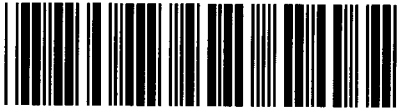




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Addendum StartPage: 0

SOAH DOCKET NO. 473-16-2751  
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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' RESPONSE TO  
SOUTHERN CROSS TRANSMISSION, LLC'S MOTION TO COMPEL**

Texas Industrial Energy Consumers (TIEC) files this response to Southern Cross Transmission, LLC's (SCT) Motion to Compel Regarding SCT Requests for Information (RFIs) 2-1, 2-2 and 2-3 (the Motion to Compel), which was filed on May 11, 2016. This response is timely filed within two working days of receipt of the Motion to Compel.<sup>1</sup> For the reasons set forth below, SCT's Motion to Compel should be denied.

**I. INTRODUCTION**

SCT's RFIs 2-1, 2-2 and 2-3 all inappropriately solicit information about the operations of TIEC's individual member companies. As explained in TIEC's Objections to SCT's Second Set of RFIs,<sup>2</sup> TIEC is an unincorporated trade association formed to represent its member companies' interests as large electricity consumers in matters before the Public Utility Commission. As a trade association, TIEC is a distinct legal entity from its individual members,<sup>3</sup> and both law<sup>4</sup> and longstanding Commission practice<sup>5</sup> dictate that TIEC's individual member

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<sup>1</sup> Docket No. 45624, SOAH Order No. 2 at 5 (Mar. 15, 2016) (responses to motions to compel are to be filed within two working days).

<sup>2</sup> See Docket 45624, Texas Industrial Energy Consumers' Objections to Southern Cross Transmission, LLC's Second Set of Requests for Information at 1-2 (May 9, 2016).

<sup>3</sup> See *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 447-48 (Tex. 1993); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

<sup>4</sup> See *University of Texas at Austin v. Vratil*, 96 F.3d 1337 (10th Cir. 1996); *Sherwin-Williams Co. v. Spitzer*, 61 ERC (BNA) 1182, 2005 WL 2128938, 2005 U.S. Dist. LEXIS 18700 (N.D.N.Y. Aug. 24, 2005).

<sup>5</sup> See *Application of CenterPoint Energy Houston Electric, LLC, Reliant Energy Retail Services, LLC and Texas Genco, LP to Determine Stranded Costs and Other True-Up Balances Pursuant to PURA Sec. 39.262*, Docket No. 29526, Order No. 12 (Jun. 2, 2004); *Joint Report and Application of Oncor Electric Delivery Company and*

companies are not subject to discovery based on TIEC's participation in a proceeding. The single contrary decision upon which SCT relies is incorrect and no longer precedential.<sup>6</sup> Additionally, TIEC simply does not have the information that SCT is requesting in its possession, custody, or control.<sup>7</sup> TIEC does not collect or possess information regarding its individual members' operations, and has no unique ability to compel its members to respond to SCT's requests.<sup>8</sup> The appropriate vehicle for SCT to obtain this information, if it were relevant, would be to issue third-party discovery requests to TIEC members.<sup>9</sup>

Further, the information requested by SCT is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.<sup>10</sup> The issues in this case are limited to the issuance of a certificate of convenience and necessity (CCN) for a transmission facility that is intended to interconnect a new DC tie to ERCOT.<sup>11</sup> Neither TIEC nor its members are applicants in this case, and information about TIEC members' individual operations has no bearing on the issues to be decided. SCT's claim that the information it seeks is relevant to show "bias" is attenuated at best. No concrete nexus has been developed between any issue in this case and the operations of TIEC's individual members.

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*Texas Energy Future Holdings Limited Partnership Pursuant to Public Utility Regulatory Act Section 14.101, Docket No. 34077, Oncor Electric Delivery Company Motion to Compel Responses to its First Set of RFIs to TIEC at 15 (Aug. 27, 2007); Application of Entergy Gulf States, Inc. for Authority to Change Rates and to Reconcile Fuel Costs, Docket No. 34800, Order No. 28 (Apr. 2, 2008).*

<sup>6</sup> See Section II.A.ii, *infra*.

<sup>7</sup> See PUC Proc. R. 22.141(a) ("A person is not required to produce a document or tangible thing unless it is within that person's constructive or actual possession, custody, or control."); Tex. R. Civ. P. 192.3(b) ("A person is required to produce a document or tangible thing that is within the person's possession, custody, or control.").

