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APPLICATION OF RAYBURN  
COUNTRY ELECTRIC  
COOPERATIVE, INC. FOR A  
CERTIFICATE OF CONVENIENCE  
AND NECESSITY (CCN) FOR A  
PROPOSED TRANSMISSION LINE IN  
HENDERSON AND VAN ZANDT  
COUNTIES, TEXAS

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BEFORE THE STATE OFFICE  
OF  
ADMINISTRATIVE HEARINGS

**BARRY D. ROBINSON'S RESPONSE  
TO RAYBURN COUNTRY ELECTRIC COOPERATIVE, INC.'S MOTION TO  
STRIKE ROBINSON'S AFFIDAVIT**

Landowner Intervenor, Barry D. Robinson ("BDR"), hereby files this response to Rayburn Country Electric Cooperative, Inc.'s ("RCEC") Motion ("Motion") to Strike the Affidavit ("Affidavit") attached to BDR's response ("Response") to RCEC's objections ("Objections") to BDR's direct testimony ("Direct Testimony") as follows:

I. This Pleading is Timely Filed

Commission Procedural Rules provide a response to a motion shall be filed within five (5) working days after receipt of the motion. RCEC's Motion was received by BDR on Wednesday, February 7, 2007. Therefore, this response is timely filed.

II. Summary of Argument

In its Objections, RCEC seeks to preclude much of BDR's Direct Testimony from consideration in these proceedings. While RCEC attacks BDR's Direct Testimony for a variety of reasons, the Objections center around BDR's alleged (1) lack of qualifications as a witness, (2) unreliability of all opinions expressed, and (3) lack of personal knowledge or relevancy. RCEC cites *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) and other cases following that decision. The Affidavit, which RCEC wants stricken, is an integral part of BDR's Response to RCEC's Objections and, in the Affidavit, BDR seeks to demonstrate – to the Administrative Law Judge's satisfaction – the admissibility of BDR's Direct Testimony and the

lack of merit in RCEC's Objections. BDR respectfully submits that the Administrative Law Judge should, at a minimum, receive and consider the Affidavit for the express purpose of enabling the Administrative Law Judge to address the evidentiary points raised by RCEC's Objections. Having sought to prohibit much of BDR's direct testimony, RCEC now seeks to hamstring these proceedings even further by denying BDR the opportunity to fully and adequately respond to RCEC's Objections. Indeed, it is RCEC's very Objections that give rise to and make necessary BDR's Response and Affidavit.

Furthermore, BDR hereby moves, pursuant to P.U.C. PROC. R. 22.225(a)(10), for the admission of the Affidavit into evidence for all purposes. The admission of such testimony is necessary for a full disclosure of the facts and the admission of such testimony into evidence will not be unduly prejudicial to RCEC or any other party to this proceeding. On the other hand, for the reasons set forth herein, the preclusion of the Affidavit from admission and consideration in these proceedings would unduly prejudice the legal rights of BDR, as a landowner intervenor.

### III. Argument

In its Motion, RCEC requests all Affidavit pages (13 – 33) be stricken. This is an unfair request, because it is overly broad. A careful review of the Affidavit indicates that, from page 16<sup>1</sup> through page 33, BDR is offering substantive and direct responses to certain RCEC Objections. Based on the number of pages in the Affidavit, 86% of the Affidavit relates to BDR's direct response to certain RCEC Objections. In the Affidavit, BDR attempts to clarify and rectify RCEC misstatements and mischaracterizations relating to BDR's professional and personal knowledge, skill, training and experience. RCEC's tactic of making overly broad assertions in its Motion is an attempt to unfairly deny BDR the opportunity to submit testimony necessary for a full disclosure of the facts.

