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SOAH DOCKET NO. 473-14-5138.WS
PUC DOCKET NO. 42857

PETITION OF NORTH AUSTIN MUNICIPAL UTILITY DISTRICT NO. 1, NORTHTOWN MUNICIPAL UTILITY DISTRICT, TRAVIS COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NO. 10 AND WELLS BRANCH MUNICIPAL UTILITY DISTRICT FROM THE RATEMAKING ACTIONS OF THE CITY OF AUSTIN AND REQUEST FOR INTERIM RATES IN WILLIAMSON AND TRAVIS COUNTIES	**§**	**BEFORE THE STATE OFFICE**
	§	**OF**
	§	**ADMINISTRATIVE HEARINGS**

SOAH DOCKET NO. 473-14-5138.WS
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PETITION OF NORTH AUSTIN MUNICIPAL UTILITY DISTRICT NO. 1, NORTHTOWN MUNICIPAL UTILITY DISTRICT, AND WELLS BRANCH MUNICIPAL UTILITY DISTRICT FROM THE RATEMAKING ACTIONS OF THE CITY OF AUSTIN AND REQUEST FOR INTERIM RATES IN WILLIAMSON AND TRAVIS COUNTIES	**§**	**BEFORE THE STATE OFFICE**
	§	**OF**
	§	**ADMINISTRATIVE HEARINGS**

PETITIONERS' OBJECTIONS TO THE PREFILED TESTIMONY AND EXHIBITS OF BART JENNINGS

TO THE HONORABLE JUDGES BIERMAN AND SHENOY:

COME NOW, North Austin Municipal Utility District No. 1, Northtown Municipal Utility District, Travis County Water Control and Improvement District No. 10, and Wells Branch Municipal Utility District (the "Petitioners") and file the following objections to the prefiled direct testimony and exhibits of Bart Jennings, which the City of Austin filed on or

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about July 15, 2014, and moves to strike certain portions of Mr. Jennings' testimony, as set forth below:

I. Background

The Petitioners have appealed the City's improper action imposing rates in violation of Texas Water Code §13.044(b) and that unjustly and unreasonably seek to recover revenue for the City that is unrelated to the cost of providing water service to the Petitioners. The City of Austin bears the burden of proving de novo that their wholesale water and wastewater rates charged to Petitioners are just and reasonable.

The City designated its expert witness in response to the Petitioners' Request for Disclosures on November 8, 2013,[1] and then supplemented those responses on July 29, 2014,[2] after the City's deadline to file its direct case. The City was required to file its "rate filing package and direct case" on July 15, 2014.[3] The discovery period in this case ends December 30, 2014.[4] Under the Texas Rules of Civil Procedure, a party is required to timely supplement its responses to discovery.[5] More specifically, a party is required to designate experts by responding to Rule 194.2(f) by the later of 30 days after the Request for Disclosure is served or 60 days before the end of the discovery period.[6] The City's deadline to designate experts was October 2, 2014. The City's Rule 194 Disclosures only identified Richard D. Giardina as an expert, and the City's First Amended Rule 194 Disclosures only identified Richard D. Giardina and Joseph M. Healy as experts. All of the City's other witnesses were identified by the City as "persons having knowledge of any relevant facts" under TRCP Rule 194. Mr. Jennings' testimony is full with attempts to both qualify Mr. Jennings as an expert and provide opinion testimony as though Mr. Jennings is a properly designated expert.

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[1] *See* City of Austin's Rule 194 Disclosures, dated November 8, 2013

[2] *See* City of Austin's First Amended Rule 194 Disclosures, dated July 29, 2014

[3] *See* Order No. 9, issued May 29, 2014, p. 8.

[4] Id.

[5] Texas Rules of Civil Procedure, Rule 193.5

[6] Id., Rule 195.2

II. Objections

Petitioners' make the following objections to portions of Mr. Bart Jennings' prefiled testimony and exhibits. Petitioners move to strike each portion of the testimony referenced below.

As a whole, Mr. Jennings testimony is irrelevant to whether the Austin's rates are just and reasonable, based upon the cost of service, including reasonable and necessary expenses and debt service costs for infrastructure used and useful to the provision of water or wastewater service. To be relevant, evidence must possess logical probative value toward some fact that is legally of consequence to the whether the City based its wholesale rates on its cost of providing water and wastewater service. He admits that his testimony is irrelevant when responding to Question Nos. 36 and 37 in his testimony found on page 17, lines 9 through 24, when he testifies that he merely attended the annual meeting at which the City announces the annual water and wastewater rate increase to the wholesale customers. "The more specific issues of the cost of water and wastewater utility service or how rates are calculated are [sic] handled by the AWU Finance Division, as Michael Castillo has discussed in his testimony." For this reason alone, the ALJ should strike Mr. Jennings' testimony and his exhibits in their entirety.

a. Question Nos. 3, 4, 5, 6, 7, and 8 and the responses, Page 3, Line 12 through Page 6, Line 13, and Austin Jennings Exhibit No. 1.

Petitioners object to the referenced testimony and exhibit on the basis of relevance. TEX R. CIV. EVID. 401-402. "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." *Edwards v. TEC*, 936 S.W.2d 462, 466-67 (Tex. App. -- Fort Worth 1996, no writ) (emphasis added). The ALJ should strike the testimony and exhibit offered, as they do not relate to a material fact in this matter.

The testimony relates to Mr. Jennings' educational background, work experience, membership in professional organizations, honors and recognitions, and the exhibit relates to a presentation Mr. Jennings' educational background, work experience, membership in professional organizations, honors and recognitions, none of which is relevant to his testimony as

a ***fact witness*** and does not assist the trier of fact in determining whether the City's wholesale rates are just and reasonable.

b. Question 5 and the response, Page 4, Line 17 through Page 6, Line 23.

