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Addendum StartPage: 0

**SOAH DOCKET NO. 473-16-5296.WS
PUC DOCKET NO. 45702**

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**APPLICATION OF THE CITY OF
CIBOLO FOR SINGLE
CERTIFICATION IN INCORPORATED
AREA AND TO DECERTIFY
PORTIONS OF GREEN VALLEY
SPECIAL UTILITY DISTRICT'S
SEWER CERTIFICATE OF
CONVENIENCE AND NECESSITY IN
GUADALUPE COUNTY**

§ **BEFORE THE STATE OFFICE**
§ **OF**
§ **ADMINISTRATIVE HEARINGS**
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**GREEN VALLEY'S OBJECTIONS TO THE CITY OF CIBOLO'S DIRECT
TESTIMONY AND EXHIBITS AND MOTION TO STRIKE**

Green Valley Special Utility District ("Green Valley") files these objections to the City of Cibolo's Direct Testimony and Exhibits ("Objections") and Motion to Strike. In support, Green Valley would show as follows:¹

I. SUMMARY OF OBJECTIONS AND MOTION TO STRIKE

Green Valley requests that certain portions of the direct testimony by Rudolph "Rudy" F. Klein, IV, P.E., offered by the City of Cibolo be stricken and that three of his exhibits, Exhibits C, E and F, also be stricken or admitted with limitations discussed herein. Many of the topics Mr. Klein discusses in the offered direct testimony fall outside of his expertise and outside of the scope of this phase of the proceeding, which both the Commission and ALJ have limited to a narrow set of issues. For example, Mr. Klein testifies extensively regarding his theory of "regionalization," which is both beyond the scope of this proceeding and consists of purely legal opinions.

As to matters properly before the ALJ, Mr. Klein relies heavily on an "appraisal" report prepared by a Mr. Jack Stowe. Neither Mr. Klein nor Mr. Stowe are in fact appraisers and are not qualified to provide the opinions reflected in either Mr. Klein's testimony or Mr. Stowe's

¹ These objections are timely filed according to the schedule set forth in SOAH Order No. 3 (September 9, 2016).

76

“appraisal.” Further, Mr. Klein’s characterization notwithstanding, the two-page letter prepared by Mr. Stowe is not an appraisal at all as required by TWC §13.255. Rather, the letter consists primarily of legal opinions regarding the scope and meaning of Section 13.255 and related Commission rules. Neither Mr. Klein nor Mr. Stowe are attorneys and they are unqualified to offer pure legal opinion testimony. Moreover, Mr. Stowe has not been made available as a witness so that his “appraisal” and the legal conclusions contained therein can be tested.

Admitting many of these statements and Exhibits C, E and F without limitation will substantially and unjustly prejudice Green Valley. Thus, Green Valley is compelled to seek the relief described herein.

II. TESTIMONY AND EXHIBITS TO BE STRICKEN

Green Valley objects to and requests that the following direct testimony and exhibits of Rudolph “Rudy” Klein, IV, P.E. offered on behalf of the City of Cibolo be stricken:

Obj.	Testimony	Subject Matter and Specific Passage	Basis to Strike
1	Page 10, Lines 19-20	Testimony addressing “regionalization” as follows: “2. Discuss my understanding of . . . regionalization policy.”	All testimony and exhibits related to Mr. Klein’s theory of “regionalization” are outside of the scope of this proceeding as established by the Commission’s Supplemental Preliminary Order and the ALJ’s Order No. 2. Expert testimony is required for pure legal opinions and witness is not qualified to provide expert opinion on the particular subject matter discussed. TEX. R. EVID. 702. This testimony is not relevant and is inadmissible pursuant to TEX. R. EVID. 401, 402 and 403.

Obj.	Testimony	Subject Matter and Specific Passage	Basis to Strike
2	Page 11, Lines 8-22	Testimony addressing City's purported "appraisal" as follows: "Q. I AM SHOWING INTO EVIDENCE."	Green Valley objects to Exhibit C to Mr. Klein's direct testimony (the "appraisal") and all testimony addressing Exhibit C on the basis of Mr. Klein's conclusory and baseless assertion that the two-page letter constitutes an "appraisal." The City has failed to establish that either Mr. Klein or the author of Exhibit C is a certified appraiser or otherwise has the education or experience to perform an appraisal as required by Section 13.255 of the Texas Water Code. Exhibit C and testimony addressing Exhibit C lacks proper foundation and is therefore inadmissible in this proceeding. The City has failed to make the author of Exhibit C available as a witness. Exhibit C consists almost exclusively of conclusory purely legal opinion that the author is not qualified to make and which Mr. Klein is not qualified to adopt. Exhibit C constitutes inadmissible hearsay. Exhibit C does not contain any true analysis that could reasonably be relied upon by an expert in Mr. Klein's field of expertise under TEX. R. EVID. 401, 402, 702, 703.
3	Page 12, Line 17	Testimony addressing City's purported "appraisal" as follows: "APPRAISALS"	Green Valley incorporates its objections to Page 11, Lines 8-22 addressing Exhibit C and related testimony.
4	Page 12, Line 18	Testimony addressing City's purported "appraisal" as follows: "...EXHIBITS C AND D ARE ..."	Green Valley incorporates its objection to Page 11, Lines 8-22 addressing Exhibit C and related testimony.

