

Finally, the testimony and Exhibit DLM-5 are relevant to the service area sought in this matter. What area may be included as a result of the motion contained in DLM-5 has a direct relationship with what area will be sought in this proceeding. For these reasons, the objections to the testimony and related attachments should be overruled.

3. **Page 4, line 14, "On October 10, 2007..." — page 5, line 1, "...testimony as DLM-8."**
LPWC objects to the testimony offered by Mr. Metzler as hearsay. Mr. Metzler is a fact witness and Mayor Pro Tempore for Lindsay. He is not employed by TCEQ, and has not been offered as a witness qualified to speak regarding past TCEQ actions affecting Lindsay. Mr. Metzler relies upon correspondence created by others, and testifies as to the content of that correspondence. The testimony is offered for the truth of the matters stated in the correspondence.

RESPONSE: The testimony on page 4, lines 14 through page 5, line 1 is not hearsay. The testimony is being offered to provide context and understanding of Mr. Metzler's belief. Thus, it is not being offered to prove the truth of the matter asserted but to demonstrate Mr. Metzler's and the City's belief. Mr. Metzler was asked, and he responded, regarding whether any additional changes to the City's water or sewer CCN since the last amendment was granted had been made. The identification of the process that the City underwent to seek its Motion for *Nunc Pro Tunc* be heard and decided upon is not hearsay and is not offered to prove the truth of the matter asserted. Thus, the testimony is not hearsay. For these reasons, the objections to the testimony should be overruled.

4. **Exhibits (sic) DLM-6 (Page 4, Lines 16-17)**

LPWC objects to the admission of DLM-6 as irrelevant and not properly authenticated. The correspondence relates to the notice of the correction of an error to an order in a previous docket. The only relevant issue is the actual boundary of the Applicant's existing CCN, which is not addressed by this letter. In addition, there is no signature on the document that might be evidence of the document's accuracy, completeness or authenticity.

RESPONSE: The referenced testimony is relevant as it discusses the City's current water CCN boundary and a change that has been approved to such boundary. The TCEQ requires an

applicant to demonstrate its current CCN in the process of applying for an amendment. That is what the City has done with this document. Additionally, it was discovered that this should have been a 2-sided exhibit and was inadvertently copied as a 1-sided document. Therefore, the City is attaching a new Exhibit DLM-6 to this response for all Parties to replace. A certified copy of the document contained in Exhibit DLM-6 will be produced for the record copy at the hearing. The certified document should remove any objection as to authentication pursuant to TEX. R. EVID. 902 (1).

- X 5. **Page 6, lines 20 — 21, "Yes, except as otherwise modified by ... witnesses."**
LPWC objects to this testimony as hearsay. The witness is testifying regarding the entire content of the Application and the testimony of other witness. The testimony is offered for the truth of the matter stated, but the witness has no personal knowledge of the facts or opinions set forth in the Application and in the testimony presented by other witnesses.

RESPONSE: The referenced testimony does not contain any out of court statements used to prove the truth of the matter asserted. Mr. Metzler is making a statement related to the accuracy of the CCN application, which he sponsors. Additionally, he is not testifying about opinions presented by other witnesses, he is simply stating that the application is true and correct, unless one of the City's experts modified such application. Furthermore, the witness has not relied on out of court statements as no statements have been made and the testimony has not been offered. There is simply no hearsay testimony being provided. Further, any testimony provided by any other City witness cannot possibly be hearsay as such statements would all be in court statements and not out of court statements. The testimony of other City witnesses is simply not hearsay. As such, the objection should be overruled.

6. **Page 7, lines 14 — 18, "...stating that all...accepted for technical review."**
LPWC objects to this testimony as hearsay. The witness is testifying regarding the content of correspondence created by TCEQ. The testimony is offered for the truth of the matter stated in the correspondence. Exhibit DLM-9 is the best evidence of its contents. overruled

RESPONSE: The testimony on page 7, lines 14-18 is not hearsay. The testimony of Mr. Metzler is supported by TCEQ records and City records which the City possesses. These records are kept in the course of a regularly conducted business activity. In the alternative, if Your Honor finds that it is hearsay, the testimony is not offered to prove the truth of the matter asserted but offered to demonstrate the witnesses belief that the TCEQ had accepted the City's application for filing and offered for the limited purpose of demonstrating compliance with the Commission's regulations. permitted for testimony

7. **Page 8, lines 11-20, "Does Lindsay have....only one certified contract operator."**
LPWC objects to the direct question as calling for speculation on the part of the witness and the response as speculation. The witness has not been qualified as one with a particular or specialized knowledge, based on education or experience, to testify regarding Lindsay's technical ability to provide water and wastewater service. overruled

RESPONSE: The testimony on page 8, lines 11-20 is not speculation. Mr. Metzler is testifying on behalf of the City and as a city council member that has the knowledge and capacity to discuss the employees of the City and the technical ability of the City to provide continuous and adequate service to the requested area as his responsibilities require that the City ensure compliance with TCEQ regulations. In the alternative, if the Judge is inclined to sustain the objection, the City requests that Mr. Metzler be allowed to provide the testimony regarding the factual aspects of his response regarding the number of certified operators and their levels of certification. To that extent, if the Judge sustains the objection, the City requests that it be allowed to ask: "Are you familiar with the certification levels of the City's contract operators? If so, please explain." allow alternative

8. Page 11, lines 10-12, "Approximately....Attachment DLM-10" and Exhibit DLM-10.

LPWC objects to this testimony and Exhibit DLM-10 as hearsay. DLM-10 contains copies of letters from various individuals. None of the individuals have been called to testify regarding their purported request for water or sewer service. The exhibit is offered to prove the truth of the matter stated.

RESPONSE: The referenced testimony and documents are not hearsay. The documents and testimony of Mr. Metzler are City records which the City has authenticated. As such, the documents are not hearsay pursuant to TEX. R. EVID. 803 (6) and (8). As Mayor *Pro Tempore*, Mr. Metzler is able to review the City's records and testify based on his review of the City's records. The testimony relies on the attachments and the attachments contain an affidavit which declares the attachments to be official records of the City, the record was made from information transmitted by a person with knowledge of the facts, the record was made at or near the time of the acts, events, conditions, opinions, diagnoses appearing on it, the record was made as part of the regular practice of that business activity, and the record was kept in the course of a regularly conducted business activity.³ Further, the City has established that the testimony and referenced documents are excepted from the hearsay rules pursuant to TEX. R. EVID. 803 (8). As a public office, the testimony and attachment establish that the information contained in the testimony and all of Exhibit DLM-10 is a record of a public office that sets forth the activities of the office (i.e. location of persons requesting water or sewer service from the City's water and sewer utility). In the alternative, if Your Honor finds that it is hearsay, the testimony and attachment are not offered to prove the truth of the matter asserted but as a response to the Commission's

³ See TEX. R. EVID. 803(6); see also *In re. K.C.P.*, 142 S.W.3d 574, 578 (Tex.App.-Texarkana 2004, no pet.). "The predicate for admission of a business record may be established by an affidavit...The predicate witness does not have to be the record's creator or have personal knowledge of the record. The witness is only required to have personal knowledge of the manner in which the records were prepared." *Id.*

regulatory requirement and offered for the limited purpose of demonstrating compliance with the Commission's regulations. Further, they are offered not for the proof of the matter asserted, but merely that the statements were made and to formulate the witness's belief that 55 property owners have requested service from the City. As such, they are not hearsay.

9. Page 11, line 16, "The map shown...." — page 12, line 2, "....CCN application" and Exhibits DLM-11 and DLM-12.

LPWC objects to this testimony and Exhibits DLM-11 and DLM-12 as hearsay. The witness is testifying as to the content of maps he did not create. The maps themselves are hearsay as they were not created by this witness, nor are they offered or proven up by the individual who created them. The testimony and the maps are offered to prove the truth of the matters stated.

RESPONSE: The referenced testimony and documents are not hearsay. The testimony on page 11, line 16 is not hearsay. The testimony of Mr. Metzler is supported by City records which the City is in possession of and was made at the direction of the City. These records are kept in the course of a regularly conducted business activity. Further, the City has established that the testimony and referenced documents are excepted from the hearsay rules pursuant to TEX. R. EVID. 803 (8). As a public office, the testimony and attachment establish that the information contained in the testimony and all of Exhibits DLM-11 and DLM-12 are records of a public office that sets forth the activities of the office (i.e. location of persons requesting water or sewer service from the City's water and sewer utility). In the alternative, if Your Honor finds that it is hearsay, the testimony and attachments are not offered to prove the truth of the matter asserted but as a response to the Commission's regulatory requirement and offered for the limited purpose of demonstrating compliance with the Commission's regulations.

*Allow -
for this is
what
city
has done
cannot
say that over
they are talking
now.*

10. Page 12, lines 12-16, "I have attached....testimony as DLM-3"(sic) and Exhibit DLM-13.

LPWC objects to this testimony and Exhibit DLM-13 as hearsay. The witness is testifying as to the content of a map he did not create. The map itself is hearsay as it was not created by this witness, nor is it offered or proven up by the individual who created it. The testimony and the map are offered to prove the truth of the matters stated.

