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SOAH DOCKET NO. 473-13-5207
PUC DOCKET NO. 41606

JOINT APPLICATION OF ELECTRIC TRANSMISSION TEXAS, LLC AND SHARYLAND UTILITIES, L.P. TO AMEND THEIR CERTIFICATES 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

CITY OF McALLEN'S RESPONSE TO JOINT APPLICANTS' MOTION TO COMPEL

COMES NOW, the City of McAllen ("City" or "McAllen") and files this response to Electric Transmission Texas, LLC's and Sharyland Utilities, L.P.'s ("Joint Applicants") Motion to Compel the City to respond to Joint Applicants' First Request for Information ("RFI"), and would respectfully show as follows. Pursuant to SOAH Order No. 1, this response is timely filed within two working days of receipt.

I. JOINT APPLICANTS' DISCOVERY IS UNTIMELY PER THE PROCEDURAL SCHEDULE, IRRELEVANT, BURDENSOME AND HARASSING

Joint Applicants improperly attempt to shift the burden of proof in this case from themselves to the City of McAllen. It is Joint Applicants' burden to establish that their request to amend their certificates of convenience and necessity ("CCNs") is justified. All of Joint Applicants' discovery requests 1-1 through 1-6 to McAllen are an attempt to discover the City of McAllen's direct case well in advance of the deadline set by the Administrative Law Judges ("ALJs") for filing testimony in this proceeding. Such discovery is exceedingly burdensome, inconvenient, and harassing on McAllen and is improper discovery under Texas Rules of Civil Procedure 192.4 and 166.

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The procedural schedule set by the ALJs in this proceeding is clear. McAllen does not have to file direct testimony or a statement of position until October 25, 2013.[1] Indeed, the discovery deadline on intervenors is a "Discovery Deadline for ***Intervenor Direct Testimony***."[2] Until and unless McAllen files direct testimony, discovery upon McAllen is improper. Indeed, forcing McAllen to answer the RFIs at this point in time would severely prejudice McAllen's interest in this proceeding. It is no secret that McAllen has intervened in this proceeding due to concerns about proposed links that would be close to the McAllen-Miller International Airport. McAllen shared these concerns with ETT/Sharyland early in this proceeding. In fact, McAllen has offered to Joint Applicants that it will answer the propounded discovery ***after*** it files its direct testimony. To force McAllen to do so at this point in time would place McAllen at a severe and substantial disadvantage vis a vis both Joint Applicants and other parties to this proceeding. Should McAllen be forced to answer discovery about its direct case now, it will provide other parties the opportunity to rebut McAllen's direct case in their direct testimony, and it will provide Joint Applicants a very substantial head-start on their rebuttal testimony.[3]

Joint Applicants' allegations that the information requested is related to their direct case are transparent and disingenuous. It is abundantly clear that Joint Applicants seek the information requested in order to rebut what Joint Applicants believe the direct cases of other parties will be. Joint Applicants' own Motion to Compel cites the fact that some parties have requested information of Joint Applicants relating to the airport as a reason Joint Applicants believe they need the information requested of McAllen.[4] Joint Applicants also state that they

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[1] SOAH Order No. 4 (Sept. 9, 2013).

[2] *Id.* (emphasis added).

[3] McAllen notes that Joint Applicants did offer to extend the deadline for McAllen to respond to the RFIs by an additional week. McAllen appreciates that offer; however, a week's extension does not solve the fundamental fairness issue associated with asking McAllen to file its direct case early. McAllen and ETT/Sharyland continue to work on a resolution of this concern and will promptly inform the ALJs if an agreement is reached.

[4] Joint Applicants' Motion to Compel at 3 (Sept. 16, 2013).

believe the information requested "is likely to be disputed."[5] Therefore, Joint Applicants seek the information requested to rebut McAllen's direct case as well as what Joint Applicants anticipate the direct cases of other parties will be. This is procedurally improper and would place McAllen (as well as other parties) at a distinct disadvantage in this proceeding. McAllen further notes that to the extent the information requested allegedly relates to Joint Applicants' direct case, it is improper for Joint Applicants to attempt to prove up their direct case through discovery to the City of McAllen.[6] Indeed, Joint Applicants' contentions that the requests relate to their direct case beg the question of how the Joint Applicants would prove up their direct case had McAllen not intervened in this proceeding.

