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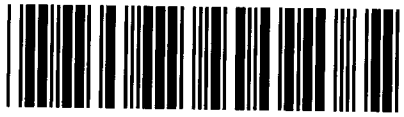

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SOAH DOCKET NO. 473-16-2751
DOCKET NO. 45624

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	§ § § § § § § §	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

TEXAS INDUSTRIAL ENERGY CONSUMERS' MOTION TO COMPEL

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) 1-15. 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 1-15, which reads:

TIEC 1-15 *Where specifically will SCT's DC line terminate in SERC? To what utility will SCT interconnect that line in SERC?*

A. The information requested by TIEC 1-15 is relevant to the subject matter of this proceeding.

SCT first objects that TIEC 1-15 seeks information that is not relevant to this proceeding. However, 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."[2] 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.[3] The Texas Supreme Court has held that the phrase "relevant to the subject matter" is to be "liberally construed to

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

[2] Tex. R. Evid. 401 (emphases added).

[3] Tex. R. Civ. P. 192.3(a).

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allow the litigants to obtain the fullest knowledge of the facts and issues prior to trial."[4] 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.[5] 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.[6]

As large electricity consumers, TIEC's members are keenly interested in evaluating the economic and reliability impacts of the proposed project and identifying any conditions of approval that might be appropriate to protect Texas customers from harm. This is consistent with Preliminary Order issue number 2: "[W]hat reasonable conditions ... should the Commission prescribe in order to protect the public interest?" Without knowing the location and character of the area that will be interconnected to ERCOT through the proposed project, it is difficult to meaningfully assess the potential conditions might be necessary, or tailor those conditions to the specific character of the project. In addition to assessing appropriate conditions, this information is relevant to numerous subparts under issue 4 of the Preliminary Order ("ERCOT Issues"), including "How should the uncertainty of whether DC ties will be exporting or importing be addressed in transmission planning?" Understanding the area to be interconnected, including its resource mix and economics, provides critical information that will allow parties to better assess the likely import/export character of this tie. Similarly, another issue is "Should DC ties be subject to economic dispatch? If not, how should ERCOT manage congestion created by DC tie imports/exports?" Again, understanding the resource mix and grid profile of the area that this project will interconnect provides important context as parties attempt to address these important questions. This information is relevant to the issues that must be decided in this case, so SCT should be compelled to provide a response.

Further, SCT provided detailed testimony regarding the potential economic and reliability benefits of this project, which are tied directly to the amount of power that can reasonably be expected to flow into and out of ERCOT along this line and, by extension, SCT's DC line to

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

[5] Tex. R. Civ. P. 192.3(a).

[6] *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.").

SERC. Along with its testimony, SCT submitted forecasts related to the amount and timing of power that it expects to flow to and from SERC, through SCT's DC line, and along the line that forms the subject of this proceeding. Without knowing where SCT proposes to terminate its DC line in SERC, or with which utility they propose to interconnect, it will be difficult or impossible to vet the results of SCT's studies and thereby determine the potential economic and reliability impacts of the project at issue. As such, knowing where the DC line will terminate is essential to evaluate the claims that SCT itself has put at issue in this docket.

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 1-15 would require SCT to produce trade secret information. 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.[7] 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 article."[8] In contrast, market data, such as pricing structures or product sales, are not considered trade secrets.[9]

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[7] *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.

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

[9] *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").

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."[10] When asserting that privilege, SCT "must provide detailed information in support of the claim...."[11] SCT has not met this burden with its cursory assertion of trade secret privilege.[12] 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.[13]

The information TIEC requested may be competitively and commercially sensitive. If so, 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.[14] 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 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."***[15] Rather than exempting such commercially sensitive information

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

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

[12] 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.*

[13] *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).

[14] *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).

[15] Protective Order at ¶ 6 (Mar. 10, 2016).

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.[16] Therefore, despite SCT's assertion that the information requested by TIEC 1-15 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

Respectfully submitted,

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[16] *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).

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 25th day of March, 2016 by hand-delivery, facsimile, electronic mail and/or First Class, U.S. Mail, Postage Prepaid.

Michael McMillin