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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

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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 DREMA GROSS

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 Drema Gross, which the City of Austin filed on or about July 15, 2014, and moves to strike certain portions of Ms. Gross' 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 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. Gross' testimony is full with attempts to both qualify her as an expert and provide opinion testimony as though Ms. Gross 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

Petitioners' make the following objections to portions of Ms. Drema Gross' prefiled testimony and exhibits. Petitioners move to strike each portion of the testimony referenced below.

As a whole, Ms. Gross 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. She fails to provide any testimony regarding the City's cost of providing service to the Petitioners. For this reason alone, the ALJ should strike Ms. Gross' testimony and his exhibits in their entirety.

a. Question Nos. 3, 4, 5, 6, 7, 8, 9, 10 and the responses, Page 3, Line 12 through Page 7, Line 4, and Austin Gross Exhibit Nos. 1, 2, and 3.

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. Gross' educational background, work experience, membership in professional organizations, honors and recognitions, and the exhibit relates to her 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 No. 11 and the response, Page 7, Lines 6 through 11.

Petitioners object to the referenced testimony because the witness is attempting to qualify himself 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).

c. Question No. 15 and the response, Page 9, Lines 11 through 21.

The Question and Ms. Gross' 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 the history of Austin's water conservation program over the past 30 years is irrelevant to whether the Austin's rates are just and reasonable, based upon the cost of service.

d. Question 16 and the response, Page 9, Line 16 through Page 10, Line 8.

The Question and Ms. Gross' 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 "how the City of Austin selected the specific water conservation measures" is irrelevant to whether the Austin's rates are based upon the cost of providing wholesale water and wastewater service to Petitioners.

e. Questions 17-18 and the responses, Page 10, Line 10 through Page 11, Line 13.

The Questions and Ms. Gross' 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 "the Citizens Water Conservation Implementation Task Force" is irrelevant to whether the Austin's rates are j based upon the cost of providing wholesale water and wastewater service to Petitioners Ms. Gross does not testify that the task force established costs for the conservation programs or methods for allocating cost to Petitioners. She is simply describing one of a myriad of City task forces used to provide general public review of ongoing City programs.

f. Question 19 and the response, Page 11, Lines 17 through 23.

The Question and Ms. Gross' 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 whether meetings of the Water and Wastewater Commission or the Resource Management Commission "take place in open meetings" is irrelevant to whether the

Austin's rates are based upon the cost of service. Ms. Gross does not testify that these commissions established costs for the conservation programs or methods for allocating costs to Petitioners. She is simply describing one of a myriad of City commissions used to provide general public review of ongoing City programs.

g. Question 20 and the response, Page 11, Line 25 through Page 12, Line 5.

The Question and Ms. Gross' 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 whether "wholesale customers were allowed to be members of boards and commissions" is irrelevant to whether the Austin's rates are just and reasonable, based upon the cost of service. Ms. Gross does not testify that these commissions established costs for the conservation programs or methods for allocating cost to Petitioners. She is simply describing one of a myriad of City commissions used to provide general public review of ongoing City programs.

h. Question 21 and the response, Page 12, Lines 7 through 20.

The Question and Ms. Gross' 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 description of "some of the key elements of the City of Austin water conservation program" is irrelevant to whether the Austin's rates are just and reasonable, based upon the cost of service. Ms. Gross does not testify how the City establishes costs for the conservation programs. She is simply describing some of the City's conservation programs.

i. Question 22, Page 12, Line 22 through Page 13, Line 13.

The Question and Ms. Gross' testimony are irrelevant under TEX. R. CIV. EVID. Rules 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. Ms. Gross is not a testifying expert, and she lacks personal knowledge of the City's water supply agreement with LCRA and any impact that agreement has on rates. More important, the question and response are irrelevant under TEX. R. CIV. EVID. Rule 401, as Mr. Gross fails to provide the trier fact any helpful information regarding the cost associated with the City's conservation program and how the City allocates those costs to Petitioners.

