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APPLICATION OF DOUBLE § BEFORE THE STATE OFFICE
DIAMOND UTILITY COMPANY, INC. § OF
FOR WATER AND SEWER § ADMINISTRATIVE HEARINGS
RATE/TARIFF CHANGE §

WHITE BLUFF RATEPAYERS GROUP’S RESPONSE TO DOUBLE DIAMOND UTILITY COMPANY’S OBJECTIONS TO, MOTION TO EXCLUDE, AND MOTION TO STRIKE DIRECT TESTIMONY AND EXHIBITS OF NELISA HEDDIN

White Bluff Ratepayers Group (“WBRG”) files this response to Double Diamond Utility Company, Inc.’s (“Double Diamond”) objections to, motion to exclude, and motion to strike portions of the testimonies and exhibits of Nelisa Heddin. Pursuant to Order No. 10, this response is timely filed.

Double Diamond requests that certain portions of the testimony and exhibits of Nelisa Heddin, offered on behalf of the WBRG, be excluded or stricken. For the reasons listed below, Double Diamond’s objections should be overruled and its motion should be denied.

I. INTRODUCTION

Double Diamond’s objections to Mr. Heddin’s testimony can be summarized as follows:

- One generic objection that unspecified portions of Ms. Heddin’s testimony are irrelevant¹
- Specific objections to Ms. Heddin’s qualifications—having sufficient knowledge to form opinions about various aspects of the application, particularly Ms. Heddin’s ability to address business structure, financial accounting, and taxation of a “large private company.”² (Objections 1 through 14)

¹ Double Diamond Utility Company, Inc.’s Objections to, Motion to Exclude, and Motion to Strike the Direct Testimony and Exhibits of Nelisa Heddin at 2 & n.3, Sept. 15, 2017.

² Double Diamond Utility Company, Inc.’s Objections to, Motion to Exclude, and Motion to Strike the Direct Testimony and Exhibits of Nelisa Heddin at 1, Sept. 15, 2017.

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II. NELISA HEDDIN IS A QUALIFIED EXPERT WITNESS

Double Diamond attempts to characterize Ms. Heddin as a lay witness incapable of discussing business structure, financial accounting, and taxation. Ms. Heddin is a seasoned expert witness with a broad understanding of the water, wastewater, and solid waste industries—including issues associated with water supply, system capacity, operation issues, rate design, and financial implications. Ms. Heddin has 17 years' experience with cost-of-service and rate design studies. As her resume details, Ms. Heddin is highly qualified to address the issues raised in relation to Double Diamond's application. Ms. Heddin does not have to be a developer to understand the costs of developing, and she does not have to have prepared Double Diamond's tax returns to critique them. As someone with a Master's in Business Administration with a specialty in Finance, Ms. Heddin is highly capable of addressing treatment of assets owned by a for-profit corporation. The appurtenant fact that Double Diamond believes its corporation to be "large" does not obfuscate Ms. Heddin's ability to serve as an evaluator who provides helpful information to the trier of fact.

Further, Ms. Heddin does not have to be a lawyer to understand the legal framework surrounding rate cases. It would be seriously inefficient to prevent expert witnesses from making references to the law or rules at issue. Texas law also provides that an expert may state an opinion on a mixed question of law and fact as long as the opinion is confined to the relevant issues and is based on proper legal concepts. *See Birchfield v. Texarkana Mem'l Hosp.*, 747 S.W.2d 361, 365 (Tex. 1987). As an expert, Ms. Heddin is permitted to give an opinion in an area of specialized knowledge helpful to the trier of fact. She is entitled to explain the basis for her opinion, even if that opinion is based in part on prior administrative and legal decisions. Ms. Heddin does not speculate on any pure question of law or the ultimate ruling by a court, and her testimony will not create a risk of unfair prejudice to any party.

If Double Diamond has concerns about Ms. Heddin's credibility, Double Diamond may certainly attempt to cross-examine Ms. Heddin on her excellent qualifications; however, objections to her testimony on the basis that she is not an expert witness are legally inappropriate. All of Double Diamond's objections under Texas Rules of Evidence Rule 702 should be overruled, since Ms. Heddin is testifying as an expert.

