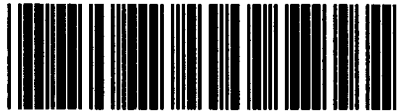




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**SOAH DOCKET NO. 473-10-1097
PUC DOCKET NO. 37448**

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.	§ § § § § § § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
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**LCRA TRANSMISSION SERVICES CORPORATION'S REPLY TO
OBJECTIONS TO APPLICANT REBUTTAL TESTIMONY**

TO THE HONORABLE WENDY K.L. HARVEL:

COMES NOW LCRA Transmission Services Corporation (LCRA TSC) and files this Reply to the objections filed by various intervenors – Point Peak Mountain Resort LLC, Barbara R. Barron, and Allen R. Paksima (collectively referred to as “Point Peak”), J17 Ranch and KDCB Garrett Ranch, Ltd., and Robert T. Payne – regarding portions of LCRA TSC’s rebuttal testimony filed in this proceeding, and in support thereof would respectfully show the following:

I. Background

Certain intervenors filed forms of objections to portions of LCRA TSC’s rebuttal testimony on January 28 or 29, 2010 in this docket. Per Order No. 5, replies to objections to LCRA TSC’s rebuttal case will occur at the start of the hearing on the merits.¹ LCRA TSC has filed this Reply to assist the ALJs in those rulings, and the Reply is timely filed. As set forth more fully below, each of these various pleadings presented as “objections” to specific (or entire witness) portions of LCRA TSC’s rebuttal case is in reality an attempt either to “rebut the rebuttal” or to reurge arguments to exclude testimony that have already been rejected. There is no legal or factual basis supporting a ruling that any of the challenged Rebuttal Testimony is inadmissible or should otherwise be stricken. Accordingly, LCRA TSC requests that these pleadings be rejected

¹ Order No. 5, at 4.

as objections, and specifically denied and stricken as improper. Alternatively, LCRA TSC respectfully submits that each and every one of these objections be overruled.

II. Point Peak's Objections

Point Peak's objections to portions of Mr. Palafox's and Mr. Reid's rebuttal testimonies amount to nothing more than Point Peak's attempt to have the last word – in the form of legal argument and further assertion of positions set out in its own direct testimony – on certain fact issues on which LCRA TSC's expert witnesses disagree with Point Peak's witness (Barbara Rae Barron). It is telling that Point Peak's nine-page "objections" never cite to or discuss any applicable legal authority that might be a basis to conclude that the challenged portions of LCRA TSC's rebuttal case are *inadmissible* as evidence. Rather, Point Peak clearly seeks the opportunity to further address the substance of LCRA TSC's rebuttal case; this is improperly attempted through the procedural vehicle of purported "objections" to that rebuttal case,² where LCRA TSC is the only party with the burden of proof on any issue in this proceeding,³ and thus the only party entitled to pre-file general rebuttal testimony. Point Peak availed itself of the written discovery process, propounding one set of RFIs to LCRA TSC based on LCRA TSC's direct case,⁴ and of course is free to further challenge Mr. Reid and Mr. Palafox through cross-examination at the hearing, and to argue the merits of their positions on ultimate issues in post-hearing briefing. However, Point Peak's attempt simply to rehash and reframe its own position in the light of LCRA TSC's rebuttal testimony should not be permitted.

A. Objection to Rebuttal Testimony of Dennis Palafox⁵

Point Peak's discussion of one excerpt of Mr. Palafox's rebuttal testimony, in which he addresses LCRA TSC's position regarding notice properly provided to Ms. Barron, states no basis for objecting to the *admissibility* of Mr. Palafox's statement. The essence of this "objection" seems to be that Point Peak disagrees with Mr. Palafox that Ms. Barron has had a meaningful opportunity to participate in the public input process that preceded LCRA TSC's filing of the

² It is interesting to note that, although Mr. Reid's direct testimony also covered similar issues including LCRA TSC's and PBS&J's methodologies regarding habitable structure counts, Point Peak filed no objections to any of LCRA TSC's direct testimony.

³ Cf. PURA § 37.056(c)(4)(A-D & F).

