

Control Number: 43934



Item Number: 42

Addendum StartPage: 0

House Bill (HB) 1600 and Senate Bill (SB) 567 83rd
Legislature, Regular Session, transferred the functions
relating to the economic regulation of water and sewer
utilities from the TCEQ to the PUC effective
September 1, 2014

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

RECEIVED

2014 DEC 10 AM 9:57

2010 APR 16 PM 2:18

CHIEF CLERKS OFFICE

Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*
Mark R. Vickery, P.G., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

April 16, 2010

The Honorable Lilo D. Pomerleau
State Office of Administrative Hearings
P.O. Box 13025
Austin, Texas 78711-3025

Re: Water Rate/Tariff Change Application of Wiedenfeld Water Works, Inc., Certificate of Convenience and Necessity No. 12052, in Kerr, Kendall, and Medina Counties; Application No. 36172-R; SOAH Docket No. 582-09-3549; TCEQ Docket No. 2009-0372-UCR

Dear Judge Pomerleau:

Please find enclosed the Executive Director's Reply to Wiedenfeld Water Works, Inc.'s Objections to Prefiled Testimony. Please let me know if you have any questions.

Sincerely,

Stefanie Skogen
Staff Attorney
Environmental Law Division

Enclosure

cc: Mailing List

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2010 APR 16 PM 2:18

CHIEF CLERKS OFFICE

SOAH DOCKET NO. 582-09-3549
TCEQ DOCKET NO. 2009-0372-UCR

WATER RATE/TARIFF CHANGE
APPLICATION OF WIEDENFELD
WATER WORKS, INC., CERTIFICATE
OF CONVENIENCE AND NECESSITY NO.
12052, IN KERR, KENDALL, AND
MEDINA COUNTIES, TEXAS,
APPLICATION NO. 36172-R

§
§
§
§
§
§
§
§
§
§

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

**EXECUTIVE DIRECTOR'S REPLY TO WIEDENFELD WATER WORKS, INC.'S
OBJECTIONS TO PREFILED TESTIMONY**

In response to Wiedenfeld Water Works, Inc.'s (Wiedenfeld's) objections to the Executive Director (ED) of the Texas Commission on Environmental Quality's (TCEQ's) prefired testimony, the ED presents the following:

I. INTRODUCTION

When determining whether or not evidence should be admitted, a trial court, or in this case an administrative law judge (ALJ), has broad discretion.¹ The criteria used by the ALJ for assessing the relevance and reliability of expert testimony must vary depending on the nature of the evidence presented by the expert witness.² The ALJ does not determine if an expert's conclusions are correct but rather decides if the analysis used by the expert is reliable.³ If another party to the case finds an expert's opinion questionable, cross examination, not an objection to testimony, is "the traditional and appropriate means of attacking" such evidence.⁴

¹ Exxon Pipeline Co. v. Zwahr, 88 S.W.3d 623, 629 (Tex. 2002).

² Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 727 (Tex. 1998).

³ *Id.* at 728.

⁴ *Id.* (quoting Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 596 (1993)).

II. REPLY TO OBJECTIONS TO LEILA C. GUERRERO-GANTIOQUI'S PREFILED TESTIMONY

A. Page 4, lines 2-9

As a state agency, the TCEQ carries out the powers delegated to it by the Texas Legislature by applying the law that falls under its jurisdiction to the facts of each type of case it regulates. For utility rate cases, ED staff examine the application and other documentation submitted in the case, consider the law that applies to the application, and determine under the law what they believe the applicant's rates should be. This means that the law is one of the tools Ms. Guerrero-Gantioqui used in addition to her financial expertise to analyze the application and calculate her, and therefore the ED's, recommended revenue requirement. Looking at Texas Rule of Evidence 704, the Texas Supreme Court has stated, "Fairness and efficiency dictate that an expert may state an opinion on a mixed question of law and fact as long as the opinion is confined to the relevant issues and is based on proper legal concepts."⁵ Here, Ms. Guerrero-Gantioqui was explaining why she and Mr. Adhikari used the original application as the starting point for their analyses rather than starting with the revisions discussed in R. Charles Wiedenfeld's prefiled testimony. In other words, she had to apply the law to the facts in the case to be able to develop her analysis. The ALJ may reach a different conclusion regarding whether Wiedenfeld met the requirements of section 291.25(g) of the TCEQ's rules, but this does not preclude the ED from providing his opinion on this issue based on the law that he has been charged with enforcing. Therefore, the objection to this testimony should be denied.

