginning with "There is no") through Page 23, Line 7; 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 33, Lines 3-13 and Lines 25-33: These portions of Mr. Joyce's rebuttal testimony offer his understanding of the Public Interest Rule and the order in which it was adopted. Mr. Joyce is an experienced rate analyst and has worked extensively with these rules and the orders in which they were adopted and in this portion of his testimony is setting the bases for his opinions.

G. WTCPUA's Objection that Mr. Joyce's Headings are Improper

The headings in Mr. Joyce's testimony are not "testimony" and are not subject to objections or the motion to strike. Accordingly, the WTCPUA's objections are improper and should be overruled.

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

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

WTCPUA's first set of objections to Dr. Zarnikau's Rebuttal under the heading "Unqualified Opinion" re-states the objection which WTCPUA lodged against Dr. Zarnikau's

Direct testimony. All of those objections were overruled in Order No. 15. In the interest of efficiency, TCMUD 12 incorporates by reference its Responses to WTCPUA's Objections to Dr. Zarnikau's Direct as Unqualified Opinion and urges that each of WTCPUA's objections to his rebuttal be overruled. In addition, WTCPUA argues that to the extent TCMUD 12's objections to Mr. Baudino's testimony are sustained, then WTCPUA's objections should also be sustained. In light of the fact that TCMUD 12's objections to Mr. Baudino's testimony were not sustained, TCMUD 12 submits that WTCPUA's objections to Dr. Zarnikau's Rebuttal should also be overruled. As to the specific objection that the following sections of rebuttal are Dr. Zarnikau's unqualified opinions that WTCPUA moves to strike, TCMUD 12 responds:

1. Dr. Zarnikau Rebuttal at page 4, line 11 (beginning with "Nor") through page 5, line 6 (ending with "appropriate standard"): WTCPUA's objection is that this is an unqualified legal opinion, and that objection was overruled in Order 15. The objection includes part of Dr. Zarnikau's direct testimony to which WTCPUA objected, but which was overruled. The objection also improperly includes page 4, lines 18 – 22 and page 5, lines 3-6, which directly rebut Mr. Baudino's testimony. Finally, WTCPUA does not object to the portion of the answer at page 5, line 15 through page 6, line 21, and hence it would also be improper to strike the Question at page 4, lines 23-24 to which that un-objected-to portion of the answer is responsive.
2. Dr. Zarnikau Rebuttal at page 19, line 23 ("In this proceeding") through line 25 ("in 2008-09") – in this portion of his testimony Dr. Zarnikau (page 18, line 30 through page 20, line 3) is rebutting Mr. Baudino's testimony concerning alternative suppliers, and at the specific portion to which WTCPUA objects, he is stating the bases for his opinion, as he is allowed to do as an expert under TRE 703. *See*, TCMUD 12's Response to WTCPUA's Objection to Dr. Zarnikau's Direct Testimony at 17.
3. Dr. Zarnikau's Rebuttal at page 22, lines 9-18 and 19-22 – WTCPUA's objection that this is an unqualified legal opinion was rejected in Order No. 15. This testimony is offered in rebuttal to Mr. Baudino's at page 27, to which TCMUD 12's objection was overruled. At page 27 of his prefiled testimony Mr. Baudino was responding to Dr. Zarnikau's Direct testimony at pages 8-9, to which WTCPUA did not object. This objection also inappropriately relies on a discovery ruling in Order 6 which was overturned on appeal. For each of these reasons, WTCPUA's objection should be overruled.

4. Dr. Zarnikau's Rebuttal at page 23, line 13 through page 24, line 2 - WTCPUA's objection that this is an unqualified legal opinion was rejected in Order No. 15. Dr. Zarnikau's testimony is offered in rebuttal to Mr. Baudino's at page 27, line 16 through page 28, line 5, in which WTCPUA's witness discusses Dr. Zarnikau's Direct testimony concerning Texas Water Code § 13.001(b) to which WTCPUA did not object. WTCPUA's objection to this portion of Dr. Zarnikau's rebuttal as unqualified legal opinion should be overruled for the same reasons that the identical objections were overruled in Order No. 15.
5. Dr. Zarnikau's Rebuttal at page 25, lines 12 – 15 – in this portion of Dr. Zarnikau's testimony he is responding to Mr. Baudino's opinion about disparate bargaining power, and Dr. Zarnikau is relying on the facts made known to him by Mr. DiQuinzio, as explained in his Direct Testimony at page 8, lines 17 – 24, to which no objection was made by WTCPUA. This testimony is permissible "expert's hearsay" under TRE 703, which Dr. Zarnikau is allowed to base his opinion on, and the objection that this unqualified opinion testimony should accordingly be overruled.
6. Dr. Zarnikau's Rebuttal at page 25, lines 21 – 24 – this testimony consists of two sentences, the second of which includes Dr. Zarnikau's opinion concerning bargaining power, which he has been qualified to render. The first sentence concerns Mr. Rauschuber's \$13.5 Million estimate of the cost of a new WTP, which is a fact that forms the bases for Dr. Zarnikau's rebuttal opinion. Under TRE 703, as an expert, Dr. Zarnikau is entitled to rely upon this type of data, and the objection should be overruled for that reason.
7. Dr. Zarnikau's Rebuttal at page 25, line 29 – WTCPUA objects that this is a legal conclusion, but that same type of objection was overruled in Order No. 15 and should be overruled here for the same reason. In addition, Dr. Zarnikau's view of the relevance of the argument he is rebutting here is properly viewed as his opinion of the lack of relevance to his economic analysis of the issue of bargaining power.

