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SOAH DOCKET NO. 473-08-1153
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NOTICE OF VIOLATION OF § BEFORE THE STATE OFFICE OF
INTERNATIONAL POWER §
AMERICA, INC., HAYS ENERGY § ADMINISTRATIVE HEARINGS
LIMITED PARTNERSHIP, §
MIDLOTHIAN ENERGY §
LIMITED PARTNERSHIP, AND §
ANP FUNDING I, LLC OF PURA §
§36.151(j) AND PUC SUBST. R. §
§25.503(f) AND (g), RELATING §
TO FAILURE TO ADHERE TO §
ERCOT PROTOCOLS §5.8.1.1, §
AND 6.5.1.1(1)(e) CONCERNING §
GOVERNOR IN SERVICE §
REQUIREMENTS AND §
FREQUENCY BIAS §
REQUIREMENTS AND OF PUC §
SUBST. R. 25.503(f)(10), §
RELATING TO FAILURE TO §
COMPLY WITH REQUESTS FOR §
INFORMATION BY ERCOT §
WITHIN THE TIME SPECIFIED §
BY ERCOT INSTRUCTIONS §

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**INTERNATIONAL POWER AMERICA, INC., HAYS ENERGY LIMITED
PARTNERSHIP, MIDLOTHIAN ENERGY LIMITED PARTNERSHIP, AND
ANP FUNDING I, LLC'S RESPONSE TO COMMISSION STAFF'S MOTION
FOR REVISION OF PROCEDURAL SCHEDULE**

TO THE HONORABLE PAUL D. KEEPER, ADMINISTRATIVE LAW JUDGE:

The District Court has no obligation to placate Vick by continuing discovery indefinitely. **All good things, including discovery, must come to an end.** The District Court did not abuse its discretion in granting summary judgment after three and a half years of discovery.¹

International Power America, Inc., Hays Energy Limited Partnership, Midlothian Energy Limited Partnership, and ANP Funding I, LLC (collectively "IPA Companies") respond to the Staff's Motion for Revision of Procedural Schedule ("Motion"). IPA Companies strenuously oppose Staff's request to extend the time for it to conduct

¹ *United States ex rel. Taylor-Vick v. Smith*, 513 F.3d 228, 233 (5th Cir. 2008)(emphasis supplied).

discovery beyond the deadline that IPA Companies and Staff agreed in their jointly proposed procedural schedule submitted November 4, 2008.²

I. SUMMARY

The ALJ should deny the Motion, and should instead adopt the discovery deadline the parties previously agreed and submitted to the ALJ. Over nearly three years now, IPA Companies have devoted an enormous amount of resources in first cooperating with and producing information for Staff's investigation (before Staff filed this case), and then answering its 13 sets of discovery requests. Much of IPA Companies' efforts were devoted to answering patently untenable allegations about IPA Companies' frequency bias signal that Staff steadfastly refused to recognize as contrary to the facts, and later abandoned when it filed its direct case. Staff was well aware of the high document and information volume these issues entail when it three times agreed to a schedule giving it six weeks to conduct discovery on IPA Companies' direct case. Staff's reasons to extend its time for discovery beyond the three years it has already had to develop its case lack merit. Staff formally investigated this case for at least 18 months before filing it, had unlimited access to IPA, ERCOT and TRE information before doing so, and has propounded 13 sets of RFIs containing 449 total questions and subparts since filing its allegations. IPA Companies have produced everything that could possibly bear on the case, and Staff has not explained what subjects remain for additional discovery. In that vein, IPA Companies' testimonies contain a much greater amount of documentation than usual, precisely to reduce the need for lengthy discovery and to make very clear what the witnesses considered and relied upon. The claim that IPA Companies produced more information than expected is largely a problem of Staff's own making, because many of the later generation RFIs Staff apparently wants to pursue have to do with its eleventh hour frequency bias signal violation it apparently failed to investigate before filing, as well as the numerous flaws and gaps in Ms. Jaussaud's penalty calculations. Based on the number of duplicative RFIs and RFIs asserting it has not received information IPA Companies have already produced, Staff seems not to be adequately reviewing

² Although they would prefer that the other deadlines not be changed, IPA Companies will not oppose the Staff's request to extend its deadline to submit rebuttal testimony and to move the hearing date to April 7-10, 2009 (and for the other related deadlines to change as well).

information already produced before filing new RFIs, which is surprising in light of the fact that Staff took the unusual step of hiring its own consulting expert to work on this case and assist in preparing its rebuttal testimony. Finally, the two and a half months Staff seeks to conduct discovery on IPA Companies' direct testimony is about five times more than is afforded a utility in a major rate case.

