



Control Number: 35460



Item Number: 70

Addendum StartPage: 0

SOAH DOCKET NO. 473-08-2612
PUC DOCKET NO. 35460

PETITION OF PNM RESOURCES, INC. § BEFORE THE
AND CAP ROCK ENERGY CORPORATION §
REGARDING PROPOSED MERGER AND § PUBLIC UTILITY COMMISSION
ACQUISITION OF STOCK § OF TEXAS

**APPLICANTS' RESPONSE TO OCCIDENTAL PERMIAN LTD.'S
MOTION TO COMPEL RESPONSES TO FIRST SET OF
REQUESTS FOR INFORMATION**

COMES NOW PNM Resources, Inc. ("PNMR") and Cap Rock Energy Corporation ("Cap Rock") (together, "Applicants") and file this Response to Occidental Permian Ltd.'s ("OPL") Motion to Compel Responses to First Set of Requests for Information.

I. INTRODUCTION

OPL states that the Applicants have the burden of showing that they are entitled to the relief they are seeking. The burden in this discovery dispute, however, is upon OPL as the moving party to demonstrate the relevancy of information sought, and a mere conclusion or assertion is not sufficient.¹ OPL further notes that this proceeding involves the proposed acquisition of Cap Rock Holding Corporation, Cap Rock, and NewCorp Resources Electric Cooperative, Inc. ("NewCorp"). Regardless of whether the proposed transaction certain involves those three entities, it is Cap Rock, as the electric utility under PURA,² that must report the proposed transaction and obtain approval before closing.

II. RESPONSE REGARDING OPL 1-12

REQUEST FOR INFORMATION NO. OPL 1-12

On what date did NewCorp stop recording depreciation of its transmission facilities consistent with the original ten year lease and begin recording depreciation of the assets

¹ Cf. *Lueg v. Tewell*, 572 S.W.2d 97 (Tex. Civ. App.—Corpus Christi 1978, no writ).

² Public Utility Regulatory Act, TEX. UTIL. CODE ANN. §§ 1.001-66.016 (Vernon 2007).

on a straight-line basis over 20 years? Has NewCorp changed its depreciation practices since this date?

The Applicants' objection to this RFI was the following:

Applicants objects to this request as irrelevant and beyond the scope of this proceeding and beyond the scope of permissible discovery pursuant to P.U.C. PROC. R 22.141(a). NewCorp's only business is providing transmission service in interstate commerce; therefore, the Federal Energy Regulatory Commission ("FERC") regulates the rates for NewCorp, and whether the effect of the proposed transaction relating to NewCorp is consistent with the public interest is being addressed at the FERC in FERC Docket No. EC08-71. Further, NewCorp is an electric cooperative and none of PURA §§ 14.101, 39.262, or 39.915 apply to electric cooperatives.

The keystone of OPL's argument with regard to this RFI shows that its motion is fundamentally flawed. OPL states that "the manner in which a fundamental ratemaking element like depreciation has been treated by NewCorp and flowed through to Cap Rock Energy in the past is necessary in order to determine whether greater protections against affiliate abuse should be incorporated as part of the post-transaction environment, and, if so, how such protections should be crafted."³ Thus, according to OPL, its request is related to asking the Public Utility Commission of Texas ("Commission") to determine the appropriateness of a particular ratemaking element in transmission rates set by the Federal Energy Regulatory Commission ("FERC"). The appropriateness of NewCorp's approach to recording depreciation is, however, a FERC ratemaking issue; it is clearly beyond the scope of this case.

OPL fails to explain why it needs this information or why NewCorp's past accounting practices or treatment of depreciation are relevant to the question of whether the transaction should be approved. NewCorp has not filed to change its depreciation rates or any other rate as a result of this transaction. If it does, OPL remains free to file a motion to intervene and protest at the FERC, where all issues relevant to any such proposed change can be decided. If OPL

³ OPL Motion to Compel at 3.

believes NewCorp's existing depreciation rates are unreasonable, it remains free to seek relief from the FERC, either through various means of informal dispute resolution or by filing a complaint.