Obj.	Testimony	Subject Matter and Specific Passage	Basis to Strike
5	Page 14, Lines 5-7	Testimony addressing City's purported "appraisal" as follows: "...EXHIBITS C AND D ARE ..."	Green Valley incorporates its objection to Page 11, Lines 8-22 addressing Exhibit C and related testimony.
6	Page 14, Lines 10-11	Testimony addressing City's purported "appraisal" as follows: "...EXHIBITS C AND D ARE ..."	Green Valley incorporates its objection to Page 11, Lines 8-22 addressing Exhibit C and related testimony.
7	Page 14, Line 14	Testimony addressing City's purported "appraisal" as follows: "...Exhibits C AND D "	Green Valley incorporates its objection to Page 11, Lines 8-22 addressing Exhibit C and related testimony.
8	Page 14, Lines 15-17	Testimony addressing City's purported "appraisal" as follows: "the City's Appraisal ... Decertification; and"	Green Valley incorporates its objection to Page 11, Lines 8-22 addressing Exhibit C and related testimony.
9	Page 15, Line 5	Testimony addressing City's purported "appraisal" as follows: "the City's appraisal"	Green Valley incorporates its objection to Page 11, Lines 8-22 addressing Exhibit C and related testimony.
10	Page 15, Line 6	Unidentified materials relied upon in forming opinions, as follows: "and other filings in this matter;"	This testimony is vague and ambiguous. Because Mr. Klein fails to identify the "other filings" or explain their relevance to this proceeding, this testimony is not relevant and is inadmissible pursuant to TEX. R. EVID. 401, 402 and 403.

Obj.	Testimony	Subject Matter and Specific Passage	Basis to Strike
11	Page 15, Lines 7-8	Legal authority relied upon as basis for opinion regarding “regionalization” theory as follows: “TWC, Chapter 26;” ... “and 30 TAC Chapter 351, Subchapter F.	Green Valley incorporates its objection to Page 10, Lines 19-20 regarding Mr. Klein’s “regionalization” theory. The referenced legal authority is relied on by Mr. Klein solely to support his “regionalization” theory.
12	Page 16, Line 21 through Page 22, Line 10	Testimony addressing “regionalization” theory as follows: Section IV in its entirety.	Green Valley incorporates its objection to Page 10, Lines 19-20 regarding Mr. Klein’s “regionalization” theory.
13	Page 23, Line 6	Testimony reflecting the City’s reliance on purported “appraisal” as follows: “City’s Appraisal,”	Green Valley incorporates its objection to Page 11, Lines 8-22 addressing Exhibit C and related testimony.
14	Page 23, Lines 19-20	Testimony reflecting the City’s reliance on purported “appraisal” as follows: “City’s Appraisal,”	Green Valley incorporates its objection to Page 11, Lines 8-22 addressing Exhibit C and related testimony.
15	Page 25, Lines 5-9	Testimony addressing “regionalization” theory as follows: “As previously ... Land. Regardless, ”	Green Valley incorporates its objection to Page 10, Lines 19-20 regarding Mr. Klein’s “regionalization” theory.
16	Page 26, Lines 7-9	Testimony regarding the nature of Green Valley’s property interests as follows: “However ... in part.”	The testimony consists of purely legal opinion testimony regarding the nature of Green Valley’s property interests. The City has failed to establish that Mr. Klein has the education, experience or training to provide purely legal opinions.