The requested discovery extension poses an unreasonable burden on IPA Companies by having it continue to answer another three weeks' worth of RFIs on top of nearly three years they have answered questions. Under the circumstances and given the past discovery and history of the case, granting the additional discovery time would give Staff an incredibly unfair advantage and slant the entire procedural schedule in Staff's favor. The ALJ should deny the request.

II. FACTUAL BACKGROUND

The Motion misrepresents and omits important facts.

Most significantly, IPA Companies did not twice ask to extend their testimony filing deadline. Nor did IPA Companies ever ask for more time for discovery. IPA Companies filed its one and only motion to extend the procedural schedule due to the fact that ERCOT unexpectedly needed more time to produce e-mails responsive to a subpoena than it originally estimated.³ **IPA Companies did not seek to extend the discovery deadline or conduct additional discovery.** Staff vigorously opposed IPA Companies' request, claiming during Judge Pomerleau's telephonic pre-hearing conference of June 22, 2008 that IPA Companies had already had plenty of time (six weeks) to conclude its discovery on Ms. Jaussaud's testimony and file their own direct case.⁴ The other occasion Staff references did not involve IPA Companies' request to extend the procedural schedule. That was when Staff, on the eve of IPA Companies filing its direct testimony, attempted to subpoena critical information about IPA Companies' frequency bias from ERCOT and TRE, which Staff should have included in the prima facie case to which IPA Companies' testimony would respond. IPA Companies altogether opposed the issuance of those subpoenas on the basis that it would prejudice IPA Companies not to possess information that ERCOT should have produced already and Staff should have

³ IPA Companies' Motion for Revision of Procedural Schedule at 2.

⁴ IPA Companies had already tendered all its RFIs to Staff by that point.

included in its direct, such that only Staff, as the prosecutor, would be the only party that could include such evidence in its testimony.⁵ **With the Staff's agreement**, the ALJ abated the procedural schedule to accommodate both Staff (by issuing the subpoenas) without unduly prejudicing IPA Companies by requiring it to file testimony before it had access to the subpoenaed information.⁶ In that instance also, **IPA Companies did not seek additional time to conduct discovery.**

Its discovery responses have shown that Staff started investigating this case in approximately January 2006. Before filing its NOV in September 2007, Staff sent four sets of investigation RFIs to IPA Companies, which produced approximately 3,700 pages of responsive information. Additionally, Staff had two interviews with key IPA Companies' personnel, and submitted at least two versions of draft NOV to IPA Companies for comment during this time. Since filing its NOV, Staff has propounded 13 RFI sets with 449 questions (six RFI sets were filed after IPA Companies filed testimony), has received in that time over 4,000 pages in information from IPA Companies, as well as nine computer disks with multiple electronic files containing more requested data, and three boxes of voluminous production of information that IPA Companies witnesses reviewed or prepared. During the three years Staff has been pursuing this case, it has also had unfettered access to ERCOT and TRE specialists and data.

In that time, Staff presumably has gained some familiarity with the arguments and data sources IPA Companies were likely to raise. At the very first pre-hearing conference in this case, Staff agreed to a schedule that provided it six weeks to propound RFIs to IPA Companies after filing their direct testimony.⁷ When Judge Pomerleau granted IPA Companies' motion to extend the schedule, Staff and IPA Companies again agreed to a schedule allowing Staff six weeks to file RFIs on IPA Companies' testimony.⁸ Finally, after the ALJ granted Staff's request for issuance of subpoenas to ERCOT, Staff yet again agreed to a schedule providing it roughly six weeks to propound

⁵ IPA Companies' Response to Staff's Motion to Issue Subpoena to ERCOT at 15-16.

⁶ See Order No. 10.

⁷ See Order No. 3.

