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Addendum StartPage: 0

SOAH DOCKET NO. 473-16-2751
DOCKET NO. 45624

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PUBLIC UTILITY COMMISSION
STATE OF TEXAS

APPLICATION OF THE CITY OF
GARLAND TO AMEND A
CERTIFICATE OF CONVENIENCE
AND NECESSITY FOR THE RUSK TO
PANOLA DOUBLE-CIRCUIT 345-KV
TRANSMISSION LINE IN RUSK AND
PANOLA COUNTIES

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BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

**TEXAS INDUSTRIAL ENERGY CONSUMERS' MOTION TO COMPEL
REGARDING TIEC 2-12, REQUEST FOR AN EXPEDITED RULING, AND
REQUEST FOR *IN CAMERA* INSPECTION AS NECESSARY**

I. INTRODUCTION

Texas Industrial Energy Consumers (TIEC) files this motion to compel Southern Cross Transmission LLC (SCT) to provide unredacted documents and communications responsive to TIEC's Request for Information (RFI) 2-12. TIEC 2-12 requested all documents and communications exchanged between or among SCT and its consultants, Resero Consulting (Resero), and LCG Consulting (LCG), regarding the Southern Cross DC tie modeling project. Counsel for TIEC and SCT agreed to exclude a prior version of the current project from this request, but TIEC explicitly clarified that the request includes all communications regarding all modeling assumptions that were considered (including those that did not make it into the model), any preliminary results of the modeling, and any changes made to the model throughout the process. SCT did not object to the scope of TIEC's request as it relates to the pending project, and stated that it would make reasonable efforts to respond.

However, upon receiving SCT's response, it is apparent that SCT made unilateral decisions to redact certain information from the documents that plainly falls within the scope of TIEC's request. Inconsistent redactions between different versions of certain email communications reveal that SCT is attempting to withhold information that is directly responsive to TIEC 2-12.¹ In other documents, the location and magnitude of SCT's redactions makes it obvious that SCT is attempting to withhold responsive information.² These redacted documents are attached for reference. For example, SCT redacted entire paragraphs from the scope of work

¹ See Section II.A *infra*.

² See Section II.B *infra*.

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and “Deliverables” sections of an agreement between Resero and LCG, despite the fact that TIEC 2-12 requested *all documents and communications* regarding the scope and guidelines for the modeling project, as well as the type of results that the model was seeking. Even a cursory review of SCT’s redactions reveals SCT’s intent to avoid legitimate discovery. TIEC filed TIEC 2-12 because it is important to know how the modeling project evolved and what limitations or instructions SCT may have provided to influence the model outputs. SCT has no right to unilaterally deny TIEC discovery on information that is within the scope of TIEC’s discovery request, and relevant to the issues in this case, without objecting or otherwise seeking approval to do so.

Intervenor direct testimony is due in one week, on April 27, 2016.³ SCT’s obfuscation during discovery has forced additional motions to compel responses to legitimate requests, which threatens to deprive TIEC of access to relevant material prior to the filing deadline. Given this timing, TIEC respectfully requests an expedited ruling on this motion and asks that the Administrative Law Judge (ALJ) order SCT to immediately produce unredacted versions of every document responsive to TIEC 2-12. While TIEC believes that the documents provided make it obvious that the redacted information is relevant and responsive to TIEC 2-12, TIEC alternatively moves for *in camera* inspection of the redacted materials if the ALJ believes this is necessary to determine whether they are responsive to TIEC 2-12. The basis of this request is discussed in further detail below.

II. SCOPE OF TIEC 2-12

TIEC 2-12 is a broad request for all communications between SCT and its consultants. It initially read:

TIEC 2-12 Please provide all documents and communications exchanged between or among Pattern, Resero Consulting (Resero), and LCG Consulting (LCG) regarding this project, including interim reports.

In the interest of limiting additional discovery disputes with SCT, TIEC agreed to limit the scope of this request to exclude prior modeling related to the Southern Cross DC tie that was performed in 2010, which could arguably be considered to be within the scope of ‘this project’ as

³ Docket No. 45624, SOAH Order No. 2 Memorializing Prehearing Conference; Ruling on Motions to Intervene; Setting Deadlines; Approving and Adopting Protective Order; and Notice of Hearing at 2 (Mar. 15, 2016).

TIEC 2-12 was drafted.⁴ In making this agreement, TIEC *explicitly stated* that TIEC 2-12 was seeking all documents and communications regarding:

- changes or modifications that were made to the model at any point during the modeling process;
- any initial or preliminary results of partial or full model runs, and any changes made to the model in response to those results;
- assumptions for the model, including both those assumptions that made it into the model and those that did not (if any),
- any questions, guidance, guidelines, or clarifications about the scope of the project, the purpose of the model, or the type of results that the model was seeking.⁵

TIEC also agreed to extend the deadline for SCT to respond to TIEC 2-12 from April 14 to April 19 in order to ease the burden of searching through a large volume of documents.⁶ Despite these accommodations, SCT has failed to respond fully to TIEC 2-12 and has unilaterally decided to redact information that is clearly responsive to this reasonable, limited request.

