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PUC DOCKET NO. 49189
SOAH DOCKET NO. 473-19-6297.WS

APPLICATION OF THE CITY OF	§	BEFORE THE STATE OFFICE
AUSTIN FOR AUTHORITY TO	§	
CHANGE THE WATER AND	§	
WASTEWATER RATES FOR NORTH	§	
AUSTIN MUNICIPAL UTILITY	§	
DISTRICT NO. 1, NORTHTOWN	§	
MUNICIPAL UTILITY DISTRICT,	§	OF
TRAVIS COUNTY WATER CONTROL	§	
AND IMPROVEMENT DISTRICT NO.	§	
10, AND WELLS BRANCH	§	
MUNICIPAL UTILITY DISTRICT IN	§	
WILLIAMSON AND TRAVIS	§	
COUNTIES	§	ADMINISTRATIVE HEARINGS

**NORTH AUSTIN MUNICIPAL UTILITY DISTRICT NO. 1, NORTHTOWN
MUNICIPAL UTILITY DISTRICT, TRAVIS COUNTY WATER CONTROL &
IMPROVEMENT DISTRICT NO. 10, AND WELLS BRANCH MUNICIPAL UTILITY
DISTRICTS' OBJECTIONS TO AND MOTION TO STRIKE
DIRECT TESTIMONY OF RICHARD D. GIARDINA**

TO THE HONORABLE JUDGE SIANO AND JUDGE DREWS:

COME NOW, North Austin Municipal Utility District No. 1, Northtown Municipal Utility District, Travis County Water Control & Improvement District No. 10, and Wells Branch Municipal Utility District (collectively, the "Districts") and file this Objection to and Motion to Strike the Direct Testimony and Attachments of Richard D. Giardina and would respectfully show the following:

I. BACKGROUND

The City of Austin dba Austin Water ("City" or "AW") filed with the Public Utility Commission ("Commission") a Statement of Intent to Change Rates for Wholesale Water and Wastewater Service on April 15, 2019 (the "Application").¹ Included in the City's Application is the Direct Testimony and Attachments of Richard D. Giardina.² SOAH Order No. 9, issued on

¹ Statement of Intent to Change Rates for Wholesale Water and Wastewater Service (April 15, 2019).

² *Id.* at 222

October 23, 2019, establishes a deadline of November 1, 2019, for filing objections to the City's Direct Testimony.³ Therefore, this Objection and Motion to Strike is timely filed.

II. PROCEDURAL BASIS

Rule 701 governs the role of opinion testimony by lay witnesses and specifies that "if the witness is not testifying as an expert, 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."⁴ The lay witness must have personal knowledge of the matter and may not rely on what another has said about an experience.⁵ Rule 701 further bars speculative lay opinion testimony because the witness has no specialized knowledge or personal experience.⁶

Rule 702 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 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."⁷ The burden is on the proponent of the witness to show that they are an expert in their particular field.⁸ A witness may qualify as an expert if they have the sufficient knowledge, skill, experience, training, or education.⁹ However, generalized experience in a particular field may not qualify the witness as an expert.¹⁰ Occupational status alone generally will not suffice to show that a particular witness is qualified as an expert witness.¹¹

³ SOAH Order No. 9, Memorializing Second Prehearing Conference; Adopting Second Revised Procedural Schedule at 2 (October 23, 2019).

⁴ Tex. R. Civ. Evid. § 701.

⁵ See *Bigby v. State*, 892 S.W.2d 864, 888 (Crim. App. 1994).

⁶ *E-Z Mart Stores, Inc. v. Havner*, 832 S.W.2d 368, 374 (Tex. App. —Texarkana 1992, den.).

⁷ Tex R. Civ. Evid. § 702.

⁸ *General Motors Corp. v. Iracheta*, 161 S.W.3d 462, 470 (Tex. 2005).

⁹ See, e.g., *Negrini v. State*, 853 S.W.2d 128, 130-31 (Tex. App.—Corpus Christi 1993, no pet.); *Massey v. State*, 933 S.W.2d 141, 156-57 (Crim. App. 1996); *Sciarrilla v. Osborne*, 946 S.W.2d 919 (Tex. App.—Beaumont 1997, den.).