⁸ See Order No. 6

RFIs to IPA Companies on their direct testimony.⁹ IPA Companies relied on these agreed time periods in agreeing to the entire schedule. At some point after IPA Companies, ERCOT, and TRE produced thousands of pages of documents concerning the issues in this case, Staff should have realized that IPA Companies' answers to RFIs might require it to review a lot of information.

Many of the RFIs Staff has been submitting lately involve two areas. The first concern Staff's new frequency bias signal allegations. Staff substantially revised its allegations at the last minute when filing its direct case, long after both IPA Companies and ERCOT specifically told Ms. Jaussaud no basis existed for the withdrawn allegations. This meant that IPA Companies spent more than two years and thousands of dollars defending against allegations that patently lacked any factual basis, and which Staff should have investigated more thoroughly before filing them. Worse still, in an apparent effort to save face, Staff blamed IPA Companies for the withdrawn allegations on the basis of having provided incomplete information.¹⁰ The ALJ will recall that Staff sought issuance of subpoenas to ERCOT shortly before IPA Companies were to file their direct testimony so that Staff could, in rebuttal, finally establish some evidence to back up these new allegations.

The other area of recent Staff questioning has to do with Dr. Daniel Maserang's recreated penalty calculations and adjustments. Dr. Maserang testified that Ms. Jaussaud failed to produce all the penalty calculations (even though they were all requested in discovery),¹¹ so he had to recreate some of these using known inputs and even then could not document her results. Dr. Maserang also made several adjustments to her calculations to account for errors she made in such matters as failing to apply high and low sustainable limit factors and the statutory \$5,000 penalty cap. Dr. Maserang used Ms. Jaussaud's data to make these adjustments. Dr. Maserang also suggested a penalty recalculation using only times that the ERCOT system frequency disturbance exceeded .10 Hz (and used publicly available ERCOT data to do so), and applying balancing energy prices for the times in question (also derived from publicly available ERCOT data). Staff appears not to understand Dr. Maserang's calculations or his data sources

⁹ Staff's Motion for Approval of Revised Procedural Schedule (November 4, 2008).

¹⁰ IPA Companies refuted that charge in its letter of June 11, 2008 to the then-assigned ALJs.

¹¹ Direct Testimony of Dr. Daniel Maserang at 8-10.

(even though he specified them in his testimony), and has devoted many RFIs asking for production of data already in Staff's possession because Staff produced it to IPA Companies in the first place.

Staff has submitted numerous duplicative RFIs, RFIs seeking information that were provided in response to earlier RFIs, or RFIs seeking information that was spelled out in the IPA Companies' testimony or exhibits. IPA Companies attach a table showing instances in which IPA Companies' response to an RFI referenced information produced in response to an earlier RFI or was disclosed in testimony or the testimonies' exhibits.

Finally, Staff failed to mention that it hired an outside consulting engineer pursuant to a request for proposals to help on this case. The consulting expert has submitted to the undersigned a certification under the Protective Order, and based on lists Staff has also tendered, it is apparent that he has been reviewing a significant amount of highly sensitive data IPA Companies have produced. This does not represent a situation where Staff faces numerous time demands and thereby cannot timely review information.

III. DISCUSSION

As the prosecutor, Staff was obliged to conduct a diligent and thorough investigation before it filed this case and publicly alleged that IPA Companies violated the law. It had no time pressure whatsoever—none of the underlying rules in question have a statute of limitation period, and nothing requires a prosecutor to file charges before he can prove them. "Rather than deviating from elementary standards of 'fair play and decency,' a prosecutor abides by them if he refuses to seek indictments until he is completely satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt."¹² Further, the rules governing this case required Staff and the Executive Director to determine that a violation occurred and determine the appropriate penalty before filing a Notice of Violation,¹³ and to make numerous averments as part of its prima facie case outlining the evidence supporting the Executive Director's conclusions that the respondent violated the substantive rule.¹⁴

¹² *United States v. Lovasco*, 431 U.S. 783, 795 (1977)

¹³ P.U.C. PROC. R. 22.246 (e).

¹⁴ P.U.C. SUBST. R. 25.503 (l)(4). Although this subsection applies to investigations, the prima facie case requirements apply here because Staff investigated the allegations it raises in this case as part of an investigation it undertook pursuant to this subsection's authority.

