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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

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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 TERESA LUTES

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 Teresa Lutes, which the City of Austin filed on or about July 15, 2014, and moves to strike certain portions of Ms. Lutes' 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. Ms. Lutes' testimony is filled with attempts to both qualify her as an expert and provide opinion testimony as though she is a properly designated expert.

[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

If the City is offering her as an expert, Petitioners object to Ms. Lutes' testimony as a whole because she is not qualified to give expert testimony on the matter for which she purports to testify. Austin did not identify Ms. Lutes as a testifying expert in its Rule 194 Disclosures filed November 8, 2013 and has not amended or supplemented its disclosures regarding Ms. Lutes, her classification or the nature of her testimony in general. Again, Petitioners do not know what Ms. Lutes' mental impressions are and did not have an opportunity to depose her on the subject of Water Treatment Plant (WTP) No. 4 or any other issue – a choice which Petitioners may have made if she had been clearly and properly designated. It would be an unfair surprise to Petitioners if Ms. Lutes is admitted as an expert witness and allowed to testify about Austin's water utility system. When a party's response to the request does not furnish all the information required by Rule 194, the trial court must exclude the testimony on the omitted information. In *VingCard A.S. v. Merrimac Hospitality System*, although the plaintiff identified its expert, it did not provide mental impressions and opinions; the trial court should have excluded expert's opinions. *VingCard A.S. v. Merrimac Hospitality Sys.*, 59 S.W.3d 847, 855-56 (Tex. App. -- Fort Worth 2001, pet. denied).

As a whole, Ms. Lutes' 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. She merely concludes that WTP No. 4 is integral to the AWU's water treatment and conveyance system and therefore all customers should pay for it according to their "fair share" (p. 15, lines 1-3). Although she states she has been with Austin and AWU for quite some time and is a registered professional engineer who has "been associated with" WTP No. 4 and "enjoyed her general responsibilities. . .," she does not correlate that background with the importance of the plant or, more importantly, the need for Petitioners to pay for the cost to build, operate, and maintain an additional plant unnecessary for providing service to these existing wholesale customers which receive service from existing water plants. For example, based on the information provided, it is unclear whether Ms. Lutes has direct knowledge of the problems she described at the Davis and Ullrich plants, their usefulness to the Petitioners, the nature of the so-

called interconnectedness, or whether Austin's water utility operated unreliably in violation of State law without WTP No. 4.

Ms. Lutes is not qualified as an expert. In *Southwestern Bell Tel. Co. v. Garza*, 164 S.W.3d 607, 621 (Tex. 2004), the Texas Supreme Court said that, "too weak" evidence is any "evidence offered to prove a vital fact [that] is so weak as to **do no more than create a mere surmise or suspicion of its existence.**"[7] The Court concluded such evidence "is, in legal effect, no evidence, and will not support a verdict or judgment."[8] Mr. Healy's testimony that the models are sound is an unsupported conclusion, absent any foundation, and not based upon any methodology, let alone sound methodology. Before the substance of expert testimony may be considered by the trier of fact, it must first be determined that the expert is suitably qualified and that the testimony is not only relevant but also based on a reliable foundation.[9] Expert testimony is unreliable and fails this threshold analysis if it is not grounded in acceptable methods and procedures and amounts to no more than a subjective belief or unsupported speculation.[10] A belief, guess, surmise, or supposition by an expert witness is not evidence, as it is not based on a reliable foundation or any methodology and her opinion may not be considered by the ALJ.

a. Question Nos. 3, 4, 5, 6, 7, 8, 9 and the responses, Page 3, Line 12 through Page 9, Line 24, and Austin Lutes 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 testimony and exhibit offered do not relate to a material fact in this matter, and should be stricken.

The testimony relates to Ms. Lutes' educational background, work experience, membership in professional organizations, honors and recognitions, and the exhibit relates to a

[7] *Southwestern Bell Tel. Co. v. Garza*, 164 S.W.3d 607, 621 (Tex. 2004) (emphasis added).

[8] *Id.*

[9] *Helena Chemical Co. v. Wilkins*, 47 S.W.3d 486,499 (Tex. 2001).

