



Control Number: 38339



Item Number: 687

Addendum StartPage: 0

SOAH DOCKET NO. 473-10-5001
PUC DOCKET NO. 38339

APPLICATION OF CENTERPOINT §
ENERGY HOUSTON ELECTRIC, §
LLC FOR AUTHORITY TO CHANGE §
RATES §

BEFORE THE
STATE OFFICE OF
ADMINISTRATIVE HEARINGS

FILED
MAY 14 2010
4:29 PM
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CENTERPOINT ENERGY HOUSTON ELECTRIC, LLC'S REPLY TO THE CITY OF HOUSTON AND COALITION OF CITIES' AND THE OFFICE OF PUBLIC UTILITY COUNSEL'S RESPONSES TO CENTERPOINT HOUSTON'S MOTION TO STRIKE PORTIONS OF THE DIRECT TESTIMONIES OF ELLEN BLUMENTHAL AND JUNE DIVELY

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APPLICATION OF CENTERPOINT ENERGY HOUSTON ELECTRIC, LLC FOR AUTHORITY TO CHANGE RATES	§ § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
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**CENTERPOINT ENERGY HOUSTON ELECTRIC, LLC'S REPLY TO THE CITY OF
HOUSTON AND COALITION OF CITIES' AND THE OFFICE OF PUBLIC UTILITY
COUNSEL'S RESPONSES TO CENTERPOINT HOUSTON'S MOTION TO STRIKE
PORTIONS OF THE DIRECT TESTIMONIES OF ELLEN BLUMENTHAL
AND JUNE DIVELY**

CenterPoint Energy Houston Electric, LLC ("CenterPoint Houston") files this reply to the City of Houston and Coalition of Cities' ("COH/COC") and the Office of Public Utility Counsel's ("OPC") Responses to CenterPoint Houston's Motion to Strike Portions of the Direct Testimonies of Ellen Blumenthal and June Dively (the "Motion"), filed on October 1, 2010. The responses filed by COH/COC and OPC fail to establish that Ms. Blumenthal and Ms. Dively possess the necessary qualifications under Texas law to testify about the impact of FIN 48 on ADFIT and pension/OPEB expenses. Accordingly, the Administrative Law Judges ("ALJs") should grant CenterPoint Houston's Motion.

I. INTRODUCTION

Ms. Blumenthal and Ms. Dively filed testimony in this proceeding that is unreliable due to the lack of experience each witness has in certain subject matters. The responses filed by COH/COC and OPC fail to demonstrate otherwise. The ALJs are the gatekeepers charged with assessing the reliability of all expert testimony before it is admitted in evidence in this case. Because COH/COC and OPC's responses do not reveal any new information about Ms. Blumenthal's or Ms. Dively's knowledge, education, skill, experience or training which would render them qualified to testify on the topics covered in the Motion, the ALJs should exercise

their authority to exclude unreliable evidence and strike the improper portions of Ms. Blumenthal and Ms. Dively's testimony.

II. ARGUMENTS AND AUTHORITIES

A. Legal Standard for Admissibility of Expert Testimony

In order to be admissible, expert testimony must qualify under Texas Rule of Evidence 702.¹ Modeled upon the Federal Rules of Evidence, Rule 702 states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

TEX. R. EVID. 702.

For an expert's testimony to be admissible, the expert's opinion must first be relevant to the issues in the proceeding. *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 628 (Tex. 2002); *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995). Second, the proponent of the testimony bears the initial burden of showing that the expert witness is qualified to render the proposed opinion. *Robinson*, 923 S.W.2d at 556. And third, the Supreme Court of Texas has held that Rule 702 requires that the proponent show that the testimony is based upon a reliable foundation. *Whirlpool Corp. v. Camacho*, 298 S.W.3d 631, 637 (Tex. 2009); *Robinson*, 923 S.W.2d at 556. "The trial court has the gatekeeper function of ensuring that expert testimony is base on a reliable foundation, and is relevant to the issues in the case." *Five Star Intern. Holdings, Inc. v. Thomson, Inc.*, No. 08-07-00143-CV, 2010 WL 1226056, at *5 (Tex. App.—El Paso Mar. 31, 2010, pet. filed) (citing *Gammill*, 972 S.W.2d at 728); *In re*

¹ P.U.C. Proc. R. 22.221.

Commitment of Marks, 230 S.W.3d 241, 243 (Tex. App.—Beaumont 2007, no pet. h.) (citing *Robinson*, 923 S.W.2d at 558).

