



Control Number: 47897



Item Number: 221

Addendum StartPage: 0

APPLICATION OF FOREST GLEN §  
UTILITY COMPANY FOR § BEFORE THE  
AUTHORITY TO CHANGE RATES § STATE OFFICE OF ADMINISTRATIVE  
HEARINGS

**MOTION TO STRIKE AND OBJECTIONS TO DIRECT TESTIMONY AND EXHIBITS**  
**OF VAN JOHNSON**

COMES NOW, Forest Glen Utility Company (“FGU” or “Applicant”) and files this Motion to Strike and Objections to Direct Testimony and Exhibits of Van Johnson and in support thereof, would respectfully show the following:

**I. BACKGROUND**

On May 18, 2018, the State Office of Administrative Hearings (“SOAH”) held the Prehearing Conference in this matter and named parties, including Intervenor Van Johnson. Mr. Johnson and each of the three (3) other intervenors participated in the hearing fully and agreed to the due dates established in the procedural schedule included in SOAH Order No. 2. In accordance with SOAH Order No. 2, FGU filed its Direct Prefiled Testimony (“PFT”) on July 18, 2018. According to the Public Utility Commission of Texas’ (“PUC” or “Commission”) Interchange Service, Intervenor Johnson filed his PFT and Exhibits on August 10, 2018. Despite emailing a PDF copy of his PFT to FGU on August 8, 2018, the Commission did not recognize the filing with its email notification of Intervenor’s filing until 11:23 AM on August 10, 2018.<sup>1</sup> SOAH Order No. 2 mandates that objections to Intervenor’s Direct Testimony be filed no later than August 16, 2018. Accordingly, FGU’s Motion to Strike and Objections are timely filed.

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<sup>1</sup> See Exhibit A, emailed filing alert from the Commission.

## II. AUTHORITIES

Title 16 Texas Administrative Code (TAC) § 22.225 of the Commission rules sets forth the manner and timing for filing of PFT in contested utility rate cases:

(a)(8) For all water and sewer matters filed under TWC chapters 12 or 13, the presiding officer shall establish a prefiled testimony schedule . . . .<sup>2</sup>

SOAH Order No. 2 established August 9, 2018 as the deadline for Intervenor to file all prefiled testimony.<sup>3</sup> Commission rules further provide that PFT must be filed timely to be admitted into evidence and comprise the administrative record in hearings held under the Administrative Procedure Act:

(b) Unless otherwise ordered by the presiding officer, direct and rebuttal testimony shall be received in written form. The written testimony of a witness on direct examination or rebuttal, either in narrative or question and answer form, may be received as an exhibit and incorporated into the record without the written testimony being read into the record. A witness who is offering written testimony shall be sworn and shall be asked whether the written testimony is a true and accurate representation of what the testimony would be if the testimony were to be given orally at the time the written testimony is offered into evidence. The witness shall submit to cross-examination, clarifying questions, redirect examination, and recross-examination. The presiding officer may allow voir dire examination where appropriate. Written testimony shall be subject to the same evidentiary objections as oral testimony. ***Timely prefiling of written testimony and exhibits, if required under this section or by order of the presiding officer, is a prerequisite for admission into evidence.***<sup>4</sup>

Additionally,

(d) *On or before the date the prefiled written testimony and exhibits are due, parties shall file the number of copies required by §22.71 of this title (relating to Filing of Pleadings, Documents and Other Materials), or other commission rule or order, of the testimony and exhibits with the commission filing clerk and shall serve a copy upon each party.*<sup>5</sup>

The Commission's procedural rules also state:

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<sup>2</sup> 16 TAC § 22.225(a)(8).

<sup>3</sup> SOAH Order No. 2 (May 21, 2018).

<sup>4</sup> 16 TAC § 22.225(b) (emphasis added).

<sup>5</sup> *Id.* at § 22.225(d). (emphasis added).

