



Control Number: 45720



Item Number: 109

Addendum StartPage: 0

2016 SEP 23 PM 2: 17

APPLICATION OF RIO CONCHO  
AVIATION, INC. FOR A  
RATE/TARIFF CHANGE

§  
§  
§

BEFORE THE STATE OFFICE  
OF  
ADMINISTRATIVE HEARINGS

PUBLIC UTILITY COMMISSION  
FILING CLERK

**COMMISSION STAFF'S RESPONSE TO RIO CONCHO AVIATION, INC.'S  
OBJECTIONS TO AND MOTION TO STRIKE PORTIONS OF COMMISSION STAFF,  
ANDREW C. NOVAK'S, DIRECT TESTIMONY**

COMES NOW the Staff of the Public Utility Commission of Texas (Staff), representing the public interest and files these Commission's Staff's Response to Rio Concho Aviation, Inc.'s Objections to and Motion to Strike Portions of Commission Staff, Andrew C. Novak's, Direct Testimony. In support thereof, Staff shows the following:

**I. BACKGROUND**

On March 22, 2016, Rio Concho Aviation, Inc. (Rio Concho) filed an application for a rate/tariff change under water certificate of convenience and necessity (CCN) No. 12835 in Tarrant County, Texas. On June 21, 2016, the administrative law judge (ALJ) entered Order No. 4, which set a deadline of September 16, 2016 to object to Staff's testimony. On September 16, 2016, Rio Concho filed its Objections to and Motion to Strike Portions of Commission Staff, Andrew Novak's Direct Testimony. SOAH Order No. 4 also set a deadline of September 23, 2016 for Staff to respond to objections to Staff's direct testimony. Therefore, this response is timely filed.

**II. OVERVIEW**

The Commission employs staff to review rate applications for compliance with the Texas Water Code (TWC), the Commission's rules, and precedent. Expertise in the requirements of compliance with these statutes and rules does not require a specific type of training, or a requisite number of years of professional experience.

Texas Rule of Evidence 702 does not restrict expert testimony to those with specific formal training, but rather allows a person to testify as an expert witness so long as: 1) the person

100

is qualified by knowledge, skill, experience, training or education; 2) the proposed testimony provides scientific, technical, or other specialized knowledge; and 3) the testimony will assist the trier of fact to determine a fact in issue.<sup>1</sup> Finally, agency's rulings in admitting expert testimony are within its broad discretion and will not be disturbed on appeal.<sup>2</sup>

Staff witness Andrew C. Novak has been actively analyzing water rate/tariff change applications at the Commission for close to one year and is qualified to render the conclusions he reached in this case. Commission proceedings are replete with Staff expert testimony in evidence from Commission employees with competency comparable to Mr. Novak.

### III. EXPERT TESTIMONY

Rio Concho objects to Mr. Novak as an expert because he “. . . has no training, expertise, or experience in determining the rate of return for water systems. . .”<sup>3</sup> While this is the first case in which Mr. Novak has testified regarding rate of return, Mr. Novak is qualified to provide expert testimony on that topic. Mr. Novak has been in training under other Commission Staff since he started with the Commission in October 2015, and has received specific rate of return training from the Staff of the Water Utilities Division of the Commission. Additionally, Mr. Novak has attended training from the Society of Utility and Regulatory Financial Analysts (SURFA). As a Financial Analyst in the Water Utilities Division, Mr. Novak's job responsibilities include reviewing water rate tariff/change applications for compliance with the TWC and Commission rules. Mr. Novak specifically reviewed these applications for rate of return issues and cost of service issues. Mr. Novak has knowledge, skill, and experience gained from his training and actual involvement in water rate change applications while employed by the Commission. Texas Rule of Evidence 702 provides the admission of expert testimony is allowed if the witness is qualified as an expert by knowledge, skill, experience, training, or education. Staff submits that Mr. Novak, through his educational background, job training and

---

<sup>1</sup> Tex. R. Evid. 702.

<sup>2</sup> *Austin Chevrolet, Inc. v. Motor Vehicle Bd.*, 212 S.W.3d 425, 432 (Tex. App – Austin 2006, pet. denied).

<sup>3</sup> Rio Concho Aviation, Inc's Objections to and Motion to Strike Portions of Commission Staff, Andrew C. Novak's, Direct Testimony (Sep. 16, 2016) (Motion to Strike Novak Testimony) at 2.

experience while employed by the Commission, is qualified by knowledge, skill, experience, training *and* education.

Rio Concho also argues that Mr. Novak's testimony as to the calculation of the rate of return "is an unsupported conclusion, absent any foundation demonstrating an understanding of his proffered methodology, let alone sound methodology."<sup>4</sup> Rio Concho's objection is misplaced and premature. Rio Concho will have an opportunity to question and challenge Mr. Novak's understanding of the methodology presented in his testimony during cross-examination at a hearing on the merits in this matter.

Rio Concho identifies portions of Mr. Novak's testimony to which it specifically objects, but relies upon its general objection for each section. Staff will respond to the identified testimony in a similar format.

**A. Novak Prefiled, page 4, lines 6-19.**

Mr. Novak testified as to the relevant legal precedent that establishes principles that are generally recognized by regulators in establishing a fair and reasonable rate of return. An expert witness may offer an opinion on a mixed question of law and fact, if the opinion is confined to the relevant issues and is based on proper legal concepts.<sup>5</sup> An issue involves a mixed question of law and fact when the standard or measure has been fixed by law and the question is whether the person or conduct measures up to that standard.<sup>6</sup> Where the expert is not a lawyer, they must be provided the proper legal concepts with which to analyze the facts.<sup>7</sup> Here, Mr. Novak was provided the proper legal concepts with which to analyze the facts. Specifically, the United States Supreme Court cases referenced by Mr. Novak specify principles to be followed in establishing a fair and reasonable rate of return. Mr. Novak is merely applying the facts to the principles established by this legal precedent, and can opine as to his consideration of these

---

<sup>4</sup> *Id.*

<sup>5</sup> See *Birchfield v. Texarkana Mem's Hosp.*, 747 S.W.2d 361, 365 (Tex. 1987).

