

Control Number: 41606



Item Number: 1256

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JOINT APPLICATION OF § BEFORE THE STATE OFFICE  
ELECTRIC TRANSMISSION TEXAS, §  
LLC AND SHARYLAND UTILITIES, §  
L.P. TO AMEND THEIR §  
CERTIFICATES OF CONVENIENCE § OF  
AND NECESSITY FOR THE §  
PROPOSED NORTH EDINBURG TO §  
LOMA ALTA DOUBLE-CIRCUIT 345 §  
KV TRANSMISSION LINE IN § ADMINISTRATIVE HEARINGS  
HIDALGO AND CAMERON §  
COUNTIES, TEXAS §

**AGREED PARTIES' OBJECTION TO JOINT APPLICANTS' MOTION  
TO ADMIT AND TAKE OFFICIAL NOTICE OF A LATE-FILED  
EXHIBIT**

**I. Introduction**

The Agreed Parties<sup>1</sup> timely file this objection to the Joint Applicants' Motion to Admit a Late-Filed Exhibit filed on January 3, 2014. Specifically, the Joint Applicants have moved for the Administrative Law Judge (ALJ) to take official notice and admit as evidence ERCOT's 2013 Regional Transmission Plan Report (RTP Report) which was published on December 30, 2013. The Agreed Parties object to the motion to admit the RTP Report as evidence because good cause has not been shown that the document is relevant to the issue of what constitutes "proximity" of the North Edinburg to Loma Alta 345-kV transmission line to the South McAllen Substation. The Agreed Parties further object to the ALJ taking official notice of the RTP Report because the contents of the RTP Report are subject to reasonable dispute.

**II. Good Cause Does Not Exist to Admit the ERCOT RTP Report as Late-Filed  
Evidence in this Case**

The Joint Applicants assert that the ERCOT RTP Report is "highly relevant to the question of how close the [North Edinburg to Loma Alta transmission line] should be routed to

<sup>1</sup> The Agreed Parties and their legal counsel in this case are identified in the Agreed Parties' Initial Brief. The members of the Agreed Parties participating in this Objection are identified in the signature blocks below.

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the South McAllen Substation.<sup>2</sup> Late-filed exhibits are permitted by P.U.C. PROC. R. 22.226(d) “for good cause shown on written motion of the party offering the evidence.” The sole justification offered by the Joint Applicants for the late-admission of the RTP Report does not constitute good cause and their motion in this respect should be denied.

The issue of whether the North Edinburg to Loma Alta transmission line should be routed “in proximity” to the South McAllen Substation has been an issue of contention in this case. Also contested is the proper definition of “in proximity” as that term was not defined by ERCOT<sup>3</sup> and the Joint Applicants unilaterally determined it by the use of a “routing circle” without consulting ERCOT.<sup>4</sup> *The RTP Report sheds no light on this issue.* Specifically, the RTP Report discusses the Cross Valley Project tap at South McAllen on page 109.<sup>5</sup> There it states: “tapping the 345-kV line from North Edinburg to Loma Alta at South McAllen and installing a 600 MVA 345/138 kV autotransformer at South McAllen will resolves [sic] these thermal violations.”<sup>6</sup> No other discussion of a “tap” or connection at South McAllen occurs in the report.<sup>7</sup>

Of the routes advocated by the parties to this case at the hearing on the merits and in initial briefs, two – the Agreed Route advocated by the Agreed Parties and Route 1S advocated by Commission Staff – are located within 11 miles of the South McAllen Substation. Route 32, advocated by the Joint Applicants, is located within 3 miles of the South McAllen Substation. None of the routes proposed in the Application or the Amendment to the Application were routed to directly connect with the South McAllen Substation.<sup>8</sup> The issue of “proximity” that remains is whether 3 miles or 11 miles is sufficient in regards to the ERCOT recommendation.<sup>9</sup> A connection of the North Edinburg to Loma Alta transmission line to South McAllen Substation

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<sup>2</sup> Joint Applicant’s Motion to Take Official Notice and Admit a Late-Filed Exhibit at 2-3. (Jan. 3, 2014). (Motion).

<sup>3</sup> Madeira Properties Ltd., Fortco Properties, Cardenas Realty Co., Inc., et. al. Exhibit No. 7 - Deposition of Jeff Billo at 67.

<sup>4</sup> Madeira Properties Ltd., Fortco Properties, Cardenas Realty Co., Inc., et. al. Exhibit No. 7, Deposition of Jeff Billo at 69; Madeira Properties Ltd., Fortco Properties, Cardenas Realty Co., Inc., et. al. Exhibit No. 5 at Question No. Fortco 1-32.

<sup>5</sup> Motion. at 121.

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

<sup>7</sup> The connection is listed in two tables that summarize the contents of the report without discussion.

<sup>8</sup> Madeira Properties Ltd., Fortco Properties, Cardenas Realty Co., Inc., et. al. Exhibit No. 6 at 136-137.

<sup>9</sup> The diagrams on pages 36-38 of the Agreed Parties’ Initial Brief demonstrate these potential connections.

can be accomplished at either distance as established in the record evidence and summarized in the Joint Parties' Initial Brief.<sup>10</sup>

The RTP Report does nothing to clarify this issue and the Joint Applicants state no other reason that it should be admitted as late-filed evidence. Therefore, good cause for late admission as record evidence has not been demonstrated and the Joint Applicants' motion in this regard should be denied.

