



Control Number 45848



Item Number 23

Addendum StartPage 0

CITY OF CELINA'S NOTICE OF  
INTENT TO PROVIDE WATER AND  
SEWER SERVICE TO AREA  
DECERTIFIED FROM AQUA TEXAS,  
INC. IN DENTON COUNTY

§  
§  
§  
§  
§

PUBLIC UTILITY COMMISSION  
OF TEXAS

---

**CITY OF CELINA'S OBJECTIONS TO PRE-FILED TESTIMONY**

---

The City of Celina (the "City") hereby objects to and moves to strike certain pre-filed testimony and exhibits submitted by Aqua Texas, Inc. ("Aqua") and in support thereof would respectfully show as follows:

**I. INTRODUCTION**

Although Aqua did not tender any of its witnesses as experts in the pre-filed testimony, it is presumed that Aqua filed pre-filed testimony and exhibits for one expert witness and two lay witnesses. Aqua's expert witness testimony was given by Joshua M. Korman, Aqua's lay witnesses are Darryl G. Waldock and Stephen H. Blackhurst. To the extent that Aqua asserts that Aqua asserts that either Darryl G. Waldock or Stephen H. Blackhurst are expert witnesses, the City objects as discussed below.

Significant parts of the pre-filed testimony of Aqua's witnesses are inadmissible pursuant to 16 Tex. Admin. Code §22.221(a) and the Texas Rules of Evidence ("TRE"). Aqua seeks to introduce irrelevant evidence, as well as improper opinion testimony, and evidence that lacks proper foundation, as explained herein.

Aqua objects to and requests that the Judge strike all such inadmissible evidence.

**II. TO THE EXTENT PROFFERED AS EXPERTS, THE CITY OBJECTS TO THE  
EXPERT WITNESS STATUTS OF DARRYL G. WALDOCK AND STEPHEN H.  
BLACKHURST**

Because Aqua did not tender any of its witnesses as expert witnesses, it is presumed that at least Mr. Waldock and Mr. Blackhurst have been offered as a lay witnesses, and the City objects to any effort to tender them as expert witnesses at this point in the proceeding.

Nevertheless, to the extent that Aqua attempts to subsequently offer Mr. Waldock or Mr. Blackhurst as an expert, the City objects because they do not qualify as an expert under TRE Rule 702. They satisfy none of the requirements under TRE 702 to be an expert.

To qualify as an expert, 'Rule 702 contains three requirements for the admission of expert testimony: (1) the witness must be qualified; and (2) the proposed testimony must be 'scientific knowledge' and (3) the testimony must 'assist the trier of fact to understand the evidence or to determine a fact in issue. *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995).

Both Mr. Waldock and Mr. Blackhurst fail on all three counts.

Qualification is a two-step inquiry: 'A witness must first have a sufficient background in a particular field, but a trial judge must then determine whether that background 'goes to the very matter on which [the witness] is to give an opinion. *Vela v. State*, 209 S.W.3d 128, 131 (Tex. Crim. App. 2006) (quoting *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996)). Mr. Waldock is clearly an expert in utility operations as evidenced from years of experience and high operator certifications. Those qualifications do not equate to expertise in either of the issues that the Public Utility Commission (PUC) has requested that we address. That is, background is not in

the area of appraisals or valuation, i.e. whether property has been rendered valueless or useless – issues that are central to the questions currently before this court. Further, his background does not qualify him as an expert in testifying on what may or may not be property.