The Question and Mr. Jennings' testimony are irrelevant under TEX. R. CIV. EVID. 401 and 402 and should be excluded from evidence and stricken from the testimony. To be relevant, evidence must possess logical probative value toward some fact that is legally of consequence to the whether the City based its wholesale rates on its cost of providing water and wastewater service. The "important aspects of [Mr. Jennings] job" are irrelevant to whether the Austin's rates are just and reasonable, based upon the cost of service. Mr. Jennings' testimony does not affect in any way the cost for the City to provide water and wastewater utility service to Petitioners. The City's burden is to show that the costs incurred by the City of Austin to provide wholesale water and wastewater service to the Petitioners and the rates imposed to recover those costs are just and reasonable, not whether Mr. Jennings thinks his job is important.

c. Question 9 and the response, Page 6, Lines 15 through 22.

The Question and Mr. Jennings' testimony are irrelevant under TEX. R. CIV. EVID. 401 and 402 and should be excluded from evidence and stricken from the testimony. To be relevant, evidence must possess logical probative value toward some fact that is legally of consequence to the whether the City based its wholesale rates on its cost of providing water and wastewater service. Mr. Jennings' opinion about "the relationship between the City and the Petitioners" is irrelevant to whether the Austin's rates are just and reasonable, based upon the cost of service. Mr. Jennings' testimony does not affect in any way the cost for the City to provide water and wastewater utility service to Petitioners.

d. Question 11 and the response, Page 7, Lines 8 through 13, and Austin Jennings Exhibit No. 2.

With regard to Austin Jennings Exhibit No. 2, Petitioners object to its admission because the City has not made the proper foundation for the exhibit to be admissible in evidence. The

City has failed to authenticate the documents referenced in the testimony as required by TEX R. CIV. EVID. 901 *et seq*. Authentication is a prerequisite to admissibility. *In re G.F.O.*, 874 S.W.2d 729, 731 (Tex. App. -- Houston [1st Dist.] 1994, no writ). The witness must have personal knowledge to testify regarding authentication. TEX R. CIV. EVID. 602; *City of Dallas v. GTE SW., Inc.*, 980 S.W.2d 928, 935 (Tex. App. -- Fort Worth 1998, pet. denied).

Further, the City has failed to authenticate the exhibit as a public record. The City failed to provide evidence to support self-authentication under TEX R. CIV. EVID. 902 and 1005. The documents are not offered under seal (TEX R. CIV. EVID. 902(1)), the City failed to provide certified copies of the evidence proffered (TEX R. CIV. EVID. 902(4)), and made no attempt to have the witness prove up the authenticity of the evidence referred to in the witness' testimony. The evidence should be excluded.

Finally, the Petitioners object to Exhibit No. 2 because it is prohibited hearsay under TEX R. CIV. EVID. 801 and 802. Mr. Jennings provides no testimony regarding his personal knowledge about the exhibit and its origins or creation.

e. Question 13 and the response, Page 8, Lines 17 through 22, and Austin Jennings Exhibit No. 3.

The question references 24 contracts and amendments between the City and North Austin MUD No. 1; however, Austin Jennings Exhibit No. 3 is simply a list of possible contracts and amendments, and it fails to provide any of those documents, and is, therefore, irrelevant under TRE 401. To be relevant, evidence must possess logical probative value toward some fact that is legally of consequence to the whether the City based its wholesale rates on its cost of providing water and wastewater service.

With regard to Austin Jennings Exhibit No. 3, Petitioners object to its admission because the City has not made the proper foundation for the exhibit to be admissible in evidence. The City has failed to authenticate the documents referenced in the testimony as required by TEX R. CIV. EVID. 901 *et seq*. Authentication is a prerequisite to admissibility. *In re G.F.O.*, 874 S.W.2d 729, 731 (Tex. App. -- Houston [1st Dist.] 1994, no writ). The witness must have personal knowledge to testify regarding authentication. TEX R. CIV. EVID. 602; *City of Dallas v. GTE SW., Inc.*, 980 S.W.2d 928, 935 (Tex. App. -- Fort Worth 1998, pet. denied).

Further, the City has failed to authenticate the exhibit as a public record. The City failed to provide evidence to support self-authentication under TEX R. CIV. EVID. 902 and 1005. The documents are not offered under seal (TEX R. CIV. EVID. 902(1)), the City failed to provide certified copies of the evidence proffered (TEX R. CIV. EVID. 902(4)), and made no attempt to have the witness prove up the authenticity of the evidence referred to in the witness' testimony. The evidence should be excluded.

Finally, the Petitioners object to Exhibit No. 3 because it is prohibited hearsay under TEX R. CIV. EVID. 801 and 802. Mr. Jennings provides no testimony regarding his personal knowledge about the exhibit and its origins or creation. Therefore, the ALJ should strike Exhibit No. 3 from the record.

f. Questions 14 through 17, Page 8 and the responses, Line 24 through Page 10, Line 8.

The Questions and Mr. Jennings' testimony are irrelevant under TEX. R. CIV. EVID. 401 and 402 and should be excluded from evidence and stricken from the testimony. To be relevant, evidence must possess logical probative value toward some fact that is legally of consequence to the whether the City based its wholesale rates on its cost of providing water and wastewater service. Other than for purposes of demonstrating jurisdiction, the questions and responses regarding the May 20, 1983 Agreement Concerning Creation are irrelevant under TEX. R. CIV. EVID. 401 as to whether the Austin's rates are just and reasonable, based upon the cost of service. The Agreement does not include any information regarding what is the City's cost of providing wholesale utility service.

Further, the Petitioners object to both the proffered testimony and exhibit because it contains speculation. The witness was not properly designated as a testifying expert, the question seeks an opinion from the witness, and the witness offers an opinion in response. As a fact witness, this witness must only testify to factual matters on which the witness has personal knowledge. TEX R. CIV. EVID. 602. "When the main substance of the witness' testimony is based on application of the witness' specialized knowledge, skill, experience, training, or education to his familiarity to the [subject matter], then the testimony will generally be expert testimony within the scope of TEX. R. CIV. EVID. 702. A witness giving such testimony must be properly disclosed and designated as an expert and the witness' testimony is subject to scrutiny [as an expert]. Any other principle would allow parties to conceal expert testimony by claiming the

witness is one whose opinions are merely for the purpose of explaining the witness' perceptions and testimony." *Reid Rd. MUD v. Speedy Stop Food Stores*, 337 S.W.3d 846, 851-52 (Tex. 2011). The ALJ should strike the witness' speculative testimony regarding the Consent Agreement.

