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NOTICE OF VIOLATION BY OCI ALAMO 1 LLC FOR VIOLATIONS OF 16 TAC § 25.55 CONCERNING WINTER WEATHER PREPAREDNESS REPORTING REQUIREMENTS	§ § § § § §	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

OCI ALAMO 1 LLC's OBJECTIONS AND
MOTION TO STRIKE TESTIMONY OF JEFFREY WIRTH

COMES NOW OCI ALAMO 1 LLC (OCI) and files these objections to, and motion to strike, portions of the direct testimony of Commission Staff witness Jeffrey Wirth.

I. ARGUMENT

A. Unqualified, Improper Legal Opinion

OCI objects to each and every statement in Jeffrey Wirth's testimony that consists of his legal opinion, arguments, and conclusions, which are impermissible and inadmissible under Texas Rule of Evidence 702. "Statutory construction is a question of law for the court to decide."[1] Thus, under Rule 702:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise **if the expert's** scientific, technical, or other **specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.**

"An expert witness may not testify regarding an opinion on a pure question of law."[2] Thus, even if Mr. Wirth were qualified as an expert, he is prohibited from testifying directly to his understanding of the law—he may only apply legal terms to his factual understanding of the factual matters in issue.[3]

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[1] *Tex. DOT v. Needham*, 82 S.W.3d 314, 318 (Tex. 2002).

[2] *Upjohn Co. v. Rylander*, 38 S.W.3d 600, 611 (Tex. App.—Austin 2000, pet. denied).

[3] *Greenberg Traurig of N.Y., P.C. v. Moody*, 161 S.W.3d 56, 94 (Tex. App—Houston [14th Dist.] 2004, no pet.).

The stated purpose of Mr. Wirth's direct testimony is "to present *expert opinion* as to the reasonableness and appropriateness of the recommended administrative penalty amount to be assessed against [OCI] for violations" of winter weather readiness report (WWRR) deadlines.[4] While an expert may be entitled to share expert opinion on the reasonableness and appropriateness of the penalty in this proceeding by applying legal terms to his *factual* understanding of the *factual matters* at issue, any and all testimony that exceeds that bound should be stricken because it constitutes no evidence as a matter of law.

The portions of Jeffrey Wirth's direct testimony that constitute nothing other than his legal opinion, legal argument, or legal conclusion are as follows (in each instance, bold emphasis added):

- Section III, page 4, lines 11-19 (opining on PURA's legal grant of authority):

> "Because violations of 16 TAC § 25.55(c)(2) are violations of provisions adopted under the authority of PURA § 35.0021, **violations of 16 TAC § 25.55(c)(2) are subject to a maximum administrative penalty of $1,000,000 per violation per day**.
>
> **Based on my review of** the underlying information forming the basis of Commission Staff's NOV and **the authority granted to the Commission by PURA § 15.023(b-1)**, the maximum administrative penalty authorized against [OCI] for its initial December 1, 2021 violations of 16 TAC § 25.55(c)(2) is $2,000,000, or $1,000,000 per resource."

- Section III, page 5, lines 8-9, 16-18, 23-26 (opining on the scope, extent, and import of PURA's grant of authority):

> "**Therefore, 16 TAC § 25.8(c) made clear that PURA § 15.023(b-1) should be applied** in this matter, **and establishes** a maximum administrative penalty amount of $1,000,000 per violation per day.
>
> . . . **In my opinion**, because the initial violation involved a provision of PURA § 35.0021, **it was subject to the authority granted under PURA § 15.023(b-1).** The violation would be considered a separate violation under 16 TAC § 25.8(c) under the version of the rule that existed at the time the NOV was filed.

[4] Wirth Direct at 2:14-25.

. . . **In my opinion**, to the extent the violations are analyzed under the current version of the rule, rather than the version of the rule that existed at the time the NOV was filed, **the violations would, as of March 17, 2022, be considered Class A violations subject to a maximum penalty of $1,000,000 per violation per day.**"

- Section IV, page 6, lines 6-20 (opining on PURA's grant of authority and the scope of 16 TAC §25.8(c)):

"**Based on the statutory authority provided under PURA § 15.023(b-1), the maximum penalty that may be assessed for [OCI]'s continuing violations of 16 TAC § 25.55(c)(2) would be** $13,000,000: $1,000,000 for each of the six days from December 2, 2021 through December 7, 2021 that [OCI] failed to submit the WWRR for OCI_ALM1-UNIT1, and $1,000,000 for each of the seven days between December 2, 2021 and December 8, 2021 that [OCI] failed to submit the WWRR for OCI_ALM1-ASTRO1. When calculated along with the $2,000,000 maximum penalty for [OCI]'s initial violations, the total maximum administrative penalty that may be assessed against [OCI] for its violations of 16 TAC § 25.55(c)(2) is $15,000,000.

. . . As described above with respect to the initial violations, **in my opinion, a violation of 16 TAC § 25.55 would be captured by 16 TAC § 25.8(c)** because it is a violation of a provision adopted under the authority of PURA § 35.0021 and therefore is subject to the authority set out in PURA § 15.023(b-1)."

- Section IV, page 7, lines 2-6, 10-13 (opining on the scope of authority granted by PURA and the meaning of 16 TAC §25.8):

"**In my opinion**, because the continuing violations involved a provision of PURA § 35.0021, **they were subject to the authority granted under PURA § 15.023(b-1)**. The violation would be considered a separate violation under 16 TAC § 25.8(c) under the version of the rule that existed at the time the NOV was filed.

