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RATEPAYERS' APPEAL OF THE  
DECISION BY LAGUNA MADRE  
WATER DISTRICT TO CHANGE  
RATES

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**SOUTH PADRE ISLAND GOLF COURSE'S OBJECTIONS TO AND MOTION TO  
STRIKE DIRECT TESTIMONY AND ATTACHMENTS OF DAN V. JACKSON AND  
EXCLUDE TESTIMONY OF DAN V. JACKSON**

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TO THE HONORABLE JUDGE SIANO AND JUDGE SOTO:

COMES NOW, **South Padre Island Golf Course ("SPI")** and files these Objections to and Motion to Strike Direct Testimony and Attachments of Dan V. Jackson and Exclude Testimony of Dan V. Jackson ("Jackson"), and would respectfully show the following:

**I. PROCEDURAL HISTORY**

1.1. On January 29, 2019, South Padre Island Golf Course via the undersigned SPI Golf Homeowners JV, Inc. ("SPI") filed a petition against Laguna Madre Water District ("LMWD") to appeal the LMWD's board of directors raw water rates charged for untreated irrigation water ("raw water"). On February 28, 2019, LMWD filed a motion for summary dismissal for lack of jurisdiction. On March 6, 2019, the staff of the Public Utility Commission of Texas ("PUC Staff") filed a second motion to dismiss for lack of jurisdiction, and SPI filed a response to the motions to dismiss on April 16, 2019. On April 23, 2019, the Public Utility Commission of Texas ("PUC") Administrative Law Judge issued Order No. 5 denying both motions to dismiss. The PUC issued a referral order on June 21, 2019, referring the case to the State Office of Administrative Hearings (SOAH) for

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assignment to an Administrative Law Judge (“SOAH ALJ”) to conduct a hearing and issue a proposal for decision, if necessary. The PUC has jurisdiction over this case under the Texas Water Code §12.013. SOAH has jurisdiction over matters relating to the conduct of the hearing in these proceedings pursuant to Texas Government Code §2003.049. At an open meeting on August 8, 2019, the PUC adopted a preliminary order.

1.2. On September 9, 2019, the SOAH ALJ adopted the parties’ agreed procedural schedule by SOAH Order No. 4. On November 4, 2019, the parties filed an agreement modifying the deadlines in the procedural schedule, as allowed by SOAH Order No. 4. That agreement establishes a deadline of November 22, 2019 for filing objections to LMWD’s Direct Testimony. Therefore, these Objections to and Motion to Strike Direct Testimony and Attachments of Dan V. Jackson and Exclude Testimony of Dan V. Jackson are timely filed.

## **II. LEGAL BACKGROUND**

2.1. Texas Rule of Civil Evidence 403 provides that, “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence.”

2.2. Texas Rule of Civil Evidence 701 provides that, “If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness’s perception; and helpful to clearly understanding the witness’s testimony or to determining a fact in issue.”

2.3. Texas Rule of Civil Evidence 702 provides that, “A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form

of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." The burden is on the proponent of the witness to show that they are an expert in their particular field. *General Motors Corp. v. Iracheta*, 161 S.W.3d 462, 470 (Tex. 2005).

2.4. Texas Rule of Civil Evidence 703 provides that, "An expert may base an opinion on facts or data in the case that the expert has been made aware of, reviewed, or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted."

2.5. Texas Rule of Civil Evidence 801 provides in part that, "'Hearsay' means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." Texas Rule of Evidence 802 provides in part that, "Hearsay is not admissible unless any of the following provides otherwise: a statute; these rules; or other rules prescribed under statutory authority."

2.6. The decisions of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and the Texas Supreme Court in *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995) establish the function of the District Court as the gatekeeper with regard to expert testimony. These decisions set forth the following broad general functions of the Court in discharging its gatekeeper mission:

1. Helpfulness. The expert's witness' testimony must assist the trier of fact. The witness must have some specialized knowledge to assist the trier of fact in making his determination. If the fact finder

is equally competent to determine an issue, the expert opinion will be struck. *Honeycutt v. K-Mart*, 24 S.W.3d 357 (Tex. 2000).

