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APPLICATION OF WIND ENERGY §
TRANSMISSION TEXAS, LLC TO §
AMEND ITS CERTIFICATE OF §
CONVENIENCE AND NECESSITY FOR §
THE PROPOSED LONG DRAW TO §
SAND BLUFF, SAND BLUFF TO DIVIDE, §
AND SAND BLUFF TO BEARKAT 345- §
KV CREZ TRANSMISSION LINES IN §
BORDEN, COKE, GLASSCOCK, §
HOWARD, MITCHELL AND STERLING §
COUNTIES §

BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

**RESPONSE TO WIND ENERGY TRANSMISSION TEXAS, LLC'S OBJECTIONS AND
MOTIONS TO STRIKE PREFILED DIRECT TESTIMONY OF C. JERRY WONG,
PH.D., P.E.**

Now Comes REED STEWART, ET AL, on whose behalf C. Jerry Wong, Ph.D., P.E., submitted prefiled direct testimony, and makes its response to the objections and motion to strike portions of the testimony of C. Jerry Wong's testimony brought by WIND ENERGY TRANSMISSION TEXAS, LLC ("WETT").

I. General Response

WETT objects to Dr. Wong's testimony primarily on the grounds of relevancy. However, the testimony which is objectionable to WETT as being irrelevant is exactly that type of testimony which the Courts require in making an initial determination of whether or not an expert's testimony is admissible on the reliability factors set forth in E.I. DuPont de Nemours & Co. v. Robinson, 923 S.W. 2d 549 (Tex. 1995). If your Honor strikes the testimony complained of by WETT as irrelevant, then it is likely that further objections to Dr. Wong's testimony brought by WETT on the grounds of "lack of reliability" might be sustained.

A. 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). As stated by the Administrative Law Judge in Order No. 1 in this docket, “[I]f the witness is not an expert, the testimony must be based on the witness’ personal knowledge. See TEX. R. EVID. [(“TRE”)] 602, 701, and 702.”

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 when 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).

Additionally, it is not sufficient that an expert simply be qualified. Even a qualified expert witness may only testify regarding scientific, technical, or other specialized matters if the expert's opinion is relevant, the opinion is reliable, *and* the opinion is based on a reliable foundation. *See* TEX. R. EVID. 702; *Whirlpool Corp. v. Camacho*, 298 S.W.3d 631, 637 (Tex. 2009). Finally, expert testimony should be excluded where "there is simply too great of an analytical gap between the data and the opinion proffered." *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 800 (Tex. 2006).

B. Relevance

Texas Rule of Evidence 401 provides that "relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without evidence. Further, Texas Rule 402 requires that, "Evidence which is not relevant is inadmissible."

C. Expert Testimony

Texas Rule of Evidence 702 provides that "a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."

D. Dr. Wong's Opinion

Dr. Wong gives his opinion as to the use of monopolies in the industry and on the use of monopolies. All of the testimony to which WETT objects either goes to Dr. Wong's knowledge, skill, experience, training or education that allows him to qualify as an expert; or, alternatively, to testimony which is his opinion.

II. WETT's OBJECTIONS

Witness and testimony	Page and line	Testimony objected to	Basis of objection and rule cite	REED STEWART ET AL Response
C. Jerry Wong Direct	P. 7, L. 10 to P. 10, L 2	Discussion of the history of concrete monopoles as it pertains to Florida Power & Light	Relevance. The evolution of FPL's designs have no bearing on the feasibility or cost of WETT's use of concrete monopoles. TRE 401 & 402.	SEE GENERAL RESPONSE ABOVE
C. Jerry Wong Direct	P. 13, L. 20 to P. 14, L. 14	Discussion re: locations where various structures are produced	Relevance. TRE 401 & 402.	SEE GENERAL RESPONSE ABOVE
C. Jerry Wong Direct	P. 15, L17 to P. 16, L 8	Discussion of O & M and lifecycle costs of spun concrete poles of Florida Power & Light	Relevance. FPL's proprietary designs could not be used by WETT, so their lifecycle and costs are not relevant. TRE 401 & 402.	SEE GENERAL RESPONSE ABOVE
C. Jerry Wong Direct	P. 17, L 11 - 19	Discussion of use of spun concrete poles by Florida Power & Light	Relevance. See above. TRE 401 & 402.	SEE GENERAL RESPONSE ABOVE

Witness and testimony	Page and line	Testimony objected to	Basis of objection and rule cite	REED STEWART ET AL Response
C. Jerry Wong Direct	P. 17, L. 20 to P. 18, L. 4	"Although I have not performed any structural design analysis... if WETT performs a life-cycle cost analysis, it will determine that spun concrete poles are in many instances a better option than the latticed tower structure."	Speculation. TRE 602 & 701.	SEE GENERAL RESPONSE ABOVE

Prayer

REED STEWART ET AL respectfully requests that WETT'S Objections and Motion to Strike portions of the expert testimony of Dr. Jerry Wong be overruled and denied, and for any other relief to which it may be entitled.

Respectfully submitted,

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Certificate of Service

I certify that a true and correct copy of the foregoing document was served on all parties of record on this 10th day of February, 2011.

Walter W. Pfluger / sp
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