

**STATE OF IOWA  
BEFORE THE IOWA UTILITIES BOARD**

<p>IN RE: ITC MIDWEST LLC DAIRYLAND POWER COOPERATIVE</p>	<p style="text-align: center;">DOCKET NO. E-22386</p> <p style="text-align: center;">ITC MIDWEST LLC AND DAIRYLAND POWER COOPERATIVE'S MOTION TO STRIKE CHRIS KLOPP REPLY TESTIMONY AND EXHIBITS</p>
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ITC Midwest LLC (“ITC Midwest”) and Dairyland Power Cooperative (“Dairyland”) submit this Motion to Strike Chris Klopp Reply Testimony and Exhibits (“Motion to Strike”). As set forth in more detail below, ITC Midwest and Dairyland (collectively, “Applicants”) respectfully request that the Iowa Utilities Board (“Board”) grant the Motion to Strike because Intervenor Klopp’s Reply Testimony and exhibits were filed late, they lack foundation and they otherwise fail to comply with the Board’s procedural order dated April 29, 2019 (“Procedural Order”) or the Board’s September 19, 2019 Order Granting Petition to Intervene (“Intervention Order”). The testimony and exhibits should also be stricken because the testimony is immaterial and irrelevant to the issues in this proceeding and allowing the testimony to be admitted would violate Applicants’ due process rights because Applicants have no ability to seek discovery of or cross-examine the multiple witnesses on their testimony from another proceeding that Ms. Klopp incorporates in her Reply Testimony.

**BACKGROUND**

On April 29, 2019, the Board issued the Procedural Order which, among other things, established a procedural schedule for this matter. In relevant part, the Board required that all reply testimony be filed by October 31, 2019.

On September 19, 2019, over ITC Midwest’s objection, the Board issued its Intervention Order by which the Board granted Intervenor Klopp’s petition to intervene. In its Order, the

Board notified Intervenor Klopp, who owns no land in Iowa that would be affected,<sup>1</sup> that she would be required to follow the same procedural and evidentiary rules as the other participants in this matter. Intervention Order at 4. The Board also confirmed the scope of this franchise proceeding: “this proceeding is not a relitigation of issues outside of those relevant to the Board’s franchising authority.” Intervention Order at 3. Further, the Board stated: “ITC Midwest’s concerns regarding the efficient development of a relevant record can be addressed as evidence introduced into the record.” *Id.*

Intervenor Klopp did not submit reply testimony on October 31, 2019. Instead, on November 4, 2019, Intervenor Klopp submitted almost 50 pages of Reply Testimony that quotes witnesses from the Certificate of Public Convenience and Necessity (“CPCN”) proceeding before the Public Service Commission of Wisconsin (“PSCW”) along with 47 exhibits. As shown on Attachment B hereto, none of these exhibits appears to be authored or created by Intervenor Klopp (with the exception of Exhibit 125, which is her own legal brief from the PSCW proceeding). Rather, the exhibits are testimony of at least five witnesses from a different proceeding, news articles, numerous transmission planning documents, and discovery requests and responses from various parties.

### **LEGAL STANDARD**

The Board has broad authority to govern the practice and procedure before it. *See* Iowa Stat. § 476.2. As part of this authority, the Board may require parties to file pre-filed testimony and exhibits according to a schedule set by the Board. Iowa Admin. Code 199-7.10(1). “Parties who wish to present a witness or other evidence in a proceeding shall comply with the board’s or

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<sup>1</sup> Intervenor Klopp Revised Response to ITC Midwest’s First Set of Data Requests, response to No. 7 (“Ms. Klopp has no interest in real property in Iowa that will be affected by the proposed Cardinal Hickory Creek 345 kV Transmission Line Project.”) The responses are attached as Attachment A.

presiding officer's order concerning prefiled testimony and documentary evidence." *Id.* at (3). Similarly, in a contested case proceeding like the current matter, "irrelevant, immaterial, or unduly repetitious evidence should be excluded from the record." Iowa Code § 17A.14(1). Further, witnesses, including those submitting written testimony, must be available for cross-examination "as necessary for a full and true disclosure of the facts." *Id.* at (3). This is consistent with the requirements of due process, which apply in administrative proceedings like this one. *Richardson v. Perales*, 402 U.S. 389, 401 (1971).

## **DISCUSSION**

### **I. THE KLOPP REPLY TESTIMONY AND EXHIBITS ARE UNTIMELY.**

In its April 29, 2019 Procedural Order, the Board ordered that all reply testimony be filed by October 31, 2019. Subsequently, in its September 19, 2019 Intervention Order, the Board specifically notified Intervenor Klopp that she must "conform to the standard of ethical conduct required of attorneys before the courts of Iowa and follow the applicable procedural and evidentiary rules." Intervention Order at 4; *see id.* ("The Board further advise[d] Ms. Klopp that she will be required to follow the Board's procedural rules and be bound by the rules of evidence applicable in administrative proceedings").