. . . **In my opinion**, to the extent the violations are analyzed under the current version of the rule, rather than the version of the rule that existed at the time the NOV was filed, **the violations would now be considered Class A violations** subject to a maximum penalty of $1,000,000 per violation per day."

- Section V, page 7, lines 19-23 (opining on the scope of applicability of PURA):

"Because 16 TAC § 25.55(c)(2) was adopted under PURA § 35.0021, **based on the plain language of the statute, I believe that PURA § 35.0021(g) applies** to a violation of 16 TAC § 25.55(c)(2) to the extent that it would require the Commission to impose an administrative penalty if a violation of 16 TAC § 25.55(c)(2) is not remedied within a reasonable time."

- Section V, page 8, lines 5-16, 19-24, and page 9, lines 1-2 (opining on the legal meaning of "remedy" and scope and meaning of PURA §35.0021(g)):

> "**It is my opinion that the late submission of the missing WWRRs did not remedy [OCI]'s initial violations of 16 TAC § 25.55(c)(2) because late submission cannot retroactively remedy the fact that [OCI] missed the December 1, 2021 submission deadline**, or the fact that the information provided in the WWRRs was not available to the Commission or ERCOT on the date required. The December 1, 2021 submission deadline was a one-time deadline which, once missed, cannot be remedied.
>
> **Therefore, because PURA § 35.0021(g) requires the Commission to impose administrative penalties for violations that are not remedied within a reasonable timeframe, and because an initial failure to meet the deadline established under 16 TAC § 25.55(c)(2) cannot be remedied, in my opinion, PURA § 35.0021(g) applies and requires the Commission to impose an administrative penalty for [OCI]'s initial violations of 16 TAC § 25.55(c)(2).**
>
> . . . **In my opinion**, [OCI]'s late submission remedied the continuing violations for the purpose of PURA § 35.0021(g) in a reasonable time, but **I do not interpret PURA § 35.0021(g) in a way** that prohibits the Commission from imposing administrative penalties for the remedied violations. Rather, **it is my opinion that**, while PURA § 35.0021(g) requires the Commission to impose penalties related to violations that have not been remedied in a reasonable time, it does not prohibit the Commission from imposing penalties for violations that have been remedied in a reasonable time if otherwise authorized by another rule or statute."

- Section VI, page 9, lines 13-27 (opining on the legal meaning of "remedy" and the scope and meaning of PURA § 15.024):

> "**For PURA § 15.024(c) to apply to a violation of 16 TAC § 25.55(c)(2), the violation must, in the first instance, be remediable**. If a person is unable to remedy the violation, then PURA § 15.024(c) cannot be applied. **As I previously testified, in my opinion, [OCI]'s initial violations were not remediable**, but the continuing violations were remediable.
>
> Next, **based on the plain language of PURA § 15.024(c), it is my understanding** that the Commission is authorized to impose an administrative penalty for a violation of 16 TAC § 25.55(c)(2) that has been remedied within 30 days if the person alleged to have committed the violation has not proven that the violation was accidental or inadvertent. If the person has not proven that the violation was accidental or inadvertent, PURA § 15.024(c) cannot be applied. To my knowledge, [OCI] has not provided any evidence to date that proves the continuing violations were accidental or inadvertent. . . .
>
> Therefore, **I believe PURA § 15.024(c) can generally be applied to violations of 16 TAC § 25.55(c)(2)**, yet the specific circumstances and nature of a violation will determine whether the statute is applicable in that specific case."

- Section VI, page 10, lines 4-18, 25-26, and page 11, lines 1-4 (opining on the legal meaning of "remedy" and scope and meaning of PURA §§ 15.024 and 35.0021):

> **As stated above, I do not believe that the late submission of the WWRRs after December 1, 2021 can retroactively remedy the initial failure to meet the submission deadline. Rather, in my opinion**, the late submission of the WWRRs after December 1, 2021 stops the continuing violation. **Because I do not believe the initial violations are remediable, it is my opinion that** the late submission of the WWRRs does not remedy the initial violations of 16 TAC § 25.55(c)(2) under PURA § 15.024(c).
>
> Conversely, **it is my opinion that** [OCI]'s late submission of the WWRRs did remedy the continuing violations of 16 TAC § 25.55(c)(2) by providing the Commission and ERCOT with the missing WWRRs. However, **I would also opine that** remedying an continuing violation does not establish that the occurrence of the violation was accidental or inadvertent.
>
> **Under PURA § 15.024(c) and 16 TAC § 22.246(g)(1)(C), [OCI] has the burden** of proving that a violation was accidental or inadvertent.
>
> . . .
>
> **In my opinion, consistent with PURA § 35.0021(g), the Commission must impose an administrative penalty** for the initial violations of 16 TAC § 25.55(c)(2) because, as discussed above, the initial violations are not remediable. Additionally, **in my opinion,** it is appropriate for the Commission to impose an administrative penalty for the continuing violations under the authority of PURA § 15.024(c) and 16 TAC § 22.246(g)(1)(C) because [OCI] has not asserted or provided any evidence that the continued violations were accidental or inadvertent."

