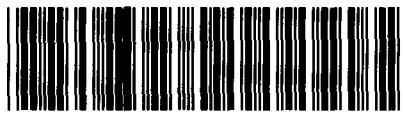

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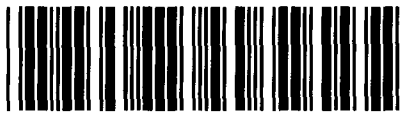

Item Number: 74

Addendum StartPage: 0

SOAH DOCKET NO. 473-20-1554.WS
PUC DOCKET NO. 49225

PETITION BY OUTSIDE CITY RATEPAYERS APPEALING THE WATER AND WASTEWATER RATES ESTABLISHED BY THE CITY OF CELINA	§ § § § §	**PUBLIC UTILITY COMMISSION OF TEXAS**

PETITIONERS' OBJECTIONS TO AND MOTION TO STRIKE THE DIRECT TESTIMONY OF JASON GRAY

TO THE HONORABLE JUDGES SIANO AND QUINN:

COME NOW, the Petitioners who file their Objections to and Motion to Strike the Direct Testimony of Jason Gray and, in support thereof, respectfully show as follows:

I. INTRODUCTION

The City of Celina ("City") pre-filed the Direct Testimony of Jason Gray on March 17, 2020, pursuant to SOAH Order No. 2.[1] Order No. 2 also provides that objections to the City's Direct Testimony are due March 31, 2020; as such, Petitioners' Objections to and Motion to Strike are timely filed.

II. BASIS FOR OBJECTIONS

Rules 401 and 402 provide the basis for excluding irrelevant testimony. All testimony, including any testimony from an expert, must be relevant; otherwise, the testimony must be excluded. Rule 401 states that relevant evidence "has any tendency to make a fact more or less probable than it would be without the evidence; ***and*** the fact is of consequence in determining the action."[2] As stated in Rule 402, "***irrelevant evidence is not admissible.***"[3]

Even if evidence is relevant and admissible, it may still be excluded under Rule 403. Under Rule 403, "the court may exclude relevant evidence if its probative value is substantially

[1] *See* SOAH Order No. 2 Memorializing Prehearing Conference; Adopting Procedural Schedule; Notice of Hearing (January 29, 2020); *see also* the Direct Testimony of Jason Gray on Behalf of the City of Celina (March 17, 2020).

[2] Tex. R. Civ. Evid. 401 (emphasis added).

[3] Tex. R. Civ. Evid. 402 (emphasis added).

outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[4] 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 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."[5] The lay witness must have personal knowledge of the matter and may not rely on what another has said about an experience.[6] Rule 701 further ***bars speculative lay opinion*** testimony because the witness has no specialized knowledge or personal experience.[7]

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."[8] The burden is on the proponent of the witness to show that they are an expert in their particular field.[9] A witness may qualify as an expert if they have the sufficient knowledge, skill, experience, training, or education.[10] However, generalized experience in a

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[4] Tex. R. Civ. Evid. 403.

[5] *See* Tex. R. Civ. Evid. 701.

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

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

[8] Tex R. Civ. Evid. 702.

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

[10] *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.).

particular may not qualify the witness as an expert.[11] Occupational status alone generally will not suffice to show that a particular witness is qualified as an expert witness.[12]

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

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

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

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."[13]

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."[14]

III. OBJECTIONS TO DIRECT TESTIMONY

Petitioners object to Jason Gray's Direct Testimony in its entirety. Mr. Gray is not an attorney, he is not an engineer, and he is not a rate expert. Yet, in the first half of his testimony, he attempts to provide expert testimony on legal issues and on water and wastewater system engineering design and operation issues – all items in which Mr. Gray lacks any expertise. The other half of his testimony is meaningless drivel about a 2007 agreement between Celina and a developer, which is irrelevant to the actual cost of providing service to Petitioners during the test year or rate year. For these reasons alone, the ALJs must strike the Direct Testimony of Jason Gray.

[13] Tex. R. Civ. Evid. 801.

[14] Tex. R. Civ. Evid. 802.

A. Gray Testimony at page 5, line 9 through page 6, line 7.

Q. Please describe the City's water and wastewater system in general terms (water source, miles of distribution lines, tanks, pump stations, etc.)

A: The City of Celina's current water utility is comprised of over a half million linear feet of pipe, over 5,000 connections, across two pressure planes with all of the required and supporting fixtures and appurtenances. The City owns and operates three pump stations and four water wells. For mass storage capacity the City utilizes two ground storage tanks and for water pressure stabilization and additional storage, the City operates three elevated storage tanks (water towers).

The ground water wells produce about 30% of the City's water, and the City purchases the remaining 70% through a wholesale treated water purchase agreement with Upper Trinity Regional Water District (UTRWD). It is important to note that Celina's water system, like the systems in all growing communities is constantly changing. Table 1 below summarizes Celina's water utility as of its latest Water Master Plan, which was approved in September 23 2017:

Table JDG-1: Celina Water System (as of 09/2017 Water Master Plan)

Item(s)	Quantity
Pipeline	591,463 linear feet
Pressure Planes	2 (high and low)
Pump Stations	3 (Celina Road, Downtown, and Morgan Lake
Ground Storage Tanks	2 (Celina Road, Downtown)
Elevated Storage Tanks	3 (Downtown, Light Farms, Morgan Lake) 1 additional EST is currently nearing completion
Standpipe	1 (Morgan Lake)
Ground Water Wells	4 (2-active, 2-inoperable)

Celina's wastewater utility is comprised of over 425,000 linear feet of sewer lines, nearly 1,000 manholes, 11 lift stations, a 0.5MGD wastewater treatment plant, and a regional sewer trunk line which delivers raw sewage from the City to the Doe Branch Wastewater Treatment Plant which is owned and operated by UTRWD. Most of the water ratepayers also receive sewer service, while in some large-lot neighborhoods individual homeowners operate septic systems.

