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November 2, 2017

*Via Electronic Filing*

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street – Second Floor North  
PO Box 3265  
Harrisburg, PA 17105-3265

RE: Columbia Water Company; Docket No. R-2017-2598203; **THE COLUMBIA WATER COMPANY'S MOTION TO STRIKE PORTIONS OF THE SURREBUTTAL TESTIMONY OF TERRY L. FOUGHT (OCA STATEMENT 3S)**

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission is The Columbia Water Company's Motion to Strike Portions of the Surrebuttal Testimony of Terry L. Fought (OCA Statement 3S) in the above-captioned matter. Copies have been served in accordance with the attached Certificate of Service.

If you have any questions regarding this filing, please do not hesitate to contact me.

Very truly yours,

Thomas J. Sniscak  
Christopher M. Arfaa  
William E. Lehman

*Counsel to the Columbia Water Company*

CMA/das  
Enclosure

cc: Honorable Joel H. Cheskis  
Honorable Andrew M. Calvelli  
Per Certificate of Service

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission	:	
	:	
v.	:	Docket No. R-2017-2598203
	:	
The Columbia Water Company	:	

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**MOTION OF THE COLUMBIA WATER COMPANY TO STRIKE  
PORTIONS OF THE SURREBUTTAL TESTIMONY OF  
TERRY L. FOUGHT (OCA STATEMENT 3S)**

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Pursuant to 52 Pa. Code §§ 5.103 and 5.243, The Columbia Water Company (“Columbia”) respectfully request that the Presiding Officers strike from the Surrebuttal Testimony of Office of Consumer Advocate (“OCA”) witness Terry L. Fought (OCA St. 3S) portions of the testimony that violate the regulations of the Pennsylvania Public Utility Commission (“Commission”) and an agreement among the parties. Specifically, Columbia requests that the Presiding Officers strike two portions of Mr. Fought’s surrebuttal testimony submitted: (1) testimony regarding high pressure in Columbia’s system, which is not responsive to Columbia’s rebuttal testimony and therefore should have been included in OCA’s case-in-chief, and (2) testimony regarding information obtained during the parties’ visit to Columbia’s facilities, which should have been contained in a supplement to Mr. Fought’s direct testimony no later than noon on October 16th, 2017, pursuant to agreement.<sup>1</sup>

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<sup>1</sup> The portions of Mr. Fought’s surrebuttal testimony that are the subject of this Motion are attached as **Exhibit A**.

## I. INTRODUCTION

1. With the filing of Mr. Fought's "surrebuttal" testimony on October 30, 2017, OCA has violated Commission regulations and precedent by serving additional direct testimony in the guise of "surrebuttal" testimony, which defeats the customer practice of successive rounds of testimony in Commission proceedings *narrowing* and *clarifying* the issues in dispute. By improperly expanding its case-in-chief during the week of hearings with testimony that should have been served weeks ago, OCA has engaged in the improper tactic known colloquially as "sandbagging." Under these circumstances the only appropriate course of action is to strike those portions of Mr. Fought's surrebuttal testimony that are not actually responding to any party's rebuttal testimony.

2. The portions of Mr. Fought's surrebuttal testimony that are based upon information he gathered during the parties' visit to Columbia's facilities should be stricken for the additional reason that OCA expressly agreed, as a condition to Columbia's permission to visit those facilities, that any such testimony would be presented as a supplement to direct testimony no later than noon on Monday, October 16, 2017.<sup>2</sup> To allow Mr. Fought to in effect supplement his direct testimony two weeks later and four days before hearings would, in addition to violating the order of proof and procedure established by the Scheduling Order, violate OCA's express agreement. The relevant portions of Mr. Fought's surrebuttal statement must be stricken, not only to protect Columbia's rights in this proceeding, but also to ensure that future litigants can enter into similar informal agreements with the assurance that their terms will be enforced by the Commission. Absent such enforcement, parties will be unwilling to enter into informal discovery arrangements

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<sup>2</sup> E-mail dated Sept. 25, 2017, from H. Breitman to W. Lehman re: CWC site visit [sic] (copy attached as **Exhibit B**).

and instead will rely exclusively on formal discovery procedures, thus increasing litigation expense and delay.

3. On June 27, 2017, Columbia filed Supplement No. 86 To Tariff - Water Pa. P.U.C. No. 7 to become effective August 29, 2017.