What the rules do not allow, however, is investigating a respondent for two years, filing charges only to change them substantially nearly a year later, complain when the respondent files more exculpatory testimony and documentation than expected, and then try to avoid scheduling agreements and expand the discovery process to find information to support these new allegations under the guise of discovery for rebuttal testimony. In major rate cases, for example, in which billions of dollars in invested capital and millions in proposed rates are at issue, discovery on the interveners' and Staff's direct case generally is very short. In a pending major Commission rate case, for example, the SOAH ALJs gave Oncor approximately three weeks to conduct discovery on all the interveners' direct testimony and two weeks to file RFIs on the Staff's direct.¹⁵ Staff's proposal here would give it approximately 10 weeks to conduct discovery concerning four testimonies in a case involving far fewer issues, documents, and witnesses.

A. Staff's Contentions Fail to Justify Its Request

Staff's first contention, that it needs more time to review Dr. Maserang's calculations, may justify additional time to file its rebuttal testimony but it does not justify additional time for discovery. As noted earlier, many of these calculations are recreations of calculations that Ms. Jaussaud said she performed, but did not produce. The other calculations take Staff's own data and reduce the penalty accordingly. For example, Dr. Maserang took Staff's daily penalty amount and reduced it to \$5,000 for any day in which the proposed penalty exceeded this statutory cap.¹⁶ Dr. Maserang has already produced: (1) all his calculations (unlike Ms. Jaussaud, who did not do so);¹⁷ (2) all the data used in all his calculations;¹⁸ (3) all the information he reviewed or prepared in anticipation of his testimony;¹⁹ and (4) all his workpapers.²⁰ In addition to the substantial information Dr. Maserang attached to his testimony, Staff has all this information and nothing else is left to produce. Staff has propounded nine additional RFIs asking questions about his testimony and supporting data, some containing multiple

¹⁵ *Application of Oncor Electric Delivery Company LLC For Authority to Change Rates*, Docket No. 35717, Order No. 3 at 4 (July 29, 2008).

¹⁶ Maserang Testimony at 14-18, Ex. DM-1.

¹⁷ IPA Companies' Response to Staff RFI DJ-7-44, 7-46.

¹⁸ IPA Companies' Response to Staff RFI DJ-8-13.

¹⁹ IPA Companies' Response to Staff RFI DJ-7-2

²⁰ IPA Companies' Response to Staff RFI DJ-7-6.

subparts. Some of these RFIs requested information that has already been produced. Staff gives no indication what additional discovery subjects it wants to pursue during the coming three weeks for Dr. Maserang. Staff has all Dr. Maserang's calculations and data, and Dr. Maserang has identified any assumptions he made. Staff can evaluate them for purposes of preparing its rebuttal. As an Illinois federal district court once observed,

The Court finds that the time has come to end discovery in this case. There has been ample time for both sides to formulate strategy and hire expert witnesses and have them complete whatever calculations are necessary to their testimony. There is no reason to allow the relevant formulae, calculations and conclusions to change constantly, or for new variables to enter into them if due diligence has been exercised in the first place.²¹

Staff's other reason, that IPA Companies have produced a great deal of information and Staff expects they will produce more, hardly provides any justification for imposing more discovery burdens on IPA Companies and requiring IPA Companies produce yet more information. Staff knew before it ever filed this case that the issues it raises involve thousands of pages of documents, primarily because IPA Companies produced thousands of pages of documents during Staff's pre-filing investigation. Staff nonetheless has three times agreed to the same amount of time for it conduct discovery on IPA Companies' direct testimony. IPA Companies relied on those agreements in accepting the overall proposed schedules. Staff's argument on this point is difficult to follow. Staff does not claim that IPA Companies have failed to produce information, produced non-requested or garbled information that made its review difficult, or in any way obstructed the discovery process. Staff seems to agree that IPA Companies have produced everything that Staff requested. Yet, because IPA Companies appear to have produced more responsive information than Staff expected, Staff makes the unsupported and unexplained leap that it needs **more** time to ask for still **more** information. That makes no sense. Will Staff claim again, when IPA Companies produce even more information over the extended period it seeks, that it needs still more time to review the additional information produced during that period?

