

Control Number: 45848



Item Number: 43

Addendum StartPage: 0

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PUBLIC UTILITY COMMISSION

**CITY OF CELINA'S NOTICE OF
INTENT TO PROVIDE WATER AND
SEWER SERVICE TO AREA
DECERTIFIED FROM AQUA TEXAS,
INC. IN DENTON COUNTY.**

§ **PUBLIC UTILITY COMMISSION**
§
§ **OF TEXAS**
§
§

**CITY OF CELINA'S RESPONSE TO
AQUA TEXAS' OBJECTIONS TO CROSS-REBUTTAL
TESTIMONY OF PAUL HORNSBY AND CHRIS HORNSBY
AND MOTION TO STRIKE**

The City of Celina (the "City") hereby responds to the Objections to Cross-Rebuttal Testimony of Paul Hornsby and Chris Hornsby and Motion to Strike filed by Aqua Texas, Inc. ("Aqua"), and in support thereof would respectfully show as follows:

I. INTRODUCTION

In its introduction, Aqua makes one assertion that is not also addressed in the body of its objections. Aqua asserts that the cross-rebuttal testimony "represents an admission that Celina's sole direct testimony witness is not qualified to opine as to appraisal matters in this docket." This is simply not true. The cross-rebuttal testimony has nothing to do with Celina's direct case. Celina's direct expert, Mr. Jones, prepared an appraisal in this case. Aqua asserts in this Motion to Strike that Celina's direct witness is not qualified because he is not a licensed appraisal, but later in this same document also asserts that Celina's rebuttal witness should be stricken because the rebuttal testimony was prepared by somebody who did not prepare an appraisal in this case.

13

Aqua's schizophrenia on this issue is simple gamesmanship and its statement that Celina has made some kind of admission is patently incorrect.

II. AQUA'S GENERAL OBJECTIONS TO CROSS-REBUTTAL TESTIMONY

A. AQUA Asserts that Celina's Cross-Rebuttal Testimony/Exhibits are Improper.

1) AQUA'S ASSERTION: "Celina is attempting to unfairly take advantage of [the expedited hearing procedure] by offering new appraiser witness testimony/exhibits in crossrebuttal two weeks before our scheduled hearing on the merits when neither witness prepared the appraisal Celina filed in this docket."

RESPONSE:

There is no order or agreement that testimony was to be limited persons that have prepared appraisals. In fact, two of Aqua's witnesses did not prepare appraisals. Whether a person prepared an appraisal or not has no bearing on whether they can be called to testify.

Furthermore, there is no date for designation of witnesses, although there is a deadline for submission of cross-rebuttal.¹ Celina satisfied that deadline.

Compliance with the deadlines set-forth in the ALJ's Order should not have "surprised" Aqua.

2) AQUA'S ASSERTION: "The cross-rebuttal testimony and exhibits offered by Celina critiquing Aqua's appraisal, filed June 13, 2016, should have been offered as part of Celina's direct case, filed August 16, 2016. . . ."

¹ Even if there were a date for designation, which there is not, if you could not anticipate calling the rebuttal witness prior to trial, then you can call the witness despite the fact that he or she has not been identified. *Gannett Outdoor Co. v. Kubezka*, 710 S.W.2d 79 (Tex. App. -- Houston [14th Dist.] 1986, no writ).

RESPONSE:

The cross-rebuttal testimony is not a critique of Aqua's appraisal. It is, in fact, a rebuttal to Aqua's direct testimony, not the appraisal. See CEL103 at Page 6, Line 28 to Page 7, Line 22. The purpose of rebuttal testimony is to directly counter testimony from another source. *Martin v. State*, 151 S.W.3d 236, 240 (Tex. App.—Texarkana 2004, pet. ref'd). As a general proposition, when a party introduces matters into evidence, that invites the other side to reply to that evidence. *Id.* The cross-rebuttal testimony provided herein serves precisely that purpose.

Aqua's direct testimony provided explanations that were not provided in the appraisal. For just one example, the Jurisdictional Exception Rule requires that if the Jurisdictional Exception Rule is employed, the appraiser must, among other things, "clearly and conspicuously disclose in the report the part of USPAP that is voided by the law or regulation." See CEL105—002. Mr. Korman's appraisal does not make this "clear and conspicuous" disclosure in his appraisal. Despite that fact, invocation of the Jurisdictional Exception Rule is central to the conclusions Mr. Korman makes in his testimony. See Korman Testimony Page 9, Line 9 to Page 10 Line 7. Mr. Korman's testimony, therefore, invited rebuttal.

