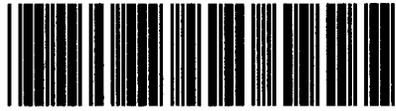




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SOAH DOCKET NO. 473-10-5001
DOCKET NO. 38339

APPLICATION OF CENTERPOINT § PUBLIC UTILITY COMMISSION
ENERGY HOUSTON ELECTRIC, LLC §
FOR AUTHORITY TO CHANGE RATES § OF TEXAS

TEXAS INDUSTRIAL ENERGY CONSUMERS' AMICUS BRIEF REGARDING
DISCOVERY OF EXPERT AND LAY WITNESSES

Texas Industrial Energy Consumers (TIEC) files the following amicus brief in response to the dispute over permissible forms of discovery that may be obtained from witnesses in this proceeding.

THE PRESENT DISCOVERY DISPUTE

On August 3, 2010, City of Houston ("COH") requested that CenterPoint Energy Houston Electric, LLC ("CEHE") provide "for any testifying expert, all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony."¹ On August 16, 2010, CEHE filed objections to this request for information ("RFI") on the basis that it is "unduly broad and burdensome," and responded that it was withholding documents on the basis of the attorney-client and work product privileges.² On August 25, 2010, COH responded with a motion to compel a response to this and other RFIs to which CEHE objected. On September 1, 2010, CEHE filed a response to COH's motion to compel, identifying the documents withheld as "email correspondence with attachments that a company employee sent on behalf of and at the direction of outside counsel." The attachments, according to CEHE, contain a legal memo and AMS metering contracts, with directions to include discussion of those contracts in their testimonies.³ CEHE seeks to shield these documents from discovery on the basis of the attorney work-product privilege.⁴

¹ COH 11-1.

² CEHE's Objections at 1-2.

³ CEHE's Resp. at 2-3.

⁴ *Id.* at 3.

TIEC'S INTEREST IN THE PRESENT DISPUTE

TIEC has a direct interest in the ALJs' determination of this issue.⁵ On August 24, 2010 TIEC propounded discovery on CEHE that contains the same question COH asked CEHE of testifying experts, and also requested that CEHE provide, for all other witnesses "all documents, tangible things, reports, models or data compilations that have been provided to, reviewed by or prepared by or for the witness in anticipation of the preparation of testimony in this proceeding." (Ex. A, TIEC 5-1, 5-3). CEHE's response to COH's motion to compel rests in large part on the argument that certain of its witnesses are "hybrid" witnesses—offering both lay and expert testimony, and that these witnesses are not subject to expert witness discovery afforded by the Texas Rules of Civil Procedure.⁶ TIEC believes CEHE's attempt to shield witnesses who have indisputably offered expert opinions from traditional discovery is improper and should be rejected. Because the ALJs' ruling on the present dispute may impact the outcome of the same or similar dispute TIEC expects to encounter with CEHE, TIEC offers this amicus brief.

DISCUSSION

I. CEHE's employee witnesses are testifying as expert witnesses properly subject to expert discovery.

On the eve of the close of discovery on its direct case, CEHE has belatedly indicated its intent to shield 11 of its witnesses (all who testify on the subject of AMS meter cost recovery) from discovery on the basis that these are "hybrid" witnesses who offer both expert and lay testimony.⁷ CEHE's attempt to create a "hybrid" witness designation—for purposes of shielding them from discovery—is without support in Texas law or Commission precedent. Although there have been instances where a particular witness has been qualified as *both* an expert *and* a lay witness,⁸ TIEC has found no case where that dual (not hybrid) designation shielded the witness from the discovery afforded by the Texas Rules of Civil Procedure on expert witnesses.

⁵ TIEC does not, at this time, take a position on the other discovery disputes between COH and CEHE.

⁶ See CEHE's Resp. at 4-5.

⁷ See *id.* at 4.