Furthermore, the questions and responses are hearsay under TEX. R. CIV. EVID. 801(b), as Mr. Jennings is referencing statements that are not his own and is offering his statements for the truth asserted. Mr. Jennings is a fact witness being asked an opinion, and under TEX. R. CIV. EVID. 701, his statements are not based upon his knowledge the events that occurred during the preparation of any agreements.

g. Question 18 and the response, Page 10, Lines 10 through 16.

Petitioners object to the referenced testimony because the witness is attempting to testify as an expert and was not designated as an expert by the City. The witness should not be allowed to testify as an expert because the witness was not properly identified in the City's Rule 194 Disclosures or the City's First Amended Rule 194 Disclosures. The law requires the exclusion of the witness' testimony if the witness was not listed in response to discovery requests, unless the ALJs find that either: 1) there was good cause for the City's failure to designate the witness as an expert, or 2) the City's failure to designate will not unfairly surprise or prejudice the Petitioners. TEX R. CIV. PROC. 193.6(a)(1), (2). Counsel's carelessness or failure to properly designate the witness is not good cause. *See e.g. Sharp v. Broadway Nat'l Bank*, 784 S.W.2d 669, 670-72 (Tex. 1990); *E.F. Hutton & Co. v. Youngblood*, 741 S.W.2d 363, 364 (Tex. 1987). Additionally, the City had ample time to review and amend its discovery responses to list the witness as a testifying expert. In fact, the City had an obligation to amend or supplement its responses because the City clearly intended to call this witness as a testifying expert. TEX R. CIV. PROC. 193.5. For the City to have this witness testify as an expert and offer the witness' opinion for the first time in its prefiled testimony is a surprise to the Petitioners and unfairly prejudices them because the Petitioners lack sufficient time seek an expert to rebut the proffered testimony. Further, designated fact witnesses should be excluded as expert witnesses, because the law does not allow a party or a witness to testify as an expert if not properly designated as a testifying expert. *Collins v. Collins*, 904 S.W.2d 792, 801 (Tex. App. – Houston [1st Dist.] 1995, writ denied, 923 S.W.2d 569 (Tex. 1996); Baylor *Med. Plaza Serv. v. Kidd*, 834 S.W.2d 69, 73 (Tex.

App. – Texarkana 1992, writ denied).

Further, the Petitioners object to both the proffered testimony and exhibit because it contains speculation. The witness was not properly designated as a testifying expert, the question seeks an opinion from the witness, and the witness offers an opinion in response. As a fact witness, this witness must only testify to factual matters on which the witness has personal knowledge. TEX R. CIV. EVID. 602. "When the main substance of the witness' testimony is based on application of the witness' specialized knowledge, skill, experience, training, or education to his familiarity to the [subject matter], then the testimony will generally be expert testimony within the scope of TEX. R. CIV. EVID. 702. A witness giving such testimony must be properly disclosed and designated as an expert and the witness' testimony is subject to scrutiny [as an expert]. Any other principle would allow parties to conceal expert testimony by claiming the witness is one whose opinions are merely for the purpose of explaining the witness' perceptions and testimony." *Reid Rd. MUD v. Speedy Stop Food Stores*, 337 S.W.3d 846, 851-52 (Tex. 2011). The ALJ should strike the witness' speculative testimony regarding the contractual relationship between the City and North Austin MUD No. 1.

The question is asking Mr. Jennings to state an opinion regarding the contractual relationship of the City and North Austin MUD No. 1 that is not based upon his person knowledge. The question asks for an opinion from Mr. Jennings, a fact witness, should be excluded from evidence and stricken from the testimony under TEX. R. CIV. EVID. 701, as his statements are not based upon his knowledge of the relationship between the City and North Austin MUD No. 1 since the beginning of that relationship.

h. Question 19 and the response, Page 10, Lines 21 through 25.

Question references 20 contract and amendments between the City and Northtown MUD; however, Austin Jennings Exhibits 4 fails to provide any of those documents, and is, therefore, irrelevant Rule 401. To be relevant, evidence must possess logical probative value toward some fact that is legally of consequence to the whether the City based its wholesale rates on its cost of providing water and wastewater service. The document is hearsay under Rule 801.

i. Questions 20-23 and the response, Page11, Line 1 through Page 12, Line 16, and Austin Jennings Exhibit No. 4.

The Questions and Mr. Jennings' testimony are irrelevant under TEX. R. CIV. EVID. 401 and 402 and should be excluded from evidence and stricken from the testimony. To be relevant, evidence must possess logical probative value toward some fact that is legally of consequence to the whether the City based its wholesale rates on its cost of providing water and wastewater service. Other than for purposes of demonstrating jurisdiction, the questions and responses regarding the January 6, 1986 Agreement Concerning Creation and Operation of Northtown MUD irrelevant under TEX. R. CIV. EVID. 401 as to whether the Austin's rates are just and reasonable, based upon the cost of service. The Agreement does not include any information regarding what is the City's cost of providing wholesale utility service. Furthermore, the questions and responses are hearsay under TEX. R. CIV. EVID. 801(b), as Mr. Jennings is referencing statements that are not his own and is offering his statements for the truth asserted. Mr. Jennings is a fact witness, and under TEX. R. CIV. EVID. 701, he statements are not based upon his knowledge the events that occurred during the preparation of any agreements.

With regard to Austin Jennings Exhibit No. 4, Petitioners object to its admission because the City has not made the proper foundation for the exhibit to be admissible in evidence. The City has failed to authenticate the documents referenced in the testimony as required by TEX R. CIV. EVID. 901 *et seq*. Authentication is a prerequisite to admissibility. *In re G.F.O.*, 874 S.W.2d 729, 731 (Tex. App. -- Houston [1st Dist.] 1994, no writ). The witness must have personal knowledge to testify regarding authentication. TEX R. CIV. EVID. 602; *City of Dallas v. GTE SW., Inc.*, 980 S.W.2d 928, 935 (Tex. App. -- Fort Worth 1998, pet. denied).