2. Qualification. The expert must be qualified to render such opinions; Rule 702 allows expert testimony providing the “witness (is) qualified as an expert by knowledge, skill, experience, training or education.” The party offering such expert testimony has the burden to prove the expert witness is qualified. *United Blood Servs. v. Longoria*, 938 S.W.2d 29, 31 (Tex. 1997).
3. Relevance. The expert opinion must be relevant to be admissible. The events must “fit” the issue. The opinion must be “sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.” 509 U.S. 591-92.
4. Methodological Reliability. The expert must explain the methodology used by the expert to formulate his opinion, and such methodology must be reliable since an unreliable methodology will not produce testimony to assist the jury. *Robinson* adopted the six factors testified to in *Daubert* for determining whether the technique or principle is reliable, but also stresses the factors are both flexible and non-exhaustive. *Id.* 557.<sup>1</sup> It focuses solely on the underlying

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<sup>1</sup> While there are many factors that a court may consider in making the threshold determination of admissibility under Rule 702 of the Texas Rules of Civil Evidence, they include at least the following:

1. The extent to which the theory has been or can be tested;
2. The extent to which the technique relies upon the subjective interpretation of the expert;
3. Whether the theory has been subjected to peer review and/or publication;
4. The technique’s potential rate of error;
5. Whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and
6. The non-judicial uses which have been made of the theory or technique.

*Robinson*, 923 S.W.2d at 557.

principles and methodology, not on the conclusions they generate. *Id. Daubert*, 509 U.S. at 559.

5. **Connective Reliability.** The expert must be able to connect the foundational data and facts to the expert's conclusions. When the expert's analysis from facts to conclusions includes a leap of faith and the expert is unable to explain the connection, then the expert's opinion should not be admissible. *In Re Paoli RR Yard PCB Litig.*, 35 F.3d 715, 719 (3<sup>rd</sup> Cir. 1994); *General Motors Electric Co. v. Joiner*, 522 U.S. 136 (1997) provides a discussion with regard to this factor. The District Court must ensure that the expert's extrapolation from the facts forming the basis of the expert's opinion to the expert's opinion is sound.
6. **Foundational Reliability.** The opinions of experts must be supported by an adequate foundation of relevant facts, data or evidence. The absence of such foundation requires striking the expert opinion is based on conjecture or speculation. Furthermore, the source of underlying data for expert's opinion "must themselves be reliable." *Workers' Compensation Commission v. Garcia*, 862 S.W.2d 61, 105 (Tex. App.—San Antonio 1993) rev'd on other grounds 89 3 S.W.2d 504 (Tex. 1995). The court must analyze the evidence and data underlying the expert's opinion. "If an expert relies upon an unreliable foundational data any opinion drawn from that data is ... inadmissible." *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 489 (Tex. 2001). The Texas Supreme Court has determined that an opinion is not admissible if there is no adequate foundation and the underlying facts are unreliable. The expert opinion does not become admissible by use of "magic language" such as based on "reasonable medical probability." *Merrell Dow Pharmaceuticals v. Havner*, 953 S.W.2d 706 (Tex. 1997). In this connection, the opinion must not be contrary to any disputed facts and the opinion must not be conclusionary. Instead, the expert must disclose the factual basis of the opinion when the opinion is challenged. *Brown v. Eight Gates*, 36 Hous. L. Rev. at 823-26.
7. **The Expert's Reliance on Inadmissible Evidence is Limited.** Rule 703 of the Texas Rules of Civil Procedure allows an expert to base an opinion upon facts and documentation not admissible into evidence if such facts and documentation are the type relied upon by other experts in the expert witness' field. The trial judge must determine (1) whether other experts in the field rely upon the facts or data and (2) whether such reliance is reasonable. Nevertheless, the trial court is not bound to accept expert testimony based on questionable data simply because other experts use such data in

the field and the underlying data should be independently evaluated. *Havner*, 953 S.W.2d at 713.