<sup>6</sup> *Mega Child Care, Inc. v. Texas Dep't of Protective & Regulatory Servs.*, 29 S.W.3d 303, 309 (Tex. App. -- Houston 2000, no pet.).

<sup>7</sup> See *Lyondell Petrochem v. Fluor Daniel, Inc.*, 888 S.W.2d 547, 554 (Tex. App. -- Houston 1994, writ denied); *Keene Corp. v. Rogers*, 863 W.S.2d 168, 176-77 (Tex. App. -- Texarkana 1993, no writ).

principles in his development of a rate of return recommendation. Rio Concho's objection to this testimony should be overruled.

**B. Novak Prefiled, page 6, lines 8-12.**

Mr. Novak testified as to his recommended rate of return on equity, and the basis of his recommendation. His training, knowledge, skill, experience, and education qualify him to review the documents in the case and make this determination. To the extent Rio Concho believes Mr. Novak is not qualified to determine the appropriate use of the Discounted Cash Flow (DCF) method, it can seek to establish that during cross-examination in a hearing on the merits in this matter. Rio Concho's objection to this testimony should be overruled.

**C. Novak Prefiled, page 6, lines 13-20.**

Mr. Novak testified as to his DCF analysis. His training, knowledge, skill, experience, and education qualify him to conduct this analysis. To the extent Rio Concho believes Mr. Novak is not qualified to determine the appropriate use of the DCF method, it can seek to establish that during cross-examination in a hearing on the merits in this matter. Rio Concho's objection to this testimony should be overruled.

**D. Novak Prefiled page 6, line 21 through page 7, line 3.**

This objection is misplaced. Rio Concho objects to this portion of testimony on the grounds that Mr. Novak is "not qualified as an expert on the determination of the appropriate rate of return in this case, and much less so with respect determining the appropriate proxy group to use in the Discounted Cash Flow Method for that purpose."<sup>8</sup> However, in the identified portion of testimony, Mr. Novak did not testify as to his determination of the *appropriate* proxy group to use in this case; rather he testified to why he used a proxy group. Mr. Novak's training, knowledge, skill, experience, and education qualify him to state why he chose to use a proxy group in his analysis. Rio Concho's objection to this testimony should be overruled.

**E. Novak Prefiled, page 7, lines 9-14.**

Mr. Novak testified as to his use of the proxy group in his analysis regarding capital structure. His training, knowledge, skill, experience, and education qualify him to conduct that

---

<sup>8</sup> Motion to Strike Novak Testimony at 4.

analysis and make a determination. Rio Concho's objection to this testimony should be overruled.

**F. Novak Prefiled, page 8, lines 2-4.**

Mr. Novak testified as to text contained in the application for a water rate change, and his opinion as to the effect that the filing of his testimony has with this case considering that text. His training, knowledge, skill, experience, and education qualify him to conduct that analysis and make a determination. Rio Concho's objection to this testimony should be overruled.

**IV. CONCLUSION**

Numerous other Financial Analysts in the Water Utilities Division with similar qualifications to Mr. Novak have filed testimony in each and every one of the water rate change applications filed at the Commission annually. To entertain Rio Concho's objections would effectively add restrictions on Staff testimony that do not exist in the Commission's rules, and would deprive finders of fact in this case of Staff's analysis of Rio Concho's application. Staff is the only party to this case that represents the public interest and its voice should not be silenced. Staff's testimony serves a valuable role in evaluating this water rate application in the context of intervenor concerns and the public interest generally. Each of the above sections of testimony to which Rio Concho objected is within the scope of Mr. Novak's job requirements and expertise. The testimony will assist the trier of fact, first the ALJ and then the Commissioners themselves, in setting rates that are just and reasonable. Rio Concho will have an opportunity to question and challenge Mr. Novak at a hearing on the merits in this docket. For the above stated reasons, Staff respectfully requests that the ALJ deny Rio Concho's objections to the Direct Testimony of Andrew C. Novak.

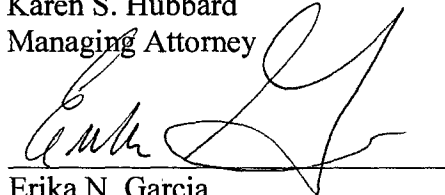
Date: September 23, 2016

Respectfully Submitted,

**PUBLIC UTILITY COMMISSION OF TEXAS  
LEGAL DIVISION**

Margaret Uhlig Pemberton  
Division Director

Karen S. Hubbard  
Managing Attorney

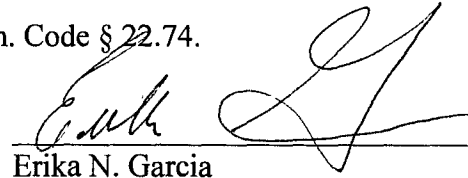


Erika N. Garcia  
State Bar No. 24092077  
Vera Dygert  
State Bar No. 24094634  
1701 N. Congress Avenue  
P.O. Box 13326  
Austin, Texas 78711-3326  
(512) 936-7290  
(512) 936-7268 (facsimile)

**SOAH DOCKET NO. 473-16-3831.WS  
PUC DOCKET NO. 45720**

**CERTIFICATE OF SERVICE**

I certify that a copy of this document will be served on all parties of record on September 23, 2016, in accordance with 16 Tex. Admin. Code § 22.74.

  
Erika N. Garcia