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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 RESPONSE TO SIERRA CLUB'S MOTION FOR RECONSIDERATION, OR IN THE ALTERNATIVE, APPEAL OF SOAH ORDER NO. 7

Southwestern Electric Power Company (SWEPCO) understands that no Commissioner has voted to add Sierra Club's Appeal to an open meeting agenda. It is out of an abundance of caution, that SWEPCO files this response to Sierra Club's Motion for Reconsideration, or in the Alternative, Appeal of SOAH Order No. 7. Sierra Club's motion for reconsideration or appeal of SOAH Order No. 7 is not authorized under the Commission's rules or precedent and should be denied on that basis alone. Additionally, the substantive arguments Sierra Club presents have already been thoroughly considered and rejected by the ALJs in this case and any appeal should be rejected for the same reasons set forth in SOAH Order No. 7. Finally, because Sierra Club has a remedy available to it in this contested case, its due process claim is also fundamentally flawed and should be rejected.

I. PROCEDURAL BACKGROUND

On April 9, 2021, SWEPCO filed an objection and motion to strike Section 5 of Sierra Club witness Devi Glick's testimony.[1] SWEPCO objected to this portion of testimony and moved that it be struck on the grounds that it is irrelevant, does not bear on a fact of consequence at issue in this case, and is beyond the scope of this proceeding. The objectionable testimony challenged

[1] Southwestern Electric Power Company's Objection and Motion to Strike the Testimony of Devi Glick on Behalf of Sierra Club (Apr. 9, 2021) (hereinafter "Motion to Strike").

SWEPCO's decision to retrofit Flint Creek to meet Effluent Limitation Guidelines (ELG) and Coal Combustion Residuals (CCR) compliance requirements.[2] Ms. Glick asserted that decision and the capital investments related to it are imprudent.[3] As her testimony acknowledged though, these projects are in the preliminary engineering and design phase and are to be completed by November 30, 2022 and February 28, 2023.[4] As such, this testimony concerns *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.[5] Little of this cost has even been incurred yet and none of it is pertinent to this case. Under the Commission's cost of service rule, rates are based on an electric utility's cost of rendering service to the public during a historical test year, adjusted for known and measurable changes.[6] Sierra Club has not shown that the actual and estimated Flint Creek costs addressed by Ms. Glick's testimony struck by the ALJs are relevant to this case under the Commission's rule.

Importantly, SWEPCO's application in this case is based on its historical test year ending on March 31, 2020. As the information referenced in Section 5 of Ms. Glick's testimony shows, 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.[7] Accordingly, such investment is not being reviewed in this proceeding, nor is it pertinent in any way to the outcome of this base rate case.[8]

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[2] Direct Testimony of Devi Glick at 29 (Mar. 31, 2021).

[3] *Id.* at 29-40. In particular, she alleges that SWEPCO "is imprudently investing $26.8 million to retrofit Flint Creek to extend the life of the plant beyond 2028." *Id.* at 29.

[4] *Id.* at 30.

[5] *Id.*

[6] 16 Tex. Admin. Code (TAC) § 25.231(a).

[7] Motion to Strike at 3.

[8] *Id.*

Sierra Club filed a lengthy response to SWEPCO's motion on April 16, 2021. Thereafter, on April 19, 2021, the ALJs issued an order requiring SWECO file a reply to Sierra Club's response.[9] SWEPCO filed its reply on April 23, 2021.[10] Sierra Club then sought leave to file a surreply and filed a surreply on April 26, 2021.[11] The ALJs granted Sierra Club's motion for leave and accepted its surreply.[12]

Accordingly, the ALJs considered the motion, response, reply, and surreply in their decision to grant SWEPCO's motion to strike Section 5 of Devi Glick's testimony. The ALJs concluded the amounts Sierra Club referred to as supporting its proposition that SWEPCO was seeking costs associated with its decision to retrofit Flint Creek were classified as CWIP "and had not been moved to SWEPCO's rate base as a capital item before the end of the test year."[13] After concluding that SWEPCO is not seeking to recover, nor will it be allowed to recover, any Flint Creek ELG/CCR retrofit costs in this case, the ALJs determined the prudence challenge raised in Section 5 of Devi Glick's testimony is not ripe for consideration in this case and granted SWEPCO's motion to strike.[14]