III. SCT'S PLAINLY INSUFFICIENT RESPONSE

A. Inconsistent redactions reveal that SCT is withholding information that is responsive to TIEC 2-12

SCT's inconsistent redaction of two versions of the same email chain makes it clear that *at least some* of their redactions are attempts to withhold information that is directly responsive to TIEC 2-12. Exhibit C is an email chain between [REDACTED] from which SCT redacted certain portions of [REDACTED] email describing [REDACTED] [REDACTED].⁷ Exhibit D is a later version of the same email chain which omits that same redaction, revealing [REDACTED] [REDACTED].⁸ Not only does this redacted fact fall within the scope of TIEC 2-

⁴ See Exhibit A (Discovery Agreement).

⁵ See *id.*

⁶ See Exhibit B. TIEC notes that this extension, which was granted in good faith, ensures that there is not sufficient time for TIEC to receive responses to any follow-up RFIs until *after* the deadline for intervenor direct testimony has passed.

⁷ See Exhibit C at 1.

⁸ See Exhibit D at 2.

12's request for "all documents and communications exchanged between or among Pattern, Resero Consulting (Resero), and LCG Consulting (LCG) regarding this project," it also falls within the narrower category of documents and communications regarding "any questions, guidance, guidelines, or clarifications about the scope of the project." This inconsistent redaction demonstrates that *SCT has in fact failed to produce information responsive to TIEC 2-12.*

B. The location and magnitude of SCT's other redactions indicates that it is withholding additional information that is responsive to TIEC 2-12

Even in places where SCT does not inconsistently redact documents, it is still apparent that SCT is withholding information that is responsive to TIEC 2-12. While it is not possible to enumerate each of SCT's questionable redactions, a few examples suffice to demonstrate the trend.

First, as discussed briefly above, SCT redacted entire paragraphs from the scope of work and "Deliverables" sections of a consulting agreement between Resero and LCG and only produced the first three pages of the contract.⁹ TIEC 2-12 requested all documents or communications regarding "any questions, guidance, guidelines, or clarifications about the scope of the project." Therefore, the description of the project and the types of deliverables expected from the consultants involved is well within the scope of TIEC's request. Additionally, TIEC 2-12 covered "assumptions for the model" and "the purpose of the model," so the redactions that completely surround the sentence "[REDACTED]" are also likely responsive.

SCT also redacted large portions of a draft presentation titled "[REDACTED]"¹⁰ Redacting any of this presentation is inappropriate in the face of TIEC 2-12's request for "any initial or preliminary results of partial or full model runs," so the entire presentation should be produced. Additionally, the portions that are only partially redacted clearly reveal that SCT is attempting to withhold responsive information. For example, on the first slide after the title that is not completely redacted, the sentence "[REDACTED]"

⁹ See Exhibit E at 2-3.

¹⁰ See Exhibit F.

██████████" is followed by a redacted box. However, as discussed above, TIEC 2-12 clearly requests information about the component parts and inputs for SCT's model, including the various scenarios and assumptions that were (and were not) tested, so this redaction is improper.

Additionally, SCT redacted the majority of email chains entitled "██████████,"¹¹ and "██████████"¹² which discuss the scenarios that form the basis of the modeling project and the assumptions used in the model, respectively. Based on the titles and unredacted content in these email chains, the redacted material is also likely responsive to TIEC 2-12, which requested all documents and communications regarding "assumptions for the model," "questions, guidance, guidelines, or clarifications about . . . the type of results the model was seeking" (ie- the scenarios to be run and the outputs to be produced), and "changes or modifications that were made to the model" such as the use of a different case or set of assumptions.

Due to the need to get this motion on file quickly, it is not possible to enumerate each of SCT's questionable redactions. Instead, all of the redacted files provided by SCT in response to TIEC 2-12 are attached to this motion as Exhibit I. A cursory review of SCT's redactions reveals many more instances of questionable redaction that are likely attempts to avoid legitimate discovery.

C. Requiring SCT to provide unredacted versions of every document responsive to TIEC 2-12 would not cause SCT any harm

SCT did not object to producing materials responsive to TIEC 2-12 as modified and cannot do so now.¹³ Ordering SCT to produce the unredacted versions of these documents and communications cannot possibly cause SCT any harm because SCT designated each document as highly sensitive protected material (HSPM) that cannot be disclosed to the public or used outside of this litigation. Further, SCT has already collected the unredacted versions of these communications, so producing them will not be burdensome.

¹¹ See Exhibit G.

¹² See Exhibit H.

¹³ See Exhibit A ("SCT will not file objections and will make reasonable efforts to respond to TIEC 2-12.").

However, TIEC anticipates that SCT will argue that the information it has withheld is irrelevant or falls outside the scope of TIEC 2-12. As discussed above, at least some redacted material can be proven to be responsive, and a large portion of the remainder is likely responsive. If the redacted material is responsive, it is almost undoubtedly relevant because the bar for relevance is low. 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.”¹⁴ 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.¹⁵ 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.”¹⁶ 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.¹⁷ 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.¹⁸ Not only is the information that SCT redacted likely responsive, it is almost definitely relevant.

