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APPLICATION OF LCRA TRANSMIS- §
SION SERVICES CORPORATION TO §
AMEND ITS CERTIFICATE OF CON- §
VENIENCE AND NECESSITY FOR THE § STATE OFFICE OF ADMINISTRATIVE
GILLESPIE TO NEWTON 345 KV CREZ §
TRANSMISSION LINE IN GILLESPIE, §
LLANO, SAN SABA, BURNET, AND § HEARINGS
LAMPASAS COUNTIES, TEXAS §

**OBJECTION OF LCRA TRANSMISSION SERVICES CORPORATION
AND MOTION TO STRIKE PREFILED DIRECT TESTIMONY
OF O'RYAN RANCHES WITNESS RYAN HOERAUF**

LCRA Transmission Services Corporation ("LCRA TSC") hereby files this Objection to Prefiled Testimony and Motion to Strike ("Motion to Strike") the testimony of O'Ryan Ranches Witness Ryan Hoerauf, and would respectfully show as follows:

I.

Background

Intervenor O'Ryan Ranches filed the testimony of Ryan Hoerauf on January 7, 2010 in this docket. Objections were required to be filed per Order No. 4 on January 14, 2010; therefore, this objection was timely filed. LCRA TSC objects to certain portions of Ryan Hoerauf's testimony on the following bases.

II.

Motion to Strike

A.

Unqualified Opinion Testimony

Opinion testimony by lay witnesses is limited to those rationally based on the witnesses' perception, TEX. R. EVID. 701, which requires personal knowledge. See Addison, Texas Practice Guide – Evidence §7.6. The knowledge must be based in part upon personal observation and not solely from hearsay. *McMillan v. State*, 754 S.W.2d 422, 425 (Tex. App. – Eastland 1988, pet. ref'd). Probative evidence of facts necessary to support a rational perception and form an

opinion is required; in other words, the person's "opinion" that such facts exist is not sufficient to subsequently support an admissible opinion. *See, for example, Green v. Ernest*, 840 S.W.2d 119 (Tex. App. – El Paso 1992, writ den.). A witness must also possess some other minimum requisite knowledge and ability proportionate to the subject matter of the opinion. *See, for example, McMillan*, 75 S.W.2d at 425 (ability to render value opinion must include knowledge of market). Finally, an opinion under Rule 701 cannot make a "general statement" of "opinion" that goes beyond case specifics and into the realm of a broader expert opinion. *See Baylor Medical Plaza Services Corp. v. Kidd*, 834 S.W.2d 69, 74 (Tex. App. – Texarkana 1992, writ den.). SOAH Rulings in PUC CCN proceedings have recognized the appropriateness of objections based on attempts to offer improper and unqualified opinion testimony. SOAH Dkt. No. 473-05-0215, PUC Dkt. No. 29833, *Application of LCRA Transmission Services Corp.*, Order No. 8 (February 25, 2005) at 2 and Order No. 9 (February 28, 2005) at 2. No proper basis for this type of opinion has been offered by this witness.

Page 4, 7th line of answer to question on page starting with "in my opinion" through the end of the page.

Page 5, 6th line of answer to first question, starting with "the drilling" through the end of the answer.

Page 7, 7th line of answer, starting with "would" through 8th line "lake".

No basis is stated for the opinions related to the hydrology and bird collision issues posited. The opinions are not supported by facts and also attempt to render broad general opinions, failing both the *Green* and *Kidd* tests.

B.

Inappropriate Expert Opinion Testimony

When offering opinion *as an expert*, a witness must possess "knowledge, skill, experience, training or education" that allows him to qualify as an expert. Tex. R. Evid. 702. This has been further identified by the Texas courts as special knowledge as to the very matter on which an opinion is offered. *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 718 (Tex. 1998); *Helena Chemical Co. v. Williams*, 47 S.W.3d at 486, 499 (Tex. 2001); *Rogers v. Alexander*, 244 S.W.3d 370, 384 (Tex. App.—Dallas 2007, no pet.) (expertise concerning actual