Obj.	Testimony	Subject Matter and Specific Passage	Basis to Strike
			TEX. R. EVID. 401, 402, 702, 703.
17	Page 26, Lines 15-24	Testimony addressing “regionalization” theory as follows: “First, it is my opinion ... regionalization,”	Green Valley incorporates its objection to Page 10, Lines 19-20 regarding Mr. Klein’s “regionalization” theory.
18	Page 27, Line 21 through Page 28, Line 5	Testimony addressing “regionalization” theory as follows: “Again, it is my opinion ...in the first place.”	Green Valley incorporates its objection to Page 10, Lines 19-20 regarding Mr. Klein’s “regionalization” theory.
19	Page 28, Lines 12-18	Testimony addressing “regionalization” theory as follows: “First, once again, it is my opinion ... decertification.”	Green Valley incorporates its objection to Page 10, Lines 19-20 regarding Mr. Klein’s “regionalization” theory.
20	Page 29, Line 23 through Page 30, Line 9	Testimony addressing “regionalization” theory and legal opinion testimony regarding the nature of Green Valley’s property interests, as follows: “First ...CCN decertification.”	The testimony consists of purely legal opinion testimony regarding the nature of Green Valley’s property interests. The City has failed to establish that Mr. Klein has the education, experience or training to provide purely legal opinions. TEX. R. EVID. 401, 402, 702, 703. Green Valley incorporates its objections to Page 10, Lines 19-20 regarding Mr. Klein’s “regionalization” theory.
21	Page 31, line 11 through Page 33, Line 11		The testimony consists of purely legal opinion testimony regarding the nature of Green Valley’s property interests. The City has failed to establish that Mr. Klein has the education, experience or training to provide purely legal opinions.

Obj.	Testimony	Subject Matter and Specific Passage	Basis to Strike
			<p>TEX. R. EVID. 401, 402, 702, 703. Green Valley incorporates its objections to Page 11, Lines 8-22 addressing Exhibit C and related testimony.</p> <p>Green Valley incorporates its objections to Page 10, Lines 19-20 regarding Mr. Klein's "regionalization" theory.</p>
22	Exhibit C	City of Cibolo's "Appraisal"	Green Valley incorporates its objections to Page 11, Lines 8-22 addressing Exhibit C and related testimony.
23	Exhibit E	Excerpts of 30 TEX. ADMIN. Code §§ 351.61, 351.62 and 351.65.	<p>Green Valley incorporates its objections to Page 10, Lines 19-20 regarding Mr. Klein's "regionalization" theory.</p> <p>The referenced legal authority is relied on by Mr. Klein solely to support his pure legal "regionalization" opinion testimony theory. TEX. R. EVID. 702 and 401, 402, and 403.</p>
24	Exhibit F	TPWD Texas Watershed Viewer Map	<p>Green Valley incorporates its objection to Page 10, Lines 19-20 regarding Mr. Klein's "regionalization" theory.</p> <p>Moreover, the Viewer Map is inadmissible hearsay under TEX. R. EVID. 802. The Viewer Map has not been authenticated in accordance with TEX. R. EVID. 901.</p>

III. ARGUMENT

A. Many portions of Mr. Klein's direct testimony should be stricken because they address issues that are beyond the scope of this limited phase of the proceeding (Objections 1, 11, 12, 15, 17, 18, 20, 21, 23, 24).

All specified testimony and exhibits (Exhibits E and F) related to Mr. Klein's theory of "regionalization" are outside of the scope of the very limited issues to be addressed in this phase of the proceeding as set forth in the Commission's Supplemental Preliminary Order.² The SOAH ALJ reaffirmed the limited nature of this phase of the proceeding.³ Yet the City of Cibolo, through its witness Mr. Klein, attempts to introduce complex regional planning policy matters into this phase by speculating that in the future a regulatory body might decide a matter that is neither before the Commission nor SOAH regarding whether a non-party to this proceeding may ultimately be a preferred service provider. Allowing testimony and exhibits so far afield from the issues at hand would needlessly complicate this already novel and technical proceeding and result in additional expense to the parties and confusion of the issues. In short, testimony regarding "regionalization" has no bearing on the fundamental issue in this phase of the proceeding as to what property will be rendered useless or valueless to Green Valley SUD as a result of decertification. This testimony is not relevant and is inadmissible pursuant to TEX. R. EVID. 401, 402 and 403 and should be stricken from the testimony.

Exhibits E and F, consisting respectively consisting of: (a) excerpts from the Texas Administrative Code addressing regionalization; and (b) a purported screen print from a Texas

² See Docket No. 45702, Supplemental Preliminary Order at 4-5 (July 20, 2016) (identifying three issues to be determined in this phase of the bifurcated proceeding: "9. What property if any, will be rendered useless or valueless to Green Valley by the decertification sought by Cibolo in this proceeding? TWC § 13.254(c) [*sic*]; 10. What property of Green valley, if any, has Cibolo requested be transferred to it? TWC § 13.254(c) [*sic*]; 11. Are the existing appraisals limited to valuing the property that has been determined to have been rendered useless or valueless by decertification and the property that Cibolo has requested be transferred?").

