



Control Number: 40606



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**SOAH DOCKET NO. 473-13-0218  
PUC DOCKET NO. 40606**

**APPLICATION OF WIND ENERGY  
TRANSMISSION TEXAS, LLC FOR  
AUTHORITY TO ESTABLISH  
INITIAL RATES AND TARIFFS**

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§

**BEFORE THE STATE OFFICE  
OF  
ADMINISTRATIVE HEARINGS**

2012 NOV 12 PM 2:19  
PUBLIC UTILITY COMMISSION  
CLERK

**STEERING COMMITTEE OF CITIES SERVED BY ONCOR'S  
MOTION TO COMPEL RESPONSES TO FIFTH  
REQUEST FOR INFORMATION**

COMES NOW, the Steering Committee of Cities Served by Oncor ("Cities") and files this Motion to Compel Wind Energy Transmission Texas, LLC ("WETT" or "Company") to respond to Cities' Fifth Request for Information ("RFI"). WETT never filed objections to Cities' RFI No. 5-1. Rather, on November 5, 2012, WETT merely filed a response that withheld any documents for which WETT claims are privileged, without any objection nor any privilege log. WETT supplemented this response with a privilege log on November 7, 2012 and also provided redacted copies of the documentation responsive to Cities' RFI No. 5-1. On November 9, 2012, WETT provided a second supplemental response with a modified privilege log. This Motion to Compel is timely filed pursuant to P.U.C. PROC. R. 22.144(e). For the reasons presented below, Cities request that the Company be compelled to respond to the above-listed questions by producing the documents responsive to Cities' RFI No. 5-1 without redactions.

**I. NON-COMPLIANT PRIVILEGE LOG**

WETT asserts a privilege to Cities' RFI No. 5-1 on the basis that some of the documents responsive to these requests may contain attorney-client and/or work-product privileged information. However, WETT has produced a privilege log that does not comply with the applicable discovery rules mandated by the Public Utility Commission ("PUC" or "Commission"). WETT's privilege log has not demonstrated, in detail, to whom the supposedly privileged documents have been provided.

## II. DEFICIENCIES IN WETT'S PRIVILEGE LOG

WETT's privilege log is deficient because it is not sufficiently detailed to enable the presiding officer to identify whom was sent the unredacted documents responsive to the request. P.U.C. PROC. R. 22.144(d)(2) provides that a privilege log must state "to whom the document was sent and from whom it was received." WETT's privilege log does not contain sufficient information for the parties to determine to whom the information was sent. In the "Sent to" box contained in the privilege log in WETT's Second Supplemental Response, the recipient is listed simply as "WETT." However, the actual identity of the recipient (i.e. the person or person(s) who have received the information) is crucial to determining whether the information is still privileged.

It is vital to be able to ascertain whether any of WETT's testifying experts have been provided the documents responsive to the request. If those documents have been produced to any of WETT's testifying experts, WETT has waived its privilege. Under Texas law, documents that would otherwise be privileged lose their privileged status if they are provided to a testifying expert.<sup>1</sup> This is true even if the expert did not rely upon or review the documents.<sup>2</sup> This is also true even if the documents were only provided to the expert accidentally.<sup>3</sup> The *only* way in which documents provided to a testifying expert can be protected under a privilege<sup>4</sup> is if the testifying expert that received the documents is withdrawn as a testifying expert.<sup>5</sup>

The Texas Supreme Court recognized the competing interests between a party's attorney-client privilege and the broad right to discover any information or materials that have been

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<sup>1</sup> *In re Christus Spohn Hospital Kleberg*, 222 S.W.3d 434, 438 (Tex. 2007).

<sup>2</sup> *Id.* at 438-441.

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

<sup>4</sup> *Id.* at 438-439. TEX. R. CIV. P. 193.3(d) allows the recovery of privilege when documents are inadvertently produced (this is called the rule's "snap-back provision").

<sup>5</sup> *Id.* at 445.

produced to a testifying expert. The Court noted that “[t]he expert witness occupies a unique place in our adversarial system of justice. ... the expert is generally held out to be, and is seen by the jury as, an objective authority figure more knowledgeable and credible than the typical lay witness.”<sup>6</sup> The Court also noted that experts are not bound by firsthand-knowledge requirements and can testify as to their opinions on issues in the case in a way that lay witnesses cannot.<sup>7</sup> The Court recognized the powerful impact that the expert witness has and that is precisely the reason why any material produced to or reviewed by such an expert witness is broadly discoverable. Given this important policy consideration, the Court held that the expert-disclosure rule prevails over the privilege rule’s snap-back provision as long as the expert intends to testify at trial.<sup>8</sup>

WETT has not provided a privilege log sufficient to support its claim of privilege. Based on WETT’s privilege log, it is impossible to determine to whom the unredacted invoices responsive to Cities’ RFI No. 5-1 were provided. As discussed above, to the extent that any of the information listed on WETT’s privilege log has been provided to any testifying experts, that information is no longer privileged. Accordingly, WETT should be compelled to produce the information produced to those testifying experts without redaction because such information is no longer protected by the attorney-client privilege.

### **III. PRAYER**

For the reasons stated above, Cities respectfully request an order directing WETT to respond to Cities’ RFI No. 5-1 without redaction and to any and all other relief to which they are justly entitled.

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<sup>6</sup> *Id.* at 440.


<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was transmitted by facsimile, electronic mail, and/or regular, First Class Mail on this 12<sup>th</sup> day of November, 2012, to the parties of record.



EILEEN MCPHEE