Mr. Blackhurst has an impressive background as being knowledgeable of regulatory process involving retail water utilities. Celina does not object to Mr. Blackhurst's testimony to the extent that he discusses his fact-based observations related to the implementation of TWC §13.254 and his fact-based observations while he was at the Texas Natural Resource Conservation Commission (TNRCC). Celina objects to Mr. Blackhurst being considered an expert on legislative intent. While Mr. Blackhurst played a role in implementing certain pieces of legislation impacting TWC §13.254, there has been no foundation that he has any expertise in determining the Legislature's intentions in passing those measures. Celina also objects to Mr. Blackhurst being considered an expert regarding former TNRCC and its successor agency, Texas Commission on Environmental Quality (TCEQ) interpretation of 'property' and whether a decertification action rendered any property 'useless or valueless'. Mr. Blackhurst admits in his testimony, P. 11, Lines 7-10, that in his tenure with the TNRCC there were 'very few' contested case hearings on this matter and most cases were settled. While he is able to testify as to his fact-based observations as a staff member of that agency, he cannot testify how the Commissioners of that agency would have ruled in a hearing. In short, there is nothing in their testimony that asserts expertise in these areas.

### **III. GROUNDS FOR SPECIFIC OBJECTIONS TO PRE-FILED TESTIMONY**

The City objects and urges the Court to strike certain portions of Aqua's proffered pre-filed testimony on the following bases, as set forth more specifically below:

### **A. Relevance**

The City objects to certain pre-filed testimony of Aqua as irrelevant to the case at hand. Relevant evidence is evidence that has the “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”<sup>1</sup> Evidence that is not relevant is inadmissible under TRE 402 and 16 Tex. Admin. Code §22.221(a).

Conclusory and speculative opinion testimony ‘that is conclusory or speculative is not relevant evidence, because it does not tend to make the existence of a material fact ‘more probable or less probable, and is therefore inadmissible under TRE 401.<sup>2</sup>

Furthermore, even if slightly relevant, the probative value of certain pre-filed testimony of Aqua is substantially outweighed by the danger of unfair prejudice and confusion of the issues. Such evidence is inadmissible under TRE 403.

### **B. Improper Opinion Testimony**

TRE 701 permits opinion testimony by a lay witness if “the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue. Aqua presents lay witness testimony expressing expert opinions, rather than opinions rationally based on personal perception. Those lay witnesses lack the necessary qualifications under Texas law to testify on certain subject matters, and those portions of their testimonies described in this motion should be excluded from the evidence in this case.

---

<sup>1</sup> TRE 401, *see also* 16 Tex. Admin. Code §22.221(a).

<sup>2</sup> *Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 232 (Tex. 2004) (quoting TRE 401).

Moreover, The City objects to certain pre-filed testimony of Aqua as it is improper opinion testimony. Before the introduction of expert opinion testimony, the proponent must show both that 'scientific, technical, or other specialized knowledge will assist the trier of fact' and that the expert is qualified by 'knowledge, skill, experience, training, or education.'<sup>3</sup> The methodology and analysis by which experts reach their conclusions must be reliable.<sup>4</sup> Certain portions of the testimony of Aqua's witnesses are of no value to the trier of fact, are outside the expertise of the witness, or are based on unreliable methodologies or analysis. Such evidence is inadmissible under TRE 702.

### **C. Personal Knowledge**

Before the introduction of evidence, the proponent must lay a foundation that the witness has personal knowledge of the matter that is the subject of the testimony. TRE 602. Aqua's witnesses fail to introduce such predicate testimony with respect to some of their testimony.

Such testimony is therefore inadmissible. In laying a foundation for expert testimony, the expert 'may rely on inadmissible hearsay, privileged communications, and other information that ordinary witnesses may not,'<sup>5</sup> but the proponent of such evidence must show that the evidence is 'of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.'<sup>6</sup> For certain portions of its testimony, Aqua fails to lay a proper foundation for its witnesses' testimony. The City Parties objects to all testimony offered without personal knowledge or other proper foundation.

---

<sup>3</sup> TRE 702.

<sup>4</sup> *Mack Trucks, Inc. v. Temez*, 206 S.W.3d 572, 581 (Tex. 2006); *Merrell Dow Pharms. v. Havner*, 953 S.W.2d 706, 714 (Tex. 1997).

<sup>5</sup> *In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d 434, 440 (Tex. 2007).