Petitioners object to the referenced testimony, because it is opinion testimony prohibited under Tex. R. Civ. Evid. 701 and 702. Mr. Gray is not an engineer. By testifying as he did above, Mr. Gray is offering his opinion on a matter for which he has no knowledge, skill, experience, training, or education that would qualify him as an expert. Given that Mr. Gray is not an expert,

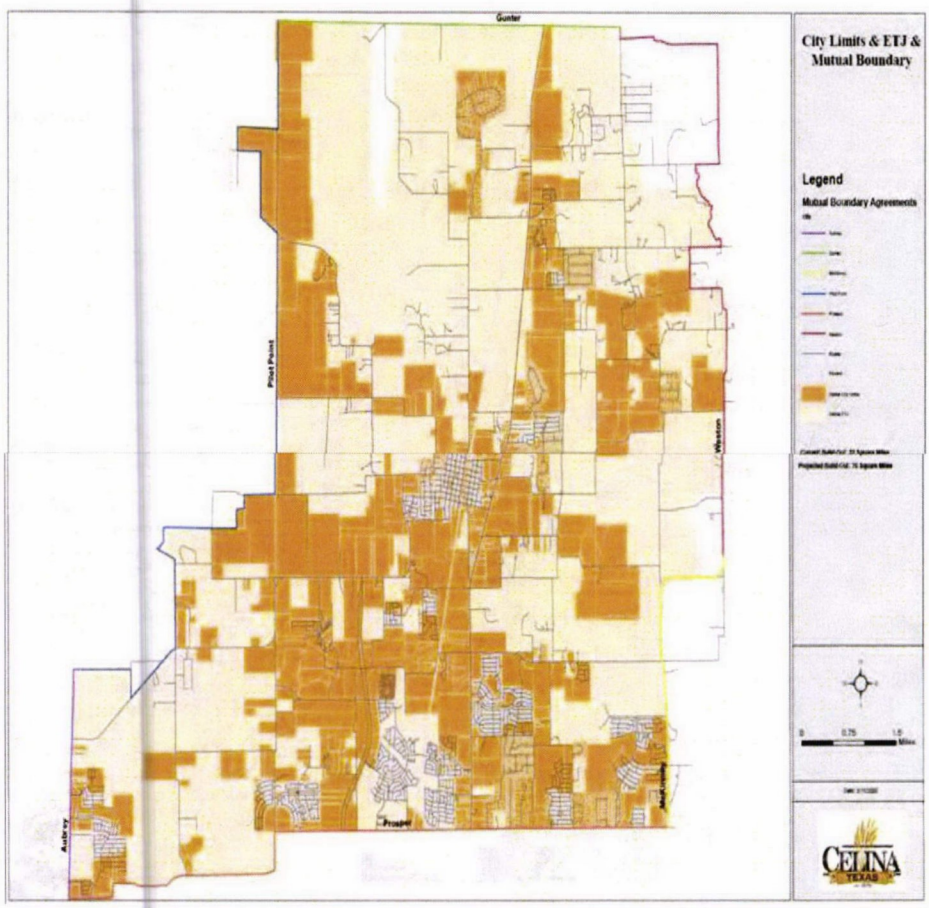
his opinion testimony must be: "(a) rationally based on the witness's perception; and (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue." Tex. R. Civ. Evid. 701. Mr. Gray's testimony does not explain the basis for his perception, nor does it aid in understanding his testimony or assist in determining a fact in issue, because he has no specialized knowledge regarding the engineering design of a water system.

Petitioners further object to the referenced testimony, because it is prohibited hearsay under Tex. R. Civ. Evid. 801 and 802. Mr. Gray states his opinion on an issue, and he provides no testimony regarding his personal knowledge about the matter. While Mr. Gray may have been a city employee nearly a decade ago, he has not laid any foundation to provide his opinion regarding the water system as it exists today. Mr. Gray is offering an opinion that is not rationally based on his perception, because he has no foundation on which to base his opinion. For these reasons, the ALJs should strike the referenced testimony from the record.

B. Gray Testimony at page 6, line 9 through page 7, line 2.

Q. Where are outside customers located?

A. While most of the City's water customers that are outside of the city limits are within Collin County MUD #1 (Light Farms), the City does serve water to additional outside city customers. These customers are located in the areas shown by the maps below that are outside of Celina's city limits and within Celina's CCN.


Gunter
Pilot Point
Weston
Aubrey
Prosper
McKinney
City Limits & ETJ & Mutual Boundary
Legend
Mutual Boundary Agreements
CELINA
TEXAS


CITY OF CELINA
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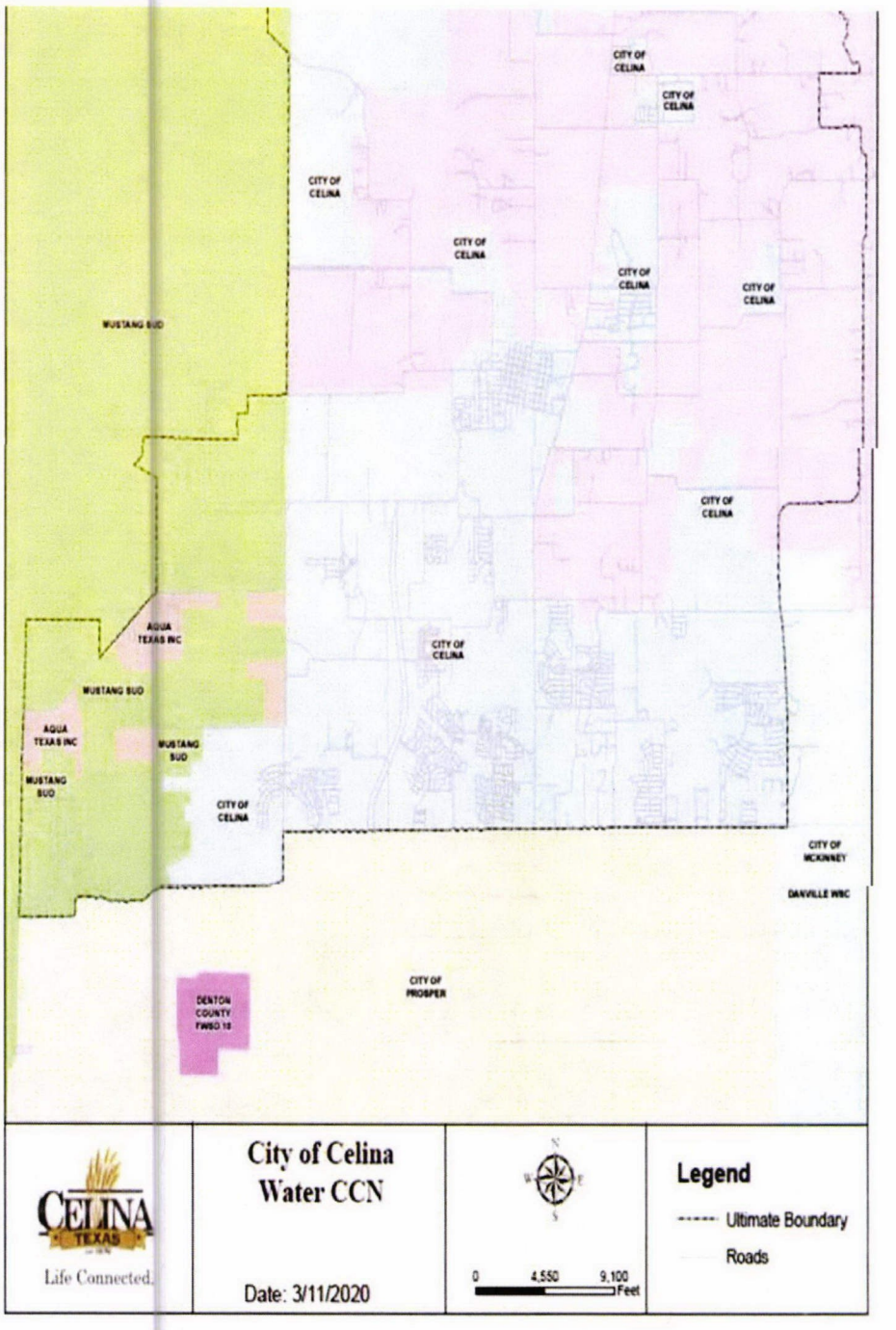

