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

APPLICATION OF LCRA TRANSMISSION SERVICES CORPORATION TO AMEND ITS CERTIFICATE OF CONVENIENCE AND NECESSITY FOR THE GILLESPIE TO NEWTON 345-KV CREZ TRANSMISSION LINE IN GILLESPIE, LLANO, SAN SABA, BURNET AND LAMPASAS COUNTIES, TEXAS	§ § § § § § § § § §	PUBLIC UTILITY COMMISSION OF TEXAS
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**INTERVENOR'S RESPONSE TO
LCRA TRANSMISSION SERVICES CORPORATION'S
OBJECTION AND MOTION TO STRIKE PREFILED DIRECT TESTIMONY
OF YATES AND BOULTINGHOUSE WITNESS JAN YATES
BOULTINGHOUSE**

Jan Yates Boultinghouse, as the Independent Executrix of the Mack Yates Estate; Margie Ann Yates Estate; Jan Yates Boultinghouse, Individually, and Kenneth R. Boultinghouse (collectively referred to herein as "Yates and Boultinghouse") file this Response to LCRA Transmission Services Corporation's (hereinafter referred to as the "LCRA") Objection and Motion to Strike Prefiled Direct Testimony of Yates and Boultinghouse Witness Jan Yates Boultinghouse (the "Objection and Motion to Strike"), and would respectfully show the following:

**I.
Background**

Intervenor Yates and Boultinghouse filed the testimony of Jan Yates Boultinghouse ("Boultinghouse") on January 7, 2010 in this matter. LCRA filed its Objection and Motion to Strike on January 14, 2010. Responses to any objections are required to be filed pursuant to Order No. 4 on or before January 20, 2010. Accordingly, this Response is being timely filed.

II.
Motion to Strike
Unqualified Opinion Testimony

In its Objection and Motion to Strike, LCRA asserts Boultinghouse is unqualified to assert specific issues made in the Pre-Filed Testimony of Boultinghouse (the "Testimony"). LCRA's assertions are incorrect.

III.
Argument and Authority

Page 4, Q26 & Answer & Page 8-0, Q52 & Answer

LCRA asserts the Testimony does not lay a sufficient foundation to address the "disruption" or "effects on horses" related to a 345 kV transmission line. *See* Objection and Motion to Strike, Page 2.

Contrary to the assertions made by the LCRA, Boultinghouse clearly qualifies her knowledge and expertise of such effects in her Testimony. As offered in her Testimony, Boultinghouse was raised on the ranch and spends virtually all of her time there. She is involved in every aspect of the management and operation of this cattle and horse ranch on a daily basis. *See* Answer to Q30 of Testimony. Boultinghouse's Testimony indicates that she maintains a herd of twenty-five horses including five (5) brood mares. *See* Answer Q21 of Testimony. Boultinghouse further testifies that she tries to have each mare deliver one (1) colt per year. *Id.*

Furthermore, Boultinghouse is a "lifetime rancher," gaining her sixty-five (65) years of knowledge and skills of raising cattle and breeding and training horses from her parents and grandparents. *See* Answer to Q42 of Testimony. Boultinghouse testifies that the specific type of horses she raises are bred specifically as competition rodeo horses.

See Answer to Q20 of Testimony. The value of these specialized rodeo horses range from \$5,000.00 to \$80,000.00. See *Id.*

To support its argument that Boultinghouse's "mere observation of a phenomenon or assertion of an opinion without an underlying foundation of knowledge and expertise", the LCRA cites to *McMillan v. State*, 754 S.W.2d 422, 425 (Tex. App. – Eastland 1988, pet. ref'd) and claims the Testimony is suspect under the *McMillan* test. However, a closer look at *McMillan v. State*, 754 S.W.2d at 422, clearly supports the foundation provided by Boultinghouse to address her concerns with the effect a transmission line will have on a horse. In *McMillan*, the court states the opinions of a lay witness are admissible if the witness can establish she has the requisite personal knowledge of the subject matter. The Testimony conclusively establishes that Boultinghouse is an expert on horses having been around them her entire life and being an experienced horsewoman. Based on her experience with horses, Boultinghouse is clearly qualified to testify as to the behavior of horses. In her Testimony, Boultinghouse explains she has personally witnessed "horses act and react strangely around electricity."¹ See Answers to Q22 and Q23 of Testimony. Boultinghouse goes on to explain she has witnessed docile horses become skittish as they approach power lines and, further, she has witnessed horses head for cover hours before an electrical storm approaches. See Answers to Q24 and Q25 of Testimony. Boultinghouse has not attempted to offer testimony as to *why* horses behave differently around electricity. Rather, Boultinghouse states, based on her vast experience in raising and breeding horses that horses behave in a certain manner around electricity.