- Section IIX, page 12, lines 5-19, 22-23, 25, and page 13, lines 1-3 (opining on the legal meaning of "filing" and the scope and meaning of PURA §15.023(b-1)):

> "Class C violations typically include failures to file regularly scheduled reports, updated contact information, or other minor informational filings that, if not timely submitted, do not cause or create the potential for significant harm to the health, safety, or economic welfare of the public.
>
> **PURA § 15.023(b-1) creates a separate and most serious category of violation**, limited to violations of provisions of PURA §§ 35.0021 and 38.075 due to the gravity of consequences caused by the generation shortage experienced during Winter Storm Uri and the impact it had on Texas. **The WWRRs were not just a "filing," but were intended by the Commission to serve as the required demonstration of completion of the substantive preparation requirements**. The WWRRs not only demonstrated completion of weather emergency preparation requirements for individual resources, but also were analyzed comprehensively to gauge fleet readiness as the state headed into the winter months. **As a substantive demonstration of compliance, it is my opinion that the WWRRs should not be considered mere 'filing violations.'**

> . . . uncertainty about [OCI]'s readiness **inherently created a reliability risk, which goes beyond the scope of 'filing violations' usually encompassed by Class C violations**. . . . and thus **should be considered** the most severe type of violation considered under PURA and Commission rule. **Therefore, it is my opinion that the failure to submit the WWRRs on time is particularly egregious and warrants significant penalties beyond what is normally assessed for Class C filing violations.**"

- Section IIX, page 14, line 24, and page 15, lines 1-2 (opining on the legal meaning of "serious"):

> "Therefore, **it is my opinion that** [OCI]'s failure to comply with the requirements are serious in light of the regulatory focus by the Commission, ERCOT, and the Texas Legislature on weather preparations."

- Section IIX, page 15, lines 13-14, 17-19, 23, and page 16, line 1 (opining on the legal import of alleged "legislative intent" and the legal meaning of "remedy"):

> "[The adoption of these rules] demonstrates legislative intent for significant penalties to be assessed for the purpose of deterring violations and encouraging compliance. . . . The fact that [OCI]'s violations at issue in this proceeding impact grid reliability supports significant penalties to deter future violations of reliability-focused requirements.
> . . . **[[OCI]'s] late submission cannot correct [OCI]'s initial violations for failure to submit the WWRRs by the December 1, 2021 deadline**."

- Section X, page 17, lines 5-18 (opining on the legal meaning of, and requirements established under, PURA §§15.023, 15.024, and 35.0021(g)):

> "**In my opinion** Commission Staff's method for calculating an administrative penalty in this matter is reasonable with respect to the factors established in PURA § 15.023, **required in light of the obligation described in PURA § 35.0021(g)**, and appropriate when considering the nature of the continuing violations under PURA § 15.024.
> . . . **In my opinion**, the appropriate administrative penalty should be $1,150,000 or $550,000 for OCI_ALM1-UNIT1 and $600,000 for OCI_ALM1-ASTRO1.
> . . . **[I]t is my opinion that** those amounts are reasonable and appropriate based on the facts and circumstances of this case."

The Texas Supreme Court has stated that statutory interpretation is a matter of law to be decided by courts. Accordingly, every statement by Mr. Wirth that expresses his opinion regarding

what a provision of PURA or the Commission's rules means is improper and not a valid subject of testimony. It is legal argument, not expert testimony, and should be stricken.

Notably, this approach mirrors exactly the approach Commission Staff has taken in objecting—successfully—in multiple cases to witness testimony as improper legal opinion.[5] OCI simply seeks to apply to Commission Staff witnesses the same standard that Commission Staff applies to other parties. OCI's objections to the above-recited, objectionable, and improper portions of Mr. Wirth's testimony are focused on his legal opinions, legal analysis, and legal conclusions. The portions quoted above that surround those statements of legal opinion, legal analysis, and legal conclusions rely entirely on those legal conclusions and are thus equally objectionable and improper.

Legal opinions, legal analysis, and legal conclusions are not evidence. Accordingly, the identified portions of Mr. Wirth's direct testimony quoted above—and any portions found to rely upon those—are objectionable, improper, and should be stricken. OCI respectfully asks Your Honor to strike the entirety of each portion of Mr. Wirth's testimony quoted above.

B. Hearsay and Unsupported Testimony

Mr. Wirth's testimony is also replete with hearsay that is objectionable, improper, and should be stricken. He relies on statements made by others and testifies, relying on those statements, that OCI's alleged late report allegedly created a reliability risk, justifying the imposition of exorbitant penalties. Hearsay is prohibited under the Texas Rules of Evidence, which apply to this proceeding. Hearsay refers to a statement made by a person who is not

[5] *See* Docket No. 52451-132, Commission Staff's Objection to and Motion to Strike Portions of the Rebuttal Testimony of Jeremiah W. Cunningham, https://interchange.puc.texas.gov/Documents/52451_132_1183659.PDF; Docket No. 52322-171, Commission Staff's Objection to and Motion to Strike Portions of the Direct Testimony of Amanda Frazier, https://interchange.puc.texas.gov/Documents/52322_171_1147652.PDF; Docket No. 52322-172, Commission Staff's Objection to and Motion to Strike Portions of the Direct Testimony of James C. Spindler, PH.D, https://interchange.puc.texas.gov/Documents/52322_172_1147654.PDF.

testifying at the current trial or hearing that a party offers in evidence to prove the truth of the matter asserted.[6] Any statement—or equivalent—made by a person not testifying in this proceeding is hearsay if offered to prove the truth of the matter asserted.