(e) Pleadings and any other documents shall be deemed filed when the required number of copies and the electronic copy, if required, in conformance with §22.72 of this title are presented to the commission filing clerk for filing.<sup>6</sup>

(h) All documents shall be filed by 3:00 p.m. on the date due, unless otherwise ordered by the presiding officer.<sup>7</sup>

### **III. MOTION TO STRIKE**

As shown on the Commission Interchange and Exhibit A, the Commission filing alert attached hereto, Intervenor Johnson failed to timely file his PFT and Exhibits. Intervenor Johnson filed his PFT on August 10, 2018, later than required under the procedural schedule established in SOAH Order No. 2. Under 16 TAC §22.225(b), the Administrative Law Judge (“ALJ”) must strike Intervenor Johnson’s PFT and Exhibits from the record and not admit those items into evidence in this case.

Even if good cause justified late filing in this case, and good cause is not grounds under Commission rules for late filing, Intervenor Johnson has not shown good cause for doing so.<sup>8</sup> In order to late-file testimony under Commission rules, an advance notification must be provided to the presiding officer *before* the filing, not afterward. But Intervenor Johnson failed to inform the ALJ at any time that he intended to file his PFT late so that she could establish reasonable procedures and deadlines necessitated by the late filing. Additionally, late filing may be admitted only if it is necessary for a full disclosure of facts and its admission is not unduly prejudicial to the legal rights of any party.<sup>9</sup> As set out more fully below, Intervenor Johnson’s PFT does not disclose any facts that are probative or helpful or germane to the ALJ in developing the administrative record in a utility rate case before the Commission. The PFT fails to mention anything regarding FGU’s cost of service or provide any credible evidence that the proposed rate is not just or reasonable. On the contrary, Intervenor Johnson’s entire PFT is simply public comment, including

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<sup>6</sup> 16 TAC § 22.71(e).

<sup>7</sup> *Id.* at § 22.71(h).

<sup>8</sup> Although Mr. Johnson stated in his August 8, 2018 email (Exhibit B) that he uploaded his testimony to the PUC “a few minutes ago” and indicated he would mail the document “tomorrow,” his signed certificate of service states service was made on August 10, 2018 and the Interchange does not show the PFT officially filed with the Commission’s filing clerk as required until the date stamp of August 10, 2018 at 10:26 AM after the August 9, 2018 deadline. Furthermore, while the parties agreed to accept email service for all filings, FGU did not agree, nor is it empowered to agree to or allow *late* filing.

<sup>9</sup> 16 TAC § 22.225(a)(11).

a majority of statements that are speculative and irrelevant to the subject of this proceeding as those statements involve issues entirely outside of the Commission's jurisdiction or include inadmissible settlement discussions. The late-filed PFT fails to assist the trier of fact in determining whether FGU's sewer rate is just and reasonable.

Intervenors were fully apprised at the Prehearing Conference that a rate case before the Commission is a statutorily created process with a very specific framework without exceptions or special accommodations for *pro se* participants. The bar for intervention in such legal proceeding is higher than a ratepayer protest, but Intervenor Johnson sought to participate nonetheless and should be held accountable.

#### IV. OBJECTIONS

a. **Page 4, Introduction, Paragraph 2.** FGU objects to the referenced testimony on the basis of relevance.<sup>10</sup> "To be relevant, the [evidence] must tend to make the existence of a *material* fact more or less probable than it would otherwise have been."<sup>11</sup> The testimony offered does not relate to a material fact in this matter, and the ALJ should strike it from the record. Mr. Johnson's professional background and work experience are not relevant to his testimony as a *fact witness* and does not assist the trier of fact in determining whether FGU's sewer rate is just and reasonable.

b. **Page 4, Introduction, Paragraphs 3-4.** FGU objects to the referenced testimony on the basis of relevance.<sup>12</sup> Intervenor Johnson's statements regarding lawn irrigation with reuse water does not relate to a material fact regarding the subject of this rate case – whether the sewer rates are just and reasonable. FGU's reuse service does not fall under the jurisdiction of the Commission and is completely unrelated to FGU's sewer service.

c. **Page 5.** FGU objects to the referenced testimony on page 5 in its entirety because Intervenor Johnson is not an expert but a lay or fact witness whose speculative opinions or inferences are not rationally based nor helpful to a determination of facts in issue.<sup>13</sup> As a fact

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<sup>10</sup> TEX R. CIV. EVID. 401-402.