<sup>6</sup> TRE 703.

#### **IV SPECIFIC OBJECTIONS TO PRE-FILED TESTIMONY**

##### **A. Objections to Mr. Waldock's Testimony**

The City objects to the following testimony of Mr. Waldock and ask that it be struck for the reasons that follow:

- 1) **Page 10, Lines 9-12 (beginning at the words "The wastewater" and ending at the word "facility"):** This testimony is improper opinion testimony. Mr. Waldock is not being offered as an expert witness, and his testimony provides no basis to conclude that he has the requisite knowledge, skill, experience, training or education to qualify him to provide opinion testimony on this issue. Mr. Waldock's testimony is simply lay witness testimony and cannot express expert opinions. This portion of Mr. Waldock's testimony should be excluded from the evidence in this case.
- 2) **Page 12, Lines 14-16:** This testimony is improper opinion testimony. Mr. Waldock is not being offered as an expert witness, and his testimony provides no basis to conclude that he has the requisite knowledge, skill, experience, training or education to qualify him to provide opinion testimony on this issue. Mr. Waldock's testimony is simply lay witness testimony and cannot express expert opinions. This portion of Mr. Waldock's testimony should be excluded from the evidence in this case.

##### **B. Objections to Mr. Blackhurst's Testimony**

The City objects to the following testimony of Mr. Blackhurst and ask that it be struck for the reasons that follow:

**1) Page 8, Lines 9-12 (beginning at the word “My” and ending at the word “conditions”):**

- a. This testimony is improper opinion testimony. Mr. Blackhurst is not being offered as an expert witness, and his testimony provides no basis to conclude that he has the requisite knowledge, skill, experience, training or education to qualify him to provide opinion testimony on this issue. Mr. Blackhurst’s testimony is simply lay witness testimony and cannot express expert opinions. This portion of Mr. Blackhurst testimony should be excluded from the evidence in this case.
- b. Even if Mr. Blackhurst is admitted as an expert on this matter, the testimony is still inadmissible because it is mere speculation and has no basis. His ‘understanding’ is based on a guess. It is not based on reliable methodologies or analysis and is of no value to the trier of fact, and is outside the expertise of the witness. It is speculation without basis and is inadmissible under TRE 401, 402, and 702. It is also inadmissible under TRE 403 because, as a guess, it is substantially outweighed by the danger of unfair prejudice and confusion of the issues. Aqua offers no substantiation to Mr. Blackhurst’s speculation such as comments submitted and addressed during the rule making process.

**2) Page 10, Lines 18-20 (beginning at the word “In” and ending at the word “entities”):**

- a. This testimony is improper opinion testimony. Mr. Blackhurst is not being offered as an expert witness, and his testimony provides no basis to conclude that



he has the requisite knowledge, skill, experience, training or education to qualify him to provide opinion testimony on this issue. Mr. Blackhurst's testimony is simply lay witness testimony and cannot express expert opinions. This portion of Mr. Blackhurst testimony should be excluded from the evidence in this case.

To the extent Mr. Blackhurst is offered as an expert, Celina objects and points out that there is no showing that Mr. Blackhurst is qualified as an expert on legislative intent and he is not qualified to testify as to what the Texas Legislature intended in SB 1 in the 75<sup>th</sup> Session (1997).

**3) Page 11, Lines 3-5 (beginning at the word "In" and ending at the word "statute"):**

- a. This testimony is improper opinion testimony. Mr. Blackhurst is not being offered as an expert witness, and his testimony provides no basis to conclude that he has the requisite knowledge, skill, experience, training or education to qualify him to provide opinion testimony on this issue. Mr. Blackhurst's testimony is simply lay witness testimony and cannot express expert opinions. This portion of Mr. Blackhurst testimony should be excluded from the evidence in this case.
- b. Even if Mr. Blackhurst is admitted as an expert on this matter, the testimony is still inadmissible because it is mere speculation and has no basis. His 'understanding' is based on a guess. It is not based on reliable methodologies or analysis and is of no value to the trier of fact, and is outside the expertise of

the witness. It is speculation without basis and is inadmissible under TRE 401, 402, and 702.