³ See SOAH Order No. 2 at 1 ("the first stage of this contested proceeding will only address Issue Nos. 9, 10, and 11 in the Commission's Supplemental Preliminary Order.") (Aug. 19, 2016).

Water Development Board online map whose authenticity has not been properly authenticated, should be stricken for the same reasons as the noted “regionalization” testimony.

B. Mr. Klein is not qualified to offer expert testimony regarding certain subject matters contained in his direct testimony and exhibits.

Many of the objections set forth above are grounded on the City of Cibolo’s offering the direct testimony of a single witness, Mr. Klein, who proceeds to opine on subject matter far beyond his qualification to testify as an expert. Mr. Klein is an engineer. As it relates to expert testimony, Rule 702 of the Texas Rules of Evidence states:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue. The witness must be qualified to give an expert opinion “by knowledge, skill, experience, training, or education.”⁴ In deciding if a witness is qualified as an expert, courts must ensure that those who purport to be experts have expertise in the actual subject they are offering an opinion about.⁵

Texas case law counsels that a witness with general experience in a particular field of expertise is not necessarily qualified to discuss every matter that might be included in that field. “Trial courts must ensure that those who purport to be experts truly have expertise concerning the actual subject about which they are offering an opinion.”⁶ In the face of proper challenge, an expert must be proved to have qualification in the specific issue before the court.⁷ Once a party objects to an expert’s testimony, the party sponsoring the expert bears the burden of responding to

⁴ *Whirlpool Corp. v. Camacho*, 298 S.W.3d 631, 637 (Tex. 2009).

⁵ *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 800 (Tex. 2006) (applying TEX. R. EVID. 702).

⁶ *Gammill v. Jack Williams Chevrolet*, 972 S.W.2d 713, 719 (Tex. 1998) (“Just as not every physician is qualified to testify as an expert in every medical malpractice case, not every mechanical engineer is qualified to testify as an expert in every products liability case.”).

⁷ *In the Interest of M.D.S.*, 1 S.W.3d 190, 203 (Tex. App. Amarillo 1999) (citing *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 719-20 (Tex. 1998) (jet fighter engineer not qualified to give expert testimony on automobile seat belt design)).

each objection and showing that the testimony is admissible by a preponderance of the evidence.⁸

The prefiled direct testimony of Mr. Klein contains statements regarding property appraisals, the nature of and universe of Green Valley's property interests, and legal analyses, including statutory interpretation. Mr. Klein has not demonstrated that he has a sufficient background to discuss these matters. Thus, Mr. Klein is not qualified to provide expert testimony as to these matters.

- 1. Mr. Klein is not qualified to provide expert testimony regarding appraisals or the nature of all of Green Valley's property and both his testimony regarding the City's "appraisal" and the "appraisal" itself should be stricken (Objections 2-9, 13, 14, 17, 19, 21, 22)**

Section 13.255(l) of the Texas Water Code requires that valuation of property affected by an application for single certification "be determined by a *qualified* individual or firm [appointed] to serve as independent *appraiser*." (emphasis added). It necessarily follows that in order to offer expert opinion as to appraisals or to prepare an "appraisal," the testifying expert must be qualified to serve as an appraiser. Mr. Klein does not identify himself as an appraiser, nor does he indicate that he has previously conducted appraisals. His testimony does not identify what standards were used in the preparation of Exhibit C, nor does he explain why he is entitled to rely on Exhibit C. Therefore, Mr. Klein should not be admitted as an expert witness to opine as to what property has been rendered useless and all testimony regarding the "appraisal" submitted as Exhibit C should be stricken.

Green Valley further objects to Exhibit C to Mr. Klein's direct testimony and all testimony addressing Exhibit C on the basis of the Mr. Klein's conclusory and baseless assertion that the two-page letter constitutes an "appraisal." Not only is Mr. Klein not qualified to meet Section 13.255's appraisal requirements, but Cibolo has failed to establish that the author of the letter is a

⁸ *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995).

certified appraiser or otherwise has the education or experience to perform an appraisal as required by Section 13.255 of the Texas Water Code. The author of the letter which Mr. Klein characterizes as an “appraisal,” Mr. Jack Stowe, does not identify any qualifications, educational background, or experience that would qualify him to provide an “appraisal” as required by Section 13.255. Mr. Stowe himself does not even attempt to characterize the letter as an appraisal. Rather, he states at the outset of his letter that he “completed my review of the area.”