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

Question is asking Ms. Gross, a fact witness, to state an opinion regarding how the City's conservation program benefits all customers of Austin Water. that is not based upon her personal knowledge of all Austin customers. The question should be excluded from evidence and stricken from the testimony under TEX. R. CIV. EVID. Rule 701.

j. Question 23 and, Page 13, Lines 15 through 27.

The Question and Ms. Gross' testimony are irrelevant under TEX. R. CIV. EVID. Rules 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 are irrelevant under TEX. R. CIV. EVID. Rule 401, as Mr. Gross fails to provide the trier fact any helpful information regarding the cost associated with the City's conservation program and how the City allocates those costs to Petitioners.

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

stricken.

Question is asking Ms. Gross, a fact witness, to state her opinion regarding how the City's conservation program benefits all customers of Austin Water, which is not based upon her personal knowledge of all Austin customers. The question should be excluded from evidence and stricken from the testimony under TEX. R. CIV. EVID. Rule 701.

k. Questions 24-25,and the responses Page 14, Line 1 through Page 15, Line 14.

The Questions and Ms. Gross' 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 drought contingency plan is irrelevant to whether the Austin's rates are based upon the cost of service. Ms. Gross does not testify how the City drought contingency plan raises or lowers costs to Petitioners. She is simply describing some of the City's drought contingency plan.

l. Question 26 and the response, Page 15, Line 16 through Page 16, Line 3.

Question is asking Ms. Gross, a fact witness, to state an opinion regarding how the City's drought contingency plan benefits all customers of Austin Water, which is not based upon her personal knowledge of all Austin customers. The question should be excluded from evidence and stricken from the testimony under TEX. R. CIV. EVID. Rule 701. The question and response are irrelevant under TEX. R. CIV. EVID. Rule 401, as Mr. Gross fails to provide the trier fact any helpful information regarding the cost associated with the City's drought contingency plan and how the City allocates those costs to Petitioners.

m. Question 28 and the response, Page 16, Lines 11 through 15, and Austin Gross Exhibit 7.

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. Gross

did not prepare the Approved Budget for Austin shown in Austin Gross Exhibit No. 7 nor did she prepare her Exhibit No. 7. Ms. Gross is making a statement regarding the budget and exhibit that were prepared by someone other than herself and offered in evidence to prove the truth of the matter asserted, i.e., that the cost of the water conservation program was $6,526,427. The question should be excluded from evidence and stricken from the testimony under TEX. R. CIV. EVID. Rule 802.

With regard to Austin Gross Exhibit 7, 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 Gross Exhibit 7 because it is prohibited hearsay under TEX R. CIV. EVID. 801 and 802. Ms. Gross provides no testimony regarding her personal knowledge about the exhibit and its origins or creation.

n. Question 29, Page 16, Lines 17 through 19, and Austin Mezaros Exhibit 24.

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. Gross did not prepare the allocation of costs to Petitioners for the conservation program shown in Austin Mezaros Exhibit No. 24 nor did she prepare Austin Mezaros Exhibit 24. Ms. Gross is making a statement regarding a budget allocation and exhibit that were prepared by someone other than herself and offered in evidence to prove the truth of the matter asserted, i.e., that the

cost of the water conservation program allocated to Petitioners was $307,302. Ms. Gross is not a designated testifying expert, and may not give opinion on hearsay documents. The question should be excluded from evidence and stricken from the testimony under TEX. R. CIV. EVID. Rule 802.

With regard to Austin Mezaros Exhibit 24, 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, and the ALJ should strike Austin Mezaros Exhibit No. 24 from the record.

o. Question 30 and the response, Page 16, Lines 21 through 27, Austin Mezaros Exhibit 24.

