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ARIZONA CORPORATION COMMISSION
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Arizona Corporation Commission

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AUG 20 2010

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BEFORE THE ARIZONA CORPORATION COMMISSION

IN THE MATTER OF THE FORMAL
COMPLAINT OF CHARLES J. DAINS
AGAINST RIGBY WATER COMPANY

DOCKET NO. W-01808A-09-0137

**RIGBY WATER COMPANY'S
MOTION TO STRIKE
TESTIMONY OF DAVID C.
IWANSKI**

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Now that pre-filed direct testimony and exhibits have been filed, Rigby Water Company ("Rigby Water") moves to strike the testimony and certain of the exhibits offered by David C. Iwanski, because Mr. Iwanski had no involvement with the development of the water system at issue, has no personal knowledge relevant to the present proceeding, has demonstrated no qualifications demonstrating any expertise in the regulation or operation of a public service corporation that would assist the trier of fact in any way, offers testimony that is contrary to Arizona law, and offers legal arguments rather than true expert testimony on the subjects he addresses. Accordingly, Mr. Iwanski's testimony and sponsored exhibits, as specifically set out below, should be stricken.

I. FACTUAL AND PROCEDURAL BACKGROUND

In October 2006, after the City of Avondale had publicly discussed acquiring Rigby's assets in Avondale, complainant, Mr. Charles Dains ("Mr. Dains"), lodged an informal complaint with the Commission concerning Rigby Water's alleged failure to obtain

1 Commission approval of a mainline extension agreement between Mr. Dains and Rigby
2 Water related to the development of the Terra Ranchettes Estates subdivision (the
3 “Agreement”). Rigby responded to that complaint by providing an accounting relating to
4 payments made to Dains, along with a copy of the Agreement, to the Commission. The
5 Commission took no action on Dains’ informal complaint, and Dains never objected to the
6 inaction.

7 Approximately two and a half years later, on March 19, 2009 (just six weeks after the
8 City of Avondale filed a condemnation case in Maricopa County Superior Court against
9 Rigby Water), Mr. Dains filed a formal complaint (“Complaint”) with the Commission
10 alleging that he was entitled to receive a refund for the amounts he had expended
11 constructing the water infrastructure serving the Terra Ranchettes subdivision on the same
12 grounds that had been previously considered and not acted upon by the Commission—
13 namely that Rigby Water had failed to obtain approval of the Agreement from the
14 Commission.

15 Since filing the Complaint, Mr. Dains has passed away. His son, Charles D. Dains
16 (“Mr. Dains, Jr.”), is now prosecuting that Complaint on behalf of the estate. On July 30,
17 2010, Mr. Dains Jr. filed pre-filed testimony from a family friend and purported expert,
18 David C. Iwanski (“Mr. Iwanski”). Mr. Iwanski is a lawyer by education and is employed
19 as a municipal water resource director with the City of Goodyear. His self-described
20 experience demonstrates no involvement or expertise with respect to Commission
21 regulations or public service corporations generally. [Direct Testimony of David C. Iwanski
22 (7/30/2010) (“Iwanski Test.”) at 1-2.] His testimony purports to provide “background”
23 information and an opinion as to why Rigby Water should be required to pay Mr. Dains Jr.
24 \$366,000. By his own admission, however, Mr. Iwanski has no personal knowledge with
25 respect to the background issues upon which he testifies. [Id.] He also bases his purported
26 expert testimony as to Rigby Water’s refund obligation on admittedly incorrect data and
27 legal arguments advanced by counsel. Given the manifest deficiencies in Mr. Iwanski’s
28 direct testimony, it should be stricken from consideration.

1 **II. ARGUMENT**

2 **A. Mr. Iwanski's Testimony Is Not Based On Personal Knowledge and Must**
3 **be Stricken.**

4 Arizona Rule of Evidence 602 states that a witness "may not testify to a matter unless
5 evidence is introduced sufficient to support a finding that the witness has personal
6 knowledge of the matter." Rule 602 is subject to the constraints of Rule 703, which sets out
7 the bases of expert opinion testimony. Rule 703 states in part that the "facts or data in the
8 particular case upon which an expert bases an opinion or inference may be those perceived
9 or made known to the expert...." Ariz. R. Evid. 703. Rule 703 only applies, however, if an
10 expert is providing an opinion.