B. WTCPUA's Objection that Testimony is Irrelevant

WTCPUA claims that the portions of Dr. Zarnikau's testimony identified in this section of its Objections are not relevant. TCMUD 12 submits that the testimony 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 as explained herein, and is accordingly relevant under TRE 401 and is admissible under TRE 402

1. Dr. Zarnikau's Rebuttal at page 16, line 9 through page 17, line 5 – WTCPUA mischaracterizes Dr. Zarnikau's testimony concerning "franchise," by assuming he is referring to a regulatory franchise, such as a CCN or a municipal franchise. But Dr. Zarnikau's use of the term "franchise" in his testimony actually refers to the use of the term in the economics and finance literature. This testimony addresses his opinion rebutting Mr. Baudino's conclusion that WTCPUA is not a monopolist by explaining the economic distinction between competition for the field and competition within the field. As he explains at page 16, lines 14 – 15: "Competition for the field refers to competition or negotiation for a right to supply a market – often called a franchise." This testimony has a tendency to make the existence of WTCPUA's monopoly more probable than it would be without the evidence, and it is therefore relevant and admissible.
2. Dr. Zarnikau's Rebuttal at page 17, lines 6-17 – in this testimony Dr. Zarnikau provides an example of how other monopoly utilities that are subject to the Commission's jurisdiction are regulated, notwithstanding their franchises, which Mr. Baudino has argued should obviate the need for Commission oversight of rates. Dr. Zarnikau's conclusion is that WTCPUA's "franchise" (as defined in the economics' literature) does not guarantee that it will charge rates consistent with the public interest. This is an issue at the heart of TCMUD 12's case and is relevant for the analysis in the Public Interest phase of this case.
3. Dr. Zarnikau's Rebuttal at page 17, line 18 through page 18, line 2 - this testimony is rebutting Staff witness Heidi Graham's testimony concerning abuse of monopoly power. Dr. Zarnikau is applying his economic analysis, as described in the preceding page 17, line 18, to rebut her position on abuse of monopoly power. WTCPUA's abuse of monopoly power is relevant under P.U.C. Subst. R. 24.133(a)(3) and this objection should be overruled as a result.
4. Dr. Zarnikau's Rebuttal at page 19, lines 6-19 – in this testimony, Dr. Zarnikau is explaining that the existence of high-cost alternatives does not negate the fact that Suppliers possess market power. He discusses alternatives in the electric and gas markets, but also addresses alternatives to the wholesale water supply furnished by

WTCPUA, that theoretically could include on-site water collection, trucked-in water, and bottled water. His opinion is stated at lines 16 – 19 – the price of non-utility alternatives tend to be too high relative to the utility-provided alternatives to make them practical alternatives. The lack of alternative means for obtaining water service is one of the factors listed in P.U.C. SUBST. R. 24.133(a)(3)(A) that demonstrates WTCPUA’s abuse of monopoly power based on its disparate bargaining power and is accordingly relevant and admissible under TRE 402.

5. Dr. Zarnikau’s Rebuttal at page 20, lines 4 – 10 - Dr. Zarnikau is discussing Suppliers’ ability to control prices and cites to WTCPUA’s drought surcharge as one indication of its ability to control prices. This is relevant to the issue of market and monopoly power, and therefore relevant under P.U.C. SUBST. R. 24.133(a)(3). This testimony is not offered in order to challenge WTCPUA’s drought surcharge which TCMUD 12 challenged in a separate proceeding, but for the permissible purpose of demonstrating WTCPUA’s ability to control prices.
6. Dr. Zarnikau’s Rebuttal at page 25, lines 6 – 11 – *see*, TCMUD 12’s response to WTCPUA’s objection under #1, above, concerning Dr. Zarnikau’s use of the term “franchise” as an economic concept.

C. WTCPUA’s Objection that Testimony is Improper Rebuttal Testimony

In this section of WTCPUA’s objections to Dr. Zarnikau’s Rebuttal, WTCPUA’s argument rests on two assertions: first, that the identified portions are not proper rebuttal because they: are “supplemental testimony raising *new issues*” under PUC Proc R. 22.225; or second, the rebuttal is used to prove an essential element of the case not addressed by another party and/or are used to bolster TCMUD 12’s direct case.

WTCPUA’s reliance on P.U.C. PROC. R. 22.225(c) is misplaced. That rule is not applicable to prefiled rebuttal testimony, but rather by its express terms applies only to *supplementation* of prefiled testimony. To the extent that WTCPUA is suggesting that it should have the opportunity to respond to TCMUD 12’s rebuttal, that argument must be rejected as inconsistent with the burden of proof carried by TCMUD 12, which entitles Petitioner to open

and close the evidence,⁷ and because the Commission's rules explicitly permit TCMUD 12 to present its rebuttal after all parties have presented their direct cases.⁸

Second, as to the objection that the following testimony is not responsive to another party's direct case and is therefore not proper rebuttal, TCMUD 12 submits the following, including references to the PUA's testimony which is rebutted, to refute each of WTCPUA's arguments. These portions of Dr. Zarnikau's Rebuttal provide a robust rebuttal to WTCPUA's testimony, but the robustness of the rebuttal does not support WTCPUA's argument that the testimony is therefore not proper rebuttal. Accordingly, WTCPUA's Objections that this testimony is not proper rebuttal should be overruled and its motion to strike denied.

1. Dr. Zarnikau page 5, lines 7-13⁹ – this testimony states Dr. Zarnikau's definition of monopoly in order to rebut Mr. Baudino's definition of "pure monopoly". This portion of Dr. Zarnikau's testimony is in response to the Question on page 24, lines 23-24, which makes clear that Dr. Zarnikau is rebutting Mr. Baudino's opinion on using a "pure monopoly" standard, and why Mr. Baudino's opinion should be rejected.
2. Dr. Zarnikau page 6, line 22 through page 7, line 16 (including JZ R1, JZ R2 and JZ R3)¹⁰ – this testimony is offered to rebut *Mr. Baudino's reliance on a freshman-level college textbook (Baudino at page 13, lines 19-20)*, and cites to textbooks Dr. Zarnikau explains are used to train professional economists for applied or empirical work. (Dr. Zarnikau Rebuttal at p. 4, line 23 – page 5, line 2). The rebuttal exhibits (JZ R1, JZ R2 and JZ R3) contain the excerpts of the textbooks that Dr. Zarnikau is testifying to in rebuttal to Mr. Baudino's reliance on an undergraduate textbook.
3. Dr. Zarnikau page 7, line 20 through page 12, line 8, and lines 20-26 (including JZ R4 and R5) – the Question to which Dr. Zarnikau is responding beginning at page 7, line 20 asks him to explain his assertion that the "pure monopoly" standard *endorsed by Mr.*

⁷ P.U.C. Proc. R. 22.203(b)(1)

⁸ P.U.C. Proc. R. 22.203(b)(3).