- c. This testimony is also inadmissible under TRE 403 because, as a guess, it is substantially outweighed by the danger of unfair prejudice and confusion of the issues.

**4) Page 12, Lines 1-6 (beginning at the word “Second” and ending at the word “decertified”):**

- a. This testimony is inadmissible because it is not based on personal knowledge and there is no foundation laid for the opinion expressed. Celina does not object to Mr. Blackhurst stating that was his thoughts but Celina objects to as being an indication of formal TNRCC interpretation and policy on the factors in TWC §13.254. Celina also objects that Mr. Blackhurst is not qualified to speak as an expert on legislative intent on these factors.
- b. In addition; this testimony is improper opinion testimony. Mr. Blackhurst is not being offered as an expert witness, and his testimony provides no basis to conclude that he has the requisite knowledge, skill, experience, training or education to qualify him to provide opinion testimony on this issue. Mr. Blackhurst’s testimony is simply lay witness testimony and cannot express expert opinions. This portion of Mr. Blackhurst testimony should be excluded from the evidence in this case.
- c. Even if Mr. Blackhurst is admitted as an expert on this matter, the testimony is still inadmissible because it is mere speculation and has no basis. His

‘understanding’ is based on a guess. It is not based on reliable methodologies or analysis and is of no value to the trier of fact, and is outside the expertise of the witness. It is speculation without basis and is inadmissible under TRE 401, 402, and 702. It is also inadmissible under TRE 403 because, as a guess, it is substantially outweighed by the danger of unfair prejudice and confusion of the issues.

**5) Page 14, Line 22 to Page 16, Line 9:**

- a. This testimony is inadmissible because it is not based on personal knowledge and there is no foundation laid for the opinion expressed. There is no evidence that he knows why the cited changes were made. In particular, as previously stated, Mr. Blackhurst is not qualified to opine authoritatively on legislative intent on the changes made. Moreover, Mr. Blackhurst is not qualified to make the legal conclusion of the impact of HB 2876 (2005) or whether there is a ‘taking’ or ‘damaging’ of private property.
- b. In addition, this testimony is improper opinion testimony. Mr. Blackhurst is not being offered as an expert witness, and his testimony provides no basis to conclude that he has the requisite knowledge, skill, experience, training or education to qualify him to provide opinion testimony on this issue. Mr. Blackhurst’s testimony is simply lay witness testimony and cannot express expert opinions. This portion of Mr. Blackhurst testimony should be excluded from the evidence in this case.

- c. Even if Mr. Blackhurst is admitted as an expert on this matter, the testimony is still inadmissible because it is mere speculation and has no basis. His 'opinion' is a guess. It is not based on reliable methodologies or analysis and is of no value to the trier of fact, and is outside the expertise of the witness. It is speculation without basis and is inadmissible under TRE 401, 402, and 702. It is also inadmissible under TRE 403 because, as a guess, it is substantially outweighed by the danger of unfair prejudice and confusion of the issues.
- d. This testimony, especially the testimony beginning at Line 20 of page 15, is completely irrelevant to this case. What the Commission should or should not do is not at issue in this case.

**6) Page 16, Line 11 to Line 19:**

- a. This testimony is improper opinion testimony. Mr. Blackhurst is not being offered as an expert witness, and his testimony provides no basis to conclude that he has the requisite knowledge, skill, experience, training or education to qualify him to provide opinion testimony on this issue. Mr. Blackhurst's testimony is simply lay witness testimony as he is clearly not an appraiser nor does his testimony reflect any specialized knowledge or experience in appraising or reviewing how to apply the factors in TWC §13.254(g) and cannot express expert opinions. This portion of Mr. Blackhurst testimony should be excluded from the evidence in this case. In addition, Mr. Blackhurst's testimony amounts to a legal conclusion on whether Aqua had

any property in the area as well as whether the property, if any, was rendered useless or valueless.