B. FIN 48

1. Ms. Blumenthal Does Not Qualify as an Expert on the Impact of FIN 48 on ADFIT

COH/COC first argues that “[a]s a threshold matter, the Commission has already accepted Ms. Blumenthal as an expert qualified to testify as to whether FIN 48 should be considered in calculating accumulated deferred federal income taxes.” COH/COC Resp. at 3. In support of this argument, COH/COC points to the fact that Ms. Blumenthal’s testimony on behalf of the OPC in Docket No. 35717 was admitted into evidence in that rate case. *Id.* As such, COH/COC argues that “[c]learly, the Commission has already found Ms. Blumenthal qualified to testify on FIN 48 matters.” *Id.*

COH/COC fails to mention that no one moved to strike Ms. Blumenthal’s testimony in Docket No. 35717. And COH/COC ignores the facts that neither the Commission nor the ALJs mention or cite Ms. Blumenthal’s FIN 48 testimony in their orders or proposal for decision. *Application of Oncor Electric Delivery Company LLC for Authority to Change Rates*, Docket No. 35717, Final Order (Aug. 31, 2009); *Application of Oncor Electric Delivery Company LLC for Authority to Change Rates*, Docket No. 35717, Order on Reh’g (Nov. 30, 2009); *Application of Oncor Electric Delivery Company LLC for Authority to Change Rates*, Docket No. 35717, Proposal for Decision (June 2, 2009). There is simply no evidence to support COH/COC’s argument that the Commission found Ms. Blumenthal qualified to testify on FIN 48 matters.

COH/COC next argues that “Ms. Blumenthal clearly possesses the necessary training, qualifications, and experience to testify on the impact of FIN 48 on accumulated deferred income taxes for regulatory rate setting.” COH/COC Resp. at 3-4. In support, COH/COC points to Ms.

Blumenthal's educational background, work experience, and prior testimony before the Commission on accumulated deferred federal income taxes ("ADFIT"). *Id.* at 5-6. But none of this education, work experience, or prior testimony (other than in Docket No. 35717) involved FIN 48, as Ms. Blumenthal's deposition makes very clear:

- Ms. Blumenthal does not advise public companies on public disclosures filed with the Securities and Exchange Commission ("SEC"), let alone disclosures involving FIN 48 (*Blumenthal Depo. Tr.* at 14:14-20);
- Ms. Blumenthal does not assist public companies in working with their financial auditors as part of the auditors' certification of a company's financial statements, let alone certification of FIN 48 liabilities (*id.* at 14:21-25);
- Ms. Blumenthal does not advise public companies on how to comply with generally accepted accounting principles, let alone FIN 48 (*id.* at 15:1-3);
- Ms. Blumenthal has not written any articles or books in the last 10 years (*id.* at 15:4-8); and
- Ms. Blumenthal has not delivered any speeches or presentations in the last 10 years (*id.* at 15:9-11).

Further, aside from lacking the training or experience necessary to offer expert testimony on the impact of FIN 48 on ADFIT, Ms. Blumenthal consistently demonstrated in her deposition why she is unable to offer such testimony. As COH/COC notes, "Ms. Blumenthal simply testifies as to whether FIN 48 liabilities should be deducted from the balance of accumulated federal deferred income taxes . . . for rate setting purposes." COH/COC Resp. at 4. But Ms. Blumenthal is unable to provide expert testimony analyzing the impact of FIN 48 on ADFIT for the reasons discussed in detail in CenterPoint Houston's Motion, including:

- Ms. Blumenthal does not know how temporary differences--the only amounts comprising ADFIT--are treated under FIN 48 yet purports to offer expert testimony regarding including FIN 48 amounts in ADFIT (*Blumenthal Depo. Tr.* at 16:15-18);
- Ms. Blumenthal failed to read or review the IRS's proposed Schedule UTP (which has been finalized since Ms. Blumenthal's deposition) or the

instructions thereto (*id.* at 19:9-20:3), which Schedule UTP greatly facilitates the IRS's scrutiny of underlying uncertain tax positions and directly refutes Ms. Blumenthal's assumption that CenterPoint Houston will never actually have to pay the IRS the amounts comprising its FIN 48 liabilities; and

Ms. Blumenthal is also not familiar with the Missouri Public Utility Commission's *Ameren* decision holding that FIN 48 liabilities should not be included in ADFIT (*id.* at 23:4-6) even though she offers direct testimony that such liabilities are normally included in ADFIT (*Blumenthal Direct* at 25).