⁹ WTCPUA lists Dr. Zarnikau's Rebuttal Exhibits, JZ R1, JZ R2 and JZ R3, in the first bullet of its Objections in this section; TCMUD 12 responds to those immediately below in second subpart of this response.

¹⁰ WTCPUA lists Dr. Zarnikau's first three Rebuttal Exhibits under its first item, but these Exhibits, JZ R1, R2 and R3 are cited in Dr. Zarnikau's Rebuttal listed in WTCPUA's second item, and as such are addressed here.

Baudino is inconsistent with definitions of monopoly adopted by courts in the U.S. The testimony to which WTCPUA objects is directly responsive to an issue raised by Mr. Baudino on behalf of WTCPUA and is accordingly admissible as rebuttal. The rebuttal exhibits are excerpts from the pages of the textbook relied upon by Dr. Zarnikau, as cited in footnotes 14 and 15.

4. Dr. Zarnikau page 12, lines 10 – 17 – this testimony explains why Dr. Zarnikau’s reliance on antitrust cases, law journal articles and other regulatory agencies in rebutting Mr. Baudino’s opinion about pure monopolies that relies on an undergraduate textbook, is more persuasive and is entitled to significant weight, and is therefore appropriately included as part of his rebuttal to Mr. Baudino.
5. Dr. Zarnikau page 14, lines 1-6 – this rebuttal testimony addresses Mr. Baudino’s conclusion that the Suppliers are not a monopoly, as Mr. Baudino states in his Direct at page 4, line 17 (summarizing his conclusions) and at page 31, line 12 (again, summarizing his conclusions).
6. Dr. Zarnikau page 18, lines 3-13 WTCPUA’s objection to this portion of Dr. Zarnikau’s rebuttal mischaracterizes the testimony; Dr. Zarnikau’s is rebutting Mr. Baudino’s testimony concerning barriers to entry that over time may have become formidable, which Mr. Baudino addresses at page 14, line 6 and at page 21, line 9 through page 24, line 15. Since Mr. Baudino devotes more than 3 pages of testimony to this issue, it is unreasonable for WTCPUA to argue as it does here that Dr. Zarnikau’s testimony on this issue is not proper rebuttal to any issue raised by WTCPUA.
7. Dr. Zarnikau page 18, line 27 through page 20, line 3 - this testimony addresses Mr. Baudino’s testimony concerning his conclusions about TCMUD 12’s alternative suppliers (or “other options” as Mr. Baudino calls them) in his prefiled testimony at page 15, line 11 through page 17, line 12, and is accordingly, proper rebuttal to an issue raised by WTCPUA’s witness.
8. Dr. Zarnikau page 20, lines 4-10 – this testimony addresses WTCPUA’s ability to control prices, which Mr. Baudino asserts at page 30, lines 1-9 WTCPUA does not have the power to do. This portion of Dr. Zarnikau’s testimony is directly responsive to Mr. Baudino’s opinion that Dr. Zarnikau’s opinion is “completely erroneous” and is proper rebuttal to WTCPUA’s testimony.

9. Dr. Zarnikau page 24, lines 18- 25 - this testimony responds to Mr. Baudino's opinions concerning "bargaining power" in his prefiled testimony at Section III "Analysis of Market Power and Bargaining Power" (pages 7 – 23); and in particular at: page 5, line 1 ("TCMUD 12 had substantial bargaining power") and 3 ("WTCPUA did not have disparate bargaining power over TCMUD 12"); page 6, line 2 ("bargaining powers held by the LCRA, the TCMUD 12 and the WTCPUA"); page 8, line 6-7 ("TCMUD 12 had substantial bargaining power"); page 12, lines 13-20 (Question asks for Mr. Baudino's opinion on Bargaining Power and the answer addresses that issue.); page 13, lines 2-12 (another Question about Mr. Baudino's opinion on bargaining power and the answer addresses that issue); and page 21, lines 3-8 (which includes Mr. Baudino's opinion about "bargaining power.") For each of these reasons, Dr. Zarnikau's testimony at page 24, lines 18 -25 in which he is asked to give an economist's definition of "disparate bargaining power as that term is used in P.U.C. Subst. R. § 24.133, is directly responsive to multiple parts of WTCPUA's witness' testimony and is proper rebuttal to an issue addressed by another party.
10. Dr. Zarnikau page 26, lines 7-26 – this testimony is part of Dr. Zarnikau's last section of Rebuttal (page 24 – 26) in which he addresses disparate bargaining power. That this part of his testimony is responsive to WTCPUA's witness' Baudino's testimony is thoroughly addressed in subpart 9, immediately above. In addition, as is clear from the Question at lines 19-22, this testimony is also responsive to Mr. Stowe's testimony. The references in Dr. Zarnikau's rebuttal to the testimony of Mr. DiQuinzio and Mr. Joyce, about which WTCPUA also objects, is simply a reference to the facts and data that Dr. Zarnikau bases his opinion on, as he is permitted to do under TRE 703. This testimony rebuts WTCPUA's witness' testimony and is therefore admissible as proper rebuttal.

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

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

1. Mr. DiQuinzio Rebuttal at page 4, lines 23 – 24 – in this sentence, and the one that follows on lines 24 – 25, Mr. DiQuinzio is explaining why there was not an alternative to

LCRA at the time TCMUD 12 signed the wholesale water services agreement. He states the fact that LCRA was the only supplier of raw water in the area at the time TCMUD 12 entered into the Raw Water Contract (which preceded the Wholesale Water Services Agreement), and therefore he draws the inference that the Districts' purchase of raw water did not result in LCRA becoming a sole source provider (i.e., did not *make* LCRA a sole source provider.) This inference is rationally based on Mr. DiQuinzio's perception and helpful to a clear understanding of his testimony, and of a fact in issue, and is accordingly admissible under TRE 701.