TIEC believes, based on the foregoing, that the redacted material is relevant and responsive to TIEC 2-12. However, if the ALJ believes it would be appropriate to review the redactions before granting this motion to compel, TIEC moves for an *in camera* inspection for this purpose.

IV. Conclusion

For the foregoing reasons, TIEC respectfully requests that the Commission grant this Motion to Compel on an expedited basis and order SCT to immediately produce unredacted versions of every document responsive to TIEC 2-12. Alternatively, TIEC requests that an *in*

¹⁴ Tex. R. Evid. 401 (emphases added).

¹⁵ Tex. R. Civ. P. 192.3(a).

¹⁶ *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 664 (Tex. 2009).

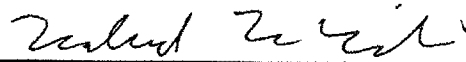
¹⁷ Tex. R. Civ. P. 192.3(a).

¹⁸ *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.”).

camera inspection be required to determine whether the redacted information falls within the scope of TIEC 2-12.

Respectfully submitted,

THOMPSON & KNIGHT LLP



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ATTORNEYS FOR TEXAS INDUSTRIAL
ENERGY CONSUMERS

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 20th day of April, 2016 by hand-delivery, facsimile, electronic mail and/or First Class, U.S. Mail, Postage Prepaid.



Michael McMillin

EXHIBIT A

McMillin, Michael

From: Robert Rima <bob.rima@rimalaw.com>
Sent: Friday, April 08, 2016 1:20 PM
To: McMillin, Michael
Subject: Re: TIEC's 2nd RFIs

Thanks, Michael. Based on TIEC's modifications in your email below, SCT will not file objections and will make reasonable efforts to respond to TIEC 2-12 and TIEC 2-23. Bob

Law Office of Robert A. Rima
(o) 512-349-9449
(c) 512-413-5473

From: "McMillin, Michael" <Michael.McMillin@tklaw.com>
Date: Friday, April 8, 2016 at 8:58 AM
To: Bob Rima <bob.rima@rimalaw.com>
Subject: TIEC's 2nd RFIs

Bob,

I heard back from Mr. Griffey on our 2nd RFIs.

TIEC 2-12

- As discussed yesterday, we are willing to limit this request to exclude the 2010 model.
- We want any communications between or among Pattern, Resero, and LCG regarding:
 - changes or modifications that were made to the model at any point during the modeling process;
 - any initial or preliminary results of partial or full model runs, and any changes made to the model in response to those results;
 - assumptions for the model, including both those assumptions that made it into the model and those that did not (if any),
 - any questions, guidance, guidelines, or clarifications about the scope of the project, the purpose of the model, or the type of results that the model was seeking.

TIEC 2-23

- On the inputs, we are willing to limit this request to the assumptions and data related to:
 - ERCOT load, generation, and DC ties
 - Load and generation in the area immediately around the Eastern Interconnect connection point
 - We do not need data for generation and load in the eastern interconnect that is far from the tie line, which should substantially narrow the scope of this request.
- On the outputs, we are requesting any and all reports that were produced at the time of the model runs, and are not (in this request) requesting information that the consultants chose not to have the model produce.

Hopefully this sufficiently narrows our requests. As I mentioned on the phone yesterday, I am travelling today, but will hopefully have intermittent access to email if you have follow up questions. If you can't get ahold of me, please preserve your objections and I will get back with you on Monday.

Best,

Michael McMillin | Thompson & Knight LLP
Associate

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www.tklaw.com/michael-mcmillin/

Thompson & Knight  Impact
ATTORNEYS AT LAW

EXHIBIT B

McMillin, Michael

From: McMillin, Michael
Sent: Tuesday, April 12, 2016 3:18 PM
To: 'Robert Rima'
Subject: RE: 45624 TIEC's 2nd Set of RFIs

Confirmed.

Best,

Michael McMillin | Thompson & Knight LLP
Associate

98 San Jacinto Blvd., Suite 1900, Austin, TX 78701
512.404.6708 (direct) | 956.244.1134 (cell) | michael.mcmillin@tklaw.com
www.tklaw.com/michael-mcmillin/

From: Robert Rima [<mailto:bob.rima@rimalaw.com>]
Sent: Tuesday, April 12, 2016 3:13 PM
To: McMillin, Michael
Subject: 45624 TIEC's 2nd Set of RFIs

Michael:

This email is to confirm our agreement that SCT's response to TIEC 2-12 will be due on April 19, 2016. Further, I have agreed that I will provide a partial response before April 19 in the event that responsive material becomes available in advance of the due date. I have, however, not represented that it is likely I will receive material in a piecemeal fashion.

Please confirm. Tanks.

Bob

EXHIBITS C THROUGH I
(HSPM – PROVIDED
PURSUANT TO
PROTECTIVE ORDER)