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[9] SOAH Order No. 6 Requiring SWEPCO to reply to Sierra Club's Response at 1 (Apr. 19, 2021) (noting, "On April 16, 2021, Sierra Club filed a 20-page response to SWEPCO's Motion (Sierra Club's Response). Among other things, Sierra Club alleges that SWEPCO incurred $401,396 in capitalized expense during the test year applicable to this case related to the Flint Hills retrofit.").

[10] Southwestern Electric Power Company's Reply to Sierra Club's Response to Motion to Strike Testimony (Apr. 23, 2021).

[11] Sierra Club's Motion for Leave to File a Surreply to SWEPCO's Motion to Strike Testimony (Apr. 26, 2021).

[12] SOAH Order No. 7 Granting Leave to File Surreply; Granting Objection and Motion to Strike a Section of Sierra Club's Direct Testimony at 4 (Apr. 27,2021).

[13] *Id.* at 5.

[14] *Id.* Additionally, the ALJ's found that SWEPCO's decision to retrofit Flint Creek was made after the end of the test year. *Id.* The ALJs also determined that Sierra Club's alternative proposal for an almost $10 million disallowance lacked support. *Id.* Finally, the ALJs recognized that this ruling would not prevent Sierra Club from raising its prudence challenges of the Flint Creek retrofit when the issue is properly before the Commission. *Id.* at 5-6.

II. INTERIM EVIDENTIARY RULINGS CANNOT APPEALED

A. Sierra Club's Appeal is procedurally improper

Under the Commission's rules, interim appeals of evidentiary orders are prohibited. "Appeals are available for any order of the presiding officer that immediately prejudices a substantial or material right of a party, or materially affects the course of the hearing, ***other than evidentiary rulings***."[15] SOAH Order No. 7 is an evidentiary ruling on SWEPCO's motion to strike Section 5 of Devi Glick's Testimony because it excludes as inadmissible that testimony on the grounds that it is irrelevant to any issue within the scope of this proceeding.[16] It is well established that a ruling on a motion to strike testimony is a non-appealable evidentiary ruling.[17] Parties have

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[15] *See* 16 TAC § 22.123(a)(1) (emphasis added).

[16] *See* 16 TAC § 22.225 (b) ("Written testimony shall be subject to the same evidentiary objections as oral testimony."); *see also id.* at § 22.221(a) (applying the Texas Rules of Evidence to contested cases). SOAH Order No. 7 expressly addresses an evidentiary objection lodged at the testimony of Sierra Club witness Devi Glick.

[17] *Application of Texas-New Mexico Power Co. for Authority to Change Rates and Application of Texas-New Mexico Power Company for Deferred Accounting Treatment for TNP One—Unit Two*, Docket Nos. 10200 and 10034, Order No. 14 at 4 (June 7, 1991) (explaining that under the PUC procedural rules, "evidentiary rulings are not appealable to the Commission pending issuance of the Examiner's Report"); *Application of Texas Utilities Electric Co. for Approval of Demand-Side Management Programs, Renewable Resources Agreement, and Requests Regarding Cost Recovery Mechanisms, and other Relief,* Docket No. 13575, Order No. 26 at 3 (March 4, 1996) (noting "interim appeals to the Commission are not available regarding an ALJ's evidentiary rulings" and citing rule); *Application of Entergy Texas for Approval of its Transition to Competition Plan and the Tariffs Implementing the Plan, and for Authority to Reconcile Fuel Costs, to Set Revised Fuel Factors, and to Recover a Surcharge for Underrecovered Fuel Costs*, Docket No. 16705, Supplemental Proposal for Decision at 42 (March 27, 1998) (regarding motion to strike portions of testimony "Cities recognized the import of this evidentiary ruling . . . filing an appeal which was deemed denied after ten days passed and the Commissioners had not placed the appeal on an open meeting agenda. *See* P.U.C. Proc. R. 22.123(g).").

