



Control Number: 49189



Item Number: 198

Addendum StartPage: 0

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

RECEIVED  
2019 NOV 22 11:10:36  
OFFICE OF THE STATE OFFICE

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 DEBI LOOCKERMAN

TABLE OF CONTENTS

I. BACKGROUND ..... 2

II. PROCEDURAL BASIS..... 2

III. OBJECTIONS TO THE DIRECT TESTIMONY OF DEBI LOOCKERMAN ..... 4

    A. Loockerman Direct Testimony at Page 15, Lines 1 through 13. .... 4

IV. CONCLUSION AND PRAYER ..... 6

198

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

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

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

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 Debi Loockerman. Austin Water details its objections and the basis for striking this testimony as follows:

**I. BACKGROUND**

On November 15, 2019, Public Utility Commission (Commission) Staff filed the Direct Testimony and Workpapers of Debi Loockerman.<sup>1</sup> State Office of Administrative Hearings (SOAH) Order No. 11, issued on November 20, 2019, establishes a deadline of November 22, 2019 for filing objections to Commission Staff’s Direct Testimony.<sup>2</sup> Therefore, Austin Water timely files these Objections and Motion to Strike.

**II. PROCEDURAL BASIS**

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

---

<sup>1</sup> Direct Testimony and Workpapers of Debi Loockerman (Nov. 15, 2019) (Loockerman Testimony).

<sup>2</sup> SOAH Order No. 11, Memorializing Third Prehearing Conference; Revising Procedural Schedule and Record Close Date; Continuing Hearing on the Merits at 2 (Nov. 20, 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.<sup>3</sup> A witness may qualify as an expert if they have the sufficient knowledge, skill, experience, training, or education.<sup>4</sup> However, generalized experience in a particular field may not qualify the witness as an expert.<sup>5</sup> Occupational status alone generally will not suffice to show that a particular witness is qualified as an expert witness.<sup>6</sup>

Under TRE 703,

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.

Under TRE 704, "An 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.<sup>7</sup> 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

---

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

<sup>4</sup> 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.).

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

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

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

that standard.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup>

### III. OBJECTIONS TO THE DIRECT TESTIMONY OF DEBI LOOCKERMAN

#### A. Loockerman Direct Testimony at Page 15, Lines 1 through 13.

*Q. DOES THE TWC ADDRESS RECOVERY OF RATE-CASE EXPENSES FOR A RATE CASE FILED UNDER TWC § 13.044(b)?*

*A. No. The TWC is silent as to the treatment of rate-case expenses for proceedings filed under TWC § 13.044(b). This contrasts with TWC § 13.043(e), which allows the Commission to consider “evidence of reasonable expenses incurred by the retail public utility in the appeal proceedings.” The TWC is also similarly silent as to the treatment of rate-case expenses for proceedings filed by investor-owned utilities under TWC §§ 13.187, 13.1871, 13.18715, and 13.1872(c)(2). Therefore, the only authority under which an investor-owned utility may recover rate-case expenses is found in 16 TAC § 24.44.*

*Q. WHAT IS YOUR RECOMMENDATION REGARDING THE RECOVERY OF RATE-CASE EXPENSES?*

*A. I recommend that the Commission deny recovery of rate-case expenses because there is no provision in the TWC that authorizes recovery of such expenses incurred for the processing of this type of application.*

Commission Staff has presented Ms. Debi Loockerman as an expert in accounting and finance in water and sewer rates. Additionally, Ms. Loockerman has described her experience in “making recommendations on regulatory issues, and participating in rulemaking and form-creation projects.” While she may have some familiarity with the rules and regulations applicable to utility ratemaking, her testimony crosses the line of her expertise. Ms. Loockerman has not provided testimony that she is “qualified as an expert by knowledge, skill, experience, training, or education” as an attorney. Her generalized experience in accounting, finance, and water and sewer rate regulation does not give her the expertise necessary to give an expert

---

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

<sup>9</sup> *Id.* at 94.

<sup>10</sup> *Id.* at 95.

opinion on the totality of the Texas Water Code (TWC) and Commission rules, and the legal authority for the recovery of rate case expenses. Her testimony is not her opinion or conclusion on a “mixed question of law and fact,” but is a naked legal conclusion, that is not based on her expertise in water and sewer rate regulation. She 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; she is testifying as to what constitutes the legal standard for recovery of rate-case expenses. Further, she has not provided any explanation of any extensive review of the TWC or the Commission’s rules and precedent.

Specifically, Ms. Loockerman gives her opinion about whether the TWC addresses recovery of rate-case expenses for a rate case filed under TWC § 13.044(b). She also draws comparisons between various sections of the TWC, and analyzes what she believes is the authority in the Commission’s rules. This is obviously a legal analysis of the TWC and Commission’s rules, and not a mixed question of law and fact. Ms. Loockerman is not giving her opinion on how Austin Water’s conduct measures up to a legal standard fixed by law, as the *Greenberg* case requires; she is giving an inadmissible lay witness opinion regarding the legal standard to be applied in this case. As the *Greenberg* case clearly held, it is solely the role of the court to define the particular legal principles applicable to a case.<sup>11</sup>

Additionally, Ms. Loockerman’s conclusion conflicts with the Commission’s conclusion in the Order on Rehearing in Docket No. 42857. There the Commission recognized that it is a fundamental principle of ratemaking that regulated public utilities are entitled to rates that will allow them to collect total revenues equal to their cost of service.<sup>12</sup> The City, functioning as Austin Water, operates as a municipal water and sewer utility. Rate case expenses are part of a

---

<sup>11</sup> *Id.*

<sup>12</sup> *Petition of 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 from the Ratemaking Actions of the City of Austin and Request for Interim Rates in Williamson and Travis Counties*, Docket No. 42857, Conclusion of Law No. 15 (Jan. 14, 2016) (citing *Suburban Util. Corp. v. Pub. Util. Comm’n.*, 652 S.W.2d 358, 362 (Tex. 1983)).

utility's operating expenses, and therefore, the inclusion and recovery of reasonable rate case expenses as part of the City's operating expense is appropriate here. A utility must be allowed to recover its reasonable and necessary rate case expenses in order to recover its full and reasonable cost of doing business. This is true for investor-owned utilities and for municipal utilities like Austin Water.

This portion of Ms. Loockerman's testimony constitutes inadmissible opinion testimony by a lay witness, and constitutes legal conclusions instead of mixed questions of law and fact. Accordingly, it should be stricken from her testimony.

#### **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](mailto:tbrocato@lglawfirm.com)  
State Bar No. 03039030

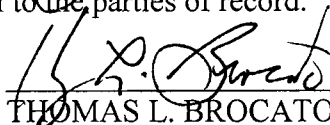
CHRISTOPHER L. BREWSTER  
[cbrewster@lglawfirm.com](mailto:cbrewster@lglawfirm.com)  
State Bar No. 24043570

W. PATRICK DINNIN  
[pdinnin@lglawfirm.com](mailto:pdinnin@lglawfirm.com)  
State Bar No. 24097603

ATTORNEYS FOR AUSTIN WATER

### **CERTIFICATE OF SERVICE**

I hereby certify that on November 22, 2019, a true and correct copy of the foregoing document was transmitted by electronic mail to the parties of record.

  
\_\_\_\_\_  
THOMAS L. BROCATO