



Control Number: 41223



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SOAH DOCKET NO. 473-13-2879

PUC DOCKET NO. 41223

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APPLICATION OF ENTERGY TEXAS,	§	BEFORE THE STATE OFFICE
INC., ITC HOLDINGS CORP., MID	§	OF
SOUTH TRANSCO LLC,	§	ADMINISTRATIVE HEARINGS
TRANSMISSION COMPANY TEXAS,	§	
LLC, AND ITC MIDSOUTH LLC FOR	§	
APPROVAL OF CHANGE OF	§	
OWNERSHIP AND CONTROL OF	§	
TRANSMISSION BUSINESS,	§	
TRANSFER OF CERTIFICATION	§	
RIGHTS, CERTAIN COST RECOVERY	§	
APPROVALS AND RELATED RELIEF	§	

**COMMISSION STAFF'S MOTION TO COMPEL RESPONSE TO STAFF RFI NOS. 1-12
AND 1-17**

COMES NOW the Staff of the Public Utility Commission of Texas (Staff), representing the public interest and files Commission Staff's Motion to Compel Response to Staff RFI Nos. 1-12 and 1-17, and would show the following:

I. BACKGROUND

On February 19, 2013, Entergy Texas, Inc. (ETI), ITC Holdings Corp. (ITC), Mid South Transco LLC, Transmission Company Texas, LLC, and ITC Midsouth, LLC (collectively, Applicants) filed an application (Application) for the following relief: (1) approval of a transaction to transfer ownership and control of ETI transmission facilities to an ITC subsidiary (Transaction), (2) approval of a transfer of certificate of convenience and necessity (CCN) rights associated with the Transaction, (3) a finding that reorganization of ETI is consistent with the public interest, (4) approval "in principle" of a cost recovery mechanism to apply after closing of the Transaction (including approval of deferral of costs incurred prior to implementation of the cost recovery mechanism), and (5) expedited approval of the Applicants' proposed notice and protective order.

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II. DISCUSSION

A. Staff RFI 1-12

On March 8, 2013, Staff filed its first request for information to ITC. Staff RFI 1-12 asked the following question:

Please refer to Page 7, lines 3 and 4 of the direct testimony of Jon E. Jipping. Please provide the date when ITC and Entergy first entered into discussions about the transaction. Please explain if there were any draft agreements prior to the final agreements, and if so, please provide copies of those draft agreements.

On March 15, 2013, ITC and ETI objected on the bases that the request: (1) is not relevant nor reasonably calculated to lead to the discovery of admissible information; (2) is overly broad and unduly burdensome; and (3) calls for information protected from disclosure pursuant to attorney-client and work product privileges.¹

In their objections, ITC and ETI did not provide any evidence, explanation, or argument beyond citing the rules that these conclusory objections rely upon.² Texas courts have long held that the party seeking to avoid discovery bears the burden to support its objections.³ Providing only conclusory objections is insufficient to warrant relief.⁴ ITC's and ETI's objections should be denied for failure to meet this pleading standard.

¹ ITC Holdings Corp. and ITC MidSouth LLC's Objections to Commission Staff's RFI Nos. 1-12 and 1-17, and Entergy Texas, Inc.'s Objections to Staff's RFI No. 1-12 at 2-3 (Mar. 15, 2013).

² *Id.*

³ *Ford Motor Co. v. Ross*, 888 S.W.2d 879, 891-892 (Tex. App. 1994) ("A trial court abuses its discretion if it *denies* discovery when no evidence has been presented in support of the responding party's objection. Because [Responding Party] presented no evidence in support of its objections, the trial court would have abused its discretion had it sustained [Responding Party's] objections for which evidence was required [i.e., overbreadth and undue burden objections.]" (Internal citations omitted.); *In re Brewer Leasing, Inc.*, 255 S.W.3d 708, 712 (Tex. App. 2008) ("The general rule in financial records production cases is that the burden on the discovery of financial records lies with the party seeking to prevent production." citing *In re Patel*, 218 S.W.3d 911, 916 (Tex.App.-Corpus Christi 2007, orig. proceeding).

