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APPLICATION OF SOUTHWESTERN § BEFORE THE STATE OFFICE
ELECTRIC POWER COMPANY FOR §
AUTHORITY TO CHANGE RATES § ADMINISTRATIVE HEARINGS

**TEXAS INDUSTRIAL ENERGY CONSUMERS' MOTION TO COMPEL
SOUTHWESTERN ELECTRIC POWER COMPANY TO RESPOND TO TIEC'S
THIRTEENTH SET OF RFIS**

I. INTRODUCTION

Texas Industrial Energy Consumers (TIEC) moves to compel Southwestern Electric Power Company (SWEPCO) to respond to TIEC's Thirteenth Set of Requests for Information (RFIs). Pursuant to SOAH Order No. 2, this motion to compel is timely filed.¹

II. GENERAL RESPONSE TO SWEPCO'S OBJECTIONS

A. TIEC's RFIs are relevant to the issues in this proceeding.

Relevance is a low threshold in the discovery context, consistent with the purpose of "seek[ing] truth so that disputes may be decided by facts that are revealed rather than concealed."² 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."³ 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."⁴ The Texas Supreme Court has held that the phrase "relevant to the subject matter" is to be "liberally construed to allow the litigants to obtain the fullest knowledge of the facts and issues prior to trial."⁵ Indeed, 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

¹ SOAH Order No. 2 at 4 (Nov. 23, 2020).

² *Tom L. Scott, Inc v McIlhany*, 798 S.W.2d 556, 559 (Tex. 1990).

³ Tex. R. Evid. 401 (emphases added).

⁴ Tex. R. Civ. P. 192.3(a).

⁵ *Ford Motor Co. v Castillo*, 279 S.W.3d 656, 664 (Tex. 2009).

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of admissible evidence.”⁶ 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.⁷

In October 2018, SWEPCO—for the first time—included all of Eastman Chemical Company’s (Eastman) load served by Eastman’s own retail behind-the-meter generation (BTMG) when reporting SWEPCO’s Monthly Network Load to the Southwest Power Pool (SPP) for transmission cost allocation purposes.⁸ Prior to October 2018, SWEPCO had always excluded Eastman’s retail BTMG load from its Monthly Network Load reporting to SPP.⁹ There were no changes to the SPP Open Access Transmission Tariff (OATT) that occurred during that time that required SWEPCO’s change in practice.¹⁰ Indeed, when SPP conducted surveys of its Network Customers on their BTMG reporting practices, many stated that they did not report their retail customers’ self-supplied electricity in calculating their Monthly Network Load, and the majority of Network Customers believed that some or all load served by retail BTMG was not included in the meaning of Network Customer’s Monthly Network Load.¹¹ Thus, this change appeared to be a voluntary decision by SWEPCO, one that significantly increased its allocation of SPP transmission costs, which it seeks to pass onto Texas ratepayers in this proceeding.

In rebuttal, SWEPCO presented the testimony of Charles Locke, Director of Transmission Policy and Rates at SPP. As part of his testimony, Mr. Locke testifies regarding the purported purpose of the aforementioned surveys in an attempt to rebut Mr. Pollock’s characterization of the surveys.¹² In addition, he testifies that in response to the surveys, SPP provided “educational information” to Network Customers, and that several Network Customers made adjustments to their load-reporting practices as a result.¹³ TIEC’s Thirteenth Set of RFIs included questions

⁶ Tex. R. Civ. P. 192.3(a).

⁷ *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.”).

⁸ Direct Testimony and Exhibits of Jeffrey C. Pollock at 13.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 17-18.

¹² Rebuttal Testimony of Charles J. Locke at 22.

¹³ *Id.* at 22-23.

regarding the surveys, the educational information, and the load-reporting practices of Network Customers in order to test and discover the bases of Mr. Locke's assertions on these topics. Despite offering this testimony from Mr. Locke, SWEPCO now objects to TIEC's RFIs on the basis of relevance. But as SWEPCO seems to acknowledge by offering testimony from Mr. Locke on these very topics, the requested information is relevant because it goes to the reasonableness of SWEPCO's decision in October 2018 to begin reporting retail BTMG to SPP and incurring higher than necessary transmission charges.

SWEPCO first contends that the requested information is not relevant because it has no bearing on the legal question of the proper interpretation of the SPP OATT.¹⁴ SWEPCO then asserts that this legal question is itself not necessary to resolve the issues in this proceeding, which SWEPCO claims are limited to whether "SWEPCO has followed the directives of SPP consistent with FERC precedent and policy and reported its load in compliance with the SPP OATT."¹⁵ SWEPCO's narrow framing of the issues in this case in an attempt to avoid discovery should be rejected.

Contrary to SWEPCO's assertions, what is at issue in this case is not simply whether SWEPCO has followed SPP's "directive." Such a framing presupposes that there was a directive from SPP, and that following such directive was required or reasonable. These are disputed issues that should not be predetermined in the discovery stage of the proceeding. Information regarding the practices and positions on retail BTMG of other SPP Network Customers, as well as the educational information provided by SPP, is probative of these issues and thus relevant for purposes of discovery in this proceeding.

Additionally, SWEPCO is incorrect that the information requested has no bearing on the legal issue of the proper interpretation of the SPP OATT. The interpretation of the SPP OATT, where ambiguous, can be aided by the use of extrinsic evidence,¹⁶ such as the practices of the

¹⁴ SWEPCO's Objections to TIEC's Thirteenth Set of RFIs at 3, 5-6.

