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SOAH DOCKET NO. 473-21-0538  
PUC DOCKET NO. 51415



APPLICATION OF SOUTHWESTERN §  
ELECTRIC POWER COMPANY FOR §  
AUTHORITY TO CHANGE RATES §

BEFORE THE  
STATE OFFICE OF  
ADMINISTRATIVE HEARINGS

**SOUTHWESTERN ELECTRIC POWER COMPANY'S**  
**OBJECTION AND MOTION TO STRIKE THE TESTIMONY OF DEVI GLICK**  
**ON BEHALF OF SIERRA CLUB**

Southwestern Electric Power Company (SWEPCO or Company) objects to the direct testimony of witness Devi Glick on behalf of Sierra Club. State Office of Administrative Hearings (SOAH) Order No. 2 in this docket established that objections to Intervenor direct testimony must be filed within seven working days of receipt of that testimony. Ms. Glick's testimony was filed on March 31, 2021; therefore, this pleading is timely filed.

**I. OBJECTIONABLE TESTIMONY**

SWEPCO objects to and moves to strike the entirety of Section 5 of Devi Glick's testimony offered on behalf of Sierra Club, which is located at page 29, line 1 through page 40, line 14 of her testimony. This portion of Ms. Glick's testimony should be stricken because it is irrelevant, does not bear on a fact of consequence at issue in this case, and is beyond the scope of this proceeding. Moreover, the time and expense that will be spent by SWEPCO to rebut this testimony and by SOAH and the Commission to consider this impertinent issue is unwarranted. As explained below, this portion of Ms. Glick's testimony should be excluded from evidence in this proceeding.

## II. OBJECTION AND MOTION TO STRIKE

### A. Section 5 of Dev Glick’s testimony is irrelevant, does not bear on a fact of consequence at issue in this case, but pertains to capital investment that will be reviewed in a future case.

Evidence is relevant when “it has a tendency to make a fact more or less probable than it would be without the evidence, and the fact is of consequence in determining the action.”<sup>1</sup> When analyzing relevance, courts consider “the purpose of offering the evidence” and evaluate whether a connection exists between “the fact offered and the fact to be proved.”<sup>2</sup>

Applied here, the apparent purpose of Ms. Glick’s testimony, at Section 5, is to challenge the Company’s decision to retrofit Flint Creek to meet Effluent Limitation Guidelines (ELG) and Coal Combustion Residuals (CCR) compliance requirements.<sup>3</sup> Ms. Glick asserts the decision and the capital investments related to it are imprudent.<sup>4</sup> In particular, Ms. Glick alleges that SWEPCO “is imprudently investing \$26.8 million to retrofit Flint Creek to extend the life of the plant beyond 2028.”<sup>5</sup> In her testimony though, she recognizes these projects are in the preliminary engineering and design phase and are to be completed by November 30, 2022 and February 28, 2023.<sup>6</sup> As such, her testimony concerns the estimated costs for the projects of \$26.8 million, and of that sum she asserts approximately \$17.3 million could be avoided by a decision to instead retire the Flint Creek plant.<sup>7</sup>

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<sup>1</sup> See Tex. R. Evid. 401 (a)-(b).

<sup>2</sup> See *Estate of Little*, 05-18-00704-CV, 2019 WL 3928755, at \*5 (Tex. App.—Dallas Aug. 20, 2019, pet. denied) (mem. op.) (describing the relevancy test) (citing *Rhey v Redic*, 408 S.W.3d 440, 460 (Tex. App.—El Paso 2013, no pet.); *Rehant Energy Servs., Inc v. Cotton Valley Compression, LLC*, 336 S.W.3d 764, 793 (Tex. App.—Houston [1st Dist ] 2011, no pet )).

<sup>3</sup> Direct Testimony of Devi Glick at 29 (Mar. 31, 2021).

<sup>4</sup> *Id.* at 29-40

<sup>5</sup> *Id.* at 29.

<sup>6</sup> *Id.* at 30.