subject required for qualification). Further, an expert otherwise qualified to testify as to a particular subject matter is only qualified to offer testimony as to his particular field. *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996) (party must establish expert to meet Rule 702 “knowledge, skill, experience, training or education” test in the *specific issues* before the forum). *See Missouri Pac. R.Co. v. Buenrostro*, 853 S.W.2d 66, 77 Tex. App. – San Antonio 1993, writ den.). Extensive education and experience are insufficient where these are not related to the specific subject matter of testimony. *Champion v. Great Dane Limited Partnership*, 286 S.W.3d 533, 544 (Tex. App. – Houston [14th Dist.] 2009, no pet.) (no specialized knowledge on type of defect). While this means that testimony may be excluded, it also means that a person may qualify as an expert in some areas but not others even though testifying on seemingly related matters in the same case. The courts are very careful to ensure that alleged expertise is restricted to areas where the alleged expert is qualified to render an opinion and does not simply bleed over into related but distinct areas. *See, e.g., Pack v. Crossroads, Inc.*, 53 S.W.3d 492 (Tex. App. – Fort Worth 2001, writ denied) (expert’s testimony accepted for establishing standard of nursing care but rejected for closely related area of standard of care for nursing *institution*). The following excerpts represent inappropriate expert opinion:

Page 4, 7th line of answer to question on page starting with “in my opinion” through the end of the page.

Page 5, 6th line of answer to first question, starting with “the drilling” through the end of the answer.

Page 7, 7th line of answer, starting with “would” through 8th line “lake”.

To the extent Mr. Hoerauf attempt to qualify as an expert, the testimony does not meet appropriate standards. Nothing is stated as Rule 702 qualifications that would allow Mr. Hoerauf to render opinions on the subjects identified, i.e. no particular knowledge as to the specific subject matter under the *Broders*, *Rogers* and *Champion* tests. Even if Mr. Hoerauf demonstrates some expertise in drilling, foundations and water flow matters, opinions regarding the effect of transmission line foundations do not meet the *Pack* test set forth above. No basis whatsoever is supplied for Mr. Hoerauf’s bird collision opinions.

C.

Inappropriate “Superimposition” Photos

The proper foundation to admit a photograph or photographic depiction into evidence requires that it accurately and correctly depicts what it purports to show. T.R. Ev. 901. Merely “superimposing” purported transmission line structures and conductors into a viewscape supposedly depicting an area does not qualify as such a photograph. This is because it is attempting to show something that does not actually exist, and has no accompanying verification that the photo is accurately illustrative. In the case of a transmission line “superimposition,” the method for illustrating that the conditions depicted are accurate is for the witness (1) to compare an actual photograph of transmission lines under similar distance, conductor and structure type conditions and show how the conditions actually exist and compare, or (2) indicate how the witness has compared actual photographs to the depiction in their professional experience and indicate how the conditions compare. Since this has not been done in the testimony, no proper foundation has been laid. The following presents an inappropriate and inadmissible “superimposed” photograph:

Attachment 3, Lower Photo.

No data has been supplied to demonstrate the accuracy of the depiction, such as elevations or an assumed centerline. No representation has been made that the creator of the photograph has compared actual transmission lines as photographed and compared that to the depiction to verify accuracy. The witness claims no expertise in formulating and verifying viewscape depictions with respect to transmission lines.

III.

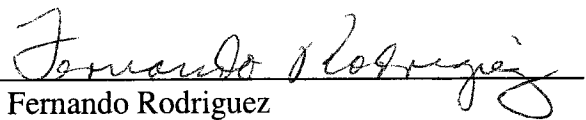
Conclusion and Request for Relief

WHEREFORE, PREMISES CONSIDERED, LCRA TSC respectfully requests that the identified testimony of Ryan Hoerauf be stricken. LCRA TSC also requests all other relief to which it may show itself entitled.

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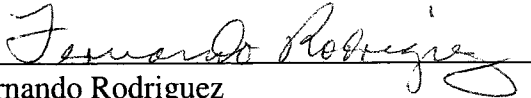
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ATTORNEYS FOR LCRA TRANSMISSION
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on all parties of record in this proceeding on this the 14th day of January, 2010, by facsimile, first-class, U.S. mail, postage prepaid, overnight delivery, or by hand delivery.



Fernando Rodriguez