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Item Number: 96

Addendum StartPage: 0

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

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BEFORE THE STATE OFFICE
PUBLIC UTILITY COMMISSION
FILING CLERK
ADMINISTRATIVE HEARINGS

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

COMES NOW, Rio Concho Aviation, Inc. ("Rio Concho") and files this Objections to and Motion to Strike Portions of Commission Staff, Andrew C. Novak's, Direct Testimony ("Novak Testimony"). Rio Concho would respectfully show the following:

I.

BACKGROUND

Rio Concho filed an application to increase its water rates with the Commission on March 22, 2016. On September 9, 2016, Commission Staff filed direct testimony. SOAH Order No. 4, issued on June 21, 2016, established a deadline of September 16, 2016 for filing objections to Staff testimony. This response is therefore timely filed.

II.

OBJECTIONS

Rio Concho generally objects to Mr. Novak's testimony because he does not demonstrate through his testimony that he is an expert on the issues addressed in his testimony. Consequently, his testimony is speculation and unsupported, unsubstantiated opinions. Unless qualified as an expert, a testifying witness must only testify to factual matters on which the witness has personal knowledge. Tex. R. Evid. 602.

Rule 702 states that

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue. Tex. R. Evid. 702.

91

But when the main substance of the witness' testimony is not based on application of the witness' specialized knowledge, skill, experience, training, or education to his familiarity to the [subject matter], then the witness's testimony must be excluded if it goes beyond the facts into the realm of opinion. Any opinion testimony in Mr. Novak's testimony is from a lay witness and limited by Rule 701, which states:

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- (a) rationally based on the witness's perception; and
- (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue. Tex. R. Evid. 701.

Although a lay witness' testimony is not required to have certainty, if the witness is simply speculating or guessing and does not establish a personal perception and knowledge upon which the testimony is based, then the testimony must be excluded. *Bigby v State*, 892 S.W.2d 864, 889 (Tex. Crim. App. 1994). Because Mr. Novak has no training, expertise or experience in determining the rate of return for water systems, his opinion testimony does not fit into either category and should not be allowed into the record.

Mr. Novak's testimony is not sufficient to qualify him as an expert. In *Southwestern Bell Tel. Co. v. Garza*, 164 S.W.3d 607, 621 (Tex. 2004), the Texas Supreme Court said that, "too weak" evidence is any "evidence offered to prove a vital fact [that] is so weak as to **do no more than create a mere surmise or suspicion of its existence.**"¹ The Court concluded such evidence "is, in legal effect, no evidence, and will not support a verdict or judgment."² Mr. Novak's testimony related 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. Before the substance of expert testimony may be considered by the trier of fact, it must first be determined that the expert is suitably qualified and that the testimony is not only relevant, but also based on a reliable foundation.³ Expert testimony is unreliable and fails this threshold analysis if it is not grounded in acceptable methods and procedures and amounts to no

¹ *Southwestern Bell Tel. Co. v. Garza*, 164 S.W.3d 607, 621 (Tex. 2004) (emphasis added).

² *Id.*

³ *Helena Chemical Co. v. Wilkins*, 47 S.W.3d 486,499 (Tex. 2001).

more than a subjective belief or unsupported speculation.⁴ A belief, guess, surmise, or supposition by an expert witness is not evidence, as it is not based on a reliable foundation or any methodology and his opinion may not be considered by the ALJ. All we know about Mr. Novak is that he has been in the workforce for less than 16 months, has been employed as a financial analyst by the PUC for less than one year, has a Bachelor of Business Administration degree related to finance and has prepared testimony in one rate appeal case and one customer complaint case.

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

Mr. Novak's is not qualified as an expert on legal matters, such as interpretation of United States Supreme Court cases, or the determination of the appropriate rate of return in this case. As a result, his testimony must be stricken under Rule 702 of the Texas Rules of Evidence. Tex. R. Evid. 702. In addition, if Mr. Novak is testifying as a lay witness, his testimony fails to satisfy the requirements of Rule 701 because it is not helpful to determining a fact issue in this case.

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

Mr. Novak's 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 use of the Discounted Cash Flow Method for that purpose. As a result, his testimony must be stricken under Rule 702 of the Texas Rules of Evidence. Tex. R. Evid. 702. In addition, if Mr. Novak is testifying as a lay witness, his testimony fails to satisfy the requirements of Rule 701 because it is misleading and not helpful to determining a fact issue in this case.

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

Mr. Novak's 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 use of the Discounted Cash Flow Method for that purpose. As a result, his testimony must be stricken under Rule 702 of the Texas Rules of Evidence. Tex. R. Evid. 702. In addition, if Mr. Novak is testifying as a lay witness, his testimony fails to satisfy the requirements of Rule 701 because it is misleading and not helpful to determining a fact issue in this case.

⁴ *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713,719 (Tex. 1998)(extending Daubert/Robinson criteria for expert witnesses to non-scientific expert testimony).

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

Mr. Novak's 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. As a result, his testimony must be stricken under Rule 702 of the Texas Rules of Evidence. Tex. R. Evid. 702. In addition, if Mr. Novak is testifying as a lay witness, his testimony fails to satisfy the requirements of Rule 701 because it is misleading and not helpful to determining a fact issue in this case.

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

Mr. Novak's 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 determining the appropriate capital structure for a utility like Rio Concho. As a result, his testimony must be stricken under Rule 702 of the Texas Rules of Evidence. Tex. R. Evid. 702. In addition, if Mr. Novak is testifying as a lay witness, his testimony fails to satisfy the requirements of Rule 701 because it is misleading and not helpful to determining a fact issue in this case.

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


Mr. Novak's is not qualified as an expert on the determination of the legal impact of testimony in this case on the presumptions related to the evidence in this case. As a result, his testimony must be stricken under Rule 702 of the Texas Rules of Evidence. Tex. R. Evid. 702. In addition, if Mr. Novak is testifying as a lay witness, his testimony fails to satisfy the requirements of Rule 701 because it is misleading and not helpful to determining a fact issue in this case.

IV.

PRAYER

Rio Concho respectfully requests that the Judges sustain its objections, enter an order excluding and striking the Testimony of Andrew C. Novak as requested above and grant such and further relief to which it may be entitled.

Respectfully submitted,


By: 
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CERTIFICATE OF SERVICE

I hereby certify that I have served or will serve a true and correct copy of the foregoing document via hand delivery, facsimile, electronic mail, overnight mail, U.S. mail and/or Certified Mail Return Receipt Requested to all parties on this the 16th day of September, 2016.


John Carlton