RESPONSE: The referenced testimony and document is not hearsay. The testimony on page 12, lines 12-16 is not hearsay. The testimony of Mr. Metzler is supported by City records which the City is in possession of and was made at the direction of the City. These records are kept in the course of a regularly conducted business activity. In the alternative, if Your Honor finds that it is hearsay, the testimony and attachment are not offered to prove the truth of the matter asserted but as a response to the Commission's regulatory requirement and offered for the limited purpose of demonstrating compliance with the Commission's regulations.

11. Page 12, lines 18-23, "Is there a need....Proposed Service Territory,"

LPWC objects to the direct question as calling for speculation and a conclusion on the part of the fact witness and the response as speculation and conclusory. The witness has not been qualified as one with a particular or specialized knowledge, based on education or experience, to testify regarding whether a need for service exists. This is ultimately a question for the trier of fact. Further, the witness relies upon a hearsay exhibit (DLM-10) in support of his speculation.

RESPONSE: The testimony on page 12, lines 18 through 23 is not speculation. As the Mayor *Pro Tempore*, Mr. Metzler and the other city councilpersons have the duty to oversee all operations of the City, including the water and sewer utilities. The testimony of Mr. Metzler is based on his review of official City records. As Mayor *Pro Tempore*, Mr. Metzler is able to review the City's records and testify based on his review of the City's records. Mr. Metzler is allowed to offer his opinion as it is rationally based on his perception based on the documents he has reviewed and the opinion is helpful to clearly understand his testimony and the determination of a fact issue. As such, the testimony is allowed pursuant to TEX. R. EVID. 701.

12. **Page 14, lines 3-5, "Most municipalities.... residents of the ETJ"**
LPWC objects to the response as speculative and hearsay. The witness has not been qualified as one with a particular or specialized knowledge, based on education or experience, to testify regarding what "most municipalities" believe. The testimony is offered to prove the truth of the matter stated.

RESPONSE: The City withdraws the testimony: "Most municipalities with utilities believe that it is key to provide utility services to its citizens and residents of the ETJ."

13. **Page 16, lines 19-22, "Does Lindsay have....Proposed Service Territory."**
LPWC objects to the direct question as calling for speculation and a conclusion on the part of the fact witness and the response as speculation and conclusory. The witness has not been qualified as one with a particular or specialized knowledge, based on education or experience, to testify regarding whether Lindsay has the ability to provide service. *overruled*

RESPONSE: The testimony on page 16, lines 19-22 is not speculation. Mr. Metzler is testifying on behalf of the City and as Mayor *Pro Tempore* has the knowledge and capacity to discuss the technical ability of the City to provide continuous and adequate service to the requested area.

14. **Page 18, lines 16-19, "Does the City have....Yes."**
LPWC objects to the direct question as calling for speculation and a conclusion on the part of the fact witness and the response as speculation and conclusory. The witness has not been qualified as one with a particular or specialized knowledge, based on education or experience, to testify regarding whether Lindsay has the financial resources to provide service. This is ultimately a question for the trier of fact. *overruled*

RESPONSE: The testimony on page 18, lines 16-19 is not speculation. Mr. Metzler is testifying on behalf of the City and as Mayor *Pro Tempore* has the knowledge and capacity to discuss the financial ability of the City to provide continuous and adequate service to the requested area.

15. Page 21, lines 11-17, "Will service to the proposed....being served by any provider."

LPWC objects to the direct question as calling for speculation and a conclusion on the part of the fact witness and the response as speculation and conclusory. The witness has not been qualified as one with a particular or specialized knowledge, based on education or experience, to testify regarding whether service by Lindsay would be an improvement to the proposed area. This is ultimately a question for the trier of fact. Overruled

RESPONSE: The testimony on page 21, lines 11-17 is not speculation. Mr. Metzler is testifying on behalf of the City and as Mayor *Pro Tempore* has the knowledge and capacity to discuss the technical ability of the City to provide continuous and adequate service to the requested area and the improvements to water and sewer service that would be seen if the City were to receive the requested amendment. Mr. Metzler is allowed to offer his opinion as it is rationally based on his perception based on the documents he has reviewed and the opinion is helpful to clearly understand his testimony and the determination of a fact issue. As such, the testimony is allowed pursuant to TEX. R. EVID. 701.

16. Page 22, lines 5-8, "The City has properly....water or wastewater system."

LPWC objects to the response after, "Yes," as speculation and conclusory. The witness has not been qualified as one with a particular or specialized knowledge, based on education or experience, to testify regarding whether an operator is properly trained, whether the customers have received adequate service, and whether the financial position of the city is good or bad. Overruled

RESPONSE: The testimony on page 22, lines 5-8 is not speculation. Mr. Metzler is testifying on behalf of the City and as Mayor *Pro Tempore* has the knowledge and capacity to discuss the employees of the City as well as the technical, managerial, and financial capability of the City to provide continuous and adequate service to the requested area. Mr. Metzler is allowed to offer his opinion as it is rationally based on his perception based on the documents he has reviewed and the opinion is helpful to clearly understand his testimony and the determination of a fact issue. As such, the testimony is allowed pursuant to TEX. R. EVID. 701.

17. **Page 22, lines 10-13, "If the certificate....Yes."**

LPWC objects to the direct question as calling for speculation and a conclusion on the part of the fact witness and the response as speculation and conclusory. The witness has not been qualified as one with a particular or specialized knowledge, based on education or experience, to testify regarding whether issuing a CCN to Lindsay would best serve the public. This is ultimately a question for the trier of fact.

RESPONSE: The testimony on page 22, lines 10-13 is not speculation. Mr. Metzler is testifying on behalf of the City and as Mayor *Pro Tempore* has the knowledge and capacity to discuss the technical ability of the City to provide continuous and adequate service to the requested area. Mr. Metzler is allowed to offer his opinion as it is rationally based on his perception based on the documents he has reviewed and the opinion is helpful to clearly understand his testimony and the determination of a fact issue. As such, the testimony is allowed pursuant to TEX. R. EVID. 701.

OBJECTIONS TO THE PREFILED TESTIMONY OF KERRY D. MARONEY

1. **Page 6, lines 2-16 and Exhibits KDM-2 —KDM-10.**

The witness testifies regarding the various exhibits attached to his prefiled testimony, Exhibits KDM-2 through KDM-10. LPWC objects to all of these exhibits. Exhibits KDM-2, KDM-3, KDM-5, KDM-6, KDM-7, KDM-8, KDM-9 and KDM-10 are hearsay. KDM-2 is a Notice of Violation letter to which the witness is not a party and a response to the notice of violation to which the witness is not a party. KDM-3, KDM-6 and KDM-7 are maps the witness did not create. KDM-5 is the same exhibit as DLM-10, purported requests for service, and none of the individuals who wrote the letters contained in KDM-5 are offered as witnesses. KDM-8 is information apparently pulled from the internet, was not prepared by the witness and is neither certified as true and correct nor properly authenticated. KDM-9 is a study prepared by someone other than this witness. Only a portion of the study is attached as Exhibit KDM-9. KDM-10 is a TPDES permit document that is not certified as true and correct. All of these exhibits are offered for the truth of the matters contained within them and are hearsay.

RESPONSE: The referenced testimony and Exhibits are City records, some of which the City has authenticated, others of which are created by TCEQ and are business records and open records. As an expert for the City, Mr. Maroney is able to review the City's records and testify based on his review of the City's records and other pertinent documents. The testimony relies

on his review of all documents contained in his exhibits and some of those exhibits contain an affidavit which declares the exhibits to be a business record of the City, the record was made from information transmitted by a person with knowledge of the facts, the record was made at or near the time of the acts, events, conditions, opinions, diagnoses appearing on it, the record was made as part of the regular practice of that business activity, and the record was kept in the course of a regularly conducted business activity.⁴ As a result, the testimony and referenced exhibits are an exception to the hearsay rules pursuant to TEX. R. EVID. 803 (6). Further, the City has established that the testimony and referenced documents are excepted from the hearsay rules pursuant to TEX. R. EVID. 803 (8). As a public office, the testimony and exhibits establish that the information contained in the testimony and all of Attachments KDM-2, KDM-3, KDM-4, KDM-5, KDM-6, KDM-7, KDM-8, KDM-9, and KDM-10 are records of a public office that sets forth the activities of the office (i.e. location of persons requesting water or sewer service from the City's water and sewer utility, correspondence with governmental agencies related to City's provision of water and sewer services, etc.). Additionally, even if the testimony could be regarded as hearsay, as an expert, Mr. Maroney may rely on hearsay to support his opinion regarding the City's ability to provide continuous and adequate service. Further, Mr. Maroney is a designated expert on the City of Lindsay's managerial and technical ability to provide continuous and adequate service to the requested area. As an expert, Mr. Maroney may testify on all components of establishing managerial and technical ability to provide continuous and adequate service to the requested area. An expert may offer testimony based on hearsay.⁵

⁴ *Id.*

⁵ TEX. R. EVID. 703.