B. Page 16, lines 22-23 and page 17, lines 1-11⁶ and 15

According to Texas Rule of Evidence 702, an expert is qualified based on knowledge, skill, experience, training, or education. As revealed by her testimony and resume, Ms. Guerrero-

⁵ Birchfield v. Texarkana Mem'l Hosp., 747 S.W.2d 361, 365 (Tex. 1987).

⁶ The quote on pages 3-4 of Wiedenfeld's objections only goes through line 11, not line 13.

Gantioqui has worked in the financial industry for over twenty-five years.⁷ This includes working for a savings and loan company for over nineteen years.⁸ She has a Bachelor of Science in Commerce and a Master of Business Administration and is a certified public accountant in the Philippines. As an employee of the Utilities and Districts Section of the TCEQ for almost four years, she has received training for evaluating rate applications from her peers as well as from attending the National Association of Regulatory Utility Commissioners Utility Rate School.⁹ One of her job responsibilities is to review rate applications, and she has reviewed approximately 115 such applications to date, 65 of which have been contested.¹⁰ She analyzes the utility's revenue requirement, which includes reviewing the utility loan portion of the application. Furthermore, Ms. Guerrero-Gantioqui does not operate in a bubble. As an employee of the TCEQ, her role in this case is to provide the ED's interpretation of the TCEQ's own rules and to analyze the evidence presented by the other parties and other information related to the case based on that interpretation. Not only does Ms. Guerrero-Gantioqui rely on her expertise, but she also works under the guidance of and learns from other experienced TCEQ employees.¹¹ Therefore, as required by Rule 702, Ms. Guerrero-Gantioqui has the knowledge, skill, experience, training, and education to testify regarding the interest rates of Mr. Wiedenfeld's and WW & W Consulting's loans to Wiedenfeld.

Wiedenfeld also questions the reliability of Ms. Guerrero-Gantioqui's interest rate testimony. However, the test which Wiedenfeld seeks to apply to this testimony applies to scientific methodologies, not all methodologies used by expert witnesses.¹² The Texas Court of Appeals has

⁷ Ex. ED-1, at 1:20-22.

⁸ *Id.* att. LG-16.

⁹ *Id.* at 2:7-9, 11-13.

¹⁰ *Id.* at 2:5.

¹¹ *Id.* at 2:10-11.

¹² *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 593-94 (1993) ("Ordinarily, a key question to be answered in determining whether a theory or technique is *scientific* knowledge that will assist the trier of fact will be whether it can be (and has been) tested.") (emphasis added); *E.I. du Pont de Nemours & Co., Inc. v. Robinson*, 923 S.W.2d 549,

found that

some cases involve situations that are not susceptible to scientific analysis, and the Robinson factors are not appropriate and do not strictly govern in those instances. . . .

[I]n fields other than the hard sciences, such as the social sciences, factors like an expert's education, training, and experience are more appropriate factors in testing reliability than the scientific method.¹³

Ms. Guerrero-Gantioqui is providing financial expert testimony, not scientific expert testimony. Therefore, it is more appropriate to look to other factors, such as her education, training, and experience, to determine if the methodology she used to analyze the interest rates is reliable. Based on Ms. Guerrero-Gantioqui's extensive education, training, and experience in the fields of accounting and rate design, the ED asserts that Ms. Guerrero-Gantioqui's methodology is reliable and that the objection to this testimony should be denied.

Looking specifically at Wiedenfeld's objection to page 17, line 15, the ED assumes Wiedenfeld asked that this sentence be struck as "related testimony"¹⁴ to Ms. Guerrero-Gantioqui's interest rate testimony. However, Ms. Guerrero-Gantioqui's testimony regarding her calculated revenue requirement applies to *all* the adjustments she made to Wiedenfeld's application numbers, not just her testimony regarding the interest rates. The main purpose of her entire testimony was to calculate a revenue requirement.¹⁵ Therefore, even if her testimony regarding the loan interest rates is

557 (Tex. 1995) ("In addition to being relevant, the underlying *scientific* technique or principle must be reliable.") (emphasis added).