However, despite the clear deadline and the Board's explicit instruction that Intervenor Klopp would be held to the same procedural rules as the other participants in this proceeding, Intervenor Klopp failed to submit her Reply Testimony and exhibits by October 31, 2019. Instead, she filed and served her Reply Testimony (which is almost 50 pages long) and is accompanied by 47 exhibits on November 4, 2019. As the time for rebuttal was already short, with a deadline of November 15, the delay was significant. Intervenor Klopp provided no explanation for her failure to comply with the Board's procedural schedule. Because Intervenor

Klopp failed to comply with the applicable rules and schedule, Applicants respectfully request that the Motion to Strike be granted.

**II. THE KLOPP REPLY TESTIMONY AND EXHIBITS ARE IRRELEVANT AND IMMATERIAL.**

**1. The Klopp Reply Testimony and Exhibits Relitigate Issues Outside of Those Relevant to the Board's Franchising Authority.**

In its Intervention Order, the Board specifically warned that “this proceeding is not a relitigation of issues outside of those relevant to the Board’s franchising authority.” Intervention Order at 3. Despite the Board’s direction, however, much of Intervenor Klopp’s Reply focuses on issues related to the PSCW’s consideration of the Project. *E.g.*, Klopp Reply at 23, 30, 36 (discussing testimony, briefing and analysis from the Wisconsin proceeding); *see id.* at 42 (“I will present those alternatives that were considered as part of the Wisconsin regulatory proceedings.”); *id.* at 44 (“As the Wisconsin proceeding progressed. . .”). Because these issues are outside of the Board’s franchising authority, they are irrelevant and immaterial to this proceeding.

Further, Intervenor Klopp’s extensive discussion of the Wisconsin proceeding is directly contrary to the Board’s prior instruction concerning her participation in this docket. When, as here, an intervenor offers testimony that exceeds the limits of the grant of intervention, striking testimony is appropriate. *See In re Interstate Power and Light Company*, Docket No. P-0890 (May 23, 2014) (striking portions of pre-filed testimony where the testimony exceeded the scope of intervention allowed by the Board). For these reasons, too, the Applicants respectfully request that the Motion to Strike be granted.

**2. Intervenor Klopp Lacks Qualifications and/or Experience to Opine on the Topics in the Klopp Reply.**

Iowa law requires that irrelevant and immaterial evidence be excluded from this proceeding. Iowa Code § 17A.14(1). It further requires that witnesses presenting testimony be subject to cross examination. *Id.* at (3). Intervenor Klopp is “bound by the same rules of evidence applicable in administrative proceedings” as the other participants in this proceeding. Intervention Order at 3-4.

In addition to filing untimely and irrelevant testimony, Intervenor Klopp has also submitted testimony for which she lacks personal knowledge and/or qualifications. Specifically, the Klopp Reply identifies the following topics: representation of public interest; analysis of the Project’s economic viability; analysis of environmental aspects of the proposal; analysis of the proposal’s reliability claims; and analysis of alternatives. Klopp Reply at 4. The Reply also includes 47 additional exhibits, only one of which was authored by Intervenor Klopp (Exhibit 125 – her legal brief from the PSCW proceeding).

Intervenor Klopp also seeks to introduce the testimony of third-party witnesses who submitted testimony in the PSCW proceeding. These witnesses are not appearing in this proceeding before the Board. Specifically, Intervenor Klopp attempts to rely upon testimony from Mr. Alexander Vedvik (Klopp Reply at 25) and Bill Powers (Klopp Reply at 30), both of whom are electrical engineers. *See* Klopp Reply Exs. 126 and 150 (Vedvik PSCW Testimonies) and 155 (Powers PSCW Testimony). She also quotes testimony from experts who supported the CPCN Application, but who are not testifying in this proceeding, and then argues against their testimony. *See e.g.* Klopp Reply at 36 (citing Dr. Anne Smith’s testimony from the CPCN Proceeding). Dr. Smith is a Stanford University trained PhD in economics and expert in

environmental policy assessment and corporate compliance strategy planning. Klopp Reply Ex. 154 (Smith PSCW Testimony).

Klopp lacks personal knowledge and expertise to speak to any of the topics in her testimony and therefore cannot establish foundation. This is confirmed by her responses to discovery. ITC Midwest specifically requested that Intervenor Klopp identify her expertise within a number of fields, including most of the topics identified in her testimony. In response, Attachment A, Intervenor Klopp stated that she lacked any such expertise:

**DATA REQUEST 5.** State whether you have expertise within the following fields. For any areas where you claim expertise, provide a summary of your qualifications, including prior experience, specialized training, education, or degrees within the following fields:

- a) statistics;
- b) public opinion research;
- c) real estate appraisal;
- d) property valuation;
- e) land surveying;
- f) property valuation of homes near transmission lines;
- g) high-voltage transmission lines;
- h) low-voltage transmission lines;
- i) electromagnetic fields;
- j) safety hazards in relation to high- and low-voltage transmission lines;
- k) health hazards in relation to high- and low-voltage transmission lines;
- l) safety hazards in relation to electromagnetic fields;
- m) health hazards in relation to electromagnetic fields;
- n) transmission system planning.