Joint Applicants' RFIs constitute an improper fishing expedition of information that is not relevant as of this point in time. The Texas Supreme Court has held that no discovery device may be used for fishing:

> A reference in *Loftin* suggests that interrogatories and depositions may properly be used for a fishing expedition when a request for production of documents cannot. *Loftin v. Martin*, 776 S.W.2d 145, 148 (Tex. 1989). ("Unlike interrogatories and depositions, Rule 167 is not a fishing rule."). We reject the notion that any discovery device can be used to 'fish.'[7]

Further, the Texas Rules of Civil Procedure define the scope of discovery. "While the scope of discovery is quite broad, it is nevertheless confined by the subject matter of the case and reasonable expectations of obtaining information that will aid resolution of the dispute."[8]

Joint Applicants have failed to establish that the information requested is relevant at this point in time. Joint Applicants allege the RFIs propounded to McAllen regarding the McAllen-

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[5] *Id.* at 2.

[6] It is also technically impossible, as Joint Applicants have already filed their direct case in this proceeding.

[7] *K Mart Corporation v. Sanderson*, 937 S.W.2d 429, 431 (Tex. 1996).

[8] Tex. R. Civ. P. 192, comment 1.

Miller International Airport as being related to an issue that McAllen has raised.[9] Joint Applicants are incorrect. McAllen, as yet, has raised no issues relating to the airport, as McAllen has not filed direct testimony in this proceeding and will not do so until October 25, pursuant to the procedural schedule established in this proceeding. In fact, Joint Applicants suggest that issues relating to the McAllen-Miller International Airport are "***likely*** to be disputed."[10] Joint Applicants' own Motion to Compel conclusively establishes that the discovery is premature and irrelevant at this juncture.

Further, the majority of the discovery is available from another source, the Federal Aviation Administration ("FAA"). Question number one, for example, asks for airport activity reports. Airport activity reports, including those for the McAllen-Miller International Airport, are available publicly from the FAA. Questions four, five, and six can similarly be answered through inquiries to the FAA. Indeed, it is surprising that Joint Applicants do not already have the information to question five (a copy of airspace information for the airport), considering that Joint Applicants have proposed to construct several transmission line links close to the airport (102, 111, 118a). One would hope that Joint Applicants were aware of the applicable airspace ***before*** asserting that links could be constructed near to the airport. Additionally, Joint Applicants appear to be wrong in that the information that was publicly available has been removed (although it is noteworthy that Joint Applicants do not specify what information was publicly available online but now has been allegedly removed). For example, the Airport Master Plan is available on the McAllen-Miller International Airport's webpage. The only real reason Joint Applicants would seek to compel the discovery of such information is to force McAllen to sponsor the information with McAllen witnesses. This is nothing more than an improper attempt

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[9] Joint Applicants' Motion to Compel at 3 (Sept. 16, 2013).

[10] *Id.* at 2 (emphasis added).

to shift the burden of proof from Joint Applicants to the City of McAllen. Joint Applicants' Motion to Compel should be denied.

II. CONCLUSION AND PRAYER

The City of McAllen should not be forced to place itself at a distinct tactical disadvantage in this proceeding simply because it would be convenient for Joint Applicants to see McAllen's direct case early. The City reiterates that it will answer the discovery propounded by Joint Applicants after it has filed its direct testimony. However, the City should not be forced to answer premature, irrelevant, harassing, burdensome discovery at this stage of the proceeding because it would severely prejudice the City to file its direct case over a month before the deadline for direct testimony in this proceeding. Joint Applicants should not be granted an opportunity to get an early start on their rebuttal testimony in plain contravention of the procedural schedule.

WHEREFORE, PREMISES CONSIDERED, the City of McAllen respectfully requests that Joint Applicants' Motion to Compel be denied for the reasons stated herein. The City of McAllen also requests any other relief to which it may show itself justly entitled.

Respectfully submitted,

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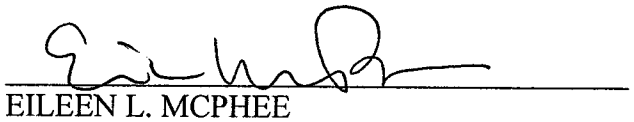
CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September, 2013, a true and correct copy of the foregoing document was served in accordance with SOAH Order No. 4.



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