Further, the City has failed to authenticate the exhibit as a public record. The City failed to provide evidence to support self-authentication under TEX R. CIV. EVID. 902 and 1005. The documents are not offered under seal (TEX R. CIV. EVID. 902(1)), the City failed to provide certified copies of the evidence proffered (TEX R. CIV. EVID. 902(4)), and made no attempt to have the witness prove up the authenticity of the evidence referred to in the witness' testimony. The ALJ should strike Austin Jennings Exhibit No. 4.

Finally, the Petitioners object to Exhibit No. 4 because it is prohibited hearsay under TEX R. CIV. EVID. 801 and 802. Mr. Jennings provides no testimony regarding his personal

knowledge about the exhibit and its origins or creation. Therefore, the ALJ should strike Austin Jennings Exhibit No. 4 from the record.

j. Question 24, Page 12, Lines 18 through 24.

Petitioners object to the referenced testimony because the witness is attempting to testify as an expert and was not designated as an expert by the City. The witness should not be allowed to testify as an expert because the witness was not properly identified in the City's Rule 194 Disclosures or the City's First Amended Rule 194 Disclosures. The law requires the exclusion of the witness' testimony if the witness was not listed in response to discovery requests, unless the ALJs find that either: 1) there was good cause for the City's failure to designate the witness as an expert, or 2) the City's failure to designate will not unfairly surprise or prejudice the Petitioners. TEX R. CIV. PROC. 193.6(a)(1), (2). Counsel's carelessness or failure to properly designate the witness is not good cause. *See e.g. Sharp v. Broadway Nat'l Bank*, 784 S.W.2d 669, 670-72 (Tex. 1990); *E.F. Hutton & Co. v. Youngblood*, 741 S.W.2d 363, 364 (Tex. 1987). Additionally, the City had ample time to review and amend its discovery responses to list the witness as a testifying expert. In fact, the City had an obligation to amend or supplement its responses because the City clearly intended to call this witness as a testifying expert. TEX R. CIV. PROC. 193.5. For the City to have this witness testify as an expert and offer the witness' opinion for the first time in its prefiled testimony is a surprise to the Petitioners and unfairly prejudices them because the Petitioners lack sufficient time seek an expert to rebut the proffered testimony. Further, designated fact witnesses should be excluded as expert witnesses, because the law does not allow a party or a witness to testify as an expert if not properly designated as a testifying expert. *Collins v. Collins*, 904 S.W.2d 792, 801 (Tex. App. – Houston [1st Dist.] 1995, writ denied, 923 S.W.2d 569 (Tex. 1996); *Baylor Med. Plaza Serv. v. Kidd*, 834 S.W.2d 69, 73 (Tex. App. – Texarkana 1992, writ denied).

Further, the Petitioners object to both the proffered testimony and exhibit because it contains speculation. The witness was not properly designated as a testifying expert, the question seeks an opinion from the witness, and the witness offers an opinion in response. As a fact witness, this witness must only testify to factual matters on which the witness has personal knowledge. TEX R. CIV. EVID. 602. "When the main substance of the witness' testimony is based on application of the witness' specialized knowledge, skill, experience, training, or education to

his familiarity to the [subject matter], then the testimony will generally be expert testimony within the scope of TEX. R. CIV. EVID. 702. A witness giving such testimony must be properly disclosed and designated as an expert and the witness' testimony is subject to scrutiny [as an expert]. Any other principle would allow parties to conceal expert testimony by claiming the witness is one whose opinions are merely for the purpose of explaining the witness' perceptions and testimony." *Reid Rd. MUD v. Speedy Stop Food Stores*, 337 S.W.3d 846, 851-52 (Tex. 2011). The ALJ should strike the witness' speculative testimony regarding the contractual relationship between the City and Northtown MUD.

The question is asking Mr. Jennings to state an opinion regarding the contractual relationship of the City and Northtown MUD that is not based upon his personal knowledge. The question asks for an opinion from Mr. Jennings, a fact witness, should be excluded from evidence and stricken from the testimony under TEX. R. CIV. EVID. 701, as his statements are not based upon his knowledge of the relationship between the City and Northtown MUD since the beginning of that relationship.

k. Question 25 and the response, Page 13, Lines 4 through 10.

Question references 20 contract and amendments between the City and Travis Co WCID No. 10; however, Austin Jennings Exhibits 5 fails to provide any of those documents, and is, therefore, irrelevant under Rules 401 and 402. To be relevant, evidence must possess logical probative value toward some fact that is legally of consequence to the whether the City based its wholesale rates on its cost of providing water and wastewater service. The ALJ should strike the witness' testimony.

l. Question 26, Page 13, Lines 12 through 18, and Austin Jennings Exhibit No. 5.

The Question and Mr. Jennings' testimony are irrelevant under TEX. R. CIV. EVID. 401 and 402 and should be excluded from evidence and stricken from the testimony. To be relevant, evidence must possess logical probative value toward some fact that is legally of consequence to the whether the City based its wholesale rates on its cost of providing water and wastewater service. Other than for purposes of demonstrating jurisdiction, the question and response regarding the 1990 Water Service Agreement is irrelevant under Rule 401 as to whether the

Austin's rates are just and reasonable, based upon the cost of service, including reasonable and necessary expenses and debt service costs for infrastructure used and useful to the provision of water or wastewater service. The Agreement does not include any information regarding what is the City's cost of providing wholesale utility service. Furthermore, the questions and responses are hearsay under TEX. R. CIV. EVID. 801(b), as Mr. Jennings is referencing statements that are not his own and is offering his statements for the truth asserted. Mr. Jennings is a fact witness, and under TEX. R. CIV. EVID. 701, he statements are not based upon his knowledge the events that occurred during the preparation of any agreements.

With regard to Austin Jennings Exhibit No. 5, Petitioners object to its admission because the City has not made the proper foundation for the exhibit to be admissible in evidence. The City has failed to authenticate the documents referenced in the testimony as required by TEX R. CIV. EVID. 901 *et seq.* Authentication is a prerequisite to admissibility. *In re G.F.O.*, 874 S.W.2d 729, 731 (Tex. App. -- Houston [1st Dist.] 1994, no writ). The witness must have personal knowledge to testify regarding authentication. TEX R. CIV. EVID. 602; *City of Dallas v. GTE SW., Inc.*, 980 S.W.2d 928, 935 (Tex. App. -- Fort Worth 1998, pet. denied). The ALJ should strike the witness' testimony.