¹⁵ *Id.*

¹⁶ *Cf. City of Rockwall v Hughes*, 246 S.W.3d 621, 626 (Tex. 2008); *see also* Tex. Gov't Code 311.023 (listing statutory construction aids including the object sought to be attained, the circumstances under which the statute was enacted, the legislative history, and the consequences of a particular construction). As SWEPCO states in its objections, the interpretation of a tariff is akin to statutory interpretation. SWEPCO's Objection to TIEC's Thirteenth Set at 3 n.6 (citing *Roberts Exp., Inc v Expert Transp., Inc.*, 842 S.W.2d 766, 771 (Tex. App.—Dallas 1992, no writ)).

individual Network Customers who make up the membership of SPP and their understanding of the tariff's requirements. Indeed, SWEPCO appears to acknowledge that the issue is not limited simply to the words in the tariff by offering testimony from Mr. Locke, who is not an attorney,¹⁷ regarding the survey responses, the educational information provided by SPP, and the practices of other Network Customers.¹⁸ For these reasons and those discussed below, TIEC's RFIs are relevant and SWEPCO should be compelled to respond.

III. RESPONSES TO OBJECTIONS TO SPECIFIC RFIS

TIEC 13-2: *Please provide all response to the 2017 and 2019 surveys identified on page 22 of Mr. Locke's testimony.*

As Mr. Locke testifies, SPP conducted two surveys in 2017 and 2019 asking its members questions regarding the reporting of retail BTMG in Network Load.¹⁹ Mr. Pollock offers testimony that the 2017 survey revealed that many SPP members were not including retail BTMG in their reporting of Network Load, and that a majority of the respondents to the 2019 survey believed that some or all load served by retail BTMG was not included in the meaning of Network Customer's Monthly Network Load.²⁰ In response, Mr. Locke contends that Mr. Pollock mischaracterized the 2019 survey responses, and that several Network Customers changed their practices after the 2017 survey when presented with educational information from SPP.²¹ The survey responses are relevant because they will reveal the practices and positions of other SPP Network Customers relating to retail BTMG. As explained above, such information is probative of whether it was required or reasonable for SWEPCO to suddenly change its practice to include retail BTMG when reporting Network Load, and the proper interpretation of the SPP OATT. Further, the survey responses are relevant because they are probative of the accuracy of Mr. Locke's assertions regarding the responses.

TIEC 13-4: *Please provide all SPP documents relating to or discussing the educational information referenced in the preceding RFI.*

¹⁷ Locke Reb. at 2.

¹⁸ *Id* at 22-23.

¹⁹ *Id* at 22.

²⁰ Pollock Dir. at 18.

²¹ Locke Reb. at 22.

Mr. Locke also offers testimony that after the 2017 survey responses were received, SPP sent out educational information to Network Customers, resulting in several Network Customers changing their reporting practices.²² Accordingly, TIEC requested the educational information,²³ as well as all documents relating to or discussing the educational information. As SWEPCO notes in its objection, TIEC has clarified that this RFI is intended to capture drafts of the presentations, communications related to the development of the presentations, and communications with Network Customers about the presentations.²⁴ Communications between SPP and Network Customers relating to the presentations are relevant because they will shed light on the practices and positions of other Network Customers, as discussed above. Further, drafts and communications relating to the development of the presentations are relevant to the issue of the interpretation of the SPP OATT, as these presentations contain the same arguments that Mr. Locke makes throughout his testimony regarding that issue.²⁵

SWEPCO also claims that this request is unduly burdensome.²⁶ However, the request is limited to documents and communications relating to a specific set of presentations that Mr. Locke chose to reference in his rebuttal testimony. Thus, the request is reasonably tailored to the relevant issues in this proceeding.

TIEC 13-4: *Identify all other SPP network customers that have load served by retail BTM generation but have not reported it as part of monthly network load in the past 5 years.*

For the reasons discussed above, the practices of other SPP Network Customers in reporting retail BTMG is relevant to whether it was reasonable for SWEPCO to abruptly change its practice and begin including retail BTMG in reporting Network Load to SPP, as well as the interpretation of the SPP OATT. Indeed, SWEPCO acknowledges as much by providing testimony from Mr. Locke regarding how the practices of certain Network Customers changed after being provided with educational information from SPP.

²² *Id.* at 22-23.

²³ This information was requested in TIEC 13-3, which SWEPCO did not object to.

²⁴ SWEPCO's Objections to TIEC's Thirteenth Set at 4.

²⁵ *See generally* SWEPCO's Response to TIEC 13-3; Locke Reb. at 6-18.

²⁶ SWEPCO's Objections to TIEC's Thirteenth Set at 4-5.

SWEPCO also raises the issue that SPP treats the survey responses and company-specific load information as confidential. However, those concerns do not bear on relevance and are adequately addressed by the Protective Order that has been adopted in this case, and which TIEC will abide by.

IV. CONCLUSION

For the foregoing reasons, TIEC requests that its Motion to Compel be granted, and that SWEPCO be required to produce all information responsive to TIEC 13-2, 13-4, and 13-10.

Respectfully submitted,

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**ATTORNEYS FOR TEXAS INDUSTRIAL
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CERTIFICATE OF SERVICE

I, James Z. Zhu, Attorney for TIEC, hereby certify that a copy of the foregoing document was served on all parties of record in this proceeding on this 11th day of May, 2021 by facsimile, electronic mail and/or first Class, U.S. Mail, Postage Prepaid.

/s/ James Z. Zhu

James Z. Zhu