¹ Boultinghouse further testified that she personally witnessed a horse die from biting an electrical line when it became confused by the line. See Answer to Q24 of Testimony. The impression is indelibly imbedded into the mind of such an experienced horse breeder.

The Testimony is focused on the behavior of horses in certain environments, not as to specific cause of the behavior.

Additionally, pursuant to *Williams v. State*, 191 S.W.2d 242, 253 (Tex. App. – Austin 2006), if the opinion is helpful to a trier of fact in the determination of a fact, then the opinion is admissible under Rule 7.01 of Tex. R. Evid. P. Further, Boultinghouse’s Testimony is consistent with Order No. 11 in Docket 37464, where Public Utility Commission staff does not object to the admission of testimony relating to the hazards of electromagnetic fields for the limited purpose of demonstrating the concerns of landowners.² As a horse breeder, Boultinghouse in her Testimony demonstrates her concern about the potential effects of electricity on horses. Furthermore, Boultinghouse’s concern is supported by her 65 years experience with horses and her extensive experience as a horse breeder and trainer. Accordingly, the testimony offered by Boultinghouse clearly demonstrates a requisite personal knowledge as to the behavioral effects of horses in certain environments. *McMillan* at 425.

Boultinghouse also testifies that the proposed transmission line route across the Headquarters Ranch “directly bisects [the ‘Horse Pasture’] and that the disruption to the breeding will be enormous.” Contrary to LCRA’s contention, a person need not be an electrical engineer specializing in the effects of electromagnetic fields to understand that construction of a transmission line through a breeding pasture will have a disrupting effect on the breeding of horses. There will be an increase in the volume of people, vehicular traffic, large construction vehicles entering the pasture, construction related

² Application of Oncor Electric Delivery Company LLC to Amend its Certificate of Convenience and Necessity for a Proposed CREZ 345-KV Transmission Line in Brown, McCulloch, Mills, San Saba, and Lampasas Counties, Order No. 11 (Jan 7, 2010).

noise and other construction related interruptions. Thus, a horse breeder would understandably be concerned about the effect of such activities on her horses.

Page 4, Q29 & Answer

In her Testimony, Boultinghouse states that, to the best of her knowledge, the ranch is a suitable habitat for the golden-cheeked warbler and the black-capped vireo, both being endangered species. LCRA asserts no factual basis is stated for the claim, and that it is a broad general opinion, therefore, failing the *McMillan* and *Kidd* tests. See Objection and Motion to Strike, Page 2.

LCRA's own Environmental Assessment and Alternative Route Analysis support the factual basis for Boultinghouse's opinion and response for the Proposed Gillespie to Newton 345KV Transmission Project Gillespie, Llano, San Saba, Burnet and Lampasas Counties, TX (Vol. I) (the "EA") of record in this matter.³ Pursuant to the EA, there are documented records of the existence of the golden-cheeked warbler and black-capped vireo within the study area, as well as several natural resources that contribute to the potential habitat of the golden-cheeked warbler and the black-capped vireo. See EA at 2-29. Specifically, as to the black-capped vireo, the EA states:

[i]t nests in patchy shrubland/brushland containing dense woody cover between ground level and approximately 6 ft...Dominant tree and shrub species present in suitable breeding habitat may include various oaks, sumacs, Texas persimmon, agarito, condalia, elbowbush, lotebush and occasionally Ash juniper and honey mesquite. The study

³ Boultinghouse's use of the EA is admissible and may be referenced pursuant to Texas Rules of Evidence 801(e)(2) and 803(24). TRE 801(e)(2) provides that a statement by a party opponent, although otherwise hearsay, is admissible. Further, TRE 803(24) provides that a statement against one's interest, although otherwise hearsay, may also be admissible. In this case, LCRA proffered the EA in its original application. LCRA cannot now disavow its own testimony. Similarly, the admission that suitable habitat for endangered species exist within the study area are clearly against the interest of LCRA. Nonetheless, LCRA has proffered the EA as a part of its original application and cannot now argue that its own testimony may not be relied upon by Boultinghouse.

area encompasses areas where some of the largest known nesting populations of the species occur. Thirteen previously recorded occurrences exist from different portions of the study area and *suitable habitat occurs in the study area. (emphasis added).*

EA at 2-29. Also, as to the golden cheeked-warbler, the EA states:

The species is a habitat specialist, occurring only in oak-juniper woodlands that contain a dense deciduous canopy and mature Ashe junipers...Common canopy species in suitable habitat include Ashe juniper, plateau live oak, Texas red oak, post oak, cedar elm, hackberries, Texas ash, and occasionally escarpment black cherry and American sycamore. Suitable habitat typically occurs in areas of steep slopes, canyons, draws and adjacent ridges and uplands.