- b. Even if Mr. Blackhurst is admitted as an expert on this matter, the testimony is still inadmissible because it is mere speculation and has no basis. His 'opinion' is based on a guess. It is not based on reliable methodologies or analysis and is of no value to the trier of fact, and is outside the expertise of the witness. It is speculation without basis and is inadmissible under TRE 401, 402, and 702.
- c. This testimony is also inadmissible under TRE 403 because, as a guess, it is substantially outweighed by the danger of unfair prejudice and confusion of the issues.

**7) Page 17, Line 6 to Line 18:**

- a. This testimony is improper opinion testimony. Mr. Blackhurst is not being offered as an expert witness, and his testimony provides no basis to conclude that he has the requisite knowledge, skill, experience, training or education to qualify him to provide opinion testimony on this issue. Mr. Blackhurst's testimony is simply lay witness testimony as he is clearly not an appraiser nor does his testimony reflect any specialized knowledge or experience in appraising or reviewing how to apply the factors in TWC §13.254(g) and cannot express expert opinions. This portion of Mr. Blackhurst testimony should be excluded from the evidence in this case. In addition, Mr. Blackhurst's testimony amounts to a legal conclusion on whether Aqua had

any property in the area as well as whether the property, if any, was rendered useless or valueless.

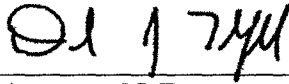
- b. Even if Mr. Blackhurst is admitted as an expert on this matter, the testimony is still inadmissible because it is mere speculation and has no basis. His 'opinion' is based on a guess. It is not based on reliable methodologies or analysis and is of no value to the trier of fact, and is outside the expertise of the witness. It is speculation without basis and is inadmissible under TRE 401, 402, and 702.
- c. This testimony is also inadmissible under TRE 403 because, as a guess, it is substantially outweighed by the danger of unfair prejudice and confusion of the issues.

## **V. PRAYER**

The City respectfully requests that the Judge sustain the City's objections and strike those portions of Aqua's pre-filed testimony that the City has identified as objectionable for the reasons set forth above.

Respectfully submitted,

ANDY BARRETT & ASSOCIATES, PLLC



ANDREW N. BARRETT

State Bar Number: 01808900

3300 Bee Cave Road

Suite 650 # 189

Austin, Texas 78746

Telephone: 512-600-3800

Facsimile: 512-330-0499

THE AL LAW GROUP, PLLC

David Tuckfield

State Bar Number: 00795996

12400 West Hwy 71

Suite 350-150

Austin, TX 78738

Telephone: (512) 576-2481

Facsimile: (512) 366-9949

ATTORNEYS FOR THE CITY OF CELINA

**CERTIFICATE OF SERVICE**

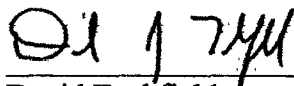
I, David Tuckfield, attorney for the City of Celina, certify that a copy of this document was served on all parties of record in this proceeding on August 22, 2016 in the following manner:

Erika Garcia  
Public Utility Commission of Texas  
1701 N Congress  
PO Box 13326  
Austin, Texas 78711-3326  
(512) 936-7268 (fax)  
ATTORNEY FOR COMMISSION STAFF

Fax: (512) 936-7268

Paul Terrill  
Geoffrey P. Kirshbaum  
Scott R. Shoemaker  
TERRILL & WALDROP  
810 W. 10th Street  
Austin, Texas 78701  
(512) 474-9100  
(512) 474-9888 (fax)  
ATTORNEYS FOR AQUA TEXAS, INC. D/B/A AQUA TEXAS

Fax: (512) 474-9888

  
\_\_\_\_\_  
David Tuckfield