⁴ *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 181 (Tex. 1999) ("A party resisting discovery, however, cannot simply make conclusory allegations that the requested discovery is unduly burdensome or unnecessarily harassing."); *State v. Lowry*, 802 S.W.2d 669, 671 (Tex. 1991) ("The burden is on the party seeking to avoid discovery to plead the basis for exemption or immunity and to produce evidence supporting that claim.")

1. The Request Will Lead to Relevant Evidence

The scope of permissible discovery in Texas is broad. Under the Texas Rules of Civil Procedure, a party may obtain discovery regarding any matter that is “relevant to the subject matter of the pending action” as long as the information is not privileged.⁵ Information is “relevant” if it tends to make the existence of any fact that is of consequence to the proceeding more or less probable than it would be without this information.⁶ The Texas Supreme Court has held that the phrase “relevant to the subject matter” is to be “liberally construed to allow the litigants to obtain the fullest knowledge of the facts and issues prior to trial.”⁷ The information sought by a discovery request does not have to be admissible as long as the request appears reasonably calculated to lead to the discovery of admissible evidence.⁸ The Commission’s Procedural Rules mirror the Rules of Civil Procedure in allowing broad discovery into relevant matters.⁹

On March 14, 2013, Commission Advising filed a memorandum to the Commissioners with a draft preliminary order establishing the issues to be addressed in this proceeding. The draft preliminary order will be considered by the Commissioners at their March 28, 2013, open meeting. However, based solely on the draft at this stage, it appears that the Commissioners will likely identify as issues to be addressed the factors set out by the Public Utility Regulatory Act

⁵ TEX. R. CIV. P. 192.3(a); *In re CSX Corp.*, 124 S.W.3d 149,152 (Tex. 2003) (“Our procedural rules define the general scope of discovery as any unprivileged information that is relevant to the subject of the action, even if it would be inadmissible at trial, as long as the information sought is reasonably calculated to lead to the discovery of admissible evidence.”) (Internal quotations and citations omitted.)

⁶ TEX. R. EVID. 401.

⁷ *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 664 (Tex. 2009).

⁸ TEX. R. CIV. P. 192.3(a).

⁹ P.U.C. PROC. R. 22.141(a).

for approving such a transaction, and also the conditions or guarantees that may be required of the Applicants in order for the Commission to grant approval.

The transaction documents that are the subject of this RFI – the merger, separation, and employee matters agreements – are the centerpiece of this proceeding. They define the scope and the process of the Transaction being contemplated by the Applicants. Staff believes that the drafts of these documents will reveal the various terms and conditions that were considered and either accepted or rejected by the parties in the course of negotiating the deal. Having insight into the development of the deal, and the alternatives considered, provides incredibly valuable understanding about the nature of the deal, the value sought and achieved by each party, and the potential benefit or detriment to the ratepayer from the resolution of various terms. In addition, not only can this understanding lead to a more informed decision about whether approval is warranted, but it can also lead to more informed development of conditions and guarantees that the Commission may decide to impose.

2. The Request is Not Overly Broad or Unduly Burdensome

Neither ITC nor ETI have indicated why the request is overly broad or unduly burdensome. Staff has no way of knowing how many documents might be responsive, but it would not seem burdensome to simply provide the drafts of the transaction documents that have gone back and forth between the two companies. Particularly in light of Staff's agreement to limit the request to only those documents sent between the companies, and not those circulated within a company, the request is not overly broad or burdensome.¹⁰

3. The Requested Documents are Not Privileged

¹⁰ *Infra.* at 5.

In discussions with ITC about the discovery request, Staff clarified that draft agreements circulated solely internally within a company were not required – rather it was the draft agreements sent between companies over the course of the negotiations that were requested. Particularly with this clarification, Staff believes that the discovery request is permissible.