Further, the City has failed to authenticate the exhibit as a public record. The City failed to provide evidence to support self-authentication under TEX R. CIV. EVID. 902 and 1005. The documents are not offered under seal (TEX R. CIV. EVID. 902(1)), the City failed to provide certified copies of the evidence proffered (TEX R. CIV. EVID. 902(4)), and made no attempt to have the witness prove up the authenticity of the evidence referred to in the witness' testimony. The ALJ should strike Austin Jennings Exhibit No. 5.

Finally, the Petitioners object to Exhibit No. 5 because it is prohibited hearsay under TEX R. CIV. EVID. 801 and 802. Mr. Jennings provides no testimony regarding his personal knowledge about the exhibit and its origins or creation. Therefore, the ALJ should strike Austin Jennings Exhibit No. 5 from the record.

m. Question 27 and the response, Page 13, Line 20 through Page 14, Line 2.

The Question and Mr. Jennings' testimony are irrelevant under TEX. R. CIV. EVID. 401 and 402 and should be excluded from evidence and stricken from the testimony. To be relevant, evidence must possess logical probative value toward some fact that is legally of consequence to

the whether the City based its wholesale rates on its cost of providing water and wastewater service. Question references a prior Water and Wastewater Rate Settlement Agreement between the City and Travis Co. WCID No. 10. The question and response are irrelevant under Rule 401 as to whether the Austin's rates are just and reasonable, based upon the current cost of service. The ALJ should strike the witness' testimony.

n. Question 28 and the response, Page 14, Line 4 through 10.

Petitioners object to the referenced testimony because the witness is attempting to testify as an expert and was not designated as an expert by the City. The witness should not be allowed to testify as an expert because the witness was not properly identified in the City's Rule 194 Disclosures or the City's First Amended Rule 194 Disclosures. The law requires the exclusion of the witness' testimony if the witness was not listed in response to discovery requests, unless the ALJs find that either: 1) there was good cause for the City's failure to designate the witness as an expert, or 2) the City's failure to designate will not unfairly surprise or prejudice the Petitioners. TEX R. CIV. PROC. 193.6(a)(1), (2). Counsel's carelessness or failure to properly designate the witness is not good cause. *See e.g. Sharp v. Broadway Nat'l Bank*, 784 S.W.2d 669, 670-72 (Tex. 1990); *E.F. Hutton & Co. v. Youngblood*, 741 S.W.2d 363, 364 (Tex. 1987). Additionally, the City had ample time to review and amend its discovery responses to list the witness as a testifying expert. In fact, the City had an obligation to amend or supplement its responses because the City clearly intended to call this witness as a testifying expert. TEX R. CIV. PROC. 193.5. For the City to have this witness testify as an expert and offer the witness' opinion for the first time in its prefiled testimony is a surprise to the Petitioners and unfairly prejudices them because the Petitioners lack sufficient time seek an expert to rebut the proffered testimony. Further, designated fact witnesses should be excluded as expert witnesses, because the law does not allow a party or a witness to testify as an expert if not properly designated as a testifying expert. *Collins v. Collins*, 904 S.W.2d 792, 801 (Tex. App. – Houston [1st Dist.] 1995, writ denied, 923 S.W.2d 569 (Tex. 1996); *Baylor Med. Plaza Serv. v. Kidd*, 834 S.W.2d 69, 73 (Tex. App. – Texarkana 1992, writ denied).

Further, the Petitioners object to both the proffered testimony and exhibit because it contains speculation. The witness was not properly designated as a testifying expert, the question seeks an opinion from the witness, and the witness offers an opinion in response. As a fact

witness, this witness must only testify to factual matters on which the witness has personal knowledge. TEX R. CIV. EVID. 602. "When the main substance of the witness' testimony is based on application of the witness' specialized knowledge, skill, experience, training, or education to his familiarity to the [subject matter], then the testimony will generally be expert testimony within the scope of TEX. R. CIV. EVID. 702. A witness giving such testimony must be properly disclosed and designated as an expert and the witness' testimony is subject to scrutiny [as an expert]. Any other principle would allow parties to conceal expert testimony by claiming the witness is one whose opinions are merely for the purpose of explaining the witness' perceptions and testimony." *Reid Rd. MUD v. Speedy Stop Food Stores*, 337 S.W.3d 846, 851-52 (Tex. 2011). The ALJ should strike the witness' speculative testimony regarding the contractual relationship between the City and Travis Co. WCID No. 10.

The question is asking Mr. Jennings to state an opinion regarding the contractual relationship of the City and Travis Co. WCID No. 10. Mr. Jennings is not a testifying expert, and he lacks personal knowledge of the relationship between the City and Travis Co. WCID No. 10 since the beginning of that relationship. The ALJ should strike the witness' testimony.

o. Question 29 and the response, Page 14, Line 15 through 20.

Question references 32 contract and amendments between the City and Wells Branch MUD; however, Austin Jennings Exhibits 6 fails to provide any of those documents, and is, therefore, irrelevant Rule 401. To be relevant, evidence must possess logical probative value toward some fact that is legally of consequence to the whether the City based its wholesale rates on its cost of providing water and wastewater service. The document is hearsay under Rule 801. Furthermore, the document lacks authentication under Rule 901. The document is not self-authenticating under Rule 902. The ALJ should strike Austin Jennings Exhibit 6 from the record.

p. Questions 30-31 and the responses, Page 14, Line 22 through Page 15, Line 17, and Austin Jennings Exhibit No. 6.

