



Control Number: 43922



Item Number: 24

Addendum StartPage: 0

House Bill (HB) 1600 and Senate Bill (SB) 567 83rd
Legislature, Regular Session, transferred the functions
relating to the economic regulation of water and sewer
utilities from the TCEQ to the PUC effective
September 1, 2014

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

May 20, 2010

The Honorable Richard R. Wilfong
State Office of Administrative Hearings
300 West 15th Street, Room 504
Austin, Texas 78701-1649

Re: Water Rate/Tariff Change Application of Double Diamond Utilities Co.,
Certificate of Convenience and Necessity No. 12087, in Hill, Palo Pinto, and
Johnson Counties, Texas, Application No. 36220-R; SOAH Docket No. 582-09-
4288; TCEQ Docket No. 2009-0505-UCR

Dear Judge Wilfong:

For your consideration, I have enclosed the Executive Director's Reply to Double
Diamond Utilities Co.'s Objections to Prefiled Testimony. Please let me know if you have
any questions.

Sincerely,

Stefanie Skogen
Staff Attorney
Environmental Law Division

Enclosure

cc: Mailing List

2010 MAY 20 PM 4:08
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SOAH DOCKET NO. 582-09-4288
TCEQ DOCKET NO. 2009-0505-UCR

<p>WATER RATE/TARIFF CHANGE APPLICATION OF DOUBLE DIAMOND UTILITIES CO., CERTIFICATE OF CONVENIENCE AND NECESSITY NO. 12087, IN HILL, PALO PINTO, AND JOHNSON COUNTIES, TEXAS, APPLICATION NO. 36220-R</p>	<p>§ § § § § § § § § §</p>	<p>BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS</p>
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**EXECUTIVE DIRECTOR'S REPLY TO DOUBLE DIAMOND UTILITIES CO.'S
OBJECTIONS TO PREFILED TESTIMONY**

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission), by and through a representative of the Commission's Environmental Law Division, files the following reply to Double Diamond Utilities Co.'s (DDU's) objections. In support of the reply, the ED shows the following:

I. INTRODUCTION

When determining whether or not evidence should be admitted, a trial court, or in this case an administrative law judge (ALJ), has broad discretion.¹ The criteria used by the ALJ for assessing the relevance and reliability of expert testimony must vary depending on the nature of the evidence presented by the expert witness.² The ALJ does not determine if an expert's conclusions are correct but rather decides if the analysis used by the expert is reliable.³ If another party to the case finds an expert's opinion questionable, cross examination, not an objection to testimony, is "the traditional and appropriate means of attacking" such evidence.⁴

II. REPLY TO OBJECTION TO ELSIE PASCUA'S PREFILED TESTIMONY

A. Page 9, lines 15-17

¹ Exxon Pipeline Co. v. Zwahr, 88 S.W.3d 623, 629 (Tex. 2002).
² Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 727 (Tex. 1998).
³ Id. at 728.
⁴ Id. (quoting Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 596 (1993)).

As a state agency, the TCEQ carries out the powers delegated to it by the Texas Legislature by applying the law that falls under its jurisdiction to the facts in each type of case it regulates. For utility rate cases, ED staff examine the application and other documentation submitted in the case, consider the law that applies to the application, and determine under the law what they believe the applicant's rates should be. This means that the law is one of the tools Ms. Pascua used in addition to her financial expertise to analyze the application and calculate her, and therefore the ED's, recommended revenue requirements. Looking at Texas Rule of Evidence 704, the Texas Supreme Court has stated, "Fairness and efficiency dictate that an expert may state an opinion on a mixed question of law and fact as long as the opinion is confined to the relevant issues and is based on proper legal concepts."⁵ Here, Ms. Pascua was explaining why she and Mr. Dickey used the original application as the starting point for their analyses rather than starting with the revisions discussed in DDU's prefiled testimony. In other words, she had to apply the law to the facts in the case to be able to develop her analysis. The ALJ may reach a different conclusion regarding whether DDU met the requirements of section 291.25(g) of the TCEQ's rules, but this does not preclude the ED from providing his opinion on this issue through his witness based on the law that he has been charged with enforcing. Therefore, the objection to this testimony should be denied.

