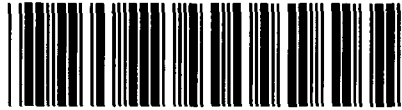


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**SOAH DOCKET NO. 473-19-6297.WS**

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

**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' RESPONSE TO 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:

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 Response to the City of Austin d/b/a Austin Water's Objections and Motion to Strike Portions of the Direct Testimony of Jay Joyce and would respectfully show the following:

**I. BACKGROUND**

The City of Austin dba Austin Water ("City" or "AWU") 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").<sup>1</sup> Pursuant to SOAH Order No. 9, Districts' filed the Direct Testimony of Jay Joyce on November 7, 2019; and the City filed its

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

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Objection and Motion to Strike Portions of the Direct Testimony of Jay Joyce on November 19, 2019.<sup>2</sup> Districts now file this Response to the City's Motion on November 26, 2019, and, per SOAH Order No. 9, the Districts filed this Response timely.<sup>3</sup>

## **II. PROCEDURAL BASIS**

Mr. Joyce's testimony is permissible expert testimony under TRE 702, 703 and 704.

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."<sup>4</sup> A witness may qualify as an expert if they have the sufficient knowledge, skill, experience, training, or education.<sup>5</sup>

Rule 703 states: "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."<sup>6</sup>

Rule 704 states: "An opinion is not objectionable just because it embraces an ultimate issue." An expert may apply legal terms to his understanding of the factual matters at issue.<sup>7</sup>

## **III. RESPONSE TO OBJECTIONS TO DIRECT TESTIMONY**

The City's objections to Mr. Joyce's testimony essentially reduce to complaints that the City believes Mr. Joyce is providing expert testimony regarding the law even though he is not an

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

<sup>3</sup> *Id.*

<sup>4</sup> Tex R. Civ. Evid. § 702.

<sup>5</sup> 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.).

<sup>6</sup> Tex R. Civ. Evid. § 703.

<sup>7</sup> *Greenberg Taurig of N.Y., P.C. v. Moody*, 161 S.W.3d 56, 94 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *Isern v. Watson*, 942 S.W.2d 186, 193 (Tex. App.—Beaumont 1997, pet. denied).

attorney. The City is wrong. Mr. Joyce's testimony is proper expert testimony applying the legal terminology to his understanding of the facts in this case. The Districts are confident the ALJs will apply the appropriate weight to his testimony.

**A. Joyce Direct Testimony at Page 10, Line 15 through Page 11, Line 5.**

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. [Citing Order on Rehearing, Docket No. 42857, at 29 (January 14, 2016)] 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? [Citing Preliminary Order at 6 (August 8, 2019)]*

Contrary to AWU's assertion that Mr. Joyce has only "some familiarity" and "generalized experience"<sup>8</sup> in utility ratemaking, he is a qualified expert based on his knowledge, skill, experience, training and education.<sup>9</sup> He is much more than a "lay witness"; he has been an expert in the field of water utility ratemaking for more than 30 years.<sup>10</sup> He has performed more than 45 Cost of Service rate studies in Texas<sup>11</sup> and testified in Austin's prior rate case, Docket No. 42857, without AWU or any other party challenging his expertise. For the past 7 years through the prior rate case beginning in 2012 through the conclusion of the appeal in 2016, during the City's Wholesale Involvement Committee ("WIC") process and settlement negotiations from 2016-2018, and now in this proceeding, Mr. Joyce has developed particularized knowledge and experience with AWU's rates and rate setting process. In this way, Mr. Joyce is not only an expert in water

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<sup>8</sup> City of Austin D/B/A Austin Water Utility's Objections and Motion to Strike Portions of the Direct Testimony of Jay Joyce at 5 (Nov. 19, 2019).

<sup>9</sup> TRE 702.

<sup>10</sup> Exhibit District-1, Direct Testimony of Jay Joyce, Exhibit JJJ-1 (Nov. 7, 2019).

<sup>11</sup> Note, with few exceptions, the entirety of Mr. Joyce's water utility experience is in Texas, contrasted with AWU witness Giardina who has actually done very little utility work here.

and wastewater utility ratemaking, but he is also an expert with respect to AWU's rates and rate setting methodology, specifically.

Districts acknowledge that Mr. Joyce is not a licensed attorney and has never been to law school. Mr. Joyce's testimony on page 10, line 17 through page 11, line 5 is not a legal conclusion, however. He is not opining on a pure question of law. It is not even a mixed question of law and fact. Mr. Joyce's testimony is a recitation of facts (Docket No. 42857, Ordering Paragraph No. 5<sup>12</sup>) and the issue no. 21 from the issues to be addressed in the Preliminary Order,<sup>13</sup> nothing more.

**B. Joyce Direct Testimony at Page 11, Line 6 through Page 13, Line 9.**

**1. Page 11, Line 6 through Page 12, Line 2**

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

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<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 Appealing the Ratemaking Actions of the City of Austin and Request for Interim Rates in Williamson and Travis Counties, Docket No. 42857, Order on Rehearing, Ordering Paragraph No. 5 at 29 (Jan. 14, 2016).

<sup>13</sup> Preliminary Order at 6 (Aug. 8, 2019).