<sup>11</sup> *Edwards v. TEC*, 936 S.W.2d 462, 466-67 (Tex. App. -- Fort Worth 1996, no writ) (emphasis added).

<sup>12</sup> TEX R. CIV. EVID. 401-402.

<sup>13</sup> TEX R. CIV. EVID. 701.

witness, this witness must only testify to factual matters on which the witness has personal knowledge.<sup>14</sup> Yet Intervenor Johnson has demonstrated no personal or expert knowledge of the subjects on which he opines in his testimony, which is not laid out in Question & Answer and/or numbered line form, relating to fixed costs and operating losses of FGU's WWTP. This testimony is speculative and improper lay or fact testimony offered as expert testimony and is irrelevant to the subject matter of this hearing.<sup>15</sup> Intervenor Johnson is not an expert who may opine on normal and reasonable business practices of an investor-owned utility like FGU, his testimony does not relate to a material fact in this matter, and the ALJ should strike the testimony.

**d. Page 6-9, General Background**

**Paragraphs 1-2.** FGU objects to the referenced testimony on the basis of relevance.<sup>16</sup> Both these paragraphs discuss the cost of reuse water, which system is a separate, stand-alone utility belonging to FGU and not under the jurisdiction of the Commission.<sup>17</sup> A third-party potable water provider, Yancey Water Supply Corporation, bills customers for their reuse water. The expenses and revenues relating to reuse are separate from any costs associated with FGU's sewer service and are not the subject of this proceeding.

**Paragraph 3.** FGU objects to the referenced testimony because Intervenor Johnson lacks the expertise to opine on FGU's business model.<sup>18</sup>

**Paragraphs 4-6.** FGU objects to the referenced testimony in its entirety in these three (3) paragraphs as it comes directly from inadmissible settlement negotiations.<sup>19</sup> Everything beginning with the phrase, "[b]ased on a meeting at Sammy's Restaurant in Castroville between Mr. Steven Greenberg. . ." is inadmissible and the ALJ should strike the testimony from the record.

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<sup>14</sup> TEX R. CIV. EVID. 602; *Reid Rd. MUD v. Speedy Stop Food Stores*, 337 S.W.3d 846, 851-52 (Tex. 2011).

<sup>15</sup> TEX R. CIV. EVID. 401-402.

<sup>16</sup> *Id.*

<sup>17</sup> See 30 Tex. Admin. Code ch. 210 implemented by the Texas Commission on Environmental Quality ("TCEQ").

<sup>18</sup> TEX R. CIV. EVID. 602; TEX R. CIV. EVID. 701.

<sup>19</sup> TEX R. CIV. EVID. 408.

**Paragraph 7.** FGU objects to the referenced testimony on the basis of relevance.<sup>20</sup> Intervenor Johnson refers to the Public Improvement District, which FGU assumes is the Potranco Ranch Public Improvement District (created by the Commissioners Court of Medina County on February 11, 2013). All improvements that the Potranco Ranch PID (“PID”) funded are owned by the PID or the PID dedicated to another governmental entity. No investments, revenues, or costs related to the PID are included in FGU’s current rates or its application to change the rates. Nor does the PID reimburse FGU for any costs. As such, testimony regarding PID taxes is wholly irrelevant to this proceeding and not germane to the subject sewer rate increase.