Mr. Wirth asserts that OCI's alleged untimely paperwork submission created uncertainty that "inherently created a reliability risk":

> Because Alamo 1 did not timely submit its WWRRs, Staff had no way of knowing whether Alamo 1 had completed the substantive preparation requirements on time, and that uncertainty about Alamo 1's readiness inherently created a reliability risk, which goes beyond the scope of "filing violations" usually encompassed by Class C violations. [followed by footnote citing page 12 of direct testimony of Ramya Ramaswamy]

That Wirth testimony, at p. 12, lines 20-23, should be stricken as impermissible indirect hearsay.

Notably, Mr. Wirth cites to the testimony of another Commission Staff witness—Ramya Ramaswamy—as support for this statement that OCI's allegedly late filing "inherently created a reliability risk." He does not explain the nature of that risk or provide his own rationale for determining that such a risk even existed—he simply asserts it existed and cites to the testimony of another Commission Staff witness as support.

But the Legislature, in PURA § 39.151(a)(2), directs *ERCOT* to "ensure the reliability and adequacy of the regional electrical network." Both Jeffrey Wirth and Ramya Ramaswamy, whose testimony Mr. Wirth relies upon,[7] are employees of the PUC,[8] not ERCOT. Mr. Wirth's conclusory statement that "uncertainty about [OCI]'s readiness inherently created a reliability

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[6] Tex. R. Evid. 801(d); Docket No. 50284-36, SOAH Order No. 3, Ruling on Motion to Strike, https://interchange.puc.texas.gov/Documents/50284_36_1075713.PDF.

[7] *See, e.g.*, Wirth Direct at 12, nn.5 & 6.

[8] *Id.* at 1:6-7; Ramaswamy Direct at 1:3-5.

risk"[9] is—according to his own footnote—based upon Ramya Ramaswamy's testimony. And what does that testimony of Ramya Ramaswamy say? It asserts various concerns or impacts or analyses regarding reliability that supposedly were held or believed or performed by ERCOT, and lists impacts on activities that are within ERCOT's responsibilities, not Commission Staff's. Stated succinctly, and as explained in OCI's objections to Ramya Ramaswamy's testimony, Ramya Ramaswamy attempts to testify *for ERCOT*. But Ramya Ramaswamy is an employee of the PUC, not ERCOT. And Commission Staff has taken the position in this docket—conveyed in conversations and reflected in Staff's objections to discovery requests—that it cannot answer RFIs that OCI has propounded upon it seeking ERCOT's information and documents, on the theories that the PUC and ERCOT are wholly separate entities and Commission Staff cannot compel ERCOT to provide information nor respond to the RFIs on behalf of ERCOT. By the same token, then, Commission Staff cannot be permitted to attempt to testify *for ERCOT*.

The net upshot is that Mr. Wirth's testimony regarding supposed reliability impacts is impermissible because it relies on Ramya Ramaswamy's testimony that is itself impermissible hearsay. Mr. Wirth's assertion regarding reliability risks points to this testimony of Ramya Ramaswamy (emphasis added):

> Because Alamo 1 did not submit the required winter weather readiness reports on December 1, 2021, Commission Staff **and ERCOT were unable** to discern whether the Alamo 1 resources were prepared for winter weather conditions at the start of the winter season or, to the extent they were not prepared by December 1, 2021, by what date the resources would be prepared for winter. Moreover, Commission Staff **and ERCOT were unaware** which preparation activities may have been outstanding, the anticipated need for future scheduled maintenance dates, or how those circumstances could affect reliability planning for this generation entity in the event of extreme winter weather during the winter 2021 season. The uncertainty caused by the lack of information created a potential hazard to the reliability of the electric grid, and, therefore, to the health, safety, and economic welfare of the public.

[9] Wirth Direct at 12:22.

> Additionally, 16 TAC § 25.55(c)(3), (4), and (6)(B) assigned expeditious deadlines **to ERCOT** and Commission Staff to review the winter weather readiness reports for approximately 850 generation entities in the ERCOT region. Because Alamo 1's winter weather readiness reports were not submitted by December 1, 2021, **ERCOT and** Commission Staff **were unable** to timely consider Alamo 1's circumstances at the outset of the report evaluation period.

That testimony asserts that ERCOT was "unaware" of certain things and was "unable" to do certain things. Ramya Ramaswamy, an employee of the PUC, which is separate and distinct from ERCOT, cannot and could not have any knowledge regarding what ERCOT was or is "aware" of or what ERCOT was or is "able" to do unless ERCOT communicated that to Ramya Ramaswamy. Ms. Ramaswamy seeks to tell this tribunal (without directly quoting ERCOT) what ERCOT has allegedly communicated to Commission Staff out of court, and offers testimony based on that out-of-court communication for the truth of what was communicated out of court. Accordingly, every statement regarding what ERCOT was "unaware" of or what ERCOT was "unable" to do is impermissible hearsay and should be stricken.

And because Ramya Ramaswamy's testimony about such things is impermissible hearsay, Mr. Wirth's reliance on it is also impermissible hearsay and should be stricken.

Importantly, this is not just a matter of striking the phrases "and ERCOT" or "ERCOT and." The entire substance of Ramya Ramaswamy's testimony about supposed reliability impacts is founded on impacts to activities that only ERCOT—not Commission Staff—performs. The alleged reliability impact that Ramya Ramaswamy testifies to is based on alleged unawareness about winter weather readiness, about any necessary scheduled maintenance, and about reliability planning. But the operative rule—16 TAC § 25.55—assigns to ERCOT, not Commission Staff, the obligation to assess the reports and act on them. Under 16 TAC § 25.55(c)(3), "ERCOT must file with the commission comprehensive checklist forms" for assessing each unit's winter readiness, which must "include checking systems and subsystems containing cold weather critical

components." And under that same rule paragraph, ERCOT—not the Commission Staff—must tailor those checklist forms to each unit's particular situation: "ERCOT must use a generation entity's winter weather readiness report submitted under paragraph (2) of this subsection to adapt the checklist to the inspections of the generation entity's resources." Thus, it is ERCOT—not Commission Staff—that the Commission, via its rule, expressly directed to review the generation entity's reports and use them to tailor specific checklists by which to assess whether the particular unit poses any reliability risk.