2. Mr. DiQuinzio Rebuttal at page 6, line 23 – this testimony is Mr. DiQuinzio's definition of "bargaining power". It is entirely permissible for a lay witness to explain what he means by the terms he is using, especially if it aids in understanding his testimony. Mr. DiQuinzio is not offering the definition as an expert opinion, but rather to the extent a definition is an "opinion," which TCMUD 12 does not concede it is, this is a lay opinion that aids in a clear understanding of his testimony in the preceding lines (page 6, lines 9 – 21) and in subsequent portions of his testimony (e.g., page 6, lines 23 through page 7, line 3). This is not opinion testimony, or if it is, it is not expert opinion testimony, but rather is permissible lay opinion under TRE 701.
3. Mr. DiQuinzio Rebuttal at page 11, line 25 through page 12, line 2 - in the preceding Q & A to this part of Mr. DiQuinzio's rebuttal he explains that TCMUD 12 did not "freely negotiate" the Wholesale Water Services Agreement with LCRA as Mr. Baudino alleges, and then explains Dr. Zarnikau's opinion on the insignificance of a finding on that issue. Mr. DiQuinzio is not offering an expert opinion, he is pointing to Dr. Zarnikau's Rebuttal testimony to complete the reader's understanding of this part of his testimony. This is not opinion testimony (under TRE 701 or 702) but is admissible testimony from Mr. DiQuinzio that references Dr. Zarnikau's opinion.
4. Mr. DiQuinzio Rebuttal at page 13, lines 1 – 3 - to the extent that this testimony re-states the expert opinion testimony of TCMUD 12's economist, Dr. Zarnikau, it is not the opinion testimony of Mr. DiQuinzio. Mr. DiQuinzio is not expressing an opinion, but rather is simply putting Dr. Zarnikau's opinion in the context of the facts Mr. DiQuinzio

testifies about. This is not opinion testimony (under TRE 701 or 702) but is admissible testimony that references the expert opinion of TCMUD 12's economist.

5. Mr. DiQuinzio Rebuttal at page 14, lines 1-7 –this testimony is rebutting WTCPUA's witnesses' testimony that the Transfer Agreement evidenced TCMUD 12's bargaining power. See, Question at page 13, lines 19 – 23 and the Answer beginning at page 13, line 24 through the lines cited in this Objection. The testimony at page 14, lines 1-7 restates Mr. DiQuinzio's Direct Testimony at page 10, lines 8 – 23, to which no objection was made. Mr. DiQuinzio participated in the discussions with LCRA and WTCPUA that resulted in the Transfer Agreement and the opinions and inferences he states in this portion of his testimony are based upon his perceptions arising from those discussions. This testimony is helpful to a clear understanding of Mr. DiQuinzio's testimony rebutting WTCPUA's witness' conclusion that TCMUD 12 had substantial bargaining power in the transaction that resulted in TCMUD 12 accepting the Transfer Agreement, which Mr. Rauschuber opines was "not a simple assignment."
6. Mr. DiQuinzio Rebuttal at page 14, lines 16 – 22 – Mr. DiQuinzio is responding here to Mr. Rauschuber's opinion concerning WTCPUA's position related to the Transfer Agreement, by explaining TCMUD 12's understanding of the requirements imposed on WTCPUA in its purchase agreement with LCRA, which directly affected TCMUD 12's contract with LCRA. TCMUD 12's subsequent execution of the Transfer Agreement resulted from TCMUD 12's understanding of WTCPUA's obligation to obtain TCMUD 12's consent to the transfer. The testimony that Mr. DiQuinzio is rebutting is found in Mr. Rauschuber's prefiled at page 17, line 17 through page 18, line 11. TCMUD 12's objection to Mr. Rauschuber's testimony was overruled. Mr. DiQuinzio's testimony is permissible lay opinion testimony under TRE 701 and is therefore admissible.
7. Mr. DiQuinzio Rebuttal at page 14, line 24 – 27 – in this section of testimony, Mr. DiQuinzio is rebutting Mr. Rauschuber's lay opinion testimony found at Rauschuber's prefiled page 17 through page 18, line 11 concernigin the Transfer Agreement. Mr. DiQuinzio participated in and was aware of the provisions about which he testifies, and this rebuttal testimony permissiblhy explains the inferences he drew during the

discussions that lead up to the execution of the Transfer Agreement. Accordingly, this is permissible lay opinion testimony under TRE 701.

8. Mr. DiQuinzio Rebuttal at page 15, lines 13 – 15 - in this testimony Mr. DiQuinzio is explaining TCMUD 12's experience with WTCPUA requesting that TCMUD 12 reduce its maximum capacity after WTCPUA took over operation of the West Travis County water system, which would have directly impacted TCMUD 12's investment in that System. This is not a legal interpretation, this is a statement of fact from TCMUD 12's general manager about WTCPUA's request that would have directly affected TCMUD 12's payments to LCRA/WTCPUA. This is not impermissible lay opinion testimony, but instead is the statement of fact from a witness who participated in these discussions and events.
9. Mr. DiQuinzio Rebuttal at page 15, lines 22 – 26 - this testimony explains that because the TCMUD 12-LCRA Wholesale Water Services Agreement was an "intangible asset" listed in the Installment Purchase Agreement – a fact that is undisputed and which TCMUD 12 reasonably perceived - WTCPUA had to obtain TCMUD 12's agreement to the transfer. This is not a legal interpretation, this was part of the business dealings TCMUD 12 engaged in upon LCRA's sale of the System to WTCPUA.
10. Mr. DiQuinzio Rebuttal at page 17, line 17 through page 19, line 15 –this testimony rebuts the terminology used by WTCPUA when referring to the agreements that form the basis of the relationship between TCMUD 12 and WTCPUA, as reflected in the testimonies of Mr. Rauscher and Mr. Baudino cited in footnotes 27 and 28. Neither of those witnesses were tendered as legal experts, and this rebuttal to their terminology highlights its misleading nature when contrasted to the express terms of TCMUD's Wholesale Water Services Agreement and the Transfer Agreement. It does not contain any legal opinion, but rather recites verbatim provisions of the relevant contracts to clarify why WTCPUA's terminology is misleading. This is proper fact testimony from the general manager of TCMUD 12, responding to the non-legal testimony of WTCPUA's witnesses.
11. Mr. DiQuinzio Rebuttal at page 18, lines 13 – 25 - this objection repeats the objection listed as #10.