Further, the “appraisal” relied upon by Mr. Klein is rife with purely legal opinion testimony regarding his interpretation of the Water Code and Commission rules. Mr. Stowe offers no basis for Green Valley to believe that he is an attorney or that he has any prior experience interpreting statutory and regulatory provisions.

Most damaging to Mr. Klein’s reliance on and testimony regarding Exhibit C is the City’s failure to make the “appraisal’s” author available as a witness in this proceeding. In its present posture, Exhibit C is inadmissible hearsay not within any exception and not the type of document reasonably relied upon by an expert.

Based on the foregoing, the only reasonable conclusion to be drawn is that Exhibit C and Mr. Klein’s testimony based on Exhibit C are unreliable on their face, lack proper foundation and should therefore be deemed inadmissible in this proceeding because they do not render any fact of consequence to this proceeding more or less probable and are not the type of information reasonably relied upon by an expert in Mr. Klein’s field of expertise. TEX. R. EVID. 401, 402, 702 and 703. Exhibit C and Mr. Klein’s testimony regarding Exhibit C should therefore be stricken in their entirety.

2. Mr. Klein is not qualified to provide expert legal opinion testimony. (Objections 1, 2, 11, 12, 15, 16, 17, 18, 20, 21, 23, 24).

In numerous sections of his direct testimony (encompassed in the above-noted objections), Mr. Klein testifies to the concept of “regionalization” as encompassed in 30 TEX. ADMIN. CODE. *Green Valley’s Objections to City of Cibolo’s Direct Testimony and Exhibits and Motion to Strike* Page 11

§351. As Green Valley urges above, Mr. Klein’s opinion testimony regarding the concept of “regionalization” is well beyond the limited scope of this phase of the proceeding as delineated by the Commission’s Supplemental Preliminary Order. But even if the concept Mr. Klein’s regionalization-based arguments (which Cibolo fails to mention have been made in the related TCEQ TPDES permitting case and rejected by the TCEQ Executive Director in his Preliminary Decision) might be somehow tangentially-related to this proceeding, which it is not, Mr. Klein is not qualified to offer expert opinions on the issue. Certain portions of Mr. Klein’s testimony also make conclusory statements regarding the legal nature of “property.”

The above-noted sections of Mr. Klein’s testimony concern legal issues that the ALJ, and ultimately, the Commission, will decide. While these legal arguments and analyses may be within the proper scope of legal briefing, they are not the appropriate subject matter of a non-lawyer such as Mr. Klein, whose engineering background and experience do not qualify him to provide expert legal opinion testimony.⁹ Nothing else in his background nor professional experience testimony, or his resume, suggests otherwise. Therefore, Mr. Klein is not qualified to offer the objectionable testimony as an expert and it will not assist the trier of fact.¹⁰ Such opinions amount to no more than lay opinions and are not relevant or helpful.¹¹ Thus, the ALJ should strike the noted portions of Mr. Klein’s testimony that offer purely legal opinion evidence, along with Exhibit E, which reproduces portions of the Texas Administrative Code that Mr. Klein purports to interpret.

IV. CONCLUSION

⁹ An expert cannot testify about an opinion on a pure question of law. *Greenberg Traurig of N.Y., P.C. v. Moody*, 161 S.W.3d 56, 94 (Tex. App.–Houston [14th Dist.] 2004, no pet.); *Upjohn v. Rylander*, 38 S.W.3d 600, 611 (Tex. App.–Austin 2000, pet. denied). While an expert witness may offer an opinion on a mixed question of law and fact, the expert may only do so if the opinion is confined to relevant issues and is based on proper legal concepts. See *Birchfield v. Texarkana Mem’l Hosp.*, 747 S.W.2d 361, 365 (Tex. 1987). Here, Mr. Klein has offered pure legal conclusions or analyses where Green Valley has objected.

¹⁰ TEX. R. EVID. 702.

¹¹ TEX. R. EVID. 401, 402, 701 and 702.

For the reasons set out above, Green Valley requests that the above-noted portions of Cibolo witness Rudy Klein's direct testimony and exhibits specified in these Objections and Motion to Strike be stricken. In the event that the ALJ declines to strike these portions of direct testimony and related exhibits, Green Valley requests that the ALJ accord such testimony and exhibit the appropriate weight.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2016, a true and correct copy of the foregoing was sent by the method indicated to counsel of records at the following addresses in accordance with P.U.C. PROC. R. 22.74:

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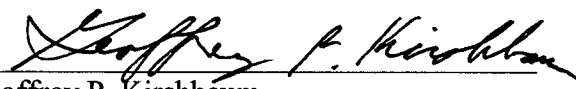
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