⁸ See *e.g.*, *Taylor v. State*, 2006 WL 1649037 at *12 (Tex.App.-Austin 2006, pet. ref'd); *Harnett v. State*, 38 S.W.3d 650 (Tex.App.-Austin 2000, pet. ref'd).

For testimony to be considered lay testimony, it must consist solely of “personal knowledge . . . gained by the perception of fact by the senses of the witness,” *i.e.*, what was “seen, heard, smelled, tasted, touched, or felt,” and opinions rationally based on those perceptions.⁹ Expert opinion testimony, however, consists of opinions based on the witness’s “skill, experience, training, or education.”¹⁰ Courts often describe the line between expert and lay opinion as whether the opinion is “grounded in common knowledge.”¹¹ Opinions grounded in common knowledge are lay opinions. Those which go beyond common knowledge, which consist of “scientific, technical, or other specialized knowledge,” are expert opinions. As shown below, CEHE’s AMS witnesses have not offered testimony based on their sensory perceptions, but rather have offered opinions based on their “skill, experience, training, or education.”

The Expert Testimony of CEHE’s Expert Witnesses

CEHE’s AMS witnesses offer expert opinion testimony. In the course of doing so, they provide a lengthy description of each witnesses’ qualifications. They tout their expertise and training, such as:

- “I have a Bachelor of Science degree in Computer Science, an MBA, and a PhD in Decision Science . . . In the three decades I have worked for CenterPoint Energy companies, I have held a variety of technical support, management, and leadership roles entirely in the information technology realm.”¹²
- “I have a Bachelor of Science in Chemical Engineering and a Master of Science in the Management of Technology, both from the University of Minnesota . . . For much of the past 12 years, I have led many of CenterPoint Energy’s enterprise-wide systems implementations, including the initial SAP implementation in the late-1990s, the SAP implementation in CenterPoint Energy – Minnesota in the early-2000s, and the implementation of SAP’s Customer Care and Systems functionality in 2005 and 2006.”¹³
- “I am a Professional Engineer licensed in the State of Texas. I received a Bachelor of Science degree in Industrial Engineering from Oklahoma State University in 1977 and a Masters of Business Administration with a concentration in Finance from the University of Houston in 1981 . . . I have held numerous positions in various areas within

⁹ *Harnett v. State*, 38 S.W.3d at 658; *see also* TEX. R. EVID. 701.

¹⁰ *See id*; *see also* TEX. R. EVID. 702.

¹¹ *See Taylor v. State*, 2006 WL 1649037 at *8.

¹² Direct Testimony of Dr. Stephen P. Pratt at 1.

¹³ Direct Testimony of Thomas S. Olinger at 1.

CenterPoint Energy Service Company, LLC, including its predecessors and affiliates, since I began my career with the Company in 1977, including Engineering Services, Rates and Economic Research, System Engineering, Corporate Planning, Finance & Property Tax, Financial Services, and Regulatory Affairs.”¹⁴

These paragraphs highlighting the witnesses’ experience and education are provided so that the opinions that follow will appear reliable, because the subject matter upon which they testify is not a matter of common knowledge. Below are quotes taken from the testimony of each of CEHE’s AMS witnesses. As the quotes demonstrate, the opinions expressed are not based on the witnesses’ sensory perceptions:

- “[T]he \$12,586,974 in costs spent during the AMS reconciliation period associated with delivery of the AMS service oriented architecture (“SOA”) and Integrated Operational Support Services (“IOSS”) were reasonable and necessary.”¹⁵
- “my testimony describes why the costs incurred by the Retail Market group are reasonable and necessary and how the \$2,448,739 in Retail Market O&M expenses relate to the approved AMS Deployment Plan”¹⁶
- “My testimony (1) determines the Company’s revenue requirement associated with its revised AMS Deployment Plan, (2) calculates a surcharge designed to recover the revised AMS revenue requirement, and (3) proposes an updated rider AMS.”¹⁷
- “The AMS capital additions, operating expenses, and revenues balances . . . are true and correct and represent the reasonable and necessary costs to complete the project.”¹⁸

As these examples demonstrate, CEHE’s AMS witnesses offer opinions based not on sensory perceptions, but rather *justifications* for the utility’s expenses, and estimates of what future expenses will be. As the numerous charts and graphs that riddle their testimonies demonstrate, these witnesses are offering almost exclusively opinions of a technical nature, that go well beyond matters of common knowledge.

