

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

**In the Matter of the Application of) Docket No. 06-540-T01
Lakeview Water Corp. for a Rate) Motion to Strike the Testimony
Increase, et al, etc.) of Krystal Fishlock-McCauley,
) Exhibit LWC 1.1**

Now comes Intervenor Frank J. Cumberland and moves the Commission to strike and exclude the “testimony” of Krystal Fishlock-McCauley in its entirety, for the reasons and on the grounds set forth below.

Applicant’s Counsel (hereinafter “Smith”) has blatantly violated Ut Admin Code R 746-100-8 C.2., and should be sanctioned therefor by striking and excluding the testimony in question.

On March 5, 2007, the undersigned submitted twenty-four Data Requests to the Applicant by serving them upon Smith. Request #23 read as follows:

23. Is it the intention of Lakeview to present the testimony of one or more expert witnesses at the hearing of this matter? If the answer is in the affirmative, please identify each and every such expert, state the subject matter upon which each will testify, attach a copy of each expert’s curriculum vitae, and a copy of any and all report(s) generated by each such expert.

Smith’s response, two months later, on May 3, was as follows:

Answer: **Objection: Objection:** Lakeview objects to Request No. 23 on the basis that it is irrelevant, overbroad, and not reasonably calculated to lead to the discovery of admissible evidence on the issue of whether Lakeview is entitled to the rate change that it seeks. Rather, the request appears to be an attempt to gather business information from Lakeview for other unknown purposes or reasons. Lakeview further objects that this request is premature and requires disclosure of information protected by the Attorney Work Product Doctrine. In accordance with the foregoing, Lakeview responds as follows: Lakeview will not comply with this request.

Parenthetically, the same or similar responses, objections, and refusals to answer or provide information were submitted by Smith to nine of the twenty-four data requests. On May 9, in an effort to resolve the discovery

disputes raised by Smith's bad faith objections, the undersigned wrote to Smith concerning this data request, as follows:

Request 23: (wow! TWO objections!) See UT Admin Code R. 746-100-8 C.2. and give me the information.

On May 22, Smith responded as follows:

Your request No.23 is premature. You cited Administrative Rule 746-100-8(C)(2) which states: Rule 26(b)(4), Utah Rules of Civil Procedure, restricting discovery shall not apply, and the opinions, conclusions, and data developed by experts engaged by parties shall be freely discoverable. The restrictions of Rule 26(b)(4) are that if an opposing party wants information of a non-testifying expert, they must pay the cost of providing the information. *If and when Lakeview retains an expert, we will provide all required information.* (emphasis supplied)

Despite the fact that Smith had been working with Fishlock as a consultant and a testifying expert witness ("I was also contracted to consult with the company on regulatory issues and to prepare accounting worksheets and provide expert witness testimony for this rate case.") (Fishlock's "testimony", p.1, ll. 17-19) since spring or summer of 2006 ("My work with Lakeview began in the spring of 2006. The books of record were not complete and available till summer of 2006 at which time I began my review.")(Fishlock's "testimony", p. 12, ll. 8-9), Smith lied about her existence and purpose in response to a data request that went directly to that issue, and concealed information he was obliged to reveal until Wednesday, November 14, 2007, three business days prior to the final hearing of this matter.

Such conduct, in direct violation of the Administrative Rule, is unethical and reprehensible. Smith went out of his way to deceive the undersigned into thinking that there neither was nor would be an expert testifying on behalf of his client, and then, three days before the hearing, submitted seventeen pages of clearly "expert" testimony and opinion along with a detailed *curriculum vitae*, all of which had been requested in March of this year but intentionally and wrongfully concealed since that time.

The Utah Rules of Civil Procedure concerning discovery, and the Administrative Rule adopting the Civil Rules to apply to Administrative Proceedings, were designed to prevent trials and hearings by ambush. Smith and his cronies are clearly attempting to subvert those rules by deceit and dishonesty. For this Commission to permit them to do so would be to send a

clear message to those similarly inclined that there really are no rules, and that “anything goes” before the Utah Public Service Commission.

On the contrary, the Commission in this instance has the opportunity to remind the practicing bar that there *are* rules, and that the Commission expects those who make a living practicing before it to observe those rules, practice fairly and honestly, and either abandon dirty tricks and sleazy tactics, or suffer the consequences. The Commission can and should strike the testimony of Krystal Fishlock-McCauley in its entirety, reject LWC exhibit 1.1, and prohibit her from testifying live or over the telephone on November 19, as the sanction for Smith’s disgraceful conduct. No other sanction makes any sense.

The undersigned submits that such a sanction is not unduly harsh, and does not deprive the Applicant of a fair opportunity to present its case. Fishlock is obviously a known quantity to the Commission. Even without reading it, the content of her “testimony” should be obvious: “Lakeview is wonderful, and should have its rate increase granted, without further inquiry.” That is what she was bought and paid for back in 2006, and sure enough, that is what she delivered. Three days before the hearing. Too late to even respond. Shameful.

Respectfully submitted,

/s/

Frank J. Cumberland
Intervenor

CERTIFICATE OF SERVICE

A copy of the foregoing Motion To Strike was mailed and emailed to Counsel for Applicant and Counsel for The Division of Public Utilities this 16th day of November, 2007.

_____/s/_____
Frank J. Cumberland, Intervenor