Petitioners object to the referenced testimony, because it is opinion testimony prohibited under Tex. R. Civ. Evid. 701 and 702. Mr. Gray is neither a surveyor nor cartographer. By testifying as he did above, Mr. Gray is offering his opinion on a matter for which he has no knowledge, skill, experience, training, or education that would qualify him as an expert. Given that Mr. Gray is not an expert, his opinion testimony must be: "(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." Tex. R. Civ. Evid. 701. Mr. Gray's testimony does not explain the basis for his perception, nor does it aid in understanding his testimony or assist in determining a fact in issue, because he has no specialized knowledge regarding which customers are located within or outside of the City.

Petitioners further object to the referenced testimony, because it is prohibited hearsay under Tex R. Civ. Evid. 801 and 802. Mr. Gray states his opinion on an issue, and he provides no testimony regarding his personal knowledge about the matter or the maps included within his testimony. While Mr. Gray may have been a city employee nearly a decade ago, he has not laid any foundation to provide his opinion regarding who lives within the City and which customers do not. Mr. Gray is offering an opinion that is not rationally based on his perception, because he has no foundation on which to base his opinion. For these reasons, the ALJs should strike the referenced testimony from the record.

C. Gray Testimony at page 8, line 1 through page 9, line 3.

> ***Q. As the City continues to grow, what areas are likely to be developed for outside customers?***
>
> *A: Celina's current water Certificate of Convenience and Necessity (CCN) boundaries cover approximately 38 square miles and the City has an agreement to be able to acquire an additional 31.9 square miles of CCN from Marilee SUD as that land develops. The City's current city limits contain approximately 32.5 square miles and could contain as much as 69.9 square miles at full build out in the highly unlikely event that all of the land currently outside of city limits voluntarily annexes into the city.*
>
> *Prior to 2017, Texas annexation law allowed for the orderly and predictable ability for cities to annex property within their Extra Territorial Jurisdiction (ETJ) under a certain set of provisions. At that time, cities could annex properties into their city limits either upon the request of the individual property owners, or if necessary, unilaterally through a process known as involuntary annexation. When Senate Bill 6 of the 2017 special legislative session was approved and signed into law on December 1, 2017, Texas effectively ended the practice of unilateral annexations by requiring landowner or voter approval of annexations in counties over 500,000 population. Various laws approved during the 2019 legislative session further narrowed the potential for cities to unilaterally annex property into their city limits by requiring consent to annex in all but very limited circumstances.*
>
> *There is a very high likelihood that many additional areas within the City's current CCN boundaries but not within the city limits may not opt to voluntarily annex into the city before*

or after development. While the City can no longer compel annexation, the City is still bound by any legal obligations to provide governmental services outside of its city limits, including the provision of water and wastewater services (TLGC §43.0688).

There are currently 31.9 square miles of Celina's and the to-be acquired Marilee SUD water CCN boundary that are not within the current city limits. Due to the recent stringent annexation requirements described above, it is reasonable to believe, and in fact likely, that large portions of these 31.9 square miles may never voluntarily annex into the city. The obligation to serve these outside city ratepayers will continue, regardless of whether or not they agree to be annexed. The fact that there are large areas all around Celina's current city limits that will very likely have additional outside city ratepayers and will receive service without annexation adds significant cost and risk to Celina's water and wastewater utilities.

Petitioners object to the referenced testimony, because it is irrelevant to the amount of money that the City spent during the test year to provide service to Petitioners, the change in those expenditures for any known or measurable changes, or the metrics used to calculate Petitioners' rates. The testimony is irrelevant to whether the City's rates are just, reasonable, and based on the cost of service. The question asked and the answer given about the areas that are likely to be developed outside of the City have absolutely ***NOTHING*** to do with the City's costs incurred during the test year used to develop the rates at issue or whether the rates to Petitioners were based on the actual cost of providing service to Petitioners. The problem with the testimony does not simply go to the weight that the ALJs may assign to the testimony. Tex. R. Civ. Evid. 402 requires the ALJs to strike this referenced portion of the testimony due to its lack of relevancy to whether the City's rates are just, reasonable, and based upon the actual cost of service.

Petitioners object to the referenced testimony, because Mr. Gray assumes facts not in evidence and therefore his opinion is irrelevant. Even if it were determined that Mr. Gray's testimony regarding what might happen in the future 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. Gray's exploration of theoretical developer is clearly confusing the issues and is irrelevant to this proceeding. Mr. Gray's testimony regarding theoretical land development should be stricken from the record.

Petitioners object to the referenced testimony, because it is opinion testimony prohibited under Tex. R. Civ. Evid. 701 and 702. Mr. Gray is not an attorney. By testifying as he did above,

Mr. Gray is offering his legal opinion on annexation laws for which he has no knowledge, skill, experience, training, or education that would qualify him as an expert. Given that Mr. Gray is not an expert, his opinion testimony must be: "(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." Tex. R. Civ. Evid. 701. Mr. Gray testimony does not explain the basis for his perception, nor does it aid in understanding his testimony or assist in determining a fact in issue, because he has no specialized knowledge regarding annexation laws.