4. On July 19, 2017, the Office of Consumer Advocate (OCA) filed a Formal Complaint at Docket No. C-2017-2614985 and the Office of Small Business Advocate (OSBA) filed a Formal Complaint at Docket No. C-2017-2615248. Another formal complaint was also filed by a Columbia customer at Docket No. C-2017-2614724.

5. Pursuant to the Public Utility Code, 66 Pa. C.S. § 1308(d), the tariff filings were suspended by Commission Order dated August 3, 2017.

6. By Notice dated August 4, 2017, the Office of Administrative Law Judge scheduled an Initial Prehearing Conference for Friday, August 25, 2017, at 2:00 p.m. in Hearing Room 2 of the Commonwealth Keystone Building, 400 North Street, Harrisburg, PA 17120 before Administrative Law Judges Joel H. Cheskis and Andrew M. Calvelli.

7. The Prehearing Conference was held as scheduled, with the OCA, OSBA, the Commission's Bureau of Investigation and Enforcement (I&E) and Columbia appearing through their legal counsel. Columbia's rate filing and the associated complaints were formally consolidated for purposes of hearing and decision, and the following procedural schedule was agreed upon:

Columbia Direct Testimony	September 8, 2017
Other Parties' Direct Testimony	October 6, 2017
All Parties' Rebuttal Testimony	October 20, 2017
All Parties' Surrebuttal Testimony	October 30, 2017
Columbia's Oral Rejoinder Outline	November 1, 2017

Hearings	November 3 and November 6, 2017
Main Brief	November 30, 2017
Reply Brief	December 8, 2017

In addition, certain modifications to the Commission’s discovery regulations were agreed-to.

8. The Presiding Officers issued a Scheduling Order implementing the above procedures on August 28, 2017.

9. The parties have served their pre-written direct, rebuttal and surrebuttal testimonies, and oral rejoinder outlines, as provided by the Scheduling Order.

10. Several weeks after issuance of the Scheduling Order, OCA contacted counsel for Columbia to request that Mr. Fought and others be permitted to visit and inspect Columbia’s facilities.

11. Due to the limited availability of Mr. Fought and Columbia counsel, it was not possible to schedule the site visit for a date prior to the October 6, 2017 due date for OCA’s direct testimony.

12. Columbia offered October 12 as a possible date for the site visit. In response, OCA counsel stated:

Since Direct Testimony is due on October 6th, a site visit on October 12th would unfortunately be after the filing deadline for direct testimony.

The OCA would appreciate a site visit on October 12th as long as the OCA has the right to supplement direct testimony in regards to the site visit should any issues arise as a result of the site visit.

Let me know if this works for you and thanks again for the quick response. (See Exhibit B at 2.)

13. Counsel for Columbia responded: “We, of course would allow Terry to supplement his testimony after the site visit on Oct. 12, but we would need that it be supplemented by noon on

Oct. 16.” (*Id.*) The reason for this condition was to give Columbia the opportunity to respond to any testimony regarding the site visit in its rebuttal testimony, which was due to be served on October 20, 2017.

14. Counsel for OCA agreed to the condition that supplemental testimony regarding information learned on the site visit would be served by October 16, 2017 at noon: “The OCA agrees to your proposal. *Should the OCA supplement direct testimony in regards to the site visit, we will do so by October 16th at noon.*” (*Id.*; emphasis added.)

15. The site visit took place as scheduled on October 12, 2017.

16. OCA did not supplement its direct testimony with information from the site visit by the October 16, 2017 deadline or thereafter.

17. Columbia submitted its written rebuttal testimony on October 20, 2017, as required by the Scheduling Order.

18. OCA submitted its surrebuttal testimony on October 30, 2017.

19. In his surrebuttal testimony, Mr. Fought raised two issues for the first time: the existence of 77 Columbia customers located along a main used to fill the Prospect and Ironville tanks who allegedly are subject to normal pressures that exceed 125 psi, and statements about Columbia’s SCADA system allegedly made by Columbia’s General Manager, David Lewis, during the October 12, 2017 site visit.