Beyond this obvious request for review of NewCorp rates, the Applicants sees no relevance of NewCorp's approach to recording depreciation to the issues to be addressed in this case. Indeed, it is only issue No. 15, regarding cost-shifting among affiliates, that OPL even attempts to tie to this discovery request. NewCorp's depreciation practices have absolutely no bearing on cost shifting, cross-subsidies, or discriminatory behavior as OPL alleges. NewCorp's rates are set by FERC and if there is an objection to those rates, it needs to be made in appropriate proceedings at FERC.

Moreover, even as to Cap Rock, this is not a rate case. The issues to be addressed here are stated in the Preliminary Order and include a consideration of the impact of the proposed transaction on Cap Rock's rates and service. The issues do not include an inquiry into the correctness of the current rates, for example. The Commission has separate procedures and standards to address such matters and those procedures and standards provide for a consideration of rates as a whole, not just a focus on a single ratemaking element such as the depreciation recording methodology of one of Cap Rock's transmission service providers.⁴

Further, none of the issues to be addressed in this case, including the three listed by OPL in its motion, point attention to NewCorp; in fact, none of the issues name NewCorp. While the word "affiliates" is used, the Commission determined in Cap Rock's last rate case that, because NewCorp is an electric cooperative, it does not constitute an affiliate of Cap Rock under PURA 11.006,⁵ and, in any event, Commission precedent has not allowed unrestricted discovery on

⁴ NewCorp is Cap Rock's only transmission service provider for its Stanton and Lone Wolf divisions, which are connected to the Southwest Power Pool, but there are numerous transmission service providers that are involved in the transmission of power to Cap Rock's other two divisions, which are within ERCOT.

⁵ Docket No. 28813, Proposal for Decision at 97 (Mar. 17, 2005).

utility affiliates in proceedings involving the review of utility acquisitions.⁶ Additionally, whether the proposed acquisition is in the public interest with regard NewCorp is the subject of a pending FERC proceeding, FERC Docket No. EC08-71. The scope of discovery in this proceeding should be appropriately drawn in consideration of matters that have been entrusted to FERC jurisdiction.

Finally, OPL argues that Cap Rock's provision of information regarding NewCorp in response to other RFIs undermines the Applicants' objection here. This argument should be rejected. The Applicants' good faith efforts to be cooperative and provide information instead of sparking a multitude of discovery disputes should be a point of commendation not condemnation. The fact that the Applicants have been willing to provide responses to other RFIs of questionable relevancy should not be counted against them. The Applicants repeatedly asserted objections to providing information about NewCorp,⁷ but, in the spirit of cooperation, provided much of the requested information nonetheless. If the Applicants' efforts to be cooperative are held to have undermined its objection here, parties will only be encouraged to be more protective and obstinate in discovery in the future. The Applicants should not be forced to adopt a practice of objecting to each and every RFI to preserve their rights to object. This would encourage excess litigation and be contrary to public and Commission policy.

III. RESPONSE REGARDING OPL 1-29 and 1-31

REQUEST FOR INFORMATION NO. OPL 1-29

Reference Exhibit MDD-1 to Ms. Davis's testimony, page VIII-1, Bates number 211, which states that Cap Rock Energy's wholesale power purchase contract with Southwest Public Service Company ("SPS") can be "cancelled" by Cap Rock Energy or SPS "if

⁶ See e.g., Docket No. 34077, *Joint Report and Application of Oncor Electric Delivery Company and Texas Energy Future Holdings Limited Partnership Pursuant to PURA § 14.101*, Order No. 12 at 4 (July 11, 2007).

⁷ See e.g., Applicants' Objection to OPL 1-6, 1-18, 1-23, 1-26, 1-32, 1-33, 1-34, 1-36, 1-38 (May 21, 2008).

either party gives a five-year notice of cancellation which can be given for the first time in 2008.” Please provide a copy of all documents, analyses, or communications prepared by or for, or received by, PNMR or Cap Rock Energy that discuss, address, or relate to actions or possible alternatives that may be taken by Cap Rock at the termination of the contract if the contract is cancelled according to its terms.

REQUEST FOR INFORMATION NO. OPL 1-31

Please provide a copy of all documents, analyses, or communications prepared by or for, or received by, PNMR or Cap Rock Energy that discuss, address, or relate to Cap Rock Energy’s plans to assure that Cap Rock can continue to meet its obligation to serve its retail customers on its Stanton and Lone Wolf distribution systems after December 31, 2013.

