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APPLICATION OF DOUBLE DIAMOND §
UTILITY COMPANY, INC. FOR WATER §
AND SEWER RATE/TARIFF CHANGE §
§

BEFORE THE STATE OFFICE
OF PUBLIC UTILITY COMMISSION
ADMINISTRATIVE HEARINGS
FILED CLERK

**DOUBLE DIAMOND UTILITY COMPANY, INC'S OBJECTIONS TO AND MOTION
TO STRIKE THE CLIFF UTILITY COMMITTEE'S INTERVENOR DIRECT
TESTIMONY AND STATEMENT OF POSITION**

TO THE HONORABLE JUDGE BELL:

COME NOW, Double Diamond Utility Company, Inc. ("DDU") and files the following objections to the direct testimony, which was filed on September 5, 2017 by The Cliffs Utility Committee ("TCUC"), and moves to strike certain portions of TCUC Statements of Position by Mr. Smith as set forth below:

I. Objections

a. General objection

DDU generally objects to Mr. Smith's testimony because it is full of speculation and unsupported, unsubstantiated opinions. As a fact witness, this witness must only testify to factual matters on which the witness has personal knowledge. Tex. R. Evid. 602. Mr. Smith is not an expert in matters related to construction, water utility ratemaking or even accounting. Consequently, his opinion testimony and statement of position on these issues is simply speculation and prohibited from being admitted into the record under Rule 702. Rule 702 states that:

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

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864, 889 (Tex. Crim. App. 1994). Because Mr. Smith has no training, expertise or experience in determining the revenue requirement or rates for an investor-owned utility, his opinion testimony does not fit into either category and should not be allowed into the record.

Mr. Smith'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. Smith's testimony contains unsupported conclusions, 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 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. .

b. TCUC Statement of Position – Page 3

As discussed in the general objection section above, DDU objects to the response because it is simple speculation. As a fact witness, this witness must only testify to factual matters on which the witness has personal knowledge. Tex. R. Evidence. 602. His opinion testimony on these issues on construction and repairs is simply speculation and prohibited from being admitted into the record under either Rule 701 or Rule 702.

c. TCUC Statement of Position – Top of Page 6

DDU objects to the proffered testimony because it contains speculation. Mr. Smith is not qualified as an expert on the determination of the appropriate construction, repairs, and rate case expenses. As a result, his testimony must be stricken under Rule 702 of the Texas Rules of

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).

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).

Evidence. Tex. R. Evid. 702. In addition, if Mr. Smith 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.

d. TCUC Statement of Position – Middle of Page 6

DDU objects to the proffered testimony because it contains speculation. Mr. Smith is not qualified as an expert on the determination of the appropriate construction, repairs, rate case expenses. 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. Smith 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. TCUC Statement of Position – Top of Page 7

DDU objects to the proffered testimony because it contains speculation. Mr. Smith is not qualified as an expert on the determination of the appropriate construction, repairs, rate case expenses. 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. Smith 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. TCUC Statement of Position – Bottom of Page 7

DDU objects to the proffered testimony because it contains speculation. Mr. Smith is not qualified as an expert on the determination of the appropriate construction, repairs, rate case expenses. 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. Smith 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.

g. TCUC Statement of Position – Bottom of Page 8

DDU objects to the proffered testimony because it contains speculation. Mr. Smith is not qualified as an expert on the determination of the appropriate construction, repairs, rate case expenses. 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. Smith 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.

II. Conclusion

DDU objects to the referenced testimony on the basis of relevance. TEX R. CIV. EVID. 401-402. "To be relevant, the [evidence] must tend to make the existence of a *material* fact more or less probable than it would otherwise have been." *Edwards v. TEC*, 936 S.W.2d 462, 466-67 (Tex. App. -- Fort Worth 1996, no writ) (emphasis added). The testimony offered does not relate to a material fact in this matter, and should be stricken.

III. Prayer

WHEREFORE, PREMISES CONSIDERED, DDU respectfully request that the Judges sustain DDU's objections and enter an order excluding and striking the Testimony as requested above and such and further relief to which they may be entitled.

Respectfully submitted,

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By: _____



John J. Carlton

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served via hand delivery, facsimile, electronic mail, overnight mail, U.S. mail and/or Certified Mail Return Receipt Requested on all parties on the 15th of September 2017.



JOHN J. CARLTON