¹³ Taylor v. Tex. Dept. of Protective & Regulatory Servs., 160 S.W.3d 641, 650 (Tex. App.—Austin 2005, no pet. h.) (citing Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 724 (Tex. 1998); In re K.A.C., No. 07-02-0393-CV, 2003 WL 21310200, at *3 (Tex. App.—Amarillo June 6, 2003, no pet.); Nenno v. State, 970 S.W.2d 549, 561 (Tex. Crim. App. 1998), *overruled on other grounds* by State v. Terrazas, 4 S.W.3d 720, 727 (Tex. Crim. App. 1999)).

¹⁴ Applicant's Objections to the TCEQ ED's Prefiled Testimony 4 (Apr. 9, 2010) [hereinafter Applicant's Objections].

¹⁵ Ex. ED-1, at 3:5-7.

struck, the sentence on page 17, line 15 should remain in evidence.

Any doubt on the ALJ's part regarding Ms. Guerrero-Gantioqui's qualifications would more appropriately affect the weight of the evidence rather than lead to its exclusion from the evidentiary record in this case. As stated in *U.S. Fidelity & Guaranty Co. v. Rochester*, "'A general knowledge of the department to which the specialty belongs would seem to be sufficient.' The value of the testimony is enhanced or depreciated according to the experience or study of the witness."¹⁶ Ms. Guerrero-Gantioqui is laying the predicate for the ED's argument on this issue, which will be discussed further in the ED's closing argument. Furthermore, Wiedenfeld will have the opportunity to cross examine this witness and present rebuttal testimony if it chooses to do so. For these reasons, the objection to this testimony should be denied.

C. Exhibit ED-1, attachments LG-2, LG-3, LG-4, LG-5, LG-6, LG-8, and LG-9

Under Texas Rule of Evidence 1006, "[t]he contents of voluminous writings, recordings, or photographs, otherwise admissible, which cannot conveniently be examined in a court may be presented in the form of a . . . summary." The ED has not provided the objected-to attachments in an attempt to summarize information found elsewhere in the record. These documents are Ms. Guerrero-Gantioqui's calculations of the ED's revenue requirement and are being presented to show those calculations, the final totals from which are discussed in Ms. Guerrero-Gantioqui's prefiled testimony. They show the starting values, i.e. the values provided by Wiedenfeld in its application, the adjustments Ms. Guerrero-Gantioqui made to those values, and her final totals. Therefore, there was no need for the witness to show that her documents were based on voluminous writings, recordings, or photographs; that those items could not be conveniently examined in court; or that the records were made available to Wiedenfeld for inspection.

The ED also disagrees with any claim that the record in this case has not been made available to any other party in the case. The ED's file in this case is public record. Anyone who wishes to view the file is welcome to come to the TCEQ's offices and review it. No party in this case, including Wiedenfeld, has been denied access to the file.

As for the objection that these documents are unauthenticated computer printouts, such an objection may have been warranted back when computers consisted of vacuum tubes and punch cards. However, this is the year 2010. Operating a computer is a common occurrence, including in the work place. Ms. Guerrero-Gantioqui and most other TCEQ employees operate a computer on a daily basis as part of their job duties. Furthermore, the ED cannot think of a single document in evidence in this case that was not produced on a computer at some point, which, according to Wiedenfeld's objection, would make all the documents submitted by both parties inadmissible. Even an older version of the Texas Rules of Evidence Handbook states,

As with "hard copy" business records, computer generated data that is reliable enough for ordinary business transactions should be found reliable enough for admission in trials. The output itself need not be prepared in the regular course of business and, in fact, may be generated solely for the purposes of the trial.¹⁷

These are spreadsheets produced using Microsoft Excel, a commonly-used computer program in the business world. Because Excel documents are regularly relied upon for ordinary business transactions, they are admissible in this case.

These attachments are the same type of documents the ED introduces in *every single* contested original jurisdiction rate case ED staff testifies in to show how ED staff calculated their

¹⁶ U.S. Fidelity & Guaranty Co. v. Rochester, 281 S.W.2d 306, 311 (Tex. Civ. App.—Fort Worth 1926) (quoting 2 BURR W. JONES, BLUE BOOK OF EVIDENCE § 268 (1913)).

