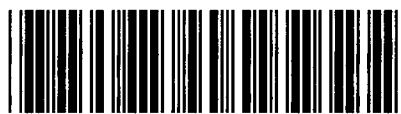




Control Number: 51415



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SOAH DOCKET NO. 473-21-0538  
DOCKET NO. 51415

2021 MAY 14 PM 1:04

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

**SOUTHWESTERN ELECTRIC POWER COMPANY'S  
RESPONSE TO SIERRA CLUB'S MOTION TO COMPEL**

Southwestern Electric Power Company (SWEPCO) requests the Administrative Law Judges (ALJs) deny Sierra Club's Motion to Compel Responses to its Sixth Set of Requests for Information (RFIs).<sup>1</sup> The RFIs at issue, Question Nos. 6.6 through 6.9, seek irrelevant information that is not calculated to lead to the discovery of admissible evidence in this proceeding and pertain to the issue determined to be beyond the scope of this proceeding in SOAH Order No. 7.<sup>2</sup>

**I. INTRODUCTION**

Sierra Club has sought to challenge the prudence of SWEPCO's decision to retrofit its Flint Creek plant for continued operations in compliance with the Coal Combustion Residuals (CCR) and Effluent Limitations Guidelines (ELG). But that issue is not ripe for consideration in this proceeding as no capital investments or costs related to the Flint Creek CCR/ELG retrofit are being reviewed for recovery in this case—any such costs will be reviewable when SWEPCO seeks to include them in rate base. On that basis, SWEPCO moved to strike the portion Sierra Club witness Devi Glick's testimony that addressed Sierra Club's premature prudence challenge concerning the Flint Creek CCR/ELG retrofit.<sup>3</sup> As explained in SOAH Order No. 7, Ms. Glick's testimony on

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<sup>1</sup> Pursuant to SOAH Order No. 2, this response is timely filed.

<sup>2</sup> See SOAH Order No. 7 (Apr. 27, 2021).

<sup>3</sup> Southwestern Electric Power Company's Objection and Motion to Strike the Testimony of Devi Glick on Behalf of Sierra Club (Apr. 9, 2021).

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the issue is not relevant to this proceeding because the decision to retrofit Flint Creek was made after the conclusion of the historical test year and the costs associated with that decision are not being reviewed for recovery in this case.<sup>4</sup>

On April 27, 2021, the ALJs granted SWEPCO's motion to strike, excluding the portion of testimony relating to this issue. Nevertheless, Sierra Club continues to seek discovery on this particular subject.<sup>5</sup> Sierra Club now inaccurately states that the information sought is relevant to "ongoing test year spending at the Flint Creek coal-burning plant, which SWEPCO proposes to include in rates in this case" and also ties its responses to the fact that SWEPCO initially filed rebuttal testimony to address and refute Sierra Club's contentions concerning the Flint Creek retrofit.<sup>6</sup> That testimony is located at Section IV of Mark A. Becker's rebuttal testimony. Significantly, as SWEPCO has previously explained, consistent with SOAH Order No. 7, SWEPCO does not intend to offer Section IV of Mr. Becker's testimony into evidence at the hearing.<sup>7</sup> Sierra Club bases its egregious dogged persistence to conduct discovery on irrelevant discovery matters on its own assessment that Order No. 7 is erroneous.<sup>8</sup> Accordingly, this motion to compel discovery responses should be denied.

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<sup>4</sup> SOAH Order No. 7, at 6 (granting SWEPCO's objection and motion to strike Section 5 of Devi Glick's testimony).

<sup>5</sup> See Sierra Club's Sixth Set of Requests for Information (Apr. 29, 2021); Sierra Club's Seventh Set of Requests for Information (May 5, 2021).

<sup>6</sup> Motion to Compel at 4.

<sup>7</sup> Section IV starts on page 9 of Mr. Becker's rebuttal testimony and goes through page 13.

<sup>8</sup> Motion to Compel at 3 (stating "the ALJs erroneously decided that CCP/ELG costs are 'not being reviewed for recovery in this case'").