**Paragraphs 8-9 & 12.** As with Paragraphs 1-2, FGU objects to the referenced testimony on the basis of relevance.<sup>21</sup> Intervenor Johnson states that wastewater and reuse “elements are the same because we get one water bill, from Yancey Water Corporation.” On the contrary, the elements are *not* the same and reuse is a separate, stand-alone utility not under the jurisdiction of the Commission.<sup>22</sup> A third-party potable water provider, Yancey Water Supply Corporation, bills customers for their reuse water. The expenses and revenues relating to reuse are intentionally separated from any costs associated with FGU’s sewer service. Paragraph 9 also refers to inadmissible settlement negotiations, which the ALJ should strike from the testimony.<sup>23</sup>

**Paragraph 10.** FGU objects to the referenced testimony on the basis of relevance.<sup>24</sup> FGU was authorized to charge a flat rate when the TCEQ approved FGU’s Certificate of Convenience and Necessity and Tariff in 2012. Whether billed as a flat or fixed rate is not germane to the subject of this proceeding, which is whether the increase in FGU’s sewer rate from \$35 to \$65/month is just and reasonable. The testimony offered does not relate to a material fact in this matter, does not assist the trier of fact, and the ALJ should strike the testimony.

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<sup>20</sup> TEX R. CIV. EVID. 401-402.

<sup>21</sup> TEX R. CIV. EVID. 401-402.

<sup>22</sup> See 30 Tex. Admin. Code ch. 210 implemented by the TCEQ.

<sup>23</sup> TEX R. CIV. EVID. 408.

<sup>24</sup> TEX R. CIV. EVID. 401-402.

**Paragraph 11.** FGU objects to the referenced testimony because Intervenor Johnson lacks the expertise to opine on FGU's business model.<sup>25</sup> The testimony also refers back to reuse, which is irrelevant to the subject of this proceeding that solely relates to FGU's proposed sewer rates.<sup>26</sup>

**Paragraph 13.** FGU objects to the referenced testimony on the basis of relevance.<sup>27</sup> What homebuilder McMillin Homes did to "convince" Intervenor Johnson to purchase his home is not only hearsay,<sup>28</sup> but it is immaterial.<sup>29</sup> "To be relevant, the [evidence] must tend to make the existence of a *material* fact more or less probable than it would otherwise have been."<sup>30</sup> The testimony offered does not relate to a material fact in this matter, does not assist the trier of fact in determining whether FGU's sewer rate is just and reasonable, and the ALJ should strike the testimony from the record.

**e. Exhibit 1, Meter and Water Rates Sheet.** FGU objects to the referenced testimony on the basis of hearsay.<sup>31</sup> The origin of the handwriting is also unclear.

**f. Exhibit 2.** FGU objects to the referenced testimony on the basis of relevance and hearsay.<sup>32</sup> The origin of the document is unclear but appears to relate to irrigation with reuse water, which is not germane to this proceeding. The origin of the handwriting is also unclear.

**g. Exhibit 3.** FGU objects to the referenced testimony on the basis of relevance and hearsay.<sup>33</sup> The origin of the document is unclear but appears to relate to irrigation with reuse water, which is not germane to this proceeding.

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<sup>25</sup> TEX R. CIV. EVID. 602; TEX R. CIV. EVID. 701.

<sup>26</sup> TEX R. CIV. EVID. 401-402.

<sup>27</sup> *Id.*

<sup>28</sup> TEX R. CIV. EVID. 801.

<sup>29</sup> TEX R. CIV. EVID. 401-402.

<sup>30</sup> *Edwards v. TEC*, 936 S.W.2d 462, 466-67 (Tex. App. -- Fort Worth 1996, no writ) (emphasis added).

<sup>31</sup> TEX R. CIV. EVID. 801.

<sup>32</sup> TEX R. CIV. EVID. 401-402; TEX R. CIV. EVID. 801.

<sup>33</sup> *Id.*



**h. Exhibit 4.** FGU objects to the referenced testimony on the basis of relevance and hearsay.<sup>34</sup> The origin of the document is unclear but appears to relate to irrigation with reuse water, which is not germane to this proceeding.

**i. Exhibit 5.** FGU objects to the referenced testimony on the basis of relevance and hearsay.<sup>35</sup> The origin of the document is unclear but appears to relate to irrigation with reuse water, which is not germane to this proceeding.