<sup>8</sup> *Id.* ("A person has possession, custody or control of a document or tangible thing as long as the person has **a superior right to compel the production from a third party** and can obtain possession of the document or tangible thing with reasonable effort.") (emphasis added).

<sup>9</sup> See PUC Proc. R. 22.145 (laying out procedure for issuing third-party subpoenas).

<sup>10</sup> Contrary to SCT's claims, TIEC has objected on relevance grounds. See Docket 45624, Texas Industrial Energy Consumers' Objections to Southern Cross Transmission, LLC's Second Set of Requests for Information at 1-2 (May 9, 2016) (citing Tex. R. Civ. P. 192.3(a) and stating that, "**Neither TIEC nor its members are applicants in this case, and information about TIEC members' individual operations has no bearing on the issues to be decided.**") (emphasis added).

<sup>11</sup> See Docket No. 45624, Preliminary Order at 2-5 (describing issues to be addressed in this proceeding).

## II. RESPONSE TO SCT'S MOTION TO COMPEL

### A. SCT Cannot Obtain Discovery From TIEC's Individual Member Companies by Serving RFIs on TIEC.

TIEC is an intervenor in this proceeding—not its individual member companies. TIEC has no ability to provide information about TIEC's member companies' operations because such information is not within TIEC's possession, custody, or control, and TIEC has no distinct or superior ability to obtain it. If SCT wants information that is in the sole possession of individual TIEC member companies, it can seek that information by issuing third-party discovery.

- i. *The information that SCT seeks is not within TIEC's possession, custody, or control.*

TIEC does not collect or possess the type of information SCT is requesting. TIEC maintains a strict antitrust policy in order to avoid any allegations of antitrust law violations and carefully restricts the information that is shared by its members. TIEC's antitrust policy provides that members shall not disclose confidential information that could support an inference of an unlawful agreement, or could affect competition with other members or with parties in the end product markets or the markets for electrical energy. Pursuant to this policy, TIEC does not collect or possess information about the individual facilities owned by its member companies. Further, the information that SCT seeks relates to generation facilities owned by TIEC members. TIEC is a trade association representing manufacturers and industrial facilities in their capacity as *electricity consumers*, so information regarding members' generation assets would be well outside the scope of TIEC's purpose and representation.

TIEC also cannot compel its members to provide the information that SCT is requesting. TIEC can only provide documents or information within its "possession, custody, or control" as prescribed by Texas Rule of Civil Procedure 192.3(b). PUC Procedural Rule 22.141(a) provides that a person has possession, custody, or control of a document "as long as the person has a *superior right to compel the production from a third party* and can obtain possession of the document . . . with reasonable effort."<sup>12</sup> Contrary to SCT's belief, TIEC has no ability to obtain the requested information from its individual member companies. Corporations do not simply cede ownership of internal data by becoming a member of a trade association. Since TIEC has

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<sup>12</sup> Emphasis added.

no greater right of access to the requested information than SCT does, if SCT believes that the information is relevant, it should avail itself of the third-party discovery process.<sup>13</sup>

ii. *SCT cannot obtain information about individual TIEC member companies through discovery to an association of which they are members.*

As a matter of law, associations are distinct entities separate and apart from their individual members.<sup>14</sup> Far from being simply a “façade of a common name and common counsel,”<sup>15</sup> as SCT alleges, TIEC is an active trade association that exists separately from its individual members. TIEC’s membership elects an executive committee of officers that hold bi-monthly and annual meetings in accordance with the rules and bylaws that TIEC has developed over the more than forty years since its inception.

SCT never disputes that TIEC is a bona fide trade association, and it is a well-settled principle of law that a trade association’s participation in litigation does not expose its individual members to discovery by virtue of their membership. For example, in *Sherwin-Williams Co. v. Spitzer*,<sup>16</sup> a New York federal court held that the National Paint and Coating Association (NCPA) did not have a “duty to be a clearinghouse for the requested information that would inextricably come from the individual members and not the NCPA.”<sup>17</sup> In *University of Texas at Austin v. Vratil*,<sup>18</sup> the Tenth Circuit held that NCAA member institutions were not subject to party discovery, finding that “[t]he district court erred in characterizing unserved, nonparty petitioners as ‘real parties in interest’ for discovery purposes.”<sup>19</sup> Without a rule prohibiting discovery on individual association members through associations in which they are members, every lawyer who is a member of the American Bar Association (ABA) would be subject to discovery every time the ABA was a party to a case, and every doctor who is a member of the

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<sup>13</sup> See PUC Proc. R. 22.145 (laying out procedure for issuing third-party subpoenas).