¹⁷ CATHLEEN C. HERASIMCHUK, TEXAS RULES OF EVIDENCE HANDBOOK 877 (4th ed. 2000) (citing 5 JACK B.

final recommended rate. The ED cannot think of any other way Ms. Guerrero-Gantioqui could have shown her calculations to the ALJ and other parties than to actually show her calculations. Furthermore, Ms. Guerrero-Gantioqui already authenticated these documents by testifying that the documents are what she claims them to be.¹⁸ Therefore, the objections to these documents should be denied.

D. Exhibit ED-1, attachment LG-7

Wiedenfeld also objected to attachment LG-7 because it is a computer printout. The same arguments the ED made in section II.C above regarding computer printouts also apply to the objection regarding this attachment, and the ED reasserts those arguments here. The only difference between this attachment and those discussed in section II.C is that it was produced using Microsoft Word, another commonly-used program in the business world that is regularly relied upon for ordinary business transactions. Therefore, the objection to this document should be denied.

III. REPLY TO OBJECTIONS TO KAMAL ADHIKARI'S PREFILED TESTIMONY

A. Page 6, lines 3-5;¹⁹ page 7, lines 21-22; and page 8, lines 1-6

As a state agency, the TCEQ carries out the powers delegated to it by the Texas Legislature by applying the law that falls under its jurisdiction to the facts of each type of case it regulates. For utility rate cases, ED staff examine the application and other documentation submitted in the case, consider the law that applies to the application, and determine under the law what they believe the applicant's rates should be. This means that the law is one of the tools Mr. Adhikari used in addition to his technical expertise to determine whether the ED would recommend granting, denying, or granting in part Wiedenfeld's application. Looking at Texas Rule of Evidence 704, the Texas

WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶901(b)(9)[02], at 901-134 (1995)).

¹⁸ Tex. R. Evid. 901(b)(1); Ex. ED-1, at 6:15-7:2.

¹⁹ The quote on page 5 of Wiedenfeld's objections is only lines 3-5, not lines 2-9.

The ED also disagrees with any claim that the record in this case has not been made available to any other party in the case. The ED's file in this case is public record. Anyone who wishes to view the file is welcome to come to the TCEQ's offices and review it. No party in this case, including Wiedenfeld, has been denied access to the file.

As for the objection that these documents are unauthenticated computer printouts, such an objection may have been warranted back when computers consisted of vacuum tubes and punch cards. However, this is the year 2010. Operating a computer is a common occurrence, including in the work place. Mr. Adhikari and most other TCEQ employees operate a computer on a daily basis as part of their job duties. Furthermore, the ED cannot think of a single document in evidence in this case that was not produced on a computer at some point, which, according to Wiedenfeld's objection, would make all the documents submitted by both parties inadmissible. Even an older version of the Texas Rules of Evidence Handbook states,

As with "hard copy" business records, computer generated data that is reliable enough for ordinary business transactions should be found reliable enough for admission in trials. The output itself need not be prepared in the regular course of business and, in fact, may be generated solely for the purposes of the trial.²¹

These are spreadsheets produced using Microsoft Excel, a commonly-used computer program in the business world. Because Excel documents are regularly relied upon for ordinary business transactions, they are admissible in this case.

These attachments are the same type of documents the ED introduces in *every single* contested original jurisdiction rate case ED staff testifies in to show how ED staff calculated their final recommended rate. The ED cannot think of any other way Mr. Adhikari could have shown his

calculations to the ALJ and other parties than to actually show his calculations. Furthermore, Mr. Adhikari already authenticated these documents by testifying that the documents are what he claims them to be.²² Therefore, the objection against them should be denied.

As for attachments KA-5 and KA-6, Wiedenfeld's arguments against the admissibility of those documents are not applicable to them. Wiedenfeld argues that these documents should be struck from the record in part because they were prepared by Mr. Adhikari and are summaries of information provided in Wiedenfeld's application and other supporting documentation. However, that is not the case. Attachment KA-5 consists of documents that Wiedenfeld provided to the TCEQ.²³ Attachment KA-6 is the TCEQ's Comprehensive Compliance Investigation reports for Wiedenfeld's systems, which were reports written by TCEQ inspectors when they periodically inspected Wiedenfeld's systems. Therefore, Wiedenfeld's objections to these documents should be denied.

