



Control Number: 34077



Item Number: 315

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**PUC DOCKET NO. 34077**

**JOINT REPORT AND APPLICATION  
OF ONCOR ELECTRIC DELIVERY  
COMPANY AND TEXAS ENERGY  
FUTURE HOLDINGS LIMITED  
PARTNERSHIP PURSUANT TO  
PURA § 14.101**

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**BEFORE THE  
  
PUBLIC UTILITY COMMISSION  
  
OF TEXAS**

**OFFICE OF PUBLIC UTILITY COUNSEL'S  
MOTION TO COMPEL ONCOR'S RESPONSES  
TO OPC'S FOURTH REQUEST FOR INFORMATION AND  
TEXAS ENERGY FUTURE HOLDINGS LIMITED PARTNERSHIP'S  
RESPONSES TO OPC'S FIRST REQUEST FOR INFORMATION**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

COMES NOW, the Office of Public Utility Counsel ("OPC") and respectfully requests that the Administrative Law Judge ("ALJ") issue an order compelling Oncor Electric Delivery Company ("Oncor") to provide requested information in response to OPC's Fourth Request For Information ("RFI") and Texas Energy Future Holdings Limited Partnership ("TEF") to provide requested information in response to OPC's First RFI. The two RFIs request the same information from Oncor and TEF in five questions. The RFIs were duly served on the parties. OPC received identical objections from Oncor and TEF to the respective RFIs on August 6, 2007. Consequently, this motion to compel is timely filed within three working days after OPC received Oncor's and TEF's objections, in accordance with Order No. 4.<sup>1</sup> In support of this motion, OPC shows the following:

<sup>1</sup> *Joint Report and Application of Oncor Electric Delivery Company and Texas Energy Future Holdings Limited Partnership Pursuant to PURA § 14.101*, Docket No. 34077, Order No. 4 Memorializing Prehearing Conference, Addressing Notice and Discovery, And Adopting Procedural Schedule (May 15, 2007).

## **Background**

OPC filed and submitted its fourth RFI to Oncor and first RFI to TEF, consisting of the same five questions, on July 30, 2007. On August 6, 2007, Oncor and TEF filed objections to RFIs. Despite good faith efforts to resolve Oncor's and TEF's objections through negotiation, OPC, Oncor and TEF have been unable to resolve the discovery dispute.

### **OPC's RFI Definitions of "Oncor" and "TEF", and the Five Questions**

OPC defined "Oncor" and "TEF", and requested documents and information from Oncor and TEF as follows:

"Oncor", the "Company", and "Applicant" refer to Oncor Electric Delivery Company, its parent company, and its affiliates."

"TEF", the "Company", and "Applicant" refer to Texas Energy Future Holdings Limited Partnership, its parent company, and its affiliates."

1. Provide all law review articles and articles in other publications which support your position that ring fencing is a viable and effective means of protecting Oncor from a bankruptcy proceeding.
2. Provide all court cases which support your position that ring fencing is a viable and effective means of protecting Oncor from a bankruptcy proceeding.
3. Provide all articles in financial journals or periodicals which describe or explain ring fencing methods which are comparable to the ring fencing which will be used to protect Oncor.
4. Provide all examples of ring fencing methods similar to that which you propose which have been successful in protecting assets or revenues of an entity during the course of a bankruptcy proceeding. Identify the entities, the bankruptcy proceeding, the time frame, and circumstances for each such example.
5. With respect to the answer to Question [1-4] 4-4 above, provide a thorough explanation as to why each example demonstrates success for a ring fencing methodology. Provide any articles, news accounts, or analyses of the examples.