**Intervenor Klopp Response to DATA REQUEST 5:**

Ms. Klopp does not have expertise in any of the stated fields.

Similarly, Intervenor Klopp has not authored any reports or other documents concerning these topics:

**DATA REQUEST 6.** Please state whether you have authored, coauthored, or edited any book(s), article(s), report(s), or studies on the following subject matters, and if so, please state (1) the name of the book(s), article(s), report(s), or studies; (2) its date of publication; (3) the name of the publication; and (4) whether the book(s), article(s), report(s), or studies was peer reviewed:

- a) statistics;
- b) public opinion research;
- c) real estate appraisal;
- d) property valuation;
- e) land surveying;
- f) property valuation of homes near transmission lines;
- g) high-voltage transmission lines;
- h) low-voltage transmission lines;
- i) electromagnetic fields;
- j) safety hazards in relation to high- and low-voltage transmission lines;
- k) health hazards in relation to high- and low-voltage transmission lines;
- l) safety hazards in relation to electromagnetic fields;
- m) health hazards in relation to electromagnetic fields;
- n) transmission system planning.

**Intervenor Klopp Revised Response to DATA REQUEST 6:**

In Ms. Klopp's November 1, 2019 response to this question she states: "Ms. Klopp has authored article(s) or report(s). She will compile a list of these items and provide them ..." Ms. Klopp has authored intervenor testimony on the above topics in the Wisconsin proceeding, Docket 5-CE-146 and (as of October 31, 2019) in the Iowa proceeding, Docket E-22386. These documents are publicly available on the Wisconsin PSC ERF system and the Iowa IUB EFS system. These documents are not peer-reviewed and have not been published elsewhere. Upon review of the Data Request 6 question, I do not believe this testimony qualifies as article(s) or report(s), so I revise my original answer to state: "Ms. Klopp has not authored, coauthored, or edited any book(s), article(s), report(s), or studies on any of the listed subject matters."

As such, Intervenor Klopp has admitted that she generally lacks qualifications and expertise concerning the testimony and exhibits in her Reply. She therefore cannot lay foundation for the other witness testimony she is proffering. This renders her testimony and exhibits irrelevant and immaterial and the Reply Testimony and exhibits are unhelpful to the

Board's consideration of issues in this proceeding. For these reasons, too, the Applicants respectfully request that the Motion to Strike be granted.

**3. Allowing Admission of Ms. Klopp's Reply Testimony and Exhibits Would Violate Applicants' Due Process Rights**

Intervenor Klopp's reliance on and recitation of documents and materials upon which she lacks expertise deprives the Applicants and other parties of their right to effectively cross-examine Intervenor Klopp on the materials she seeks to introduce into the record. As illustrated by the testimony and Attachment B, most (if not all) of the information contained in the Reply comes from third parties or sources who are not available for cross-examination in this proceeding. Further, given Intervenor Klopp's lack of qualifications on the issues on which she offers testimony, the ability to cross-examine Intervenor Klopp would not give the Applicants and other parties sufficient opportunity to test the truth of the proffered testimony. This is inconsistent with Iowa law, which specifically provides for the right of cross-examination in these proceedings. *E.g.*, Iowa Code § 17A.14(3).

The Applicants also are denied the ability to engage in discovery with these third parties to check their veracity. The third-party materials Ms. Klopp seeks to introduce are technical, and were vigorously litigated in Wisconsin, where the PSCW ultimately rejected many of the opinions in those materials. As a matter of due process, fundamental fairness, and under Iowa law, the Applicants should have the opportunity to test and challenge those materials that are central to Ms. Klopp's position through discovery and cross examine of the witnesses Ms. Klopp puts forward in her Reply Testimony to support her claims. Also as a matter of fundamental fairness, as well as efficiency, Ms. Klopp should not be permitted to quote and then rebut testimony from Wisconsin that is not being offered in this proceeding. Absent the ability for



Applicants to fairly challenge the materials, Intervenor Klopp's Reply Testimony and exhibits should therefore be stricken.

**CONCLUSION**

Klopp's Reply Testimony and Exhibits were untimely filed and thus do not comply with the Board's Procedural Order and Intervention Order. The Reply Testimony also attempts to re-litigate matters from the Wisconsin proceeding and contains information outside of Intervenor's Klopp's personal experience and knowledge and for which she lacks expertise. As such, the Reply Testimony and Exhibits are also irrelevant and immaterial. Further, due process requires that the Reply be stricken because the Applicants and other parties will not have the opportunity to effectively cross-examine any witnesses with respect to the testimony and exhibits. Accordingly, the Applicants respectfully request that the Motion to Strike be granted.

Dated: November 11, 2019

By: /s/ Bret A. Dublinske

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And

Dated: November 11, 2019

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