CEHE’s attempt to create a new category of witness, and new discovery rules that would apply to such witnesses, should be rejected. As CEHE admits, it seeks to withhold a legal memo and notes from its attorneys that were provided to the witnesses for the express purpose of

¹⁴ Direct Testimony of Paul D. Gastineau (AMS) at 1.

¹⁵ Direct testimony of Stephen P. Pratt at ES-1.

¹⁶ Direct testimony of Susan J. Neel at 6.

¹⁷ Direct Testimony of Paul D. Gastineau (AMS) at 2.

¹⁸ Direct Testimony of Cherish Loog at ES-1.

preparing their testimonies. Theirs is precisely the kind of testimony for which the Rules of Civil Procedure provide complete discovery.

II. The work product privilege does not apply to communications with witnesses who provide expert testimony.

Discovery of experts is unqualified. However, CEHE attempts to raise two defenses to disclosure of documents provided to its AMS experts: (1) the request is unduly burdensome and (2) work-product privilege protects disclosure. Neither succeed. Regardless of how many documents CEHE has already provided, it has identified relevant documents provided to witnesses who have given expert opinion testimony, and these documents must be disclosed. The Rules do not provide for a document limit. If that were so, companies would always withhold the most potentially damaging documents until the limit was reached. And it is not unreasonable for parties to request that all documents provided to experts be disclosed, given that the Texas Rules of Civil Procedure expressly provide for “all documents . . . that have been provided to . . . the expert in anticipation of a testifying expert’s testimony.”¹⁹

The Texas Rules of Civil Procedure specifically withdraw the protections afforded by the attorney work-product privilege to information provided to experts—no matter how that information was provided.²⁰ The Rules “specifically state that work product loses its protected status when it is provided to a testifying expert”²¹ CEHE complains that COH’s request impermissibly goes beyond documents upon which its experts relied. However, as the Texas Supreme Court has recently noted, the Rules were amended to change the disclosure requirement from “documents relied upon,” to documents “provided to or relied upon” by the expert.²² Indeed, the very purpose of the amended rule was to lessen the number of discovery disputes regarding expert witnesses.²³ Thus, even documents inadvertently provided to a testifying expert

¹⁹ Tex. R. Civ. Proc. 192.3(e)(6).

²⁰ Tex. R. Civ. Proc. 192.3(e)(3), 192.5(c)(1).

²¹ *In re Christus Spohn Hosp. Kleberg* 222 S.W.3d 434 (Tex. 2007).

²² *See id.*

²³ *See id.*

must be disclosed.²⁴ Because CEHE's witnesses are clearly providing expert testimony, all relevant documents provided to those witnesses must be disclosed.

III. Commission precedent requires disclosure of the documents.

Without citing any precedent to support this hybrid category, CEHE notes that its AMS witnesses are not paid experts but instead are fact witnesses who testify based on their experience regarding matters learned in the scope of their employment—as if the witnesses' employment was somehow dispositive of this issue. As the ALJs of course are aware, employee witnesses are routinely and uniformly treated as experts in the subjects upon which they testify in cases before the Commission. For the reasons discussed below, an expert witness designation for the AMS witnesses is not only proper under well-established Commission precedent but is also absolutely necessary to ensure that the Commission has a full record upon which to make its decision.