### **Oncor's and TEF's Objections**

As indicated above, Oncor and TEF made the same objections to OPC's RFIs. Oncor and TEF present their objections in two parts: first, as "Initial Objections"; and second, as "Specific Objections" to the definitions of "Oncor" and "TEF, and then to the five questions. In their Initial Objections, Oncor and TEF first generally object "to any request to the extent that it may be construed as requiring information that is beyond the appropriate scope of review in this Docket, and therefore, not relevant."<sup>2</sup> They maintain that the case involves only "the review of the Transaction as it affects Oncor" pursuant to the PURA § 14.101(b) factors. They specifically assert that discovery is limited to only the criteria listed in PURA § 14.101(b)(1) and (2). They maintain that discovery should be limited to these factors only to the extent of the effects of the Transaction upon Oncor. They omit the criteria in § 14.101(b)(3) and (4). They also generally object to requests for information regarding TXU Corp. and TXU Corp.'s non-utility subsidiaries to the extent that the requests ask for information beyond the review of the § 14.101(b)(1) and (2) factors in the context of the Transaction's effects upon Oncor.<sup>3</sup> Third, Oncor and TEF generally and vaguely object to the "Definitions" and "Instructions" in OPC's RFI to the extent that the same seek to expand Oncor's and TEF's obligations under the relevant procedural rules. Neither Oncor nor TEF provides no elaboration of this objection.<sup>4</sup> Lastly, Oncor and TEF generally object to providing privileged information and to filing a privilege log until a ruling is issued on their relevance objections.

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<sup>2</sup> Docket No. 34077, Oncor's Objections to OPC's Third Set of Requests For Information To Oncor Electric Delivery Company, at 2 (August 3, 2007).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

In their “Specific Objections,” Oncor and TEF incorporate their general Initial Objections. Oncor further objects to the inclusion of its affiliates in the definition of “Onco,” claiming that the definition “is overly broad, unduly burdensome, and outside the scope of discovery in that it is not reasonably calculated to lead to the discovery of admissible information.” TEF states the same objection in regard to OPC’s definition of “TEF.” Neither Oncor nor TEF provides any elaboration or argument in support of its objection to the respective definition. Oncor and TEF then assert objections to each of the five RFI questions on the same grounds: discovery relevancy; “contention interrogatory;” publicly available materials; unduly burdensome – equally accessible; and privilege. Oncor and TEF also object to filing a privilege index. OPC will address each of the objections.

#### **Argument**

At the outset, OPC hereby expressly limits the scope of each of the five questions to the documents described in the particular question that have been reviewed by any of Oncor’s or TEF’s testifying witnesses or by a consulting expert whose mental impressions or opinions regarding ring fencing in the context of the particular question have been reviewed by a testifying witness for Oncor or TEF. OPC offered this limitation to Oncor and TEF in an effort to resolve the discovery dispute.

Oncor and TEF object to OPC’s RFI definitions of “Onco” and “TEF” and to questions 1 through 5 based upon discovery relevancy. Information is discoverable so long as it appears “reasonably calculated to lead to the discovery of admissible evidence.” Tex. R. Civ. P. 192.3(a). As explained below, OPC’s RFI questions seek documents and information that are relevant because they request documents or information reasonably calculated to lead to the discovery of admissible evidence under Texas law.

### Legal Standards Governing Discovery Relevancy

The whole aim and purpose of discovery is to allow the parties to obtain the fullest knowledge of issues and facts prior to trial. *Gutierrez v. Dallas Ind. St. Dist.*, 729 S.W.2d 691, 693 (Tex. 1987), *quoting West v. Solito*, 563 S.W.2d 240, 243 (Tex. 1978). Discovery is designed to prevent trials by ambush and to ensure that fairness will prevail. *Id.* Additionally, the Texas Supreme Court has recognized on more than one occasion that parties “cannot use one hand to seek affirmative relief in court and with the other lower an iron curtain of silence around the facts of the case.” *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 555 (Tex. 1990), *quoting Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d 105, 108 (Tex.1985).

The scope of relevancy in discovery in contested case proceedings before the Commission is governed by § 2001.091 of the *Administrative Procedure Act* (APA),<sup>5</sup> Rule 192.3 of the Texas Rules of Civil Procedure,<sup>6</sup> and Commission Procedural Rule §22.141(a).<sup>7</sup> Consistent with APA § 2001.091 and the Commission rules, Texas Rules of Civil Procedure 192.3(a) properly states the standard of discovery relevancy applicable in Commission contested case proceedings:

In general, a party may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party. It is not a ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

In accordance with this rationale, the Texas Supreme Court held in *Axelson v. McIlhany*:

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<sup>5</sup> TEX. GOVT. CODE ANN. § 2001.091 (Vernon 2000).

