



Control Number: 47275



Item Number: 423

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APPLICATION OF THE COMMONS § BEFORE THE STATE OFFICE
WATER SUPPLY, INC. FOR § OF
AUTHORITY TO CHANGE RATES § ADMINISTRATIVE HEARINGS

**COMMISSION STAFF'S OBJECTION AND MOTION TO STRIKE PORTIONS OF
THE REBUTTAL TESTIMONY OF BRET WAYNE FENNER, P.E.**

COMES NOW the Staff of the Public Utility Commission of Texas (Staff), representing the public interest, and files this Objection and Motion to Strike Portions of the Rebuttal Testimony of Bret Wayne Fenner, P.E. and would show the following:

I. BACKGROUND

On March 7, 2018, The Commons Water Supply, Inc. (The Commons) filed the Rebuttal Testimony of Bret Wayne Fenner, P.E.. Pursuant to the procedural schedule adopted in SOAH Order No. 5, objections to The Commons' rebuttal testimony are due no later than March 14, 2018. Therefore, this pleading is timely filed.

II. OBJECTION AND MOTION TO STRIKE

Pages 1 through 4 of Exhibit A attached to Mr. Fenner's testimony should be stricken because they constitute inadmissible hearsay that is not subject to an exception. Hearsay is an out of court statement offered to prove the truth of the matter asserted.¹ To rebut Staff's position that The Commons' cost per connection per month for labor expenses is high for a utility with less than 1,000 connections, Mr. Fenner proffered "letters from various investor owned utilities...that indicates their average cost of operations."² These letters, which are actually emails from four different individuals, each state a range of dollar amounts representing the cost per connection per

¹ Tex. R. Evid. 801(d).

² Prefiled Rebuttal Testimony of Bret Wayne Fenner, P.E. on Behalf of The Commons Water Supply, Inc. at 2:16-3:2 (Mar. 7, 2018) (Fenner Rebuttal).

month for the operations of various utilities.³ Mr. Fenner relies on these dollar amounts to conclude that The Commons' charge per connection per month for operations is "within the range charged by other similar utilities..."⁴ None of the statements are supported by any form of admissible documentary evidence. Yet, as Mr. Fenner's testimony indicates, he is offering the statements contained in these emails as proof of utility operations costs. Accordingly, pages 1 through 4 of Exhibit A should be stricken as hearsay because they contain statements offered to prove the truth of the matter asserted.

Any pages in Exhibits C and D that Mr. Fenner does not cite to directly should also be stricken. On rebuttal, a party is limited to evidence that directly answers or disproves the last round of evidence offered by an opposing party.⁵ Exhibit C contains the full transcript of the deposition of Staff's witness Andrew Novak;⁶ yet, Mr. Fenner only cites to pages 26, 27, and 41 as support for his rebuttal.⁷ Exhibit D contains the full transcript of the deposition of Staff's witness Gregory Charles;⁸ yet, Mr. Fenner only cites to pages 19 and 22-25.⁹ Thus, pages 1 through 25, 28 through 40, 42 through 51, and the entire index of Mr. Novak's deposition transcript should be stricken from Exhibit C, and pages 1 through 18, 20 through 21, 26 through 36, and the entire index of Mr. Charles's deposition transcript should be stricken from Exhibit D because they have not been used to answer or disprove either Mr. Novak's or Mr. Charles's direct testimony.

Furthermore, lines 3 through 15 on page 41 of Mr. Novak's deposition and lines 19 through 25 on page 24 and 1 through 22 on page 25 of Mr. Charles's deposition contain questions which are the subject of pending objections and the answers to those questions. Each question and accompanying objection is identified and discussed more fully below. Before The Commons' may

³ See e.g., Fenner Rebuttal, Ex. A at 1 (stating, "I find the average cost of operation is between \$18.00 and \$23.00 per connection, per month").

⁴ Fenner Rebuttal at 3:4-5.

⁵ See *In re Bledsoe*, 41 S.W.3d 807, 813 (Tex. App.—Fort Worth 2001, no pet.).

⁶ Fenner Rebuttal, Ex. C.

⁷ Fenner Rebuttal at 2:fn 1, 7:fn 7.

⁸ Fenner Rebuttal, Ex. D.

⁹ Fenner Rebuttal at 9:fn 10, 10:fn12, 10:fn 14.

use the answers to these questions as rebuttal evidence, the presiding office must issue a ruling on the objections.¹⁰

Staff makes the following objection related to the deposition of Andrew Novak:

1) Novak Deposition Transcript at 41:3-15

Q: Okay. Given that The Commons Water Supply is fully built out, do you believe it would have a need for significant expenditures to increase its net plant?

MS. D'AMBROSIO: Objection; form.

A: Can you ask that question again?

Q: (By Ms. Shea) Sure.

Given that The Commons Water Supply is completely, fully built out and doesn't have any room for expansion for facilities, do you believe that there would be a need for significant expenditures to increase net plant.

A: I couldn't say if there would be a need for significant expenditures to enhance their plant.

This question is objectionable because it calls for speculation.¹¹ Answering this question would require Mr. Novak to speculate on matters with which he is not familiar; specifically, The Commons' future need for investment in capital assets. A review of the assets that comprise The Commons' invested capital is outside the scope of the financial review conducted by Mr. Novak in this proceeding, and answering this question would require the witness to speculate as to what expenditures The Commons' may or may not make in the future. In addition, this question is premised on the fact that The Commons' is fully built out; however, no foundation has been laid to support this assertion.

