



Control Number: 47897



Item Number: 223

Addendum StartPage: 0

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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 PREFILED TESTIMONY AND  
EXHIBITS OF DENNIS BROWN**

COMES NOW, Forest Glen Utility Company (“FGU” or “Applicant”) and files this Motion to Strike and Objections to Prefiled Testimony and Exhibits of Dennis Brown 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 Dennis Brown. Mr. Brown 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 Brown filed his PFT and Exhibits on August 10, 2018. FGU received an email notification of Intervenor’s filing at 3:28 PM on August 10, 2018 as well.<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.

**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:

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<sup>1</sup> 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 schedule . . . .<sup>2</sup>

SOAH Order No. 2 established August 9, 2018 as the deadline for Intervenors 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:

(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>

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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).

<sup>6</sup> 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.<sup>7</sup>

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

As shown on the Commission Interchange and the Exhibit A, Commission filing alert attached hereto, Intervenor Brown failed to timely file his PFT and Exhibits. Intervenor Brown 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 Brown’s PDT 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 Brown 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 Brown 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>8</sup> As set out more fully below, Intervenor Brown’s PFT does not disclose any facts that are 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 Brown’s entire PFT is simply public comment, including 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. 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

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<sup>7</sup> *Id.* at § 22.71(h).

<sup>8</sup> 16 TAC § 22.225(a)(11).

is higher than a ratepayer protest, but Intervenor Brown sought to participate nonetheless and should be held accountable.

#### IV. OBJECTIONS

**a. Question No. 2, Page 1, Introduction.** FGU objects to the referenced testimony on the basis of relevance.<sup>9</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>10</sup> The testimony offered does not relate to a material fact in this matter, and the ALJ should strike it from the record. Mr. Brown’s 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 the basis of relevance.<sup>11</sup> FGU was authorized to charge a flat rate when the Texas Commission on Environmental Quality (“TCEQ”) approved FGU’s Certificate of Convenience and Necessity and Tariff in 2012. Whether a flat 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 and the ALJ should strike it.

**c. Page 3, General Background.** FGU generally objects to the testimony on page 3 in its entirety as Intervenor Brown 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>12</sup> As a fact witness, this witness must only testify to factual matters on which the witness has personal knowledge.<sup>13</sup> Intervenor Brown’s testimony relating to the democratic free market, the San Antonio Water System (“SAWS”), and flat versus volumetric rates is improper lay or fact testimony offered as expert testimony, assumes facts not in evidence (*i.e.*, that FGU proposed two sewer rate increases “in less than a year”), and is irrelevant to the subject matter of this hearing.

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<sup>9</sup> TEX R. CIV. EVID. 401-402.

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

<sup>11</sup> TEX R. CIV. EVID. 401-402.

<sup>12</sup> TEX R. CIV. EVID. 701.

<sup>13</sup> TEX R. CIV. EVID. 602; *Reid Rd. MUD v. Speedy Stop Food Stores*, 337 S.W.3d 846, 851-52 (Tex. 2011).

Moreover, as it pertains to charges for reuse water, this testimony (in the last paragraph of page 3) is also irrelevant because reuse charges have nothing to do with the sewer rate that is the subject of this proceeding and does not fall within the jurisdiction of the Commission.

**d. Attachment 1, SAWS bill.** FGU objects to the referenced testimony on the basis of hearsay.<sup>14</sup> A purported 2013 water and wastewater bill from SAWS to an unidentified customer is furthermore irrelevant as 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 the testimony from the record.

**e. Attachment 2.** FGU objects to the referenced testimony on the basis of hearsay.<sup>15</sup> Attachment 2, which may be related to the SAWS' bill in Attachment 1 and is illegible, is also irrelevant for the same reason that 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.

**f. Attachment 3, Audit History.** FGU objects to the referenced testimony on the basis of hearsay.<sup>16</sup> Attachment 3 titled "Audit History" with sub-header "Yancey Water Supply Corporation" is also irrelevant for the same reason that 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.

## **V. PRAYER**

WHEREFORE, PREMISES CONSIDERED, Forest Glen Utility Company respectfully requests that the ALJ grants its Motion to Strike Intervenor Brown's Prefiled Testimony and Exhibits in their entirety or, in the alternative, sustain FGU's objections and enter an order excluding and striking Intervenor Brown'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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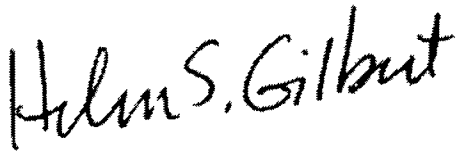
<sup>14</sup> TEX R. CIV. EVID. 801.

<sup>15</sup> *Id.*

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

Respectfully submitted,

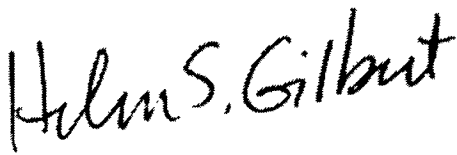
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By:   
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**ATTORNEYS FOR FOREST GLEN  
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**CERTIFICATE OF SERVICE**

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: hngilbert@puc.texas.gov  
Subject: Interchange Notification: 47897-219  
Date: August 10, 2018 at 3:28 PM  
To: hngilbert@puc.texas.gov

Filing Alert! A new document has been filed under 47897-219

Filing : 47897-219  
Item Type : TEST  
Date Filed : 8/10/2018  
Party : DENNIS M. BROWN  
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=219>

Master Description:

APPLICATION OF FOREST GLEN UTILITY COMPANY FOR AUTHORITY TO CHANGE RATES

Filing Description:

Dennis M. Brown Direct Testimony and Attachments

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END OF FILING

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