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PUBLIC UTILITY COMMISSION
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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 3-1

I. INTRODUCTION

Texas Industrial Energy Consumers (TIEC) files this motion to compel Southern Cross Transmission LLC (SCT) to answer TIEC's Request for Information (RFI) 3-1. This motion is timely filed pursuant to the procedural order in this case because it is filed within two working days of receipt of SCT's objection.¹

II. RESPONSE TO SCT OBJECTIONS

SCT objected to TIEC's RFI 3-1, which reads:

TIEC 3-1 Please provide unredacted versions of all documents and communications produced in response to TIEC 2-12.

SCT's objections are baseless, and it should be required to produce all responsive documents and communications immediately.

A. SCT's objection that TIEC 3-1 seeks information outside the scope of TIEC 2-12 has no bearing on its duty to respond.

SCT first objects to TIEC 3-1 by stating that that request would "require SCT to provide material that is outside the scope of TIEC's modified request [in TIEC 2-12]."² However, the fact that a discovery request covers material that is outside the scope of a prior request is not a valid basis for objection. In fact, acquiring material that SCT alleges is outside the scope of

¹ SOAH Order No. 2 Memorializing Prehearing Conference at 5 (Mar. 15, 2016).

² Docket 45624, SCT's Objections to TIEC's Third Set of Requests for Information at 2 (Apr. 26, 2016).

TIEC 2-12 *is the specific purpose of TIEC 3-1*, and follow-up or clarifying discovery requests are a routine part of discovery in litigated cases. In its response to TIEC 2-12, SCT chose to take an unreasonably narrow view of the scope of modified TIEC 2-12, as discussed in TIEC's prior Motion to Compel.³ Having examined the redacted documents that SCT provided in response to TIEC 2-12, TIEC is well within its rights to follow up on its prior request in a way that prevents SCT from avoiding production of the potentially relevant information that was redacted in those documents. Further, it is worth noting that *SCT does not claim that the unredacted documents are irrelevant*. Therefore, SCT's objection to TIEC 3-1 is just a further tactic to delay legitimate discovery on issues within the scope of this proceeding.

B. SCT has not met its burden to prove the trade secret privilege, and the terms of the Protective Order appropriately limit use and dissemination of the requested information.

SCT also contends that responding to TIEC 3-1 would require SCT to produce trade secret information.⁴ However, SCT has not met the very high burden to show that any of the information responsive to TIEC's request constitutes a "trade secret." Trade secrets are a very narrow category of information that is so sensitive it is not required to be produced even with the restrictions afforded under the Commission's protective order. Trade secrets are something more than merely information that a competitor could use to its advantage. The classic example of a "trade secret" is the formula for Coca-Cola, where inadvertent disclosure would be so damaging that the courts have exempted the information from disclosure, even under a strict protective order. Another example is the formula for a rubber compound to make tires.⁵ As the Texas Supreme Court stated in one of the seminal cases on trade secrets, the term of art "[g]enerally relates to the production of goods, as, for example, a machine or formula for the production of an

³ See Docket 45624, TIEC's Motion to Compel Regarding TIEC 2-12, Request for an Expedited Ruling, and Request for *In Camera* Inspection as Necessary (Apr. 20, 2016).

⁴ Docket 45624, SCT's Objections to TIEC's Third Set of Requests for Information at 2 (Apr. 26, 2016).

⁵ *In re Cont'l Gen. Tire, Inc.*, 979 S.W.2d at 612; *In re Bridgestone/Firestone, Inc.*, 106 S.W.3d 730, 736 (Tex. 2003); *In re Cooper Tire & Rubber Co.*, 313 S.W.3d at 915.

article.”⁶ In contrast, market data, such as pricing structures or product sales, are not considered trade secrets.⁷

To invoke the trade secret privilege, a party must make an affirmative showing with specific evidence. “Merely claiming trade secrets are at issue is not sufficient.”⁸ When asserting that privilege, SCT “must provide detailed information in support of the claim....”⁹ SCT has not made any attempt to satisfy this burden with its cursory assertion of trade secret privilege.¹⁰ Additionally, SCT must meet its burden to prove that a particular piece of information is a trade secret *before* that information is deemed protected and *before* TIEC has to make any showing whatsoever to overcome those protections.¹¹

If the information TIEC requested is in fact competitively and commercially sensitive, SCT has the option to produce it as “Highly Sensitive” information under the terms of the Protective Order. But not all confidential or competitively sensitive material qualifies for the heightened protections of trade secret privilege.¹² This is particularly true in PUC practice given the restrictive protections for Highly Sensitive material. SCT has not shown that any of the requested information qualifies for protection above and beyond the significant safeguards

⁶ *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 777 (Tex. 1958).

