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APPLICATION OF THE CITY OF § BEFORE THE STATE OFFICE
AUSTIN DBA AUSTIN WATER FOR §
AUTHORITY TO CHANGE WATER §
AND WASTEWATER RATES § ADMINISTRATIVE HEARINGS

CITY OF AUSTIN D/B/A AUSTIN WATER’S OBJECTIONS
AND MOTION TO STRIKE PORTIONS OF THE
DIRECT TESTIMONY OF JAY JOYCE

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**CITY OF AUSTIN D/B/A AUSTIN WATER’S OBJECTIONS
AND MOTION TO STRIKE PORTIONS OF THE
DIRECT TESTIMONY OF JAY JOYCE**

TO THE HONORABLE JUDGE SIANO AND JUDGE DREWS:

COMES NOW, the City of Austin (City) d/b/a Austin Water (AW or Austin Water) and files these Objections and Motion to Strike Portions of the Direct Testimony of Jay Joyce. Austin Water details its objections and the basis for striking this testimony as follows:

I. BACKGROUND

On November 7, 2019, 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 (Districts) filed with the Public Utility Commission (Commission) the Direct Testimony and Exhibits of Mr. Jay Joyce.¹ State Office of Administrative Hearings (SOAH) Order No. 9, issued on October 23, 2019, establishes a deadline of November 19, 2019 for filing objections to Districts Direct Testimony.² Therefore, Austin Water timely files these Objections and Motion to Strike.

II. PROCEDURAL BASIS

Under Texas Rules of Evidence (TRE) 701, “[i]f 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 (b) helpful to clearly understanding the witness’s testimony or to determining a fact in issue.”

¹ Direct Testimony of Jay Joyce on Behalf of Districts (Nov. 7, 2019).

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

Under TRE 702,

[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 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.³ A witness may qualify as an expert if they have the sufficient knowledge, skill, experience, training, or education.⁴ However, generalized experience in a particular field may not qualify the witness as an expert.⁵ Occupational status alone generally will not suffice to show that a particular witness is qualified as an expert witness.⁶

Under TRE 703,

[a]n 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.

Under TRE 704, “[a]n opinion is not objectionable just because it embraces an ultimate issue.” However, although an expert may testify to ultimate issues that are mixed questions of law and fact, an expert may not give opinions or state legal conclusions regarding questions of law; questions of law are not the ultimate issue to be decided by trier of fact, but rather, are questions for the court.⁷ An issue involves a mixed question of law and fact when a standard or measure has been fixed by law and the question is whether the person or conduct measures up to

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

⁴ *See, e.g., Negrini v. State*, 853 S.W.2d 128, 130-131 (Tex. App.—Corpus Christi 1993, no pet.); *Masset v. State*, 933 S.W.2d 141, 156-57 (Tex. Crim. App. 1996); *Sciarrilla v. Osborne*, 946 S.W.2d 919 (Tex. App.—Beaumont 1997, den.).

⁵ *Cf. Houghton v. Port Terminal R.R. Ass’n*, 999 S.W.2d 39, 49 (Tex. App.—Houston [14th Dist.] 1999, no writ).

⁶ *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996).

⁷ *See Puente v. A.S.I. Signs*, 821 S.W.2d 400, 402 (Tex. App.—Corpus Christi 1991, writ denied).

that standard.⁸ An expert is not allowed to testify directly to his understanding of the law, but may only apply legal terms to his understanding of the factual matters in issue.⁹ It is not the role of the expert witness to define the particular legal principles applicable to a case; that is the role of the trial court.¹⁰

III. OBJECTIONS TO THE DIRECT TESTIMONY OF JAY JOYCE

A. Joyce Direct Testimony at Page 10, Line 15 through Page 13, Line 9.

IV. STANDARD OF REVIEW

Q. WHAT IS THE STANDARD OF REVIEW IN THIS CASE?

A. This case is proceeding as a result of the Commission's decision in Docket No. 42857, which required AWU to seek Commission approval before increasing Districts' water or wastewater rates. The Commission's Preliminary Order establishes the issues, but the overall standard is generally covered under Item 21 in the Preliminary Order:

What are the just and reasonable rates that are sufficient, equitable, and consistent in application to the districts and that are not unreasonably preferential, prejudicial, or discriminatory?

Q. TEXAS WATER CODE SECTION 13.044 STATES THAT THE "MUNICIPALITY SHALL HAVE THE BURDEN OF PROOF TO ESTABLISH THAT THE RATES ARE JUST AND REASONABLE." PLEASE EXPLAIN "JUST AND REASONABLE RATES."