Petitioners further object to the referenced testimony, because it is prohibited hearsay under Tex. R. Civ. Evid. 801 and 802. Mr. Gray states his opinion on an issue, and he provides no testimony regarding his personal knowledge about his improper speculative testimony of the likely areas that may develop in the future. Mr. Gray is offering an opinion that is not rationally based on his perception, because he has no foundation on which to base his opinion. For these reasons, the ALJs should strike the referenced testimony from the record.

D. Gray Testimony at page 9, lines 5 through line 24.

Q: How is water supplied to Light Farms and CCMUD#1 from the City?

A: The water that Celina eventually uses to serve retail water customers within the subdivision referred to as Light Farms, which is also within the boundaries of CCMUD# flows through the City's water system, and the water delivered to Light Farms and all other outside city customers is heavily interdependent upon the entire City of Celina water system. The systemic relationship between Celina and Light Farms or its other outside city customers cannot be compared to a wholesale system where a wholesale provider delivers treated water to a "middle-man" distributer at a single take-point and then the distributor resells the water to a retail utility operator who stores the water, independently pressurizes its lines and delivers retail service to its end-user ratepayers. There is no middle-man in the Celina system. It is, in every sense, an interconnected and interdependent retail water system. All parts of the Celina system, including the infrastructure which serves Light Farms, are used by and useful to all other parts of the system.

The bulk of water served to Celina's ratepayers, including the water served to Light Farms, is initially delivered as treated wholesale water through the City's contract with UTRWD. UTRWD water is delivered into the ground storage tanks at the City's take point at the Celina Road Pump Station at the western edge of the city limits. Because Celina is at the end of the UTRWD line, the City then retreats and disinfects UTRWD water as necessary and pumps the water through the City's 500,000 feet of pipes.

Petitioners object to the referenced testimony, because it is opinion testimony prohibited under Tex. R. Civ. Evid. 701 and 702. Mr. Gray is not an engineer. By testifying as he did above, Mr. Gray is offering his opinion on a matter for which he has no knowledge, skill, experience, training, or education that would qualify him as an expert. Given that Mr. Gray is not an expert, his opinion testimony must be "(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." Tex. R. Civ. Evid. 701. Mr. Gray's testimony does not explain the basis for his perception, nor does it aid in understanding his testimony or assist in determining a fact in issue, because he has no specialized knowledge regarding how the water system is engineered to supply water to the out of City customers.

Petitioners further object to the referenced testimony, because it is prohibited hearsay under Tex R. Civ. Evid. 801 and 802. Mr. Gray states his opinion on an issue, and he provides no testimony regarding his personal knowledge about the current water supply design and operation. While Mr. Gray may have been a city employee nearly a decade ago, he has not laid any foundation to provide his opinion regarding how the City water system is designed. Mr. Gray is offering an opinion that is not rationally based on his perception, because he has no foundation on which to base his opinion. For these reasons, the ALJs should strike the referenced testimony from the record.

E. Gray Testimony at page 9, line 26 through page 14, line 5.

Q: Do you know what the phrase "used and useful" means in the context of utility rate regulation?

A: Yes. Based on my education and experience, the phrase "used and useful" is a fundamental component of determining fair and equitable utility rates. In essence, in order to be considered "used and useful" the various infrastructure, systems, and components of the utility must be able to be actually used by and useful to ratepayers. The concept of "used by" is fairly self-evident – simply put, the components of the utility that are included in the costs for ratemaking purposes need to be actually used to provide the services.

The concept of "useful" is a slightly less self-evident but is based in the idea that a utility should not include the cost of infrastructure, systems, and components that are not technologically capable of or necessarily useful in the provision of the services. For example, it is common for water utilities to double meter certain high-volume customers. The two separate meters provide redundancy and an automatic audit function for one another. Two meters in this context are both used and useful for the efficient and effective provision of

services. If, for hyperbolic example, the same utility provided twenty meters at the same location then one could argue that all twenty of the meters are "used" by the ratepayers because the water is actually flowing through each of the meters. You cannot, however, make a rational argument that eighteen of the twenty meters are "useful" as they provide no additional benefit to the ratepayer.

Q: Is it true that the City's entire water and wastewater system is used and useful to providing service to outside city customers?

A: Yes, the entire City of Celina water and wastewater systems are used by and is useful to providing service to all ratepayers, regardless of whether they reside inside or outside of city limits.

Municipal retail water systems are planned and designed as redundant, closed-loop systems. These systems generally produce their water independently or receive water from a limited number of wholesale major pipelines at "take-points" and then circulate the water through the municipal system via a completely interconnected and interdependent system that is designed to manage and moderate:

a) water pressure throughout the entire system;

b) the average age, or "freshness" of the water in the system;

c) available capacity for peak hour and peak day usage;

d) fire-flow capabilities;

e) multiple water main redundancies;

f) and other criteria.

Good municipal water systems are robust and are designed to withstand partial outages or service disruptions in various elements of the system while still providing fire protection and clean, safe drinking water to its ratepayers at all times. Celina's water system is designed and operates in this robust manner.

Water pressure throughout the City's low-pressure plane and specifically at Light Farms is generally regulated through the Light Farms elevated storage tank. As an example of the interconnected and interdependent nature of the overall system, this elevated storage tank is filled through redundant water mains: one that branches off of the main pipeline coming from the northwest and the Celina Road ground storage tank along FM455 to Dallas Parkway, and the other that comes from the northeast and the Downtown ground storage tank that follows the BNSF railroad track.

Either of these two redundant water mains can be removed from service for a short period of time and water can still be served to Light Farms. However, if either of these two major water mains is removed from service for an extended period of time, major operational shifts would need to take place in order to keep the water pressure, capacity, and freshness within

acceptable and safe regulatory levels. Because the water is no longer circulating throughout the entire system, the City would have to bleed certain lines that are now "dead-end" lines in order to keep the water quality from deteriorating. Water pressure would suffer if demand in the area outstrips the capacity of the remaining operable water main and begins to drain the level of the elevated storage tank. Water pressure can become too high if the system pressure cannot be relieved through other areas in the looped system. Just because the portions of the system are wisely designed to be able to overcome short-term redundancy issues does not mean that the whole system is not required for the consistent, safe, efficient delivery of water to all ratepayers.