Similarly, under 16 TAC § 25.55(c)(4), ERCOT, not the Commission, is obligated to take action. That paragraph of the Commission's rule mandates that "ERCOT must file with the commission a compliance report that addresses whether each generation entity has submitted the winter weather readiness report . . . and whether the generation entity submitted an assertion of good cause for noncompliance."

And the only other paragraph of the rule cited by Ramya Ramaswamy (16 TAC § 25.55(c)(6)(B)) simply assigns a joint responsibility to Commission Staff and ERCOT: "Commission staff will work with ERCOT to expeditiously review notices asserting good cause for noncompliance."

Regarding the assessment of planning and reliability risks that Ramya Ramaswamy mentions, the Commission's rule, at 16 TAC § 25.55(d)(1), directs ERCOT—not Commission Staff—to conduct inspections and to prioritize those inspections based on reliability risk: "ERCOT must conduct inspections of resources for the 2021-2022 winter weather season and must prioritize its inspection schedule based on risk level." Thus, it is clear that ERCOT—not Commission Staff—is the entity that assesses the reliability "risk level" and it is ERCOT—not Commission

Staff—that is obligated to conduct inspections based upon the reliability risk level it determines based upon information it has received from generation owners.

Ramya Ramaswamy's testimony about "uncertainty" and "unawareness" and "inability" to assess reliability is an attempt by Commission Staff to testify *for ERCOT* about obligations specifically assigned by the Commission's own rule to ERCOT—not to Commission Staff. As a Commission Staff employee, Ramya Ramaswamy has no knowledge regarding ERCOT's awareness of anything or ERCOT's inability to do anything, unless ERCOT has told Ramya Ramaswamy about those things. And if ERCOT has done so, that was an out-of-court statement, which Ramya Ramaswamy now seeks to offer (without quoting it) for the truth of the matter asserted. Accordingly, it is impermissible hearsay and should be stricken from Ramya Ramaswamy's testimony. Consequently, any statement in Mr. Wirth's testimony that relies on that same testimony by Ramya Ramaswamy must also be stricken, for impermissibly seeking to indirectly admit impermissible hearsay.

Moreover, Ramya Ramaswamy's and Mr. Wirth's testimony regarding alleged "reliability risks" is contravened by ERCOT's own public report on its assessment of precisely such reliability risks. On January 17, 2022, ERCOT presented its Winterization and Inspection Update presentation at the ERCOT Special Board of Directors Meeting.[10] In that presentation, ERCOT stated that its inspections—conducted between December 2–22, 2021—revealed only a handful of *actual* deficiencies, *none of which it labeled as a reliability risk*. And at no point in ERCOT's Final Report,[11] filed January 21, 2022, does ERCOT contend that those *actual* deficiencies—let

[10] Item 3: Weatherization and Inspection Update, https://www.ercot.com/files/docs/2022/01/17/3_Weatherization_and_Inspection_Update.pdf; *see also* Winter Weather Readiness, https://www.ercot.com/gridinfo/generation/winterready.

[11] ERCOT's Final Report on Winter Weather Readiness Inspections, Project No. 52786 & 52787, https://www.ercot.com/files/docs/2022/01/21/52786_52787_ERCOT_Final_Report_on_Winter_Weather_Readiness_Inspections.pdf.

alone late filings—were "reliability risks." It instead noted that deficiencies were few and far between, and its inspections revealed that "the owners of generation and transmission infrastructure in the ERCOT region have taken the Commission's weatherization mandate seriously and have demonstrated good faith in complying with the rule's requirements."[12] Accordingly, Mr. Wirth's reliance on Ramya Ramaswamy's testimony about "reliability risks" is unsupported, is hearsay, and is shown to be demonstrably false by ERCOT's public report.

The governing procedural rule, 16 TAC § 22.221(a), provides that the "Texas Rules of Civil Evidence as applied in nonjury civil cases in the courts of Texas shall be followed in contested cases." Pursuant to Texas Rule of Evidence 802, evidence is hearsay when its probative value depends in whole or in part upon the competency or credibility of some person other than the person by whom it is sought to be produced.[13] The inclusion of hearsay testimony impermissibly prejudices OCI because it deprives OCI of the opportunity to test the veracity of the statements being made about what ERCOT was "unaware" of or "unable" to do and the allegedly "inherent" "reliability risks" that follow from that unawareness or inability.

Therefore, OCI objects to the following portions of Mr. Wirth's testimony as hearsay and requests that they be stricken:

- Section IIX, page 12, lines 20-23 (relying on Ms. Ramaswamy's testimony, which introduces hearsay from ERCOT):

> "Because [OCI] did not timely submit its WWRRs, Staff had no way of knowing whether [OCI] had completed the substantive preparation on time, and that uncertainty about [OCI]'s readiness inherently created a reliability risk, which goes beyond the scope of 'filing violations' usually encompassed by Class C violations."

[12] *Id.* at 2.