In the alternative, if Your Honor finds that it is hearsay, the testimony and attachment are not offered to prove the truth of the matter asserted but as a response to the Commission's regulatory requirement and offered for that limited purpose of demonstrating compliance with the Commission's regulations. For these reasons, the objections to the testimony and related attachments should be overruled.

2. Page 7, lines 6-7, "A copy of—Attachment KDM-2."

LPWC has objected to Exhibit KDM-2 as hearsay and the witness refers to this exhibit as representing the truth of the matters stated therein. This testimony and the exhibit are hearsay.

RESPONSE: The referenced testimony and attachment is a City record which was created by TCEQ and is a business record. As an expert for the City, Mr. Maroney is able to review the City's records and testify based on his review of the City's records and other pertinent documents. As a result, the testimony and referenced attachment is an exception to the hearsay rules pursuant to TEX. R. EVID. 803 (6). Further, the City has established that the testimony and referenced document is excepted from the hearsay rules pursuant to TEX. R. EVID. 803 (8). As a public office, the testimony and attachment establish that the information contained in the testimony and all of Attachment KDM-2 is a record of a public office that sets forth the activities of the office (i.e., correspondence with governmental agencies related to City's provision of water and sewer services, etc.). Additionally, even if the testimony could be regarded as hearsay, as an expert, Mr. Maroney may rely on hearsay to support his opinion regarding the City's ability to provide continuous and adequate service. Further, Mr. Maroney is a designated expert on the City of Lindsay's managerial and technical ability to provide continuous and adequate service to the requested area. As an expert, Mr. Maroney may testify on all components of establishing managerial and technical ability to provide continuous and

adequate service to the requested area. An expert may offer testimony based on hearsay.⁶ In the alternative, if Your Honor finds that it is hearsay, the testimony and attachment are not offered to prove the truth of the matter asserted but as a response to the Commission's regulatory requirement and offered for that limited purpose of demonstrating compliance with the Commission's regulations. Further, even if the documents are hearsay, Mr. Maroney may testify regarding the documents as the basis upon which he formulates his opinions. For these reasons, the objections to the testimony and related attachment should be overruled.

3. Page 8, lines 16-17, "An official CCN...Attachment KDM-3."

LPWC has objected to Exhibit KDM-3 as hearsay and the witness refers to this exhibit as representing the truth of the matters stated therein. The witness did not create the map to which he refers, and the map has not been offered or certified as true and correct or properly authenticated. This testimony and the exhibit are hearsay.

RESPONSE: The referenced testimony and attachment are City records which were created by TCEQ and are business records. As an expert for the City, Mr. Maroney is able to review the City's records and testify based on his review of the City's records and other pertinent documents. The testimony relies on his review of the map contained in this attachment. As a result, the testimony and referenced attachment is an exception to the hearsay rules pursuant to TEX. R. EVID. 803 (6). Further, the City has established that the testimony and referenced document is excepted from the hearsay rules pursuant to TEX. R. EVID. 803 (8). As a public office, the testimony and attachment establish that the information contained in the testimony and all of Attachment KDM-3 is a record of a public office that sets forth the activities of the office (i.e. location of City's authority to provide water and sewer utility service). Additionally, even if the testimony could be regarded as hearsay, as an expert, Mr. Maroney may rely on hearsay to support his opinion regarding the City's ability to provide continuous and adequate

⁶ *Id.*

service. Further, Mr. Maroney is a designated expert on the City of Lindsay's managerial and technical ability to provide continuous and adequate service to the requested area. As an expert, Mr. Maroney may testify on all components of establishing managerial and technical ability to provide continuous and adequate service to the requested area. An expert may offer testimony based on hearsay.⁷ In the alternative, if Your Honor finds that it is hearsay, the testimony and attachment are not offered to prove the truth of the matter asserted but as a response to the Commission's regulatory requirement and offered for that limited purpose of demonstrating compliance with the Commission's regulations. For these reasons, the objections to the testimony and related attachment should be overruled. Further, even if the document is hearsay, Mr. Maroney may testify regarding the document as the basis upon which he formulates his opinions.

4. **Page 9, lines 10-19, "There is a need....Mr. Metzler."**

LPWC has objected to Exhibits KDM-5 (and the same documents in Exhibit DLM-10), KDM-6 and KDM-7 as hearsay. The witness refers to these exhibits as representing the truth of the matters stated therein. The witness did not create any of the documents contained in Exhibit KDM-5, nor did he create the maps which are Exhibits KDM-6 and KDM-7. This testimony and the exhibits are hearsay.

RESPONSE: The referenced testimony and documents are not hearsay. The documents and testimony of Mr. Maroney are City records which the City has authenticated. As such, the documents are not hearsay pursuant to TEX. R. EVID. 803 (6) and (8). As an expert witness for the City, Mr. Maroney is able to review the City's records and testify based on his review of the City's records. The testimony relies on the attachments and the attachments contain an affidavit which declares the attachments to be official records of the City, the record was made from information transmitted by a person with knowledge of the facts, the record was made at or near

⁷ *Id.*

the time of the acts, events, conditions, opinions, diagnoses appearing on it, the record was made as part of the regular practice of that business activity, and the record was kept in the course of a regularly conducted business activity.⁸ Further, the City has established that the testimony and referenced documents are excepted from the hearsay rules pursuant to TEX. R. EVID. 803 (8). As a public office, the testimony and attachments establish that the information contained in the testimony and all of Exhibit KDM-5 is a record of a public office that sets forth the activities of the office (i.e. location of persons requesting water or sewer service from the City's water and sewer utility). Further, Mr. Maroney is a designated expert on the City of Lindsay's managerial and technical ability to provide continuous and adequate service to the requested area. As an expert, Mr. Maroney may testify on all components of establishing managerial and technical ability to provide continuous and adequate service to the requested area. An expert may offer testimony based on hearsay.⁹ In the alternative, if Your Honor finds that it is hearsay, the testimony and attachments are not offered to prove the truth of the matter asserted but as a response to the Commission's regulatory requirement and offered for the limited purpose of demonstrating compliance with the Commission's regulations. Further, even if the documents are hearsay, Mr. Maroney may testify regarding the documents he reviewed as the basis upon which he formulates his opinions.

⁸ See TEX. R. EVID. 803(6); see also *In re. K.C.P.*, 142 S.W.3d 574, 578, *supra* note 3.

⁹ TEX. R. EVID. 703.

5. **Page 9, lines 21-22, "Lindsay had..., Census Bureau."**

LPWC objects to this testimony as hearsay.

6. **Page 9, lines 22-23, "I have attached...Attachment KDM-8."**

LPWC has objected to Exhibit KDM-8 as hearsay and the witness refers to this exhibit as representing the truth of the matters stated therein. This testimony and the exhibit are hearsay.

*Overruled
as basis of
the case*

RESPONSE: The documents and testimony of Mr. Maroney are records Mr. Maroney has reviewed in order to formulate his opinions and testimony. As an expert witness for the City, Mr. Maroney may testify on all components of establishing managerial and technical ability to provide continuous and adequate service to the requested area, growth to the requested area which the Commission requires a showing of, and the ability of the City to provide continuous and adequate service to the new growth in the City. An expert may offer testimony based on hearsay.¹⁰ Even if the documents are hearsay, Mr. Maroney may testify regarding the documents as the basis upon which he formulates his opinions.

7. **Page 10, Lines 4-5, "Additionally, there are... is needed."**

LPWC objects to this testimony as inadmissible. There is no evidence in the record of to support the environmental reasons on which the witness bases this opinion, as further explained in paragraphs 9 and 10 below.

Overruled

RESPONSE: Upon providing his testimony, there will be evidence of the environmental need for the service to be provided by the City. Mr. Maroney explains the environmental needs on the water side and sewer side.¹¹ Mr. Maroney is a registered professional engineer who designs water and sewer systems throughout the state. He is familiar with the environmental impacts of different systems. The City welcomes any examination of these issues with Mr. Maroney. If it

¹⁰ *Id.*

¹¹ See APP Exhibit 3 at 10, l. 6-22.

pleases the court, the City would be willing to move the objected to testimony to follow page 10, line 22 after Mr. Maroney explains the environmental needs for the CCN.

8. Page 10, lines 6-8, "Regarding water,...lose water service."

LPWC objects to this testimony as inadmissible. There is no evidence in the record of well failures on which the witness bases this opinion.

overruled

9. Page 10, lines 14-18, "This is important...adversely affected."

LPWC objects to this testimony as inadmissible. There is no evidence in the record of failure of OSSF systems, impacts from discharge coming from a failed OSSF system or pollutant levels on which the witness bases this opinion. There is no evidence in the record of OSSF failures in the proposed service area.

overruled

RESPONSE: These objections are spurious at best. As a qualified expert, Mr. Maroney may utilize his testimony time to discuss the environmental impacts of the City's CCN application. While not discussing OSSF failures in the proposed area, Mr. Maroney's opinion need not be that restrictive. He may offer his opinion based on his experience. Although LPWC may not like the opinions, the objections go more to the weight, not the admissibility, of the testimony. The City welcomes any examination of these issues with Mr. Maroney.