More specifically, Celina's water system operates on two distinct pressure planes, which are divided as the high-pressure plane (generally east of Preston Road) and the low-pressure plane generally to the west of Preston Road. While it is true that these two pressure planes are designed function independently, they are in fact interconnected and interdependent. Most of Celina's water is delivered to the low-pressure plane on the far western edge of the City. This water is then pumped to the Downtown ground storage tank, and then further pumped to the high-pressure plane from the Downtown pump station. As needed for capacity, pressure regulation, or redundancy, water in the high-pressure plane can be sent back to the low-pressure plane via a water main along Pecan Street. In addition to this physical interconnectedness and interoperability, all of the capacity of the ground storage and elevated storage facilities in both the low- and high-pressure planes are required to meet state regulations and the peak demands of the system as a whole.

Like water systems, good municipal wastewater systems are designed as a whole and interdependent system. Although generally not pressurized, wastewater collection and treatment systems are dependent upon the regular and predictable flow of wastewater from the whole system in order to be effective. When sizing and determining the grade of wastewater main lines, it is crucial that the lines be neither too small for the expected flow (for obvious overflow reasons), and they should also not be too large for the expected flow.

Lines that are either oversized or incorrectly graded do not convey enough wastewater and run a high risk of becoming septic (anaerobic) due to the wastewater in the lines becoming stagnant rather than flowing at a predictable rate. Septic wastewater is more caustic to the infrastructure itself and aerobic wastewater treatment plants are not designed or operated to handle highly septic wastewater. A septic shock to a treatment plant designed for aerobic wastewater will create a system chemistry and biology that is very different than designed for and can cause the effluent to become toxic. This is why most municipal wastewater treatment plants will not accept the dumping of a septic pump tank, RV tank, or other septic wastewater at their plant. Because the wastewater system in Celina is designed and operated as an aerobic collection and treatment system, the entire system is used by and useful to all of the ratepayers that are connected to it.

Q: Could only a "portion" of the City's system be used and useful to providing service to outside customers?

A: No, not for any extended period of time. As described above, any well-designed municipal water or wastewater system should be able to be isolated for a short period of time in order

withstand lines, valves, lift station or other maintenance, unexpected main line leaks, catastrophic pump failures, natural disasters or other issues that arise from time to time. This does not mean that the entire system is not used by and useful to providing service to all of its retail customers.

As robust at Celina's system is, like every other water system I have experience with, it can and does have partial failures. Municipal water and wastewater systems are perhaps the best example of incredibly complex networks of intricate, interdependent actions that most people simply take for granted. Consider that in order to maintain proper water pressure, freshness, capacity, and availability depends on, among other things:

a) constant delivery of water at a relatively stable rate from UTRWD;

b) decontamination of the water throughout the system to maintain water quality that cannot contain too much disinfectant near the treatment source, but must retain enough disinfectant at its furthest reaches;

c) automated opening and closing of dozens or even hundreds of valves depending on multiple variables throughout the system at any given point in time;

d) manual opening and closing of large numbers of valves and interconnections to plan for scheduled maintenance or unscheduled repairs;

e) use of the water by thousands of independent ratepayers at a relatively expected rate – too much use and the system will quickly run out – too little use and the water may become infected with bacteria or harmful minerals

f) thousands of pipes and fixtures that are constantly exposed to underground or above-ground elements for decades on end.

Robust as these systems are, they are still finicky due to these and other factors that determine the daily outcome of the system as a whole. A water main break in one area may cause built-up pressure in a closed line that creates another water main break miles away. Every time one major element of the system is breached, it impacts the whole rest of the system in often unpredictable ways. This is why municipalities each spend tens or hundreds of millions of dollars annually to equip and prepare the system and those that operate it. This is why the state of Texas requires such deliberate long-term planning of the systems.

Q: As the City continues to develop and adds more outside city customers, will water continue to pass through substantially all of the City's system to reach these outside customers?

A: Yes. As shown in Figure JDG-2 above, there is more of the City's CCN service territory 11 including future growth areas outside of current city limits than falls within it. While many of these property owners may voluntarily annex all or a part of their land into the city limits, I am confident that not all will. As these properties that choose not to annex depend on the City for water service, you can easily see that there is no part of the City's system that will not be used to reach outside customers.

Q: How would you characterize the City's system, considering the fact that water can arrive at outside city connections though several different pathways?

A: I would characterize the City's system as a sort of "spider's web". As I discussed in my testimony, the City's system is an entirely interconnected and interdependent network of pipes, pumps, tanks, valves, producers, hydrants, chemicals, customers, and fixtures. Water arriving at almost any meter can and will arrive at that meter through a myriad of routes at any given hour depending on any combination of the wide variety of factors I've outlined. This is currently the case and will become even more prevalent as the City's system continues to build out. Again, consider that the City effectively no longer has the ability to unilaterally annex property into its city limits. Because of this limitation, cities can no longer determine which customers that require service will be inside of our outside of city limits, and as such, must plan for additional redundancy of delivery without regard to whether or not the property is within the city or outside of it.

Petitioners object to the referenced testimony, because Mr. Gray assumes facts not in evidence and therefore his opinion is irrelevant. Even if it were determined that Mr. Gray's testimony regarding what might happen in the future 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. Gray's exploration of theoretical design of a water system to transport water to future development is clearly confusing the issues and is irrelevant to this proceeding. The ALJs should strike Mr. Gray's testimony regarding water system design from the record.

Petitioners object to the referenced testimony, because it is opinion testimony prohibited under Tex. R. Civ. Evid. 701 and 702. Mr. Gray is neither an engineer nor an attorney. By testifying as he did above, Mr. Gray is offering his opinion on a matter for which he has no knowledge, skill, experience, training, or education that would qualify him as an expert. Given that Mr. Gray is not an expert, his opinion testimony must be: "(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." Tex. R. Civ. Evid. 701. Mr. Gray's testimony does not explain the basis for his perception, nor does it aid in understanding his testimony or assist in determining a fact in issue, because he has no specialized knowledge regarding how the water system is engineered to supply water to the out of City customers or how the wastewater system is designed to transport the wastewater from the out of City customers to the wastewater plant. Further, he has no specialized knowledge to determine how portions of the water system or wastewater system meet the legal definition of "used and useful."

Petitioners further object to the referenced testimony, because it is prohibited hearsay under Tex R. Civ. Evid. 801 and 802. Mr. Gray states his opinion on an issue, and he provides no testimony regarding his personal knowledge about either the current water supply design and operation or the engineering design and operation of the current wastewater collections system. While Mr. Gray may have been a city employee nearly a decade ago, he has not laid any foundation to provide his opinion regarding his testimony. Mr. Gray is offering an opinion that is not rationally based on his perception, because he has no foundation on which to base his opinion. For these reasons, the ALJs should strike the referenced testimony from the record.

