

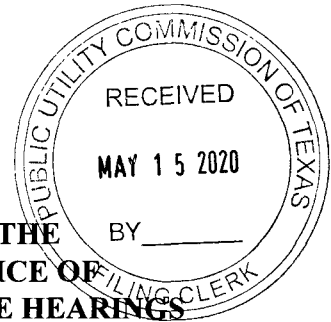
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PUC DOCKET NO. 49795
SOAH DOCKET NO. 473-20-1118



COMPLAINT OF PETTY GROUP, LLP §
AGAINST RIO GRANDE ELECTRIC §
COOPERATIVE, INC. §

BEFORE THE
STATE OFFICE OF
ADMINISTRATIVE HEARINGS

**PETTY GROUP, LLP'S SUR-REPLY TO RIO GRANDE ELECTRIC COOPERATIVE
INC.'S REPLY TO PETTY'S RESPONSE TO RGEC'S MOTION TO COMPEL AND
REQUEST FOR IN CAMERA INSPECTION**

Petty Group, LLP ("Petty") hereby submits this Sur-Reply to Rio Grande Electric Cooperative, Inc.'s ("RCEC") Reply to Petty's Response to RGEC's Motion to Compel and Request for *In Camera* Inspection. RGEC filed its Motion to Compel and Request for *In Camera* Inspection on April 30, 2020 (the "Motion to Compel"). Petty filed its Response to the Motion to Compel and Request for *In Camera* Inspection on May 7, 2020 (the "Response"). RGEC then filed its Reply to this Response (the "Reply") on May 14, 2020. Accordingly, this filing is timely filed. Petty respectfully requests that the Administrative Law Judge ("ALJ") deny RGEC's Motion to Compel. In support thereof, Petty shows as follows:

**I. PETTY PROPERLY WITHHELD THE LIMITED SET OF DOCUMENTS
IDENTIFIED IN APPENDIX A**

In its Motion to Compel, RGEC seeks to require the production of a set of communications that Petty appropriately withheld based on work product and attorney-client privileges. As detailed in Petty's Response, Petty has already produced nearly 2,700 pages of communications. The remaining limited set of documents provided in Appendix A, which only contain 31 pages of redacted privileged information, were correctly withheld due to privilege considerations. As detailed further below, RGEC's Reply does not provide an adequate justification for disclosure of these communications.

1. Nathan Morgan.

At issue are Privilege Log Items 60, 62, and 68. Petty withheld these few communications based on the work product privileges. RGEC contends that this privilege was waived because Mr. Morgan received the communications and the documents “relate directly to the issues on which the witness filed testimony.”¹ This assertion is incorrect. These communications were not “provided to, reviewed by, or prepared by or for” Mr. Morgan “in anticipation of” his testimony.² RGEC assumes from the information in Petty’s Privilege Log that these documents are something Mr. Morgan “must have reviewed or relied upon because otherwise Mr. Morgan would not have the information that is included with his testimony.”³ RGEC’s conclusion regarding these documents are baseless, as the basic information provided in the Privilege Log does not allow for this type of leap. Petty has already disclosed the communications that were provided to, reviewed by, or prepared by or for Mr. Morgan and anticipation of his testimony, and the remaining three communications are regarding distinct subject matters.

Similarly, RGEC contends that these communications “clearly ‘relate’ to [Mr. Morgan’s] testimony.”⁴ Again, the limited information provided in the Privilege Log does not permit these types of broad assertions. The communications deal with a subject matter outside the scope of Mr. Morgan’s testimony and therefore are not related to his testimony.

RGEC then extensively details how Privilege Log Items 82 and 83 are discoverable because Mr. Morgan does not qualify as a client representative under the attorney-client privilege, citing to Tex. R. of Evid. 503(a)(2)(A). Mr. Morgan, however, does qualify as a client representative under Tex. R. of Evid. 503(a)(2)(B), which states that a client representative

¹ RGEC’s Reply at 1.