The Questions and Mr. Jennings' testimony are irrelevant under TEX. R. CIV. EVID. 401 and 402 and should be excluded from evidence and stricken from the testimony. To be relevant, evidence must possess logical probative value toward some fact that is legally of consequence to the whether the City based its wholesale rates on its cost of providing water and wastewater

service. Other than for purposes of demonstrating jurisdiction, the questions and responses regarding the January 6, 1986 Agreement Concerning Creation are irrelevant under Rule 401 as to whether the Austin's rates are just and reasonable, based upon the cost of service, including reasonable and necessary expenses and debt service costs for infrastructure used and useful to the provision of water or wastewater service. The Agreement does not include any information regarding what is the City's cost of providing wholesale utility service. Furthermore, the questions and responses are hearsay under TEX. R. CIV. EVID. 801(b), as Mr. Jennings is referencing statements that are not his own and is offering his statements for the truth asserted. Mr. Jennings is a fact witness, and under TEX. R. CIV. EVID. 701, he statements are not based upon his knowledge the events that occurred during the preparation of any agreements.

With regard to Austin Jennings Exhibit No. 6, Petitioners object to its admission because the City has not made the proper foundation for the exhibit to be admissible in evidence. The City has failed to authenticate the documents referenced in the testimony as required by TEX R. CIV. EVID. 901 *et seq*. Authentication is a prerequisite to admissibility. *In re G.F.O.*, 874 S.W.2d 729, 731 (Tex. App. -- Houston [1st Dist.] 1994, no writ). The witness must have personal knowledge to testify regarding authentication. TEX R. CIV. EVID. 602; *City of Dallas v. GTE SW., Inc.*, 980 S.W.2d 928, 935 (Tex. App. -- Fort Worth 1998, pet. denied). The ALJ should strike the witness' testimony.

Further, the City has failed to authenticate the exhibit as a public record. The City failed to provide evidence to support self-authentication under TEX R. CIV. EVID. 902 and 1005. The documents are not offered under seal (TEX R. CIV. EVID. 902(1)), the City failed to provide certified copies of the evidence proffered (TEX R. CIV. EVID. 902(4)), and made no attempt to have the witness prove up the authenticity of the evidence referred to in the witness' testimony. The ALJ should strike Austin Jennings Exhibit No. 6.

Finally, the Petitioners object to Exhibit No. 6 because it is prohibited hearsay under TEX R. CIV. EVID. 801 and 802. Mr. Jennings provides no testimony regarding his personal knowledge about the exhibit and its origins or creation. Therefore, the ALJ should strike Austin Jennings Exhibit No. 6 from the record.

q. Question 32 and the responses, Page 15, Lines 19 through 27.

The Question and Mr. Jennings' testimony are irrelevant under TEX. R. CIV. EVID. 401

and 402 and should be excluded from evidence and stricken from the testimony. To be relevant, evidence must possess logical probative value toward some fact that is legally of consequence to the whether the City based its wholesale rates on its cost of providing water and wastewater service. Question references the Water and Wastewater Rate Settlement Agreement between the City and Wells Branch MUD. The question and response are irrelevant under Rule 401 as to whether the Austin's rates are just and reasonable, based upon the cost of service, including reasonable and necessary expenses and debt service costs for infrastructure used and useful to the provision of water or wastewater service. The Agreement does not include any information regarding how to determine the cost of service or rates based upon the cost of service.

Finally, the Petitioners object to testimony regarding the Agreement because it is prohibited hearsay under TEX R. CIV. EVID. 801 and 802. Mr. Jennings provides no testimony regarding his personal knowledge about the Agreement and its origins or creation. Therefore, the ALJ should strike Mr. Jennings testimony regarding the Water and Wastewater Rate Settlement Agreement.

r. Questions 33-34 and the responses, Page 16, Lines 1 through 23.

The Question and Mr. Jennings' testimony are irrelevant under TEX. R. CIV. EVID. 401 and 402 and should be excluded from evidence and stricken from the testimony. To be relevant, evidence must possess logical probative value toward some fact that is legally of consequence to the whether the City based its wholesale rates on its cost of providing water and wastewater service. Other than for purposes of demonstrating jurisdiction, the questions and responses regarding the January 6, 1986 Agreement Concerning Creation are irrelevant under Rule 401 as to whether the Austin's rates are just and reasonable, based upon the cost of service, including reasonable and necessary expenses and debt service costs for infrastructure used and useful to the provision of water or wastewater service. The Agreement does not include any information regarding how to determine the cost of service or rates based upon the cost of service. Furthermore, the questions and responses are hearsay under Rule 801(b), as Mr. Jennings is referencing statements that are not his own and is offering his statements for the truth asserted. Mr. Jennings is a fact witness, and under Rule 701, he statements are not based upon his knowledge the events that occurred during the preparation of any agreements. Therefore, the ALJ should strike Mr. Jennings testimony.

s. Question 35 and the response, Page 16, Line 25 through Page 17, Line 4.

Petitioners object to the referenced testimony because the witness is attempting to testify as an expert and was not designated as an expert by the City. The witness should not be allowed to testify as an expert because the witness was not properly identified in the City's Rule 194 Disclosures or the City's First Amended Rule 194 Disclosures. The law requires the exclusion of the witness' testimony if the witness was not listed in response to discovery requests, unless the ALJs find that either: 1) there was good cause for the City's failure to designate the witness as an expert, or 2) the City's failure to designate will not unfairly surprise or prejudice the Petitioners. TEX R. CIV. PROC. 193.6(a)(1), (2). Counsel's carelessness or failure to properly designate the witness is not good cause. *See e.g. Sharp v. Broadway Nat'l Bank*, 784 S.W.2d 669, 670-72 (Tex. 1990); *E.F. Hutton & Co. v. Youngblood*, 741 S.W.2d 363, 364 (Tex. 1987). Additionally, the City had ample time to review and amend its discovery responses to list the witness as a testifying expert. In fact, the City had an obligation to amend or supplement its responses because the City clearly intended to call this witness as a testifying expert. TEX R. CIV. PROC. 193.5. For the City to have this witness testify as an expert and offer the witness' opinion for the first time in its prefiled testimony is a surprise to the Petitioners and unfairly prejudices them because the Petitioners lack sufficient time seek an expert to rebut the proffered testimony. Further, designated fact witnesses should be excluded as expert witnesses, because the law does not allow a party or a witness to testify as an expert if not properly designated as a testifying expert. *Collins v. Collins*, 904 S.W.2d 792, 801 (Tex. App. – Houston [1st Dist.] 1995, writ denied, 923 S.W.2d 569 (Tex. 1996); *Baylor Med. Plaza Serv. v. Kidd*, 834 S.W.2d 69, 73 (Tex. App. – Texarkana 1992, writ denied).