10. Page 11, lines 9-16, "I have attached...could be understated."

LPWC has objected to Exhibit KDM-9 as hearsay and the witness refers to this exhibit as representing the truth of the matters stated therein. The witness also attempts to cite a statement attributed to the EPA. This testimony and the exhibit are hearsay.

*overruled
as
basis
for
evidence*

RESPONSE: The referenced testimony and documents are not hearsay. The documents and testimony of Mr. Maroney are records Mr. Maroney has reviewed in order to formulate his testimony. As an expert witness for the City, Mr. Maroney may testify on all components of establishing managerial and technical ability to provide continuous and adequate service to the requested area, current service in the area, problems arising in the requested area from current

utility service, etc. An expert may offer testimony based on hearsay.¹² In the alternative, if Your Honor finds that it is hearsay, the testimony and attachment are not offered to prove the truth of the matter asserted but as a response to the Commission's regulatory requirement and offered for the limited purpose of demonstrating compliance with the Commission's regulations. Even if the documents are hearsay, Mr. Maroney may testify regarding the documents and information he relied upon as the basis upon which he formulates his opinions.

11. Page 12, lines 18-19, "and has no plans... service business."

LPWC objects to this testimony as hearsay.

Overruled

RESPONSE: This cannot be hearsay as Mr. Maroney has not attributed this statements to anyone's out of court statements. Because the testimony is not based on out of court statements, it cannot be hearsay. Even if the testimony were based on hearsay, Mr. Maroney could utilize that hearsay evidence to formulate his opinion that LPWC will not be impacted by the City's sewer CCN.

12. Page 14, lines 6-11, "Lindsay currently....304 additional customers."

LPWC objects to this testimony as inadmissible. The witness gives opinions regarding Lindsay's capacity to serve additional sewer customers and Lindsay's water wells. There is no evidence in the record regarding how Lindsay would serve 470 additional homes, nor is there evidence in the record regarding the capacity of Lindsay's wells.

Overruled

13. Page 14, lines 16-18, "Additionally, the City...as growth demands."

LPWC objects to this testimony as inadmissible. The witness gives an opinion regarding Lindsay's capacity and ability to serve, yet provides no underlying evidence or calculations in the record for this conclusion.

"

14. Page 15, lines 17-19, "Additionally,...Proposed Service Territory."

LPWC objects to the testimony at lines 17-19, as the witness states that "Lindsay is not in danger of running out of water," yet provides no basis for that conclusion.

"

¹²

TEX. R. EVID. 703.

RESPONSE: As a professional engineer that has designed water and sewer systems throughout the state, Mr. Maroney has the requisite knowledge, skills, and training to discuss capacity issues. Mr. Maroney may provide this testimony as an expert. If anyone seeks to challenge the conclusions, they are welcome to do so. Merely because the calculations were not listed in his testimony does not mean his conclusions are inadmissible. LPWC's objections go solely to the weight, not the admissibility of the evidence.

15. Page 16, lines 9-13, "Furthermore,....requested by Lindsay."

LPWC objects to this testimony as irrelevant and nonresponsive. There is no basis for this opinion. The witness is not qualified to determine whether LPWC made a good faith effort in any fact situation, and particularly not as to past performance under a settlement agreement.

Sustained

RESPONSE: As an expert witness, Mr. Maroney is merely responding to the question regarding the feasibility of obtaining services from an adjacent retail public utility. LPWC's actions under the settlement agreement are relevant to the feasibility of receiving service from at least LPWC, thus are relevant to the issue. The testimony is responsive as it relates to the question in that LPWC's actions under the settlement agreement provide the basis for his opinion regarding the feasibility of receiving service from an adjacent retail public utility, one of the factors the TCEQ must consider in this case. The basis of Mr. Maroney's opinion is the lack of action taken by LPWC relative to the settlement agreement. Mr. Maroney is a qualified expert to understand the inactions of LPWC and draw his conclusions. LPWC's objections go solely to the weight, not the admissibility of the evidence.

16. Page 18, line 22, "and the needs for the foreseeable future."

LPWC objects to this testimony as inadmissible. The witness gives an opinion regarding Lindsay's water supply for the future, but there is no evidence in the record to support this conclusion.

Overruled

RESPONSE: The witness does provide the evidence regarding water supply in the future. He provides this testimony on page 14 of his direct testimony. If LPWC disputes the basis for the opinion, they are welcome to examine Mr. Maroney on the issue. LPWC's objections go solely to the weight, not the admissibility of the evidence.

17. Page 18, lines 19-20, "Lindsay's most... is established."

LPWC objects to this testimony as inadmissible. The witness gives an opinion regarding Lindsay's water supply quality, but there is no evidence in the record to support this conclusion. *of value*

RESPONSE: The witness does provide the evidence regarding water quality. He provides this testimony on page 18 of his direct testimony. If LPWC disputes the basis for the opinion, they are welcome to examine Mr. Maroney on the issue. LPWC's objections go solely to the weight, not the admissibility of the evidence.

18. Page 19, lines 14-16, "A number....Attachment KDM-5."

LPWC has previously objected to the documents contained in KDM-5 as hearsay and that objection is reurged here.

RESPONSE: The referenced testimony and documents are not hearsay. The documents and testimony of Mr. Maroney are records Mr. Maroney has reviewed in order to formulate his testimony. As an expert witness for the City, Mr. Maroney may testify on all components of establishing managerial and technical ability to provide continuous and adequate service to the requested area, current service in the area, problems arising in the requested area from current utility service, etc. An expert may offer testimony based on hearsay.¹³ In the alternative, if Your Honor finds that it is hearsay, Mr. Maroney may testify regarding the documents as the basis upon which he formulates his opinions.

¹³

Id.

19. **Page 19, lines 18-21, "The State has made...surface water contamination..."**
LPWC objects to this testimony as inadmissible. There is no evidence in the record to support the witness' conclusions. overruled

RESPONSE: Mr. Maroney is an expert on engineering and environmental matters for water and sewer systems. He may testify regarding his understanding of recent state trends. If LPWC disputes the basis for the opinion, they are welcome to examine Mr. Maroney on the issue. LPWC's objections go solely to the weight, not the admissibility of the evidence.

20. **Page 20, lines 15-17, "With Lindsay's...Proposed Service Territory."**

LPWC objects to this testimony as inadmissible. There is no evidence in the record to support the witness' conclusions. overruled

RESPONSE: The witness does provide the evidence regarding capacity. He provides this testimony on page 14 of his direct testimony. If LPWC disputes the basis for the opinion, they are welcome to examine Mr. Maroney on the issue. LPWC's objections go solely to the weight, not the admissibility of the evidence.

Objections to the Prefiled Testimony of Jack E. Stowe

1. **Page 12, line 22 "According to the Federal Reserve..." — page 13, line 3, "...subject to in the market" and Exhibit JES-6.**

LPWC objects to the testimony and Exhibit JES-6 as hearsay. Exhibit JES-6 is not certified as correct or authenticated and cannot be offered for the truth of the matter stated by the witness. overruled

RESPONSE: The documents and testimony of Mr. Stowe are records Mr. Stowe has reviewed in order to formulate his testimony. As an expert witness for the City, Mr. Stowe may testify on all components of establishing the financial ability to provide continuous and adequate service to the requested area. An expert may offer testimony based on hearsay.¹⁴ As an expert,

¹⁴ *Id.*

Mr. Stowe may testify from hearsay documents that formulate his opinions. LPWC's objection goes to the weight, not the admissibility, of the testimony and the documents.

2. **Page 13, lines 15-16, "As illustrated...taxable value."**

LPWC objects to the testimony and Exhibit JES-7 as hearsay. Exhibit JES-7 is simply pulled from the internet, is not certified as correct or authenticated and cannot be offered for the truth of the matter stated by the witness.

RESPONSE: The documents and testimony of Mr. Stowe are records Mr. Stowe has reviewed in order to formulate his testimony. As an expert witness for the City, Mr. Stowe may testify on all components of establishing the financial ability to provide continuous and adequate service to the requested area. An expert may offer testimony based on hearsay.¹⁵ As an expert, Mr. Stowe may testify from hearsay documents that formulate his opinions. LPWC's objection goes to the weight, not the admissibility, of the testimony and the documents.

3. **Page 16, lines 1-11, "In your opinion....water system development."**

LPWC objects to the direct question and the testimony in response to the question. The witness is not qualified to testify regarding environmental effects of Lindsay's application. The witness is a financial expert.

4. **Page 16, lines 17-20, "However, ...well could be fixed."**

LPWC objects to the testimony regarding reliability of water service. The witness is not qualified to testify regarding reliability of water service. The witness is a financial expert.

5. **Page 17, lines 6-13, "In your opinion,....treatment facilities."**

LPWC objects to the direct question and the testimony in response to the question. The witness is not qualified to testify regarding environmental effects of granting Lindsay's application to amend Lindsay's sewer CCN. The witness is a financial expert.

6. **Page 17, lines 15-21, "Mr. Stowe,evapotranspiration systems, etc."**

LPWC objects to the direct question and the testimony in response to the question. The witness is not qualified to testify regarding an OSSF facility. The witness is a financial expert.

