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

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

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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 Stephen J. Coonan 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 Stephen J. Coonan.[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 346.

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. LEGAL BACKGROUND

Rule 403 provides the basis for excluding otherwise relevant testimony: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." The rule seeks to curtail abuse of the evidentiary system in civil court by providing a check on what can be admitted. Otherwise, for any given case, there would be a massive amount of information and evidence that could be admitted.

Rule 701 governs the role of opinion testimony by lay witnesses and specifies that "if the witness is not testifying as an excerpt, 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

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[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).

knowledge, skill, experience, training, or education.[9] However, generalized experience in a particular 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]

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

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[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).

(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. SPECIFIC OBJECTIONS TO DIRECT TESTIMONY

A. Coonan Testimony at page 9, lines 11 through 15.

Q. IF THE CITY HAS A FIRM SUPPLY OF 325,000 ACRE-FEET PER YEAR AND ONLY DIVERTED 151,028 ACRE-FEET DURING FY 2018, WHY DOES AW CONTINUE TO PLAN FOR AND DEVELOP NEW WATER SUPPLIES?

The reductions were to be based off the consumption rates for the prior year, as opposed to contracted rates. The fact that the City had paid in advance for a firm supply of water did not protect it from the possibility of running low on water during the severe drought, thus emphasizing the value of developing its own, drought resistant supplies, such as reclaimed water.

Mr. Coonan assumes facts not in evidence and therefore his opinion is irrelevant. Even if it were determined that Mr. Coonan's testimony regarding what might have happened is relevant, it is in violation of Rule 403 of the Texas Rules of Civil Evidence, which states that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice

[12] Tex. R. Civ. Evid. § 801.

[13] Tex. R. Civ. Evid. § 802.

[or] confusion of the issues." Mr. Coonan's exploration of theoretical droughts is clearly confusing the issues and is irrelevant to this proceeding. Mr. Coonan's statement regarding theoretical droughts should be stricken from the record.

B. Coonan Testimony at page 9, lines 18 through 19.

Q. WOULD THE WHOLESALE CUSTOMERS HAVE BEEN AFFECTED BY THE PRO-RATA CURTAILMENT?

Yes, the wholesale customers would have been required to reduce their consumption by the same percentage as the City was required to reduce.

Mr. Coonan assumes facts not in evidence and therefore his opinion is irrelevant. Even if it were determined that Mr. Coonan's testimony regarding what might have happened is relevant, it is in violation of Rule 403 of the Texas Rules of Civil Evidence, which states that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice [or] confusion of the issues." Mr. Coonan's exploration of theoretical reductions in consumption is clearly confusing the issues and irrelevant to this proceeding. Mr. Coonan's statement regarding theoretical reductions in consumption should be stricken from the record.

C. Coonan Testimony at page 9, line 22 through page 10 line 7.

Q. HOW WAS AW GOING TO ACHIEVE THE REDUCTION IN WATER DEMANDS TO MATCH THE PROPOSED CURTAILMENT?

Fortunately, AW had proactively begun several programs to reduce water demands even before the drought began. AW intensified these efforts as the drought deepened. LCRA recognized that some of their firm customers, like AW, had already done a lot to conserve water, and that it was inappropriate for LCRA to require an equal reduction from those customers that had already invested in on-going water conservation or reuse while other customers might have done very little in these categories. As a result, the City was able to demonstrate that they had already reduced their demands during the referenced baseline year through conservation and reuse by 26,266 acre-feet per year. Based on this demonstration, Austin's prorate curtailment was set at 6 percent by LCRA.

The Petitioners object to the referenced testimony because it is prohibited hearsay under Tex R. Civ. Evid. 801 and 802. Mr. Coonan 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. Coonan to provide his opinion on AW's reduction in water demands. Mr. Coonan is offering

an opinion that is not rationally based on his perception, because has no foundation on which to base his opinion.

D. Coonan Testimony at page 10, lines 11 through 13.

Q. WOULD THE WHOLESALE CUSTOMERS HAVE BENEFITED FROM AUSTIN'S PROACTIVE DECISIONS TO REDUCE WATER CONSUMPTION?

Yes, the wholesale customers would have had to reduce their consumption by 6 percent as opposed to 20 percent because Austin had been proactive in their efforts to reduce water consumption through conservation and reuse.

Mr. Coonan assumes facts not in evidence and therefore his opinion is irrelevant. Even if it were determined that Mr. Coonan's testimony regarding what might have happened is relevant, it is in violation of Rule 403 of the Texas Rules of Civil Evidence, which states that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice [or] confusion of the issues." Mr. Coonan's exploration of theoretical reductions in consumption is clearly confusing the issues and irrelevant to this proceeding. Mr. Coonan's statement regarding theoretical reductions in consumption should be stricken from the record.

The Petitioners further object to the referenced testimony, because it is prohibited hearsay under Tex R. Civ. Evid. 801 and 802. Mr. Coonan 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. Coonan to provide his opinion on AW's reduction in water demands. Mr. Coonan is offering an opinion that is not rationally based on his perception, because has no foundation on which to base his opinion.