11 Rules 702 and 704 allow properly qualified experts to testify in the form of an
12 opinion about issues as to which their expertise may assist the trier of fact,
13 even if the opinion embraces an ultimate issue of fact. Rule 703 permits the
14 expert to base opinions or inferences on facts or data not admissible in
evidence if they are a type reasonably relied upon by experts in the field.

15 Bieghler v. Kleppe, 633 F.2d 531, 533 (9th Cir. 1980) (emphasis added).¹ Thus, if Mr.
16 Iwanski were qualified as an expert on an issue that might assist the trier of fact, which he is
17 not as discussed below, he might be able to testify as to the bases of his opinion, but even
18 then he could not verify bare facts unless he had personal knowledge regarding those facts.
19 He admittedly does not.

20 Much of Mr. Iwanski's pre-filed direct testimony is not expressing even a purported
21 expert opinion. Rather, as he states, his testimony is "provid[ing] background on issues in
22 this case." [Iwanski Test. at 2, Ins. 22-23.] Arizona Rule of Evidence 602 governs such
23 testimony. Under Rule 602, Mr. Iwanski's second hand knowledge and recitation of facts
24 with which he had no personal involvement must be stricken. Zimmer v. Peters, 176 Ariz.
25 426, 431, 861 P.2d 1188, 1193 (App. 1993) (where the witness is "not testifying from
26

27 ¹ The Arizona Rules of Evidence are adopted from the Federal Rules of Evidence. In
28 absence of Arizona law, courts may use federal law as "a guide to interpretation of our
rules...." State v. Johnson, 132 Ariz. 5, 8, 643 P.2d 708, 711 (App. 1981).

1 memory, that portion of ... testimony could properly be excluded pursuant to Rule 602,
2 Arizona Rules of Evidence, which provides that a witness may only testify to matters about
3 which he or she has personal knowledge.”). Accordingly, Rigby Water requests that Mr.
4 Iwanski’s testimony be stricken to the extent that it is factual testimony not within his
5 personal knowledge.

6 **B. Mr. Iwanski’s Direct Testimony Should be Stricken Because it is Legally**
7 **and Factually Unsupported, Contrary to Governing Law, Consists of**
8 **Improper Argumentation, and Mr. Iwanski Is Not Qualified to Proffer**
9 **the “Opinions” Stated.**

10 Under Rule 702 of the Arizona Rules of Evidence, “[i]f scientific, technical, or other
11 specialized knowledge will assist the trier of fact to understand the evidence or to determine
12 a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or
13 education, may testify thereto in the form of an opinion or otherwise.” Ariz. R. Evid. 702.
14 The questions of whether or not specialized knowledge will assist the trier of fact and
15 whether a proposed witness is qualified to render an opinion are left to the trial court’s
16 sound discretion. Arizona v. Dickey, 125 Ariz. 163, 169, 608 P.2d 302, 308 (1980) (citing
17 State v. Means, 115 Ariz. 502, 566 P.2d 303 (1977)).

18 Expert testimony is not “a mechanism for having someone of elevated education or
19 station engage in a laying on of hands, placing an imprimatur upon the justice of one’s
20 cause. Rather it is a device allowing the trier to receive information, beyond its competence,
21 useful to a resolution of the dispute before it.” 1 Joseph M. Livermore, Robert Bartels, &
22 Anne Holt Hameroff, Arizona Practice: Law of Evidence § 702.1 (4th ed. 2000); see also
23 Pincock v. Dupnik, 146 Ariz. 91, 96, 703 P.2d 1240, 1245 (App. 1985) (citing Arizona
24 Practice: Law of Evidence § 702.1); Lay v. City of Mesa, 168 Ariz. 552, 554, 815 P.2d 921,
25 923 (App. 1991) (same). If the subject on which the expert wishes to testify is within the
26 common knowledge of the average juror, “the proposed testimony would not ‘assist the
27 trier of fact to understand,’ would . . . be wasteful of judicial time, and would create a risk
28 that the common sense information provided by the witness would be over-weighted by the
trier because of the distinction of the witness.” Arizona Practice: Law of Evidence §702.1.