¹⁵

Id.

7. Page 18, lines 1-6, "What impacts....can be adversely affected."

LPWC objects to the direct question and the testimony in response to the question. The witness is not qualified to testify regarding environmental effects of OSSF systems. The witness is a financial expert.

Sustained

8. Page 18, line 8, "Have you reviewed...." — page 19, line 2, "could be understated" and Exhibit JES-8.

LPWC objects to the direct question and the testimony in response to the question. The witness is not qualified to testify regarding OSSF systems in this matter. The witness is a financial expert. Further, the witness references Exhibit JES-g, which is a partial copy of a report and does not contain information on Region IV. The report is hearsay and irrelevant as attached to the testimony. The report should not be used to prove the truth of the matters stated therein.

Sustained

9. Page 19, lines 4-14, "What will be....requested CCN area."

LPWC objects to the direct question and the testimony in response to the question. The witness is not qualified to testify regarding environmental impacts of providing wastewater service. The witness is a financial expert.

Sustained

10. Page 19, line 21, "In a study...." — page 20, line 9, "\$10,000 to install" and Exhibits JES-9 and JES-10.

LPWC objects to this testimony as irrelevant and objects to Exhibits JES-9 as hearsay and JES-10 as hearsay and irrelevant. The witness testifies regarding studies conducted by the Guadalupe Water Company and Harris County, which are not parties to this case, and which cover areas not at issue in this case. The testimony is irrelevant to this matter.

*overruled
sounds
financial
irrelevant*

11. Page 20, lines 15-17, "As discussed above...approximately \$10,000."

LPWC objects to this testimony as irrelevant and objects to Exhibits JES-9 as hearsay and JES-10 as hearsay and irrelevant. The witness testifies regarding studies conducted by the Guadalupe Water Company and Harris County, which are not parties to this case, and which cover areas not at issue in this case. The testimony is irrelevant to this matter.

*11
permitted*

12. Page 21, lines 3-8, "According to....as high as \$760.20" and Exhibits JES-11 and JES-12.

LPWC objects to this testimony as irrelevant because it refers to information from the Agricultural Extension Service and the City of Austin, which are not parties to this case. LPWC further objects to the testimony as the witness is not qualified to testify regarding types of septic systems. The witness is a financial expert in this matter. Additionally, LPWC objects to Exhibits JES-11 and JES-12 as both hearsay and irrelevant. JES-11 is an article on Leaching Chambers and JES-12 is an article published by the City of Austin on the internet. Neither exhibit is certified and neither address the witness' financial testimony.

Sustained

13. Page 22, lines 8-16. "The City would... revenue stream."

LPWC objects to this testimony because the witness is not qualified to provide an expert opinion on development effects of centralized wastewater service. He is a financial expert for Lindsay.

Overruled

14. Page 23, lines 1-7, "Mr. Stowe, ...requested area."

LPWC objects to the direct question and the testimony in response to the question. The question requires the witness to speculate regarding environmental effects. The witness is not qualified to provide an expert opinion on environmental effects in this matter.

Sustained in part see pg

15. Page 23, lines 14-15, "It will also...OSSFs."

LPWC objects to this testimony because the witness is not qualified to provide an expert opinion on environmental effects in this matter. He is a financial expert for Lindsay.

in part Sustained

16. Page 24, line 17, "In your opinion....," — page 25, line 4, "Integrity of the requested area"

LPWC objects to this testimony because the witness is not qualified to provide an expert opinion on environmental effects in this matter. He is a financial expert for Lindsay.

17. Page 25, lines 12-23. "As I previously.... OSSF requirements."

LPWC objects to this testimony because the witness is not qualified to provide an expert opinion on development effects of centralized wastewater service, or the environmental effects and burdens of OSSF operations in this matter. He is a financial expert for Lindsay.

Overruled

RESPONSE: The above objections are nothing more than spurious objections in their entirety. Regarding the relevancy objection, all documents and testimony are relevant to the environmental impacts of a sewer CCN which will be served through a central sewer system. The relative costs are relevant to the need for the central sewer system and the potential costs of the service to consumers. All such factors are to be considered by the TCEQ in this proceeding. Regarding the objections of Mr. Stowe not being qualified to provide an expert opinion on environmental effects in this matter, Mr. Stowe's company conducted a study regarding on-site sewage facilities.¹⁶ As such, Mr. Stowe is qualified based on his knowledge, skills, and experience to provide this testimony. If LPWC challenges his qualifications, they

¹⁶

See APP Exhibit 4 at Attachment JES-8.

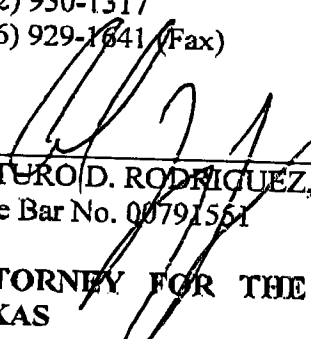
are more than welcome to examine Mr. Stowe on the issues. Further, as one with the qualifications to testify on issues related to OSSFs, Mr. Stowe can reference other materials to formulate the opinions contained in his testimony. An expert may offer testimony based on hearsay.¹⁷ As an expert, Mr. Stowe may testify from hearsay documents that formulate his opinions. LPWC's objections go to the weight, not the admissibility, of the testimony and documents.

CONCLUSION

Lindsay respectfully requests that Your Honor overrule the objections filed by Lindsay Pure Water Company. Lindsay also respectfully requests any further relief to which it has shown itself to be justly entitled.

Respectfully submitted,

RUSSELL & RODRIGUEZ, L.L.P.
1633 Williams Drive, Building 2, Suite 200
Georgetown, Texas 78628
(512) 930-1317
(866) 929-1641 (Fax)



ARTURO D. RODRIGUEZ, JR.
State Bar No. 00791561

**ATTORNEY FOR THE CITY OF LINDSAY,
TEXAS**

¹⁷

TEX. R. EVID. 703.

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of September, 2008, a true and correct copy of the foregoing document has been sent via facsimile, first class mail, or hand-delivered to the following counsel or party representatives of record:

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ARTURO D. RODRIGUEZ, JR.

HEARING ON THE MERITS

SOAH DOCKET NO.582-06-2023

TCEQ DOCKET NO. 2006-0272-UCR

TRANSCRIPT OF PROCEEDINGS BEFORE THE
STATE OFFICE OF ADMINISTRATIVE HEARINGS
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
AUSTIN, TEXAS

APPLICATION OF THE TOWN OF)	SOAH DOCKET NO.
LINDSAY TO AMEND WATER AND)	582-06-2023
SEWER CERTIFICATES OF)	
CONVENIENCE AND NECESSITY)	
(CCN) NOS. 13025 AND 20927 IN)	
COOKE COUNTY, TEXAS)	TCEQ DOCKET NO.
APPLICATION NOS. 35096-C & 35097-C))	2006-0272-UCR

ORAL DEPOSITION
JAMES MYRICK
WEDNESDAY, AUGUST 27, 2008

ORAL DEPOSITION OF JAMES MYRICK,
produced as a witness at the instance of the City of
Lindsay and duly sworn, was taken in the above-styled
and numbered cause on Wednesday, August 27, 2008, from
9:55 a.m. to 1:06 p.m., before Kim Pence, Certified
Shorthand Reporter in and for the State of Texas,
reported by machine shorthand at the offices of
Armbrust & Brown, L.L.P., 100 Congress Avenue, Suite
1300, Austin, Texas 78701, pursuant to the Texas Rules
of Civil Procedure and the provisions stated on the
record or attached hereto.

WEDNESDAY, AUGUST 27, 2008
DEPOSITION OF JAMES MYRICK

Exhibit A

HEARING ON THE MERITS

SOAH DOCKET NO.582-06-2023

TCEQ DOCKET NO. 2006-0272-UCR

Page 41

1 A They provide their own with an aerobic
2 system, which is part of the restrictions requested by
3 the county.

4 Q That would be Cooke County?

5 A Yes.

6 Q Does Lindsay Pure Water provide any
7 wastewater service?

8 A No, sir.

9 Q Okay. Is Lindsay Pure Water with respect to
10 the City of Lindsay's CCN application for which
11 you're -- I'm deposing you here today, is there any
12 part of the City of Lindsay's sewer CCN application
13 that you're contesting or that Lindsay Pure Water is
14 contesting?

15 A Contesting the sewer CCN, no.

16 Q Okay.

17 THE WITNESS: I don't think we did, did
18 we?

19 MR. CARLTON: (Nodded)

20 Q (BY MR. RODRIGUEZ) So is it fair to say then
21 that the only part of the City of Lindsay's CCN
22 application that you -- that Lindsay Pure Water is
23 contesting is just the -- it's the City's water CCN
24 amendment?

25 A That is correct.

WEDNESDAY, AUGUST 27, 2008
DEPOSITION OF JAMES MYRICK

HEARING ON THE MERITS
SOAH DOCKET NO.582-06-2023 TCEQ DOCKET NO. 2006-0272-UCR

Page 42

1 Q Okay. So no part of the sewer CCN do you --

2 A No, sir. I do not want to have anything to
3 do with the sewer system.

4 Q Okay. I can't say that I blame you.

5 When you developed -- excuse me. Strike
6 that.

7 When you went and platted the South
8 Ridge of Lindsay subdivision, that was platted through
9 the county. Is that correct?