[13] *Texarkana Mack Sales, Inc. v. Flemister*, 741 S.W.2d 558, 562 (Tex. App.—Texarkana 1987, no writ).

- Section IIX, page 13, lines 15-20 (relying on hearsay from ERCOT) (emphasis added):

> "Without the WWRRs, **neither ERCOT** nor the Commission **had any way of knowing** whether [OCI] could be relied upon or would otherwise impact grid reliability in future winter weather events. In my opinion, the risk to reliability and potential hazard to the health and safety of the public caused by the uncertainty and lack of information justifies Staff's recommended penalties."

- Section IIX, page 14, line 14 through page 15, line 2 (citing Ramya Ramaswamy twice, thus relying on hearsay from ERCOT) (emphasis added):

> "Additionally, [OCI]'s failure to submit the required WWRRs to ERCOT created a potential hazard to the health, safety and welfare to the public. Without the timely submission of the reports, **ERCOT and** the Commission **were unable to know** whether [OCI] had properly prepared its generation or energy storage resources for future weather events. **This lack of information created an inherent potential hazard** to the health, safety, and economic welfare of the public **by risking** Commission Staff and **ERCOT's ability to accurately and effectively address the needs of the grid** in a timely manner. Additionally, each day [OCI]'s violations continued, the potential hazards caused by the uncertainty surrounding [OCI]'s reliability capabilities increased, as the state headed deeper into the winter season and the likelihood of severe winter weather grew. **Therefore, it is my opinion** that [OCI]'s failure to comply with the requirements are serious in light of the regulatory focus by the Commission, ERCOT, and the Texas Legislature on weather preparations."

C. Unsupported, Conclusory Testimony

Testimony must be concrete, based on the witness's expertise, and conclusions must be based on reliable facts and methodologies. "Although expert opinion testimony often provides valuable evidence in a case, 'it is the basis of the witness's opinion, and not the witness's qualifications or his bare opinions alone, that can settle an issue as a matter of law; a claim will not stand or fall on the mere *ipse dixit* of a credentialed witness.'" *Coastal Transp. Co., Inc. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 232 (Tex. 2004) (quoting *Burrow v. Arce,* 997 S.W.2d 229, 235 (Tex. 1999)). Conclusory or speculative testimony is not relevant evidence, because it does not tend to make the existence of a material fact "more probable or less probable." *Id.* (quoting Tex. R. Evid. 401).

In multiple instances, Mr. Wirth improperly speculates as to the existence and/or potential of a reliability risk and hazard to the electric grid—and the public—without support. As these portions of his testimony are entirely conjecture, OCI objects to, and moves to strike, each conclusory statement, including the following:

- Section IIX, page 13, lines 12-15 (speculating about what *might* happen *if* resources are not prepared):

> "Winter Storm Uri exposed the consequences of generation shortage, and, **to the extent resources in the ERCOT power region were not prepared to handle winter weather, the potential hazard** to public health, safety, and economic welfare that was demonstrated during Winter Storm **Uri existed as winter approached in December 2021.**"

- Section IIX, page 14, lines 21-24 (speculating about "potential hazards," not actual observed hazards, and speculating about the "likelihood" of any severe winter weather):

> "Additionally, each day Alamo 1's violations continued, **the potential hazards caused by the uncertainty surrounding Alamo 1's reliability capabilities increased, as the state headed deeper into the winter season and the likelihood of severe winter weather grew.**"

- Section IIX, page 16, lines 8-10 (speculating about "potential risk," not observed actual risk):

> "The **failure to timely provide the WWRRs created a potential risk for weather-related failure** at one or both resources and, therefore, merits the assessment of significant administrative penalties."

D. Testimony Outside Expertise and Purpose

OCI further objects to Mr. Wirth's testimony on the ground that it is outside his area of expertise. In his own words, the purpose of Mr. Wirth's testimony is to "present [his] expert opinion as to the reasonableness and appropriateness of the recommended" penalty administered.[14] Specifically, to "address issues related to the maximum administrative penalty authorized" under

[14] Wirth Direct at 2:14-15.

the circumstances.[15] His responsibilities are limited to reviewing and auditing "information and reports" to determine the need for outreach and compliance assistance, "information gathering and analysis," and enforcement actions, including determining appropriate penalties.[16]

Mr. Wirth has substantial experience with the Public Utility Commission. But that does not entitle him to opine on any and every issue in this case. Even if his opinions were not impermissible legal conclusions (which they are, in extraordinarily large measure), they must be within his area of expertise. OCI objects to, and moves to strike, the portions of Mr. Wirth's testimony constituting legal conclusions that are outside of his expertise. Each and every instance of testimony that reaches a legal conclusion is outside of Mr. Wirth's area of expertise—as recounted in Section A, above.

Mr. Wirth also testifies beyond his own stated purpose and expertise when he opines on the alleged risk posed by a late-filed report. Even if the testimony was not hearsay (which it is), it is impermissible for Mr. Wirth to opine beyond his area of expertise regarding the "inherent risk of financial harm that could have occurred" from an untimely report.[17] His expertise is determining the appropriateness of a penalty; but that is distinct from assessing financial risk allegedly posed to (presumably) market participants (not the Commission). The PUC has promulgated a rule that defines specific classes for violations, which set out and control the penalty for any given violation.[18] Thus, determining whether a penalty fits a certain class of violation is a very straightforward process that involves reading rules and regulations and determining which penalty applies under the relevant rule. Assessing some nebulous "risk of financial harm" to some

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[15] *Id.* at 2:18-19.