Further, the Petitioners object to both the proffered testimony and exhibit because it contains speculation. The witness was not properly designated as a testifying expert, the question seeks an opinion from the witness, and the witness offers an opinion in response. As a fact witness, this witness must only testify to factual matters on which the witness has personal knowledge. TEX R. CIV. EVID. 602. "When the main substance of the witness' testimony is based on application of the witness' specialized knowledge, skill, experience, training, or education to his familiarity to the [subject matter], then the testimony will generally be expert testimony within the scope of TEX. R. CIV. EVID. 702. A witness giving such testimony must be properly

disclosed and designated as an expert and the witness' testimony is subject to scrutiny [as an expert]. Any other principle would allow parties to conceal expert testimony by claiming the witness is one whose opinions are merely for the purpose of explaining the witness' perceptions and testimony." *Reid Rd. MUD v. Speedy Stop Food Stores*, 337 S.W.3d 846, 851-52 (Tex. 2011). The ALJ should strike the witness' speculative testimony regarding the contractual relationship between the City and Wells Branch MUD.

The question is asking Mr. Jennings to state an opinion regarding the contractual relationship of the City and Wells Branch MUD. Mr. Jennings is not a testifying expert, and he lacks personal knowledge of the relationship between the City and Wells Branch MUD since the beginning of that relationship. Therefore, the ALJ should strike Mr. Jennings testimony.

t. Questions 36-37 and the responses, Page 17, Lines 9 through 24.

As noted above, these Questions and Mr. Jennings' responses demonstrate that his entire testimony is irrelevant under TEX. R. CIV. EVID. 401 and 402, and the ALJ should exclude the testimony and strike it from the record. Mr. Jennings testimony is irrelevant to whether the Austin's rates are just and reasonable, based upon the cost of service. He admits that fact when responding to Question Nos. 36 and 37, when he testifies that he merely attends the annual meeting at which the City announces the annual water and wastewater rate increase to the wholesale customers. "The more specific issues of the cost of water and wastewater utility service or how rates are calculated are [sic] handled by the AWU Finance Division, as Michael Castillo has discussed in his testimony. For this reason alone, the ALJ should strike Mr. Jennings' testimony and his exhibits in their entirety.

u. Question 38, Page 17, Line 26 through Page 18, Line 20.

The Question and Mr. Jennings' testimony are irrelevant under TEX. R. CIV. EVID. 401 and 402 and should be excluded from evidence and stricken from the testimony. To be relevant, evidence must possess logical probative value toward some fact that is legally of consequence to the whether the City based its wholesale rates on its cost of providing water and wastewater service. The question and response on how districts change over time is irrelevant as to whether the Austin's rates are just and reasonable, based upon the cost of service.

Petitioners object to the referenced testimony because the witness is attempting to testify

as an expert and was not designated as an expert by the City. The witness should not be allowed to testify as an expert because the witness was not properly identified in the City's Rule 194 Disclosures or the City's First Amended Rule 194 Disclosures. The law requires the exclusion of the witness' testimony if the witness was not listed in response to discovery requests, unless the ALJs find that either: 1) there was good cause for the City's failure to designate the witness as an expert, or 2) the City's failure to designate will not unfairly surprise or prejudice the Petitioners. TEX R. CIV. PROC. 193.6(a)(1), (2). Counsel's carelessness or failure to properly designate the witness is not good cause. *See e.g. Sharp v. Broadway Nat'l Bank*, 784 S.W.2d 669, 670-72 (Tex. 1990); *E.F. Hutton & Co. v. Youngblood*, 741 S.W.2d 363, 364 (Tex. 1987). Additionally, the City had ample time to review and amend its discovery responses to list the witness as a testifying expert. In fact, the City had an obligation to amend or supplement its responses because the City clearly intended to call this witness as a testifying expert. TEX R. CIV. PROC. 193.5. For the City to have this witness testify as an expert and offer the witness' opinion for the first time in its prefiled testimony is a surprise to the Petitioners and unfairly prejudices them because the Petitioners lack sufficient time seek an expert to rebut the proffered testimony. Further, designated fact witnesses should be excluded as expert witnesses, because the law does not allow a party or a witness to testify as an expert if not properly designated as a testifying expert. *Collins v. Collins*, 904 S.W.2d 792, 801 (Tex. App. – Houston [1st Dist.] 1995, writ denied, 923 S.W.2d 569 (Tex. 1996); *Baylor Med. Plaza Serv. v. Kidd*, 834 S.W.2d 69, 73 (Tex. App. – Texarkana 1992, writ denied).

Further, the Petitioners object to the proffered testimony and because it contains speculation. The witness was not properly designated as a testifying expert, the question seeks an opinion from the witness, and the witness offers an opinion in response. As a fact witness, this witness must only testify to factual matters on which the witness has personal knowledge. TEX R. CIV. EVID. 602. "When the main substance of the witness' testimony is based on application of the witness' specialized knowledge, skill, experience, training, or education to his familiarity to the [subject matter], then the testimony will generally be expert testimony within the scope of TEX. R. CIV. EVID. 702. A witness giving such testimony must be properly disclosed and designated as an expert and the witness' testimony is subject to scrutiny [as an expert]. Any other principle would allow parties to conceal expert testimony by claiming the witness is one whose opinions are merely for the purpose of explaining the witness' perceptions and testimony." *Reid*

Rd. MUD v. Speedy Stop Food Stores, 337 S.W.3d 846, 851-52 (Tex. 2011). The ALJ should strike the witness' speculative testimony regarding how districts change over time.

v. Question 39 and the response, Page 18, Line 22 through Page 19, Line 11.

The question and response on how the City's relationship with districts change over time is irrelevant under TEX. R. CIV. EVID. 401 as to whether the Austin's rates are just and reasonable, based upon the cost of service.