10 A Yes.

11 Q Was it -- was there a plat application that
12 was required to go through the City of Lindsay?

13 A No.

14 Q Okay. So the only plat approval you got was
15 from the county of Cooke?

16 A That is correct.

17 Q Okay. Do the Cooke County subdivision
18 regulations or any other regulations require the
19 Lindsay Pure Water to provide any kind of fire flow or
20 fire protection services for the South Ridge of
21 Lindsay?

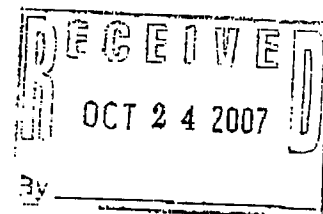
22 A No. They were -- one of the Commissioners
23 asked to have a fire hydrant put up close to the road.

24 Q Okay. Was that hydrant provided?

25 A Most definitely.

WEDNESDAY, AUGUST 27, 2008
DEPOSITION OF JAMES MYRICK

Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
Glenn Shankle, *Executive Director*



Texas Commission on Environmental Quality
Protecting Texas by Reducing and Preventing Pollution

October 17, 2007

Ms. Celeste Baker, Acting General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087 (MC 101)
Austin, Texas 78711-3087

Re: TCEQ DOCKET NO. 2006-1778-UCR, EXECUTIVE DIRECTOR'S REQUEST
FOR A CORRECTION TO CITY OF LINDSAY'S CERTIFICATE OF
CONVENIENCE AND NECESSITY UNDER 30 TEX. ADMIN. CODE § 50.145.

Dear Ms. Baker:

On May 16, 2003, the Executive Director issued an Order approving the City of Lindsay's application for a water CCN. The Order stated that approval was reflected in the copy of the official water service area map for Cooke County, Texas, which was attached to the Order.

On September 1, 2006, the Chief Clerk of the Commission received the City's *Motion for Judgment Nunc Pro Tunc*. The City claimed that the water CCN map approved in the Order was a clerical mistake and requested that the Commission correct the purported error by substituting that map with maps attached to the City's settlement agreements with the protestants.

The Commission heard the City's request at the October 10, 2007, Commission Meeting and gave guidance to the Executive Director that the substitution of the maps would correct an error and therefore would constitute a nonsubstantive correction to the CCN under 30 TAC §§50.145(b)(4) and (5).

Pursuant to 30 TAC §50.145(c), the Executive Director hereby provides notice to the Office of the General Counsel and the Office of the Public Interest Counsel of the Executive Director's intent to make the requested map revisions. The Executive Director has spoken with the City and is awaiting digital mapping which will be used to accomplish the revisions. When the Executive Director receives adequate maps to accomplish the revision, the Executive Director will issue an endorsement to the permit.

DLM-6

P.O. Box 13087 • Austin, Texas 78711-3087 • 512-239-1000 • Internet address: www.tceq.state.tx.us
printed on recycled paper using soy-based ink

09/26/08 FRI 14:09 [TX/RX NO 8021]

If you have comments or questions, please contact Ms. Tammy Benter by phone at 512/239-6136, or by email at Tholguin@tceq.state.tx.us.

Sincerely,



Doug Holcomb, Section Manager
Utilities & Districts Section
Water Supply Division

cc: Mailing list

JN

R&R
RUSSELL & RODRIGUEZ, L.L.P.
ATTORNEYS AT LAW

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June 9, 2008

VIA HAND DELIVERY

Honorable James W. Norman
Administrative Law Judge
300 West 15th Street
Austin, Texas 78701

Re: *Application from the Town of Lindsay to Amend Certificate of Convenience and Necessity (CCN) No. 13025 in Cooke County; Application No. 35096-C and Application from the Town of Lindsay to Amend CCN No. 20927 in Cooke County; Application No. 35097-C; SOAH Docket No. 582-06-2023, TCEQ Docket No. 2006-0272-UCR*

JUN 9 11 31 AM '08
STATE OFFICE OF
THE ATTORNEY GENERAL

Dear Honorable Norman:

Order No. 6 directs the City of Lindsay ("City") to prefile its direct case, including all testimony and exhibits on June 9, 2008. The City hereby provides each party and the Administrative Law Judge a complete copy of the City's Prefiled Direct Testimony and Exhibits.

Enclosed is the City's prefiled testimony and exhibits. Specifically, please find:

- 1) Applicant Exhibit 1, Application filed by the City of Lindsay to Amend its water and sewer CCN;
- 2) Applicant Exhibit 2, Prefiled Direct Testimony and Attachments of Mr. Donald L. Metzler;
- 3) Applicant Exhibit 3, Prefiled Direct Testimony and Attachments of Mr. Kerry D. Maroney, P.E.; and
- 4) Applicant Exhibit 4, Prefiled Direct Testimony, Attachments, and Schedules of Mr. Jack E. Stowe.

The City may use portions of any of the above-referenced exhibits at hearing, either in the size provided or enlarged as a separate exhibit.

Honorable James W. Norman
June 9, 2008
Page 2 of 3

The City is providing prefiled testimony and exhibits to all parties in a manner consistent with Order No. 6.

Sincerely,


Arturo D. Rodriguez, Jr.

Cc: Service List
Mr. Pat Dillon

Honorable James W. Norman
June 9, 2008
Page 3 of 3

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of June, 2008, a true and correct copy of the foregoing document has been sent via facsimile, first class mail, or hand-delivered to the following counsel of record:

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Austin, Texas 78711-3087
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ARTURO D. RODRIGUEZ, JR.

ARMBRUST & BROWN, L.L.P.
ATTORNEYS AND COUNSELORS

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FACSIMILE 512-435-2380

JOHN CARLTON
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jcarlton@abastin.com

July 18, 2008

VIA FACSIMILE: (512) 475-4994

James W. Norman
Administrative Law Judge
State Office of Administrative Hearings
300 West 15th Street
Austin, Texas 78701

Re: SOAH Docket No. 582-06-0203; TCEQ Docket No. 2006-0272-UCR; *Application of the Town of Lindsay to Amend Water and Sewer Certificates of Convenience and Necessity (CCN) Nos. 13025 and 20927 in Cooke County, Texas*; Application Nos. 35096-C & 35097-C

Dear Judge Norman:

Enclosed herewith are revised pages 5, 6 and 7 of the Prefiled Direct Testimony and Exhibits of Jim Myrick filed July 7, 2008. Please replace the existing pages 5, 6 and 7 of the prefiled testimony with the enclosed replacement pages. I apologize for any inconvenience this has caused. By copy of this letter, copies of the attached are being forwarded to all participating parties.

Thank you for your attention to this matter. If you have any questions, please do not hesitate to contact me.

Sincerely,

ARMBRUST & BROWN, L.L.P.

John J. Carlton
Attorney for Lindsay Pure Water Company

Enclosure

cc: Arturo D. Rodriguez
Blas J. Coy
Brian MacLeod
Christiaan Siano
TCEQ Docket Clerk

335403-1 07/18/2008

LINDSAY PURE WATER COMPANY SYSTEM

Q. PLEASE DESCRIBE THE LINDSAY PURE WATER COMPANY SYSTEM.

A. This system was initially designed to serve, at a minimum, the South Ridge of Lindsay subdivision at full build-out of Phases 1 through 4, which included 65 connections, but it has been oversized in many ways that will allow it to serve other areas. The main components of the water system include:

- (1) approximately 1.2 miles of 6-inch C900 PVC distribution lines;
- (2) a 100,000 gallon standpipe, with maximum elevation of 963 feet above sea level;
- (3) a well that is 905 feet deep, has a static water level of 325 feet and is pumping a minimum of 100 gallons per minute from 515 feet deep;
- (4) a 2000 gallon pressure tank;
- (5) a 10-horsepower service pump with a capacity of ~~420~~ 210 gallons per minute; and
- (6) a 3-horsepower high pressure pump with 100 gallons per minute capacity.

We are planning to replace the 3-horse power pump with another 10-horsepower pump with a capacity of ~~420~~ 210 gallons per minute in the next few months. With two 10-horsepower pumps we should be able to supply ~~840~~ 420 gallons per minutes at 60 pounds of head pressure.

1 Q. HOW MANY CONNECTIONS IS THE LINDSAY PURE WATER SYSTEM
2 CAPABLE OF SERVING?

3 A. Based upon the Commission rules and the way the system is currently operated, it can
4 serve up to 100 connections. The storage tank capacity is sufficient for 500 connections at
5 200 gallons per connection. The currently pump capacity is sufficient for ~~260~~ 155
6 connections (the new pump would allow us to serve ~~420~~ 210 connections). The
7 distribution lines are sufficient for up to 250 connections. The 100 gallon per minute well
8 capacity is sufficient for 168 connections. The limiting factor is the pressure tank, which
9 has a capacity to serve 100 connections. The Commission rules require a system to have
10 pressure tank capacity of 20 gallons for every connection. By changing the way we
11 operate to eliminate the use of pressure tank, the system could serve up to 168
12 connections, which is the well capacity limit. This is because the capacity of the
13 standpipe that is 80 feet above the highest service connection, which is considered
14 elevated storage, is sufficient to serve about 180 connections. By adding a second well,
15 depending on the production of the well, the system could serve up to 180 connections
16 without any additional improvements. By adding additional elevated storage or pressure
17 tank capacity, the system can be expanded to serve even more connections.

