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APPLICATION OF DOUBLE §
DIAMOND PROPERTIES §
CONSTRUCTION CO. DBA ROCK §
CREEK FOR A RATE/TARIFF CHANGE §

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

**DOUBLE DIAMOND PROPERTIES CONSTRUCTION CO. DBA ROCK CREEK'S
OBJECTIONS AND MOTION TO STRIKE TO THE DIRECT TESTIMONY OF
NELISA HEDDIN FOR ROCK CREEK HOMEOWNERS**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

NOW COMES, Double Diamond Properties Construction Co. dba Rock Creek ("DDPC") and files its Objections and Motion to Strike to the Direct Testimony of Nelisa Heddin for Rock Creek Homeowners. In support thereof, DDPC would respectfully show as follows:

I. OBJECTIONS TO DIRECT TESTIMONY OF NELISA HEDDIN.

DDPC objects to and moves to strike portions of the direct testimony of the Rock Creek Homeowners' expert witness, Nelisa Heddin, on the grounds that certain portions of her testimony are beyond the scope of her expertise and are not relevant to this proceeding. DDPC is the investor-owned utility who filed the application to establish rates in this proceeding. Ms. Heddin opines in some length on the business decisions of Double Diamond, Inc., the developer of the Rock Creek Resort and on the decisions of an investor of an investor-owned utility. However, Ms. Heddin fails to establish her expertise which would qualify her to opine on the business decisions of a developer or an investor. Moreover, the business decisions of a developer are irrelevant to whether the utility, DDPC, acted prudently in providing water service to lot owners within the development.

If a witness is not qualified as an expert, his or her testimony is limited to opinions rationally based on the witness's perception and helpful to understanding the testimony or determining a fact in issue.¹ To give any other opinion, a witness must be qualified "by knowledge, skill, experience, training, or education" and "the expert's scientific, technical, or

¹ Tex. R. Evid. 701; 16 Tex. Admin. Code § 22.221 ("TAC") (applying the Texas Rules of Evidence in contested case hearings).

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other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.”² All evidence, including the opinions of an expert, must be found to be relevant – which means it must have “any tendency to make a fact more or less probable than it would be without the evidence” and it must be “of consequence in determining the action.”³

In providing her background education and experience, Ms. Heddin describes performing cost of service and rate design studies for utilities – specifically for cities.⁴ She claims that doing so has given her a “broad understanding” of the water utility industry, including “issues associated with water supply, system capacity, operational issues, rate design and financial implications.”⁵ However, this testimony only establishes that Ms. Heddin is qualified to speak to the cost of service and rate design of water service providers – and specifically cities. It does not establish that she has any knowledge, skill, experience, training, or education that would qualify her to testify as to the business decisions of developers of subdivisions or the business decisions of investors of investor-owned utilities.

Moreover, whether the business decisions of a developer are prudent and reasonable are irrelevant to the decisions of the utility to serve its customers. A utility like DDPC, which holds a Certificate of Convenience and Necessity issued by the PUC, must provide continuous and adequate service to all customers within its certificated area.

A. Specific Objections to Direct Testimony of Nelissa Heddin

1. Page 18, Lines 2-3

DDPC objects to this question which improperly assumes facts which are not in evidence. This question asks Ms. Heddin to opine about the business decision of “DDPC.” Yet, the question improperly assumes that DDPC is the entity that makes decisions regarding when property owners can or must build on their lots. There is no evidence that DDPC is the entity that makes this decision. Because the question improperly assumes facts not-in-evidence and poses an improper question to Ms. Heddin, DDPC requests that both the question and her entire answer be stricken from the record.

² Tex. R. Evid. 702.

³ Tex. R. Evid. 402.

⁴ Direct Testimony of Nelisa Heddin for Rock Creek Homeowners at 5:15-20 (April 5, 2017).

⁵ *Id.* at 6:9-12.

