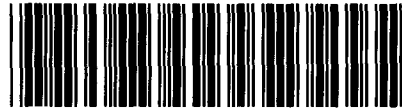




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SOAH DOCKET NO. 473-17-1641.WS
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APPLICATION OF LIBERTY §
UTILITIES (WOODMARK SEWER) §
CORP. (CCN NO. 20679), LIBERTY §
UTILITIES (TALL TIMBERS SEWER) §
CORP. (CCN NO. 20694), AND §
LIBERTY UTILITIES (SUB) CORP. TO §
CHANGE RATES FOR SEWER §
SERVICES IN SMITH COUNTY, §
TEXAS §
PUBLIC UTILITY COMMISSION
BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

SOAH ORDER NO. 9
RULING ON MOTIONS TO STRIKE TESTIMONY

I. INTRODUCTION

Currently pending before the Administrative Law Judge (ALJ) are several motions to strike testimony. Liberty Utilities (Woodmark Sewer) Corp., Liberty Utilities (Tall Timbers) Corp., and Liberty Utilities (Sub) Corp. (collectively, Liberty Utilities) filed a motion to strike extensive portions of the direct testimony of intervenor Katherine Carter (Liberty Utilities's Motion to Strike).

Public Utility Commission of Texas staff (Staff) filed its Objection and Motion to Strike the Rebuttal Testimony of Liberty Utilities witness Bruce H. Fairchild (Staff's Motion to Strike).

The Office of Public Utility Counsel (OPUC) filed its Objections and Motion to Strike Rebuttal Testimony seeking to strike portions of the rebuttal testimony filed by Liberty Utilities witnesses Gerald Becker, Matthew Garlick, Bruce Fairchild, and Mark Zeppa (OPUC's Motion to Strike).

The City of Tyler (Tyler) filed its Objections to and Motion to Strike Rebuttal Testimony of Matthew Garlick and Mark H. Zeppa (Tyler's Motion to Strike). The various motions to strike are ruled on as follows:

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II. RULINGS ON MOTIONS TO STRIKE

Liberty Utilities's Motion to Strike

DENIED. Liberty Utilities seeks to strike virtually all of Ms. Carter's direct testimony on grounds of relevance (Objections 1, 2, 3, 5, 6, 7, and 8) and because Liberty Utilities argues that Ms. Carter is not qualified to opine that "Liberty Utilities is a monopoly in Smith County" (Objection 4).¹ Ms. Carter testifies that her company, Southchase Rentals, owns 14 duplexes for which she pays the sewer bills.² As such, she and her company are an "affected person" as defined in Texas Water Code § 13.002(1) and Ms. Carter is entitled to testify on the effect Liberty Utilities' proposed rate increase will have on her business and tenants. Commission practice is to allow affected persons, particularly parties proceeding *pro se*, to provide testimony regarding the effect on them or their related interests of a proposed regulatory action (such as the proposed rate increase).

Similarly, while not an attorney, Ms. Carter may testify as to her understanding of what constitutes a "monopoly in Smith County," and the ALJs can assess the weight to be given her testimony, given the facts adduced at hearing.³ Liberty Utilities may test Ms. Carter's testimony and credibility on cross examination, and can argue the weight to given her testimony in argument and briefs.

Staff's Motion to Strike (Rebuttal Testimony of Bruce Fairchild)

For the reasons stated in Liberty Utilities's Consolidated Response to Objections and Motions to Strike Liberty Utilities' Prefiled Rebuttal Testimony and Exhibits (Liberty Utilities's

¹ Carter Direct Testimony at 3; Liberty Utilities Motion to Strike at 2.

² Carter Direct Testimony at 2.

³ In Texas Water Code § 13.001(b) the legislature has found that "retail public utilities are by definition monopolies in the areas they serve." The definition would appear to apply to Liberty Utilities in this case. The ALJ would also note that Mr. Garlick states that Liberty Utilities is a retail public utility and is a monopoly in the area in which it serves. Garlick Rebuttal Testimony at 9.

Consolidated Response), Staff's Motion to Strike is **DENIED**. Because Staff challenged Liberty Utilities's use of the presumptively reasonable rate of return on equity option prescribed in the Commission's standard rate filing package, Liberty Utilities is entitled to present rebuttal testimony by Mr. Fairchild addressing Staff's use of the discounted cash flow (DCF) and capital asset pricing model (CAPM), by correcting what he alleges are flaws in the Staff methodology.

With respect to Staff's contention that Liberty Utilities did not provide evidence that Mr. Fairchild planned to present a DCF or CAPM analysis in his rebuttal testimony,⁴ Liberty Utilities points out that Mr. Fairchild did not begin his rebuttal analysis until he read the parties' direct testimony in May and June 2017. Staff points to Liberty Utilities's response to Staff RFI 2-9 as evidence that Liberty was not responsive to a discovery question asking whether Mr. Fairchild had conducted additional analysis, to which Liberty Utilities answered "No."⁵

Staff RFI 2-9 was filed on December 11, 2016, and Liberty Utilities responded on January 11, 2017. However, as noted, Mr. Fairchild did not have reason to amend his analysis or his discovery response until he reviewed Staff and intervenor testimonies in May and June 2017, at which point he was began preparing rebuttal testimony. Finally, Staff and other parties will have the opportunity to challenge Mr. Fairchild's analysis and conclusions on cross-examination, and may argue the weight to given Mr. Fairchild's testimony in argument and briefs.

