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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, DEBI LOOCKERMAN'S, DIRECT TESTIMONY**

COMES NOW, Rio Concho Aviation, Inc. ("Rio Concho") and files this Objections to and Motion to Strike Portions of Commission Staff, Debi Lookerman's, Direct Testimony ("Loockerman 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 Ms. Loockerman's testimony because she does not demonstrate through her testimony that she is an expert on some of the issues addressed in her testimony. Consequently, portions of her testimony are 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.

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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 her familiarity to the [subject matter], then the witness's testimony must be excluded if it goes beyond the facts into the realm of opinion. Opinion testimony in some portions of Ms. Loockerman'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 Ms. Loockerman has no training, expertise or recent experience in the operation of or the costs of operation of a small water system, her opinion testimony on these issues does not fit into either category and should not be allowed into the record.

Ms. Loockerman's testimony is not sufficient to qualify her as an expert on the operation of or the costs to operate small water systems. 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 Ms. Loockerman's testimony related the reasonableness and necessity of costs incurred to operate a small water system is an unsupported conclusion, absent any foundation demonstrating an understanding of her proffered opinions. 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

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).

it is not grounded in acceptable methods and procedures and amounts to no 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 her opinion may not be considered by the ALJ. All we know about Ms. Loockerman related to operation of small water systems is that she provided office management and accounting for a 79 connection water system sometime between 1997 and 2008 and for two other water systems with fewer than 50 connections during that same time. This experience is not recent and hardly qualifies her as an expert on the reasonableness and necessity of costs to operate a water system like Rio Concho in the current economic environment.

A. Loockerman Prefiled, page 6, lines 10-14.

Ms. Loockerman is not qualified as an expert on costs to operate a system like Rio Concho. As a result, her testimony must be stricken under Rule 702 of the Texas Rules of Evidence. Tex. R. Evid. 702. In addition, if Ms. Loockerman is testifying as a lay witness, her testimony fails to satisfy the requirements of Rule 701 because it is not helpful to determining a fact issue in this case.

B. Loockerman Prefiled, page 7, lines 12-15.

Ms. Loockerman is not qualified as an expert on costs to operate a system like Rio Concho. As a result, her testimony must be stricken under Rule 702 of the Texas Rules of Evidence. Tex. R. Evid. 702. In addition, if Ms. Loockerman is testifying as a lay witness, her testimony fails to satisfy the requirements of Rule 701 because it is not helpful to determining a fact issue in this case.

C. Loockerman Prefiled, page 7, line 16 through page 9, line 13.

Ms. Loockerman is not qualified as an expert on costs to operate a system like Rio Concho. As a result, her testimony must be stricken under Rule 702 of the Texas Rules of Evidence. Tex. R. Evid. 702. In addition, if Ms. Loockerman is testifying as a lay witness, her testimony fails to satisfy the requirements of Rule 701 because it is 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. Loockerman Prefiled, page 10, lines 2-11.

Ms. Loockerman is not qualified as an expert on costs to operate a system like Rio Concho. As a result, her testimony must be stricken under Rule 702 of the Texas Rules of Evidence. Tex. R. Evid. 702. In addition, if Ms. Loockerman is testifying as a lay witness, her testimony fails to satisfy the requirements of Rule 701 because it is not helpful to determining a fact issue in this case.

E. Loockerman Prefiled, page 11, lines 5-9.

Ms. Loockerman is not qualified as an expert on operation of or the costs to operate a system like Rio Concho. As a result, her testimony must be stricken under Rule 702 of the Texas Rules of Evidence. Tex. R. Evid. 702. In addition, if Ms. Loockerman is testifying as a lay witness, her testimony fails to satisfy the requirements of Rule 701 because it is not helpful to determining a fact issue in this case.