2. Ms. Dively Does Not Qualify as an Expert on the Impact of FIN 48 on ADFIT

OPC asserts that CenterPoint's criticisms of Ms. Dively are "unfounded." OPC Resp. at 7. In support of this assertion, OPC attempts to now change substantive portions of Ms. Dively's deposition transcript to show that Ms. Dively "reviewed the direct testimony and exhibits of CenterPoint witness, Alan Felsenthal, in preparing her testimony in this case" and that Ms. Dively "was also aware of the Missouri Public Utility Commission case to which Mr. Felsenthal referred in his testimony." *Id.*

OPC claims that Ms. Dively "mis-spoke" when she responded that she had not read Felsenthal's testimony. *Id.* The relevant portion of Ms. Dively's deposition transcript is as follows:

Q. Are you familiar with the -- did you review Al Felsenthal's testimony?

A. No.

Dively Depo. Tr. at 21:2-4. Neither the question asked nor the answer to it could have been clearer. And OPC's classification of Ms. Dively's response as that she "mis-spoke" is simply an after-the-fact attempt to change the substantive record to try and portray Ms. Dively as an expert on these issues.

Likewise, the question regarding the Missouri Public Utility Commission's decision in *Ameren* and Ms. Dively's answer were straightforward and presented no opportunity for ambiguity:

Q. Are you familiar [with] the decision of the Missouri Commission in the Amer[e]n case?

A. No.

Id. at 21:5-7. Indeed, Ms. Dively stated that she is not aware of any case in which FIN 48 liabilities were included in rate base. *Id.* at 19:4-21:1. OPC is seeking to classify as mere "errors" substantive matters irrefutably demonstrating that Ms. Dively is unqualified to render an opinion as to the inclusion of FIN 48 amounts in ADFIT.

OPC then asserts that Ms. Dively "is an expert in financial accounting and utility ratemaking, and fully capable as a CPA of providing expert testimony on the inappropriateness of removing FIN 48 amounts from ADFIT in ratemaking." OPC Resp. at 5. OPC goes on to describe in detail Ms. Dively's educational background, work history, and professional qualifications. *Id.* But notably, none of the matters comprising Ms. Dively's resume involve learning about, working on, or providing advice regarding, FIN 48.

Instead, neither Ms. Dively's qualifications regarding matters other than FIN 48 nor OPC's attempts to substantively change Ms. Dively's deposition transcript change the facts discussed in detail in CenterPoint Houston's Motion showing that Ms. Dively is truly unfamiliar with FIN 48 and simply does not have the necessary background to be considered an expert on the inclusion of FIN 48 amounts in ADFIT, including:

- Ms. Dively does not know how temporary differences--the only amounts comprising ADFIT--are treated under FIN 48 yet purports to offer expert testimony regarding including FIN 48 amounts in ADFIT (*Dively Depo. Tr.* at 14:5-20);

- Ms. Dively failed to read or review the IRS's proposed Schedule UTP (which has been finalized since Ms. Dively's deposition) or the instructions thereto (*id.* at 15:18-16:10), which Schedule UTP greatly facilitates the IRS's scrutiny of underlying uncertain tax positions and directly calls into question the Commission's reasons for including FIN 48 amounts in ADFIT in Docket No. 35717;
- Ms. Dively has not provided expert testimony on FIN 48 in any other case (*id.* at 8:8-10), does not advise public companies on public disclosures filed with the SEC (*id.* at 8:11-14), does not assist public companies in working with their financial auditors as part of the financial auditors' certification of a company's financial statements (*id.* at 8:15-18), has not written any articles or books analyzing FIN 48 (*id.* at 10:3-5), has not delivered any speeches or presentations analyzing FIN 48 (*id.* at 10:6-8), and has not attended any seminars or courses on FIN 48 (*id.* at 10:9-11); and
- Ms. Dively does not know why FIN 48 was promulgated, when companies were required to adopt it, or when CenterPoint Houston adopted it (*id.* at 12:11-20).