A. "Just and reasonable" are not arbitrary adjectives but instead are terms of art built upon decades of judicial action and court decisions pertaining to the regulated utility industry. Utility rate cases across the U.S. consider the question of whether rates are just and reasonable, and the term "just and reasonable rates" relates to an accepted set of principles relied upon by regulators, regulated entities, and customers. In broad terms, just and reasonable rates should balance the interests of the ratepayer with those of the regulated utility. The concept of just and reasonable rates encompasses those rates that allow the utility to recover prudently incurred costs, as the U.S. Supreme Court opined in the Federal Power Commission et al v. Hope Natural Gas Co. case. In the area of Texas water law, the term "reasonable and necessary costs" is often used in lieu of the words "prudently incurred costs," but the concept is the same. "Reasonable costs" are costs that are similar in price to those costs found in the

⁸ *Greenberg Traurig of N.Y., P.C v. Moody*, 161 S.W.3d 56, 93–94 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

⁹ *Greenberg Traurig of New York, P.C. v. Moody*, 161 S.W.3d 56, 94 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

¹⁰ *Id.* at 95.

market charged to other utilities. "Necessary costs" are those costs for items that are absolutely required for the provision of service to the customers.

In Docket No. 42857, as in this case, AWU used the cash-needs basis for establishing rates. In terms of just and reasonable rates charged by AWU to the Districts, the Commission found just and reasonable rates as those rates that allowed AWU to recover the actual, reasonable and necessary costs of providing service to the Districts and to cover its debt service for those capital expenditures that were used and useful for providing that service to the Districts. As an example, the Commission excluded the costs for reclaimed water, because that was not a cost that is necessary for the provision of water or wastewater service to the Districts. Regarding debt service, the Commission excluded the debt service for Water Treatment Plant No. 4 ("WTP4"), since it was not yet in service. Now that WTP4 is operational, the issues in this docket relate to whether the costs to construct WTP4 were prudently incurred and whether WTP4 is useful in providing service to the Districts.

Other factors that regulators review when considering the reasonableness of proposed utility rates include those identified by James C. Bonbright, et. al. in the foundational book entitled Principles of Public Utility Rates. Bonbright cited the following attributes of a sound rate structure:

- 1. Rates should be simple, understandable, publicly acceptable, and feasible in application.*
- 2. Rates should be free from controversy regarding interpretation.*
- 3. Rates should effectively yield total revenue requirements based upon prudent expenditures.*
- 4. Rates should provide revenue stability from year to year.*
- 5. Rates should be stable, i.e. rates should experience minimal unexpected changes that are seriously averse to existing customers.*
- 6. Rates should apportion the total cost of service fairly among different consumers.*
- 7. Rate relationships should avoid "undue discrimination."*
- 8. Rates should promote efficiency, discourage wasteful expenditures and wasteful use, and promote all justified types and amounts of use.*

The Bonbright principles, as well as the Hope decision, help regulators determine rates that balance the interests of utility ratepayers with those of the utility.

Districts have presented Mr. Jay Joyce as an expert in utility ratemaking, specifically with regard to water and wastewater utilities. While he may have some familiarity with the rules and regulations applicable to utility rate making, his testimony crosses the line of his expertise. Mr. Joyce has not provided testimony claiming that he is "qualified as an expert by knowledge, skill, experience, training, or education" as an attorney. His generalized experience in utility ratemaking does not give him the expertise necessary to give an opinion on legal burdens of proof, the meaning of terms within the provisions of the Texas Water Code, "decades of judicial

action and court decisions,” U.S. Supreme Court decisions, and other legal concepts, principles, and standards. His testimony is not his opinion or conclusion on a “mixed question of law and fact,” but is a naked legal conclusion, that is not based on his expertise. He has not testifying as to whether Austin Water’s conduct measures up to a standard that has been fixed by law, as the *Greenberg* case requires; he is testifying as to what constitutes the legal standard. Further, he has not provided any explanation of any extensive research of decades of judicial actions and court decisions in response to Austin Water’s Requests for Information (RFI) regarding documents reviewed in anticipation of his testimony.

