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JOINT APPLICATION OF ELECTRIC §
TRANSMISSION TEXAS, LLC AND §
SHARYLAND UTILITIES TO AMEND §
ITS CERTIFICATE OF CONVENIENCE §
AND NECESSITY FOR THE NORTH §
EDINBURG TO LOMA ALTA DOUBLE- §
CIRCUIT 345-KV TRANSMISSION LINE §
IN HIDALGO AND CAMERON §
COUNTIES, TEXAS §

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

**FORTCO PROPERTIES, LTD., RIO FRESH, JUAN LINO GARZA, AND GARZA
FAMILY LIVING TRUST'S MOTION TO COMPEL**

On September 6, 2013, Fortco Properties, Ltd., Rio Fresh, Juan Lino Garza, and Garza Family Living Trust (Joint Movants) propounded a request for information upon Electric Transmission Texas, LLC (ETT) and Sharyland Utilities (Sharyland) (together, Joint Applicants), identified as RFI 1-1-1 through 1-40. On September 13, 2013, the Joint Applicants filed objections to a single request, RFI 1-14, requesting the Joint Applicants to produce all drafts of the Environmental Assessment and Alternative Route Analysis for this project. The Joint Applicants object on the grounds that drafts are not relevant, the production request is unduly burdensome, and that production would result in "administrative and judicial inefficiency and be contrary to sound public policy." These objections lack any factual or legal basis, and therefore Joint Movants file this motion to compel.

ARGUMENT

I. Introduction

P.U.C. PROC. R. 22.141(a) sets forth the scope of discovery allowed in proceedings before the Commission. Discovery is obtainable for "any matter, not privileged or exempted under the Texas Rules of Civil Evidence, the Texas Rules of Civil Procedure, or other law or rule that is relevant to the subject matter in the proceeding."¹ Discoverable matters include "any

¹ P.U.C. PROC. R. 22.141(a).

documents, including papers, books, accounts, drawings, graphs, charts” and “any other tangible things which constitute or contain matters relevant to the subject matter in the action.”²

The Request for Information at Issue in the Joint Applicants’ objection is as follows:

1-14 Please produce all drafts of the Environmental Assessment and Alternative Route Analysis for this project.

II. The Requested Documents are Relevant and Discoverable

The drafts of the Environmental Assessment and Alternative Route Analysis for this project are relevant documents to this case. Specifically, the drafts provide detail and insight as to how the various alternate routes were developed, what routes were developed but not included in the final draft of the Application, and the routing characteristics of routes not included. The Application includes some references to routes and route links that were not ultimately proposed as routes or links for consideration by the Administrative Law Judge or the Commission.³ Review of the drafts of the Environmental Assessment and Alternative Route Analysis will likely allow insight into the expert’s analysis and why these routes and links were omitted.

Further, the drafts are specifically discoverable both under the Commission’s rule cited above and pursuant to the Texas Rules of Civil Evidence and Texas Rules of Civil Procedure. Texas Rule of Civil Procedure 194.2(f)(4)(A) specifically requires disclosure upon request of “all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert’s testimony.” Texas Rule of Civil Evidence 703 describes the bases of opinion testimony by experts those facts and data “perceived by, reviewed by, or made known to the expert” whether or not those facts or data are admissible in evidence. P.U.C. PROC. R. 22.141(a) exempts only matters privileged or exempted by the Texas Rules of Evidence and Texas Rules of Civil Procedure to be withheld from discovery. The Joint Applicants have filed direct testimony by Rob Reid that offers expert

² *Id.*

³ *See, for example*, Figure 3-1 Preliminary Alternative Links, Sheet 3 of 4. Links 205 and 206 depicted on that figure were not included in the Application.

opinions regarding the Environmental Assessment and Alternative Route Analysis.⁴ Therefore, the drafts of that document are documents that have been provided to, by, or for an expert witness in this case and are specifically discoverable.

The Joint Applicants state no legal or factual basis for their claim that the drafts are not relevant and discoverable evidence. Their complaint that the drafts “lack any evidentiary weight”⁵ is a decision for the ALJ and/or the Commission, not one for them to make unilaterally, and in any case the admissibility or evidentiary weight of documents reviewed by, prepared by, or provided to an expert are immaterial pursuant to the Texas Rules of Civil Evidence and Texas Rules of Civil Procedure. The factual argument that “variations between the draft and final version of a document demonstrate nothing more than that the document was unfinished at the time”⁶ is simply untrue. As described above, the drafts likely include information about routes or links not included in the Application.

III. Production of Drafts is not Unduly Burdensome

The Joint Applicants’ second basis for objection to RFI 1-14 is that producing the drafts would entail “expense and effort” that is “not justified”.⁷ This argument is also without merit. To the extent the draft reports are voluminous, they can be produced under the Commission procedural rules specific to that issue. To the extent the draft reports exist in electronic format, they can be produced in that format. Thus, the Joint Applicant’s claims of undue expense are without merit.

The Joint Applicants are the sole party with access to the drafts and cannot be allowed to unilaterally declare that it is “too hard” to produce them. Further, the RFI requests “drafts” and is much narrower than the “produce any and all documents related to” requests that are commonly proffered in Commission proceedings. If there are one or more drafts of the EA in the Joint Applicants’ possession then they are likely labeled as such and are likely in electronic form. Retrieving and electronically producing a finite number of drafts of a specific document is

⁴ Direct Testimony of Rob R. Reid at 5 (“The purpose of my testimony is to introduce and support the document entitled *North Edinburg-Loma Alta 345 kV Transmission Line Project – Environmental Assessment and Alternative Route Analysis*(EA).”).

⁵ Joint Applicants’ Objections to Fortgo Properties, Ltd. Et Al.’s First Set of Requests for Information to Joint Applicants (Objections) at 2.

⁶ *Id.*

⁷ *Id.*

not unduly burdensome, particularly when the information to be gained about routes and links analyzed by the Joint Applicants but not included in their Application is important to the routing decisions made in the Application and may not be otherwise available.

IV. Production of Drafts is Sound Public Policy


The Joint Applicants assert that “production of drafts would result in administrative and judicial inefficiency and be contrary to sound public policy.”⁸ This argument is without legal basis. The Commission’s rules, which incorporate the Texas Rules of Civil Evidence and the Texas Rules of Civil Procedure for discovery matters plainly make the documents reviewed by, prepared for or by, or provided to an expert witness discoverable as described above. This in itself is a expression of public policy. Joint Applicants point to no rule or precedent in support of their objection on this point other than a SOAH ALJ’s decision in a different matter based on facts that are not relevant to the present case. In the case cited, the subject of discovery was draft testimony of an employee witness. Here, the drafts sought are document prepared by or reviewed by a third-party expert in the case.

V. Conclusion

The drafts of the Environmental Assessment and Alternative Route Analysis for this project are discoverable pursuant to P.U.C. PROC. R. 22.141(a), Texas Rule of Civil Procedure 194.2(f)(4)(A), and Texas Rules of Civil Evidence 703. The Joint Applicants have stated no legal basis for their objections and the Joint Movants respectfully request that this Motion to Compel response to RFI 1-14 be granted.

⁸ *Id.*

Respectfully submitted,



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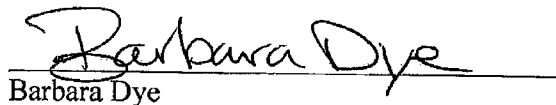
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**Attorneys for Fortco Properties, Ltd., Rio Fresh,
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Trust**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served in accordance with Order No. 4 of this docket on this 16th day of September, 2013.



Barbara Dye