

Control Number: 49737



Item Number: 87

Addendum StartPage: 0

2019 SEP 13 PM 2:49

APPLICATION OF SOUTHWESTERN §
ELECTRIC POWER COMPANY FOR § BEFORE THE STATE OFFICE
CERTIFICATE OF CONVENIENCE §
AND NECESSITY AUTHORIZATION § OF
AND RELATED RELIEF FOR THE §
ACQUISITION OF WIND § ADMINISTRATIVE HEARINGS
GENERATION FACILITIES §

**SOUTHWESTERN ELECTRIC POWER COMPANY'S REQUEST FOR IN CAMERA
INSPECTION RELATED TO TEXAS INDUSTRIAL ENERGY CONSUMERS'
SECOND SET OF REQUESTS FOR INFORMATION**

Southwestern Electric Power Company (SWEPCO) files this request for in camera inspection, and would respectfully show the following:

I. Introduction

SWEPCO received Texas Industrial Energy Consumers' (TIEC) Second Set of Requests for Information (RFI) on July 25, 2019. SWEPCO, having determined that certain materials were both responsive to TIEC's RFI and subject to a claim of privilege, filed privilege-based objections to these RFIs, on August 5, 2019. Pursuant to an agreement between the parties, SWEPCO filed its privilege log on August 14, 2019. As a result of discussions between the parties, SWEPCO filed a revised privilege log on August 30, 2019. TIEC filed a motion to compel on September 10, 2019. In accordance with 16 Tex. Admin Code (TAC) § 22.144(g), this request is timely filed.

TIEC seeks to compel production of Item Nos. 15, 16, and 19 through 37 on SWEPCO's revised privilege log, specifically any documents identified in SWEPCO's privilege log as being withheld only on the basis of the work-product privilege that SWEPCO determined were prepared in reasonable anticipation of future regulatory litigation. In its motion to compel, TIEC argues that the withheld items were either not prepared in anticipation of litigation or SWEPCO has failed to demonstrate the applicability of the privilege. Consistent with 16 TAC § 22.144(f), SWEPCO

will file a complete response to TIEC's motion to compel and its full legal argument with support on September 17, 2019. As required by 16 TAC § 22.144(g), SWEPCO now provides the factual and legal bases for its assertions of privilege herein in support of its request for *in camera* inspection.

As a practical matter, only limited portions of the documents identified in SWEPCO's privilege index are responsive to TIEC's request for "all analyses, presentations, and internal correspondence regarding SWEPCO's decision to pursue build-own-transfer projects instead of PPAs." SWEPCO will provide the administrative law judges with the full documents for context for their *in camera* review. As required by 16 TAC § 22.144(g), SWEPCO will provide the documents to the presiding officer, under seal, within one working day of filing this request.

II. Work-Product Privilege

The work product privilege is codified at Tex. R. Civ. Proc. 192.5(a)(1) and (2) and states:

192.5(a)(1) Work Product

(a) Work product defined. Work product comprises:

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.

Under the rule, communications between a party and its attorney or among a party and its representatives, in anticipation of litigation, are protected.¹

¹ *In re Monsanto Co.*, 998 S.W.2d 917 (Tex. App.—Waco 1999, no pet.).

In *National Tank*, the Supreme Court of Texas defined “anticipation of litigation” with a two-part test:

- (a) A reasonable person would have concluded from the totality of circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and
- (b) The party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation.²

The Court held that the “prospect of litigation was enough to trigger the privilege” and that “substantial chance” means only that litigation is “more than merely an abstract possibility or unwarranted fear.”³

III. Factual and Legal Basis for Assertion of Privilege

As described in SWEPCO’s revised privilege index and established by the affidavit of John Crespo attached hereto, Item Nos. 15-16 and 19-37 consist of emails and supporting documents prepared at the request of counsel pertaining to the Company’s regulatory planning process in preparation for seeking regulatory approvals and in anticipation of contested regulatory litigation.⁴ Item Nos. 15-16 and 19-37 contain privileged internal discussions as well as materials and mental impressions of a party prepared in anticipation of contested regulatory litigation.⁵ These items reflect an ongoing internal dialogue related to SWEPCO’s regulatory planning processes, the creation of materials to aid the development of SWEPCO’s positions in advance of anticipated regulatory litigation, as well as materials prepared or mental impressions developed in anticipation

² *Nat’l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993).

³ *Id.* at 204-05.

⁴ See Affidavit of John Crespo at ¶¶ 3-6.

⁵ *Id.* at ¶¶ 4-5.

of litigation.⁶ The privilege index sufficiently describes the privileged materials as pertaining to the development of the Company's positions and preparation for regulatory proceedings and itself shows the internal transmittals and exchanges among the client in developing the work product at issue.⁷

Specifically, these documents discuss various aspects of the request for proposal (RFP) planning process in conjunction with the Company's preparation for future regulatory litigation and coordination of necessary filings for regulatory approvals for projects selected through the RFP process. Moreover, the prospect of litigation was such that a reasonable person would anticipate it from the totality of the circumstances. As the documents indicate, the Company considered not just the complex planning involved with the RFP process but also the subsequent regulatory filings necessary for approval of the projects. There is a specific statutory requirement in Texas that SWEPCO file for regulatory review of any acquisition of generation resources.⁸ Additionally in light of the significant dollar amounts involved and various potential regulatory issues that could arise, SWEPCO fairly recognized the prospect of contested regulatory litigation. Evidenced throughout this set of documents is that these documents and communications were expressly developed in anticipation of litigation. Thus, SWEPCO reasonably possessed a good faith belief litigation had a substantial chance of occurring.