long been admonished that interim appeals are not available for such rulings.[18] Orders addressing motions to strike are often clearly identified as evidentiary rulings.[19]

Such rulings cannot be appealed on interim basis and rightly so. The administrative burden and inefficiency that would ensue if all orders addressing evidentiary matters were immediately appealable to the Commission is incalculable. Pursuant to the Commission's rules, "Interim orders shall not be subject to exceptions or application for rehearing prior to the issuance of a proposal for decision."[20] In contested cases, evidentiary objections raised prior to the hearing are addressed in the same way as those addressed during the hearing.

Sierra Club's assertion that an inability to immediately appeal this evidentiary ruling raises a due process concern that precludes it from presenting argument and evidence on each issue involved in the case is misguided. What Sierra Club is entitled to do to preserve its objection to the exclusion of this evidence is explicitly addressed by the Commission's rules. Sierra Club must

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[18] *Application of Central and South West Corp. and American Electric Power Co., Inc. Regarding Proposed Business Combination*, Docket No. 19265, Order No. 58 Ruling on Motions to Strike Intervenor Testimony at 3 (Aug. 3, 1999) ("Parties are reminded that this order represents evidentiary rulings and these rulings are not set to appeal to the Commission.").

[19] *Joint Report and Application of Texas-New Mexico Power Company, NM Green Holdings, Inc., and Avangrid, Inc. for Regulatory Approvals Under PURA §§ 14.101, 39.262 and 39.915*, Docker No. 51547, Order No. 9 Notice of Prehearing Conference , Establishing Procedures and Guidelines for the Prehearing Conference and Exhibits, and Setting Deadlines at 1 (Mar. 12, 2021) ("Additionally, the parties should be prepared to discuss any outstanding motions, *evidentiary matters, including objections or motions to strike testimony and rebuttal testimony*, and any other matters that may assist in the disposition of this proceeding in a fair and efficient manner.") (emphasis added); *Application of Rio Concho Aviation, Inc. for a Rate/Tariff Change*, Docket No. 45720, Order No 5 Ruling on Staff Evidentiary Objections at 1 (Aug. 24, 2016) (ruling on objections and motion to strike testimony); *Notice of Violation by Freedom Group, LLC, d/b/a Freedom Power, of PURA §§ 39.101(h) and 39.151(j) and P.U.C. Subst. R. 25.483 and 25.485* Docket No. 33138 Order Granting Motion to Strike and Evidentiary Ruling on Objections to Testimony of Lauren Damen at 1 (Mar. 2, 2007)(granting motion to strike).

[20] 16 TAC § 22.123(a)(1).

make an offer of proof "prior to the close of the hearing" as provided by 16 TAC § 22.227.[21] The rule cautions this is necessary to avoid "waiver of any objection to the exclusion of the testimony or documentary evidence in question."[22] Preservation of the issue permits Sierra Club to present its objection to the Commission when it rules upon the Proposal for Decision.[23] In a contested case, evidence may be excluded on the basis that it is irrelevant or immaterial, but a party may raise an objection to that exclusion and it will be noted in the record.[24] Therefore, Sierra Club has a proper remedy in this proceeding and may pursue its objection at the proper time. Accordingly, Sierra Club's appeal should be denied.

III. THE APPEAL IS WITHOUT MERIT

A. The disputed testimony is irrelevant to the resolution of issues in this 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."[25] When analyzing relevance, courts consider "the purpose of offering the evidence" and evaluate whether

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[21] 16 TAC § 22.227 provides as follows: "When the presiding officer excludes testimony or documentary evidence, the party offering the excluded material shall be permitted to make an offer of proof prior to the close of the hearing. The party may make the offer by dictating into the record or submitting in writing the substance of the proposed testimony or by tendering the documentary evidence for inclusion in the record. Except for cross examination concerning matters relating to the admissibility of the testimony or documentary evidence, cross examination on offers of proof shall be deferred until such time, if any, that the testimony is admitted into evidence. The presiding officer may direct that offers of proof be transcribed separately. Failure to make an offer of proof may constitute a waiver of any objection to the exclusion of the testimony or documentary evidence in question."