12. Mr. DiQuinzio Rebuttal at page 19, lines 5 -9 – this objection repeats the objection listed as #10.

Speculation: WTCPUA objects to Mr. DiQuinzio's testimony as listed on p[ages 25 – 27, as "speculation". In each instance, Mr. DiQuinzio is relying on his personal knowledge garnered in his role as the General Manager of the Districts, and in particular in his dealings with LCRA, and Lakeway MUD. This testimony is admissible because it is based on his personal knowledge (TRE 602) and in some instances is his lay opinion that is rationally based on his perceptions and provides a clear understanding of his testimony concerning the lack of alternative wholesale water suppliers.

13. &14 Mr. DiQuinzio Rebuttal at page 5, lines 2-5, and lines 9-14–

15. Mr. DiQuinzio Rebuttal at Page 7, lines 24 – 28

16. Mr. DiQuinzio Rebuttal at Page 8, lines 10 -16

17. Mr. DiQuinzio Rebuttal at Page 8, lines 15 – 18

18. Mr. DiQuinzio Rebuttal at Page8, lines 19 – 26

19. Mr. DiQuinzio Rebuttal at Page 10, lines 12 – 17

20. Mr. DiQuinzio Rebuttal at Page 10, lines 17 – 21

21. Mr. DiQuinzio Rebuttal at Page 12, lines 3-9

22. Mr. DiQuinzio Rebuttal at Page 12, lines 17 – 18

23. Mr. DiQuinzio Rebuttal at Page 12, lines 23 – 24

24. Mr. DiQuinzio Rebuttal at Page 15, lines 13 – 15

25. Mr. DiQuinzio Rebuttal at Page15, line 27 through page 16, line 1

26. Mr. DiQuinzio Rebuttal at Page 16, line 5 through page 17, line 16 - Mr. DiQuinzio's Rebuttal explains that TCMUD 12 appealed the rate decision because the PUA provided TCMUD 12 with the forecasted monthly charges that the PUA stated would result once the new 2014 rate methodology was adopted. This is not offered to prove these will be the rates, but to show that the PUA stated these were the rates that were likely to result from the new methodology adopted in 2013, that went into effect in 2014. This testimony

is the subject of several other objections and TCMUD 12's response to those is found below.

B. WTCPUA's Objection that Testimony is Irrelevant

1. *Testimony Relating to the 2008 Time Frame*

WTCPUA's objection here is conditioned on the ALJ's granting of TCMUD 12's objections and motion to strike the testimony of Mr. Baudino. Since that testimony was not struck, there is no need to respond to the three portions of Mr. DiQuinzio's Rebuttal that are the subject of this section (Bullets 1, 2 and 3 on page 28) of WTCPUA's objection, which are presumably moot.

2. *Testimony Related to Impact Fees* WTCPUA's is that impact or connection fees are not relevant because TCMUD 12's Appeal does not address those fees. However, in the following portions of Mr. DiQuinzio's Rebuttal, the connection fees are not discussed in order to challenge them, but rather to address matters of relevance, including TCMUD 12's bargaining power (pursuant to P.U.C. Subst. R. 24.133 (a)(3)(A) relative to LCRA (the relationship between LCRA and TCMUD 12 was determined relevant in Order No. 15).

(4) Mr. DiQuinzio Direct at page 6, lines 2-6 – this testimony rebuts Mr. Baudino's opinion that LCRA did not have complete control over prices and quantities when TCMUD 12 entered into the Wholesale Water Services Contract with LCRA. The upfront and significant pre-payment of connection fees discussed in this portion of the rebuttal testimony was a contractual provision demanded by LCRA that was beneficial to them and burdensome to TCMUD 12. This information has a tendency to make the existence of LCRA's disparate bargaining power more probable than it would be without the evidence and it is therefore relevant and admissible.

(5) Mr. DiQuinzio's Rebuttal at page 6, lines 9-21 – this testimony addresses the same issue, the relative bargaining power of LCRA and TCMUD 12, and accordingly relevant and admissible.

3. **Other Relevance Objections** – WTCPUA's objections in this section rest on an unreasonably narrow view of relevance, which ignores the fact that the standard as enunciated in TRE 401 is that relevant evidence is evidence having *any tendency* to make the existence of any fact that is of consequence to the determination of the

action more or less probable than it would be without the evidence. Additionally, some of these objections are frivolous rather than sound relevance objections. For these reasons, and based on the additional responses below, these objections should be overruled.

(5) Mr. DiQuinzio's Rebuttal at page 3, lines 22 – 25 – WTCPUA's objection focuses on the reference to the 2014 rates, arguing that the rates were changed in 2013. This is a frivolous objection – the rates in dispute here were changed in 2013, but they were effective in 2014. In addition, the objection is to 3 lines of testimony while the argument addresses only the words "in 2014."

(6) Mr. DiQuinzio's Rebuttal at page 4, lines 8-9 and line 12 – WTCPUA objects to words that address the time period that Mr. DiQuinzio covers and again demonstrates that WTCPUA is urging an extremely narrow interpretation of relevance, which TCMUD 12 urges the ALJ to overrule. The evidence has a tendency to make the existence of the lack of alternative providers of water service more probable, and therefore is relevant under TRE 401 and admissible under TRE 402.

