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SOAH DOCKET NO. 473-14-5138.WS

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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 § OF
DISTRICT §
FROM THE RATEMAKING ACTIONS §
OF THE CITY OF AUSTIN §
AND REQUEST FOR INTERIM RATES §
IN WILLIAMSON AND TRAVIS §
COUNTIES § ADMINISTRATIVE HEARINGS

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PETITIONERS' OBJECTIONS TO, MOTION TO STRIKE AND
MOTION TO EXCLUDE THE PREFILED TESTIMONY AND EXHIBITS
OF RICHARD D. GIARDINA

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 Richard D. Giardina, which was filed on July 15, 2014, and moves to strike certain portions of Mr. Giardina'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.

II. Objections

a. Inadequate Foundation for Opinion Testimony

Mr. Giardina's opinion regarding the justness and reasonableness of the City of Austin's wholesale rates should be excluded in their entirety because they lack adequate evidentiary foundation to support them as required by TEX. R. CIV. EVID. 702, 703 and 705(c). Mr. Giardina admits at Page 3, Line 16, that his "review has been limited as stated in my testimony below." He then testifies on Page 3, Lines 16-24, that "With the inclusive COS study about to begin at Austin Water Utility, *I have not undertaken a comprehensive review of the all the issues that might arise as part of that COS study.* Petitioners have stated repeatedly that they may have other issues that are appropriate for consideration in the COS. *Had I undertaken a comprehensive review, I might be able to offer additional opinions regarding possible items not properly allocated among the Austin Water Utility customer classes which could have positive and/or negative impacts on the COS for the Petitioners and other wholesale customers.*" (emphasis added). Mr. Giardina's further testimony specifically addresses specific issues raised by the Petitioners.¹ He clarifies on Page 10, Line 26 through Page 11, Line 2, that the Petitioners "objections ... are the focus of my review of the overall AWU rate-setting process." Given that Mr. Giardina admits that he did not undertake a comprehensive review of the underlying facts or

¹ See Testimony of Richard D. Giardina, Page 10, lines 20-23.

data supporting City's calculation of its wholesale water rates and that his focus was on Petitioners objections at the time his testimony was filed, there insufficient foundation for his opinion at Page 26, Lines 12-17, that "In my opinion, with these adjustments, the FY 2013 Water Rates for the Petitioners appropriately reflect the cost to provide water utility service to the Petitioners and were developed in a manner consistent with industry practices and standards. I conclude that, with the adjustments I have specified, and which have been detailed by other City of Austin witnesses, the FY 2013 water rates were fair, reasonable and non- discriminatory." These statements are an opinion that the City of Austin's entire rate-setting process and methodology and the rates resulting from it are just, fair, reasonable and non-discriminatory. However, Mr. Giardina himself admits that he only reviewed the issues raised by the Petitioners and not the entire process or costs.

Mr. Giardina makes the same conclusion with regard to the City of Austin's wholesale wastewater rates at Page 30, Lines 20-23, Page 30, Line 27 through Page 31, Line 5, and Page 31, Lines 2-5. But his testimony regarding the wholesale wastewater rates provides no foundation for his opinions beyond his review of the issues raised by Petitioners.

Therefore, there is no foundation for his opinions beyond the specific opinions set forth in his testimony regarding the issues raised by the Petitioners addressed in his testimony, and his opinions at Page 26, Lines 12-17, Page 30, Lines 20-23, Page 30, Line 27 through Page 31, Line 5, and Page 31, Lines 2-5, and summarized again at Page 31, Lines 15-19, should be stricken from his prefiled testimony and excluded from evidence in this matter as required by TEX. R. CIV. EVID. 705.

b. Relevance

Petitioners object to the following testimony 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 offered does not relate to a material fact in this matter, and should be stricken.

The Question and Mr. Giardina's testimony at Page 9, Line 15, through Page 10, Line 5, are not relevant as required by TEX. R. CIV. EVID. 401, 402, 702, and 703 and should be excluded


from evidence and stricken from the testimony. Whether “the City of Austin provided a fair opportunity for wholesale customers to participate in the three steps of the cost of service process?” is irrelevant to a determination of whether the wholesale rates that the City of Austin charges to the Petitioners are “just and reasonable,” which is what the Commission is charged to determine under Section 13.044(b) of the Texas Water Code and what the City of Austin has the burden to prove. 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. Likewise, Mr. Giardina’s testimony in response to Question 9 does not “assist the trier of fact to understand the evidence or to determine a fact in issue...” because the provision of a “fair opportunity... to participate in the ... process” as stated in Question 9 is unrelated to the actual determination of the cost of service.

III. Prayer

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

Respectfully submitted,
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By: 

John J. Carlton

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.



JOHN J. CARLTON