<sup>6</sup> Tex. R. Civ. P. 192.3.

<sup>7</sup> P.U.C. PROC. R. 22.141(a). In adopting its discovery rules, the Commission expressly stated that its discovery rules are not intended as a substitute for appropriate reliance on the Texas Rules of Civil Procedure, except to the extent that the Commission rules expressly provide different requirements for matters also covered by the Texas Rules of Civil Procedure. 18 Tex. Reg. 6644 (September 28, 1993).

The “relevant to the subject matter” and “reasonably calculated to lead to admissible evidence” tests are liberally construed to allow the litigants to obtain the fullest knowledge of the facts and issues prior to trial. *Gutierrez v. Dallas Indep. School Dist.*, 729 S.W.2d 691, 693 (Tex.1987). It does not matter that the information sought may be inadmissible at trial if it appears reasonably calculated to lead to the discovery of admissible evidence.

*Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 553 (Tex. 1990) (citing *Gutierrez*, *supra* at 693).

A party, such as Oncor or TEF, who seeks to prevent the production of information through discovery, must “state *specifically* the legal or factual basis for the objection.” (emphasis added) Tex. R. Civ. P. 193.2(a). See, *Peeples v. Hon. Fourth Sup. Jud. Dist.*, 701 S.W.2d 635, 637 (Tex. 1985). Moreover, Commission Rule §22.144(d)(1) requires that “*All arguments* upon which the objecting party relies shall be presented *in full in the objection*.” (emphasis added) P.U.C. PROC. R. §22.144(d)(1). Therefore, only the arguments presented in Oncor’s or TEF’s filed objection may be considered in support of the objection. Likewise, the ALJ and Commission may consider an argument presented in an objection only to the extent that it is *actually* presented in the objection. Under the plain meaning of Commission Rule § 22.144(d)(1), a new argument and supplementation of an argument contained in a response to a motion to compel may not be presented in support of an objection.

**OPC’s requests meet the test of discovery relevancy.**

OPC’s five questions focus on the Applicants’ proposed ring fencing of Oncor, which is a fundamental area of inquiry in the case. Questions 1 and 2 ask Oncor and TEF for published articles and court decisions regarding ring fencing as a viable and effective means of protecting Oncor from a bankruptcy proceeding. Question 3 asks for published articles that describe or explain ring fencing methods that are comparable to the methods of ring fencing that the Applicants propose to use to protect Oncor. Questions 4 and 5 request information and published articles on and identification of specific examples of ring fencing methods similar to

the Applicants' proposal that have been successful in protecting assets or revenues of an entity during a bankruptcy. These requests are obviously designed to obtain information related to the Applicants' ring fencing proposal and the Commission's evaluation of it. Oncor's and TEF's challenges on the basis of discovery relevance are completely groundless and not supported by any argument.

As stated initially, OPC seeks only published articles and court decisions that have been reviewed by any of Oncor's or TEF's testifying witnesses or by a consulting expert whose mental impressions or opinions regarding ring fencing in the context of the particular question have been reviewed by a testifying witness for Oncor or TEF. OPC is not asking Oncor or TEF to marshal evidence or brief legal issues. However, OPC is entitled to learn through discovery the basis for the opinions of Oncor's and TEF's expert witnesses on ring fencing. Oncor and TEF are obligated by discovery rules to provide OPC with the requested information and documents that are within Oncor's or TEF's possession, custody or control. P.U.C. PROC. R. 22.141; Tex. R. Civ. P. 192.3(a), (b), (e) and (j). Oncor's and TEF's "contention interrogatory" objection should be overruled.

