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

**DOUBLE DIAMOND UTILITY COMPANY, INC.’S RESPONSE TO
THE CLIFFS UTILITY COMMITTEE’S MOTION TO REOPEN THE
RECORD FOR ADMISSION OF LOT SALES AGREEMENT**

COMES NOW, Double Diamond Utility Company, Inc. (“DDU”) and files this Response to The Cliffs Utility Committee’s Motion to Reopen the Record for Admission of Lot Sales Agreement, and in support thereof, DDU would respectfully show the following:

BACKGROUND

The Hearing on the Merits in this proceeding concluded on October 26, 2017. The Proposal for Decision was issued by Administrative Law Judge Casey Bell on February 13, 2018, and the parties filed their exceptions and replies to the Proposal for Decision on March 28, 2018, and April 12, 2018, respectively.

The Final Order in this matter was addressed at an open meeting of the Public Utility Commission (“PUC”) on May 10, 2018 (the “Open Meeting”). Pursuant to DDU’s request, oral argument was heard at the Open Meeting and the PUC Commissioners heard argument and asked questions of counsel for DDU, counsel for Intervenor White Bluff Ratepayers Group (“WBRG”), and the representative for Intervenor The Cliffs Utility Commission (“TCUC”), Byrom J. Smith. Counsel for PUC Staff was also present and available at the Open Meeting.

On May 22, 2018, TCUC filed its Motion to Reopen the Record for Admission of Lot Sales Agreement. In its motion, TCUC requests the PUC reopen the record *solely* for the purpose of admitting a document that was discussed at the Open Meeting. The document was not introduced during the Hearing on the Merits. TCUC did not confer with DDU prior to filing its Motion, and DDU opposes admission of this document into the record. Parties must file pleadings in opposition

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to admission of late-filed exhibits within five working days of the receipt of the motion requesting admission of the exhibit;¹ therefore, this response is timely filed.

ARGUMENT

DDU opposes TCUC's motion to admit the document because it violates the PUC's Procedural Rules, is hearsay, cannot be authenticated and is irrelevant and speculative.

A. The PUC's Procedural Rules Preclude Admission of the Document

The PUC's Procedural Rules, related to the supplementation of prefiled testimony and exhibits, states in part that "...supplementation of prefiled testimony and exhibits may be allowed prior to or during the hearing provided that the witness is available for cross-examination. The presiding officer may exclude such testimony if there is a showing that the supplemental testimony raises new issues or unreasonably deprives opposing parties of the opportunity to respond to the supplemental testimony...."² Further, the PUC's Procedural Rules related to late filed exhibits, state in relevant part that "(e)xcept as may otherwise be agreed to by the parties on the record prior to the close of the hearing, no exhibit shall be received in evidence in any proceeding after the hearing has been concluded except on the motion of the presiding officer or for good cause shown on written motion of the party offering the evidence...."³ In addition, PUC Procedural Rules require that a document be "necessary to ascertain facts not reasonably susceptible of proof under the Texas Rules of Civil Evidence," and "of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs" if the document is to be admitted despite the fact that it does not comport with the Texas Rules of Evidence.⁴

The timing of TCUC's motion to reopen the record is not "prior to or during the hearing;"⁵ and the document is offered **208 days** after the hearing on the merits concluded. Moreover, because the hearing has concluded, there is no witness available for cross-examination, re-direct examination or rebuttal testimony related to this information. The introduction of this new

¹ 16 Tex. Admin. Code ("TAC") § 22.226(d).

² 16 TAC § 22.225(c).

³ 16 TAC § 22.226(d).

⁴ 16 TAC § 22.221(a).

⁵ 16 TAC § 22.225(c).

document would deprive DDU of the opportunity to respond at this very late date. Further, TCUC has not shown good cause to admit this evidence other than to state that it did not understand the potential significance of the document. TCUC merely seeks to bolster its previous arguments. Simply claiming ignorance and wanting to bolster an argument with an untimely offer of a document into the record is neither good cause nor is it good precedence to waive the PUC's Procedural Rules related to evidence and exhibits in contested cases.