[10] *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713,719 (Tex. 1998)(extending Daubert/Robinson criteria for expert witnesses to non-scientific expert testimony).

presentation Ms. Lutes background, work experience, membership in professional organizations, honors and recognitions, none of which is relevant to her 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 10 and the response, Page 4, Lines 22 through 27.

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 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 Rule 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 witness' speculative testimony regarding the importance of debt service should be stricken.

The question is asking Ms. Lutes, a fact witness, to state an opinion regarding whether WTP No. 4 is an integral part of the Austin utility system and how it benefits customers. Ms. Lutes is not qualified to opine on the integral nature of WTP No. 4 to the rest of Austin's water utility system or the need and benefits from this plant. The question and response should be excluded from evidence and stricken from the testimony under TEX. R. CIV. EVID. 701.

c. Question 12 and the response, Page 5, Lines 19 through 21, and Austin Lutes Exhibit 2.

With regard to Austin Lutes Exhibit 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 Austin Lutes Exhibit No. 2 because it is prohibited hearsay under TEX R. CIV. EVID. 801 and 802. Ms. Lutes provides no testimony regarding her personal knowledge about the exhibit's origins or creation, and the ALJ should strike Austin Lutes Exhibit No. 2 from the record.

d. Questions 17-19 and the responses, Page 7, Line 20 through Page 8, Line 27.

The Questions and Ms. Lutes' 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. A description of the City's topography and geography is irrelevant to whether the City based its rates upon the cost of service. A description of the land area and population of the City is irrelevant to whether the City based its rates on the cost of providing wholesale water and wastewater service to the Petitioners. A description of the water source is irrelevant to the cost of service.

e. Question 20, Page 9, Lines 3 through 14, and Austin Lutes Exhibit No. 3.

The question calls for hearsay and the document referenced in the response is hearsay. Rule 802 provides that hearsay is not admissible unless it falls within an exception. Ms. Lutes did not prepare the AWU presentation shown in Austin Lutes Exhibit No. 3. The ALJ should exclude the question and her response from evidence and stricke the testimony under TEX. R. CIV. EVID. 802.

With regard to Austin Lutes 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 Austin Lutes Exhibit No. 3 because it is also prohibited hearsay under TEX R. CIV. EVID. 801 and 802. Ms. Lutes provides no testimony regarding her personal knowledge about the exhibit and its origins or creation, and the ALJ should strike Austin Lutes Exhibit No. 3 from the record.

f. Question 21 and the response, Page 9, Line 16 through Page 10, 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 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 Rule 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 whether WTP No. 4 is integral to the AWU water distribution system.

The question is asking Ms. Lutes, a fact witness, to state an opinion regarding whether WTP No. 4 is an integral part of the Austin utility system and how it benefits customers. Ms. Lutes is not qualified to opine on the integral nature of WTP No. 4 to the rest of Austin's water utility system or the need and benefits from this plant. The ALJ should exclude the question and response from evidence and strike the testimony under TEX. R. CIV. EVID. 701.

g. Question 22 and the response, Page 10, Line 6 through Page 11, Line 8, and Austin Lutes Exhibit No. 4.

Question is asking Ms. Lutes, a fact witness, to state an opinion regarding whether failure to build WTP No. 4 will increase risks to the water system. Ms. Lutes has demonstrated no specific expertise that she could determine the potential risk for upsets to the water utility, including the likelihood for tropical storms, dam failure, truck spills, etc. The question and response should be excluded from evidence and stricken from the testimony under TEX. R. CIV. EVID. 701.

The question calls for hearsay and the document referenced in the response is hearsay. Rule 802 provides that hearsay is not admissible unless it falls within an exception. Ms. Lutes did not prepare the August 13, 2009 letter shown in Austin Lutes Exhibit No. 4. Ms. Lutes is making a statement regarding the need to diversify water sources based upon an exhibit that was prepared by someone other than herself and offered in evidence to prove the truth of the matter asserted, i.e., that building a new water plant to draw water from the same water source upstream on the same river as the other two water plants will diversify the City's water supply. The ALJ should exclude the question and response from evidence and strike from the testimony under TEX. R. CIV. EVID. 802.