E. Coonan Testimony at page 10, lines 16 through 18.

Q. IS THE WATER REUSE PROGRAM ONE OF THE WAYS AUSTIN REDUCED CONSUMPTION?

Yes. LCRA specifically identified reuse as one of the activities that could be credited, and the benefit of this activity was available to the wholesale customers even though they did not have direct access to the reuse water

Mr. Coonan assumes facts not in evidence and therefore his opinion is irrelevant. Even if it were determined that Mr. Coonan's testimony regarding what might have happened is relevant,

it is in violation of Rule 403 of the Texas Rules of Civil Evidence, which states that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice [or] confusion of the issues." Mr. Coonan's exploration of theoretical reductions in consumption and water reuse is clearly confusing the issues and irrelevant to this proceeding. Mr. Coonan's statement regarding theoretical reductions in consumption and water reuse should be stricken from the record.

The Petitioners further object to the referenced testimony because it is prohibited hearsay under Tex R. Civ. Evid. 801 and 802. Mr. Coonan 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. Coonan to provide his opinion on AW's reduction in water demands. Mr. Coonan is offering an opinion that is not rationally based on his perception, because has no foundation on which to base his opinion.

F. Coonan Testimony at page 12, lines 10 through 11.

> ***Q. ARE THESE WATER SUPPLY PLANS REQUIRED TO INCLUDE WATER REUSE AS A COMPONENT?***
>
> *In fact, the Regional Water Plans indicate that approximately 14 percent of the water needs in the State of Texas will be met by water reuse.*

Petitioners object to the referenced testimony and exhibit on the basis of relevance. Tex R. Civ. Evid. 401-402. "To be relevant, the [evidence] must tend to make the existence of a *material* fact more or less probable than it would otherwise have been." *Edwards v. TEC,* 936 S.W.2d 462, 466-67 (Tex. App. -- Fort Worth 1996, no writ) (emphasis added). The testimony and exhibit offered do not relate to a material fact in this matter, namely the cost of providing service to the Districts during the test and rate years. The fact that those plans contemplate consumption in 2070 or 50 years in the future is irrelevant to the matter at hand and should be stricken.

G. Coonan Testimony at page 13, lines 4 through 5.

Q. HOW MUCH WATER IS AUSTIN CURRENTLY REUSING AND HOW MUCH DO THEY PLAN ON REUSING IN THE FUTURE?

The City intends to expand the use of reuse to as much as 54,600 acre-feet per year as detailed in AW's Water Forward Plan.

Petitioners object to the referenced testimony and exhibit on the basis of relevance. Tex R. Civ. Evid. 401-402. "To be relevant, the [evidence] must tend to make the existence of a *material* fact more or less probable than it would otherwise have been." *Edwards v. TEC,* 936 S.W.2d 462, 466-67 (Tex. App. -- Fort Worth 1996, no writ) (emphasis added). The testimony and exhibit offered do not relate to a material fact in this matter, which is the cost of providing service to the Districts during the test and rate years. The fact that those plans contemplate consumption in 2115 or about 100 years in the future is irrelevant to the matter at hand and should be stricken.

H. Coonan Testimony at page 14, lines 6 through 17.

Q. HOW DOES THE VOLUME OF WATER REUSE IN AUSTIN COMPARE TO THE USE OF WATER BY WHOLESALE WATER CUSTOMERS AND THE PETITIONERS IN THIS CASE?

Austin delivered approximately 2.5 billion gallons or 7,547 acre-feet of water to its wholesale customers during the 2018 test year. The following is a list of the four petitioners involved in this case along with their water use in the 2018 test year.

1. *North Austin MUD — 326.5 million gallons or 1,002 acre-feet*
2. *Northtown MUD — 291.8 million gallons or 895 acre-feet*
3. *WCID #10 — 827.4 million gallons or 2,539 acre-feet*
4. *Wells Branch MUD — 481.3 million gallons or 1,477 acre-feet*

The total water supplied to the four petitioners in this case was 5,913 acre-feet in the 2018 test year.

The 4,465 acre-feet of water supply conserved by AW through reuse represents 75 percent of the water used by the petitioners in this case and 59.2 percent of the total wholesale water demand of 7,547 acre-feet.

Petitioners object to the referenced testimony and exhibit on the basis of relevance. Tex R. Civ. Evid. 401-402. "To be relevant, the [evidence] must tend to make the existence of a *material* fact more or less probable than it would otherwise have been." *Edwards v. TEC,* 936 S.W.2d 462, 466-67 (Tex. App. -- Fort Worth 1996, no writ) (emphasis added). The testimony and exhibit offered do not relate to a material fact in this matter, which is the cost of providing service to the Districts, and should be stricken.

I. Coonan Testimony at page 14, line 20.

Q. DO OTHER UTILITIES TRANSFER COSTS FROM THEIR REUSE SYSTEMS TO THEIR WATER FUND?

Yes, it is relatively common for this to happen.

The Petitioners further object to the referenced testimony because it is prohibited hearsay under Tex R. Civ. Evid. 801 and 802. Mr. Coonan 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. Coonan to provide his opinion regarding other utilities' costs and their water funds. Mr. Coonan 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 Stephen J. Coonan 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.

John J. Carlton