18 **SOUTH RIDGE OF LINDSAY DEVELOPMENT STATUS**

19 Q. WHO OWNS THE UNSOLD LOTS IN PHASE 3 OF THE SOUTH RIDGE OF
20 LINDSAY SUBDIVISION?

21 A. Myrick Development.

22 Q. WHO OWNS THE PROPERTY THAT WILL BE PHASE 4 OF THE SOUTH RIDGE
23 OF LINDSAY SUBDIVISION?

24 A. Myrick Development.

1 Q. HOW MANY ACRES OF LAND DOES MYRICK DEVELOPMENT OWN WITHIN
2 THE SOUTH RIDGE OF LINDSAY SUBDIVISION?

3 A. Myrick Development owns approximately 42 acres of land within the South Ridge of
4 Lindsay, which includes 8 unsold lots of approximately 1 acre each and approximately 34
5 acres of land that is to be developed as Phase 4.

6 Q. WHICH UTILITY COMPANY DO YOU WANT TO PROVIDE WATER SERVICE
7 TO THE MYRICK DEVELOPMENT PROPERTY WITHIN THE SOUTH RIDGE OF
8 LINDSAY SUBDIVISION?

9 A. Lindsay Pure Water Company.

10 **EXPANSION OF LINDSAY SYSTEM**

11 Q. WHAT ARE LINDSAY PURE WATER COMPANY'S DESIRES WITH REGARD TO
12 PROVIDING SERVICE IN THE AREA SURROUNDING ITS CURRENT CCN?

13 A. Our company would like to be the service provider in the area that surrounds our CCN.

14 Q. WHY IS THAT?

15 A. We would like to be the service provider because we have facilities in close proximity that
16 have sufficient capacity to serve a significant number of additional connections, and with
17 some slight improvements, could serve ~~an~~ many more connections on top of that. By
18 serving additional connections, we would be able to fully utilize our system's resources
19 and cost efficiently serve landowners in the area surrounding us.

20 Q. IF YOU WANT TO SERVE IN THE AREA SURROUNDING YOU, WHY HAVE
21 YOU NOT APPLIED FOR A CCN FOR THAT AREA?

22 A. There is no current need for service.

ARMBRUST & BROWN, L.L.P.
ATTORNEYS AND COUNSELORS

100 CONGRESS AVENUE, SUITE 1300
AUSTIN, TEXAS 78701-2744
512-435-2300

FACSIMILE 512-435-2360

FACSIMILE COVER PAGE

Date: May 21, 2008

NAME:	COMPANY:	FACSIMILE NO.:	TELEPHONE NO.:
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Arturo D. Rodriguez	Russell & Rodriguez, L.L.P.	(512) 930-7742	(512) 930-1317
Brian MacLeod Christiaan Siano	Texas Commission on Environmental Quality	(512) 239-0606	(512) 239-0750
Blas J. Coy, Jr.	Office of Public Interest Counsel	(512) 239-6377	(512) 239-6363
Docket Clerk	Texas Commission on Environmental Quality	(512) 239-3311	(512) 239-3311

Please call us immediately if the document you receive is incomplete or illegible.

From: John J. Carlton	Telephone No.: (512) 435-2375
Client/Matter No.: 52515.0101	Total No. of Pages Sent: 5

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RE: SOAH Docket No. 582-06-0203; TCEQ Docket No. 2006-0272-UCR; *Application of the Town of Lindsay to Amend Water and Sewer Certificates of Convenience and Necessity (CCN) Nos. 13025 and 20927 in Cooke County, Texas; Application Nos. 35096-C & 35097-C*

ATTACHMENTS: Replacement pages for Prefiled Direct Testimony and Exhibits of Jim Myrick for Lindsay Pure Water Company.

THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT OR THE EMPLOYEE OR AGENT RESPONSIBLE FOR DELIVERING THE MESSAGE TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION, OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE (COLLECT), AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA THE U. S. POSTAL SERVICE. THANK YOU.
252890-1 03/24/2008

Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
Bryan W. Shaw, Ph.D., *Commissioner*
Mark R. Vickery, P.G., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

September 26, 2008

Honorable James Norman
State Office of Administrative Hearings
Administrative Law Judge
300 West 15th Street, Suite 502
Austin, Texas 78701

Re: Town of Lindsay; SOAH Docket No. 582-06-2023; TCEQ Docket No. 2006-0272-UCR

Dear Judge Norman:

Enclosed please find the Executive Director's Response to Lindsay Pure Water Company's Objections to the Prefiled Testimony and Exhibits of the Executive Director. Should you have any questions or concerns, please do not hesitate to contact me at (512) 239-0750.

Sincerely,

A handwritten signature in black ink, appearing to read "B MacLeod".

Brian MacLeod
Staff Attorney
Environmental Law Division

Enclosure

cc: Mailing list

SOAH DOCKET NO. 582-06-2023
TCEQ DOCKET NO. 2006-0272-UCR

APPLICATION OF THE TOWN OF
LINDSAY TO AMEND A WATER
CERTIFICATE OF CONVENIENCE AND
NECESSITY (CCN) NO. 13025 IN COOKE
COUNTY; APPLICATION NO. 35096-C;
and APPLICATION TO AMEND A
SEWER CERTIFICATE OF
CONVENIENCE AND NECESSITY (CCN)
NO. 20927 IN COOKE COUNTY, TEXAS;
APPLCIATION NO. 35097-C

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BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

**THE EXECUTIVE DIRECTOR'S RESPONSE TO LINDSAY PURE WATER
COMPANY'S OBJECTIONS TO THE PREFILED TESTIMONY AND EXHIBITS OF
THE EXECUTIVE DIRECTOR**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

All of Lindsay Pure Water Company's objections are based on the same faulty premise, namely, that the Executive Director's witness is not an expert and therefore cannot give opinions (speculate) based on hearsay and facts not in evidence. If the ED's witness is an expert, then all of her testimony is admissible.

I. EXPERT WITNESSES CAN GIVE OPINION TESTIMONY AND DRAW INFERENCES BASED ON HEARSAY

Rule 703 of Texas Rules of Evidence reads as follows: “The facts or data in a 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 reasonable 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.”

II. THE EXECUTIVE DIRECTOR'S WITNESS IN THIS CASE IS AN EXPERT WITNESS

Rule 702 of the Texas Rules of Evidence provides the test for qualifying a witness as an expert. It provides as follows: "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 opinion or otherwise."

The ED's witness testified on page 1, line 4-8 of her prefiled testimony that she has worked for the Commission for nine years on the utilities and financial review team, and that she had been a team leader of that team for over two years. She is testifying to her interpretation of the Commission's own regulations and how they apply to this particular case. If the team leader for the team that executes those regulations for the Commission is not an expert on how the CCN factors are to be applied, it would be difficult to imagine who would be. This same witness faced an identical attack on her qualifications in the town of Prosper case (SOAH Docket No. 582-03-1994). In that case the very same ALJ hearing this case found that this witness is qualified as an expert and can give testimony as to the CCN factors as an expert witness. A copy of the relevant pages of the transcript of that hearing are attached hereto. As Mr. Russell (attorney involved in the Prosper case) pointed out in that hearing, the objection is a "basic attack on the Commission's ability to appoint people to interpret and apply its own regulations." (Page 906 lines 19-20 of the attachment).

Furthermore, the ED's witness testified in her prefiled testimony that she has a bachelor of science degree in economics and biology and a master's degree in business administration. She also testified that two former employment positions gave her experience in business financial analysis and in conducting socioeconomic research and analysis and in drafting Environmental Baseline Studies

and other environmental reports. (page 1 lines 10-21 of her prefiled testimony). She further testified that her current responsibilities include supervising a team whose primary responsibility is to process applications related to obtaining or amending Certificates of Convenience and Necessity and that she reviews and processes CCN related applications. (page 2 lines 1-10 of her prefiled testimony) She further testified that she has been assigned over 260 separate CCN related applications and has prefiled testimony as an expert in numerous CCN and rate cases, and that she had testified live from the stand as an expert in two CCN cases. (page 2 lines 11-22 of her prefiled testimony).

There should be no doubt that the person who supervises the processing of CCN applications for the very agency charged with the authority to review and approve applications for CCNs can give expert testimony that would be helpful to the trier of fact on how the factors are weighed. If the ED's expert is not an expert on how the factors are weighed in determining whether a CCN should be issued, then such a person would not exist.

III. THE SPECIFIC TESTIMONY OBJECTED TO

The objections are listed below by number. However, all can be overruled based on the fact that the ED's witness is an expert. For the purposes of being thorough, a brief rebuttal to each objection is offered.