8. Rule 403. The expert's opinion must not be unfairly prejudicial and cumulative. "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk the judge in weighing possible prejudice against probative force under Rule 403 exercise more control over experts than over lay witnesses." *Daubert*, 509 U.S. at 595; *U.S. v. Posado*, 57 F.3d 428, 435 (5<sup>th</sup> Cir. 1995).

Furthermore, the party designating the expert as its witness has the responsibility to submit competent evidence that the expert should be allowed to express the opinion to the fact finder. *United Blood Servs. v. Longoria*, 938 S.W.2d 29, 31 (Tex. 1997).

2.7. *Daubert* and *Robinson* dealt with scientific expert opinions, but the decisions of the United States Supreme Court in *Kumho Tire Co. v. Carmichael*, 526 U.S. 127 (1999) and the Texas Supreme Court in *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713 (Tex. 1998) addressed the issue of whether the Court's function as gatekeeper was the same in connection with the experts who provided testimony on the basis of their experience. *Gammill* did not establish all criteria of assessing experience-based testimony, but the Court specified some criteria for such experience-based testimony. The *Gammill* Court quoted from *General Electric Co. v. Joiner*, 522 U.S. 136 (1997) that a court should not accept expert testimony that is connected to the evidence "only by the *ipse dixit* of the expert" because there may be "too great an analytical gap between the data and the opinion proffered." *Gammill*, 972 S.W.2d at 726. The *Gammill* Court stated that the *Joiner* formulation recited by the *Havner* rule was correct, i.e. "It is not so simply because 'an expert says it is so.'" *Id.* (quoting *Havner*, 953 S.W.2d at 712). In this connection, the Supreme Court approved the use by the trial court of the analytical gap test and other appropriate guidelines from

*Daubert/Robinson* in connection with experience-based testimony. Likewise, the decisions of the Texas Supreme Court and the Courts of Appeals indicated other factors may be utilized by the courts in determining if the opinions of the expert are reliable and admissible.

2.8. In the case now before this SOAH ALJ, LMWD bears the burden of proving Jackson's opinions are admissible under the case law and rule cited above. For the reasons set forth below, Jackson's testimony should be excluded.

### **III. OBJECTION TO LMWD'S DIRECT TESTIMONY**

3.1. SPI objects to Jackson's testimony as prohibited by Texas Rules of Evidence 701 and 702 because he is not an expert on calculations of raw water rates. He is basing his opinions on the calculation methodology he himself initiated and has used for the District for 23 years, essentially making himself an expert in methodology he created. See Jackson Testimony at page 4, lines 4 through 9, page 6, line 16 through 23, and page 18, lines 2 through 13.

3.2. SPI objects to Jackson's testimony at page 4, lines 19 through 21 that the customers of LMWD have accepted his raw water rate approach as misleading, confusing the issues, and hearsay. On the contrary, SPI, the largest of only three (3) raw water customers in the District, has been a vocal opponent of the District's increasing water rates for years. All such rates were adopted by the LMWD after Jackson recommended them. Tex. R. Civ. Evid. §§402 and 802.

3.3. SPI objects to Jackson's testimony at page 12, lines 5 through 8 that the LMWD's financial position is sound and stable. Jackson is not qualified as an expert by knowledge, skill, experience, training, or education to offer this opinion. Tex. R. Civ. Evid.



§702. He has testified at page 2, lines 20 through 21, that he has experience setting utility rates, financing the costs of growth and generating revenues to fund desired services. Nowhere in his testimony does he discuss any knowledge, skill, experience, training, or education in analyzing a water district's *financial position*. Further, he offers no basis for his conclusion that it is sound and stable, nor what he considers "sound and stable" to mean. Further, this testimony concerning the LMWD's financial position lacks foundational facts and data to support this opinion. Tex. R. Civ. Evid. §703. By this testimony, Jackson attempts to confuse the issues of financial condition and the reasonable rate charged for raw water. Tex. R. Civ. Evid. §403. He does not explain why LMWD needs \$15,000,000 in non-capital assets, and how that is factored into his calculation of a raw water rate, if at all.