<sup>14</sup> See *Tex. Ass’n of Bus.*, 852 S.W.2d at 447; *Hunt*, 432 U.S. at 343.

<sup>15</sup> Docket 45624, Southern Cross Transmission, LLC’s Motion to Compel Regarding SCT 2-1, 2-2 and 2-3 at 4 (May 11, 2016).

<sup>16</sup> 61 ERC (BNA) 1182, 2005 WL 2128938, 2005 U.S. Dist. LEXIS 18700 (N.D.N.Y. Aug. 24, 2005).

<sup>17</sup> *Id.* at 20.

<sup>18</sup> 96 F.3d 1337 (10th Cir. 1996).

<sup>19</sup> *Id.* at 1340.

American Medical Association (AMA) would be subject to discovery every time the AMA was a party to a case.

The Commission has also held that information from the individual members of an association cannot be obtained by serving discovery requests upon that association. The Commission most squarely addressed this issue in Docket No. 29526, when CenterPoint sought to compel the production of individual companies' information through TIEC.<sup>20</sup> Similar to SCT's claims here, CenterPoint argued that because TIEC's standing was "based on the justiciable interests of its individual members, the individual members are obligated to participate in the proceeding through the Association . . . ."<sup>21</sup> The administrative law judge correctly rejected CenterPoint's arguments, holding that since TIEC's member companies were not parties to the proceeding and TIEC did not possess the required information, CenterPoint should conduct this discovery through third-party subpoenas.<sup>22</sup>

Similar outcomes have been reached in other Commission cases, including the following:

- *Docket No. 34077.* Oncor Electric Delivery Co. (Oncor) attempted to conduct discovery on individual TIEC member companies by serving discovery on TIEC.<sup>23</sup> Like SCT, Oncor claimed that information in the custody of association members should be produced.<sup>24</sup> Oncor's motion to compel was denied, and Oncor's requests were limited to documents within the "possession, custody and control" of TIEC.<sup>25</sup>
- *Docket No. 34800.* Entergy sought discovery from individual TIEC members. The ALJs issued an order explaining that "TIEC's members are not technically parties to

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<sup>20</sup> *Application of CenterPoint Energy Houston Electric, LLC, Reliant Energy Retail Services, LLC and Texas Genco, LP to Determine Stranded Costs and Other True-Up Balances Pursuant to PURA Sec. 39.262*, Docket No. 29526, Order No. 12 (Jun. 2, 2004).

<sup>21</sup> Docket No. 29526, Order No. 12.

<sup>22</sup> *Id.*

<sup>23</sup> *Joint Report and Application of Oncor Electric Delivery Company and Texas Energy Future Holdings Limited Partnership Pursuant to Public Utility Regulatory Act Section 14.101*, Docket No. 34077, Oncor Electric Delivery Company Motion to Compel Responses to its First Set of RFIs to TIEC at 15 (Aug. 27, 2007).

<sup>24</sup> *Id.*

<sup>25</sup> Docket No. 34077, Order No. 26 at 2 (Sept. 7, 2007).

this case; therefore, it is reasonable to assume that TIEC would not be in possession of much of the information.”<sup>26</sup>

SCT’s argument is premised exclusively on Order No. 9 from Docket No. 23718. That order, which was incorrectly decided in 2001, compelled TIEC to request information from its individual members and produce any information that its members provided in response to that request.<sup>27</sup> However, SCT fails to mention that, as demonstrated above, *every subsequent decision* on this issue—in 2004, 2007, and 2008—has uniformly rejected attempts to compel discovery responses from individual TIEC members. Additionally, in two of those three cases the party advancing the motion to compel similarly attempted to rely on the order from Docket No. 23718, so it is clear that the judges considered and disregarded the prior, incorrect decision upon which SCT relies, and that the order is no longer precedential.<sup>28</sup> It is disingenuous for SCT to rely on a case that was incorrect when it was decided and has been overruled by subsequent decisions while failing to apprise the ALJ of those subsequent orders.