Objection 1— Expert witnesses routinely base their opinions on testimony of other witnesses in the case. Mr. Meltzer's testimony is in his prefiled evidence. Additionally, the testimony recounts the exhibits which are applications for service. Such requests are "operative words" (effect on hearer not veracity of declarant is central) and not hearsay, therefore, once they are authenticated, they are

admissible in evidence.

Objection 2— The description of the location of the testimony doesn't match with the allegations of what was testified to at the citations given in the objection. As such, the objection should be overruled. However, the pages and lines referred to only recount what size storage tanks Lindsay has and the locations of existing retail water utilities. These are facts routinely used by experts without doing personal observations in CCN cases. Experts do not go into the field and actually test the capacity of storage tanks nor do they go out and survey the land to determine the distance to neighboring utilities with a surveying team. If necessary, at the pretrial hearing, the ED's witness can give testimony to support this obvious fact. Here, again, her reliance on testimony of other witnesses is objected to. However, experts may rely on testimony of other witnesses in drawing inferences and giving opinions.

Objection 3— The question is specifically aimed at the adequacy of ability to provide sewer service and is sufficiently specific to overcome a speculation objection. Furthermore, an objection that the testimony calls for an answer on an ultimate fact is not sustainable under Texas Rule of Evidence 704. The answer is not long and rambling and the reason underlying a speculation objection doesn't apply to prefiled testimony. The question is already asked and answered in the prefiled testimony. There should be no fear that a witness could go on at length and be allowed to give a narrative to a jury. There is no jury. And if the testimony is long and rambling and includes a narrative rather than an answer to the direct question, the objection should be targeted at that portion of the testimony rather than at the question itself, as there is no way to interrupt the answer when it has already been prefiled. The answer is short and direct. The policies underlying objections to questions calling for speculation don't apply here. Furthermore, as argued above, experts can testify based on matters that

normally would not be admissible in evidence. Experts routinely testify based on facts related in other witnesses testimony.

Objection 4— This is not an objection to the testimony, but is rather an attempt to rebut the testimony. The ED's witness testified that Lindsay Pure Water has not filed an application for a CCN. She is the person in charge of handling CCN applications; the objection that the testimony is based on facts not in evidence has no application. She is testifying to the fact that they have no application on file. The fact is in evidence when she testified to it. She draws the conclusion that this would tend to show that it is not feasible for Lindsay Pure Water Co. to serve the area. The argument that Lindsay is already serving customers doesn't make her testimony inadmissible, it is other evidence that Lindsay Pure Water Company wants to use to rebut her conclusion.

Objection 5— Statements in an application are not hearsay. They are operative words. To the extent that the statements are not operative words, the ED's experts routinely relies on statements made in applications. Otherwise, the ED could not even rely on whether the person who filed it actually was who they said they were.

Objection 6— The ED's witness has extensive experience in determining the financial abilities of a retail public utility to provide water and sewer service. Therefore, she qualifies as an expert on this factor with even greater force. The "question calls for speculation" objection should also be overruled for the reasons stated above. The question is sufficiently specific, the answer is direct, and the policies underlying the sustaining of such an objection do not apply to this case.

Objection 7— The inability of a TCEQ expert to give opinion testimony on the environmental integrity portion of the CCN criteria has already been addressed in the attachment to this response. That case involved this very witness and this very judge. Therefore, the ED refers the court to the

attachment. As for the portion of the objection stating that the question calls for speculation, the ED refers the court to the discussion above.

Objection 8— As for the “question calls for speculation” objection, the ED refers the court to the argument given above; *to wit*, the question has sufficient focus, the answer is not long and rambling, and the concepts behind such an objection (cutting off the witness before they start to ramble) are particularly inapplicable to prefiled testimony. If the answer did create the problems such an objection is meant to solve, then the non-responsive or rambling portions of the testimony should be the focus of the objection when the evidence is prefiled. Again, the objection is more of a rebuttal than a statement on the admissibility of the evidence. Furthermore, the witness is eminently qualified to testify on the effects of economies of scale because she is the team leader for the agency that makes such determinations. Moreover, she has a degree in economics, and an MBA.

IV. ANY PROBLEMS WITH THE TESTIMONY OF THE ED'S WITNESS GOES TO THE WEIGHT, NOT THE ADMISSIBILITY OF HER TESTIMONY

Because the trier of fact in this case is an ALJ, there is no jury to protect from being swayed by hearsay evidence. The ALJ as trier of fact, will give the testimony the weight it deserves. To the extent that the facts underlying an expert's testimony are questionable, Texas Courts have held that the “weakness of facts in support of an expert's opinion generally goes to the weight of the testimony rather than its admissibility.” *LMC Complete Auto, Inc. v. Burke*, 229 S.W.3d 469, 478 Tex. App.—Houston [1st. Dist.] 2007, pet denied.

IV. IF THE BASIS OF HER TESTIMONY IS INSUFFICIENT, SUCH INSUFFICIENCY NEEDS TO BE ESTABLISHED BY A VOIR DIRE EXAMINATION RATHER THAN A

BLANKET OBJECTION.

Rule 704 of the Texas Rules of Evidence contemplates that objections to expert testimony based on insufficiency of underlying facts or insufficient proof of expert status should be done by means of voir dire rather than a blanket objection. Therefore, if such objections are to be considered, they would have to be by live testimony rather than legal argument.

V. TO REQUIRE THE ED TO PROVIDE WITNESSES WITH ACTUAL KNOWLEDGE OF EACH OF THE CCN CRITERIA AND A DEGREE IN EACH SCIENTIFIC OR BUSINESS AREA INVOLVED WOULD LEAD TO UNWORKABLE CHAOS

The personal knowledge that Lindsay Pure Water Company claims the ED's witness must have in order to testify includes actual verification of all facts regarding a city's financial position (statements by the city's expert are insufficient), personal knowledge of each fact stated in the application, actually producing a non-existent CCN application, a degree in every area of business (finance, public finance accounting) and environmental science that might entail a conclusion regarding a CCN criterion, personal inspection of every piece of equipment used by a utility, and more. The time it would take to make all these personal observations and to obtain all these degrees would mean that no case would ever get heard. The number of different witnesses needed to give all the underlying data through personal observation would make the case even more impossible to try. That is the very reason why experts are allowed to give their testimony in the form of opinion or otherwise without disclosing the underlying data.

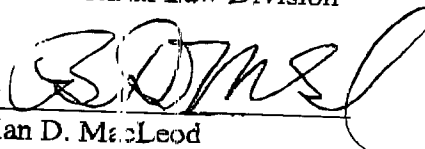
VI. EVEN IF THE EVIDENCE IS INADMISSIBLE UNDER THE TEXAS RULES OF EVIDENCE, THE EVIDENCE SHOULD BE ADMITTED PURSUANT TO THE TEXAS ADMINISTRATIVE PROCEDURES ACT.

Section 2001.081 of the Texas Government Code provides that evidence that would not be admissible under the Texas Rules of Evidence is still admissible in an administrative hearing if necessary to ascertain facts not reasonably susceptible of proof under those rules if not precluded by statute and a type on which reasonably prudent person commonly relies on in the conduct of personal affairs. For the reasons stated in this response, the ED believes that these criteria are met.

WHEREFORE PREMISES CONSIDERED, the ED requests that the objection to the ED's prefiled testimony be overruled.

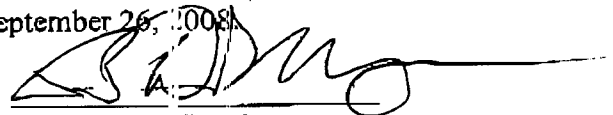
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Robert Martinez, Director
Environmental Law Division

By 
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CERTIFICATE OF SERVICE

This is to certify that all parties on the attached Mailing List have been sent a copy of the foregoing document in accordance with TCEQ and SOAH rules on September 26, 2008.



Brian D. MacLeod
Staff Attorney
Environmental Law Division

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SOAH Docket Nos. 582-06-1641
TCEQ Docket Nos. 2006-0044-UCR

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TRANSCRIPT OF PROCEEDINGS BEFORE THE
STATE OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
AUSTIN, TEXAS

APPLICATION OF THE TOWN OF) SOAH DOCKET NO.
PROSPER TO AMEND SEWER) 582-03-1994
CERTIFICATE OF CONVENIENCE AND)
NECESSITY NO. 20888 IN)
DENTON COUNTY,) TCEQ DOCKET NO.
APPLICATION NO. 34004-C) 2002-1250-UCR

HEARING ON THE MERITS
THURSDAY, DECEMBER 16, 2004

BE IT REMEMBERED THAT at 10:03 a.m. on
Thursday, the 16th day of December 2004, the above-
entitled matter continued at the State Office of
Administrative Hearings, William P. Clements Building,
300 West 15th Street, Room 404, Austin, Texas, before
JAMES NORMAN, Administrative Law Judge; and the
following proceedings were reported by Aloma J. Kennedy,
a Certified Shorthand Reporter of:
Volume 4 Pages 770 - 1131