**OPC is requesting *particular* published articles and information on ring fencing.**

Whether the requested materials are "publicly available" is beside the point. Clearly, the point of OPC's five RFI questions is to learn the basis of the ring fencing recommendations of Oncor's and TEF's witnesses. OPC is not requesting documents at large on the topic of ring fencing. OPC is entitled to discover the published articles and court cases regarding ring fencing (in the requested context) that have been reviewed by Oncor's and TEF's witnesses and by their consulting experts whose mental impressions or opinions regarding ring fencing have been reviewed by Oncor's or TEF's testifying witnesses. This information and these documents are



within the possession, custody or control of only Oncor and TEF. P.U.C. PROC. R. 22.141; Tex. R. Civ. P. 192.3(a), (b), (e) and (j). The ALJ should overrule Oncor's and TEF's objection.

**OPC does not have access to Oncor's and TEF's ring fencing articles and information.**

Similarly, Oncor's and TEF's assertion that the requested published articles and information are equally accessible to OPC is patently false. In the five questions, OPC is requesting information and documents the identity of which is known only by Oncor and TEF. OPC is entitled under Commission and court procedural rules to obtain the requested information and documents from Oncor and TEF. *See*, P.U.C. PROC. R. 22.141; Tex. R. Civ. P. 192.3(a), (b), (e) and (j). Oncor and TEF are obligated under the rules to collect the requested documents and information that is within their possession, custody or control. In contrast to the Camco case cited by Oncor and TEF,<sup>8</sup> OPC has no means by which it can identify the requested documents regarding ring fencing other than through the RFI requests to Oncor and TEF. OPC has no other source from which it can identify the particular documents that it requests.

**Neither Oncor nor TEF substantiated its objection of undue burden.**

In addition, neither Oncor nor TEF provide in their objections any information regarding the work necessary to comply with OPC's five requests, in order to support their allegation that any of the five requests is unduly burdensome. "Any party who seeks to exclude matters from discovery on the grounds that the requested information is unduly burdensome, costly or harassing to produce, has the affirmative duty to plead and prove the work necessary to comply with discovery. ... Failure to follow this procedure constitutes a waiver of any complaint ...." *Ind. Insulating Glass/Southwest, Inc. v. Street*, 722 S.W.2d 798, 802 (Tex.App.-Fort Worth

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<sup>8</sup> *Camco, Inc. v. Baker Oil Tools, Inc.*, 45 F.R.D. 384 (S.D. Tex. 1968).

1987, writ dismissed). *See also, Peeples, supra* at 637. Therefore, the ALJ should overrule these complaints.

**The requested published articles and information are not privileged.**

Oncor and TEF claim that the requested documents that support their legal theories on ring fencing “could reveal [their] attorneys’ mental impressions or trial strategies developed in anticipation of litigation.” Unless Oncor or TEF published the ring fencing documents that present their attorneys’ mental impressions or trial strategies developed in anticipation of litigating this case (in which case privilege is waived), the five requests do not ask for the documents described by Oncor and TEF. The documents that OPC seeks in the five questions are *published* documents. They clearly do not fall within the definition of “work product” under Tex. R. Civ. P. 192.5(a).

Furthermore, Oncor and TEF may not engage in the offensive use of claiming privilege to prevent the discovery of documents while seeking affirmative relief from the Commission based on the very issue to which the requested documents relate – ring fencing. By using the claim of privilege offensively, Oncor and TEF waive their claim under Texas law. The ALJ should overrule Oncor’s and TEF’s privilege objections and compel them to fully respond to OPC’s five RFI questions.