⁴ See Interchange Item 293 (LCRA TSC's Response to Point Peak's First RFIs, served Dec. 14, 2009).

⁵ Palafox Rebuttal Testimony (Interchange Item 856).

Application for the Gillespie to Newton project. On its face, the objection to Mr. Palafox's testimony is purely rebuttal legal argument and should therefore be overruled.

B. Objection to Rebuttal Testimony of Robert [sic] Reid⁶

The bulk of Point Peak's "objections" are directed at several aspects of Mr. Reid's rebuttal testimony, namely 1) his statements relating to Point Peak's proper characterization as a "mountain" and/or a "resort," for purposes of his expert analysis of existing land uses, in the context of the routing considerations governing this case; and 2) his rebuttal of Ms. Barron's interpretation and application of habitable structure counts relating to certain links included in LCRA TSC's primary alternative routes. Although Point Peak's "objections" to Mr. Reid's rebuttal testimony start off in a more promising fashion – at least invoking certain buzz words that suggest admissibility objections based on the Texas Rules of Evidence or other applicable legal authority⁷ – they quickly devolve into a rather lengthy restatement of Point Peak's own positions,⁸ and ultimately never establish a legal or factual basis for striking any of Mr. Reid's testimony as *inadmissible*.

Contrary to Point Peak's conclusory representations, this two-page portion of Mr. Reid's rebuttal testimony directly rebuts Ms. Barron's direct testimony, and (like the entirety of his rebuttal testimony) is admissible. Reflecting Point Peak's determination to get the last pre-filed word on habitable structures, on their face Point Peak's "objections" to Mr. Reid's testimony are simply further argument of the parties' competing evidence on this obviously disputed issue.⁹ Point Peak's new counter-rebuttal pleading is best understood as a restatement, defense, or expanded explanation of Ms. Barron's own direct testimony. A side-by-side comparison to Point

⁶ Reid Rebuttal Testimony (Interchange Item 861).

⁷ The entirety of Point Peak's admissibility argument seems to be set out in two unelaborated statements. *See* Point Peak Objection at 3 ("Mr. Reid's testimony is objectionable as it is not rebuttal testimony in that it does not rebut direct testimony. In addition, it is vague, ambiguous, and assumes facts not in evidence."); Point Peak Objection at 5 ("Thus, Mr. Reid's testimony [regarding Ms. Barron's habitable structure count] is objectionable because it constitutes a global statement without sufficient foundation (or evidence to the contrary), relies upon hearsay, and misstates the facts in evidence.").

⁸ Although slightly less than two pages of Mr. Reid's rebuttal testimony is directed specifically toward Ms. Barron's direct testimony (*see* Reid Rebuttal Testimony (Interchange Item 861) at 49-51), Point Peak burns through more than three times that many pages supposedly "objecting" to the admissibility of Mr. Reid's rebuttal.

⁹ The balance of Point Peak's "objections" (*see* pp. 3-4) are also pure and self-evident counter-rebuttal, and nearly beyond reply in the context of "objections" to admissibility. Ms. Barron's insistence that Point Peak actually is a "mountain," and that she is free to call her property a "resort," even though no such facilities have yet begun to be constructed there, is, as Point Peak would say, within the realm of fact issues for the ALJs' consideration. Mr. Reid is well within the realm of his established expertise to opine to the contrary, on both matters.

Peak's Response¹⁰ to LCRA TSC's objection and motion to strike portions of Ms. Barron's testimony reveals that much of that response argument – regarding Ms. Barron's differing interpretation of the Commission's "habitable structures" definition and how it should be applied in this case – is simply carried forward into Point Peak's "objections" to Mr. Reid's rebuttal testimony.¹¹ Point Peak now tries to frame Mr. Reid's testimony as "objectionable" because Ms. Barron still disagrees with his interpretation and methodologies utilized to determine and count qualifying "habitable structures" under the governing criterion, and because Ms. Barron still believes she has performed a superior field investigation of habitable structures (for links C14 and C17, anyway)¹² that yields a more accurate count than Mr. Reid's. Of course, Point Peak has in no way objected to Mr. Reid's direct testimony that establishes his (and his firm's) substantial expertise and experience in conducting environmental assessments for transmission line projects, evaluating land uses, habitable structures, and generally applying the PUC's criteria to the facts of each case.