## II. ARGUMENT

### A. Mr. Fought’s Surrebuttal Testimony Regarding 77 Customers Along the Main Used to Fill the Prospect and Ironville Tanks Should be Stricken

20. Columbia’s rebuttal testimony does not address customer pressure issues. Nevertheless, on surrebuttal, Mr. Fought asserts that 77 customers located along a main used to fill the Prospect and Ironville tanks are subject to high pressures (OCA St. 3S at 1:23-2:5). He

then recommends that Columbia should submit a plan to reduce those pressures. (*Id.* at 2:7-2:12.) Mr. Fought's testimony is not permissible surrebuttal as the purpose of surrebuttal is limited to addressing the Company's rebuttal testimony.

21. Mr. Fought's new testimony about the 77 customers along main used to fill the Prospect and Ironville tanks and his corresponding recommendation clearly should not be permitted. OCA may protest that Mr. Fought was not aware of the 77 customers until he received Columbia's response to OCA discovery Set XI. However, this does not, and cannot, justify the submission on surrebuttal of material that could have, and should have, been included in OCA's direct testimony. OCA's complaint against Columbia's rate increase was filed on July 19, 2017, and OCA thus had nearly three months in which to request and receive the information that Mr. Fought did not think to ask about until OCA served its *ninth* set of discovery requests. Much of that discovery was on issues addressed by Mr. Fought. If Mr. Fought's testimony is permitted simply because it is the subject of a dilatory discovery request by OCA or Mr. Fought, then any party that wishes to sandbag an opponent will simply serve discovery requests with return dates falling after the due dates for their earlier testimony (thus depriving the opposing party of the opportunity to address it in rebuttal) and then raise it in surrebuttal, just as the OCA has done here. Raising this issue as Mr. Fought does at the 11<sup>th</sup> hour creates prejudice to the Company as it is unable to conduct discovery of this late testimony. OCA cannot be permitted to circumvent the Commission's regulations in this manner.

**B. Mr. Fought's Testimony Regarding SCADA System Monitoring of System Pressure Should Be Stricken**

22. Columbia's rebuttal neither raised nor addressed SCADA system monitoring or system pressure. Yet, Mr. Fought's surrebuttal addresses these two subjects. In doing so, Mr. Fought discusses certain statements allegedly made by Company General Manager David Lewis

during the October 12, 2017 site visit (OCA St. 3S at 2:22-2:28). This testimony violates the parties' express informal discovery agreement entered into pursuant to 52 Pa. Code § 5.322 and is not legitimate surrebuttal testimony in that it does not address any Company rebuttal or any other party's rebuttal—which by definition is the purpose of surrebuttal.

23. Mr. Fought had ample opportunities earlier in this proceeding, including conducting discovery on the subject over 3 months or more. OCA was concerned that Mr. Fought would not be able to incorporate information learned during the site visit into his direct testimony due to scheduling. Columbia accommodated that concern by agreeing that Mr. Fought could supplement his direct testimony with such information, but only if the supplement was received by noon on October 16, 2017. The Company insisted on this condition so that it would have the opportunity to address any issues raised by Mr. Fought on the basis of the site visit in its rebuttal testimony. OCA expressly agreed to this proposal (*see* Exhibit B), and the site visit was conducted on the basis of this agreement.

24. Mr. Fought did not supplement his direct testimony on October 16 or at any time thereafter. Instead, he waited until his surrebuttal testimony to mention matters raised by the site visit. This is patently improper. OCA agreed that such matters would be raised, if at all, in a supplement to Mr. Fought's direct testimony served on or before October 16. In waiting to raise such matters until the surrebuttal phase, OCA has violated its agreement with Columbia that any such discussion should have been included in a supplement to his *direct* testimony.

25. Mr. Fought's discussion of information from the site visit must be stricken to avoid litigation by surprise and ambush, in violation of the evidentiary presentation and process approved by the Presiding Officers in the Scheduling Order. It also must be stricken in order to enforce the parties' informal discovery agreement. Mr. Fought's violation of that agreement has created

prejudice, distraction, extra rate case costs, and deprivation of due process in that it has deprived Columbia and other parties of the opportunity to promulgate discovery regarding his tardy testimony.

WHEREFORE, for all of the foregoing reasons, Columbia respectfully requests that the Presiding Officers enter an Order:

- a. Granting this Motion;
- b. Striking Mr. Fought's surrebuttal testimony (OCA Statement 3S) at page 1, line 21, through page 2, line 12, and at page 2, line 22, through page 2, line 28; and
- c. Granting such further relief as may be just.