² See Tex. R. Civ. P. 192.3(e)(6).

³ RGEC’s Reply at 2.

⁴ RGEC’s Reply at 2.

includes “another person who to facilitate the rendition of professional legal advice to the client makes or receives confidential communication while acting in the scope of employment for the client.” Moreover, Petty is unsure why RGEC articulates these claims, as Mr. Morgan is not the preparer, custodian, sender, or the recipient for these communications. Mr. Morgan is also not listed on the Privilege Log for these items. Therefore, these claims about Mr. Morgan are irrelevant and should not be considered in relation to Privilege Log Items 82 and 83.

2. Bobby Grubb.

At issue are Privilege Log Items 72, 73, 74, 82, and 83. The crux of RGEC’s argument is that these communications must have been reviewed or relied upon by Robert Grubb, when in fact both Bobby Grubb and Robert Grubb have provided affidavits attesting that Robert Grubb was never provided these documents and they were not used as the basis for his testimony. Petty has already disclosed the communications Bobby Grubb relied upon for his harmonics analysis, which in turn Robert Grubb reviewed for his testimony. RGEC argues that Petty “failed to identify any information regarding the content of these emails such that RGEC could determine whether they relate to Bobby Grubb’s testimony or the analysis done by Bobby Grubb related to harmonics or Robert Grubb[’]s testimony.”⁵ As a preliminary note, Bobby Grubb did not file testimony in this proceeding so that portion of RGEC’s argument is irrelevant. Additionally, Petty did not provide the specific information in these emails because the communications are privileged such that RGEC is not entitled to review or knowledge of the subject matter.

RGEC also contends that the communications within Privilege Log Items 82 and 83 are not core work product subject to the attorney-client privilege. RGEC claims that Bobby Grubb does not qualify as a client representative.⁶ However, Bobby Grubb does qualify as a client

⁵ RGEC’s Reply at 5.

⁶ RGEC’s Reply at 5.

representative under Tex. R. of Evid. 503(a)(2), which states that a client representative includes “another person who to facilitate the rendition of professional legal advice to the client makes or receives confidential communication while acting in the scope of employment for the client.”⁷ Therefore, these communications were properly withheld on these grounds. Additionally, as stated in Petty’s Response, while these communications were provided to Bobby Grubb, Bobby Grubb did not submit testimony in this proceeding. Instead, testimony was filed by his colleague Robert Grubb, and the subject documents were not provided to Robert Grubb, discuss a subject matter outside the scope of Robert Grubb’s testimony, and were not reviewed or relied upon by Robert Grubb in anticipation of his testimony in this proceeding. Accordingly, these documents were properly withheld.

3. Justin Lankutis.

At issue is Privilege Log Item 70. RGEC assumes from nothing more than the date of the communication on the Privilege Log that this e-mail must relate to “the facts known by the expert that relate to or form the basis of the expert’s mental impressions and opinions formed or made in connection with this case.”⁸ The conclusion RGEC draws here is unreasonable and untrue, as the subject matter of the e-mail is outside the scope of Mr. Lankutis’ testimony and does not relate to his mental impressions or opinions formed or made in connections with this case. Therefore, this communication was appropriately withheld.

II. PETTY COMPLIED WITH ALL PRIVILEGE LOG REQUIREMENTS

In its Reply, RGEC requests additional time to prepare its privilege log, which is a matter raised in an entirely different set of pleadings.⁹ As stated in Petty’s pleading dated May 11, 2020,

⁷ Tex. R. of Evid. 503(a)(2)(B).

⁸ RGEC’s Reply at 5 (referencing Tex. R. Civ. P. 192.3(e)(3)).

⁹ See RGEC’s Objections to 6th RFIs and Request for Extension of Waiver of Privilege Log Requirements (May 6, 2020); see also Petty’s Motion to Compel Responses to its Sixth RFIs (May 11, 2020).