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. Gross did not prepare the allocation of costs to Petitioners for the conservation program shown in Austin Mezaros Exhibit 24 nor did she prepare Exhibit No. 24. Ms. Gross is making a statement regarding a budget allocation and exhibit that were prepared by someone other than herself and offered in evidence to prove the truth of the matter asserted, i.e., that the cost of the water conservation program allocated to Petitioners does not include all costs for all conservation efforts. Ms. Gross is not a designated testifying expert, and may not give opinion on hearsay documents. The question should be excluded from evidence and stricken from the testimony

under TEX. R. CIV. EVID. Rule 802.

Furthermore, Petitioners object to the document for the reasons stated above, as the City failed to provide the proper foundation for the document to be admissible as evidence, it document lacks authentication under TEX. R. CIV. EVID. Rule 901, and the document is not self-authenticating as allowed under TEX. R. CIV. EVID. 902. The ALJ should strike Austin Mezaros Exhibit 24 from the record.

p. Question 31 and the response, Page 17, Lines 4 through 16.

The Question and Ms. Gross' testimony are irrelevant under TEX. R. CIV. EVID. Rules 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 "performance measures exist to determine the success of the water conservation program" is irrelevant to whether the Austin's rates are just and reasonable, based upon the cost of service. Ms. Gross does not testify how the City establishes costs for the conservation programs or allocates costs to Petitioners. She does not testify to whether the water conservation programs were successful for the Petitioners. She is simply describing the City's conservation programs, which are irrelevant to the Cost of Service.

q. Questions 32-35, Page 17, Line 21 through Page 19, Line 9.

The Question and Ms. Gross' testimony are irrelevant under TEX. R. CIV. EVID. Rules 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 customer participated in the water conservation program during the entire existence of that program is irrelevant to whether the Austin's rates are just and reasonable, based upon the cost of service during the Test Year. Ms. Gross does not testify how the City establishes costs for the conservation programs or allocates costs to Petitioners. She does not testify to whether the water conservation programs were successful for

the Petitioners. She is simply describing the City's conservation programs during the entire life of the conservation program, which are irrelevant to the Cost of Service.

r. Questions 36-37, Page 19, Lines 11 through 24.

The Question and Ms. Gross' testimony are irrelevant under TEX. R. CIV. EVID. Rules 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 Petitioners have implemented any water conservation efforts does not affect the City's cost of providing water and wastewater service in any way. Ms. Gross does not testify that Petitioners participation in conservation efforts affects the City's cost of service in any way.

s. Question 38 and the response, Page 19, Line 26 through Page 20, Line 8.

The question and response are irrelevant under TEX. R. CIV. EVID. Rule 401, as Mr. Gross fails to provide the trier fact any helpful information regarding whether it is necessary for all customers to pay for a water conservation program. Ms. Gross does not testify how much the City's water conservation programs cost or how much of that cost Petitioners should bear. She is simply giving her lay opinion that all customers should pay some unknown, undetermined amount for water conservation.

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

The question is asking Ms. Gross, a fact witness, to state an opinion regarding whether all customers should continue to pay for the water conservation program, which is not based upon her personal knowledge of all Austin customers. The question should be excluded from evidence and stricken from the testimony under TEX. R. CIV. EVID. Rule 701. The question and response are irrelevant under TEX. R. CIV. EVID. Rule 401, as Mr. Gross fails to provide the trier

fact any helpful information regarding whether it is necessary for all customers to pay for a water conservation program. Ms. Gross does not testify how much the City's water conservation programs cost or how much of that cost Petitioners should bear. She is simply giving her lay opinion that all customers should pay some unknown, undetermined amount for water conservation.

t. Question 39 and the response, Page 20, Line 12 through 26.

The question and response are irrelevant under TEX. R. CIV. EVID. Rule 401, as Mr. Gross fails to provide the trier fact any helpful information regarding whether the costs or financial benefits of the water conservation program. Ms. Gross does not testify how much the City's water conservation programs cost or how much of that cost Petitioners should bear.

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

Question is asking Ms. Gross, a fact witness, to state an opinion regarding the City of Austin's water conservation program and procedures. The question should be excluded from evidence and stricken from the testimony under TEX. R. CIV. EVID. Rule 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 Drema Gross at the hearing for this matter 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