**Oncor and TEF waived their privilege objection because neither party filed an index of privileged responsive documents or showed good cause for postponement of filing the privilege index.**

Under Commission rule 22.144(d), in order to object on the basis of a claim of privilege, the objecting party must either file an index of privileged documents within two working days after filing the objection, or also object to providing the documents on the basis of relevance and object to filing a privilege index. The objection to filing the privilege index “shall show good

cause for postponement of the filing of the index.” P.U.C. Proc. R. 22.144(d)(3). Neither Oncor nor TEF included any pleading at all, much less a “showing,” of good cause for the postponement of the filing of the privilege index. Their failure to file a privilege log was deliberate and incompatible with an assertion of privilege. They merely stated a bare objection to the filing of the privilege index. Compliance with the Commission’s rule is not an option. A party may not choose to totally ignore Commission rules related to objecting to discovery requests and still assert the objection. Because they failed to comply with the Commission’s rule, Commission precedence dictates that they waived their claim of privilege and their objections on this basis.<sup>9</sup> The ALJ must deny their objection on the basis of their claim of privilege.

**Oncor and TEF present no argument or explanation to support their complaints against the definition of “Oncor,” “TEF” and the RFI instructions as being an undue burden, overly broad, harassing, or an expansion of Oncor’s or TEF’s obligations under procedural rules.**

“Any party who seeks to exclude matters from discovery on the grounds that the requested information is unduly burdensome, costly or harassing to produce, has the affirmative duty to plead and prove the work necessary to comply with discovery. ... Failure to follow this procedure constitutes a waiver of any complaint ....” *Ind. Insulating Glass/Southwest, Inc. v. Street*, 722 S.W.2d 798, 802 (Tex.App.-Fort Worth 1987, writ dismissed). *See also, Peebles, supra* at 637. Oncor’s complaints about the RFI instructions and the definition of “Oncor” as being unduly burdensome, harassing, and/or an expansion of Oncor’s obligations under the

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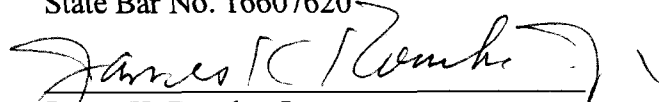
<sup>9</sup> *See, Application of Central and Southwest Corporation and American Electric Power Company, Inc. Regarding Proposed Business Combination*, Docket No. 19265, Order On Appeal Of Order No. 42 (March 11, 1999). *See also, Application of East Texas Electric Cooperative, Inc. to Amend Certificate of Convenience and Necessity for a proposed Transmission Line within Anderson, Houston, Cherokee, Smith, and Van Zandt Counties*, Docket No. 12456, 19 P.U.C. BULL. 1754,1760 (Order No. 6, Feb. 10,1994 and Order Denying Appeal of Order No. 6, Mar. 10,1994).

Commission's procedural rules are not supported by any argument about the work necessary to respond to the RFI questions in accordance with the definition and instructions or by any other explanation to support these complaints. Consequently, these assertions are not valid objections. Oncor waived these potential objections by failing to support them with the necessary pleading under law. *Id.* The ALJ should overrule these complaints. OPC appropriately defined "Oncor" to include TXU Corp., TXU Energy and TXU Power in part to assure that the particular requests could not be avoided because the requested information happened to be in the possession, custody or control of TXU Corp. or a subsidiary affiliate instead of the immediate possession of Oncor. Parties should not be forced to guess which TXU affiliate maintains the requested information in order to obtain it. Parties should not be subjected to any attempt at a "shell game" by the applicants.

WHEREFORE, PREMISES CONSIDERED, OPC respectfully requests that the Administrative Law Judge overrule Oncor's and TEF's objections and compel them to fully and immediately answer OPC's RFI questions. OPC requests that the ALJ and Commission grant OPC any such other and further relief to which it may show itself to be justly entitled.

Respectfully submitted,

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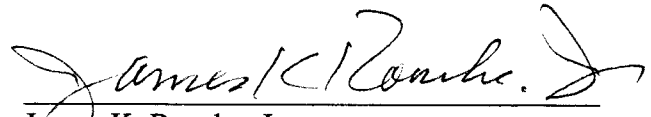
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**CERTIFICATE OF SERVICE**

Docket No. 34077

I certify that on August 9, 2007, I served a true copy of the foregoing Office of Public Utility Counsel's Motion To Compel on all parties of record via United States First-Class Mail, hand-delivery or facsimile.

  
James K. Rourke, Jr.