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REVIEW OF THE RATES OF
SHARYLAND UTILITIES, L.P.

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BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

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TEXAS INDUSTRIAL ENERGY CONSUMERS' MOTION TO COMPEL

I. INTRODUCTION

Texas Industrial Energy Consumers (TIEC) files this motion to compel Sharyland Utilities, L.P. (Sharyland) and Sharyland Distribution & Transmission Services, LLC (SDTS) to respond to TIEC's Requests for Information (RFIs) 8-2 and 8-5. This motion is timely filed pursuant to PUC Procedural Rule 22.144.

II. RESPONSE TO SHARYLAND'S OBJECTIONS

Sharyland filed identical objections to TIEC 8-2 and 8-5. Those requests for information read as follows:

TIEC 8-2 Please refer to the December 30, 2016 Direct Testimony of David A. Campbell at page 4, line 17 through page 5, line 11. Provide all communications, meeting minutes and presentations and analyses made by or presented to HIFR, any Hunt entity, Sharyland, or SDTS pertaining to the decision to transfer the GSEC Interconnection Project and the Cross Valley Project to Sharyland instead of selling them to SDTS. Also provide communications, meeting minutes, presentations and analyses made to or by HIFR with respect to the Right of First Offer on the GSEC Interconnection and Cross Valley Projects.

TIEC 8-5 Please refer to the December 30, 2016 Direct Testimony of David A. Campbell at page 4, line 17 through page 5, line 11. Please provide all documents and communications regarding Sharyland's acquisition of GS Project Entity, LLC and CV Project Entity, LLC.

Under the Real Estate Investment Trust (REIT) corporate structure, SDTS is known as the "AssetCo," the entity that owns all of the physical utility assets and infrastructure, while Sharyland is the "OpCo," the utility operating company that leases and operates the SDTS facilities to provide utility service directly to customers. InfraREIT, Inc. (or HIFR) is the

ultimate publicly traded parent of SDTS, and SU Investment Partners, L.P. is the ultimate corporate parent of Sharyland.

In the normal course of business, SDTS's publicly traded parent, InfraREIT, would fund new utility investments to be owned by SDTS. SDTS would then lease the facilities to Sharyland for use in providing electric service to customers. Given this standard REIT arrangement, Sharyland is thinly capitalized and is not in a position to routinely fund new infrastructure projects. The requests above seek further information on two specific infrastructure projects that were *not* funded by SDTS or its ultimate owners, but were instead transferred to the Sharyland, the thinly-capitalized OpCo. It is important for customers to understand the factors that led to this deviation from the typical REIT arrangement, as well as the cost and reliability implications this situation may have for customers. TIEC 8-2 and 8-5 are designed to elicit information that will shed light on why these infrastructure projects ended up at the OpCo, and the potential impacts to Sharyland's customers for these particular projects and any other projects that may receive the same treatment in the future. This information is essential to evaluating Sharyland and SDTS's financial health and their collective ability to finance utility infrastructure, as well as understanding the risks and costs that the REIT construct may impose on transmission development so that any necessary protections may be developed.

For the reasons discussed below, these requests are well within the scope of this proceeding and are reasonably calculated to lead to the discovery of admissible evidence. Sharyland's objections to these requests should be overruled, and it should be compelled to respond to TIEC 8-2 and 8-5. TIEC also respectfully requests that the Administrative Law Judges (ALJs) resolve this dispute as expeditiously as possible so that the information may be available prior to the deadline for intervenor direct testimony.

A. *TIEC 8-2 and 8-5 request relevant information.*

TIEC 8-2 and 8-5 seek information that is probative of disputed issues in this case, and Sharyland's objections are without merit.

As discussed above, neither SDTS nor Sharyland retains any significant capital to fund new investment under the REIT construct. Rather, all or nearly all projects are funded by SDTS's publicly traded parent, InfraREIT. TIEC 8-2 and 8-5 request general information

regarding the financing and development of transmission projects through special-purpose Hunt affiliate entities, and request additional, specific information about two projects that InfraREIT, Inc. recently refused to fund. Specifically, InfraREIT, Inc., the publicly traded parent of SDTS, refused to purchase the GSEC Interconnection Project and the Cross Valley Project from the Hunt entities that developed these projects. As a result, the projects were ultimately transferred to Sharyland, and are currently on Sharyland's books. Given that Sharyland is an operating company that does not have the credit profile or reserves necessary to regularly absorb significant capital expenditures, it is important to understand why these transactions occurred, how they were handled from a financial standpoint, and whether similar situations can be expected in the future. The information requested by these RFIs is relevant to determine the financial stability of the complicated web of companies involved in Sharyland's corporate structure, and whether Sharyland is appropriately abiding by the Commission's affiliate rules¹ and CCN requirements.² Sharyland's customers and the Commission are entitled to understand the implications of this development, including how it may affect the costs of these particular projects, the implications for Sharyland/SDTS's ability to finance new infrastructure, and the rate and reliability impacts for customers.