With regard to Austin Lutes 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 evidence should be excluded.

Finally, the Petitioners object to Austin Lutes Exhibit No. 4 because it is prohibited hearsay under TEX R. CIV. EVID. 801 and 802. Ms. Lutes provides no testimony regarding her personal knowledge about the exhibit and its origins or creation, and the ALJ should strike Austin Lutes Exhibit No. 4 from the record.

h. Question 23 and the response, Page 11, Lines 10 through Page 13, Line 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 the proffered testimony 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 Rule 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 risk and benefits of WTP No. 4.

Question is asking Ms. Lutes, a fact witness, to state an opinion regarding whether construction of WTP No. 4 will reduce risks to the water system. Ms. Lutes is not qualified to opine on the "multiple benefits," let alone any benefits from the completion of WTP No. 4 as set forth on p. 11, lines 13-19. Nowhere do her resume and background indicate that her opinion on reliability and diversification is credible. Similarly, Ms. Lutes has not demonstrated the expertise necessary to render a reliable opinion (at p. 12, lines 9-13) on whether WTP No. 4 is necessary to provide continuous and adequate service. Further at p. 12, lines 15-21, she opines that rehabilitation to the North Austin Reservoir and Pump Station (and the delivery of reliable service) would be impossible without bringing WTP No. 4 into service, but this too is an unreliable opinion because she is not an expert in this area. This problem continues at p. 12, lines 25-27 regarding the reliability of WTP No. 4 as a supply source. Certainly, there is no indication that Ms. Lutes has the requisite expertise to conclude on p. 13, lines 14-16 that "*all customers will benefit. . .*with the Water Treatment Plant No. 4 project in service." This is an entirely self-serving statement by an unqualified witness. The ALJ should exclude the question and response from evidence and strike from the testimony under TEX. R. CIV. EVID. 701.

i. Question 24 and the response, Page 13, Line 18 through Page 14, Line 3.

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 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 Rule 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 whether WTP No. 4 will provide water to Petitioners.

The question is asking Ms. Lutes, a fact witness, to state an opinion regarding whether construction of WTP No. 4 will provide water to Petitioners. For all the same reasons indicated above, Ms. Lutes lacks the expertise to render the opinion on p. 13, lines 26-27 that WTP No. 4 provides "benefits for all customers." The ALJ should exclude the question and response from evidence and strike the testimony under TEX. R. CIV. EVID. 701.

j. Question 26 and the response, Page 14, Lines 9 through 22.

Ms. Lutes' testimony regarding the cost associated with WTP No. 4 should be excluded in their entirety because it lack adequate evidentiary foundation to support her opinion of the

costs as required by Rules 702, 703 and 705(c) of the Texas Rules of Evidence. Ms. Lutes admits at Line 10 that her "knowledge of the specific costs is limited" and that she is "not the construction manager."

k. Question 27, Page 14, Line 26 through Page 15, Line 3.

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 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 Rule 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 City should recover capital and O&M costs from all customers.

The question is asking Ms. Lutes, a fact witness, to state an opinion regarding whether the City should recover capital and O&M costs from all customers, including Petitioners, for an uncompleted WTP No. 4 regardless of whether WTP No. 4 is used and useful to providing service to Petitioners. Ms. Lutes is not qualified to opine on the question at hand. Ms. Lutes makes the ultimate, unfounded and unqualified conclusion that WTP No. 4 is "integral" to Austin's water utility system and as such all utility customers, including Petitioners must "pay their fair share of *all* WTP No. 4 costs." She does not explain here (or anywhere else in her testimony) what "integral" means, what constitutes "fair share," or what "all costs" means. Most importantly, she has demonstrated no expertise that her opinion of costs bears any relation to utility 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, and as such, her opinion is unreliable. The ALJ should exclude the question and response from evidence and strike the testimony under TEX. R. CIV. EVID. 701.

III. Prayer

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

Respectfully submitted,

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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