[22] *Id. See also* Tex. Gov't Code § 2001.060 (providing that the record in a contested case includes among other things offers of proof).

[23] 16 TAC § 22.123(a)(1) "Interim orders shall not be subject to exceptions or application for rehearing prior to the issuance of a proposal for decision."

[24] *See* Tex. Gov't Code § 2001.082 (concerning exclusion of evidence); *id.* at § 2001.084 (stating objection may be made to exclusion of evidence and noted in the record).

[25] *See* Tex. R. Evid. 401 (a)-(b).

a connection exists between "the fact offered and the fact to be proved."[26] As SWEPCO has repeatedly explained, the decision to retrofit Flint Creek was made outside the historical test year and the related expenditures that Sierra Club seeks to challenge are not being reviewed or recovered in this case. The costs incurred to date is CWIP and is therefore not includable in SWEPCO's cost of service under 16 Tex. Admin. Code § 25.231(c)(2)(D).[27] Therefore, Sierra Club's prudence challenge on this issue is not ripe for consideration here but should be raised in a future proceeding where such costs and investments are actually before the Commission. Because the prudence issue Sierra Club raises is beyond the scope of this proceeding, its claim that it has been denied its right "to respond and to present evidence and argument on each issue ***involved in the case***" is mistaken.[28]

Sierra Club's attempt to tether the stricken testimony to preliminary order issues 15, 24, and 44 is also unavailing.[29] The only way Sierra Club can tie those issues to its prudence challenge is to ignore entirely SWEPCO's requests for relief and to interpret the scope of this contested base rate case to include not only the investments and expenses the utility has expressly sought to include in rate base and recover in this case—but also to extend to any investments and costs not being reviewed or requested for inclusion in rate base for recovery in rates. Such an interpretation of the preliminary order issues is unreasonable and untenable. Based on the contents of

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[26] *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.); *Reliant Energy Servs., Inc. v. Cotton Valley Compression, LLC*, 336 S.W.3d 764, 793 (Tex. App.—Houston [1st Dist.] 2011, no pet.)).

[27] *See* SOAH Order No. 7 at 5 ("The ALJs conclude that the $401,396 referenced in Section 5 of Ms. Glick's testimony and her Exhibit DG-3 is classified as CWIP, and had not been moved to SWEPCO's rate base as a capital item before the end of the test year").

[28] Sierra Club's Motion for Reconsideration, or in the alternative, Appeal of SOAH Order No. 7 at 6 ("Motion for Reconsideration") (quoting Tex. Gov't Code § 2001.051) (emphasis added).

[29] *Id.* at 3-4. Issue No. 15 asks about SWEPCO's invested capital that has not been previously subjected to a prudence review by the Commission, Issue 24 asks what SWEPCO's reasonable and necessary O&M expenses are, and Issue 44 asks if any of SWEPCO's expenditures are unreasonable, unnecessary, or not in the public interest.

SWEPCO's motion, Sierra Club's response, and the replies of SWEPCO and Sierra Club, SOAH Order No. 7 correctly decided that Section 5 of Devi Glick's testimony was not germane to this case and not relevant to the matters to be decided in this proceeding.

B. SOAH Order No. 7 correctly decided the evidentiary objection at issue

Sierra Club's contention that the evidentiary ruling in SOAH Order No. 7 decides ultimate issues of law and fact is wrong.[30] The ultimate issue of fact and law that Sierra Club refers to and that is the subject of Section 5 of Devi Glick's testimony is the prudence of SWEPCO's decision to retrofit the Flint Creek plant in compliance with CCR and ELG requirements.[31] That decision, and any associated capital investment or future capital investment to implement that decision, is not being reviewed in this case.[32] As a result, Ms. Glick's testimony does not bear on an ultimate issue of law and fact in this proceeding. Moreover, the evidentiary ruling in Order No. 7 simply reflects a determination on the scope of the current proceeding not a decision on the merits of an issue.[33]

Sierra Club also claims they have been precluded from presenting evidence on the Flint Creek CCR and ELG related investment, which it asserts, "the Company indisputably seeks to recover in rates."[34] This contention is baseless, has been consistently refuted by SWEPCO, and was squarely rejected in Order No. 7. There are no Flint Creek CCR/ELG investment projects included in SWEPCO's request for recovery in rates. These costs will be reviewed in a future proceeding after these projects are put into service. At no point has Sierra Club been foreclosed

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[30] *Id.* at 7-11.