The Commission has previously addressed the precise issue presented here and found that a company employee who offers opinion testimony of the type offered in this case is an expert witness. Recently, in Docket No. 34077, Oncor Electric Delivery Company asserted that each of its employee witnesses were hybrid witnesses who were not paid experts but instead are fact witnesses who offer opinions based on their employment and experience.²⁵ Oncor sought a determination by the ALJ that these witnesses would not be subject to expert discovery. The ALJ rejected Oncor's suggestion, overruled Oncor's objections, and ordered that discovery on these witnesses could proceed.²⁶

Also, in Docket No. 12700, El Paso Electric Company ("EPE") asserted that its Vice President for Mergers and Acquisitions was a fact witness rather than an expert witness.²⁷ EPE's purpose in seeking this designation was to circumvent expert discovery—including the

²⁴ See *id.* at 444.

²⁵ *Joint Report and Application of Oncor Electric Delivery Company and Texas Energy Future Holdings Limited Partnership Pursuant to PURA § 14.101*, PUC Docket No. 34077, TEF's and Oncor's Joint Response in Opposition to TIEC's Motion to Compel and Alternative Motion for Joinder at 8 (May 17, 2007).

²⁶ See *id.* at Order No. 7 (June 12, 2007).

²⁷ Docket No. 12700, *Application of El Paso Electric Company for Authority to Change Rates and of Central and South West Corporation and El Paso Electric for Approval of Acquisition*, Order No. 16 (Apr. 28, 1994) at 9.

production of otherwise privileged documents upon which the witness based his expert testimony.²⁸ The presiding ALJ in Docket No. 12700 found that the vice president was an expert witness:

The ALJ finds, after reading Mr. King's prefiled testimony, that it includes specialized information and opinions concerning the proposed acquisition that is intended to assist the Commission in understanding the CSW acquisition and determining whether it is in the public interest. Mr. King's expertise in this area appears from his testimony to have been acquired from his special skill, expertise and training. The ALJ therefore concludes that he is an expert witness in the area of mergers and acquisitions of electric utility companies.²⁹

The Commission upheld the ALJ's decision on this point.³⁰

A review of the testimony filed by CEHE's witnesses in this proceeding shows that the ALJs should come to the same conclusion here. The AMS witnesses have all submitted opinion testimony in an attempt to convince the Commission that, based on their experience and expertise, the AMS expenses are reasonable and necessary and should be included in rates. Parties must be allowed to conduct expert discovery on these witnesses pursuant to TEX. R. CIV. P. 192.3(e) in order to provide the Commission with sufficient evidence to evaluate the proper weight to be given these opinions. If CEHE's new "hybrid" designation is adopted, utilities could simply make their testifying experts company employees, and parties would be unable to learn all the bases for their opinions. The Commission has rejected such attempts in the past, and the ALJs should do so here.

CONCLUSION

For the reasons set forth above, CEHE's objections to COH's RFI 11-1 should be overruled and COH's motion to compel should be granted. TIEC also requests all other relief to which it is justly entitled.

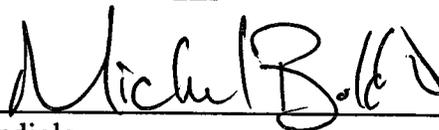
²⁸ Order No. 16 at 16-18.

²⁹ Order No. 16 at 14.

³⁰ Docket No. 12700, Order Upholding Presiding Officers' Order No. 16 (Apr. 28, 1994).

Respectfully submitted,

ANDREWS KURTH LLP

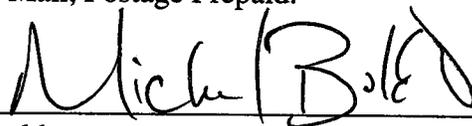


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CERTIFICATE OF SERVICE

I, Michael Boldt, Attorney for TIEC, hereby certify that a copy of this document was served on all parties of record in this proceeding on this 3rd day of September, 2010 by hand-delivery, facsimile, electronic mail and/or First Class, U.S. Mail, Postage Prepaid.



Michael Boldt