

Control Number: 40090



Item Number: 65

Addendum StartPage: 0

RECEIVED

12 SEP 18 PM 2:17

P.U.C. DOCKET NO. 40090
SOAH DOCKET NO. 473-12-5530 PUBLIC UTILITY COMMISSION
FILING CLERK

NOTICE OF VIOLATION OF PURA	§	BEFORE THE STATE OFFICE OF
§39.352, FORMER P.U.C. SUBST. R.	§	
§25.107(g)(9)(A), §25.107(g)(B) and	§	ADMINISTRATIVE HEARINGS
§25.107(j)(1), AND CURRENT	§	
§25.107(g)(1)(D) RELATED TO	§	
CERTIFICATION OF RETAIL	§	
ELECTRIC PROVIDERS, AND	§	
CURRENT P.U.C. SUBST R. §25.475,	§	
25.479, 25.480 and 25.483, RELATED	§	
TO CUSTOMER PROTECTION	§	
RULES FOR RETAIL ELECTRIC	§	
SERVICE BY GLACIAL ENERGY OF	§	
TEXAS, INC.	§	

**GLACIAL ENERGY OF TEXAS, INC.'S RESPONSE
TO PUCT STAFF'S MOTION TO COMPEL**

Pursuant to Section 22.144(f) of the Procedural Rules of the Public Utility Commission of Texas ("PUCT")¹ and Glacial Energy of Texas, Inc.'s ("Glacial TX") Notification of Extension of Deadline to Respond to Staff's Motion to Compel,² Glacial TX hereby submits this Response to PUCT Staff's August 30, 2012 Motion to Compel Responses to Staff's First Set of Requests for Information ("RFIs").

I. Background

On August 3, 2012, Staff propounded its First Set of RFIs to Glacial TX. The parties made a good faith attempt to resolve Glacial TX's objections to Staff's RFIs, and did in fact resolve certain objections. However, certain of Glacial TX's objections could not be resolved. Therefore, on August 13, 2012, Glacial TX submitted various objections, in whole or in part, to

¹ P.U.C. PROC. R. 22.144(f).

² Glacial Energy of Texas, Inc.'s Notification of Extension of Deadline to Respond to Staff's Motion to Compel, PUC Docket No. 40090 et al., at 2 (filed Sept. 6, 2012).

65

Staff's RFI Nos. 1-4, 1-5, 1-8, 1-10 through 1-15, 1-18 through 1-21, and 1-25.³ On August 30, 2012, Staff submitted a motion seeking to compel Glacial TX to respond to RFI Nos. 1-4, 1-5, 1-11 through 1-15, and 1-25.

Based on discussions between Glacial TX and Staff, and subject to and without waiving its objections and privilege assertions, Glacial TX agreed to provide certain responsive documents to Staff on a rolling basis. Also based on those discussions, on September 6, 2012, Glacial TX filed a notification that Glacial TX and Staff had agreed to a modification of the deadline for Glacial TX to respond to Staff's Motion to Compel until September 18, 2012. Pursuant to Glacial TX's September 6, 2012 Notification, Glacial TX hereby responds to Staff's Motion to Compel and renews its general objections to Staff's First Set of RFIs, and its specific objections to RFI Nos. 1-4(a) and 1-15.

II. General Answer to Staff's Motion to Compel

A. Staff Is Seeking to Compel Glacial TX To Provide Information That Is Neither Relevant to This Proceeding nor Reasonably Calculated To Lead to the Discovery of Admissible Information.

As Glacial TX explained in its Opposition to Staff's RFIs, discovery in this proceeding should be limited to the review of three specific categories of information:

- (i) whether Glacial TX's initial Retail Electric Provider ("REP") application included material omissions;
- (ii) whether Glacial failed to comply with P.U.C. SUBST. R. 25.107(g)(1)(D) (the "10% Ownership Restriction") after it became effective in May 2009 (more than three years after Glacial TX's REP certificate was granted); and
- (iii) whether Glacial TX has violated certain requirements related to the form and content of enrollment materials, bills, and disconnection notices.