### **III. The Proffered Exhibit is Inadmissible Hearsay**

Additionally, the ALJ should not admit Joint Applicants' late-filed exhibit into the evidentiary record because it is inadmissible hearsay. The proffered exhibit is hearsay pursuant to Texas Rule of Evidence 801 and is inadmissible pursuant to Texas Rule of Evidence 802. Hearsay is inadmissible due to the fact that hearsay is by nature uttered "out of court" and is thus unavailable for examination before the trier of fact.<sup>11</sup> Joint Applicants offer no valid exception or exemption from the general prohibition against hearsay. With regard to this document in particular, the hearsay problems are readily apparent. The hearing established that ERCOT is currently in the process of revising its load forecast model.<sup>12</sup> It is this same model that is under review that forms the basis for the document offered now by Joint Applicants, purportedly for the truth of the matter asserted. There is considerable controversy as to the accuracy and veracity of the document. Because the document is unreliable hearsay, it is also inadmissible and Joint Applicants' Motion should be denied.

### **IV. Official Notice is Not Appropriate**

Pursuant to P.U.C. PROC. R. 22.222 official notice may be taken of "judicially cognizable facts not subject to reasonable dispute in that they are generally known within the jurisdiction of the Commission." The fact that ERCOT filed its RTP Report on December 30, 2013 is a fact not subject to reasonable dispute and is known within the jurisdiction of the Commission. However, all of the conclusions stated in the report are subject to considerable controversy, because they are based on power flow studies using load forecast methodology that is currently being revised at ERCOT and has been the subject of comment and deliberation at the ERCOT Board as it

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<sup>10</sup> Agreed Parties' Initial Brief at 38. (Dec. 18, 2013).

<sup>11</sup> *Nissan Motor Co. Ltd. v. Armstrong*, 145 S.W.3d 131, 139-40 (Tex. 2004).

<sup>12</sup> Tr. at 127 (Dec. 4, 2013).

relates to the Capacity Demand and Reserves (CDR) Report that has been delayed indefinitely pending the revision of load forecast methodology.<sup>13</sup> This was discussed on the record at the hearing on the merits in this case.<sup>14</sup> Further, as discussed in the Agreed Parties' Initial Brief, the RTP does not approve or recommend any project; each and every transmission project discussed in the report will have to be taken through the ERCOT process.<sup>15</sup> By no stretch of the imagination can the contents of the document proffered by Joint Applicants be considered "not subject to reasonable dispute."<sup>16</sup> The document simply does not fit within the definition required by Commission Rule 22.222 and therefore, this Honorable ALJ should decline to take judicial notice of the document.

Finally, the ALJ should decline to take judicial notice of the report at this late state in the proceeding, after the close of the evidentiary record. The Texas Third Court of Appeals has noted that while an agency may take official notice of generally recognized facts, that power is always subject to the proviso that the parties must be given both adequate notice and adequate opportunity to show the inaccuracy of the facts or fallacy of the conclusions which the agency proposes to accept without proof.<sup>17</sup> If the ALJ takes judicial notice of the report, the parties to this proceeding will be deprived of any opportunity to show the inaccuracy of the facts or the fallacy of the conclusions. In depth examination of this report would be necessary, including a possible second deposition of Jeff Billo. For the ALJ to take judicial notice of Joint Applicants' RTP Report without providing an opportunity for the intervenors in this proceeding to examine and test the document, would inject potential reversible error into this proceeding. Accordingly, the ALJ should deny Joint Applicants' Motion to Take Official Notice.

If, however, the ALJ does take official notice of the ERCOT RTP Report, such notice should include the context of the report and the controversy of its contents as established in the

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<sup>13</sup> Tr. at 127-129 (Dec. 4, 2013). See also *Proceeding to Examine the Inputs Included in the ERCOT Capacity, Demand, and Reserves Report*, Project No. 41060, Memorandum (Jan 3, 2013).

<sup>14</sup> Tr. at 117-132 (Dec. 4, 2013).

<sup>15</sup> Agreed Parties' Initial Brief at 40 (Dec. 18, 2013).

<sup>16</sup> While Agreed Parties acknowledge that this Honorable ALJ took judicial notice of an ERCOT report in PUC Docket No. 34611, it does not appear that such report was subject to the considerable dispute over the ERCOT Regional Planning Group process that has been present in this proceeding. Thus, the facts in this proceeding are distinguishable from those in Docket No. 34611.


<sup>17</sup> *Office of Pub. Util. Counsel v. Pub. Util. Com'n*, 185 S.W.3d 555, 572 fn. 25 (Tex. App.—Austin 2006, pet. denied) (quoting *Railroad Comm'n of Tex. v. Lone Star Gas Co.*, 611 S.W.2d 911, 913-14 (Tex. App.—Austin 1981, writ ref'd n.r.e.) (applying predecessor to Government Code § 2001.090).

record evidence in this case regarding the unreliability of the load forecasts upon which the report's power flow studies and other analyses are based. Therefore, the findings in the report should be given little weight in the ultimate determination of the issues of this case,

#### V. Conclusion

Wherefore, premises considered, the Agreed Parties respectfully request that the ALJ deny the Joint Applicants' Motion to Admit and Take Official Notice of Late-Filed Evidence and request any other relief to which they are entitled.

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### CERTIFICATE OF SERVICE

I certify that a copy of this document was served in accordance with Order Nos. 3-5 in  
this case on this 7<sup>th</sup> day of January, 2014.

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Arthur Fuller; Carrie Welch; Buena Tierra Holdings, LLC;  
Scurlock Construction & Development, LLC; San Mateo  
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Developments, Inc.; Joseph Sekula, Guadalupe Maldonado;  
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