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**SOAH DOCKET NO. 473-15-4944.WS**  
**DOCKET NO. 44236**

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FILING CLERK

<b>APPLICATION OF CUSTOM WATER COMPANY, LLC, FOR A RATE/TARIFF CHANGE</b>	<b>§ § § §</b>	<b>STATE OFFICE OF ADMINISTRATIVE HEARINGS</b>
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**COMMISSION STAFF'S MOTION TO STRIKE**

**COMES NOW** the Commission Staff of the Public Utility Commission of Texas, representing the public interest, and files this Motion to Strike.

**I. BACKGROUND**

On January 12, 2015, Custom Water Company, LLC filed an application for a rate/tariff change with a proposed effective date of March 20, 2015. Under Custom Water's proposed rates, which the company began charging on March 20, 2015, the monthly base rate including 1,000 gallons for a residential 5/8 or ¾ pipe would increase from \$36.00 to \$54.43, and the gallonage charge will increase from \$5 to \$7 for each additional 1,000 gallons over the minimum.<sup>1</sup>

On July 27, 2015, the docket was referred to the State Office of Administrative Hearings (SOAH). On September 16, 2015, Commission Staff filed a Motion for Interim Rates.<sup>2</sup> In Order No. 1, the SOAH administrative law judge (ALJ) set a deadline of September 24, 2015 for Custom Water to file its direct case. On that date, Custom Water submitted the letter of Cris A. Lemon, C.P.A as its direct case. Pursuant to Order No. 1, Intervenor direct testimony is due October 13, 2015, and Staff direct testimony is due October 23, 2015. Pursuant to Order No. 1, written objections to Custom Water's direct testimony are due October 6, 2015. Staff now timely files these objections and Motion to Strike the letter by Cris A. Lemon.

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<sup>1</sup> Customer Water Company's Application at 34 (Jan. 12, 2015).

<sup>2</sup> Staff notes that the deadline pursuant to 16 TAC § 22.78 (a) for Custom Water to file a response to Staff's Motion for Interim Rates was within five working days of receipt.

## II. EVIDENTIARY OBJECTIONS AND MOTION TO STRIKE THE LETTER

### BY CRIS A. LEMON

Staff's evidentiary objections generally fall into four categories: expert opinion testimony, hearsay, relevance, and lay opinion testimony.

#### QUALIFICATIONS OF AN EXPERT:

To provide an admissible opinion, an expert must be qualified by "knowledge, skill, experience, training, or education." TRE 702. *In re Commitment of Bohannon*, 388 S.W. 3d 296, 304 (Tex. 2012). Trial courts must ensure that those who purport to be experts truly have experience concerning that actual subject about which they are offering an opinion. *Id.*

#### HEARSAY:

A hearsay statement is not admissible unless an exception permits its admission. TRE 801, 802. A hearsay statement is an oral or written verbal expression or nonverbal conduct of a person, if intended as a substitute for verbal expression, not made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. *Id.*, TRE 801(d). For example, newspaper articles offered for the truth of the matter asserted are hearsay. *City of Austin v. H.L. & P., Co.*, 844 S. W. 2d 773, 791 (Tex. App. – Dallas 1992, writ denied).

#### RELEVANCE:

To be admissible, evidence must be relevant, meaning that the evidence must have a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. To be relevant, the testimony must be so "sufficiently tied to the facts of the case that it will aid...in resolving a factual dispute." *E.I du Pont de Nemours Co. v. Robinson*, 923 S.W.2d at 556. TRE 401, 402.

#### ADMISSIBILITY OF LAY OPINION TESTIMONY:

If a witness is not testifying as an expert, the witness' opinion testimony is limited to those opinions which are rationally based on the perception of the witness and helpful to a clear understanding of the witness' testimony or the determination of a fact in issue. Tex. R. Evidence 701.

A. Mr. Lemon states on page 1 of his letter that:

"Both the Montague and Oak Shores water systems required substantial upgrades. For the Montague System, requirements were to drill new wells. Estimates were gathered which projected the cost per well at \$300,000, plus engineering and completion. Mr. Fenoglio was able to reduce this cost because he is a licensed Water Well Driller and Pump Installer (TX License #2817). This allowed him to bid out specifics of the project rather than rely on a contractor providing a "turn key" cost. Therefore, instead of approximately \$700,000 in cost for the two wells, actual costs came in at approximately \$300,000. In the case of Oak Shores, requirements were to replace the storage tanks. Again, because of his license, this was completed with a significant reduction in costs to the system customers. This does raise a point of potential revision to the rate application. Mr. Fenoglio does draw income from the water company; however, it is not reflected as a true, salaried position. His knowledge, expertise, and certification saved thousands in cost to upgrade the systems. We are looking at the reasonable cost that a small water system would pay an operator with similar credentials. We are also taking steps to properly report and categorize this as a salaried expense."

**Objection: Failure to qualify as an expert, relevance, and does not fall within the scope of lay opinion.**

This paragraph of Mr. Lemon's letter, in summary, appears to attempt to demonstrate that upgrades were needed, that those upgrades were completed at a low cost relative to alternatives, and that the cost-savings realized by Mr. Fenoglio's management could have reasonably been included, but were not, as part of the company's application request. Mr. Lemon fails to provide any documentation for these assertions, and Staff has no ability to evaluate their accuracy. As stated, they are opinion only. Further, Mr. Lemon's letter does not establish that he is an expert on water systems, or on whether those water systems require upgrades. Additionally, Mr. Lemon's letter does not establish that he is an expert on what the costs of the two wells would have been had Mr. Fenoglio not bid out portions of the project. Nor does Mr. Lemon's letter establish he is an expert on what savings were realized, if any,

by Mr. Fenoglio bidding out portions of the project. Perhaps a contractor with experience building water system projects would be able to offer expert opinion on this subject, but Mr. Lemon indicates his area of expertise is accounting. Mr. Lemon does not qualify as an expert on the areas he discusses in this paragraph, and his indication that the amount collected through base rates for Mr. Fenoglio's salary *could* have been higher than requested in the application is speculative and not relevant. Again, due to the specific nature of the statements, which rely on particular undocumented facts, the statements are not merely a perception of Mr. Lemon, and do not qualify as a lay opinion and are not admissible.