The Applicants’ objections to these RFIs were the following:

Applicants objects to this request as irrelevant and beyond the scope of this proceeding and beyond the scope of permissible discovery pursuant to P.U.C. PROC. R 22.141(a). Additionally, the request is a vague and overly burdensome fishing expedition in asking for "all documents, analyses, or communications . . . that discuss, address, or relate to actions or possible alternatives that may be taken by Cap Rock . . ."

There are some Occidental affiliates in other parts of Texas and/or in other states that are competitors with CRE in purchasing power from SPS and other entities. There are other Occidental affiliates that are competitors with potential suppliers to CRE if the SPS wholesale power purchase contract is cancelled. Because of this dual competitor status of Occidental affiliates, CRE will also seek non-disclosure to Occidental and its consultants pursuant to the Paragraph 36 of the Protective Order in place in this docket if a response is required.

In its Motion to Compel, OPL argues that these RFIs are relevant in that they seek information regarding Applicants’ plans to assure that Cap Rock can provide service to customers in the Stanton and Lone Wolf divisions after December 31, 2013.⁸ Again, OPL’s keystone argument shows on its face why the motion should be denied. The request is simply too speculative and tenuously connected to any of the issues to be addressed in this proceeding to constitute a relevant inquiry. OPL has not shown why it needs this highly confidential

⁸ OPL Motion to Compel at 5.

information to evaluate the transaction. Any wholesale agreement that Cap Rock enters into for the purchase of energy and capacity in interstate commerce will be subject to the FERC's jurisdiction and can be reviewed at the appropriate time. The Commission will also retain its jurisdiction to review Cap Rock's purchasing practices. While power supply is an important element of the manner in which various customers are served, OPL has not even suggested how or whether the proposed acquisition might have any impact on the SPS contract. The requested information is not relevant to that issue nor is the question reasonably drawn to discover information that might lead to the discovery of relevant information.

Moreover, Cap Rock did not completely ignore OPL's request as it might have but attempted to be helpful and cooperative by providing an overview of Cap Rock's efforts in connection with the SPS contract. As shown in Cap Rock's response, provided as Attachment A, Cap Rock has not yet developed plans to address the expected cancellation of the SPS contract. It has just begun to take steps to address the situation. The documents that OPL seeks, for example, could identify the names of potential power suppliers and in doing so disrupt Cap Rock's efforts. OPL may well wish competitive harm on Cap Rock since it or its affiliates compete as purchasers and suppliers of power in the very markets that Cap Rock is engaged. In any event, the names of potential suppliers for a contract that may need to be replaced more than five years into the future simply has too tenuous a tie to the transaction that is at issue in this proceeding to reflect any relevance to this proceeding. OPL's RFI is not appropriately tailored to seeking information about the potential impact on Cap Rock's operations if the proposed transaction is approved.

The Commission has thoughtfully considered a requesting party's competitive status in connection with the discovery propounded by the party and denied motions to compel in light of such considerations. For example, in Docket No. 19265, *Application of Central and Southwest*

Corporation and American Electric Power Company Regarding Proposed Business Combination, the ALJ considered a group of questions that dealt with “CSW Energy’s intentions regarding generation facilities, the generation planned by Calpine Corporation in the Rio Grande Valley and if so who CSW Energy would see the power to.”⁹ The ALJ denied the motion to compel responses to this group of questions, noting that, among things, “it appears that some of the questions may have less to do with this proceeding and more to do with PUB’s attempt to get information as it negotiates for power purchases from Calpine.” Similarly, in Docket No. 21190, *Application of Southwestern Public Service Company Regarding Proposed Merger Between New Century Energies, Inc. and Northern States Power Company*, the ALJ considered a question requesting documents relating to requests for transmission service for purposes of integrating and coordinating the electric operations of the merging companies.¹⁰ The ALJ noted that the requesting party’s stated purpose of obtaining information seems to confirm the utility’s complaint that the requesting party is actually seeking discovery for use in a FERC proceeding, “or for its own competitive purposes.”