F. Gray Testimony at page 15, line 1 through page 16, line 14.

Q: Is it feasible or possible for Light Farms to become its own water system? If it does, would the City be left with excess capacity in its system?

A: While difficult, it would be possible for Light Farms to become its own water system. The Town of Prosper currently has a 12" water line on the south side of Frontier Parkway, which is the southern boundary of Light Farms and could serve Light Farms if a number of additional infrastructure changes were made. The pressure planes used by Celina at Light Farms and Prosper are not consistent, but do overlap, and as such, it is possible.

This potential scenario highlights one of the major additional risk factors that cities face with outside city customers that they do not face with inside city customers. The City of Celina has invested heavily in the infrastructure needed to provide reliable, safe, and high-quality drinking water and fire protection to the residents of Light Farms based on the City's contractual obligation to provide the service. In addition, the City has continued to increase its subscribed capacity through UTRWD to have access to purchase the water as requested by Light Farms and its ratepayers. Likewise, UTRWD has invested heavily in the infrastructure and operational requirements that are driven in part by the growth in use of the ratepayers at Light Farms. Once increased, this additional subscribed capacity cannot be reduced, and the City of Celina is contractually obligated to pay for access to this quantity of water whether or not Light Farms remains connected to Celina's system.

It is true that the ratepayers at Light Farms or other outside city customers could disconnect from the City's service and obtain water through other sources and the City would be left with potentially significant excess capacity that it is obligated to pay for. This is not true for inside city customers. While they may vary their usage, the vast majority of inside city customers could not receive their water from any other source, and so their use provides a much more dependable, reliable, and lower risk long-term revenue source.

Q: Would it be possible for another municipal utility district (MUD) or other types of special district to obtain another source for its water system?

A: Generally, yes. In most cases, MUDs have the authority to contract with wholesale water providers, use wells, or produce their own treated surface water. The holder of the certificate of convenience and necessity (CCN) over an area has an impact, but CCNs can be traded, bought, and sold, and can also be decertified if the holder of the CCN cannot demonstrate its actual ability to serve the area. The fact that MUDs and other types of special districts can, either initially or over time, elect to obtain another source for its water or sewer services is a major risk factor for any city that invests in providing water to that MUD.

I have seen a number of cases where a city negotiates to obtain the service area of a MUD or other special district. In every one of those cases, the city that accepts the customers of the district also must, by law and by bond covenant, accept the legal and financial obligations of the district as part of the agreement. The reverse is not true. If a district is able to either generate its own services or is able to obtain services from another entity it is not automatically required to reimburse the city for the investment in infrastructure, water rights, systems that the city has expended on behalf of providing services to the district or ratepayers within that district.

Petitioners object to the referenced testimony, because it is irrelevant to the amount of money that the City spent during the test year to provide service to Petitioners, the change in those expenditures for any known or measurable changes, or the metrics used to calculate Petitioners' rates. The speculative testimony about whether the out-of-City customers could find an alternative water supply is irrelevant to whether the City's rates are just, reasonable, and based on the actual costs incurred to provide service. Thus, under Tex. R. Civ. Evid. 402, the ALJs should strike this referenced portion of the testimony due to its lack of relevancy to whether the City's rates are just, reasonable, and based upon the actual cost of service.

Petitioners object to the referenced testimony, because Mr. Gray assumes facts not in evidence and therefore his opinion is irrelevant. Even if it were determined that Mr. Gray's testimony regarding what might happen in the future 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. Gray's exploration of theoretical water suppliers to out-of-city customers in the future is clearly confusing the issues and is irrelevant to this proceeding. The ALJs should strike Mr. Gray's testimony regarding future water suppliers from the record.

G. Gray Testimony at page 16, line 16 through page 24, line 9.

Q. Did the City assume a significant level of risk in its agreement to serve Light Farms? If so, what risks are involved?

A: Yes. In short, the City has taken its contractual obligation to provide water and wastewater service to outside city customers, including those at Light Farms, very seriously. The City has invested millions in infrastructure and water capacity procurement to support the direct requirements of Light Farms and has designed the City's water system to be a fully interconnected and interdependent water system with the infrastructure that provides service to Light Farms.

Frankly, the City could have reduced the financial risk of its system design to more isolate the Light Farms area, but that would have come with an increased risk to fire safety, water quality, and operational risks than the robust system in place today, and with greater costs to serve the Light Farms area. These are the typical trade-offs that a City must make in providing the best infrastructure and services at the most just and reasonable rates for all. Such an isolated design could have been modeled on a wholesale seller-buyer model that effectively created a Light Farms sub-system that would be at the end of a single line, neither redundantly interconnected nor interdependent with the City's remaining system. In balancing the risks and costs, the City correctly shoes to construct a system that best protected fire safety, water quality, and a more robust infrastructure to serve all customers at the fairest rates. In balancing these multiple goals, the City understandably and reasonably relied on the mutually negotiated, written and approved Development Agreement to accept the financial risks believing in good faith that the other party would uphold their end of the agreement.

I believe that it is important to note that the Development Agreement, as written and amended, is a comprehensive Development Agreement in the sense that it is not just about providing water and wastewater services. While I believe that the 1.50 outside city rate multiplier is fair and reasonable in its own right, the Agreement was contemplated, negotiated, and has functioned as a wholly considered Development Agreement and should not be taken apart piece by piece. Below, I have taken the liberty to outline some of the other benefits and obligations of the Development Agreement to illustrate this point.

A) As part of interim agreements, the City of Celina agreed to drop its opposition of to the creation of CCMUD#1 and to consent to its creation1. While not technically required, it was a well-known fact at the time that in order to obtain a TCEQ approved municipal utility district, the MUD had to gain the consent of any city within which the development overlapped with either city limits or Extra Territorial Jurisdiction (ETJ). Without this consent, it is highly unlikely that CCMUD#1 could have gained approval.

B) As evidence of the intended interconnected and interdependent nature of the water and wastewater systems, the City's official Water Distribution Master Plan and Wastewater Master Plan2 were attached as exhibits to the Development Agreement. These Master Plans formed the foundation of the Applicable Regulations governing the planning, design, construction, and operation of the system as a whole. If Light Farms were

considered a subsystem that did not depend upon the use and usefulness of the City's entire water system, these documents would have shown Light Farms as a planned subsystem. By agreeing to plan for and construct an interconnected and interdependent whole water system, the City exposed itself to a higher degree of financial risk for the sake of Light Farms and all outside city ratepayers' fire safety, water quality, and operational efficiencies.