C. Ms. Blumenthal is Not Qualified to Testify as an Expert on the Impact of Pension and OPEB Expenses on Rate Base

COH/COC first argues that Ms. Blumenthal is qualified to testify on pension/OPEB expense because she is simply relying on numbers provided by CEHE's actuaries (not disputing them) to generate her own expense ratio for determining the amount of pension expense to be included in current rates and the amount of the pension regulatory asset to be recovered and amortized in this proceeding. COH/COC Resp. at 8. In support of this argument, COH/COC claims that what Ms. Blumenthal did is no different than "the approach taken by CEHE's witness, Mr. Woods, who is likewise, not a pension actuary," and that as a CPA in Texas, she is clearly familiar with, and qualified to testify on, generally accepted accounting principles ("GAAP"). *Id.*

COH/COC's argument is a red herring. CenterPoint Houston does not take issue with Ms. Blumenthal's reliance on the numbers provided by CEHE's actuaries. Nor does it argue that Ms. Blumenthal is not generally familiar with GAAP as a CPA. Rather, CenterPoint Houston's

Motion is based on the fact that Ms. Blumenthal lacks a necessary understanding of FAS 87, 106, 112 or 158 (collectively, the "Pension/OPEB FAS"), and therefore she is not qualified to opine on the impact of pension and OPEB expenses on CenterPoint Houston's rate base.

To perform the required calculations, which includes selection of appropriate assumptions and preparation of the reports required under the Pension/OPEB FAS for an employer's pension plan and OPEB, an *actuary* with sufficient training, education and years of practice is required. Ms. Blumenthal admits that she is not an actuary. *Blumenthal Depo. Tr.* at 80:9-81:8 ("Q: [Y]ou are not an actuary; is that correct? A: That's correct."). She further admits that she has never worked in the area of pension/OPEB in any capacity, either as an auditor, manager of benefits or consultant or otherwise. *Id.* at 81:9-82:9 ("Have you ever been responsible for providing advice in connection with designing retirement benefit plans . . .? A: No.").

Despite her lack of knowledge with respect to the Pension/OPEB FAS, Ms. Blumenthal provides opinions regarding the assumptions used to determine the pension plan expense under FAS 87, including assumptions with respect to the discount rate, the long term expected return on plan assets, and the rate of increase in compensation, and she further opines as to the impact of changes in the amount and frequency of cash contributions to the pension plan on FAS 87. *Blumenthal Direct* at 5:14-16, 6:1-4, 14:6-14, 15:1, 18:1-12, and 22:5-8. Because Ms. Blumenthal's opinions are based on the manipulation of underlying assumptions used calculate the results under the Pension/OPEB FAS, and area she admits she has no expertise, Ms. Blumenthal's direct testimony on these issues is not reliable and should be struck.

CenterPoint Houston further notes that Mr. Woods, who also is not an actuary, has not been offered as an expert with respect to the Pension/OPEB FAS. Mr. Woods is merely

responding to the intervenor's questions based on information prepared and provided by the actuary for the Company's pension plan and OPEB.

COH/COC next argues that CenterPoint Houston misapplied the formula set forth in PURA § 36.065 in determining the amount of the pension regulatory asset to be recovered in this proceeding. COH/COC Resp. at 9. Again, because Ms. Blumenthal's calculations with respect to the regulatory asset are dependent on a manipulation of the assumptions used to calculate the FAS 87/106 numbers, her testimony on the regulatory asset should be excluded from the evidence in this proceeding. In addition, the fact that Ms. Blumenthal interprets PURA § 36.058 differently than the Company does not speak to the threshold issue of Ms. Blumenthal's lack of expertise on the Pension/OPEB FAS.

Finally, COH/COC argues that because Ms. Blumenthal is "simply adopting the Company's own [assumptions on FAS 87]," she is qualified to testify on the impact of those assumptions on FAS 87 as well as the effect of cash contributions to the pension plan. COH/COC Resp. at 9. This argument suffers from the same infirmity as COH/COC's previous arguments. While Ms. Blumenthal may rely on numbers provided by CEHE's actuaries to make certain calculations, this does qualify her to provide expert opinion testimony as to the impact of changes in the amount and frequency of cash contributions to the pension plan on FAS 87.

III. CONCLUSION

COH/COC and OPC's responses do not establish that Ms. Blumenthal and Ms. Dively have expertise over the subject matters on which they purport to offer expert opinions. Rather, they attempt to recharacterize the testimony after the fact in such a way to make knowledge, skill, and experience with FIN 48 and Pension/OPEB FAS unnecessary. The ALJs should reject

this attempt and strike the portions of Ms. Blumenthal's and Ms. Dively's direct testimony as requested in CenterPoint Houston's Motion.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on all parties of record in this proceeding, by facsimile, hand delivery, e-mail, or United States first class mail on this 6th day of October, 2010.

Linda A Johnston