Respectfully submitted,



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Thomas J. Sniscak (Attorney ID 33891)  
Christopher M. Arfaa (Attorney ID 57047)  
William E. Lehman (Attorney ID 83936)  
Hawke McKeon & Sniscak LLP  
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[welehman@hmslegal.com](mailto:welehman@hmslegal.com)

*Counsel for The Columbia Water Company*

Dated: November 2, 2017



1 Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS FOR THE  
2 RECORD.

3 A. Terry L. Fought, 780 Cardinal Drive, Harrisburg, Pennsylvania, 17111.  
4

5 Q. MR. FOUGHT, DID YOU SUBMIT DIRECT TESTIMONY IN THIS  
6 PROCEEDING ON BEHALF OF THE OFFICE OF CONSUMER ADVOCATE?

7 A. Yes.  
8

9 Q. HAVE YOU REVIEWED THE REBUTTAL TESTIMONY SUBMITTED BY  
10 CWC'S WITNESS DAVID T. LEWIS?

11 A. Yes.  
12

13 Q. WHAT IS THE PURPOSE OF YOUR SURREBUTTAL TESTIMONY IN THIS  
14 PROCEEDING?

15 A. The purpose of my surrebuttal testimony is to (1) address high pressure in  
16 portions of the CWC's distribution system and (2) respond to portions of the  
17 rebuttal testimony by CWC's witness David T. Lewis, CWC Statement No. 1R.  
18 concerning maintenance of CWC's Pressure Reducing Valves (PRVs) and (3)  
19 Exercising Isolation Valves  
20

21 HIGH PRESSURE  
22

23 Q. WHAT IS YOUR TESTIMONY REGARDING HIGH PRESSURE IN CWC'S  
24 DISTRIBUTION SYSTEM?

25 A. According to the CWC's response to OCA Set XI-4, there are 77 customers  
26 subject to normal pressures that exceed 125 psi located along a main used to fill  
27 the Prospect and Ironville Tanks. Also, there are 27 customers served by a  
28 recently completed main in Manor Township that are subject to normal pressures  
29 exceeding 125 psi; however, a PRV will be installed in the proposed Donnerville  
30 Road Chlorine Booster Station that will reduce the normal pressure below 125

1 psi for these 27 customers. The proposed Donnerville Road Chlorine Booster  
2 Station is expected to be in service by the end of 2017. See Exhibit TLF-4.  
3 In accordance with 52 PA Code § 65.6 (a) the normal operating pressure at the  
4 main should not exceed 125 psig nor more than 150 psig during periods of hourly  
5 minimum demand.  
6

7 **Q. WHAT IS YOUR RECOMMENDATION IN REGARDS TO CWC'S HIGH**  
8 **PRESSURE?**

9 A. Since the higher pressures can cause considerable damage to customers'  
10 property, CWC should, for the 77 customers located along the main used to fill  
11 the Prospect and Ironville Tanks, submit a plan to become in compliance with  
12 PUC's pressure regulations to ensure the protection of the customers' property.

13  
14 **MAINTENANCE OF PRVS**  
15

16 **Q. WHAT ARE MR. LEWIS'S POSITIONS ON CWC MAINTAINING ITS PRVS?**

17 A. Mr. Lewis's positions are that: (1) CWC constantly monitors the pressure  
18 throughout its system with its SCADA system; (2) CWC regularly maintains its  
19 PRVs; and (3) the customer complaint log shows only one incident involving  
20 PRVs (CWC St. 1R, pp. 15-16).  
21

22 **Q. DO YOU AGREE THAT CWC CONSTANTLY MONITORS THE PRESSURE**  
23 **SYSTEM THROUGHOUT ITS SYSTEM WITH ITS SCADA SYSTEM?**

24 A. At the October 12, 2017 meeting, Mr. Lewis stated that the SCADA system  
25 determines pressures in the distribution system based on water elevations in its  
26 storage tanks. He also stated that the SCADA system could not be relied on to  
27 indicate high pressure due to a PRV failure and would not activate an alarm if  
28 high pressures occur.

29  
30 **Q. WHAT IS MR. LEWIS'S POSITION ON REGULARLY MAINTAINING ITS**  
31 **PRVS?**

**From:** Breitman, Harrison W.  
**To:** [William Lehman](#)  
**Cc:** [Thomas Sniscak](#); [Christopher Arfaa](#)  
**Subject:** RE: CWC site visit  
**Date:** Monday, September 25, 2017 2:56:11 PM

---

Bill,

The OCA agrees to your proposal. Should the OCA supplement direct testimony in regards to the site visit, we will do so by October 16<sup>th</sup> at noon.