Indeed, Point Peak's "objections" to Mr. Reid's rebuttal testimony are self-defeating. Again and again, while urging Ms. Barron's version of the appropriate classification of habitable structures, Point Peak itself states that these are factual matters for the ALJs to weigh in this case:

- (regarding vacant structures) "Ultimately, that is a fact question for the [ALJ] and [PUC] to determine." (p. 5).
- (regarding rooftops as indicating habitable structures) "it is ultimately a fact question that should be considered by the presiding officer in this Docket." (p. 7)
- "It is also up to the fact finder to determine whether there is a difference between a camper and a single family residence." (p. 7)
- "the fact finder will determine whether one structure is equal to another structure." (p. 8).

LCRA TSC could not agree more. Upon full presentation of the evidence, the ALJs will be in a position to weigh LCRA TSC's testimony (Mr. Reid's and other witnesses') regarding habitable

¹⁰ Interchange Item 713.

¹¹ Compare Interchange Item 713 [Point Peak's Resp.] at 3-5 with Interchange Item 940 [Point Peak's Objections] at 4-7.

¹² Clearly this is a case where an intervenor is not concerned about a habitable structure *undercount* in order to keep a transmission line route off of her own property; quite the opposite – Ms. Barron's testimony is aimed at showing a habitable structure *overcount* on certain other links and routes that she would prefer.

structure counts against the testimony of Ms. Barron and any other parties addressing this issue.¹³ Notwithstanding Point Peak's stage-setting for those competing points of view, it has established no basis to strike Mr. Reid's rebuttal testimony addressing Ms. Barron's assessment of habitable structures as inadmissible.

Even if Point Peak were entitled to revisit its habitable structures argument through purported "objections" to the admissibility of LCRA TSC's rebuttal case, which of course it is not, Point Peak's discussion of this competing evidence also mischaracterizes LCRA TSC's positions, and LCRA TSC's well established approach to analysis of habitable structures potentially affected by the Gillespie to Newton project. First, Point Peak's descriptions of LCRA TSC's and PBS&J's methodologies utilized to identify and count habitable structures are incomplete and incorrect. The very RFI response to which Point Peak cites on this point reveals as much, indicating that LCRA TSC staff and consultants did far more than what Point Peak refers to as a "quick desktop review," only of aerial photography, to identify habitable structures meeting the Commission's applicable definition.¹⁴ Mr. Reid's considerable direct testimony¹⁵ and excerpts from the Environmental Assessment¹⁶ also describe the various methodologies that were utilized in this portion of the routing analysis. Second, Point Peak completely ignores evidence regarding the substantial additional work that LCRA TSC staff and consultants have done to update the accuracy of the habitable structure count, as additional information has continued to emerge and be clarified since the filing of LCRA TSC's Application and direct testimony. (This, of course, is common practice as CCN cases for transmission line projects move forward and intervenors bring to light more detailed information about structures on private property.) LCRA TSC has filed a Second Errata to its Application,¹⁷ detailing its further work to date to revise the habitable structure count for particular links. Other portions of Mr. Reid's rebuttal testimony address particular issues of habitable structures raised by other intervenors, detailing in what circumstances

¹³ Presumably, this will include consideration of intervenor cross-rebuttal (Roger Michael Rannefeld) offered on behalf of the Landowners' Preservation Group, which directly challenges much of Ms. Barron's field investigation and conclusions regarding habitable structures.

¹⁴ See Interchange Item 293 [LCRA TSC's RFI Resp.] at 10 (describing field reconnaissance, use of digital aerial photography, and various types of maps).

¹⁵ See Interchange Item 6, Application [Reid Direct Test.] at 8-10, 15, 18-19.

¹⁶ See Interchange Item 6, Application Attachment 1 (EA) at pp. 5-12, 6-26, Figures 6-1a, 6-1b, and 6-1c, and Tables 6-1, and 6-3 through 6-13 (as such tables have been revised and further updated in Mr. Reid's rebuttal testimony (Exhibit RRR-4R)).