1 Moreover, “[a]s one approaches the ultimate issues in the case, the trial judge should
2 exercise his discretion with great care to insure that the proposed testimony truly relates to
3 an area of specialized knowledge and that the witness is truly qualified to provide assistance
4 to the trier.” Arizona Practice: Law of Evidence § 702.1. Under Rule 704 of the Arizona
5 Rules of Evidence, “[t]estimony in the form of an opinion or inference otherwise admissible
6 is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.”
7 Ariz. R. Evid. 704. The Comment to Rule 704 cautions, however, that “[s]ome opinions on
8 ultimate issues will be rejected as failing to meet the requirement that they assist the trier of
9 fact to understand the evidence or to determine a fact in issue. Witnesses are not permitted
10 as experts on how juries should decide cases.” Ariz. R. Evid. 704, Comment. Here, Mr.
11 Iwanski’s purported opinions simply fail to meet these criteria. As discussed below,
12 Mr. Iwanski is not qualified to opine in this matter, proffers legally and factually
13 unsupported testimony and proffers legal argumentation instead of expert testimony.

14 **1. Mr. Iwanski is not Qualified to Proffer the Opinions Expressed.**

15 Under the recently enacted A.R.S. § 12-2203, which essentially adopts the federal
16 Daubert standard for experts, expert testimony is only admissible if the “witness is qualified
17 to offer an opinion as an expert on the subject matter based on knowledge, skill, experience,
18 training or education.” A.R.S. § 12-2203(A)(1). Mr. Iwanski has not demonstrated any
19 particular, relevant expertise in the subject matter at issue. Mr. Iwanski is a lawyer by
20 education. [Iwanski Test. at 12.] He has some experience as a municipal water resource
21 director. [Id.] That does not make him an expert in the operation of public service
22 corporations, the development of water infrastructure to service new developments within a
23 public service corporation’s Certificate of Convenience and Necessity (“CC&N”) or
24 Commission rules and regulations. He has apparently not worked for a public service
25 corporation or the Commission. [Id.] He does not appear to have any particular expertise as
26 a lawyer in the law and regulations applicable to public service corporations. [Id.] In fact,
27 nothing in Mr. Iwanski’s disclosed background demonstrates that he is qualified by
28 education, experience, skill or training to proffer an expert opinion on the matters at issue

1 and, as is apparent from reading his testimony, he is woefully deficient in relevant expertise
2 and biased in favor of his close friend's family.

3 By way of example, Mr. Iwanski opines that the "Certificated Water Right"
4 purportedly obtained by Mr. Dains had some value for which Mr. Dains is entitled to be
5 compensated. [Iwanski Test. at 3, lns. 22-24.] In taking that position, Mr. Iwanski
6 demonstrates his complete lack of knowledge with respect to development within a public
7 service corporation's CC&N. Pursuant to A.R.S. §45-576, a developer that wishes to
8 develop property within the boundaries of an active management area is required to obtain a
9 certificate of assured water supply or obtain a service commitment from the local water
10 provider, if that provider has been designated as having an assured water supply, prior to
11 submitting a plat for approval to a city or town. A.R.S. § 45-576(A). That certificate
12 merely demonstrates "that sufficient water of adequate quality will be continuously
13 available to satisfy the needs of the referenced subdivision for at least one hundred years."
14 [See DCI-3 (Certificate of Assured Water Supply issued to Charles Dains (8/16/1985)).] A
15 Certificate of Assured Water Supply does not entitle the developer to withdraw water or
16 provide water service to its development. See A.R.S. § 45-592 (person may not drill a new
17 well without meeting additional permitting requirements). The cost of obtaining that
18 certificate is not part of the cost of the infrastructure, and is not considered by the
19 Commission in determining the original cost of such infrastructure. Mr. Iwanski, however,
20 appears to argue that the value of that Certificate somehow justifies Rigby Water being
21 required to refund to Mr. Dains Jr. an amount exceeding the actual cost of the infrastructure
22 in question, a position contrary to Commission regulation as discussed immediately below.
23 This demonstrated lack of expertise simply bars Mr. Iwanski's testimony. Ariz. R. Evid.
24 702.