III. REPLY TO OBJECTIONS TO BRIAN DAVID DICKEY'S PREFILED TESTIMONY

A. Page 4, lines 19-20

The ED is unsure as to the basis for this objection. Mr. Dickey is merely stating what DDU's application and testimony clearly reflect: DDU applied for one rate for The Cliffs and

⁵ *Birchfield v. Texarkana Mem'l Hosp.*, 747 S.W.2d 361, 365 (Tex. 1987).

one rate for The Retreat and White Bluff combined.⁶ Mr. Dickey is not attempting to surmise what DDU wishes to seek if the right to consolidate is not granted; he is just stating that according to its application, DDU wants to have a consolidated rate for The Retreat and White Bluff. Therefore, the objection to this testimony should be denied.

B. Page 6, lines 9-11.

As a state agency, the TCEQ carries out the powers delegated to it by the Texas Legislature by applying the law that falls under its jurisdiction to the facts in each type of case it regulates. For utility rate cases, ED staff examine the application and other documentation submitted in the case, consider the law that applies to the application, and determine under the law what they believe the applicant's rates should be. This means that the law is one of the tools Mr. Dickey used in addition to his technical expertise to determine whether the ED would recommend granting, denying, or granting in part DDU's application. Looking at Texas Rule of Evidence 704, the Texas Supreme Court has stated, "Fairness and efficiency dictate that an expert may state an opinion on a mixed question of law and fact as long as the opinion is confined to the relevant issues and is based on proper legal concepts."⁷ Here, Mr. Dickey was explaining why he, and therefore the ED, is recommending denial of DDU's application with regard to The Retreat and White Bluff. In other words, he had to apply the law to the facts of the case to develop his analysis. The ALJ may reach a different conclusion regarding whether DDU met the requirements of section 291.21(m) of the TCEQ's rules, but this does not preclude the ED from providing his opinion on this issue based on the law that he was been charged with enforcing. Therefore, the objection to this testimony should be denied.

⁶ *E.g.*, Ex. DDU-1, at 255-56 (listing the proposed rates for The Retreat and White Bluff), 257-58 (listing the proposed rates for The Cliffs).

⁷ *Birchfield v. Texarkana Mem'l Hosp.*, 747 S.W.2d 361, 365 (Tex. 1987).

IV. EXCEPTION TO EXCLUSION

Even if the ALJ finds that any of the testimony DDU has objected to violates the Texas Rules of Evidence, this does not mean it must be excluded from the evidence. Under the TCEQ's rules, "[w]hen necessary to ascertain facts not reasonably susceptible of proof under [the Texas Rules of 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 people in the conduct of their affairs."⁸ The ED believes it is both reasonable and prudent to rely on the testimony provided by staff, as the testimony explains the ED's position through the expert analyses of his staff regarding various issues in this case. Therefore, the objections against the ED's testimony should be denied.

V. CONCLUSION

The ED respectfully asserts that none of DDU's objections to Ms. Pascua's and Mr. Dickey's prefiled testimony have merit and requests that all objections be denied.

Respectfully submitted,

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

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⁸ 30 TEX. ADMIN. CODE § 80.127(a)(1) (West 2010).

CERTIFICATE OF SERVICE

I certify that on May 20, 2010, a copy of the foregoing document was sent by first class mail, agency mail, electronic mail, and/or facsimile to the persons on the attached Mailing List.

Stefanie Skogen

Stefanie Skogen, Staff Attorney
Environmental Law Division

Mailing List

Double Diamond Utility Co., Inc.
SOAH Docket No. 582-09-4288
TCEQ Docket No. 2009-0505-UCR

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