[16] *Id.* at 1:11-15.

[17] *Id.* at 15:5-6.

[18] *See* 16 TAC § 25.8.

unidentified entity is not within that area of "expertise." Nor does such testimony assist the trier of fact, since the testimony is vague and speculative, without recitation of any facts to support the speculation that a harm "could have occurred."

Mr. Wirth's attempt to create a "financial risk" by speculating that a loss of generation "could have occurred" is wholly speculative, unsupported by any facts. Accordingly, it is improper, unhelpful to the trier of fact, without any factual basis, and should be stricken.

Further, Mr. Wirth improperly testifies as to ERCOT's perspective, understanding, knowledge, views, and more, in several instances, noted above. Any awareness that Mr. Wirth would have of ERCOT's perspective, views, knowledge, and similar considerations is hearsay (see above), but it also constitutes information outside of his expertise, as a matter of law. He is a PUC employee with expertise regarding reviewing reports and conducting information-gathering and analysis. He has no expertise, per his own testimony, regarding assessment of reliability risks associated with actual operation of generation facilities and administration of the ERCOT grid. Thus, he has no inherent expertise regarding what ERCOT's reliability experts would understand, know, or appreciate.

Mr. Wirth also offers his opinion regarding "legislative intent." But his own testimony does not indicate that he has any experience or expertise whatsoever regarding the legislative process or how to divine the Legislature's intent with respect to any topic. Accordingly, his testimony regarding legislative intent is outside the scope of his expertise, objectionable, improper, and should be stricken.

For these reasons, OCI objects and moves to strike the following testimony as outside the purpose or area of expertise of Mr. Wirth (all emphasis added):

- Section IIX, page 12, line 22 (opining on grid "reliability risk"):

> ". . . uncertainty about [OCI]'s readiness **inherently created a reliability risk** . . ."

- Section IIX, page 13, lines 6-9 (opining on grid "reliability risk"):

> "[OCI]'s failure to timely submit its WWRRs created a potential hazard by creating uncertainty about [OCI]'s preparation and readiness. The lack of information about [OCI]'s physical preparations and capabilities **posed a reliability risk**, which created a potential hazard to public health and safety."

- Section IIX, page 14, lines 14-24, and page 15, lines 1-2 (opining on grid "reliability risk" and purporting to speak for ERCOT):

> "Additionally, [OCI]'s failure to submit the required WWRRs to ERCOT **created a potential hazard to the health, safety and welfare to the public**. Without the timely submission of the reports, **ERCOT and the Commission were unable to know** whether [OCI] had properly prepared its generation or energy storage resources for future weather events. This **lack of information created an inherent potential hazard to the health, safety, and economic welfare of the public** by **risking** Commission Staff and **ERCOT's ability to accurately and effectively address the needs of the grid** in a timely manner. Additionally, each day [OCI]'s violations continued, the potential hazards caused by the uncertainty surrounding [OCI]'s reliability capabilities increased, as the state headed deeper into the winter season and the likelihood of severe winter weather grew. Therefore, **it is my opinion that** [OCI]'s **failure to comply with the requirements are serious** in light of the regulatory focus by the Commission, ERCOT, and the Texas Legislature on weather preparations."

- Section IIX, page 15, lines 5-8 (opining on a speculative "financial harm" that "could have occurred"):

> "However, failure to timely provide [OCI]'s WWRR carried an inherent risk of **financial harm** that **could have occurred** in the event of a loss of generation during the time period between the submission deadline and the date on which ERCOT and Commission Staff actually received the missing WWRRs."

- Section IIX, page 15, lines 13-14 (opining on legal conclusion based on opinion regarding "Legislative intent"):

> ". . . PURA § 35.0021 **demonstrates legislative intent** for significant penalties to be assessed for the purpose of deterring violations and encouraging compliance."

- Section IIX, page 15, lines 17-19 (opining on impacts on "grid reliability"):

> "[OCI]'s violations at issue in this proceeding **impact grid reliability** . . ."

- Section IIX, page 15, lines 23, page 16, line 1 (opining on legal meaning of "remedy"):

> ". . . late submission **cannot correct [OCI]'s initial violations** for failure to submit the WWRRs by the December 1, 2021 deadline."

The above excerpts reflect multiple instances where Mr. Wirth's testimony veers substantially outside his expertise as described by his own testimony. Accordingly, OCI objects to those excerpts as unsupported and improper and respectfully asks Your Honor to strike them.

E. Improper Attempt to Supplement Direct Case

Once a party has presented evidence and closed its case-in-chief, it is not permitted to reopen evidence and take a "second bite at the apple" because it wants to present more evidence. *Poag v. Flories*, 317 S.W.3d 820, 828 (Tex. App.—Fort Worth 2010, pet. denied); *accord Apresa v. Montfort Ins. Co.*, 932 S.W.2d 246, 249–50 (Tex. App.—El Paso 1996, no writ). Only in exceptional circumstances—such as new evidence coming to light—may a party *request* to reopen the case to present additional evidence. *Poag*, 317 S.W.3d at 828. But even that depends on the trial court's discretion and a showing of the party's exercise of diligence in initially bringing forth relevant evidence: evidence may not be reopened where the moving party fails to show that they were diligent yet unable to produce the additional evidence in a timely fashion. *Id.* Unequivocally, there is no "right to supplement testimony."