⁷ *Numed, Inc. v. McNutt*, 724 S.W.2d 432, 435 (Tex. App.—Fort Worth 1987, no writ) (holding that pricing structure, marketing research, customer lists, and contract renewal dates are not trade secrets); *Brooks v. Am. Biomedical Corp.*, 503 S.W.2d 683, 685 (Tex. Civ. App.—Eastland 1973, writ ref’d n.r.e.) (holding that credit information and prices charged are not trade secrets because all this information “can be ascertained by an independent investigation”).

⁸ *In re Waste Mgmt. of Tex., Inc.*, 392 S.W.3d 861, 870 (Tex. App.—Texarkana 2013, no pet.).

⁹ *In re Cooper Tire & Rubber Co.*, 313 S.W.3d 910, 915 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

¹⁰ Even if the materials requested by TIEC in the challenged RFI were trade secrets, that does not mean that SCT may simply withhold them from TIEC. There is “no absolute privilege for trade secrets and similar confidential information.” *In re Cont’l Gen. Tire, Inc.*, 979 S.W.2d 609, 612 (Tex. 1998) (quotations and citations omitted). If the Commission holds that some of the materials responsive to TIEC’s First Set of RFIs are trade secrets, the Commission must then apply a balancing test to determine whether the information must nonetheless be produced. *Id.*

¹¹ See *In re Continental General Tire*, 979 S.W.2d 609, 610 (Tex. 1998) (holding that the burden to overcome trade secret protection only shifts to the requesting party *after* the party resisting discovery makes an affirmative showing that the requested information is a trade secret).

¹² See, e.g., *Complaint of AT&T Communications of Texas Against Southwestern Bell Telephone Co.*, Docket No. 23063, Ruling on SBCS’s Motion for Non-Disclosure Regarding Contracts with Third Party Vendors at 6-7 (May 10, 2001) (upheld on appeal) (confidential information might compromise competitive position, but it was nonetheless not a trade secret; protective order was sufficient); *Petition of Rhythms Links, Inc. and Petition of Dieca Communications and Covad Communications Co. for Arbitration of the Interconnection Rates, Terms, Conditions and Related Arrangements with Southwestern Bell Telephone Co.*, Docket Nos. 20226 and 20272, Order No. 25, Ruling on Motions to Declassify at 6-10 (Oct. 26, 1999) (same).

granted by the Protective Order. The Protective Order in this case follows the Commission's standard language, which reflects established Commission precedent and practice on how various categories of sensitive information should be treated. The Protective Order specifically contemplates the production of "business operations or financial information that is commercially sensitive."¹³ Rather than exempting such commercially sensitive information from disclosure as a trade secret, the Protective Order envisions that the material will be produced as Highly Sensitive, subject to strict protections on its use and dissemination. The Commission has found such protections to be sufficient for commercially sensitive information, even when that information was alleged to be a trade secret.¹⁴ Therefore, despite SCT's assertion that the information requested by TIEC 3-1 is a trade secret, that information is sufficiently shielded from disclosure under the terms of the Protective Order.

III. Conclusion

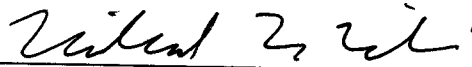
For the foregoing reasons, TIEC hereby requests that its Motion to Compel be granted.

¹³ Protective Order at ¶ 6 (Mar. 10, 2016).

¹⁴ *Application of Central Power and Light Co. for Authority to Change Rates*, Docket No. 14965, Order No. 12, Ruling on Motion to Compel at *3 (Jan. 16, 1996) (avoiding ruling on whether some information was a trade secret or not, because the party "may produce any [] project information that it claims is [a] trade secret as protected material under the protective order," which is sufficiently protective) (*available as* 2001 WL 34065107).

Respectfully submitted,

THOMPSON & KNIGHT LLP

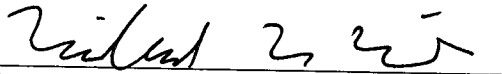


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CERTIFICATE OF SERVICE

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 28th day of April, 2016 by hand-delivery, facsimile, electronic mail and/or First Class, U.S. Mail, Postage Prepaid.



Michael McMillin