(7) Mr. DiQuinzio's Rebuttal at page 4. Lines 8-9 and line 12 - this objection is of the same type as the objection to #6 above, and should be overruled for the same reasons as # 6 should be overruled. This testimony also addresses the lack of alternatives to LCRA at the time TCMUD 12 entered into the Wholesale Water Supply Agreement through the present

(8) Mr. DiQuinzio's Rebuttal at page 7, lines 27 – 28 – this testimony addresses the economic infeasibility of TCMUD 12's construction of an alternative WTP, a matter addressed in Mr. Rauschuber's testimony on behalf of WTCPUA. Again, the objection is based on a narrow interpretation of "relevance" and also frivolously focuses on the word "now." This evidence makes the lack of reasonable alternative water supply more probable than it would be without this evidence and it is accordingly relevant under TRE 401 and admissible under TRE 402.

(9) Mr. DiQuinzio's Rebuttal at page 8, lines 19 -20 - the objection to this testimony which states that TCMUD 12 was not in 2013-14 and is still not in any position to shoulder the cost of alternative water service facilities is relevant to the issue of WTCPUA disparate bargaining power as evidence of abuse of monopoly power.

WTCPUA cites no precedent in support of its contention that the continuing inability of TCMUD to finance a water system construction project is not relevant to the outcome of this matter. This testimony is relevant under P.U.C. Subst. R. 24.133(a)(3)(A).

(10) Mr. DiQuinzio's Rebuttal at page 8, lines 23 – 25 - this testimony provides additional evidence concerning TCMUD 12 and 13's financial condition, and is relevant for the reasons stated in # 9 above. WTCPUA's objection that TCMUD 13 is not a party to this proceeding is disingenuous at best– TCMUD 12 brought the Petition on behalf of itself and TCMUD 11 and 13; all three Districts are entitled to the water provided under the Raw Water Contract with LCRA¹¹ and all three Districts are expressly named in the Wholesale Water Services Agreement between LCRA and TCMUD 12 that was transferred to WTCPUA.¹² The rights and obligations related to raw water and wholesale water services are established by the Memorandum of Understanding, which was part of Mr. DiQuinzio's Direct Testimony.¹³

(11) Mr. DiQuinzio's Rebuttal at page 13. Lines 4-18 – WTCPUA's objection to this testimony which discusses the history of WTCPUA and its participating entities (the latter of which are parties to this case) is without merit. This testimony describes the relationship between and among WTCPUA, its participating entities, and LCRA, and it has a tendency to make the existence of WTCPUA's disparate bargaining power, under PUC Subst R. 24.133(a)(3)(A) more probable than it would be without the evidence. To the extent that WTCPUA is suggesting that this relevant evidence should be excluded on "special grounds" under TRE 403, they failed to plead that rule, but notwithstanding that limitation on the objection, the ALJ is not a jury, and is unlikely to be prejudiced by learning of the history detailed in this testimony. In light of the fact that evidence concerning TCMUD 12's relationship with LCRA was found relevant in Order No.15, this additional evidence concerning the other parties' relationship with LCRA is also relevant.

¹¹ J. DiQuinzio Direct, JAD Exhibit 2.

¹² J. DiQuinzio Direct, JAD Exhibit 4.

¹³ JAD Exhibit 1.

(12) Mr. DiQuinzio's Rebuttal at page 15, line 27 through page 16, line 1 - this testimony rebuts Mr. Baudino's testimony cited in the Question at page 15, line 21 and demonstrates that neither WTCPUA possessed significant bargaining power over LCRA's wholesale water service customers to the extent that they were able to charge the non-signing wholesale customers the new rates even though those customers had not consented to transfer of their contracts to WTCPUA. This rebuttal is relevant to the issue addressed by Mr. Baudino which concerns the existence of and identity of who had bargaining power, which is relevant to determining WTCPUA's abuse of monopoly power under the Commission's rule.

(13) Mr. DiQuinzio's Rebuttal at page 16, line 5 through page 17, line 16 - the testimony that is the subject of this objection directly rebuts Mr. Rauschuber's testimony which emphasizes (**bold**, *italics* and underlining the word ***DECREASE*** in discussing the rates that are the subject of TCMUD 12's protest. Mr. DiQuinzio's Rebuttal explains that TCMUD 12 appealed the rate decision because the PUA provided TCMUD 12 with the forecasted monthly charges that the PUA stated would result once the new 2014 rate methodology was adopted. Mr. DiQuinzio's testimony is offered to rebut Mr. Rauschuber's emphatic testimony which questions the validity of or rationale for TCMUD 12's appeal. While TCMUD 12 agrees that the forecasted monthly charges are not going to be evaluated in this Public Interest appeal, they are relevant to the issue of WTCPUA's abuse of monopoly power. Specifically, WTCPUA's new rate methodology resulted in the monthly rates that *were forecasted by WTCPUA*; and TCMUD 12's reliance on the PUA's explanation of the rates resulting from the new methodology explain the basis for TCMUD 12 to file this Appeal. For each of these reasons, TCMUD 12 urges the ALJ to overrule WTCPUA's multiple objections¹⁴ to this testimony and deny the motion to strike same.

C. **WTCPUA's Objection that Testimony is Inadmissible Hearsay –**

¹⁴ Additional objections are listed below that will refer back to this response.

the objection in this section of WTCPUA's pleading assert that the cited testimony is not "expert's hearsay" under TRE 703 because Mr. DiQuinzio is not an expert, and then concludes that the testimony is hearsay under TRE 703 (sic). For each of the reasons explained below, the testimony is either not hearsay or falls within an exception to the hearsay rule under TRE 803 and the objection should be overruled:

1. Mr. DiQuinzio's Rebuttal at page 4, lines 14 – 16 - this testimony is Mr. DiQuinzio's present sense impression of LCRA's interest in exploring the possibility of constructing a new WTP on The Highlands property, a business proposition that Mr. DiQuinzio was directly involved with as evidenced by his rebuttal testimony at page 4, lines 14 through page 5, line 22. TRE 803(1) explains that a statement describing or explaining an event or condition made while the declarant was perceiving the event is not excluded by the hearsay rule.
2. Mr. DiQuinzio's Rebuttal at page 4, line 28 through page 5, line 2 - the testimony in question here is not a "statement" under TRE 801(a), and therefore is not hearsay. The testimony is Mr. DiQuinzio's recounting of a matter within his personal knowledge, and is admissible under TRE 602 as is clear from reading this portion of his rebuttal testimony as a whole.
3. Mr. DiQuinzio's Rebuttal at page 5, lines 9 – 14 - the testimony in question here is not a "statement" under TRE 801(a) and therefore is not hearsay. Mr. DiQuinzio is recounting matters related to LCRA's considering and ultimately abandoning the possibility of constructing a new WTP at The Highlands to serve an area that would include The Highlands and cover the area west to Marble Falls. Mr. DiQuinzio participated in these business discussions with LCRA as is evident from a review of his testimony and this information is within his personal knowledge under TRE 602 and is accordingly admissible.
4. Mr. DiQuinzio's Rebuttal at page 5, line 20 – this objection relates to the same type of testimony concerning LCRA abandoning the idea it had explored with TCMUD 12 of building a new Highlands WTP. For each of the reasons explained above in #1-4, this testimony is not hearsay, and is at matter within Mr. DiQuinzio's personal knowledge under TRE 602.

5. Mr. DiQuinzio's Rebuttal at page 6, lines 1-2 - this testimony is not hearsay, but instead describes Mr. DiQuinzio's interaction with LCRA at the time of the execution of the Wholesale Water Services Agreement, based upon his personal knowledge of the matter. TRE 603. The testimony rebuts Mr. Baudino's testimony that LCRA did not have control of the prices and quantities set in the Wholesale Agreement. This is also Mr. DiQuinzio's lay opinion or inference that is rationally based on his perception of his dealings with LCRA and that is helpful to a clear understanding of his testimony which concerns bargaining power, which is admissible under TRE 701.
6. Mr. DiQuinzio's Rebuttal at page 7, lines 20 – 23 and Exhibit JAD R1 - this testimony rebuts assertions by PUC Staff Ms. Graham's testimony which criticizes Mr. DiQuinzio's estimate of \$25,520,000 to construct a WTP for failing to provide "documentation . . .to substantiate these cost allegations." Mr. Rauschuber similarly disputes Mr. DiQuinzio's estimate.¹⁵ The testimony to which WTCPUA objects falls under the hearsay exception explained at TRE 803(6) – Records of Regularly Conducted Activity. The person who compiled the information, Mr. Rummel, is TCMUD 12's engineer, who prepared the report or data compilation at the request of TCMUD 12's General Manager, Mr. DiQuinzio, on the course of Mr. Rummel's regularly conducted business activity. This testimony is not excludable by the hearsay rule because it is a TRE 803(5) exception to that rule.
7. Mr. DiQuinzio's Rebuttal at page 11, line 20 - the testimony to which WTCPUA lodges its last hearsay objection is not hearsay, but instead describes Mr. DiQuinzio's interaction with LCRA at the time of the execution of the Wholesale Water Services Agreement, based upon his personal knowledge of the matter. TRE 603. The testimony rebuts Mr. Baudino's testimony that TCMUD 12 "freely negotiated" with LCRA in an "arm's length transaction" the Wholesale Agreement. This is also Mr. DiQuinzio's lay opinion or inference that is rationally based on his perception of his dealings with LCRA and that is helpful to a clear understanding of his testimony which concerns bargaining power, which is admissible under TRE 701.

¹⁵ See, citation to Graham's and Rauschuber's testimony at DiQuinzio Rebuttal page 7, line 4, fn. 7 and 8.

D. WTCPUA's Objection that Testimony is Improper Rebuttal Testimony –

In this section of WTCPUA's objections to Mr. DiQuinzio's Rebuttal, WTCPUA's argument rests on two assertions: first, that the identified portions are not proper rebuttal because they are "supplemental testimony raising *new issues*" under PUC Proc R. 22.225; or second, the rebuttal is used to prove an essential element of the case not addressed by another party and/or are used to bolster TCMUD 12's direct case.

WTCPUA's reliance on P.U.C. Proc. R. 22.225(c) is misplaced. That rule is not applicable to prefiled rebuttal testimony, but rather by its express terms applies only to supplementation of prefiled testimony. To the extent that WTCPUA is suggesting that it should have the opportunity to respond to TCMUD 12's rebuttal, that argument must be rejected as inconsistent with the burden of proof carried by TCMUD 12, which entitles Petitioner to open and close the evidence,¹⁶ and because the Commission's rules explicitly permit TCMUD 12 to present its rebuttal after all parties have presented their direct cases.¹⁷

Secondly, as to the objection that the following testimony is not responsive to another party's direct case and is therefore not proper rebuttal, TCMUD 12 submits the following, including references to the PUA's testimony which is rebutted, to refute each of WTCPUA's arguments. These portions of Mr. DiQuinzio's Rebuttal provide a robust rebuttal to WTCPUA's testimony, but the robustness of the rebuttal does not support WTCPUA's argument that the testimony is therefore not proper rebuttal. Accordingly, WTCPUA's Objections that this testimony is not proper rebuttal should be overruled and its motion to strike denied.

- (1) Mr. DiQuinzio's Rebuttal at page 3, line 7 – 9 – the testimony to which WTCPUA objects is the introductory response to Mr. DiQuinzio's testimony, which states: "I am responsible for the filing of the Petition on behalf of TCMUDs 11, 12 and 13 (collectively, the "Districts"), as directed by the Districts' Boards of Directors" If upheld, WTCPUA's objection would lead to the absurd result of excluding all such introductory identifying testimony in rebuttal, except perhaps in the rare circumstance where a party actually questions the identity of the witness, his position, and/or his

¹⁶ P.U.C. Proc. R. 22.203(b)(1)

¹⁷ P.U.C. Proc. R. 22.203(b)(3).

representative capacity. TCMUD 12 urges the ALJ to overrule this objection as an unreasonable application of the limitation on rebuttal.

