



Control Number: 46256



Item Number: 1687

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SOAH DOCKET NO. 473-17-1641.WS
PUC DOCKET NO. 46256

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2017 JUL -5 PM 3:05

APPLICATION OF LIBERTY § BEFORE THE STATE OFFICE
UTILITIES (WOODMARK SEWER) §
CORP. (CCN NO. 20679), LIBERTY §
UTILITIES (TALL TIMBERS SEWER) §
CORP. (CCN NO. 20694), AND § OF
LIBERTY UTILITIES (SUB) CORP. TO §
CHANGE RATES FOR SEWER §
SERVICES IN SMITH COUNTY, §
TEXAS § ADMINISTRATIVE HEARINGS

UTILITY COMMISSION
FILING CLERK

SOAH ORDER NO. 6
CONSOLIDATING APPEAL, RULING ON PENDING DISCOVERY
MOTIONS, RULING ON MOTIONS TO STRIKE TESTIMONY,
AND RULING ON HSPM DESIGNATIONS

I. CONSOLIDATING APPEAL FROM CITY OF TYLER

On May 8, 2017, Liberty Utilities (Woodmark Sewer) Corp., Liberty Utilities (Tall Timbers) Corp., and Liberty Utilities (Sub) Corp. (Collectively Liberty Utilities), filed an appeal of City of Tyler (Tyler) Ordinance No. O-2017-33, which denied Liberty Utilities' application to change sewer rates for customers served by Liberty Utilities within the city limits of the City of Tyler (Tyler or City). Liberty Utilities requests that its appeal of the Tyler ordinance denying Liberty Utilities' rate request be consolidated with this docket, and that upon final order in this docket, that the Commission set the rates within Tyler and in the environs to provide a unified rate structure.

Liberty Utilities' request is **GRANTED**. Therefore, Liberty Utilities' appeal from the action of the City of Tyler is consolidated into the docket, and the Commission's final order in this case will apply to the areas service by Liberty Utilities within the city as well as the areas service by Liberty Utilities outside Tyler.

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II. PENDING DISCOVERY DISPUTES

Tyler RFI 3-7 to Liberty Utilities, Tyler's Motion to Compel:

GRANTED in part, and **DENIED** in part. Liberty Utilities shall identify the contributions in aid (CIAC) associated with the particular properties identified by Tyler within its city limits. CIAC is relevant to the computation of invested capital used to calculate rates. Tyler's Motion to Compel Liberty Utilities to "provide all documentation demonstrating compliance with Tyler's resolution No. R-2011-8 [sic],"¹ is **DENIED**. Tyler has not demonstrated how or why compliance with a city ordinance is relevant to this rate case when the city could have initiated enforcement actions if it felt an ordinance had been flouted.

Liberty Utilities RFI 1-20 to Tyler, Liberty Utilities' Motion to Compel:

DENIED. Liberty Utilities' information request is not properly limited in time. In addition, the issue of Tyler's management practices is not relevant in this case. *Liberty Utilities'* management and prudence is an issue in this case. Tyler argues correctly in its Response to Liberty Utilities' Motion to Compel that the issue in this rate case is whether it would have been prudent for Liberty Utilities to have purchased sewer treatment capacity from Tyler. That does raise the issue of Tyler's environmental compliance history.

Liberty Utilities RFI 1-28 to Tyler, Liberty Utilities' Motion to Compel:

DENIED. Liberty Utilities' request asking for information for the last 16 years is not reasonably limited in time, and is not relevant. Whether Tyler disagrees with Liberty Utilities' position that a "mutually beneficial business relationship" is unlikely is a matter that can be addressed by Liberty Utilities directly in testimony and in well-formulated cross-examination.

¹ Tyler Motion to Compel at 2.

Liberty Utilities RFI 1-40 to Tyler, Liberty Utilities' Motion to Compel:

DENIED in part, **GRANTED** in part. For the same reasons given in the ruling on Liberty Utilities' RFI 1-28, the Motion to Compel is **DENIED** in large part. However, because the Consent Decree in the case cited is presumably public record, Tyler will provide Liberty Utilities with a copy of the Consent Decree, or direct Liberty Utilities to a location where a copy can be procured.

Liberty Utilities RFI 1-41 to Tyler; Liberty Utilities' Motion to Compel:

DENIED. Tyler has provided information regarding RFI-40(b), so that subsection of the RFI is not in issue. The remainder of Liberty Utilities' Motion to Compel responses to RFI 1-41(a), (c), (d), and (e) is **DENIED** for the reasons in Tyler's Response to the Motion to Compel. Tyler's retail rates are not in issue in this case. Moreover, Tyler has not yet formulated how to pay for measures required by the Consent Decree and has nonetheless provided what information it has compiled.