Mr. Joyce's testimony is not a legal conclusion. Mr. Joyce has over three decades of experience in the utility rate industry across the country. In performing and analyzing numerous cost of service studies and rate calculations, he has applied foundational principals for what constitute "just and reasonable" rates repeatedly. He has applied his understanding of just and reasonable rates in each rate case, out of which he has developed a sound methodology.<sup>14</sup> Mr. Joyce's knowledge and experience related to what is "just and reasonable" is beyond many experts in this field and certainly beyond the average witness.<sup>15</sup> Ultimately, his testimony helps the trier of fact, the ALJs, understand the evidence.<sup>16</sup> In a complicated and expansive case like this one, it is helpful that an expert like Mr. Joyce can render opinions relevant to the specific issue before the State Office of Administrative Hearings.

AWU argues that the term "just and reasonable" is undefined, that it is in dispute, and that only the Commissioners can determine what the term means.<sup>17</sup> The Commission disagrees and has previously found that "while there is no rule that defines the term just and reasonable-it is a well-known standard in the industry."<sup>18</sup> Districts' acknowledge that ultimately the Commissioners will adopt findings of fact and conclusions of law in this case. To do so, they rely upon the ALJs to make recommendations on what is "just and reasonable." The ALJs in turn rely upon the parties to present evidence, including testimony, about what costs comprise "just and reasonable" rates. Mr. Joyce has testified in numerous rate cases in which he applied the "just and reasonable" principles to the specific facts of those individual cases as have non-lawyer Commission staff. In these cases, he is not testifying about his understanding of the law but applying legal terms to his understanding of the factual matters in issue in those cases.<sup>19</sup> This action is permissible expert testimony that assists the trier of fact, he is not providing legal conclusions. Mr. Joyce's testimony provides the framework for the bases of his opinions in this case.

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<sup>14</sup> *Helena Chemical Co. v. Wilkins*, 47 S.W.3d 486, 499 (Tex. 2001).

<sup>15</sup> *In re Commitment of Bohannon*, 388 S.W.3d 296, 304 (Tex. 2012).

<sup>16</sup> TRE 702.

<sup>17</sup> City of Austin D/B/A Austin Water Utility's Objections and Motion to Strike Portions of the Direct Testimony of Jay Joyce at 6 (Nov. 19, 2019).

<sup>18</sup> See Docket No. 42857, Order on Rehearing, Finding of Fact 51A, at 23 (Jan. 14, 2016).

<sup>19</sup> *Welder v. Welder*, 794 S.W.2d 420, 433 (Tex.App.-Corpus Christi 1990, no writ).

## **2. Page 12, Line 3 through Page 12, Line 13**

*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 A WU to the Districts, the Commission found just and reasonable rates as those rates that allowed A WU 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.*

Mr. Joyce's testimony regarding WTP4 is an apt illustration of applying his understanding of the "just and reasonable" principals to a relevant factual issue in this case. Far from being "at odds with Commission precedent" as asserted by the City, Mr. Joyce's focus on the reasonableness of WTP4 aligns with the Preliminary Order and Order on Interim Appeal that expressly made the investigation into the prudence of WTP4 a material issue in this case. Given the Commission's recent ruling on the Staff and Districts' Joint Appeal of Order No. 7, Mr. Joyce's focus was correct.

Additionally, to the extent Mr. Joyce testifies about the Commission's findings in Docket No. 42857, this part of his testimony is simply a recitation of the facts and matters of record. There is no evidentiary basis for AWU's objection. So that the administrative record is full and complete in this case, Mr. Joyce's testimony provides the background of the rate disputes between the parties to explain his opinions in this case and assist the trier of fact.

## **3. Page 12, Line 14 through Page 12, Line 13**

*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.*

As an expert, Mr. Joyce may rely on regulators, treatises, opinion testimony of others, and even hearsay. In citing Bonbright, Mr. Joyce is not rendering a legal opinion or giving his understanding of the law about sound rate structure. He is simply pointing out what the Bonbright book states, as if excerpts from the book were offered into evidence on their own. This is permissible expert testimony.

**C. Joyce Testimony at Page 14, Lines 2 through 6.**

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

**A. ...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 for those wholesale customers.**

AWU argues at cross purposes here – that Mr. Joyce is prohibited from testifying about rules and regulations as a non-lawyer, but that he must cite to and explain the rules underlying his opinion at the same time. What is clear is that in over 30 years of utility ratemaking experience and countless legal proceedings on subject matter identical to this case, Mr. Joyce is aware of the applicable law, and he applied it to specific facts. Again, this testimony is not regarding his understanding of the law; rather, he is applying the rules that he has become familiar with to the



factual matters at issue in this case.<sup>20</sup> Commission precedent prohibits AWU from including costs that are unrelated to providing utility service for those wholesale customers.<sup>21</sup>

#### **IV. CONCLUSION**

Mr. Joyce has more relevant expert experience with utility ratemaking in Texas than any other witness in this case. His testimony will assist the ALJs and make the administrative record complete. As with any witness, the ALJs will assign due weight to his testimony as appropriate.

#### **V. PRAYER**

WHEREFORE, PREMISES CONSIDERED, the Districts respectfully request that the Administrative Law Judges DENY the City of Austin d/b/a Austin Water's Objections and Motion to Strike Portions of the Direct Testimony of Jay Joyce and grant such other relief to which Districts may be entitled.

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<sup>20</sup> *Welder v. Welder*, 794 S.W.2d 420, 433 (Tex.App.-Corpus Christi 1990, no writ).

<sup>21</sup> See Docket No. 42857, Order on Rehearing, Finding of Fact 33, at 21 (Jan. 14, 2016).

Respectfully submitted,



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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 26<sup>th</sup> day of November 2019.



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John J. Carlton