3.4. SPI objects to Jackson's testimony at page 14, lines 11 through 12 that LMWD has increased its rates in recent years like utilities throughout the state of Texas. Tex. R. Civ. Evid. §703. Jackson does not identify which utilities in Texas he is referring to, nor does he not state he has reviewed such data, or that he is personally aware of it. At his deposition on November 21, 2019, he testified he does not know what other districts charge for raw water, nor did he use comparables in his calculations and water rate recommendations to the LMWD. Again, Jackson attempts to confuse the issues of financial condition and the reasonable rate charged for raw water. Tex. R. Civ. Evid. §403.

3.5. SPI objects to Jackson's testimony at page 14, lines 15 through 17, that LMWD incurs significant costs in transporting raw water, delivering treated water, and collecting and treating wastewater for its unique service area. This confuses the issues before the SOAH ALJ, because the costs of delivering treated water and collecting and

treating wastewater should not be allocated to raw water customers. Further, the transportation of raw water is done for all customers of LMWD, not just raw water customers. Tex. R. Civ. Evid. §403.

3.6. SPI objects to Jackson's testimony at page 14, lines 22 through 25 that LMWD is managed prudently, and that LMWD has made the necessary but difficult decisions to set its rates and fees for services at a level that will ensure continued financial health. He has not shown he is qualified to make these conclusions; the conclusions are not supported by data, and confuses the issues. Tex. R. Civ. Evid. §§403, 702 and 703.

3.7. SPI objects to Jackson's testimony at page 15, lines 12 through 14, and lines 18 through 22, that a fair and reasonable rate calculation included LMWD's anticipated new raw water customers, both inside and outside the boundaries of LMWD. This is misleading and confuses the issues because SPI is within the boundaries of the LMWD. Moreover, there have never been more than three (3) raw water customers in the LMWD. Tex. R. Civ. Evid. §403. There is simply no data to support his conclusion that this "anticipated" factor must be taken into consideration. Tex. R. Civ. Evid. §§703 and 801.

3.8. SPI objects generally to Jackson's testimony to the extent he opines on the costs of transporting raw water for 26 miles from the Rio Grande River to the reservoir. This is misleading and confuses the issues. Tex. R. Civ. Evid. §403. All of the LMWD customers benefit from this transportation, not just the raw water customers.

3.9. SPI objects to Jackson's testimony at page 15, line 30 through page 16, line 10 to the extent he asserts that raw water customers need to pay for a transportation system for which they paid little or none of the cost. The raw water customers were not

using the line for the first 8 years after its installation. This is not based on data; Jackson has not shown he is qualified to make this conclusion, and it is misleading. Tex. R. Civ. Evid. §§403, 702 and 703.

3.10. SPI objects to Jackson's testimony at page 16, lines 12 through page 17, line 2. Jackson is drawing unreasonable conclusions not based on any facts or data. Because he did not speak to SPI about these things, he concludes they did not have a problem with his calculations. LMWD has not established that Jackson is qualified to make such assumptions. Finally, these statements are highly prejudicial, based upon hearsay, and misleading. Tex. R. Civ. Evid. §§403, 701, 702, and 703. Jackson has drawn an unreasonable, illogical and highly prejudicial conclusion that because he is not aware of any concern from SPI in 1996, his methodology was somehow accepted by SPI and is reasonable. This is not the first time Jackson attempts to confuse issues by stating that a LWMD customer accepts his methodology, suggesting a sole customer has equal bargaining power with LMWD. Of note, Jackson testified at his deposition on November 21, 2019, and in his testimony at page 19, lines 19 through 20, that raw water customers account for less than 1% of revenue for LMWD.