Additionally, the Preliminary Order in this case makes clear that "any party may argue that maintaining REIT status is not in the public interest."³ The information sought by these RFIs is relevant to whether the REIT is a suitable utility platform that should be allowed to continue as-is, or whether restrictions are appropriate to protect customers from unjustified costs and risks.

Sharyland claims that this information is not relevant because Sharyland is not seeking to put the costs of these projects in rates in this proceeding. However, these projects are currently on the books of Sharyland Utilities, even if the projects are not being submitted for inclusion in rates here, and have an impact on the utility's financial integrity and overall costs. The information requested by these RFIs is therefore essential to evaluating Sharyland and SDTS's

¹ See Docket No. 45414, Preliminary Order at 7 ("Did any of Sharyland Utilities, L.P.'s invested capital arise from payments made to an affiliate? If so, for each item or class of items, does the payment conform to the requirements in PURA § 36.058?").

² See *id.* at 23 ("What transmission and distribution facilities, if any, does Sharyland Utilities, L.P. currently own for which it might require a certificate of convenience and necessity?").

³ *Id.* at 6.

financial health and stability, and to determine what steps may be necessary to protect customers' interests in light of the complicated and risky manner by which Sharyland and SDTS develop and finance new transmission projects. These issues are relevant even if a particular project is not included in the rates proposed in this case. Further, TIEC anticipates that Sharyland will seek to include the costs of these facilities in an interim Transmission Cost of Service (TCOS) update after this rate case is concluded. Given that Sharyland has a pending rate case, customers should have the opportunity to raise questions about these facilities *now*, before they are put in rates, and not years later after the projects have been incorporated into ERCOT's transmission cost of service.

Relevance is a low threshold in the discovery context, consistent with the objective of developing a full factual record. Under the Texas Rules of Evidence, information is "relevant" if it has "*any* tendency to make the existence of *any* fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."⁴ 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 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."⁶ In fact, 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.⁷ In short, preemptive denial of discovery is improper unless there exists "no possible relevant, discoverable testimony, facts, or material to support or lead to evidence" that would support a claim or defense at issue in this case.⁸

The method by which these projects were ultimately financed and developed, and the circumstances leading to that arrangement, are relevant because they reveal information about SDTS and Sharyland's financial health and potential limitations on access to capital. Both

⁴ Tex. R. Evid. 401 (emphases added).

⁵ Tex. R. Civ. P. 192.3(a).

⁶ *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 664 (Tex. 2009).

⁷ Tex. R. Civ. P. 192.3(a).

⁸ *Castillo*, 279 S.W.3d at 664; see also *State v. Lowry*, 802 S.W.2d 669, 671 (Tex. 1991) ("Only in certain narrow circumstances is it appropriate to obstruct the search for truth by denying discovery.").

entities are jointly obligated to fund improvements to ensure the safety and reliability of Sharyland's electrical transmission and distribution system.⁹ Further, the potential stresses that supporting the financing, development, and acquisition (at a premium) of these projects may have had on Sharyland or SDTS, as well as the possible rate adjustments that may need to be made to accommodate those activities while maintaining the financial health of the utility, are an appropriate avenue of inquiry for this case. In prior cases, the Commission has determined that information related to affiliate transactions and transfers is relevant in a utility rate case.¹⁰ In addition, as noted above, this information is probative of whether restrictions or protections should be imposed on the REIT construct to protect Sharyland's customers. Ultimately, these RFIs are reasonably calculated to lead to the discovery of admissible evidence, and Sharyland should be compelled to respond.