The Commission has long relied on the participation of trade associations and other customer groups in litigated proceedings. TIEC routinely participates matters related to the Texas electric market—and it is not alone. Texas Competitive Power Advocates (TCPA), which has intervened in this case, “is a trade organization representing power generation companies, wholesale power marketers, and retail electric providers with investments in Texas and ERCOT’s wholesale electric market.”<sup>29</sup> It is notable that, while SCT is seeking discovery regarding TIEC members’ generation assets in ERCOT, it has not submitted similar requests to TCPA, which represents the interests of power generation companies. Rather, SCT’s requests appear designed to harass TIEC’s members, potentially due to other pending discovery disputes.

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<sup>26</sup> *Application of Entergy Gulf States, Inc. for Authority to Change Rates and to Reconcile Fuel Costs*, Docket No. 34800, Order No. 28 (Apr. 2, 2008).

<sup>27</sup> See *Application of Southwestern Public Service Company for Authority to: (1) Revise its Fixed Voltage Level Fuel Factors; (2) Surcharge its Historical Fuel Under-Recoveries; (3) Surcharge its Estimated Fuel Under-Recoveries*, Docket No. 23718, Order No. 9 at 3 (May 2, 2001).

<sup>28</sup> See Docket 29526, Motion to Compel Response to CenterPoint’s First Request for Information to Texas Industrial Energy Consumers at 4-5 (Apr. 30, 2004); Docket 34800, Entergy Gulf States, Inc.’s Motion to Compel Responses by Texas Industrial Energy Consumers to Entergy Gulf States, Inc.’s First Request for Admissions and Second Request for Information at 3 (Mar. 20, 2008).

<sup>29</sup> Docket 45624, Texas Competitive Power Advocates Motion to Intervene at 1 (Mar. 23, 2016).

Various other trade associations, including the Texas Cotton Ginners' Association, the St. Lawrence Cotton Growers' Association, and the Texas Energy Association for Marketers (TEAM), regularly participate in Public Utility Commission proceedings. The Commission relies on these associations to present evidence and develop the record upon which it bases its decisions. The suggestion that every member of these organizations has somehow inadvertently become subject to party discovery simply by virtue of being a member is contrary to long-standing Commission practice and policy.

SCT's Motion to Compel seeks the production of documents and information by entities that are not parties to this litigation and for which TIEC has no ability to compel production. Consistent with well-established Commission precedent, SCT's request must be denied, and SCT may pursue this information through third-party discovery, as appropriate.

**B. The Issues Implicated by SCT's Requests Are Not Relevant to the Issues to Be Decided in This Case.**

Even if SCT could obtain information about TIEC's individual member companies by issuing discovery on TIEC, the substance of SCT's discovery requests are not relevant to any issues in this case and are not calculated to lead to the discovery of admissible evidence. TIEC notes that SCT's motion to compel states falsely that TIEC did not object on relevance grounds. This is incorrect, as evident from TIEC's objections,<sup>30</sup> and appears to be a mistake based on SCT's subsequent arguments attempting to support a relevance claim.

SCT's motion to compel claims that it seeks the information requests in RFIs 2-1, 2-2 and 2-3 to show potential "bias" or "motive" of TIEC's members—not to address any substantive factual issue in this case. SCT attached publicly available information to its motion to compel showing that certain TIEC members own generation assets. There is no reason why more specific information about TIEC members' facilities is necessary to prove any fact issue relevant to the issues in this case, and SCT has failed to make any coherent claim to that end. Rather, these requests appear to be a bald-faced attempt to harass TIEC's members for their participation in this matter and the positions that TIEC is taking as an association. SCT's Motion to Compel

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<sup>30</sup> See Docket 45624, Texas Industrial Energy Consumers' Objections to Southern Cross Transmission, LLC's Second Set of Requests for Information at 1-2 (May 9, 2016) (citing Tex. R. Civ. P. 192.3(a) and stating that, "*Neither TIEC nor its members are applicants in this case, and information about TIEC members' individual operations has no bearing on the issues to be decided.*") (emphasis added).



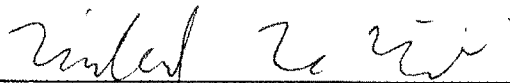
does not and cannot identify any preliminary order issue, any portion of the Application, or any requested relief to which information about the individual facilities owned and operated by TIEC members would be relevant.

### **III. Conclusion**

For the foregoing reasons, TIEC hereby requests that SCT's Motion to Compel be denied.

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 13th day of May, 2016 by hand-delivery, facsimile, electronic mail and/or First Class, U.S. Mail, Postage Prepaid.



Michael McMillin