Again the Applicants do not indicate how the attorney-client or work product privilege may apply to these documents. The attorney-client privilege is clearly not applicable when the request is limited to documents sent between companies, as the attorney-client privilege is destroyed when a communication is sent to a third party.¹¹

Furthermore, “work product” under TEX. R. CIV. PROC. 192.5 is limited to material prepared in anticipation of litigation.¹² It is difficult to know the Applicants’ legal theory since they fail to present it, but it is hard to imagine how drafts of the transaction documents could be material prepared in anticipation of litigation. Perhaps one could concoct a strained interpretation that work product is any material prepared by companies in the course of business activities that may eventually come before their regulators. However, this would lead to absurd results. The Applicants are regulated utilities – any document that they touch could be considered privileged work product under this interpretation, as their regulators have authority to regulate most aspects of their rates, services, books, records, etc. through various and frequent filings and proceedings. To allow utilities to refuse disclosure of documents concerning their business activities, precisely because those activities may be regulated through contested cases, would hamstring the Commission’s ability to regulate.

¹¹ *Nguyen v. Excel Corp.*, 197 F.3d 200, 207 (5th Cir. 1999) (“When relayed to a third party that is not rendering legal services on the client's behalf, a communication is no longer confidential, and thus it falls outside of the reaches of the privilege.”); *Cameron County v. Hinojosa*, 760 S.W.2d 742, 745-46 (Tex. App. 1988) (“The Supreme Court held that if the matter for which a privilege is sought has been disclosed to a third party, thus raising the question of waiver of the privilege, the party asserting the privilege has the burden of proving that no waiver has occurred.”) (Internal quotations and citations omitted.)

¹² *National Tank Co. v. Brotherton*, 851 S.W.2d 193, 201-203 (Tex. 1993);

B. Staff RFI 1-17

Also in its first request for information to ITC, Staff asked the following question in RFI

1-17(a):

Please refer to Page 16, lines 6 through 13 of the direct testimony of Jon E. Jipping and address the following:

- a) Please provide a copy of the agreements with the electric cooperatives.

ITC objected on the basis that the request is not relevant nor reasonably calculated to lead to the discovery of admissible information.¹³ ITC provides no evidence, explanation, or argument for this objection. Accordingly, this objection should be denied for failure to meet the applicable pleading standard.¹⁴

Further, Staff believes that the request seeks relevant and admissible information. In his direct testimony, ITC witness Jon E. Jipping uses the Spearville to Axtell 345-kV transmission project as an example of ITC's transmission planning and building processes. Mr. Jipping states that this transmission project was the result of agreements with certain electric cooperatives in Kansas and Oklahoma. Staff believes that a review of the agreements between ITC and the electric cooperatives is essential to its review of the circumstances surrounding this illustrative example that Mr. Jipping offers to support his testimony.

Staff notes that ITC has provided redacted copies of these agreements, designated as highly-sensitive protected material. Staff would request that ITC provide non-redacted copies of these agreements, which may also be designated as highly-sensitive protected material.

III. CONCLUSION

For the reasons stated above, Staff requests that ITC be compelled to file responses to Staff RFI Nos. 1-12 and 1-17.

¹³ ITC Holdings Corp. and ITC MidSouth LLC's Objections to Commission Staff's RFI Nos. 1-12 and 1-17, and Entergy Texas, Inc.'s Objections to Staff's RFI No. 1-12 at 3 (Mar. 15, 2013).

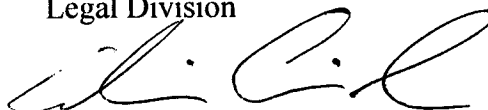
¹⁴ *Supra.* at 2.

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Respectfully Submitted,

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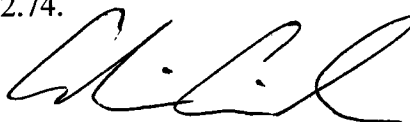


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CERTIFICATE OF SERVICE

I certify that a copy of this document will be served on all parties of record on March 20, 2013 in accordance with P.U.C. Procedural Rule 22.74.



Adrian Eissler