**j. Exhibit 6.** FGU objects to the referenced testimony on the basis of relevance and hearsay.<sup>36</sup> The origin of the document is unclear but appears to relate to irrigation with reuse water, which is not germane to this proceeding.

**k. Exhibit 9.** FGU objects to the referenced testimony on the basis of relevance and hearsay.<sup>37</sup> The origin of the document is unclear but appears to relate to irrigation with reuse water, which is not germane to this proceeding.

## **V. PRAYER**

WHEREFORE, PREMISES CONSIDERED, Forest Glen Utility Company respectfully requests that the ALJ grants its Motion to Strike Intervenor Johnson's Prefiled Testimony and Exhibits in their entirety or, in the alternative, sustain FGU's objections and enter an order excluding and striking Intervenor Johnson's PFT and Exhibits at the hearing for this matter as requested above, and such and further relief to which it may be entitled.

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<sup>34</sup> *Id.*

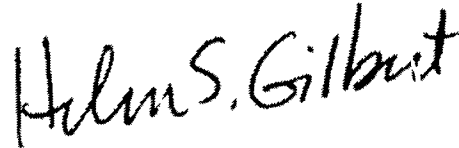
<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

Respectfully submitted,

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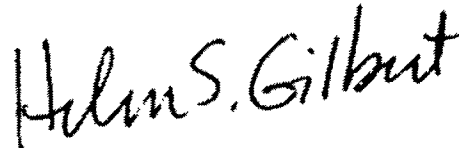
By: \_\_\_\_\_

Helen S. Gilbert

**ATTORNEYS FOR FOREST GLEN  
UTILITY COMPANY**

**CERTIFICATE OF SERVICE**

I hereby certify that I have or will serve a true and correct copy of the foregoing document via hand delivery, facsimile, electronic mail, overnight mail, U.S. mail, or Certified Mail Return Receipt Requested on all parties on the 16th of August 2018.



By: \_\_\_\_\_

Helen S. Gilbert

## EXHIBIT A

From: noreply@puc.texas.gov  
Subject: Interchange Notification: 47897-217  
Date: August 10, 2018 at 11:23 AM  
To: hgilbert@gwtexas.com



Filing Alert! A new document has been filed under 47897-217

Filing : 47897-217  
Item Type : TEST  
Date Filed : 8/10/2018  
Party : VAN JOHNSON  
Utility Type : W  
Category : D. REG. RATEWATER  
Date Sent : 8/10/2018  
User : Helen Gilbert (hgilbert)

Document Link:  
<https://interchange.puc.texas.gov/Search/Documents?ControlNumber=47897&ItemNumber=217>

Master Description  
APPLICATION OF FOREST GLEN UTILITY COMPANY FOR AUTHORITY TO CHANGE RATES

Filing Description:  
Van Johnson's Testimony to PUC

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END OF FILING

Public Utility Commission  
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Interchange  
[interchange.puc.texas.gov](http://interchange.puc.texas.gov)

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If you have questions, please contact the PUC Helpdesk at [helpdesk@puc.texas.gov](mailto:helpdesk@puc.texas.gov)

## EXHIBIT B

From: Van Johnson johnsv337@gmail.com  
Subject: Van Johnson's Testimony to PUC  
Date: August 8, 2018 at 4:36 PM  
To: Spencer, Oshea oshea.spencer@puc.texas.gov, Randall Wilburn rbw@gwtdlaw.com, Helen Gilbert ngilbert@gwtdlaw.com, Cecil Perkins cecilgroup@gmail.com, Dennis Brown dennisb@stglobal.net, Fleming Mitchell mitch013@gmail.com

Good evening everyone. Attached is a PDF copy of my testimony uploaded to the PUC Interchange a few minutes ago. The tracking number is ESDAZSPX.

I will mail of this document to PUC tomorrow afternoon

Randy or Helen you copy is provided by email as agreed to a few weeks ago.

Van Johnson  
112 Sunrise Hill  
Castroville, TX 78009  
210-384-8317

PDF

*J.*

Van Johnson  
PUC Te...ony.pdf