In its Objections, RCEC repeatedly and selectively ignored relevant, material and competent testimony and chose to file Objections that were clearly without merit and served only to confuse the issues. The purpose of the Affidavit was not to circumvent the rules or cure purported deficiencies in BDR's Direct Testimony, but to remedy the uncertainty and confusion created by RCEC's Objections. A reading of the Affidavit confirms this fact. For example, in its Objections, RCEC chose to interpret and present BDR's Direct Testimony in an incorrect and

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<sup>1</sup> BDR Affidavit starting at page 16, Certain RCEC Objections are addressed as follows:

incomplete light when, although BDR's Direct Testimony indicated BDR was a Certified Public Accountant, an internal auditor with Natural Gas Policy Act of 1978 and Federal Energy Regulatory Commission expertise, a natural gas consultant with certain pertinent analytical skills and an affordable housing builder and developer<sup>2</sup>, RCEC claimed BDR was only an "accountant, gas industry consultant and participant in real estate developments". This mischaracterization is unfair to BDR and to this proceeding.

In its Objections, RCEC does not dispute the truth of the Affidavit. RCEC claims it would be fundamentally unfair and a disregard of the Procedural Orders and Commission Rules, if the Administrative Law Judge permits consideration of the Affidavit in connection with RCEC's Objections. RCEC does not indicate consideration of the Affidavit would be unfair to RCEC, but implies a theoretical unfairness in the proceeding. The fact is the Commission Rules provide for late-filed testimony<sup>3</sup> and the Administrative Law Judge has the authority to allow supplemental direct testimony.<sup>4</sup> RCEC has not shown it will suffer any unfair prejudice by allowing the Affidavit.

In a Commission CCN proceeding, pre-filed written testimony is crucial to the presentation of a party's case, because the proceeding is primarily based on "written" testimony versus live-witness or oral testimony. In Order No. 15, the Administrative Law Judge clarifies, for the benefit of landowner intervenors, that pre-filed testimony must include all evidence (including exhibits) that the intervenors wish to offer at the hearing on the merits, because intervenors will not be allowed to offer oral direct testimony at the hearing. Pre-filed written testimony is the only realistic opportunity a landowner intervenor has to present its case and, for this important reason, BDR respectfully requests the Administrative Law Judge allow him the opportunity to submit the Affidavit as late-filed supplemental testimony, in order to have a full disclosure of the facts.

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<sup>2</sup> See BDR Direct Testimony at 3.

<sup>3</sup> P.U.C. PROC. R. 22.225(a)(10) states "Late-filed testimony may be admitted into evidence if the testimony is necessary for a full disclosure of the facts and admission of the testimony into evidence would not be unduly prejudicial to the legal rights of any party. A party that intends to offer late-filed testimony into evidence shall, at the earliest opportunity, inform the presiding officer, who shall establish reasonable procedures and deadlines regarding such testimony."

<sup>4</sup> In Order No. 22, the Administrative Law Judge indicates filing a supplement to direct testimony may be permitted if the merits support such a request.

#### IV. Conclusion

The Affidavit is an integral part of BDR's Response and was made necessary by the nature of RCEC's Objections. BDR has the right to fully respond to RCEC's Objections and show their lack of merit. RCEC has not shown it will suffer any prejudice, if the Affidavit is allowed. However, BDR will suffer prejudice, if the Affidavit is not allowed. The Affidavit is necessary for a full disclosure of the facts in this proceeding and should be received and considered. RCEC's Motion is without merit and should be denied in its entirety.

Barry D. Robinson respectfully requests the Administrative Law Judge:

- (1) Deny RCEC's Motion in its entirety;
- (2) Pursuant to P.U.C. PROC. R. 22.225(a)(10), admit BDR's Affidavit for all purposes as late-filed supplemental testimony and establish reasonable procedures and deadlines regarding such testimony;
- (3) Fully receive and consider the Affidavit in the review of and ruling on RCEC's Objections to BDR's Direct Testimony;
- (4) Grant such other and further relief to which BDR is entitled.

Respectfully submitted,



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February 12, 2007

#### CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the above and foregoing document has been hand-delivered, mailed by first-class mail, postage prepaid, or faxed to all parties on the service list, on this 12<sup>th</sup> day of February, 2007.



Barry D. Robinson