Commission Staff has the burden of proof and must meet that burden with its direct testimony. Commission Staff has now filed its direct testimony. Commission Staff cannot now reserve the right to supplement its case. Thus, OCI objects to, and moves to strike, Commission Staff's improper attempt to reserve a *right* to supplement its direct testimony at will:

- Section X, page 17, lines 20-21 (improperly "reserving" a "right" to supplement the direct prosecutorial testimony):

> "I reserve the right to supplement this testimony during the course of the proceeding if new evidence becomes available."

If new evidence becomes available, Commission Staff must *request* that it be permitted to reopen evidence, at which point it must first demonstrate how and why justice so requires.

F. Improper Attempt to Amend NOV

In addition to the above objections, OCI also objects and moves to strike the testimony of Mr. Wirth to the extent and on the basis that his testimony improperly attempts to modify, outside the requirements imposed by the Commission's rule for issuance of a Notice of Violation (NOV), the NOV issued by the PUC on December 8, 2021. On December 8, 2021, the PUC issued its NOV with the following "Statement of the Amount of Recommended Penalty":

> Based on the attached Report of Violations, DICE recommends assessing an administrative penalty against [OCI] in the amount of $1,100,000.[19]

Now, the PUC—through the testimony of Mr. Wirth—attempts to modify the amount contained in that NOV. Under 16 TAC § 22.246(f)(2), a Notice of Violation is required to include certain information:

> (B) For violations of the TWC or a rule or order adopted under chapter 13 of the TWC, within ten days after the report is issued, the executive director will, by certified mail, return receipt requested, give written notice of the report to the person who is alleged to have committed the violation or continuing violation which is the subject of the report.
> (C) The notice must include:
> (i) a brief summary of the alleged violation or continuing violation;
> (ii) **a statement of the amount of the recommended administrative penalty**;
> (iii) a statement recommending disgorgement of excess revenue, if applicable, under §25.503 of this title;
> (iv) a statement that the person who is alleged to have committed the violation or continuing violation has a right to a hearing on the occurrence of the violation or continuing violation, the amount of the administrative penalty, or both the occurrence of the violation or continuing violation and the amount of the administrative penalty;
> (v) a copy of the report issued to the commission under this subsection; and
> (vi) a copy of this section, §22.246 of this title (relating to Administrative Penalties).

[19] Docket No. 52929 PUC NOV by OCI Alamo 1 LLC, at 2, https://interchange.puc.texas.gov/Documents/52929_2_1172427.PDF.

Commission Staff has not revised its NOV or issued a NOV seeking any penalty other than $1,100,000. The Commission's rule requires the Commission, when seeking an administrative penalty, to issue a written NOV including "a statement of the amount of the recommended administrative penalty." Importantly, that rule requires the written NOV itself to state "the amount." It does not allow the Commission Staff to state some calculation methodology (e.g., $50,000 per day) and then seek an unstated total amount of administrative penalty based on that methodology. Rather, the rule requires that the NOV itself state "the amount." After having issued its NOV with a stated "amount" of administrative penalty of "$1,100,000," Commission Staff now improperly seeks to increase that amount via Mr. Wirth's testimony. That violates 16 TAC §22.246(f)(2)(C)(ii). Any modification of the amount contained in the NOV is inappropriate, violative of the Commission's own rule, improper, and should be stricken. Specifically, OCI objects to and asks Your Honor to strike the following portion of Mr. Wirth's testimony:

- Section IIX, page 11, lines 21-25 (attempting to amend the NOV's statement of penalty amount via testimony):

> "The NOV only accounted for accumulation of penalties through December 7, 2021. Because [OCI] failed to submit the WWRR for OCI_ALM1-ASTRO1 until December 9, 2021, an additional $50,000 should be added to the total account for the additional day the violation continued. This brings Staff's total recommended administrative penalty to $1,150,000."

OCI objects and moves to strike this testimony.

II. CONCLUSION

OCI makes these objections without waiver of its right to challenge the accuracy of the portions of the foregoing testimony to which OCI has objected, if any objections are not sustained. Commission Staff presented two witnesses, employed by the PUC, to testify to countless topics that were unsupported, hearsay, prohibited by Texas law and rules of evidence, improper under PURA and the Texas Administrative Code, outside the witness's expertise, and impermissible

legal conclusions—some of which reached the ultimate issues in the proceeding. Such testimony is improper under any one of those grounds. In this pleading, OCI objects to and moves to strike multiple portions of the testimony of Jeffrey Wirth. OCI respectfully requests that its objections and motions to strike be sustained and that it be granted any other relief to which it may show itself entitled.

WHEREFORE, OCI respectfully requests that the ALJ strike the testimony of Jeffrey Wirth described and objected to above.

Dated May 20, 2022.

Respectfully submitted,

ENOCH KEVER PLLC

Carolyn Shellman
State Bar No. 18196200
William A. Moore
State Bar No. 00794330
Zackery Horton
State Bar No. 24120906
7600 N. Capital Of Texas Hwy
Building B, Suite 200
Austin, Texas 78731
(512) 615-1200 (Phone)
(512) 615-1198 (Fax)
cshellman@enochkever.com
bmoore@enochkever.com
zhorton@enochkever.com

By: Carolyn E. Shellman
Attorneys for OCI Alamo 1 LLC

CERTIFICATE OF SERVICE

I certify that on May 20, 2022, a true copy of this Joint Motion was served by email on all parties of record, as directed in the July 16, 2020 Second Order Suspending Rules in Project No. 50664.

Alyssa C. Shattuck