



Control Number: 49737



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**SOAH DOCKET NO. 473-19-6862
PUC DOCKET NO. 49737**

APPLICATION OF SOUTHWESTERN	§	BEFORE THE STATE OFFICE
ELECTRIC POWER COMPANY FOR	§	
CERTIFICATE OF CONVENIENCE	§	
AND NECESSITY AUTHORIZATION	§	OF
AND RELATED RELIEF FOR THE	§	
ACQUISITION OF WIND	§	
GENERATION FACILITIES	§	ADMINISTRATIVE HEARINGS

**SOAH ORDER NO. 3
GRANTING TIEC’S MOTION TO COMPEL;
AMENDING DISCOVERY RESPONSE DEADLINE**

I. MOTION TO COMPEL

On July 25, 2019, Texas Industrial Energy Consumers (TIEC) served its second set of requests for information (RFI) on Southwestern Electric Power Company (SWEPCO). On August 5, 2019, SWEPCO filed objections based on privilege and, on August 30, 2019, a revised privilege log. On September 10, 2019, TIEC filed a motion to compel SWEPCO to respond to TIEC’s Request for Information 2-4.¹ On September 13, 2019, SWEPCO filed a request for *in camera* inspection, along with a supporting affidavit, and submitted the contested materials under seal. On September 17, 2019, SWEPCO filed a response to TIEC’s motion to compel, reasserting its claim that the documents at issue are protected from discovery under the work-product privilege.²

At issue are privilege log Item Nos. 15, 16, and 19 through 37. As described in the revised privilege log and the affidavit, those documents were created at the request of counsel in preparation for regulatory litigation. They consist of draft messaging materials and accompanying email exchanges among employees of SWEPCO and its affiliated companies. In his affidavit, John Crespo—Deputy General Counsel for SWEPCO’s parent company—stated that the withheld information was prepared “in aid of SWEPCO’s regulatory planning process for seeking necessary

¹ That request states, “Please explain why SWEPCO limited the RFP to build-own-transfer projects and did not request proposals for wind purchase power agreements (PPAs). Please provide all analyses, presentations, and internal correspondence regarding SWEPCO’s decision to pursue build-own-transfer projects instead of PPAs.” TIEC RFI 2-4.

² Tex. R. Civ. P. 192.5(a)(1), (2).

regulatory approvals, and development of positions on discrete issues in anticipation of litigation.” He also stated that the documents “relate to an ongoing internal dialogue encompassing SWEPCO’s regulatory planning process” and have not been disclosed to third parties.

TIEC’s motion argues that SWEPCO has failed to demonstrate that the work-product privilege applies, as it has not shown that the documents were created with the preparation for litigation as their primary purpose, given their non-litigious titles (*e.g.*, “Communications Plan”) and the fact that they were created before SWEPCO had even issued the request for proposals that resulted in the wind projects for which it is seeking approval in this docket.

Upon *in camera* inspection, the ALJs find that SWEPCO has not met its burden to show that the work-product privilege extends to the disputed documents. To be protected under the work-product privilege, SWEPCO must show that preparation for litigation was the primary motivating purpose for the documents’ creation.³ On their face, these documents do not demonstrate the requisite connection to anticipated litigation. Instead, they pertain to “messaging” generally.⁴ Nor is it apparent from the documents themselves that they were prepared at the direction of counsel. Mr. Crespo’s supporting affidavit does not provide sufficient detail to support a finding that the privilege applies to any particular document. Given that none of the individuals involved in the communications are alleged to be attorneys, and in light of distance in time and substance from the litigation asserted as the basis for the documents’ creation, allowing discovery of the disputed documents does not infringe on the “privileged area within which the lawyer can analyze and prepare his or her case.”⁵ On the other hand, extending the privilege to such materials would, as TIEC notes, effectively bar all discovery from utilities like SWEPCO, since almost any document they prepare relates to a regulated activity that may be subject to review or approval. Because privileged information is not discoverable,⁶ “the privilege has been limited both by

³ *In re Maher*, 143 S.W.3d 907, 912 (Tex.App.—Ft. Worth 2004, orig. proceeding) (citing *Nat’l Tank v. Brotherton*, 851 S.W.2d 193, 200 (Tex. 1993)).

⁴ *See Wiley v. Williams*, 769 S.W.2d 715, 717 (Tex.App.—Austin 1989, orig. proceeding) (work-product privilege “not an umbrella for materials assembled in the ordinary course of business”).

⁵ *Owens-Corning Fiberglas Corp. v. Caldwell*, 818 S.W.2d 749, 750 (Tex. 1991).

⁶ Tex. R. Civ. P. 192.3(a).

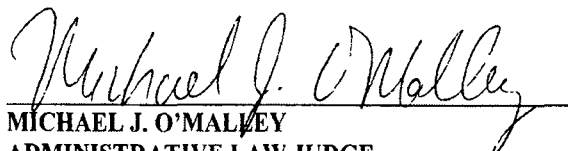
statutory exception and strict construction to situations which encourage full disclosure.”⁷ Accordingly, TIEC’s motion to compel is GRANTED.

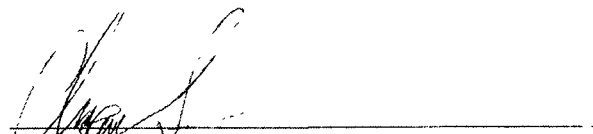
WHEREFORE, IT IS ORDERED that **within five business days**, SWEPCO SHALL produce privilege log Item Nos. 15, 16, and 19 through 37 in response to TIEC RFI 2-4.

II. DISCOVERY RESPONSE DEADLINE

On September 18, 2019, after considering competing procedural schedules, the ALJs issued procedural schedule which ordered responses to discovery on SWEPCO’s direct case within 10 days. On September 20, 2019, SWEPCO filed a motion to reconsider this requirement, stating that there was no good cause to shorten the usual 20-day deadline, Staff and intervenors had more than 180 days for discovery on its direct case, and that such a response time would be burdensome on its witnesses who were simultaneously involved in litigation in three other jurisdictions. On September 23, 2019, Staff filed a response asking that SWEPCO’s motion be denied. After considering the motion and response, the ALJs find no good cause to depart from the 20-day response deadline under 16 Texas Administrative Code § 22.144(c)(1). Accordingly, SWEPCO’s motion is **GRANTED**. The discovery response deadline set out in Order No. 2 is hereby amended as follows: **SWEPCO shall have 20 days to respond to discovery on its direct case**. This ruling shall apply to all pending discovery requests.

SIGNED September 25, 2019.


MICHAEL J. O'MALLEY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARING


CHRISTIAAN SIANO
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

⁷ *Austin v. State*, 934 S.W.2d 672, 673 (Tex. Crim. App. 1996).