Staff makes the following objections related to the deposition of Greg Charles:

1) Charles Deposition Transcript at 24:19-25:7

Q: I understand that, but it requires The Commons to have a certain number of customers using in excess of 15,000 gallons in order to collect their revenue requirement, correct?

¹⁰ 16 Tex. Admin Code (TAC) § 33.143(a); Tex. Gov't Code § 2001.097(b).

¹¹ Tex. R. Civ. Proc. 199.5(e) and cmt. 4; Tex. R. Evid. 401; *Madrigal v. State*, 347 S.W.3d 809, 813 (Tex. App.—Corpus Christi 2011, no pet.) (“testimony that is based solely on speculation and conjecture necessarily lacks probative value, and therefore fails to meet the relevancy requirement of the rules of evidence”).

I mean, you're using—coming up with revenue generated, which will then go into the revenue requirement calculation, so if they don't have customers utilizing in excess of 15,000 gallons in the quantity of customers using that gallonage, then they're not going to meet the revenue requirement, correct?

MS. D'AMBROSIO: Objection, form.

A: That is true. All—all those who are in that tier, given the—given the suggested rates, if they use more.

This question is objectionable because it is a leading question related to rate design, which is a contested material issue in this proceeding.¹² Because it is a compound question—asking first whether Mr. Charles's recommended rate design requires a certain number of customers to use in excess of 15,000 gallons and then asking if The Commons can meet its revenue requirement if they don't have customers using in excess of 15,000 gallons—it is also vague.¹³ As a result, the witness's answer is unreliable and irrelevant.¹⁴

2) Charles Deposition Transcript at 25:8-17

Q: (By Ms. Shea) And in that instance, doesn't that actually create an incentive for the utility to discourage conservation—

MS. D'AMBROSIO: Objection.

Q: (By Ms. Shea)—because they need that revenue to come up with their revenue requirement, isn't that correct?

MS. D'AMBROSIO: Objection, form.

A: Oh, yes, the way that is—the way it is there, yes.

This question is objectionable because it is a leading question related to rate design, which is a contested material issue in this proceeding.¹⁵ The question also calls for speculation¹⁶ because

¹² Tex. Gov't Code § 2001.097(c); Tex. R. Evid. 611(c); *Cecil v. T.M.E. Investments, Inc.*, 893 S.W.2d 38, 48 (Tex. App.—Corpus Christi 1994, no writ) (“leading questions should cover testimony only up to the point of controversy”).

¹³ Tex. R. Civ. Proc. 199.5(e) and cmt. 4.

¹⁴ Tex. R. Evid. 401; *Madrigal*, 347 S.W.3d at 813.

¹⁵ Tex. Gov't Code § 2001.097(c); Tex. R. Evid. 611(c); *Cecil*, 893 S.W.2d at 48.

¹⁶ Tex. R. Civ. Proc. 199.5(e) and cmt. 4.

it requires Mr. Charles to speak on The Commons' approach to conservation, which he may or may not be familiar with. As a result, the witness's answer is unreliable and irrelevant.¹⁷

3) Charles Deposition Transcript at 25:18-22

Q: (By Ms. Shea) Okay. I take it, then, that you did not design your rates with the specific goal of encouraging conservation, correct?

MS. D'AMBROSIO: Objection, form.

A: No, the way those—it turned out there, no.

This question is objectionable because it is a leading question related to rate design, which is a contested material issue in this proceeding.¹⁸

III. PORTIONS OF MR. FENNER'S REBUTTAL THAT SHOULD BE STRICKEN

In accordance with the foregoing objections, Staff requests that the following be stricken:

Document	Pages to Be Stricken	Subject Matter
Fenner Rebuttal Testimony, Exhibit A	1-4	Emails to Bret Fenner from Patric C. King, Mike Ellington, John-Mark Matkin, and Chuck Peterson stating the average cost of utility operations
Fenner Rebuttal Testimony, Exhibit C	1-25; 28-40; 41:3-15; 42-51; and the entire Index	Pages of Andrew Novak's deposition transcript not used to rebut Staff's direct testimony and the portion of page 41 that includes a question that is the subject of a pending objection and the answer to that question
Fenner Rebuttal Testimony, Exhibit D	1-18; 24:19-25; 25:1-22; 26-36; and the entire Index	Pages of Greg Charles's deposition transcript not used to rebut Staff's direct testimony and the portions of pages 24-25 that include questions that are the subject of pending objections and the answers to those questions

¹⁷ Tex. R. Evid. 401; *Madrigal*, 347 S.W.3d at 813.

¹⁸ Tex. Gov't Code § 2001.097(c); Tex. R. Evid. 611(c); *Cecil*, 893 S.W.2d at 48.

IV. CONCLUSION

For the reasons discussed above, Staff respectfully requests the entry of an Order sustaining Staff's objections and striking the following from Mr. Fenner's rebuttal testimony: pages 1-4 of Exhibit A; pages 1 through 25, 28 through 40, 41 lines 3 through 15, 42 through 51, and the entire index of Exhibit C; and pages 1 through 18, 20 through 21, 24 line 19 through 25 line 22, 26 through 36, and the entire index of Exhibit D.

Dated: March 14, 2018

Respectfully Submitted,

**PUBLIC UTILITY COMMISSION OF TEXAS
LEGAL DIVISION**

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**SOAH DOCKET NO. 473-18-0193.WS
PUC DOCKET NO. 47275**

CERTIFICATE OF SERVICE

I certify that a copy of this document will be served on all parties of record on March 14, 2018, in accordance with 16 TAC § 22.74.


Eleanor D'Ambrosio