B. TIEC 8-2 and 8-5 are not otherwise objectionable.

In addition to the relevance objections discussed above, Sharyland has also claimed that TIEC 8-2 and 8-5 are overbroad, request attorney-client privileged information, and request information outside of Sharyland's possession, custody, or control. None of these objections justify allowing Sharyland to withhold any responsive, non-privileged information that in its possession.

i. TIEC 8-2 and 8-5 are not overbroad.

TIEC 8-2 and 8-5 are not overbroad because they relate specifically to two transmission construction projects—the GSEC Interconnection and Cross Valley Projects—and are limited to a single aspect of those projects, namely the decision to transfer them to Sharyland instead of funding them through InfraREIT. As discussed above, the particulars of these projects and the process that led to them being placed on Sharyland's books are relevant, and it is not unreasonably burdensome to request that Sharyland produce the internal deliberations that led to those decisions.

⁹ Docket No. 35287, Order at 6, FoF 31.h-i (Jul. 21, 2008).

¹⁰ See *Application of Central Power and Light Company for Authority to Change Rates*, Docket No. 14965, Order Granting in Part Appeal of Order No. 8 (Jan. 16, 1996) (Commission permitted discovery of equity infusions and other cash transfers by CSW or CPL to each of its subsidiaries or affiliates during test year and each subsequent month through present date).

The Texas Rules of Civil Procedure take an expansive, liberal view on appropriate discovery, and state that parties may obtain discovery regarding “any matter that is not privileged and is relevant to the subject matter of the pending action.”¹¹ Discovery of relevant, non-privileged matters can be limited due to breadth only if “the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.”¹² The discovery requested in TIEC 8-2 and 8-5 is relevant for the reasons discussed above, and TIEC has *no other method* of obtaining insight into the corporate inner-workings of the REIT and the drivers that resulted in Sharyland funding these projects. Requiring Sharyland to do a routine search of its communications on this issue is not “overbroad” under any reasonable understanding of the discovery process. TIEC 8-2 and 8-5 are reasonably bounded in both time and scope; further, TIEC has been willing to work with Sharyland on additional limitations as long as they do not undermine the objective of the requests. The costs and burden associated with producing these documents does not reasonably outweigh the probative value of this information for the ALJs, the parties, and ultimately the Commission.

ii. Sharyland should be required to produce all non-privileged information responsive to TIEC 8-2 and 8-5 and provide a privilege log.

Sharyland has also objected that TIEC 8-2 and 8-5 request the production of attorney-client privileged materials. Because Sharyland has also objected to these RFIs on relevance grounds, it has not produced a privilege log. Because TIEC’s requests are relevant for the reasons previously discussed, Sharyland should be compelled to produce all non-privileged information, including redacted versions of documents that are only partially privileged, and should be required to provide a privilege log. TIEC will assess the merits of Sharyland’s privilege log and seek further production if appropriate.

iii. Sharyland should be required to produce all information in its possession, custody, and control that is responsive to TIEC 8-2 and 8-5.

Sharyland was intimately involved in the transactions that form the basis of TIEC 8-2 and 8-5, and either has much of the information that TIEC has requested, or at least has a superior

¹¹ Tex. R. Civ. P. 192.3(a).

¹² Tex. R. Civ. P. 192.4(b).

right of access to that information. It is inconceivable that Sharyland could have been forced to take ownership of the projects referenced in TIEC's discovery requests without having any involvement in the underlying decision making process. This is particularly true given the significant overlap in the management and ownership of Sharyland, SDTS, InfraREIT, and the other Hunt entities involved in the overall REIT structure (including the various Hunt project development entities). To the extent that Sharyland has possession of or a superior right of access to the information requested in TIEC 8-2 and 8-5, it should be compelled to produce that information.

III. CONCLUSION

For the foregoing reasons, TIEC requests that its Motion to Compel be granted, and that Sharyland be required to produce all information responsive to TIEC 8-2 and 8-5:

Respectfully submitted,

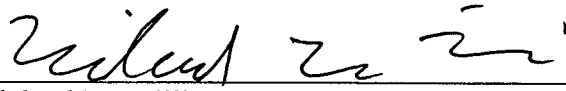
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CERTIFICATE OF SERVICE

I, Michael McMillin, Attorney for TIEC, hereby certify that a copy of the foregoing document was served on all parties of record in this proceeding on this 31st day of January, 2017 by hand-delivery, facsimile, electronic mail and/or First Class, U.S. Mail, Postage Prepaid.



Michael McMillin