- (2) Mr. DiQuinzio's Rebuttal at page 4, lines 14 – 18 – this testimony is responding to WTCPUA's Baudino's testimony which contains numerous opinions about TCMUD's bargaining power relative to LCRA, including the ability to negotiate pricing, in 2008-09.
- (3) Mr. DiQuinzio's Rebuttal at page 7 lines 8-28 – this testimony rebuts Staff witness Graham's and WTCPUA's Rauschuber's testimony identified in the Question at lines 4-7. He restates a portion of his direct testimony in order to explain the foundation for his rebuttal. WTCPUA's restatement of its objection to the references to the current lack of alternative suppliers is addressed above, in TCMUD 12's response to "Other Relevance Objections" # 7 & 8.
- (4) Mr. DiQuinzio's Rebuttal at page 10, lines 12 – 21 – this testimony rebuts Mr. Baudino's opinion that TCMUD 12 failed to fully investigate alternative suppliers of wholesale water service as noted in the Question on lines 1-4 and footnote 14. The objection is directed at the testimony concerning Lakeway MUD found only at lines 17 – 21. Nonetheless, this testimony is proper rebuttal to WTCPUA's witness' testimony and therefore should not be struck based on WTCPUA's objection.
- (5) Mr. DiQuinzio's Rebuttal at page 10, line 23 through page 11, line 11 – WTCPUA argues that this testimony does not disprove evidence presented by WTCPUA or the PUC Staff and is therefore impermissible rebuttal, but makes that objection while acknowledging that the testimony addresses disparate bargaining power. Even a quick review of WTCPUA's and Staff's testimony reveals that they dispute that WTCPUA has disparate bargaining power as evidenced by the rate change that is the subject of this appeal. This objection is frivolous and should accordingly be overruled.
- (6) Mr. DiQuinzio's Rebuttal at page 11, line 25 through page 12, line 2 - this testimony rebuts Mr. Baudino's testimony that is identified in the Question at page 11, lines 12-14, and footnotes 15 and 16 and relies upon the testimony of Dr. Zarnikau to explain TCMUD 12's rationale for arguing that TCMUD 12's negotiations with LCRA

should not be the focus of this case. This is properly within the scope of permissible rebuttal and the objection should be overruled.

(7) Mr. DiQuinzio's Rebuttal at page 12, line 24 through page 13, line 18 –

this testimony addresses the history of TCMUD 12 and LCRA, an issue raised by WTCPUA and PUC Staff, and which was found relevant in Order No. 15, and also the historical relationship between WTCPUA, its Participating Entities and LCRA . This testimony rebuts evidence from TCMUD 12's opponents that WTCPUA does not have disparate bargaining power, and that TCMUD 12's decision to enter into the Wholesale Water Services Agreement with LCRA allegedly proves WTCPUA has not abused its monopoly power.¹⁸ Mr. DiQuinzio's testimony at page 13, lines 6 – 18 directly rebuts Mr. Baudino's testimony at page 6, line 8 through page 7, line 11, where he explains the creation of the WTCPUA and its purpose. Because the testimony that is challenged in this section of WTCPUA's "Improper Rebuttal" argument is directly responsive to the indicated testimony of WTCPUA and Staff, this objection should be overruled.

(8) Mr. DiQuinzio's Rebuttal at page 13, lines 6 – 18 – the objection to these lines of testimony is addressed in TCMUD 12's response to WTCPUA's Objection #7, immediately above, because the testimony that is the subject of this objection is also the subject of that objection.

(9) Mr. DiQuinzio's Rebuttal at page 16, line 10 through page 17, line 16 - the testimony that is the subject of this objection directly rebuts Mr. Rauschuber's testimony which emphasizes (**bold**, *italics* and underlining the word ***DECREASE***) in discussing the rates that are the subject of TCMUD 12's protest. Mr. DiQuinzio's Rebuttal explains that TCMUD 12 appealed the rate decision because the PUA provided TCMUD 12 with the forecasted monthly charges that the PUA stated *would result* once the new 2014 rate methodology was adopted. Mr. DiQuinzio's testimony is offered to rebut Mr. Rauschuber's emphatic testimony which questions the validity of or rationale for TCMUD 12's appeal. See, also, TCMUD 12's Response to WTCPUA's Relevance Objection #13, above.

¹⁸ H. Graham R 7: 9 - `8; Baudino e.g., at 4: 17 – 5:12 (summary) .

(10)Mr. DiQuinzio's Rebuttal at page 19. lines18 -23 - this objection which claims WTCPUA has not presented into evidence any fact related to the services other than "treatment" it provides to TCMUD 12 is simply unsupported. Mr. DiQuinzio is rebutting Mr. Baudino's testimony at p. 4, lines 17 – 18 (WTCPUA "is a sole source provider of wholesale water treatment services"); page 4, lines 20 – 21 (TCMUD 12 chose the LCRA (now the WTCPUA) as its sole source supplier of wholesale water treatment services"); page 5, line 15 (the wholesale water treatment service agreement); page 5, line 21 (wholesale water treatment services); *ad nauseam*. See, also, Mr. Rauschuber at page 20, lines 4, 11, 15, 20, and 23 (referring to wholesale water treatment service rate). The testimony which is the subject of this last objection rebuts WTCPUA's testimony as indicated and is properly within the scope of TCMUD 12's rebuttal case.

V. CONCLUSION

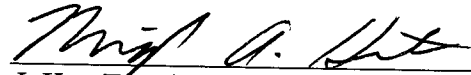
WHEREFORE, PREMISES CONSIDERED, TCMUD 12 respectfully urges the Honorable Administrative Law Judge to overrule all of WTCPUA's objections, deny WTCPUA's Motion to Strike in its entirety, and for such further relief to which it may be entitled.

Respectfully Submitted,

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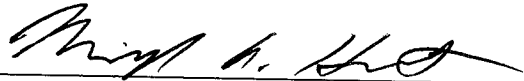


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**ATTORNEYS FOR TRAVIS COUNTY
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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of April 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