¹⁷ Interchange Item 360.

LCRA TSC has concluded that an additional habitable structure should (or should not) be counted.¹⁸

Although Point Peak now reframes its own position in reference to portions of LCRA TSC's rebuttal case (principally Mr. Reid's testimony, but also tangentially portions of Mr. Symank's, Mr. Palafox's¹⁹ and Ms. Lee's, to which Point Peak does not object), it has not established grounds for the ALJ to strike any of that rebuttal testimony. Point Peak's objections should be summarily overruled in their entirety, as improper counter-rebuttal.

III. J17 Ranch and KDCB Garrett Ranch, Ltd.'s Objections

On their face, the "objections" of J17 Ranch and KDCB Garrett Ranch, Ltd. to the entire rebuttal testimonies of Mr. Reid and Mr. Palafox ("all rebuttal testimony opinions regarding the appropriateness or statutory compliance of any route") are merely a conclusory attempt by these intervenors to reargue their unsuccessful motion to exclude these witnesses's direct testimonies (and the Environmental Assessment which Mr. Reid sponsors).²⁰ This approach ignores the ALJ's denial of that motion for the reasons set out in LCRA TSC's Response thereto,²¹ namely that 1) LCRA TSC's (and its consultant PBS&J's) methodology regarding endangered species habitat issues is reliable and appropriate for CREZ CCN proceedings, and therefore that its experts' testimonies are admissible; and 2) there can be no basis for a spoliation argument under the circumstances of this case and the discovery that has been conducted. J17 Ranch and KDCB Garrett Ranch have offered no new basis, in law or fact, to challenge the admissibility of (now the rebuttal) testimonies of Mr. Reid and Mr. Palafox, and their "objections" should be summarily overruled in their entirety.

¹⁸ Reid Rebuttal Test. at 8-10, 34-37, 40, 41, 47, 49-51, 52, and 53.

¹⁹ One aspect of Point Peak's counter-rebuttal seems particularly misdirected. Specifically, Point Peak cites to the rebuttal testimony of Mr. Palafox regarding LCRA TSC's use of county appraisal district data for one purpose to attempt a "gotcha" that Mr. Reid has not substantiated his position that use of CAD data is not adequate or appropriate for the distinct purpose of habitable structure counts. Point Peak's Obj. at 8-9. By no means does this establish an inconsistent position on the part of LCRA TSC, nor any basis to question the reliability or admissibility of Mr. Reid's rebuttal testimony. These two purposes within the scope of a transmission line routing case are entirely different, and Mr. Reid's methodology is well recognized and established in the context of habitable structure counts. (Indeed, such an approach is necessary where such appraisal district data indicates "improvements" to a parcel without indicating whether there is a habitable structure.

²⁰ Interchange Item 657.

²¹ Order No. 13, at 17.

IV. Robert T. Payne's Objections²²

Mr. Payne's "Reply to LCRA Rebuttal Testimony of Symank, Palafox, Garza and Reed [sic]" is, on its face, wholly improper counter-rebuttal. To the extent that this pleading can even loosely be construed as "objections" to any of LCRA TSC's rebuttal case, Mr. Payne has not even begun to identify any grounds under which this testimony is not admissible, and thus any such "objections" should be summarily overruled and this pleading stricken.

V. Conclusion and Request for Relief

WHEREFORE, PREMISES CONSIDERED, LCRA TSC respectfully requests that the objections of Point Peak Mountain Resort et al, J17 Ranch and KDCB Garrett Ranch, Ltd., and Robert T. Payne, each directed at portions of LCRA TSC's Rebuttal Testimony, be overruled in their entirety. LCRA TSC also requests all other relief to which it may show itself entitled.

Respectfully submitted,

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²² Interchange Item 912.

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ATTORNEYS FOR LCRA TRANSMISSION
SERVICES CORPORATION

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 pursuant to Order No. 1 on this the 3rd day of February, 2010, by e-mail, facsimile, First-Class, U.S. mail, postage prepaid, overnight delivery, or by hand delivery.

Fernando Rodriguez w/permission
Fernando Rodriguez *gm*