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

**MOTION TO STRIKE AND OBJECTIONS TO DIRECT TESTIMONY AND EXHIBITS
OF CECIL PERKINS**

COMES NOW, Forest Glen Utility Company (“FGU” or “Applicant”) and files this Motion to Strike and Objections to Direct Testimony and Exhibits of Cecil Perkins 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 Cecil Perkins. Mr. Perkins 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 Perkins filed his PFT and Exhibits on August 10, 2018. FGU received an email notification of Intervenor’s filing at 10:54 AM on August 10, 2018 as well.¹ 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.

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:

¹ See Exhibit A, emailed filing alert from the Commission.

(a)(8) For all water and sewer matters filed under TWC chapters 12 or 13, the presiding officer shall establish a prefiled testimony schedule²

SOAH Order No. 2 established August 9 2018 as the deadline for Intervenor's to all prefiled testimony and exhibits.³ 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.***⁴

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.*⁵

The Commission's procedural rules also state:

(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.⁶

² 16 TAC § 22.225(a)(8).

³ SOAH Order No. 2 (May 21, 2018).

⁴ 16 TAC § 22.225(b) (emphasis added).

⁵ *Id.* at § 22.225(d). (emphasis added).

⁶ 16 TAC § 22.71(e).

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

III. MOTION TO STRIKE

As shown on the Commission Interchange and the Exhibit A, Commission filing alert attached hereto, Intervenor Perkins' PFT and Exhibits were not timely filed. Intervenor Perkins 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 Perkins' 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 Perkins has shown no good cause for doing so. 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 Perkins 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.⁸ As set out more fully below, Intervenor Perkins' PFT does not disclose any facts that are probative, 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 of FGU's cost of service or provide any credible evidence that the proposed rate is not just or reasonable. On the contrary, Intervenor Perkins' entire PFT is public comment, including a majority of statements that are simply speculative and irrelevant to the subject of this proceeding as those statements involve issues or subjects falls entirely outside of the Commission's jurisdiction. The late-filed PFT fail to assist the trier of fact in determining whether FGU's sewer rate is just and reasonable, it compresses the remaining hearing schedule and necessitates expensive responsive pleadings which are difficult on a small cash-strapped investor owned utility like FGU.

⁷ *Id.* at § 22.71(h).

⁸ 16 TAC § 22.225(a)(11).

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 Perkins sought to participate nonetheless and should be held accountable.

IV. OBJECTIONS

a. **Page 1, Introduction.** FGU objects to the referenced testimony on the basis of relevance.⁹ “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.”¹⁰ The testimony offered does not relate to a material fact in this matter and should be stricken. Mr. Perkins’ professional background, work experience, and honors and recognitions 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 2, Purpose of Testimony.** FGU objects to the referenced testimony on page 5 in its entirety because Intervenor Perkins 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.¹¹ As a fact witness, this witness must only testify to factual matters on which the witness has personal knowledge.¹² Yet Intervenor Perkins has demonstrated no knowledge of the subjects on which he opines in his testimony relating to the unreasonableness of the increase, normal utility communications or business decisions made by FGU. This testimony is speculative and improper lay or fact testimony offered as expert testimony and is irrelevant to the subject matter of this hearing.¹³ Intervenor Perkins 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.

⁹ TEX R. CIV. EVID. 401-402.

¹⁰ *Edwards v. TEC*, 936 S.W.2d 462, 466-67 (Tex. App. -- Fort Worth 1996, no writ) (emphasis added).

¹¹ TEX R. CIV. EVID. 701.

¹² TEX R. CIV. EVID. 602; *Reid Rd. MUD v. Speedy Stop Food Stores*, 337 S.W.3d 846, 851-52 (Tex. 2011).

¹³ TEX R. CIV. EVID. 401-402.

c. Pages 6-7, General Background

Paragraph 1. FGU objects to the referenced testimony on the basis of hearsay.¹⁴

Paragraph 2. FGU objects to the referenced testimony on the basis of relevance.¹⁵ FGU's range of billing below the rate legally authorized by the Texas Commission on Environmental Quality ("TCEQ") in 2012 has no correlation to FGU's Cost of Service in its application for rate increase or whether the *proposed* rates are just and reasonable in this proceeding.

Paragraph 3. FGU objects to the referenced testimony because Intervenor Perkins lacks the expertise to opine on variable versus fixed utility rates.¹⁶

Paragraph 4. FGU objects to the referenced testimony on the basis of hearsay.¹⁷ FGU further objects to the referenced testimony because Intervenor Perkins lacks both facts and expertise to opine on rates charged homeowners and builders.¹⁸

Paragraph 5. FGU objects to the referenced testimony because Intervenor Perkins lacks the expertise to opine on what type of communication is customary for an investor-owned utility regulated by the PUC.¹⁹ Furthermore, customer complaints are irrelevant to this proceeding, which relates solely to the request for rate increase and tariff change sought by FGU.²⁰

Paragraph 6. FGU objects to the referenced testimony on the basis of hearsay.²¹ FGU further objects to the referenced testimony (Exhibit C) because Intervenor Perkins assumes (and misstates) facts not in evidence.