Petitioners object to the referenced testimony because the witness is attempting to testify as an expert and was not designated as an expert by the City. The witness should not be allowed to testify as an expert because the witness was not properly identified in the City's Rule 194 Disclosures or the City's First Amended Rule 194 Disclosures. The law requires the exclusion of the witness' testimony if the witness was not listed in response to discovery requests, unless the ALJs find that either: 1) there was good cause for the City's failure to designate the witness as an expert, or 2) the City's failure to designate will not unfairly surprise or prejudice the Petitioners. TEX R. CIV. PROC. 193.6(a)(1), (2). Counsel's carelessness or failure to properly designate the witness is not good cause. *See e.g. Sharp v. Broadway Nat'l Bank*, 784 S.W.2d 669, 670-72 (Tex. 1990); *E.F. Hutton & Co. v. Youngblood*, 741 S.W.2d 363, 364 (Tex. 1987). Additionally, the City had ample time to review and amend its discovery responses to list the witness as a testifying expert. In fact, the City had an obligation to amend or supplement its responses because the City clearly intended to call this witness as a testifying expert. TEX R. CIV. PROC. 193.5. For the City to have this witness testify as an expert and offer the witness' opinion for the first time in its prefiled testimony is a surprise to the Petitioners and unfairly prejudices them because the Petitioners lack sufficient time seek an expert to rebut the proffered testimony. Further, designated fact witnesses should be excluded as expert witnesses, because the law does not allow a party or a witness to testify as an expert if not properly designated as a testifying expert. *Collins v. Collins*, 904 S.W.2d 792, 801 (Tex. App. – Houston [1st Dist.] 1995, writ denied, 923 S.W.2d 569 (Tex. 1996); Baylor *Med. Plaza Serv. v. Kidd*, 834 S.W.2d 69, 73 (Tex. App. – Texarkana 1992, writ denied).

Further, the Petitioners object to the proffered testimony and because it contains speculation. The witness was not properly designated as a testifying expert, the question seeks an

opinion from the witness, and the witness offers an opinion in response. As a fact witness, this witness must only testify to factual matters on which the witness has personal knowledge. TEX R. CIV. EVID. 602. "When the main substance of the witness' testimony is based on application of the witness' specialized knowledge, skill, experience, training, or education to his familiarity to the [subject matter], then the testimony will generally be expert testimony within the scope of TEX. R. CIV. EVID. 702. A witness giving such testimony must be properly disclosed and designated as an expert and the witness' testimony is subject to scrutiny [as an expert]. Any other principle would allow parties to conceal expert testimony by claiming the witness is one whose opinions are merely for the purpose of explaining the witness' perceptions and testimony." *Reid Rd. MUD v. Speedy Stop Food Stores*, 337 S.W.3d 846, 851-52 (Tex. 2011). The ALJ should strike the witness' speculative testimony regarding how the City's relationship with districts changes over time.

w. Questions 40-41 and the responses, Page 19, Line 13 through Page 20, Line 5.

Further, the Petitioners object to the proffered testimony and because it contains speculation. The witness was not properly designated as a testifying expert, the question seeks an opinion from the witness, and the witness offers an opinion in response. As a fact witness, this witness must only testify to factual matters on which the witness has personal knowledge. TEX R. CIV. EVID. 602. "When the main substance of the witness' testimony is based on application of the witness' specialized knowledge, skill, experience, training, or education to his familiarity to the [subject matter], then the testimony will generally be expert testimony within the scope of TEX. R. CIV. EVID. 702. A witness giving such testimony must be properly disclosed and designated as an expert and the witness' testimony is subject to scrutiny [as an expert]. Any other principle would allow parties to conceal expert testimony by claiming the witness is one whose opinions are merely for the purpose of explaining the witness' perceptions and testimony." *Reid Rd. MUD v. Speedy Stop Food Stores*, 337 S.W.3d 846, 851-52 (Tex. 2011). The ALJ should strike the witness' speculative testimony

Mr. Jennings is a fact witness, not an expert, and he lacks any understanding regarding the district operations or purposes. Under Rule 701, his statements are not based upon his personal knowledge or expertise about districts, and should be excluded from evidence and stricken from the testimony.

x. Question 42 and the response, Page 20, Lines 7 through 12.

The Question and Mr. Jennings' testimony are irrelevant under TEX. R. CIV. EVID. 401 and 402 and should be excluded from evidence and stricken from the testimony. To be relevant, evidence must possess logical probative value toward some fact that is legally of consequence to the whether the City based its wholesale rates on its cost of providing water and wastewater service. The question regarding whether there are alternative processes for resolving disputes between the City and the Districts is irrelevant to whether the Austin's rates are just and reasonable, based upon the cost of service. Therefore, the ALJ should strike Mr. Jennings testimony.

y. Question 43 and the response, Page 20, Line 14 through 21.

The Question and Mr. Jennings' testimony are irrelevant under TEX. R. CIV. EVID. 401 and 402 and should be excluded from evidence and stricken from the testimony. To be relevant, evidence must possess logical probative value toward some fact that is legally of consequence to the whether the City based its wholesale rates on its cost of providing water and wastewater service. The question of whether Mr. Jennings has ever had to go to the TCEQ or PUCT to resolve issues with a wholesale water or wastewater customer is irrelevant under TEX. R. CIV. EVID. 401 as to whether the Austin's rates are just and reasonable, based upon the cost of service. Therefore, the ALJ should strike Mr. Jennings testimony.

III. Prayer

WHEREFORE, PREMISES CONSIDERED, Petitioners respectfully request that the Judges sustain Petitioners' objections and enter an order excluding and striking the Testimony of Bart Jennings as requested above and such and further relief to which they may be entitled.

Respectfully submitted,

Randall B. Wilburn, Attorney at Law
State Bar No. 24033342
3000 South IH 35, Suite 150
Austin, Texas 78704
Telephone: (512) 535-1661
Telecopier: (512) 535-1678

John J. Carlton
State Bar No.03817600
The Carlton Law Firm, P.L.L.C.
2705 Bee Cave Road, Suite 200
Austin, Texas 78746
Telephone: (512) 614-0901
Telecopier: (512) 900-2855

By: _____
Randall B. Wilburn

ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served via hand delivery, facsimile, electronic mail, overnight mail, U.S. mail and/or Certified Mail Return Receipt Requested on all parties on the 22nd of December, 2014.

Randall B. Wilburn