3.11. SPI objects generally to Jackson's testimony as to the application of his Utility Basis Methodology as it fails to segregate costs associated with supplying water to raw water customers as opposed supplying water to potable water customers. He confuses the issues, misleads the SOAH ALJ and the parties, and employs an unreasonable application of the Utility Basis Methodology which serves as the basis of his opinions and conclusions on the ultimate issues of a fair, just and reasonable raw water rate. Tex. R. Civ. Evid. §§403, 701, and 703.

3.12. SPI objects to Jackson's testimony at page 17, lines 17 through 26 that calculating a rate for customers inside the boundaries of LMWD (who pay taxes to LMWD) and another rate for customers outside the boundaries of LMWD would be perceived as unfair. He has not shown he is qualified to make this assumption – which defies common sense. This opinion is unsupported by data, leads to an absurd conclusion, is hearsay, and is misleading because he has done the exact opposite—in no way improving the result—while claiming his calculations to be reasonable and fair. Tex. R. Civ. Evid. §§403, 701, 702, 703, and 801. Further, SPI objects to Jackson's testimony at page 29, lines 14 through 18 about historical and "potential" raw water customers outside of the LMWD's boundaries. There is no historical data nor potential raw water customers outside of the LMWD's boundaries. Tex. R. Civ. Evid. §§703, 801. SPI is not outside of the boundaries.

3.13. SPI objects generally to Jackson's testimony as unreliable, unreasonable, and not supported by reliable data. Tex. R. Civ. Evid. §§701, 703. As the LMWD consultant for about 28 years, Jackson improperly forecasted what he considers reasonable raw water rates various times. His 2015 rate study is completely inconsistent with his 2018 draft rate study and final 2018 rate study. He is using his own model, and his model has been shown by his own subsequent rate studies to be unreliable in forecasting future raw water rates. For example, at page 19, line 31 through page 20, line 2 he testifies that the true raw water rate is allegedly higher than his 2018 rate study. And in his recent deposition, he acknowledged several errors in his 2015 rate study, resulting in a 27% increase in water rates in the same year (2018).

3.14. SPI objects generally to Jackson's failure to provide a schedule of assets related to the supply and delivery of raw water, to establish what costs he attributed to raw water users versus what he attributed to potable water users. His calculations with respect to raw water users are wholly unsupported by data. Tex. R. Civ. Evid. §703. He speaks in general terms when claiming he only allocated costs associated with raw water to the calculation of the raw water rate. His opinions are lack foundation, are unreliable, and unreasonable. Tex. R. Civ. Evid. §§701 and 703.

3.15. SPI objects generally to Jackson's reliance on the LMWD staff's opinions as to what costs are associated with raw water and which costs are not. There is no evidence that LMWD staff are qualified to render such opinions on which Jackson bases his opinions. Tex. R. Civ. Evid. §701, 702, 703.

3.16. SPI objects to Jackson's testimony at page 29, lines 2 through 12. Jackson asserts, without supporting facts or data, that LMWD has invested \$17.8 million in assets for transporting raw water. He further testifies, without supporting facts or data, that LMWD is assuming a risk in acquiring water rights for servicing raw water customers. There is no data to show why this is a risk, how long a water right is purchased for, the cost of a water right, the water rights needed for serving potable water customers versus raw water customers, etc. Tex. R. Civ. Evid. §703.

3.17. SPI objects to Jackson's testimony at page 29, line 30 through page 30, line 29, that water rights are becoming increasingly scarce and ever more expensive. He only offers what LMWD paid in 2018 for water rates and provided no facts to support this opinion. Tex. R. Civ. Evid. §703. Jackson simply offers a value he assessed to the LMWD's water rights without assigning values, calculations or other data to support the

number he arrived at. This is no foundation, the opinions are misleading, and confuse the issues. Tex. R. Civ. Evid. §403.