³ Glacial Energy of Texas, Inc.'s Objections to Commission Staff's First Set of Requests for Information to Glacial Energy of Texas, Inc., PUC Docket No. 40090 et al. (filed Aug. 13, 2012) ("First Objections").

These are the only categories of allegations Staff set forth in the January 6, 2012 Notice of Violation (“NOV”) and the January 9, 2012 Petition for Revocation. To permit Staff to expand the scope of discovery beyond these three categories of information would allow Staff to seek information that is neither relevant nor reasonably calculated to lead to the discovery of evidence that would be admissible for the purpose of proving the alleged violations. Indeed, the Supreme Court of Texas “has repeatedly emphasized that discovery may not be used as a fishing expedition,” but rather “requests must be reasonably tailored to include only matters relevant to the case.”⁴

However, Staff’s RFIs seek a significant amount of information related to the operations of Franklin Power Company (“Franklin”), a company that ceased operations seven years ago. This proceeding simply does not concern matters related to Franklin’s operations or financing, or the transition of Franklin customers to the provider of last resort (“POLR”) in 2005. The PUCT revoked Franklin’s REP certificate on July 17, 2006 in PUC Docket No. 31166. If the PUCT had any concerns with Franklin’s operations or wind-down activities, that proceeding would have been the appropriate docket within which to obtain such information. It is now wholly inappropriate to seek such information, seven years after Franklin ceased operations, from Glacial TX, which was in no way involved with Franklin or the revocation of its REP certificate.

Moreover, Franklin is not – and could not be – a party to this docket. Staff is not seeking any relief against Franklin; nor could it. Therefore, Glacial TX continues to object to these RFIs

⁴ See *In re Am. Optical Corp.*, 988 S.W.2d 711, 713 (Tex. 1998); see also *In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex. 2003) (stating that requests must show a reasonable expectation of obtaining information that will aid the dispute’s resolution).

for seeking information that is neither relevant nor reasonably calculated to lead to the discovery of admissible information.

Finally, Glacial TX emphasizes that, concurrent with this filing, Glacial TX is submitting supplemental responses to Staff's RFI Nos. 1-4, 1-5, 1-11 through 1-14, and 1-25 with respect to Franklin.⁵ Those responses are made in the spirit of cooperation without waiver of Glacial TX's right to contest the admissibility of any such matters upon hearing. Indeed, other than with respect to part of Staff RFI No. 1-4(a) and No. 1-15, as discussed below, Glacial TX is providing responses to all of Staff's First Set of RFIs.

B. Staff Does Not Support Its Claim that Mr. Mole Has a Superior Right to Compel the Production of Information from Third Parties.

In seeking information regarding Franklin, Staff claims, without providing any support, that Mr. Mole "has a superior right to compel production of such information as he admittedly held an ownership interest in Franklin."⁶ As an initial matter, it is unclear from Staff's Motion to Compel from whom Staff believes Mr. Mole could possibly seek to compel the production of such information. Footnote 17 of the Motion to Compel suggests, as an example, that Mr. Mole could require the production of responsive information from Mr. Francisco Segura. As explained in Glacial TX's response to Staff RFI No. 1-8, Mr. Segura served as the President of Operations of Glacial TX from inception to 2007 and, prior to his employment by Glacial TX, had served as Vice President of Operations and Customer Relations for Franklin.

Staff does not explain how Mr. Mole, by virtue of his previously-held indirect interest in Franklin, which ceased operations seven years ago, would have any ability now to compel a former Franklin employee to provide any information. Glacial is not aware of any relationship

⁵ In addition, Glacial TX has provided (and continues to provide) communications between Mr. Mole and Franklin personnel that are responsive to RFI No. 1.4(h) under separate cover.

⁶ Motion to Compel at 6-7.

between Mr. Mole and Mr. Segura, contractual or otherwise, that would enable Mr. Mole to require Mr. Segura to produce any information. Similarly, Staff does not explain how Mr. Mole would have the ability to compel the production of information by *any* third party, either because of his previous investment in Franklin or otherwise.