B. On page 2 of his letter, Mr. Lemon states:

"One of these heavy equipment assets is a backhoe machine. Because Mr. Fenoglio has the required certifications, he is able to utilize this equipment to service the water system while reducing costs to customers. In these rural areas, a qualified and certified water system contractor with the necessary equipment would be difficult to rely on. These systems are at least 30 to 50 miles from a recognized city. Ownership of these assets allows him to repair and/or construct necessary system upgrades or additions. It is also allows for a timely response to a water outage given TCEQ's time frame requirements."

**Objection: Failure to qualify as an expert and does not fall within the scope of lay opinion.**

Again, Mr. Lemon's letter does not demonstrate that he is an expert on the price differential between hiring a water system contractor to do needed work for the utility, versus the cost of the utility owning its own backhoe, nor has he demonstrated that he is qualified to give expert opinion on the risks of relying on a water-system contractor to construct or repair necessary system upgrades, build additions, or respond to water outage problems. Again, due to the specific nature of the statements, which rely on particular undocumented facts, the statements are not merely a perception of Mr. Lemon, and do not qualify as a lay opinion and are not admissible.

C. On page 3 of his letter, Mr. Lemon states:

“Being a customer of the Montague system himself, Mr. Fenoglio has tried to maintain reasonable water rates. Requirements to upgrade system assets have forced necessary action to raise more revenue to offset debt costs and increased expenses. This application represents a reasonable effort to increase revenues. We are continuing to revise various aspects of the application. We do reserve the right modify these numbers.”

**Objection: Failure to qualify as an expert, hearsay, relevance, and does not fall within the scope of lay opinion.**

Mr. Lemon’s statement regarding what Mr. Fenoglio’s intent was in filing this application is hearsay. Further, as detailed above, Mr. Fenoglio is not qualified as an expert on required system upgrades. Additionally, Mr. Fenoglio’s statement that “We are continuing to revise various aspects of the application” is not relevant. Even if the letter from Mr. Fenoglio is read liberally to be direct testimony of Custom Water, that testimony should encompass or support Custom Water’s requested rate change, not intimate that the application filed in support of the rate change is a moving target that can be revised.

### **III. FORM OBJECTIONS TO LETTER BY CRIS LEMON**

The SOAH ALJ set a deadline of September 24, 2015 for Custom Water to file its direct case, and the Commission’s procedural rules 16 TEX. ADMIN. CODE § 22.225 (TAC) dictates that written direct testimony be pre-filed. The letter by Mr. Lemon is not in the form of direct testimony, and for that reason alone, it should be stricken from the evidentiary record. At best, it is a statement of position and non-evidentiary.

Additionally, several comments in the letter do not even support the application Custom Water has already submitted, indicating that the company could revise its application and ask for something different than what it has already requested (“We are looking at the reasonable cost that a small water system would pay an operator with similar credentials. We are also taking steps to properly report and categorize this as a salaried expense.”; “[W]e are looking at the book value of the old wells and storage tanks to determine if there is any continued value to the water systems.”; “We are continuing to review the company’s working capital

requirements in order to determine adequate cash flow.”; “We are continuing to revise various aspects of the application. We do reserve the right modify these numbers.”).

In short, what has been submitted by Custom Water is not direct testimony and it does not support the application Custom Water has already filed.

#### **IV. LETTER BY MR. LEMON SHOULD BE STRICKEN IN WHOLE**

Staff would respectfully request that the letter from Mr. Lemon be stricken from the evidentiary record in whole. In the event the ALJ strikes the letter in whole from the evidentiary record, Staff is not opposed to the letter being treated as a statement of position.

In the alternative, Staff is not opposed to giving Custom Water an extension of one to two weeks to resubmit its direct case to correct the issues Staff has identified. However, if the ALJ grants this request, Staff would ask that the remaining dates in the procedural schedule be modified as well, which may require some coordination among parties to find new dates that do not conflict with existing obligations and the holidays. Additionally, if an extension to Custom Water re-submitting its direct testimony is granted and the remaining procedural schedule dates are therefore modified in kind, Staff would respectfully re-urge its September 16, 2015 Motion for Interim Rates. A modification of the procedural schedule will likely delay a final decision in this case. Staff continues to believe that the rates currently being collected are not justified or reasonable, and does not believe it is reasonable for customers to pay higher, unjustified rates for any longer than necessary.

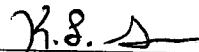
#### **V. CONCLUSION**

Staff respectfully requests that the letter from Mr. Lemon be stricken from the record. Alternatively, Staff would request that the letter be treated as a statement of position; or, that Custom Water be given an opportunity to resubmit its direct case to correct the issues Staff has identified, that the procedural schedule be modified to accommodate Custom Water’s resubmittal of revised testimony, and that Staff’s Motion for Interim Rates be granted.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I certify that a copy of this document will be served on all parties of record on October 6, 2015 in accordance with 16 TAC § 22.74.



Katherine Lengieza Gross