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SOAH DOCKET NO. 473-10-1097
PUC DOCKET NO. 37448

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APPLICATION OF LCRA	§	BEFORE THE
TRANSMISSION SERVICES	§	PUBLIC UTILITY COMMISSION
CORPORATION TO AMEND ITS	§	FILING CLERK
CERTIFICATE OF CONVENIENCE AND	§	
NECESSITY FOR	§	PUBLIC UTILITY
COMMISSION	§	
THE GILLESPIE TO NEWTON 345-KV	§	
CREZ TRANSMISSION LINE IN	§	
GILLESPIE, LLANO, SAN SABA,	§	
BURNET, AND LAMPASAS	§	
COUNTIES, TEXAS	§	OF TEXAS

**MOTION FOR LEAVE TO FILE *DAUBERT/ROBINSON* MOTION TO
EXCLUDE EXPERT TESTIMONY**

Intervenors Peggy Jean Mueller, owner of the J17 Ranch ("J17 Ranch"), CJ Ranch, Hank Weghorst, Linda Weghorst, and Margaret Wilkinson move for leave to file a motion to exclude portions of the expert testimony of Rob R. Reid ("Reid") and Dennis Palafox ("Palafox"), and as grounds therefor, would show the following:

1. It is incumbent on the Administrative Law Judge to exercise the "gatekeeping" function to determine the reliability and admissibility of expert testimony in this contested case. *Gammill v. Jack Williams Chevrolet, Inc.* 972 S.W.2d 713, 722-726 (Tex. 1998). The judge has the duty to ensure that all expert testimony is relevant and reliable. *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 628 (Tex. 2002); *Helena Chemical Co. v. Wilkins*, 47 S.W.3d 486, 499 (Tex. 2001).

2. To trigger that duty, the Texas Supreme Court has held that the party objecting party may properly raise such *Daubert/Robinson* objections either before trial or when the evidence is offered at trial. *Kerr-McGee Corp. v. Helton*, 133 S.W.3d 245, 251-252

(Tex. 2004); *Blanco River Authority v. Kraft*, 77 S.W.3d, 805, 807 (Tex. 2002); *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 409 (Tex. 1998).

3. It is necessarily proper and timely to raise *Daubert/Robinson* objections to the foundational reliability of expert testimony when the grounds for those objections become apparent from the record. *Kerr-McGee Corp. v. Helton*, 133 S.W.3d at 252.

4. In this case, it was not possible to determine the foundational defects in the pre-filed testimony of LCRA's experts by the December 14, 2009 deadline for objections established in Order No. 4 in this Docket. Given the law on the time when *Daubert/Robinson* challenges to expert opinion testimony can be raised, Intervenor's do not interpret that Order No. 4 to preclude such objections as are contained in the Motion to Exclude.

5. Nevertheless, if it is argued that Order No. 4 applies to such objections, then good cause exists for granting Intervenor's leave to file and urge those objections at this time.

6. The matters set out in the Motion to Exclude were not known to Intervenor's until well after the December 14, 2009 deadline. It was not until the TPWD's December 23, 2009, letter was it made clear that the foundational reliability of the route selection methodology of PBS&J was fatally flawed. It was not known until this week that the route selection methodology was fatally flawed and that the critical document upon which the route selection process was based – the draft environmental assessment – had been destroyed by LCRA TSC. It also was not known until this week that LCRA would not attempt to defend the flaws exposed by the TPWD letter until it filed rebuttal testimony, less than two weeks before the hearing is scheduled to begin, (LCRA TSC's

Response to J17 Ranch's First Set of RFI No. 1-1 through 103[Docket Interchange Item No. 591]), if then. LCRA TSC's Appeal of Order No. 10 (Docket Interchange Item No. 601).

7. As has been made clear, the accelerated schedule established for this case in Order No. 4 is driven by the 180-day deadline of Section 39.203(e) of the Utilities Code. Such artificial statutory deadlines can render proceedings void if there are denials of due process rights. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). To the extent that Order No. 4 is applied to deny Intervenor's right to object to and seek exclusion of inadmissible expert testimony, it is a denial of their rights to due process and due course of law.

WHEREFORE, Intervenor's pray that this Motion for Leave be in all things granted. Intervenor's also pray for such other and further relief to which they may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of January 2010, a copy of the foregoing was served on counsel for LCRA via email pursuant to the Orders of SOAH entered in this proceeding regarding the service of discovery.

Jeffery L. Hart
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