C) *The Development Agreement allows for the orderly development of the property within certain lot sizes and residential densities and according to certain engineering and development standards3. This land use entitlement provides an extremely valuable and high degree of development certainty to the developer and allows the developer to appropriately plan for maximizing its return on investment. Without this land use entitlement, the developer would have been subject to potentially changing platting rules that can be unilaterally established by the City.*

D) *Section 2.2 of the 3/12/2007 Development Agreement stipulates the Development Fees and Charges to which the developer is subjected4. By setting the impact fees as specific, fixed, and unchanging dollar amounts rather than simply referring to the then-current impact fees charged by the City, the developer was granted a higher degree of development cost containment than normally allowed. This provision, in fact, placed the outside of city limits MUD in a competitively favorable position to similar developments within the City as the inside city developments were subject to water and wastewater impact fees which could be unilaterally increased by the City based upon its findings in a water or wastewater impact fee study. For comparison, the 3/12/2007 Development Agreement set impact fees at $1,300 for water and $1,500 for wastewater for typical residential lots. The City's last impact fee update now assesses maximum impact fees of $2,930 for water and $2,357 for wastewater. This provides the Light Farms residents a potential $2,487 savings per lot in impact fees alone. Several other development related fees (building permit fees, park dedication fees, plan review fees, etc.) were similarly agreed to in the 3/12/2007 Development Agreement. While these significant development cost mitigation factors would not be captured in a cost of service study, they do represent real and substantial benefits to both the developers of the property and ultimately to the residents of Light Farms.*

E) *Section 2.4 of the 3/12/2007 Development Agreement allowed the developer to place temporary manufactured housing within the property in order to satisfy the residency requirements of establishing the municipal utility district. If the City had not agreed to this provision, the developer would have been forced to build each home sufficient to satisfy the City and County's building codes at a cost of hundreds of thousands of dollars more than simply placing temporary manufactured housing in the development. Again, the value of this development savings would not be reflected in rate design or a cost of service study, but should be considered as part of the whole agreement.*

F) *Of particular interest, in Section 2.10 of the 3/12/2007 Development Agreement the developer specifically and unconditionally waived, on behalf of themselves and any subsequent landowners "any and all claims against the City regarding the validity or enforceability of the...water rates described in this Agreement." As Celina's City*

Administrator at the time of the adoption of this Development Agreement, I am confident that this waiver was considered to be very valuable to the City to provide for assurances that its investments in water and wastewater infrastructure and capacities would be able to be reasonably recovered and that the City relied on the negotiation and provision in the Development Agreement in making the investments that it has. It should be noted that this Development Agreement, including this particular waiver provision was filed of record in the Collin County real property records, making it a part of each homeowner's title to their homes in Light Farms.

G) Article 3, along with other clauses and provisions of the 3/12/2007 Development Agreement and its state-granted authority allows CCMUD#1 the right to sell bonds and obligations. The risk and interest rate advantage of MUD bonds compared to traditional development financing is almost incalculable for a development of this size and scale. It is certainly in the tens of millions of dollars. Without the City's consent to create CCMUD#1, the developer would have passed any additional costs associated with traditional development financing on to the homebuilders in the cost of lots, and the homebuilders would have passed this additional cost on to home buyers. This is another example of a cost that is not accounted for in a rate study or cost of service study, but is a tangible and real savings conferred by the City of Celina to the homeowners and ratepayers of Light Farms.

H) Article 5, together with Exhibit O of the 3/12/2007 Development Agreement created an obligation for the City to provide water and wastewater capacity as described in the Agreement. This obligation represents a significant risk and burden accepted by the City to the benefit of the developer and the eventual outside city ratepayers.

I) The above A through H represent some, but not all of the additional value granted to the developer and outside ratepayers residing in Light Farms. The City has, to my knowledge, fulfilled each and every obligation it has under the Agreement. While I fully support the fundamental premise that both inside and outside water and wastewater rates must be established based on their respective cost of providing the services, there are countless ways in which the Development Agreement either reduces the burden to the Light Farms developers and homeowners and extends real financial risk to the City of Celina, making the 1.50 outside city customer multiplier an essential and fair component of that agreement.

As City Manager of Celina, I personally met with the Light Farms developer on a nearly bi-weekly basis for most of the time between 2007 and 2011. In that time, the Development Agreement was amended twice and has since been amended seven additional times. During my dozens of meetings, I do not recall the developer bringing up the 1.50 outside city customer multiplier a single time as an area of concern. It was not reconsidered or renegotiated in any of the nine amendments to the Development Agreement. There have been ample opportunities to request a renegotiation of the Development Agreement or the outside city customer multiplier. In the four years that I served in Celina, I do not recall a single time when anyone questioned the fairness or reasonableness of the outside city customer multiplier.

Furthermore, beyond the risk associated specifically with this Development Agreement, it is important to note the substantial risk faced by growing cities in general, and the additional risk assumed by cities that provide services outside of city limits. The testimony of Mr. Dan V. Jackson in this case demonstrates the variety of well documented risk factors assumed by a utility in providing service to outside customers. I wish here to demonstrate the impact of how these risk factors came into play in reality in Celina shortly after the Development Agreement was executed.

The City of Celina began its prudent planning for this development and the eventual growth of the community well prior to when the Development Agreement was finalized in 2007. The City invested time, energy, effort, and money in order to understand and plan for the growth that they knew was inevitable. The community knew that growth was coming, what they did not know was precisely when that growth would arrive.

As a reasonable part of that growth planning, the City embarked on an effort to secure adequate water capacity for its internal growth and the prospect of Light Farms (then knows as Lights Ranch) as early as 2004 when the City contracted with UTRWD to increase their Authorized Demand from 1.5MGD to 2.5MGD. The full brunt of the cost of this action came in 2007, just after the Development Agreement was executed. As described above, Section 5.3 and Exhibit O of the Development Agreement determine that (emphasis added):

> *"The Demand Projections, together with the Applicable Regulations, shall be used to size the Facilities for water and sanitary sewer service and to limit the City's obligation to provide service to the RPG Property based upon projected build-out. From time to time RPG may revise the Demand Projections; in which case a copy of the revisions shall be immediately provided to the City, and the City will use all reasonable efforts to meet the revised Demand Projections; provided, however, if the City incurs any additional costs whatsoever in satisfying or attempting to satisfy any change in the Demand Projections that increases the service demand sooner than depicted on the initial Demand Projections, RPG shall pay all such costs to the City and there shall be no credit or rebate on impact fees for such costs paid by RPG."*

Note that the Developer's obligation to pay any additional costs is limited to if the Developer increased the service demand sooner than the schedule depicted in Exhibit O. If the City incurred the expected cost and the Development did not produce as expected, the Developer had no obligation to repay the City for the expenses it incurred actually preparing to deliver the capacity as requested. This is a common risk factor in providing utility services, and because of circumstances beyond the control of the City or Developer in this particular instance (the Great Recession starting in 2008), a risk that materialized into substantial costs for the City that have never and will never be directly reimbursed.