[31] SWEPCO's Reply to Sierra Club's Response at 3-5.

[32] SOAH Order No. 7 at 5.

[33] Separately, Sierra Club's contention that SOAH Order No. 7 is somehow based on counsel's arguments rather than the ALJs review and understanding of the dispute based on the schedules and evidence cited in the motion and subsequent filings is unwarranted. Motion for Reconsideration at 9.

[34] Motion for Reconsideration at 2, 11-13.

from raising issues germane to this proceeding and testing or rebutting the testimony of other witnesses or developing its case within the scope of this proceeding.[35] Sierra Club has not been prejudiced or deprived of any process it is due in this proceeding.[36] As explained above, it has a remedy to challenge the evidentiary ruling it opposes provided it employs the procedures applicable to this contested case. Moreover, it has not demonstrated a violation of its substantive rights.[37] Sierra Club continues to be able "to respond and to present evidence and argument on each issue involved in the case," which is precisely what it is entitled to do.[38] The ALJs simply precluded Sierra Club from presenting irrelevant testimony concerning an issue that is outside the scope of this case.

Finally, it is simply untrue that SOAH Order No. 7 "strips the Commission of its authority to protect customers from SWEPCO's decision to effectively lock its customers into $26.8 million in . . . retrofits at Flint Creek."[39] Again, customers will not be paying any sum towards the Flint Creek retrofit *prior* to the investment being placed into service and the Commission's review and approval of such inclusion in a future case. The evidentiary ruling on the admissibility of evidence

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[35] Sierra Club makes the misleading statement that "SWEPCO has now filed rebuttal testimony directly responding to Sierra Club's [stricken] evidence." Appeal at 14. While SWEPCO did file the rebuttal testimony of Mark A. Becker to refute the assertions and recommendations of Sierra Club's witness Devi Glick, with respect to the portion of testimony that was struck in SOAH Order No. 7, SWEPCO has indicated that consistent with the order's ruling it has no intent to offer that testimony into evidence at the hearing. *See, e.g.*, Objection to Sierra Club's Sixth Request for Information at 4 (May 6, 2021) ("Accordingly, and consistent with this order, SWEPCO does not intend to offer Section IV of Mr. Becker's testimony into evidence.").

[36] *Madden v. Tex. Bd. of Chiropractic Exam'rs*, 663 S.W.2d 626-27 (Tex. App.—Austin 1983, writ ref'd n.r.e.) ("To be meaningful, 'notice' and 'hearing' require previous notice and a hearing relative to the issues of fact and law which will control the result to be reached."). "The basic elements of due process at the agency level are notice, hearing and an impartial trier of facts." *Geeslin v. State Farm Lloyd's*, 225 S.W.3d 786, 802 (Tex. App.—Austin 2008, no pet.) (citation omitted).

[37] *City of Corpus Christi v. Pub. Util. Comm'n*, 51 S.W.3d 231, 262 (Tex. 2001) (due process deprivation entails a showing of harm related to the procedures afforded).

[38] Tex. Gov't Code § 2001.051.

[39] Motion for Reconsideration at 13-14.

at the hearing, which is still subject to a procedurally proper challenge, does not in any way hamper or impede the Commission's regulatory authority.

IV. CONCLUSION

SWEPCO respectfully requests that Sierra Club's Motion for Reconsideration, or in the alternative, Appeal of SOAH Order No. 7 be denied. SWEPCO requests any such other relief it is shown to be justly entitled.

Respectfully submitted,

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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 May 14, 2021, in accordance with the Second Order Suspending Rules issued in Project No. 50664 and Order No. 1 in this matter.

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