EA at 2-29. The Headquarters Ranch is a part of the study area, and virtually all of these natural resources are prevalent on the Headquarters Ranch. Boultinghouse testified as to the existence of certain trees that are, by LCRA's own admission, suitable habitat for the both the black-capped vireo and golden-cheeked warbler. See Answers to Q42, Q43, Q44, Q45 and Q46 of Testimony. Boultinghouse merely agrees with the LCRA that the Headquarters Ranch is suitable habitat for the golden-cheeked warbler and black-capped vireo.

By objecting to this portion of Boultinghouse's Testimony, the LCRA seems content to discredit its own EA. While the LCRA has admitted the EA has factual constraints of the EA and LCRA has admitted that it has not performed actual environmental assessments of the affected properties, LCRA cannot selectively pick and choose which portions of the EA it wants admissible in this proceeding. Boultinghouse simply agrees with and supports the testimony proffered by the LCRA in its EA that portions of the study area are suitable habitat for endangered species. Either the LCRA

must choose to stand by its EA and recognize the validity of this portion of Boultinghouse's or it should withdraw its EA as factually incorrect.

Page 7, In Answer to Q42, 2d full paragraph, 4th line "Towers" through 5th line

In her Testimony, Boultinghouse states that "[t]owers that tall will probably have to have warning lights on top, so there will be visual degradation at night as well as during the day time." The LCRA asserts Boultinghouse holds no basis in transmission line design and construction to support her assertion that warning lights will be necessary. *See* Objection and Motion to Strike, Page 2.

The statement made by Boultinghouse is an opinion on the resulting visual degradation caused by warning lights, which Boultinghouse believes would be probable if a transmission line crossed the ranch. Boultinghouse has personal knowledge that a private airstrip is located on property adjacent to Headquarters Ranch.⁴ It is common knowledge that power lines and other infrastructure in the proximate vicinity of airstrips contain warning lights to prevent collisions with the transmission lines or other infrastructure. Such an opinion is offered based on Boultinghouse's perception of the surrounding circumstances related to this specific issue. *See* Tex. R. Evid. 701.

Additionally, the EA discusses the impacts transmission lines may have on aviation. Pursuant to the EA, when placing a transmission line within a specific proximity to public or private airstrips, there may be potential "requirements to mark and/or light the structures." *See* EA 5-16 and 5-17. Had LCRA performed an actual inspection of the

⁴ *See* Pre-filed Testimony of James Dudley Morse pages 2-3 and Exhibit "C" (indicating the existence of a private airstrip on property adjoining the Headquarters Ranch); *See* also James Dudley Morse's Response to the Commission Staff's Second Set of Request for Information. In response to Request for Information BA-1-4, Mr. Morse identifies a private airstrip on his property adjoining the Headquarters Ranch. Thus, Boultinghouse is understandably concerned about the probability of warning lights on the transmission line towers.

area, LCRA too would know of the existence of the airstrip. However, LCRA admits it has failed to perform actual environmental assessments of the potentially affected properties, instead relying on aerial photography in its preparation of the EA.

In general, it is interesting to note that LCRA has objected to portions of virtually every intervenor in this docket. LCRA seems content to deny the Administrative Law Judge relevant information necessary to make the best possible decision. The opinions asserted by Boultinghouse in her Testimony, both expert and factual, are likely to assist the trier of the instant matter to determine the requisite concerns for a transmission line on the Headquarters Ranch. *Williams v. State*, 191 S.W.2d at 242. These opinions are specifically relevant and necessary to this proceeding because LCRA admits it has failed to conduct actual assessments of the environmental, cultural, historical and archeological effects of the proposed transmission lines on the subject properties. Instead, based on its voluminous objections, LCRA prefers the trier be denied important information in making its recommendation to the Public Utility Commission. Accordingly, LCRA's objections should be denied.

IV.

Conclusion and Request for Relief

The objection and arguments made by the LCRA in its Objection and Motion to Strike the Prefiled Direct Testimony of Yates and Boultinghouse Witness Jan Boultinghouse are inappropriate, unfounded and inapplicable and, therefore, should be denied.

WHEREFORE, PREMISES CONSIDERED, Yates and Boultinghouse respectfully request that LCRA's Objection and Motion to Strike be denied, that the Pre-

Filed Testimony of Jan Boultinghouse be allowed into evidence, in its entirety, and for all other relief which they may be entitled.

Respectfully Submitted,

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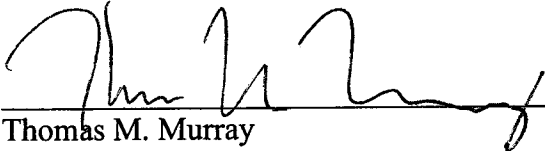
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CERTIFICATE OF SERVICE

I, Thomas M. Murray, hereby certify that a copy of this document was served on all parties of record in this proceeding on this 19th day of January, 2010, by electronic mail, facsimile and/or First Class U.S. Mail.


Thomas M. Murray