IV. GENERAL OBJECTION

Wiedenfeld made an additional objection to some of the ED's documents, stating that "the ED's witnesses discuss the contents of these documents prior to said documents being sought to be introduced into evidence in violation of the 'best evidence' rule."²⁴ Under Texas Rule of Evidence 103(a)(1), objections to evidence must be specific. Wiedenfeld does not specify which documents it is objecting to and does not point to where in the ED witnesses' testimonies Wiedenfeld believes the witnesses violated the best evidence rule. Without these specifics, the ED cannot identify which documents Wiedenfeld objected to or how Wiedenfeld believes the ED's witnesses introduced those documents improperly. Therefore, this is a general objection and should be denied.

²¹ HERASIMCHUK, *supra* note 17, at 877 (citing 5 WEINSTEIN & BERGER, *supra* note 17, ¶901(b)(9)[02], at 901-134).

²² Tex. R. Evid. 901(b)(1); Ex. ED-2, at 5:12-6:1.

²³ Ex. ED-2, at 4:18-20.

V. EXCEPTION TO EXCLUSION

Even if the ALJ finds that any of the testimony or documents that Wiedenfeld has objected to violate the Texas Rules of Evidence, this does not mean they must be excluded from the evidence. Under the TCEQ's rules, "[w]hen necessary to ascertain facts not reasonably susceptible of proof under [the Texas Rules of Evidence], evidence not admissible under those rules may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent people in the conduct of their affairs."²⁵ The ED believes it is both reasonable and prudent to rely on the testimony and documents provided by staff. The testimony explains the ED's position through the expert analyses of his staff regarding various issues in this case, and the documents are those typically used by ED staff to present the ED's recommendation in utility rate cases. Therefore, the objections against the testimony and documents should be denied.

VI. CONCLUSION

The ED respectfully asserts that none of Wiedenfeld's objections to Ms. Guerrero-Gantioqui's and Mr. Adhikari's testimony have merit and requests that all objections be denied.

Respectfully submitted,

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Mark R. Vickery, P.G., Executive Director

Robert Martinez, Director
Environmental Law Division

By Stefanie Skogen
Stefanie Skogen
Staff Attorney
State Bar of Texas No. 24046858
Environmental Law Division

²⁴ Applicant's Objections 1-2 (Apr. 9, 2010).

²⁵ 30 TEX. ADMIN. CODE § 80.127(a)(1) (West 2009).

P.O. Box 13087, MC-173
Austin, Texas 78711-3087
Phone: (512) 239-0575
Fax: (512) 239-0606

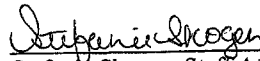
TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2010 APR 16 PM 2:19

CHIEF CLERKS OFFICE

CERTIFICATE OF SERVICE

I certify that on April 16, 2010, a copy of the foregoing document was sent by first class mail, agency mail, electronic mail, and/or facsimile to the persons on the attached Mailing List.


Stefanie Skogen, Staff Attorney
Environmental Law Division

Mailing List
Wiedenfeld Water Works, Inc.
SOAH Docket No. 582-09-3549
TCEQ Docket No. 2009-0372-UCR

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS:**

The Honorable Lilo D. Pomerleau
State Office of Administrative Hearings
P.O. Box 13025
Austin, Texas 78711-3025
Phone: (512) 475-4993
Fax: (512) 475-4994

**REPRESENTING WIEDENFELD
WATER WORKS, INC.:**

Mark H. Zeppa
Law Offices of Mark H. Zeppa, P.C.
4833 Spicewood Springs Road, Suite 202
Austin, Texas 78759-8435
Phone: (512) 346-4011
Fax: (512) 346-6847

WESTWOOD PARK RATEPAYERS:

Santos Hernandez
107 Sherwood Drive
Comfort, Texas 78013
Phone: (210) 872-3122
Fax: (210) 354-2901

Hanson Paul LeBlanc III
177 Greenwood Drive
Comfort, Texas 78013
Phone: (210) 458-7724
Fax: (210) 458-5991

**REPRESENTING THE OFFICE OF
PUBLIC INTEREST COUNSEL:**

James Murphy
Texas Commission on Environmental Quality
Office of Public Interest Counsel, MC-103
P. O. Box 13087
Austin, Texas 78711-3087
Phone: (512) 239-6623
Fax: (512) 239-6377

OFFICE OF THE CHIEF CLERK:

LaDonna Castañuela
Texas Commission on Environmental Quality
Office of the Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Phone: (512) 239-3300
Fax: (512) 239-3311