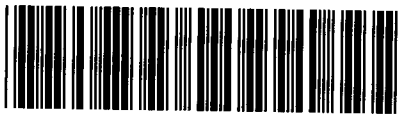

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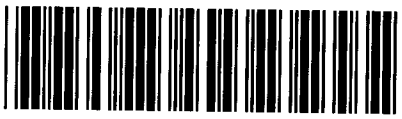

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SOAH DOCKET NO. 473-14-5138.WS
PUC DOCKET NO. 42857

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
PUC DOCKET NO. 42867

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 JOSEPH HEALY

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

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prefiled direct testimony and exhibits of Joseph Healy, which the City of Austin filed on or about July 15, 2014, and moves to strike certain portions of Mr. Healy's 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. Healy's testimony is filled with attempts to both qualify him as an expert and provide opinion testimony as though he 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 object to Mr. Healy's testimony as a whole because he is not qualified as an expert. Austin did not identify Mr. Healy as a testifying expert in its Rule 194 Disclosures filed November 8, 2013. The City filed Mr. Healy's testimony on July 15, 2014. Although the City amended its Disclosures thereafter on July 29, 2014, adding Mr. Healy as a testifying expert, the City did not identify any of his mental impressions as required. In fact, other than at the conclusion of his direct testimony (where he finds the Excel program that the City used for its rate model to be sound), Mr. Healy's mental impressions are never revealed. It would be an unfair surprise to Petitioners if Mr. Healy is admitted as an expert witness and allowed to draw further conclusions beyond his rudimentary explanation that he knows how to use Microsoft Excel. 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, Mr. Healy's 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. He merely testified that he has used an Excel spreadsheet and that the spreadsheet's mathematical calculations are correct. In other words, Mr. Healy does not provide any testimony regarding the validity of the inputs received from the City, whether the costs are just and reasonable, or whether the debt service is for infrastructure used and useful for the provision of service to the Petitioners. Rather, based on the information provided and his testimony on page 20, line 13 that it is all "sound," p. 20, his testimony amounts to a statement that the Excel spreadsheet uses the correct mathematical calculations to come up with an answer or rate. Basically, he testifies "garbage in, garbage out." For this reason alone, the ALJ should strike Mr. Healy's testimony and his exhibits in their entirety.

However, even more fundamentally, Mr. Healy 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 his opinion may not be considered by the ALJ. All we know about Mr. Healy is that he is employed as a financial analyst, he has a B.B.S. degree and, unsurprisingly, he finds his Microsoft Excel spreadsheet program to be sound.

III. Prayer

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

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[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).

Respectfully submitted,

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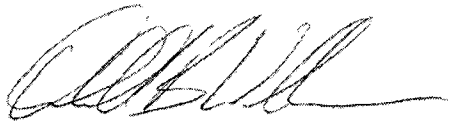
ATTORNEYS FOR PETITIONERS

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.



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Randall B. Wilburn