<sup>7</sup> *Id.*

Significantly, however, there is no connection between Ms. Glick’s purpose for offering this testimony and proof of any fact of consequence in this proceeding. SWEPCO’s application in this case is based on its historical test year ending on March 31, 2020. As demonstrated by the information referenced in Section 5 of Ms. Glick’s testimony, the capital investment for these projects will begin to be placed in service in 2021, well after the end of the historical test year period.<sup>8</sup> Such investment is not being reviewed in this proceeding, nor is it pertinent in any way to the outcome of this base rate case.<sup>9</sup>

Section 5 of Ms. Glick’s testimony is simply beyond the scope of this proceeding. Ultimately, SWEPCO’s decision to retrofit Flint Creek and any associated investment towards that end will be reviewed in a future case—when SWEPCO requests to include such investment in its rate base. Because the capital investment this testimony addresses is not being reviewed in this case, the prudence challenge concerning the decision to retrofit Flint Creek has no tendency to make any fact at issue *in this case* more or less probable than it would be without the testimony—nor is the information or testimony offered of any consequence in determining this action. As such, this testimony is patently irrelevant. As irrelevant testimony is not admissible, this testimony should be stricken.<sup>10</sup> Accordingly, SWEPCO moves to strike Section 5 of Ms. Glick’s testimony.

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<sup>8</sup> *Id.* at 30, n. 60 (citing SWEPCO Response to Sierra Club Request 1-9, Attachment 1).

<sup>9</sup> “But to be admissible, evidence must be relevant to the issues presented in the case.” *Estate of Little*, 2019 WL 3928755, at \*5 (citing *City of Harlingen v Estate of Sharboneau*, 48 S.W.3d 177, 186 (Tex. 2001)). SWEPCO notes that only invested capital that has been placed in service is being reviewed in this case for inclusion in rate base. While some CCR/ELG capital expenditures were made prior to 2021, such expenditures represent Construction Work In Progress (CWIP) until placed in service. The inclusion of CWIP in rate base is “an exceptional form of rate relief” (16 TAC § 25.231(c)(2)(D)) that is not being requested in this case.

<sup>10</sup> Tex. R. Evid. 402 (“Irrelevant evidence is not admissible.”). There is no need to consider irrelevant testimony. “Irrelevant evidence, even when admitted without objection, will not support a judgment.” *Henderson v Spann*, 367 S.W.3d 301, 304 (Tex. App.—Amarillo 2002, pet. denied) (determining admission of irrelevant evidence was abuse of discretion and probably led to rendition of improper verdict).

Finally, consideration of this irrelevant testimony is unwarranted and would constitute a waste of SOAH and the Commission's finite resources.<sup>11</sup> Similarly the Company should not be required to expend additional time and effort rebutting testimony that is clearly beyond the scope of this proceeding.

### III. CONCLUSION

SWEPSCO respectfully requests its objections to Ms. Glick's testimony be sustained in all respects and that its motion to strike Section 5 of Ms. Glick's testimony be granted. SWEPSCO requests any such other relief it is shown to be justly entitled.

Respectfully submitted,

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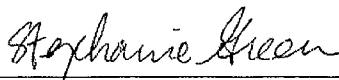
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**AMERICAN ELECTRIC POWER SERVICE  
CORPORATION**

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<sup>11</sup> *Cf. Milliken v. Grigson*, 986 F. Supp. 426, 432 (S.D. Tex. 197), *aff'd* 158 F.3d 583 (5th Cir. 1998) ("Requiring the Court to sift through such irrelevant material creates an intolerable waste of judicial resources.").

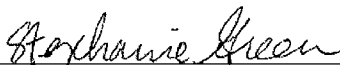
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**CERTIFICATE OF SERVICE**

I certify that, unless otherwise ordered by the presiding officer, notice of the filing of this document was provided to all parties of record via electronic mail on April 9, 2021, in accordance with the Second Order Suspending Rules issued in Project No. 50664 and Order No. 1 in this matter.

  
Stephanie Green