Further, the document is not "necessary to ascertain facts not reasonably susceptible of proof under the Texas Rules of Civil Evidence," and is not "of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs" as required by the PUC's Procedural Rules.⁶

TCUC's motion to reopen the record and admit the document into evidence violates multiple portions of Subchapter L of the PUC's Procedural Rules and would essentially allow for substantive, albeit flawed, information to be admitted without the opportunity for cross-examination, re-direct examination or rebuttal testimony to challenge the veracity of the document. Accordingly, TCUC's motion should be denied and the document should be excluded from the record.

B. The Document is Hearsay

"The Texas Rules of Civil Evidence as applied in nonjury civil cases in the courts of Texas shall be followed in contested cases."⁷ The document offered by TCUC is hearsay under Texas Rules of Evidence, Rule 801, because it is not a statement made by a declarant while testifying in this proceeding and is being offered by TCUC to prove the truth of the matter asserted.⁸ Consequently, it is not admissible under Rule 802.⁹ In addition, the document does not meet any of the exceptions to hearsay under Rule 803 or Rule 804.¹⁰ Without the ability to engage in cross-examination, re-direct questioning or to provide rebuttal testimony, DDU will be unfairly prejudiced and denied its due process rights if the document is admitted into evidence at this time.

⁶ 16 TAC § 22.221(a).

⁷ 16 TAC § 22.221(a).

⁸ Texas Rules of Evidence Rule 801.

⁹ Texas Rules of Evidence Rule 802.

¹⁰ Texas Rules of Evidence Rules 802-804.

Accordingly, TCUC's motion should be denied and the document should be excluded from the record.

C. The Document cannot be Authenticated

Pursuant to Rule 901(a) of the Texas Rules of Evidence, TCUC "must produce evidence sufficient to support a finding that the item is what [TCUC] claims it is."¹¹ The document offered by TCUC is not properly authenticated as required by Rule 901.¹² The document offered by TCUC is not self-authenticating as defined in Rule 902.¹³ It appears to be an excerpt of an incomplete response to discovery from another entity in a separate proceeding before the PUC. The authenticity of the document is not demonstrated on its face. TCUC has not produced any evidence of authenticity, and DDU will be unfairly prejudiced and denied its due process rights if the document is admitted into evidence at this time. The PUC must deny TCUC's motion because the document has not been authenticated and not admit the document into the record.

D. The Document is Irrelevant & Speculative

TCUC is attempting to bolster its argument related to the rate base to be set for DDU through this proposed evidence. However, the document is not relevant to that determination and is speculative at best. The document is hearsay, has not been authenticated, and is an unsigned, unrecorded copy of a draft deed. The document does not "make a fact more or less probable than it would be without the evidence" as required by Rule 401(a).¹⁴ In addition, Rule 403 requires that the document be excluded because any "probative value is substantially outweighed by a danger of ... unfair prejudice, [and] confusing the issues, ..." ¹⁵ The PUC must deny TCUC's motion because the document is irrelevant and speculative and not admit the document into the record.

¹¹ 16 TAC § 22.221(a).

¹² Texas Rules of Evidence Rule 901(a).

¹³ Texas Rules of Evidence Rule 902.

¹⁴ Texas Rules of Evidence Rule 401(a).

¹⁵ Texas Rules of Evidence Rule 403.

PLEADING IN THE ALTERNATIVE

If the PUC establishes a new precedent and concludes that TCUC's proposed document should be admitted, then in order to protect DDU's due process rights, the PUC must grant DDU's Motion to Reopen the Record, which has been filed on the same date as this response, is in direct response to TCUC's proposed evidence, and is based upon the same reasoning offered by TCUC. In addition, the PUC must remand this matter to the administrative law judge for further proceedings to allow the parties sufficient opportunity to evaluate and challenge the proposed evidence.

CONCLUSION

Double Diamond Utility Company, Inc., prays that The Cliffs Utility Committee's Motion to Reopen the Record for Admission of Lot Sales Agreement be DENIED for the reasons stated above. In the alternative and if the Commission decides to admit the document into the record, Double Diamond Utility Company, Inc., prays that its Motion to Reopen the Record and Admit Responsive Evidence be granted and this case be remanded to the administrative law judge for further proceedings.

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 24th day of May, 2018



John J. Carlton