Petty is amenable to an extension for RGEC's privilege log deadline, but requested that the extension be limited to May 13, 2020, which is five calendar days after the Commission rules' deadline.¹⁰ RGEC, on the other hand, requests an extension of two-weeks after the Commission rules' deadline to May 22, 2020. Petty already agreed to a two-week extension for RGEC's direct testimony deadline and an additional two-week extension for the privilege log is not warranted nor reasonable based on the current circumstances. The parties currently are preparing for a mediation scheduled for June 3, 2020. Petty needs adequate time to review both the direct testimony and discovery documents to prepare for this mediation, as well as identify any items on the privilege log that should be addressed. Should mediation fail, Petty must also be in a position to timely prepare rebuttal testimony and prepare for hearing. The extension RGEC requests would be prejudicial toward Petty, as it strategically limits the amount of time Petty has to review and prepare for the upcoming mediation. Petty notes that RGEC was served these RFIs ten days before their testimony deadline, putting RGEC on notice of this requirement well in advance.

Additionally, RGEC contends that Petty failed to produce a privilege log for RGEC's Second RFIs until April 15, 2020. This assertion is also incorrect. Petty first filed its Privilege Log on December 20, 2019. The original Privilege Log was quite extensive and included all communications subject to privileges. Then, after Petty filed its direct testimony in this proceeding on April 3, 2020 and designated expert witnesses, Petty supplemented the Privilege Log, now disclosing documents required to be provided under Tex. R. Civ. P. 192.3(e) and in accordance with RGEC's Second RFIs. The Amended Privilege Log was provided to all parties on April 13, 2020, three working days after RGEC filed its Response to RGEC's Second RFIs.¹¹ While the Commission's Interchange reflects a filing date of April 15, 2020, this is erroneous. During the

¹⁰ Petty's Motion to Compel Responses to its Sixth RFIs (May 11, 2020).

¹¹ See Attachment A.

current COVID-19 conditions, confidential documents are logged on the Interchange system when the documents arrive via mail, rather than electronic submittals.

Therefore, RGEC and Commission Staff received Petty's Amended Privilege Log within three working days of Petty's Response to RGEC's Second RFIs. This short timeframe does not justify RGEC's two-week extension request.

III. CONCLUSION AND REQUESTED RELIEF

For the reasons discussed herein, Petty respectfully requests that the ALJs deny RGEC's Motion to Compel Responses to its First and Second Requests for Information and Request for *In Camera* Inspection and grant Petty such further relief to which it may be entitled.

Respectfully submitted,

/s/Meghan E. Griffiths

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ATTORNEYS FOR PETTY GROUP, LLP

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the forgoing was served on all parties of record in this proceeding on the 15th day of May, 2020 by hand delivery, facsimile, electronic mail, First Class U.S. Mail, or overnight delivery.

/s/ Alisha Mehta

Alisha Mehta

Brown Willis, Donna

From: Brown Willis, Donna
Sent: Monday, April 13, 2020 10:02 AM
To: 'tshea'; 'dbarron@cozen.com'; 'rustin.tawater@puc.texas.gov'; 'DAmbrosio, Eleanor'; 'jsimonet@cozen.com'; 'drogers@tshealaw.com'
Cc: Griffiths, Meghan E.; Ferri, Jennifer A.; Mehta, Alisha; Starkie, Pat
Subject: PUC 49795, Petty's First Amended
Attachments: Petty Group, LLP's Confidential Cover Sheet for First Amended Privilege Log.pdf; PUC Filing Submission Confirmation; PUC Docket No. 49795; Petty Group, LLP's Cover Sheet for First Amended Privilege Log.pdf; 25597089_1_First Amended Privilege Log to RGEN's First _ Second RFIs - Confidential (FINAL)(25594129.1).pdf

Good morning: The attached Petty's Confidential First Amended Privilege Log to RGEN's First and Second RFIs. The attached Confidential Cover sheet has been filed with the PUC.

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