3) AQUA's ASSERTION: "Aqua's licensed appraiser has no opportunity to respond to Celina's cross-rebuttal appraiser testimony in pre-filed rebuttal."

RESPONSE:

It was always Celina's position that any witness will have the opportunity to respond through redirect and recross. In fact, 16 Texas Admin Code § 22.225(b)

provides that “[t]he witness shall submit to cross-examination, clarifying questions, redirect examination, and recross-examination.”

The substance of Mr. Paul Hornsby and Mr. Chris Hornsby is identical. Celina was forced to contact and hire at the last minute an expert that could address Mr. Korman’s newly expounded theories set-forth in his testimony. Because of this last minute need, the expedited hearing schedule, and Mr. Paul Hornsby’s potential conflict, Celina was not able to guarantee his attendance. If he does not attend, however, Mr. Chris Hornsby will testify adopting the same substantive testimony. Aqua has all the notice and opportunity it needs to address the substance of the testimony which, depending on unavoidable scheduling conflicts, will be presented by either Mr. Paul Hornsby or Mr. Chris Hornsby.

To the extent that either Mr. Paul Hornsby or Mr. Chris Hornsby is unable to swear to his testimony under oath or submit to cross-examination per 16 TAC § 22.225(b), Celina agrees that testimony from that person will be withdrawn.

III. AQUA’S GENERAL OBJECTIONS TO CROSS-REBUTTAL TESTIMONY

1) Aqua objects to and moves to strike the portion of CEL103 at Page 8, Lines 24-27 and Page 8, Lines 28-Page 9 Line 5.

Aqua asserts that this portion of the testimony calls for speculation, is legal opinion, and calls for an opinion based on witness's perception of legislative intent.

In fact, the witness is responding to his thoughts about what Mr. Blackhurst raises at Page 14, Line 10 through page 16, Line 9, and what Mr. Korman raises at page 9, Lines 13-17. Both raised and discussed the factors at the Texas Water Code §13.254, which includes the impact on

future revenues lost from existing customers. This is simply rebuttal testimony to that raised by Messrs. Blackhurst and Korman.

With regard to speculation, it is opinion testimony, which is allowed under TRE 702.

With regard to legal opinions, an expert witness may offer an opinion on a mixed question of law and fact, if the opinion is confined to relevant issues and is based on proper legal concepts. *See Bircheffield v. Texarkana Mem 'l Hosp.* 747 S.W.2d 361, 365 (Tex. 1987). As Mr. Blackhurst pointed out in his testimony, in 2005 the Legislature changed Texas Water Code §13.254(g) by replacing “the impact on future revenues and expenses of the retail public utility” with “the impact on future revenues lost from existing customers.” This is a fact testified to by Aqua’s witness, Mr. Blackhurst. Blackhurst Testimony, Page 14, Lines 15-17. Celina’s rebuttal witness based his opinion on the facts established by Aqua’s direct testimony.

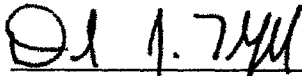
2) Aqua objects to and moves to strike the portion of CEL103 at Page 8, Lines 24-27 and Page 8, Lines 28-Page 9 Line 5.

Aqua asserts that this testimony is speculative, lacks proper foundation, not relevant, and is unfairly prejudicial because it provides testimony about an impression Mr. Korman gives in his testimony. As an expert, Mr. Hornsby has reviewed Mr. Korman’s testimony. The understanding Mr. Hornsby obtained from reviewing this testimony is appropriate for rebuttal testimony. Mr. Hornsby will be subject to cross-examination, and Mr. Korman will be able to provide redirect per 16 Texas Admin Code § 22.225(b). Any clarifications or disputes about Mr. Korman’s actual testimony may be clarified at that time.

PRAYER

The City respectfully requests that the Judge overrule the objections asserted by Aqua and deny the Motion to Strike for the reasons set forth above.

Respectfully submitted,



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CERTIFICATE OF SERVICE

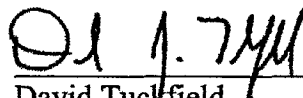
I, David Tuckfield, attorney for the City of Celina, certify that a copy of this document was served on all parties of record in this proceeding on September 12, 2016 in the following manner:

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