¹⁴ TEX R. CIV. EVID. 801.

¹⁵ TEX R. CIV. EVID. 401-402.

¹⁶ TEX R. CIV. EVID. 602; TEX R. CIV. EVID. 701.

¹⁷ TEX R. CIV. EVID. 801.

¹⁸ TEX R. CIV. EVID. 602; TEX R. CIV. EVID. 701.

¹⁹ *Id.*

²⁰ TEX R. CIV. EVID. 401-402.

²¹ TEX R. CIV. EVID. 801.

Paragraph 7. FGU objects to the referenced testimony on the basis of hearsay.²² FGU further objects to the referenced testimony because Intervenor Perkins assumes (and misstates) facts not in evidence (Exhibit C) - 60% relates to the savings from using reuse water for irrigation instead of potable water from Yancey Water Supply Corporation and is not related to rates for sewer service.²³

Paragraph 8. FGU objects to the referenced testimony on the basis of hearsay.²⁴ This testimony also irrelevant because the potable water service provided by neighboring utility, Yancey Water Supply Corporation is not germane to the subject of this proceeding, FGU's requested sewer rate increase.²⁵

Paragraph 9. FGU objects to the referenced testimony on the basis of hearsay.²⁶ This testimony is also irrelevant because the potable water service provided by neighboring utility, Yancey Water Supply Corporation is not germane to the subject of this proceeding, FGU's requested sewer rate increase.²⁷ Intervenor Perkins is conflating the FGU's reuse service, which does not fall under the jurisdiction of the Commission, and potable water rates charged by Yancey Water Supply Corporation which are not germane to this sewer rate proceeding, with FGU's proposed sewer rates.

Paragraph 10. FGU objects to the referenced testimony because Intervenor Perkins lacks the expertise to opine on the business practices of an investor-owned utility regulated by the PUC.²⁸

d. Exhibit A, Harry Hausman Communication. FGU objects to the referenced testimony on the basis of hearsay.²⁹

²² TEX R. CIV. EVID. 801.

²³ See Direct Testimony of Steven Greenberg on Behalf of Forest Glen Utility Company (July 18, 2018,, p. 3, lns. 20-22 and p. 4, lns. 3-6.

²⁴ TEX R. CIV. EVID. 801.

²⁵ TEX R. CIV. EVID. 401-402.

²⁶ TEX R. CIV. EVID. 801.

²⁷ TEX R. CIV. EVID. 401-402.

²⁸ TEX R. CIV. EVID. 602; TEX R. CIV. EVID. 701.

²⁹ TEX R. CIV. EVID. 801.

e. **Exhibit B, Audit History.** FGU objects to the referenced testimony on the basis of hearsay.³⁰ Exhibit B titled “Audit History” with sub-header “Yancey Water Supply Corporation” is also irrelevant because it 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 it from the record.³¹

f. **Exhibit C, Mary Hoyt Communication.** FGU objects to the referenced testimony on the basis of hearsay.³² Exhibit C is also irrelevant because it relates to the comparison between FGU’s *reuse* water service and the potable water service provided by neighboring utility, Yancey Water Supply Corporation. FGU’s reuse utility does not fall under the jurisdiction of the Commission and Yancey’s potable water service is not germane to the sewer rate increase that is the subject of this proceeding. This email 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 it from the record.³³

g. **Exhibit D, Welcome Sheet for Members of Yancey Water Supply Corporation**

FGU objects to the referenced testimony on the basis of hearsay.³⁴ FGU further objects to the referenced testimony on the basis of relevance.³⁵ “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.”³⁶ Yancey Water Supply Corporation’s potable water service does not relate to a material fact in this matter, and the ALJ should strike the exhibit from the record.

³⁰ *Id.*

³¹ TEX R. CIV. EVID. 401-402.

³² TEX R. CIV. EVID. 801.

³³ TEX R. CIV. EVID. 401-402.

³⁴ TEX R. CIV. EVID. 801.

³⁵ TEX R. CIV. EVID. 401-402.

³⁶ *Edwards v. TEC*, 936 S.W.2d 462, 466-67 (Tex. App. – Fort Worth 1996, no writ) (emphasis added).

V. PRAYER

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

Respectfully submitted,

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**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
Helen S. Gilbert

EXHIBIT A

From: noreply@puc.texas.gov
Subject: Interchange Notification: 47897-216
Date: August 10, 2018 at 10:54 AM
To: hgilbert@gwtlaw.com



Filing Alert! A new document has been filed under 47897-216

Filing : 47897-216
Item Type : PL
Date Filed : 8/10/2018
Party : CECIL PERKINS
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=216>

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

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DIRECT TESTIMONY OF CECIL PERKING

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