¹⁰ Cf. *Houghton v. Port Terminal R.R. Ass'n.*, 999 S.W.2d 39, 49 (Tex. App.—Houston [14th Dist.] 1999, no writ).

¹¹ *Broders v. Heise*, 924 S.W.2d 148, 153-53 (Tex. 1996).

Rules 801 and 802 lay out the definition of hearsay and prohibit hearsay from admission as evidence. Rule 801 states:

“(a) Statement. “Statement” means a person’s oral or written verbal expression, or nonverbal conduct that a person intended as a substitute for verbal expression.

(b) Declarant. “Declarant” means the person who made the statement.

(c) Matter Asserted. “Matter asserted” means:

- (1) any matter a declarant explicitly asserts; and
- (2) any matter implied by a statement, if the probative value of the statement as offered flows from the declarant’s belief about the matter.

(d) Hearsay. “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.

(e) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) A Declarant-Witness’s Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant’s testimony and:

- (i)** when offered in a civil case, was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition; or
- (ii)** when offered in a criminal case, was given under penalty of perjury at a trial, hearing, or other proceeding—except a grand jury proceeding—or in a deposition;

(B) is consistent with the declarant’s testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(C) identifies a person as someone the declarant perceived earlier.

(2) An Opposing Party’s Statement. The statement is offered against an opposing party and:

- (A)** was made by the party in an individual or representative capacity;
- (B)** is one the party manifested that it adopted or believed to be true;
- (C)** was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.”¹²

Rule 802, meanwhile, states: “Hearsay is not admissible unless any of the following provides otherwise: (a) a statute; (b) these rules; or (c) other rules prescribed under statutory authority. Inadmissible hearsay admitted without objection may not be denied probative value merely because it is hearsay.”¹³

III. OBJECTIONS TO DIRECT TESTIMONY

A. Giardina Testimony at page 10, lines 4 through 5.

Q. PLEASE DESCRIBE THE COS STUDY AND THE SERVICES PROVIDED BY RAFTELIS.

AW leadership discussed each of the issues internally and made the final decisions.

The Districts object to the referenced testimony, because it is prohibited hearsay under Tex R. Civ. Evid. 801 and 802. Mr. Giardina states his opinion on an issue, and he provides no testimony regarding his personal knowledge about the matter. No foundation has been laid for Mr. Giardina to provide his opinion. Mr. Giardina is offering an opinion that is not rationally based on his perception because has no foundation on which to base his opinion.

B. Giardina Testimony at page 17, lines 9 through 12.

Q. CAN YOU DESCRIBE THE DIFFERENCE BETWEEN THE CASH VERSUS UTILITY APPROACH TO DETERMINING REVENUE REQUIREMENTS?

The AW Executive Team recommended the determination of revenue requirements based on the cash basis methodology for both inside city and outside city retail customers, as well as wholesale customers.

¹² Tex. R. Civ. Evid. § 801.

¹³ Tex. R. Civ. Evid. § 802.

The Districts further object to the referenced testimony, because it is prohibited hearsay under Tex R. Civ. Evid. 801 and 802. Mr. Giardina states his opinion on an issue, and he provides no testimony regarding his personal knowledge about the matter. No foundation has been laid for Mr. Giardina to provide his opinion. Mr. Giardina is offering an opinion that is not rationally based on his perception because has no foundation on which to base his opinion.

IV. PRAYER

WHEREFORE, PREMISES CONSIDERED, the Districts respectfully request that the Administrative Law Judges sustain its objections, enter an order excluding and striking the Direct Testimony and Attachments of Richard D. Giardina as requested above and grant other such relief to which Districts may be entitled.

Respectfully submitted,



John J. Carlton

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ATTORNEYS FOR DISTRICTS

CERTIFICATE OF SERVICE

I hereby certify that I have served or will serve a true and correct copy of the foregoing document via hand delivery, facsimile, electronic mail, overnight mail, U.S. mail and/or Certified Mail Return Receipt Requested to all parties on this the 1st day of November, 2019.

A handwritten signature in black ink, appearing to read 'J. Carlton', is written over a horizontal line.

John J. Carlton