III. Specific Responses to Staff's Motion to Compel

1-4 For each of the calendar years beginning in 2003 and through 2006, provide the following with respect to Gary Mole and Energy West Resources, Ltd. d/b/a Franklin Power Company and Fire Ply Powered by Franklin (hereafter referred to as "Franklin"):

(a) Federal income tax returns of Gary Mole ;

Mr. Mole's personal tax returns (RFI No. 1-4(a)) are neither relevant in this proceeding nor reasonably calculated to lead to the discovery of admissible information. While Staff suggests that Mr. Mole's personal tax returns may shed light on whether Mr. Mole was a principal of Franklin, such claims are merely a false pretext to conceal Staff's efforts to harass Mr. Mole by prying into his private affairs. The Texas Supreme Court has cautioned that subjecting federal income tax returns to discovery should be kept to the minimum in the interest of protecting privacy.⁷ Accordingly, before compelling the production of such highly sensitive personal information, Staff should state with particularity why it believes that such returns are relevant.⁸

Mr. Mole's personal tax returns are simply not relevant to this proceeding. In response to inquiries related to whether Mr. Mole was a principal of Franklin, Glacial TX has already disclosed Mr. Mole's ownership history in Franklin and Glacial TX, and Glacial TX has

⁷ See *In re Williams*, 328 S.W.3d 103, 116 (Tex. App. 2010) (quoting *Maresca v. Marks*, 362 S.W.2d 299, 301 (Tex. 1962)).

⁸ See *id.* at 116 (explaining that "once an objection to the production of federal income tax returns is asserted, unlike the production of other financial records, the party seeking discovery of the tax returns bears the burden of demonstrating relevance and materiality").

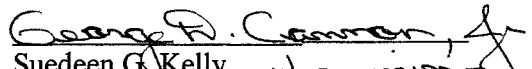
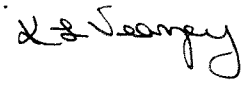
provided (and continues to provide) hundreds of pages of communications between Mr. Mole and Franklin personnel that are responsive to RFI No. 1-4(h). Staff's attempt to pry into Mr. Mole's personal affairs by reviewing his personal income tax returns goes too far.

1-15 Provide a current list of Glacial's creditors, including the amount of indebtedness for each creditor. Also provide a copy of all indentures, notes, bonds, mortgages and any other documents relating to Glacial's credit and/or loan obligations.

Glacial TX continues to object to Staff RFI 1-15, as Glacial TX's current creditors and the respective amounts of indebtedness are wholly irrelevant to this proceeding. Staff does not explain in its Motion to Compel with any clarity why Glacial TX should be required to provide such information. Rather, Staff merely asserts, without providing any support, that "[t]he information sought by Staff regarding Glacial's creditors is relevant to the ownership of and involvement with Glacial by virtue of a debtor interest."⁹ Staff does not explain why "a debtor interest" in Glacial TX is of any relevance in this proceeding at all. Indeed, neither the NOV nor Staff's Petition for Revocation make any reference to Glacial TX's creditors or loan agreements. Moreover, Staff's statement that "[s]uch information may also be relevant, and is reasonably calculated to lead to admissible evidence in this matter" is conclusory and provides no support for Staff's request to compel Glacial to provide this information.

⁹ Motion to Compel at 7.

Respectfully submitted,


Sudeen G. Kelly *w/ permission* 

George D. (Chip) Cannon, Jr.

G. Scott Binnings

Patton Boggs LLP

2550 M Street NW

Washington, DC 20037

(202) 457-6000 (Telephone)

(202) 457-6315 (Facsimile)

Attorneys for Glacial Energy of Texas, Inc.

Dated: September 18, 2012

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was hand delivered and/or mailed this 18th day of September 2012, via facsimile and/or U.S. Mail, postage pre-paid to all parties of record.

George D. Cannon, Jr.
George D. (Chip) Cannon, Jr. w/ permission of George, Jr.