The term “just and reasonable” is undefined, and its meaning has clearly been under dispute in this case. Each case is different, and only the Commissioners can determine what is ultimately “just and reasonable.” No prior holdings or principles from a book can conclusively determine what is definitively “just and reasonable,” and neither can Mr. Joyce, who is not an attorney expert witness. Further, his opinions are at odds with Commission precedent; the Commission has never required a municipally-owned utility to conduct a prudence review of its invested capital. Specifically, his assertion that “[n]ow that WTP4 is operational, the issues in this docket relate to whether the costs to construct WTP4 were prudently incurred and whether WTP4 is useful in providing service to Districts” is not based on his expertise in utility ratemaking, but is a baseless legal opinion about the legal standard in this case. Mr. Joyce does not point to any portion of the list of issues to be addressed in this case ordered by the Commission in the preliminary order. This assertion is not a mixed question of law, or any attempt to apply the facts to the law, but is solely an inadmissible lay witness opinion.

Even Mr. Joyce’s discussion of the “Bonbright Principles,” that stem from the “foundational book” cited in Mr. Joyce’s testimony, should be stricken. While excerpts from a learned treatise are exempted from hearsay, Mr. Joyce’s discussion of the Bonbright Principles are not for the purpose of giving an opinion on a mixed question of law and fact. In contrast, his discussion is for the purpose of giving Mr. Joyce’s opinion of what the legal standard is in this case. Mr. Joyce uses the Bonbright Principles to establish “[o]ther facts that regulators review

when considering the reasonableness of utility rates,” which is meant to establish the legal standard for what constitutes “just and reasonable.” As the *Greenberg* case explained and as Mr. Joyce attempts to do here, “[i]t is not the role of the expert witness to define the particular legal principles applicable to a case.”

This portion of Mr. Joyce’s testimony constitutes inadmissible opinion testimony by a lay witness, and accordingly, it should be stricken from his testimony.

B. Joyce Testimony at Page 14, Lines 2 through 6.

Q. HOW DID YOU ASSESS THE REASONABLENESS OF AWU’S COST OF SERVICE PROPOSALS?

... While AWU may choose to include many costs unrelated to the cost of utility service in the retail rates it charges to AWU’s own residents and businesses, general ratemaking principles and the rules and regulations in Texas prohibit AWU from including costs that are unrelated to providing utility service to the wholesale customers in AWU’s cost of service for those wholesale customers.

Again, Mr. Joyce has provided impermissible lay witness testimony regarding legal issues. As discussed above, Districts have presented Mr. Joyce as an expert in utility ratemaking, not as an attorney. His testimony does not describe any familiarity with Texas rules and regulations, much less an expertise, other than his participation in other rate cases and his citation to *Federal Power Commission et al v. Hope Natural Gas Co.* case. His opinion that “rules and regulations in Texas prohibit AWU from including costs that are unrelated to providing utility service to wholesale customers in AWU’s cost of service for those wholesale customers” is a legal conclusion, not a mixed question of law and fact. He is giving an expert legal opinion on Texas rules and regulations, not a utility ratemaking expert’s opinion. As the *Greenberg* case explained, “[i]t is not the role of the expert witness to define the particular legal principles applicable to a case,” as Mr. Joyce attempts to do here.

Additionally, Mr. Joyce has failed to provide any basis for his opinion or cite to any authority. Mr. Joyce has not provided any testimony that shows that he has been made aware of, reviewed, or personally observed the Texas rules and regulations to which he speaks, as required by TRE 703. While TRE 705 provides that an expert witness can state his opinion without first

testifying to the underlying facts and data, this portion of Mr. Joyce's testimony is not expert testimony based upon his utility ratemaking expertise. This portion of his testimony consists of an impermissible lay witness opinion, which speaks to a legal conclusion of law. Therefore, Mr. Joyce cannot provide his opinion without testifying to the underlying facts or data.

For these reasons, Austin Water requests that this portion of Mr. Joyce's testimony be stricken by the ALJs.

IV. CONCLUSION AND PRAYER

For the foregoing reasons, AW respectfully requests that the specified portions of the above-referenced testimonies be stricken, and requests any other relief to which they may be entitled.

Respectfully submitted,

LLOYD GOSSELINK
ROCHELLE & TOWNSEND, P.C.
816 Congress Avenue, Suite 1900
Austin, Texas 78701
(512) 322-5800
Fax: (512) 472-0532



THOMAS L. BROCATO
tbrocato@lglawfirm.com
State Bar No. 03039030

CHRISTOPHER L. BREWSTER
cbrewster@lglawfirm.com
State Bar No. 24043570

W. PATRICK DINNIN
pdinnin@lglawfirm.com
State Bar No. 24097603

ATTORNEYS FOR AUSTIN WATER

CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2019, a true and correct copy of the foregoing document was transmitted by electronic mail to the parties of record.



THOMAS L. BROCATO