F. Loockerman Prefiled, page 11, line 10 through page 12, line 12.

Ms. Loockerman is not qualified as an expert on operation of a system like Rio Concho. As a result, her testimony must be stricken under Rule 702 of the Texas Rules of Evidence. Tex. R. Evid. 702. In addition, if Ms. Loockerman is testifying as a lay witness, her testimony fails to satisfy the requirements of Rule 701 because it is not helpful to determining a fact issue in this case.

G. Loockerman Prefiled, page 12, line 14 through page 15, line 4.

Ms. Loockerman is not qualified as an expert on operation of or the costs to operate a system like Rio Concho. As a result, her testimony must be stricken under Rule 702 of the Texas Rules of Evidence. Tex. R. Evid. 702. In addition, if Ms. Loockerman is testifying as a lay witness, her testimony fails to satisfy the requirements of Rule 701 because it is not helpful to determining a fact issue in this case.

H. Loockerman Prefiled, page 13, line 5 through page 14, line 3.

Ms. Loockerman is not qualified as an expert on costs to operate a system like Rio Concho, much less the benefits required to secure employees in the current marketplace. As a result, her testimony must be stricken under Rule 702 of the Texas Rules of Evidence. Tex. R. Evid. 702. In addition, if Ms. Loockerman is testifying as a lay witness, her testimony fails to satisfy the requirements of Rule 701 because it is not helpful to determining a fact issue in this case.

I. Loockerman Prefiled, page 14, line 6 and Attachment DL-3 Bates 47-51 and Bates 53-67 and Bates 68-76.

Federal tax returns are typically afforded some basic protection in the litigation process, due to their highly sensitive nature. *Maresca v. Marks*, 362 S.W.2d 299, 300-301 (Tex. 1962). Tax returns can be produced if information relevant to the litigation can only be obtained from those returns. *Id.*

When tax returns are produced, the returns should be subject to a protective order, as the information remains highly sensitive, although it may also be relevant to the underlying litigation. Placing the tax returns in the public domain by publicly filing the entire return, or even a portion thereof, would violate the basic privacy rights of the taxpayers, and would not serve to advance the litigation.

Consequently, the pages in the tax returns that have not been cited by Ms. Loockerman are irrelevant, highly sensitive protected materials and must be stricken from the record.

J. Loockerman Prefiled, page 14, lines 9-18.

Ms. Loockerman is not qualified as an expert on costs to operate a system like Rio Concho. As a result, her testimony must be stricken under Rule 702 of the Texas Rules of Evidence. Tex. R. Evid. 702. In addition, if Ms. Loockerman is testifying as a lay witness, her testimony fails to satisfy the requirements of Rule 701 because it is not helpful to determining a fact issue in this case.

K. Loockerman Prefiled, page 14, lines 9-18.

Ms. Loockerman is not qualified as an expert on costs to operate a system like Rio Concho. Any flow through adjustments to federal income tax as part of the revenue requirement are resultantly flawed. As a result, her testimony must be stricken under Rule 702 of the Texas Rules of Evidence. Tex. R. Evid. 702. In addition, if Ms. Loockerman is testifying as a lay witness, her testimony fails to satisfy the requirements of Rule 701 because it is not helpful to determining a fact issue in this case.

L. Loockerman Prefiled, page 20, lines 13-15.


Ms. Loockerman is not qualified as an expert on costs to operate a system like Rio Concho. As a result, her testimony must be stricken under Rule 702 of the Texas Rules of Evidence. Tex.

R. Evid. 702. In addition, if Ms. Loockerman is testifying as a lay witness, her testimony fails to satisfy the requirements of Rule 701 because it is not helpful to determining a fact issue in this case.

IV.
PRAYER

Rio Concho respectfully requests that the Judge sustain its objections, enter an order excluding and striking portions of the Testimony and Attachments of Debi Loockerman as requested above and grant such and further relief to which it may be entitled.

Respectfully submitted,

By: 
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ATTORNEY FOR RIO CONCHO AVIATION, INC.

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