25 **2. Mr. Iwanski's Direct Testimony is Legally and Factually**
26 **Unsupported.**

27 Furthermore, Mr. Iwanski's direct testimony demonstrates either an incomplete
28 understanding of Commission Rules (consistent with his apparent lack of expertise) or a

1 willful ignorance of those rules and the actual facts of this matter. Mr. Iwanski “testifies”
2 that Rigby Water agreed to refund a total of \$244,500 to Mr. Dains and bases his subsequent
3 calculations on that mistaken figure. [Iwanski Test. at 6, ln. 9.] As an initial matter, the
4 figure utilized by Mr. Iwanski is substantially overstated. While Mr. Dains failed to ever
5 provide Rigby Water with actual cost documentation, at different times he (or his
6 construction manager) estimated the costs of construction to be either \$204,414.34 and
7 \$207,388.67. [See Exhibits RWC 13; RWC 14 (filed concurrently).] Under Commission
8 Rule R14-2-406, any refunds made to Mr. Dains are limited to the actual costs expended on
9 construction. More importantly, the Commission rules expressly recognize that the cost of
10 construction may not be fully refunded over the term of a mainline extension agreement (as
11 does the Agreement). In that instance, the unrefunded portion of construction costs are
12 treated as a contribution in aid of construction. Mr. Iwanski simply ignores these
13 regulations (and the terms of the Agreement) in opining that Rigby Water agreed to fully
14 refund an artificial, agreed-upon estimate of costs to Mr. Dains. In taking that position,
15 Mr. Iwanski reveals the essentially tainted, biased and unsupported nature of his “opinions.”
16 Accordingly, his testimony should be stricken from the record. A.R.S. § 12-2203(A) (expert
17 testimony not admissible unless the “opinion is based on sufficient facts and data” and “is
18 the product of reliable principles and methods”).

19 **3. Mr. Iwanski’s Direct Testimony is Nothing More Than Legal**
20 **Argumentation Under the Pretense of Expert Testimony.**

21 Mr. Iwanski’s direct testimony is also replete with legal argumentation in the guise of
22 “expert” testimony. As noted above, “[w]itnesses are not permitted as experts on how juries
23 should decide cases.” Ariz. R. Evid. 704, Comment. In other words, expert witnesses
24 should not be a second advocate for a party. Their role is to provide insight into areas
25 outside the common understanding of the trier of fact, not to present legal arguments in
26 favor of the party that retained them (or, as here, in favor of a close family friend).
27 Mr. Iwanski’s testimony, however, does just that.

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1 While Mr. Iwanski repeatedly mischaracterizes and interprets Commission
2 regulations, the most egregious instance of improper argumentation is his repeated assertion
3 that Mr. Dains “sold” the water system to Rigby Water. Mr. Iwanski makes this bald
4 assertion without any factual or legal basis. In fact, Mr. Iwanski’s testimony actually
5 contradicts the factual record and relevant regulations. As noted in the concurrently filed
6 direct testimony of Fred T. Wilkinson, Rigby Water informed Mr. Dains of the need to enter
7 into a mainline extension agreement on numerous occasions prior to construction of the
8 subdivision and its water infrastructure. [Direct Testimony of Fred T. Wilkinson
9 (8/20/2010) at 6.] Rigby Water also provided Mr. Dains with a copy of the relevant portions
10 of Commission regulations nearly two years prior to construction of that infrastructure.
11 [Exhibit RWC 1.]

12 Because the Terra Ranchettes subdivision is located within the boundaries of Rigby
13 Water’s CC&N and Mr. Dains had requested that Rigby Water provide service to that
14 subdivision, the water infrastructure Mr. Dains constructed became the property of Rigby
15 Water, subject to certain refund obligations. See Ariz. Admin. Rules R14-2-406(I) (“All
16 pipelines, valves, fittings, wells, tanks or other facilities installed under this rule shall be the
17 sole property of the Company, and parties making advances in aid of construction under this
18 rule shall have no right, title or interest in any such facilities”). Mr. Dains, however, chose
19 not to enter into the required mainline extension agreement until after completion of
20 construction.