Liberty Utilities' Objections to City of Tyler's Prefiled Direct Testimony and Exhibits and Motion to Strike:

GRANTED with respect to Objection 45 to Direct Testimony of Chris Ekrut (page 60, lines 11-12). All other objections to the Direct Testimonies of Tyler witnesses Gregory Morgan and Chris Ekrut are **DENIED**.

Liberty Utilities' objections to the Direct Testimonies of Tyler witnesses Gregory Morgan and Chris Ekrut are based on the argument that neither person is qualified to testify as an expert. Therefore, Liberty Utilities contends that the direct prefiled testimonies offered by both witnesses are outside the area of their alleged expertise. Tyler argues in response that both witnesses are expert witnesses and may offer their opinions – including opinions that

may be based on mixed questions of law and fact – so long as the expert opinion is confined to the relevant issues and is based on proper legal concepts.²

The Administrative Law Judge (ALJ) concurs with Tyler and believes the testimony offered by both witnesses is germane and relevant, and is the type of expert testimony regularly offered in Commission proceedings. Whether it is probative will depend on cross-examination during the hearing on the merits, the testimony offered in opposition by Liberty Utilities' witnesses, and the persuasiveness of the parties' positions in briefs. More to the point, expert testimony offered with respect to Liberty Utilities' management, prudence (*e.g.*, with respect to the issues regarding regionalization), accounting practices practiced by Liberty Utilities, and the possible alternative of connecting to Tyler's sewer system in lieu of expending funds on new sewer plant to serve Tall Timbers and Woodmark, among other issues, is directly relevant to the matters under review in this case. Gregory Morgan and Chris Ekrut will be tendered as witnesses at the hearing on the merits, and Liberty Utilities is free to challenge their respective expert opinions on cross-examination, and may argue the weight to be given their opinions in briefs and argument.

Liberty Utilities' Objections to OPUC's Prefiled Direct Testimony and Exhibits and Motion to Strike:

DENIED. For many of the same reasons expressed in the ruling regarding Tyler's expert witnesses, the ALJ believes Liberty Utilities' objections to the testimonies of OPUC witnesses Nelissa Heddin and Anjuli Winker are not well-founded. OPUC is correct that its witnesses "do not opine on purely legal questions, but rather mixed questions of law and fact: Each analysis begins by setting out the legal concepts guiding their analysis and then applies the facts and data to those concepts to reach a conclusion or recommendation."³ As expert witnesses, both Ms. Heddin and Ms. Winker may opine on the issues on which they have filed direct testimony.

² Tyler Response to Liberty Utilities Objections to City of Tyler Prefiled Testimony and Exhibits and Motion to Strike at 2.


³ OPUC Response to Liberty Utilities' Objections to and Motion to Strike Portions of OPUC's Direct Testimony at 10.

Their testimonies are germane and relevant, and Liberty Utilities may explore the foundation of both witnesses' opinions on cross-examination, through the testimony of its own witnesses, and in brief and argument. Upon review of the record as a whole, the ALJ and the Commission will decide the weight to be given to the testimony given by any and all witnesses as those testimonies affect the proposal for decision and the Commission's final order in this case.

III. RECLASSIFYING LIBERTY UTILITIES' DESIGNATED HIGHLY SENSITIVE PROTECTED MATERIAL (HSPM).

As a result of the transfer of this case to the undersigned and the ALJ's prolonged medical leave, this issue has not heretofore been addressed. In reviewing the testimony, it appears the parties have treated the nine documents designated by Liberty Utilities as HSPM, though Tyler contends that some of the material designated as HSPM should be unprotected.⁴ After reviewing the pleadings and arguments of the parties, the ALJ concludes that the material designated by Liberty Utilities qualifies at the very least as Confidential. However, it is not clear that Liberty Utilities has carried its burden that all nine documents should be considered HSPM. Staff's Response to HSPM Designation⁵ offers a solution with which the ALJ concurs. That is, the two documents related to W-2 tax forms and Canadian T4 tax forms should be treated as HSPM. The other seven documents should be treated as Confidential under the Protective Order. It is so **ORDERED**.

SIGNED June 30, 2017.


FERNANDO RODRIGUEZ
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

⁴ City of Tyler's Response to Liberty Utilities' Objection to Tyler's Request for Change in Designation at 3.

⁵ Commission Staff's Response to HSPM Designations at 1.