III. AN EXPERT CAN RELY ON FACTS NOT IN EVIDENCE

Double Diamond attacks Ms. Heddin's ability to rely on facts that are not in evidence under Rule 701, which limits lay witness testimony to testimony that is rationally based on the witness's perception and helpful to clearly understanding the witness's testimony or determining a fact in issue. As demonstrated above, a Rule 701 objection fails against Ms. Heddin, because she is a qualified expert witness.

Under Texas Rules of Evidence Rule 703, an expert witness may base an opinion on facts or data that are not admissible in evidence, provided that the inadmissible facts or data are of a type reasonably relied upon by experts in the particular field. Under Rule 705, an expert may state an opinion—and give the reasons for it—without first testifying to the underlying facts or data. Double Diamond provides no evidence or argument that an expert such as Ms. Heddin cannot rely on information she gathers in the course of her consulting activities. The facts and data that form the basis for an expert's opinion do not need to be introduced into evidence. *Southland Lloyds Ins. Co. v. Cantu*, 399 S.W.3d 558, 567–68 (Tex. App.—San Antonio 2011, pet. denied).³ If Double Diamond believes her research to be incomplete, Double Diamond may mount that as a factual challenge to the weight of Ms. Heddin's testimony, not as a legal objection.

All of Double Diamond's Rule 701 objections are invalidated by the fact that Ms. Heddin is a qualified expert witness, and Rule 701 does not bar testimony by an expert witness because an expert witness may rely on information outside his personal knowledge. *See* Tex. R. Evid. 701; *id.* Rule 703; *see also Aguilar v. State*, 887 S.W.2d 27, 29 n.7 (Tex. Crim. App. 1994).

IV. GENERAL OBSERVATION

In a rate case such as this, the burden of proof rests with the provider of water services to show that the proposed rate change is just and reasonable. *See* 16 Tex. Admin. Code § 24.12 (2016). Double Diamond, as a large and sophisticated corporate entity, should be able to clearly and properly document the source of the capital used to acquire its assets. As outlined in Ms. Heddin's testimony, Double Diamond simply cannot make this demonstration. Rather than

³ Even before the adoption of Rule 703, Texas judges could permit an expert witness to express an opinion based in part on facts that were admissible but never introduced. *See John Hancock Mut. Life Ins. v. Stanley*, 215 S.W.2d 416, 421 (Tex. Civ. App.—Fort Worth 1948, writ. ref'd n.r.e.).

making a clear and direct demonstration of the source of the capital, Double Diamond has greatly complicated the issue by filing two vastly different versions of its rate base in this proceeding, and by making unsubstantiated claims regarding the level of developer supplied capital.

Double Diamond created the level of complexity in this filing as a way to support its lack of documentation and now argues that WBRG can only contest the complexity by hiring additional experts to testify about corporate, development, and tax issues. A utility should not be allowed to force the ratepayers to dig through the utility's records, history, and tax filings to try to determine how the utility should have filed its rate application. Double Diamond's objections to Ms. Heddin's testimony support WBRG's position that if a utility and developer are related, the burden is on the utility to clearly show, in its direct case,⁴ that the capital used to fund assets did not come from lot purchases. The burden should be on the utility and not on the ratepayers.

V. GENERIC OBJECTIONS ARE IMPROPER

Double Diamond also throws in a generic Rule 403 objection to relevance without apparently understanding the purpose of relevance. Double Diamond uses the objection of relevance as a catch-all vehicle to express dissatisfaction with Ms. Heddin's testimony, never identifying specific portions of Ms. Heddin's testimony or explaining how such testimony is not actually relevant. This is an improper legal objection. If Double Diamond wishes to question these items, the proper forum is cross-examination.

VI. CONCLUSION

For these reasons, White Bluff Ratepayers Group requests the administrative law judge overrule all of Double Diamond's objections to, motion to exclude, and motion to strike portions of the testimonies and exhibits of expert witness Nelisa Heddin.

Dated: September 22, 2017

Respectfully submitted,



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⁴ It is interesting to note that Double Diamond offered no experts on direct to support its position regarding the appropriate level of developer contributed assets. Double Diamond should not be allowed to offer additional experts on rebuttal to support its position.

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CERTIFICATE OF SERVICE

I certify that a copy of this Response to Double Diamond's First Request for Information was served on all parties of record in this proceeding on September 22, 2017, by hand-delivery, facsimile, electronic mail, and/or First Class Mail.



C. Joe Freeland