21 Despite these facts, Mr. Iwanski makes bald assertions as to the “true” nature of the
22 interactions between the parties. His legal analysis, which has no basis in Arizona law, is
23 made without any personal knowledge of the underlying interactions and is wholly
24 contradicted by the evidence. This type of legal analysis is not an expert opinion, but the
25 legal argument of counsel. Rather than assisting the trier of fact as required by Ariz. R.
26 Evid. 702, Mr. Iwanski attempts to replace the trier of fact through his testimony. As such,
27 that testimony should be rejected.

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C. Mr. Iwanski's Computation Exhibits are Similarly Deficient and Should be Stricken.

Finally, Mr. Iwanski's supposed "computation" of the amounts to be refunded to Mr. Dains should also be stricken, because: (1) Mr. Dains has not demonstrated that Mr. Iwanski is qualified by training or education to offer an opinion as to any economic or damages issue; (2) Mr. Iwanski's calculations are based on admittedly incorrect or incomplete data; (3) Mr. Iwanski ignores relevant Commission rules in his calculations; and (4) his calculations directly contradict the terms of the parties' Agreement.

As an initial matter, Mr. Iwanski's computation is based on an unsupported estimate of construction costs. As noted above, Mr. Dains indicated on several occasions that the actual costs of construction, the maximum refund allowed by Commission rules, were substantially less than the estimated costs attached to the mainline extension agreement. Mr. Iwanski simply ignores this inconvenient fact. In addition, Mr. Iwanski's actual calculations utilize estimated refunds for the years of 2007-2009 and simply omit the refund that has been paid in 2010. [See DCI-6 (note at bottom indicates use of estimated refunds).] As a result, his calculations have no factual basis and even less probative value and should be stricken.² A.R.S. § 12-2203(A) (expert opinion not admissible unless based "on sufficient facts and data").

Mr. Iwanski also purports to calculate an interest component on the refund amount. In doing so, Mr. Iwanski simply ignores paragraph 16 of the parties' Agreement that states that "[n]o interest shall be paid on any amount advanced." [See Exhibit RWC 5, ¶ 16.] Mr. Iwanski, without any support for his position, instead calculates interest on the total unrefunded estimated cost of construction at 1.5% interest, compounded monthly (or 18% per year). Mr. Iwanski offers no basis for that calculation and has demonstrated absolutely

² To the extent that Mr. Iwanski is performing nothing more than a simple mathematical calculation, his testimony is not of such a "specialized" nature as to require expert testimony and should be stricken. See Dickey, 125 Ariz. at 169, 608 P.2d at 308 (expert opinion not appropriate if subject within common experience).

1 no education or training qualifying him to determine what interest rate, if any, should be
2 applied. Accordingly, Mr. Iwanski's purported calculations must be stricken. A.R.S. § 12-
3 2203(A) (expert opinion not admissible unless it is the "product of reliable principles and
4 methods" and the "witness reliably applies the principles and methods to the facts of the
5 case").

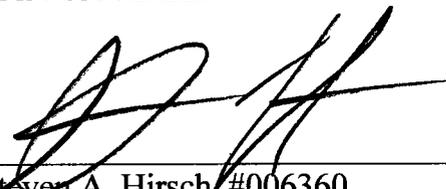
6 In summary, Rigby Water requests that all of Mr. Iwanski's direct testimony, except
7 for his testimony concerning his research into the filing of the Agreement with the
8 Commission, be stricken for the reasons set forth above. Exhibits DCI-4 through DCI-6
9 should also be stricken as irrelevant and improper.

10 **III. CONCLUSION**

11 For the foregoing reasons, the Commission should strike the portions of the direct
12 testimony and exhibits of Mr. Iwanski as indicated above.

13
14 RESPECTFULLY SUBMITTED this 20th day of August, 2010.

15 BRYAN CAVE LLP

16
17
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24 **ORIGINAL** and 13 copies of the foregoing
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