Thanks,  
Harrison W. Breitman, Esq.  
Assistant Consumer Advocate  
Office of Consumer Advocate  
555 Walnut Street  
5<sup>th</sup> Floor, Forum Place  
Harrisburg, PA 17101  
(P) 717-780-4536  
(F) 717-783-7152

---

**From:** William Lehman [mailto:[WELehman@hmslegal.com](mailto:WELehman@hmslegal.com)]  
**Sent:** Monday, September 25, 2017 12:05 PM  
**To:** Breitman, Harrison W.  
**Cc:** Sniscak, Thomas; Arfaa, Christopher M.  
**Subject:** RE: CWC site visit

Harrison,

In all fairness, the rate case was filed 3 months ago. We originally offered up Sept. 26 and Terry was not available, nor was he available the first week of Oct. We, of course would allow Terry to supplement his testimony after the site visit on Oct. 12, but would need that it be supplemented by noon on Oct 16.

Thanks, Bill

William E. Lehman  
Attorney

Hawke McKeon & Sniscak LLP

100 N. Tenth Street  
Harrisburg, PA 17101  
717-236-1300  
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**EXHIBIT B**

[welehman@hmslegal.com](mailto:welehman@hmslegal.com)

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**From:** Breitman, Harrison W. [<mailto:HBreitman@paoca.org>]  
**Sent:** Monday, September 25, 2017 11:39 AM  
**To:** William Lehman <[WELehman@hmslegal.com](mailto:WELehman@hmslegal.com)>  
**Cc:** Demanchick, Phillip D. <[PDemanchick@paoca.org](mailto:PDemanchick@paoca.org)>; Marsilio, Kristine <[KMarsilio@paoca.org](mailto:KMarsilio@paoca.org)>; Hoover, Christine Maloni <[CHoover@paoca.org](mailto:CHoover@paoca.org)>  
**Subject:** RE: CWC site vist

Bill,

Since Direct Testimony is due on October 6<sup>th</sup>, a site visit on October 12<sup>th</sup> would unfortunately be after the filing deadline for direct testimony.

The OCA would be appreciate a site visit on October 12<sup>th</sup> as long as the OCA has the right to supplement direct testimony in regards to the site visit should any issues arise as a result of the site visit.

Let me know if this works for you and thanks again for the quick response.

Harrison W. Breitman, Esq.  
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Office of Consumer Advocate  
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---

**From:** William Lehman [<mailto:WELehman@hmslegal.com>]  
**Sent:** Monday, September 25, 2017 11:25 AM

**To:** Breitman, Harrison W.  
**Cc:** Demanchick, Phillip D.; Marsilio, Kristine; Hoover, Christine Maloni  
**Subject:** RE: CWC site vist

Harrison, Sorry, but tomorrow will not work. The day I sent last week, Oct. 12 I believe, is the only day available the first two weeks of Oct.

Thanks, Bill

William E. Lehman  
Attorney

Hawke McKeon & Sniscak LLP

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**From:** Breitman, Harrison W. [<mailto:HBreitman@paoca.org>]  
**Sent:** Monday, September 25, 2017 10:59 AM  
**To:** William Lehman <[WELehman@hmslegal.com](mailto:WELehman@hmslegal.com)>  
**Cc:** Demanchick, Phillip D. <[PDemanchick@paoca.org](mailto:PDemanchick@paoca.org)>; Marsilio, Kristine <[KMarsilio@paoca.org](mailto:KMarsilio@paoca.org)>; Hoover, Christine Maloni <[CHoover@paoca.org](mailto:CHoover@paoca.org)>  
**Subject:** CWC site vist

Bill,

Apologies for not being able to get back to you earlier, I was sick on Thursday and Friday so I wasn't in the office. Terry is available for a site visit on September 26<sup>th</sup>. Let me know if the date is still ok

with you. If it is, I'll let Terry know to pack his bags.

Harrison W. Breitman, Esq.  
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## CERTIFICATE OF SERVICE


I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

### BY ELECTRONIC & FIRST CLASS MAIL

Scott B. Granger, Esquire  
Erika L. McLain, Esquire  
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Thomas J. Sniscak  
Christopher M. Arfaa  
William E. Lehman

Dated this 2<sup>nd</sup> day of November, 2017.