Finally, "[w]hen the claim for protection is based on a specific privilege, such as the attorney-client or attorney work product, the documents themselves may constitute the only

⁶ *Id.* at ¶ 6.

⁷ *See* Revised Privilege Index (August 30, 2019).

⁸ *See* PURA §§ 37.053, 37.056, 37.058.

evidence substantiating the claim of privilege.”⁹ As in camera inspection will show, the withheld documents corroborate SWEPCO’s assertions of the work-product privilege.

IV. Conclusion

In accordance with 16 TAC § 22.144(g), SWEPCO will provide the subject documents to the presiding officer, under seal, no later than one working day after filing this request for in camera inspection. SWEPCO respectfully requests that its objections be sustained and that it be granted any other relief to which it may be entitled.

Respectfully submitted,

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⁹ *In re Fairway Methanol LLC*, 515 S.W.3d 480, 494 (Tex. App.—Houston [14th Dist.] 2017, orig. proceeding) (citing *Weisel Enters., Inc. v. Curry*, 718 S.W.2d 56, 58 (Tex. 1986)).

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By: 
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**ATTORNEYS FOR SOUTHWESTERN
ELECTRIC POWER COMPANY**

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this motion was served on all parties of record this
13th day of September, 2019.


Stephanie Green

**SOAH DOCKET NO. 473-19-6862
PUC DOCKET NO. 49737**

APPLICATION OF SOUTHWESTERN ELECTRIC POWER COMPANY FOR CERTIFICATE OF CONVENIENCE AND NECESSITY AUTHORIZATION AND RELATED RELIEF FOR THE ACQUISITION OF WIND GENERATION FACILITIES	§ § § § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
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AFFIDAVIT OF JOHN CRESPO

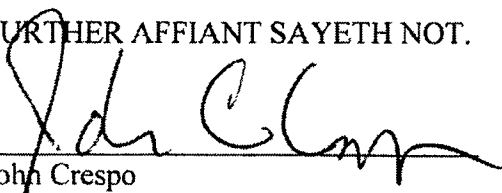
STATE OF OHIO	§
	§
COUNTY OF FRANKLIN	§

BEFORE ME, the undersigned authority, came and appeared John Crespo who, being by me first duly sworn, deposes and says as follows:

1. I am over twenty-one (21) years of age, of sound mind capable of making this affidavit. I have personal knowledge of the facts stated herein, and they are true and correct.
2. I am the Deputy General Counsel for American Electric Power Company, Inc. (AEP). My responsibilities include providing legal counsel to AEP executive management concerning a broad range of legal issues facing AEP and its individual subsidiaries including Southwestern Electric Power Company (SWEPCO).
3. I am making this affidavit in support of SWEPCO's assertion that Item Nos. 15-16 and 19-37 as identified on SWEPCO's revised privilege log filed on August 30, 2019, in PUC Docket No. 49737, SOAH Docket No. 473-19-6862, are protected from disclosure pursuant to the attorney work-product privilege.
4. As indicated on the revised privilege index, Item Nos. 15-16 and 19-37 contain communications among a group of American Electric Power Service Corporation (AEPSC)/SWEPCO/Public Service Company of Oklahoma (PSO) employees, at the request and under the direction of counsel, in aid of SWEPCO's regulatory planning process for seeking necessary regulatory approvals, and development of positions on discrete issues in anticipation of litigation. SWEPCO and PSO are required by law to obtain regulatory approval in Texas, Louisiana, Arkansas, and Oklahoma in order to acquire generating facilities and/or obtain assurances of cost recovery.

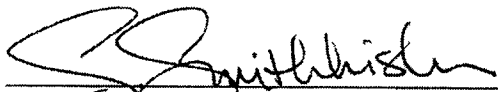
5. Item Nos. 15-16 and 19-37 contain and transmit the draft documents and materials as well as analysis and mental impressions that were prepared or created in anticipation of regulatory litigation in connection with the request for proposal (RFP) planning process, by this group of AEPSC/SWEPCO/PSO employees charged with analyzing these issues.
6. Item Nos. 15-16 and 19-37 relate to an ongoing internal dialogue encompassing SWEPCO's regulatory planning process and were primarily aimed toward preparing for regulatory litigation.
7. The documents listed on SWEPCO's privilege index were intended to remain confidential among and have not been disclosed to third parties other than SWEPCO and PSO legal counsel.

FURTHER AFFIANT SAYETH NOT.


John Crespo

Sworn to and subscribed before me

This 10th day of September, 2019.


NOTARY PUBLIC

My Commission Expires:

April 29, 2024

