



Control Number: 40348



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SOAH DOCKET NO. 473-12-6064
PUC DOCKET NO. 40348

APPLICATION OF TEXAS-NEW § BEFORE THE STATE OFFICE
MEXICO POWER COMPANY FOR §
APPROVAL OF AN ENERGY § OF
EFFICIENCY COST RECOVERY §
FACTOR § ADMINISTRATIVE HEARINGS

**CITIES' MOTION TO COMPEL TNMP TO RESPOND TO CITIES'
FIRST REQUEST FOR INFORMATION**

COME NOW, Cities Served by Texas-New Mexico Power Company ("Cities") and file this Motion to Compel Texas-New Mexico Power Company ("TNMP" or "Company") to respond to Cities' First Request for Information ("RFI"). On May 21, 2012, TNMP filed objections to Cities' First RFI, Question No. CJ 1-16. TNMP's objections should be overruled, and the Company should be compelled to respond to Cities' First RFI. Pursuant to P.U.C. PROC. R. 22.144(e) and Order No. 1, this Motion to Compel is timely filed.

LEGAL STANDARD FOR DISCOVERY

The scope of relevant discovery in contested case proceedings before the Public Utility Commission ("PUC" or "Commission") is broad.¹ Discovery is intended to allow the parties the fullest knowledge of issues and facts prior to trial.² The PUC's procedural rules allow parties to obtain discovery "regarding any matter, not privileged or exempted...that is relevant to the subject matter of the proceeding."³ Furthermore, material is discoverable even if it is not ultimately admissible at trial, if the information sought is reasonably calculated to lead to the

¹ The scope of relevancy in contested case hearings before the Commission is governed by § 2001.091 of the Texas Administrative Procedure Act, TEX. GOV'T CODE ANN. § 2001.001-.902 (West 2008 & Supp. 2011); Rule 192.3 of the TEX. R. CIV. PROC.; and P.U.C. PROC. R. 22.141(a).

² *Gutierrez v. Dallas Independent School District*, 729 S.W.2d 691, 693 (Tex. 1987), quoting *West v. Solito*, 563 S.W.2d 240, 243 (Tex. 1978).

³ P.U.C. PROC. R. 22.141(a).

discovery of admissible evidence.⁴ “Relevant to the subject matter” and “reasonably calculated to lead to the discovery of admissible evidence” are to be liberally construed.⁵

REQUESTS FOR INFORMATION

TNMP objects to Cities’ RFI No. CJ 1-16, the text of which follows below:

CJ 1-16 How are the demand and energy savings from the 2011 energy efficiency program used to adjust the Company’s projected demand and energy forecast and corporate plan for 2011 and subsequent years? Provide supporting documents that demonstrate how the projected demand and energy savings from the 2011 program are incorporated into the official forecasts.

TNMP’s Objection:

TNMP objects to Cities’ request on the basis that the request “seeks information that is neither relevant to the issues presented in this matter nor likely to lead to the discovery of admissible evidence and to the extent the request seeks information outside of the scope of TNMP’s EEPR.”⁶ TNMP further asserts that its corporate plan is not subject to the scope of this proceeding.⁷

TNMP’s claims lack merit. Cities’ RFI No. CJ 1-16 is both relevant and reasonably calculated to lead to the discovery of admissible evidence because it has a direct bearing on whether an energy efficiency performance bonus is appropriate for TNMP, and if so, what the reasonable amount of that bonus should be. TNMP is requesting a performance bonus for 2011 based on its assertions that it exceeded its 2011 demand reduction goal by 3.38% and its energy reduction goal by 62.3%.⁸ TNMP’s eligibility for and the proper amount of any performance bonus for 2011 is an issue to be addressed in this proceeding pursuant to the Commission’s Draft

⁴ TEX. R. CIV. PROC. 192.3.

⁵ *Axelson, Inc. v. McIlhaney*, 798 S.W.2d 550, 553 (Tex. 1990).

⁶ TNMP’s Objections at 3 (May 21, 2012).

⁷ *Id.*

⁸ Direct Testimony of Stefani M. Case at 3 (Apr. 30, 2012).

Preliminary Order.⁹ As Cities explain below, demand and energy reduction savings are used to calculate whether TNMP will be eligible for a performance bonus.

Utilities are eligible for performance bonuses in energy efficiency cost recovery factor (“EECRF”) proceedings if the utility exceeds its demand and energy reduction goals established by the Commission rules at a cost not exceeding the cost caps established in the rules.¹⁰ In fact, a utility’s performance bonus is directly calculated based upon how much the utility exceeded its demand and energy reduction goals.¹¹ Whether and how much the utility exceeded its demand and energy reduction goals is calculated based on the Company’s forecasted energy and demand savings.¹² Thus, the Company’s forecasted energy and demand savings are directly tied to whether the Company is eligible for a performance bonus for its 2011 energy efficiency program.

By examining how the demand and energy savings from the 2011 energy efficiency program were used to adjust the Company’s projected demand and energy forecast and corporate plan for 2011 and subsequent years, Cities seek to test the accuracy and veracity of TNMP’s forecasted energy and demand savings. If TNMP uses the demand and energy savings from the 2011 energy efficiency program to adjust the Company’s official projected demand and energy forecast used for corporate planning and corporate forecasts reported to investors, it would be evidence that the Company has confidence in the assumptions used in those demand and energy savings.

⁹ Draft Preliminary Order at 3 (May 11, 2012).

¹⁰ P.U.C. SUBST. R. 25.181(h).

¹¹ P.U.C. SUBST. R. 25.181(h)(3) (A utility that exceeds 100% of its demand and energy reduction goals shall receive a bonus equal to 1% of the net benefits for every 2% that the demand reduction goal has been exceeded, with a maximum of 20% of the utility’s program costs).

¹² P.U.C. SUBST. R. 25.181(e).

By contrast, if the Company does *not* use its demand and energy savings from its 2011 energy efficiency program to report forecasts to investors and as the basis for corporate planning, this would be evidence that the Company has little confidence in the assumptions used in those demand and energy savings. For example, TNMP's calculation of net benefits from its energy efficiency program are based on forecasted future demand reduction, which in turn are dependent on estimates of the programs' useful lives. Whether the Company utilizes similar assumptions regarding future demand reductions for purposes other than calculating the performance bonus is relevant to the credibility of the Company's assumptions in this docket. Therefore, Cities seek the information requested in RFI No. CJ 1-16 to test the accuracy of calculations used to derive costs that TNMP seeks to recover in this proceeding.

For these reasons, Cities' RFI No. CJ 1-16 is directly relevant to and reasonably calculated to lead to admissible evidence as to whether TNMP is eligible for its requested bonus in this proceeding. TNMP should be compelled to produce the information responsive to the request.

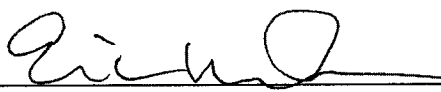
PRAYER

WHEREFORE, PREMISES CONSIDERED, Cities respectfully request the Administrative Law Judge to grant Cities' Motion to Compel TNMP to Respond to Cities' First RFI and to any and all other relief to which they are justly entitled.

Respectfully submitted,

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ATTORNEYS FOR THE CITIES SERVED BY
TEXAS-NEW MEXICO POWER COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was transmitted by e-mail, fax, hand-delivery and/or regular, first class mail on this 23rd day of May, 2012 to the parties of record.



EILEEN McPHEE