For instance, in 2007 when UTRWD was able to deliver the additional 1MGD discussed above, the City immediately began paying an incremental cost of $22,833.33 per month in Demand charges alone, regardless of whether or not that water was actually used by the City of Celina. That additional $273,999.96 in annual Demand Charge would have been

quickly recovered in the event Light Farms actually developed according to its schedule, but it did not.

Exhibit O of the Development Agreement (reproduced below as Figure JDG-3 below) includes the original Demand Projections by Light Farms for water and wastewater service.

Exhibit O
Demand Projections

Light Ranch Residential Development
Sanitary Sewer and Water Development Schedule

Year	Total Lots	Water Demand ADF in MGD	Sanitary Sewer Demand ADF in MGD
2008	250	0.125	0.088
2009	600	0.300	0.210
2010	1000	0.500	0.350
2011	1400	0.700	0.490
2012	1850	0.925	0.648
2013	2300	1.150	0.805
2014	2700	1.350	0.945

NOTES:

ADF	Average Daily Flow
MGD	Million Gallons per Day
Sanitary Sewer Demand	350 gallons per lot per day
Water Demand	500 gallons per lot per day

According to these projections, the City was obligated to use all reasonable efforts to meet these demands, and the City did in fact meet these projected demands with its investment in infrastructure and by increasing its Authorized Demand from UTRWD. Due to the impact of the Great Recession on real estate development, however, the first lots were not delivered in Light Farms until fall of 2013.8 By then, the City of Celina had been paying the additional $273,999.96 in Demand Charge for six full years, a total of $1.6 million, prior to even the first ratepaying connection in Light Farms. This is a risk that was recognized by the City, and a set of contractual obligations that the ratepayers of Celina were burdened with in this particular case. This $1.6 million in cost does not even include the premature cost of infrastructure that was invested in, the additional maintenance require to flush lines that have no users, or other costs to fulfill the obligations of the City, it reflects only the additional cost to simply have access to the water as projected. To put that into perspective, the entire budget for Celina's water and sewer fund in FY2007 was just $2.6 million.

The risk of operating a utility, and in particular the risk of operating a utility outside of the city limits is not a hypothetical risk. While the City faces some of these same growth planning related risks for inside city customers, that risk is exacerbated when the City is contractually obligated to provide service at levels projected by an outside city developer. Admirably, the City fulfilled its obligations and commitments under the Development Agreement-despite the considerable and very real cost of doing so.

One other element of risk associated with growth generally, and specifically with growth that is outside of the city but served by its utilities is in regard to debt burden. Very often, utilities will sell Revenue Certificates of Obligation which are secured only by the utility system revenue in order to finance the expansion of a system. In very fast growth communities, however, it is not at all uncommon to sell Combination Tax and Revenue Certificates of Obligation to finance the expansion of the utility system. Unlike Revenue COs, Combination Tax and Revenue COs are secured by the full faith and credit of the City, including its property taxing authority if necessary. Many fast growth cities do this in order to expand their borrowing capacity and to lower their cost of funds. Celina is facing approximately $160 million in additional infrastructure cost and, in my professional experience, they should be considering Combination Tax and Revenue COs to fund all or a portion of this debt. This represents another additional cost and risk factor for serving outside of city ratepayers. So long as sufficient utility system revenue exists, there is no additional burden. If, however, sufficient revenues do not exist, that burden falls to the Celina taxpayers to overcome. This tax burden is not shared by outside of city customers. If the City decides to sell Revenue only COs to mitigate this risk, all ratepayers (both inside and outside of the city limits) will pay a premium in debt service charges because of the more limited securitization of the debt.

Petitioners object to the referenced testimony, because the testimony is irrelevant to the amount of money that the City spent during the test year to provide service to Petitioners, the change in those expenditures for any known or measurable changes, or the metrics used to calculate Petitioners' rates. The testimony is irrelevant to whether the City's rates are just, reasonable, and based on the cost of service. The question asked and the answer given about the City's assumption of risk in the 2007 Development Agreement have absolutely ***NOTHING*** to do with the City's costs incurred during the test year or whether the rates to Petitioners were based on the actual cost of providing service to Petitioners. The problem does not just go to the weight that the ALJs may assign to the testimony. Tex. R. Civ. Evid. 402 requires the ALJs to strike this referenced portion of the testimony due to its lack of relevancy to whether the City's rates are just, reasonable, and based upon the actual cost of service.

H. Gray Testimony at page 16, line 16 through page 24, line 9.

Q. Would you summarize your points?

A: To summarize, the entire water and wastewater systems as planned, designed, operated, an maintained by the City of Celina is used by and useful to all of the customers of the systems, including all customers inside and outside of the city limits; and the 1.50 multiplier for outside of city water customers is and was an integral part of the City's careful and reasonable balancing of risks and goals in the planning, construction, and operation of the water and wastewater system with just and reasonable rates for all.

Petitioners object to the referenced testimony. As discussed above, Mr. Gray is neither an engineer nor attorney; therefore, he lacks the necessary knowledge and skills to opine on whether a water or wastewater system is used and useful to all customers. The ALJs should strike the entirety of Mr. Gray's testimony from the record.

IV. PRAYER

WHEREFORE, PREMISES CONSIDERED, the Outside City Ratepayers of the City of Celina respectfully request that the Administrative Law Judges sustain Petitioners' objections, enter an order excluding and striking the Direct Testimony of Jason Gray as requested above and grant such other relief to which Petitioners may be entitled.

Respectfully submitted,

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ATTORNEYS FOR PETITIONERS, OUTSIDE CITY RATEPAYERS OF CITY OF CELINA

CERTIFICATE OF SERVICE

I hereby certify that I have served or will serve a true and correct copy of the foregoing document via electronic mail to all parties on this the 31st day of March 2020.

John J. Carlton