2. Page 18, Lines 14-16

If the Honorable Administrative Law Judge declines to strike the entire answer to the improper question addressed above, DDPC requests that the last sentence of that answer be stricken from the record. In that sentence, Ms. Heddin states her opinion as to the actions of an investor of an investor-owned utility. However, Ms. Heddin is not qualified as an expert to opine regarding the actions or decisions of investors of investor-owned utilities. She has presented no knowledge, skill, experience, training, or education about the business decisions of investors in investor-owned utilities. As such, she has failed to establish that she is qualified as an expert on such issues pursuant to the Texas Rules of Evidence. Whether an investor would invest in a particular investor-owned utility is unrelated to the cost of service and rate designs for cities which Ms. Heddin is experienced in performing or the water supply, capacity, operational, rate design, or financial issues of which Ms. Heddin claims to have knowledge. In addition, her opinion is not helpful to the trier of fact in understanding any evidence or in determining the issues in dispute.⁶ Finally, her opinion does not qualify as a lay witness opinion because it is not rationally based on her perception.⁷

3. Page 20, Lines 5-6 and 8-12

DDPC objects to this question and answer because it improperly requests that Ms. Heddin evaluate the business decisions of a developer – an area in which she is not qualified as an expert to provide an opinion. The question asks Ms. Heddin about the “business practices of the ‘Double Diamond Companies’” and the first two sentences of the answer, beginning with “These” on Line 8 and ending with “utility” on Line 12, show that Ms. Heddin is answering the question by opining about the business practices of developers. Again, Ms. Heddin’s prefiled testimony fails to establish that she is an expert in the business practices of developers. While she has experience with rate design and cost of service analyses for cities, she does not list any experience with the business practices of developers. Without such knowledge, skill, experience, training or education, Ms. Heddin lacks the qualifications required by the Texas Rules of Evidence to provide an opinion on this subject. Moreover, her opinion is not helpful to the trier of fact in understanding any evidence or in determining the issues in dispute.⁸ Finally, her

⁶ Tex. R. Evid. 702.

⁷ Tex. R. Evid. 701.

⁸ Tex. R. Evid. 702.

opinion does not qualify as a lay witness opinion because it is not rationally based on her perception.⁹

In addition, Ms. Heddin's opinion about the business decisions of a developer – not a utility – is not relevant to this proceeding.¹⁰ DDPC is the utility, and its DDPC's decisions that are relevant to this proceeding. Whether Double Diamond, Inc., a developer, chose to develop a particular tract of land or the order in which it developed subdivisions within a tract of land is not relevant to this proceeding. Thus, DDPC requests that these passages be stricken from the record.

4. Page 33, Line 11 through Page 34, Line 9

The question beginning on Page 33, Line 11 asks Ms. Heddin to explain the “findings” of a particular Texas Supreme Court opinion. Ms. Heddin proceeds to quote specific passages from the opinion and ultimately concludes with her opinion that the “holding” of the case “applies” to this case. Ms. Heddin is an expert on rate design and cost of service analyses. She is not a legal expert. Her legal analysis of a Texas Supreme Court opinion, and her opinion of the “holding” of that case, are not proper expert testimony. Without establishing the knowledge, skill, experience, training or education to evaluate the Texas Supreme Court's decision, Ms. Heddin's opinion about the holding of the case and its applicability are beyond the scope of her expertise. Moreover, this opinion testimony is not helpful to the trier of fact who is more than capable of reading and analyzing case law.¹¹ Finally, her opinion does not qualify as a lay witness opinion because it is not rationally based on her perception.¹² For these reasons, DDPC requests that Ms. Heddin's legal analysis be stricken from the record.

II. CONCLUSION

DDPC objects to specific portions of Ms. Heddin's prefiled direct testimony on the grounds that those portions are beyond the scope of Ms. Heddin's expertise and are not helpful to the trier of fact. Thus, they are inadmissible under Texas Rule of Evidence 702. Because none of the proposed opinions are rationally based on Ms. Heddin's perceptions, they are inadmissible as lay witness opinions under Texas Rule of Evidence 701. In addition, certain opinions offered

⁹ Tex. R. Evid. 701.

¹⁰ Tex. R. Evid. 402.

¹¹ Tex. R. Evid. 702.

¹² Tex. R. Evid. 701.

by Ms. Heddin are not relevant to this proceeding and are inadmissible under Texas Rule of Evidence 402. For these reasons, DDPC moves to strike the above-cited portions of Ms. Heddin's testimony from the record in this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 12th day of April, 2017, a true and correct copy of the foregoing document was served via email pursuant to Rule 22.74:

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