Here, too, the ALJ should note that OPL does not contest the status of OPL and OPL affiliates as potential competitors with the Cap Rock, OPL merely submits that the protective order will sufficiently protect the competitive interests. But OPL’s approach assumes the relevance of the request in the first instance. Given the stained connection of these RFIs to the transaction action at hand in the context of the issues to be addressed in this proceeding, and in light of OPL’s competitive interests, the motion to compel should be denied.

⁹ Docket No. 19265, Order No. 18 at 8 (Sept. 21, 1998).


¹⁰ Docket No. 21190, Order No. 10 at 4-5 (Jan. 19, 2000).

IV. CONCLUSION

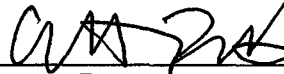
The Applicants respectfully request that their objections be sustained, that OPL's Motion to Compel be denied, and that Applicants be granted any other relief to which it is entitled.

Respectfully submitted,

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**ATTORNEYS FOR CAP ROCK ENERGY
CORPORATION**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on all parties of record on this the 2d day of June 2008 hand-delivery, overnight delivery, first class mail, or fax transmission.



Everett Britt

SOAH Docket No. 473-08-2612
PUC Docket No. 35460
CRE' Response to OPL's 1st RFI

**PNMR and CRE'S
RESPONSES TO OPL'S FIRST REQUEST FOR INFORMATION
QUESTIONS OPL 1-1 THROUGH OPL 1-38**

OPL 1-29: Reference Exhibit MDD-1 to Ms. Davis's testimony, page VIII-1, Bates number 211, which states that Cap Rock Energy's wholesale power purchase contract with Southwest Public Service Company ("SPS") can be "cancelled" by Cap Rock Energy or SPS "if either party gives a five-year notice of cancellation which can be given for the first time in 2008." Please provide a copy of all documents, analyses, or communications prepared by or for, or received by, PNMR or Cap Rock Energy that discuss, address, or relate to actions or possible alternatives that may be taken by Cap Rock at the termination of the contract if the contract is cancelled according to its terms.

OBJECTION: Applicants object to this request as irrelevant and beyond the scope of this proceeding and beyond the scope of permissible discovery pursuant to P.U.C. PROC. R. 22.141(a). Additionally, the request is a vague and overly burdensome fishing expedition in asking for "all documents, analyses, or communications . . . that discuss, address, or relate to actions or possible alternatives that may be taken by Cap Rock . . ."

There are some Occidental affiliates in other parts of Texas and/or in other states that are competitors with CRE in purchasing power from SPS and other entities. There are other Occidental affiliates that are competitors with potential suppliers to CRE if the SPS wholesale power purchase contract is cancelled. Because of this dual competitor status of Occidental affiliates, CRE may also seek non-disclosure to Occidental and its consultants pursuant to the Paragraph 36 of the Protective Order in place in this docket if a response is required.

RESPONSE: (prepared by: Counsel)

(Sponsor: Melissa D. Davis, President and CEO)

Subject to the objection, CRE provides the following information regarding the information sought by this request:

SOAH Docket No. 473-08-2612
PUC Docket No. 35460
CRE' Response to OPL's 1st RFI

**PNMR and CRE'S
RESPONSES TO OPL'S FIRST REQUEST FOR INFORMATION
QUESTIONS OPL 1-1 THROUGH OPL 1-38**

CRE has not received a cancellation notice from SPS for its Wholesale Full Requirements Electric Power agreement, but, in light of the stipulation in the recent SPS Fuel Continuation Case 05-00341-UT in New Mexico (in which Occidental was a key driver), CRE expects that SPS will have little choice but to cancel its contract with CRE. While the termination date would still be a little more than five years away, CRE has begun to investigate its options to replace to SPS contract. CRE has participated in discussions with potential power suppliers but no formal offers have been made. CRE has also engaged in discussions with other load-serving entities regarding the possibility of aggregating purchased power needs but again no formal arrangements have been developed. None of the potential suppliers or co-purchasers is an affiliates of PNM Resources, Inc. CRE has discussed with the Southwest Power Pool projected future transmission issues that could affect the range of potential suppliers. Finally, CRE has engaged a consultant to assist CRE as it investigates its options to replace the SPS contract. A copy of the consulting agreement is provided as a confidential attachment to this response.