OPUC's Motion to Strike (Rebuttal Testimony of Bruce Fairchild)

For the reasons raised in Liberty Utilities's Consolidated Response and the response to Staff's Motion to Strike outlined above, OPUC's Motion to Strike is **DENIED**. OPUC complains that Mr. Fairchild's analysis in rebuttal testimony results in a different return on equity, cost of debt, capital structure, and overall rate of return than that requested in Liberty Utilities's application. OPUC and the other parties may explore those changes on

⁴ Staff's Motion to Strike at 2.

⁵ Staff's Motion to Strike at 2 and Attachment A.

cross-examination, in argument, and briefs and may argue that Liberty Utilities should be limited to amounts it requested in its application.

OPUC's Motion to Strike (Rebuttal Testimony of Matthew Garlick)

For the reasons stated in Liberty Utilities's Consolidated Response, OPUC's Motion to Strike is **DENIED**. OPUC bases many of its arguments on relevance. However, in Order No. 6 the ALJ denied Liberty Utilities's motion to strike the direct testimonies of Nelissa Heddin and Anjuli Winker because the ALJ believes their testimonies addressing prudence issues may be of assistance to the triers of fact. The ALJ reaches a similar conclusion here. Mr. Garlick's testimony addresses prudence issues addressed by the testimony of the other parties and will not be struck because it may assist the triers of fact in understanding and addressing the prudence issues in dispute. OPUC's arguments regarding relevance are actually disagreements with the conclusions reached in Mr. Garlick's testimony, which are disagreements on the merits and not issues related to relevance. The weight to be given Mr. Garlick's testimony can be tested by the parties in cross-examination, in argument, and in briefs.

OPUC's Motion to Strike (Gerald Becker)

For the reasons stated in Liberty Utilities's Consolidated Response, OPUC's Motion to Strike is **DENIED**. No party has challenged Mr. Becker's qualifications to testify, and OPUC provides no basis or background for its assertion that Mr. Becker "is not an expert witness and has no personal knowledge of such matters."⁶ To the extent OPUC and the other parties have a disagreement with Mr. Becker's opinion regarding the capitalization policies of municipalities vis-à-vis an investor-owned water or sewer utility, they will have the opportunity to test his testimony, credibility, and his conclusions on cross-examination, in argument, and in briefs. With respect to OPUC's assertion that Mr. Becker is incorrect regarding the proper way to assess invested capital, OPUC's argument goes to the merits and not a matter of relevance.

⁶ OPUC's Motion to Strike at 8.

OPUC's Motion to Strike (Mark Zeppa)

For the reasons stated in Liberty Utilities's Consolidated Response, OPUC's Motion to Strike is **DENIED**. OPUC is correct to the extent it suggests that the triers of fact in this case are, initially, the ALJs, and ultimately, the Commission.⁷ Mr. Zeppa's testimony indicates that he has sufficient knowledge and expertise for his testimony to be admissible.⁸ OPUC and the parties will have the opportunity to test Mr. Zeppa's historical recollections and legal opinions on cross-examination, in argument, and in briefs, and the weight to be given his testimony is an issue to be determined on the merits.

Moreover, given that the ALJ denied Liberty Utilities's motions to strike OPUC prudence witnesses's direct testimonies in Order No. 6 because they addressed mixed questions of law and fact, it would be unreasonable to deny Liberty Utilities the chance to address the prudence and legal opinions raised by the parties' witnesses in their direct testimonies.

Tyler's Motion to Strike (Matthew Garlick and Mark Zeppa)

For the reasons stated in Liberty Utilities's Consolidated Response, as well as the reasons stated above in regard to OPUC's motion to strike the rebuttal testimonies of Matthew Garlick and Mark Zeppa, Tyler's Motion to Strike is **DENIED**. As with the response to motions to strike filed by Staff and OPUC, Tyler will have the opportunity to test the testimonies and conclusions of Messrs. Garlick and Zeppa on cross-examination, in argument, and in briefs. The ALJs will assess that information in deciding how weight to accord the rebuttal testimonies that Tyler seeks to strike.

With respect to Tyler's argument that Edmund Pamatat's affidavit should be struck as an exhibit from Mr. Garlick's rebuttal testimony, the ALJ agrees with the response contained in

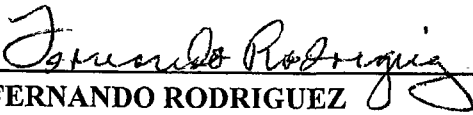
⁷ OPUC's Motion to Strike at 10.

⁸ Zeppa Rebuttal Testimony at 9. This order addresses only the admissibility of Mr. Zeppa's testimony, not any other issue relating to Mr. Zeppa both representing and testifying for a party in this case.

Liberty Utilities's Consolidated Response that, given that the ALJ denied Liberty Utilities's motion to strike Mr. Morgan's direct testimony on similar issues over the objection of Liberty Utilities, it would be unfair to prevent Liberty Utilities from responding. The ALJ also concurs with Liberty Utilities's position that, while Mr. Pamatat's presence at the hearing would be preferable, allowing Mr. Garlick to include Mr. Pamatat's affidavit as an exhibit is a reasonable accommodation because, as an expert, Mr. Garlick can rely on the affidavit such as the one in question.⁹

As with the other witnesses in this case, the parties can test Mr. Garlick's testimony, and credibility, including his understanding of the information provided in Mr. Pamatat's affidavit, on cross-examination, in argument, and in briefs.

SIGNED July 21, 2017.


FERNANDO RODRIGUEZ
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

⁹ The ALJ notes that no party requested that Mr. Pamatat appear telephonically. Rather, the only motion considered was to strike his affidavit altogether, which is not reasonable under the circumstances.