3.18. SPI objects to Jackson's testimony at page 31, lines 9 through 19 that he properly and reasonably calculated the rate of return. The opinions are unreliable because the rate does not segregate the debt owed for wastewater and treated water assets from that owed by raw water (which is none). Tex. R. Civ. Evid. §403. It further fails to justify the inclusion of a rate of return in the calculation for raw water rates with data or facts. Tex. R. Civ. Evid. §703.

3.19. SPI objects to Jackson's testimony at page 36, lines 1 through 31 that raw water rates charged by other districts in the Rio Grande Valley are not relevant to calculating the LMWD's raw water rate. He offers several reasons, none of which are supported by data or facts. Tex. R. Civ. Evid. §703. He speaks vaguely about other districts and only in generalities. Interestingly, Jackson's 2018 Water Rate Study, which is attached to his prefiled testimony, has numerous references to Rio Grande Valley comparables for *treated* water rates.

3.20. SPI objects to Jackson's testimony at page 37, lines 1 through 11 that LMWD's small revenue from raw water customers (less than 1% of LMWD's ratepayer revenue) justifies him using general assumptions to set the raw water rate. Jackson admits his opinions are not supported by data or facts and that they are assumptions, which unfairly and unreasonably diminishes the importance of SPI's claims. Tex. R. Civ. Evid. §§403 and 703. "My opinion has always been that the dollars at stake in these proceedings are not a substantial portion of the District's revenue base...The nominal amount of revenues certainly justifies my use of general assumptions in the rate study to

set the raw water rate..." id. Jackson admitted he did not do the leg work to properly review the raw water rates in his studies, and in his testimony. His opinions as to a fair and reasonable raw water rate are therefore entirely unreliable.

### **PRAYER**

WHEREFORE, PREMISES CONSIDERED, South Padre Island Golf Course respectfully requests that the State Office of Administrative Hearings Administrative Law Judge sustain its objections, enter an order striking the Direct Testimony and Attachments of Dan V. Jackson and preventing him from testifying and/or offering opinions at the hearing on the merits of this cause, as requested herein, and grant it such other and further relief to which it may be entitled.

Respectfully submitted,

ROYSTON, RAYZOR, VICKERY & WILLIAMS, L.L.P

By: **/s/ James H. Hunter, Jr.**  
James H. Hunter, Jr.,  
State Bar No. 00784311  
[jim.hunter@roystonlaw.com](mailto:jim.hunter@roystonlaw.com)  
Liliana Elizondo  
State Bar No. 24078470  
[liliana.elizondo@roystonlaw.com](mailto:liliana.elizondo@roystonlaw.com)  
55 Cove Circle  
Brownsville, Texas 78521  
(956) 542-4377 (Telephone)  
(956) 542-4370 (Facsimile)  
**ATTORNEYS FOR RATEPAYER**

**Certificate of Service**

I hereby certify, that a true and correct copy of the above and foregoing document was served via facsimile, certified mail/regular U.S. first class mail, and/or e-mail upon the following counsel of record on this the 21<sup>st</sup> day of November 2019.

Brian J. Hansen  
Law Offices of Fryer & Hansen, PLLC  
1352 West Pecan Blvd  
McAllen, Texas 78501  
[email@fryerandhansen.com](mailto:email@fryerandhansen.com)  
***Attorney for Laguna Madre Water District***

Kourtnee Jinks  
Public Utility Commission of Texas Legal Division  
1701 N. Congress Avenue  
P.O. Box 13326  
Austin, Texas 78711-3326  
[kourtnee.jinks@puc.texas.gov](mailto:kourtnee.jinks@puc.texas.gov)  
***Attorney for Public Utility Commission***

Stephen Journeay  
Public Utility Commission of Texas  
1701 N. Congress Avenue  
P.O. Box 13326  
Austin, Texas 78711-3326  
[desiree.garcia@puc.texas.gov](mailto:desiree.garcia@puc.texas.gov)  
***Commission Counsel for Public Utility Commission***

/s/ James H. Hunter, Jr.  
Of Royston, Rayzor, Vickery & Williams, L.L.P.