In reality, most of the Staff's latest discovery requests involve its new frequency bias allegations or Dr. Maserang's attempt to recreate Ms. Jaussaud's missing

²¹ *Merit Ins. Co. v. Colao*, 1988 U.S. Dist. LEXIS 3839, at *3 (N.D. Ill. Apr. 21, 1988)(Memorandum Opinion)

intermediate penalty calculations. As noted before, many of Staff's discovery requests seek information that IPA Companies had already provided. Extending the discovery period so that Staff can continue to churn out discovery requests, given the fact that it had not adequately conducted its investigation before filing its frequency bias allegations, or Staff's failure to produce the requested Jaussaud calculations is unwarranted.

B. The Request Would Impose Unreasonable Burdens on IPA Companies

As noted earlier, IPA Companies have been providing information to Staff for nearly three years now. Simply put, although the IPA Companies agree they must answer discovery requests for a reasonable period, they are not in business to answer RFIs. Other than three in-house lawyers and a legal assistant (who is currently on maternity leave), who deal with nearly all IPA litigation and transactions throughout the country, no other employees at these companies is designated as a litigation support person. Every witness, and every supporting employee, has a primary job operating the company, managing its various assets, or trading electricity. The more discovery they must answer, the more difficult it is for them to perform their actual job functions and operate generation facilities reliably.

While obviously it is difficult to set an across-the-board standard for how much discovery should occur, further discovery would impose unreasonable burdens on IPA Companies, which have produced thousands of pages of documents and electronic data. IPA Companies intentionally attached a significant amount of information to their witness' testimony, and one reason was to reduce the amount of discovery Staff needed to conduct. The IPA Companies' testimonies are quite specific about the data points and facts that the witnesses rely upon in reaching their opinions, and the testimony very thoroughly explaining each witness' reasoning. Producing this type of testimony took not only the witnesses but supporting employees and counsel a great deal of time, and required significant resources. Many of these discovery requests have required IPA Companies and numerous employees to conduct extensive document and e-mail searches to locate responsive information.

Finally, particularly in light of Staff's propensity to ask for the same information more than once, one can assume that some proportion of the discovery Staff would

conduct during the requested three week extension will seek information IPA Companies have already provided. This does not represent a reasonable use of IPA Companies' resources.

C. Granting the Request Would Severely Prejudice IPA Companies

If the ALJ grants Staff's request, this would result in Staff having a total of eleven months of discovery for its testimonies²² to the six weeks extended to the IPA Companies to conduct discovery on Staff's direct testimony.²³ While IPA Companies could and did conduct discovery before Ms. Jaussaud filed her testimony (leaving aside that this was the first time Staff designated Ms. Jaussaud as its witness despite having represented in April that it had no idea who would be its witness and that Staff did not unveil a major allegation in the case until Ms. Jaussaud filed her testimony), Staff conducted an 18 month formal investigation before filing this case in which it required IPA Companies to produce thousands of pages of documents and submit to interviews. Staff also has nearly unrestricted access to ERCOT and TRE resources at its disposal, while by contrast, IPA Companies had to take their depositions and subpoena information from these entities and even then received incomplete answers. Staff's uneven allocation of discovery and investigation time, resources to devote to this case, and access to information has inherently put IPA Companies at a disadvantage. Giving Staff even more time to continue submitting discovery requests simply increases that advantage.

IV. CONCLUSION

Like the three and a half years that the Fifth Circuit agreed was long enough for Ms. Vick to conduct discovery on her wrongful termination claims, three years is long enough for the Staff to have investigated and conducted discovery on its claims here. The ALJ should deny Staff's Motion insofar as it requests additional time for Staff to submit RFIs to the IPA Companies.

²² September 12, 2007 to June 4, 2008 for its direct, and November 19, 2008 to January 28, 2009 for its rebuttal. See Order No. 3 and Staff's Motion.

²³ June 4 to July 16, 2008. See Order No. 3.

Respectfully submitted,

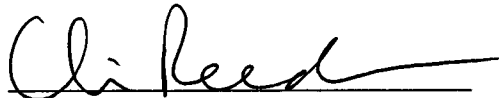


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Chris Reeder

**INSTANCES IN WHICH STAFF REQUESTED INFORMATION PREVIOUSLY
PRODUCED OR DISCLOSED**

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