## II. RESPONSE TO MOTION TO COMPEL

Although the scope of discovery in Commission proceedings is broad, requests must show a reasonable expectation of obtaining information that will aid in the dispute's resolution.<sup>9</sup> The Commission's rules define the scope of permissible discovery: "Parties may obtain discovery regarding any matter, not privileged or exempted under the Texas Rules of Civil Evidence, the Texas Rules of Civil Procedure, or other law or rule, *that is relevant to the subject matter in the proceeding.*"<sup>10</sup> In evaluating whether information is relevant to the subject matter of a proceeding, it must be determined whether the information "has any tendency to make a fact more or less probable than it would be" without the information and that "fact is of consequence in determining the action."<sup>11</sup> SWEPCO objected to Sierra Club 6.6-6.9 because they seek information that is irrelevant, outside the scope of permissible discovery, and will not aid in the resolution of matters in this case. Furthermore, Sierra Club is actively ignoring the fact that the scope of this proceeding and the recovery sought by SWEPCO, as the applicant in this base rate case, does not include capital projects or costs associated with the decision to retrofit Flint Creek to comply with CCR/ELG guidelines.

The requests at issue here pertain to rebuttal testimony of Mr. Becker that is explicitly identified as responding to the section of Ms. Glick's testimony that was struck in this proceeding pursuant to SOAH Order No. 7.<sup>12</sup> The information sought in Sierra Club 6.6 concerns the disposition analysis supporting SWEPCO's decision to retrofit Flint Creek. Sierra Club 6.7

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<sup>9</sup> *In re Nat'l Lloyd's Ins. Co.*, 532 S.W.3d 794, 808 (Tex. 2017) (quoting *In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex. 2003) (orig. proceeding)).

<sup>10</sup> 16 Tex. Admin. Code § 22.141(a) (emphasis added).

<sup>11</sup> Tex. R. Evid. 401.

<sup>12</sup> SOAH Order No. 7, at 6. Each of these requests identify by page number discussion concerning Section IV of Mr. Becker's testimony.

requests information regarding the use of PLEXOS for the unit disposition analysis supporting SWEPCO's decision to retrofit Flint Creek. Sierra Club 6.8 relates to Ms. Glick's unit utilization criticisms of the unit disposition analysis supporting SWEPCO's decision to retrofit Flint Creek. Finally, Sierra Club 6.9 seeks specific information concerning SWEPCO's modeling and assumptions used in its unit disposition analysis.

Sierra Club, however, argues that through these requests they seek to obtain information "relevant to the timing, amount, prudence, and public's interest related to 'any' of SWEPCO's capital expenditures."<sup>13</sup> This argument is based on the flawed assumption that review of capital expenditures in a rate case includes not only those amounts and expenditures for which SWEPCO seeks recovery but also any capital investments regardless of whether or not they are included in the Company's requests for relief. This view is mistaken.

Sierra Club also argues that its requests are relevant to the "total cost" of operating Flint Creek and "whether SWEPCO's ongoing test-year spending at Flint Creek . . . and other capital expenditures, are reasonable and necessary."<sup>14</sup> But the requests do not seek anything other than information directed to the prudence of the Company's decision to retrofit Flint Creek and the analyses it undertook to make that decision. The test year applicable to this proceeding ended March 31, 2020, so it is unclear what Sierra Club means by "ongoing test year spending." As SWEPCO has explained, the investment projects related to the Flint Creek CCR/ELG retrofit were not placed in service before the end of the test year, as confirmed by Order No. 7. Because these RFIs only attempt to develop information regarding the prudence of the Flint Creek retrofit and

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<sup>13</sup> Motion to Compel at 5.

<sup>14</sup> *Id.* at 6.

the analyses related to the Company's decision on the issue, the information sought remains beyond the scope of this proceeding.

These requests therefore seek information that is not related to SWEPCO's request for relief in this case, do not bear on a fact of consequence in this case, and are beyond the scope of this proceeding. Simply put, the information Sierra Club seeks through RFIs 6.6-6.9 is not intended to aid the resolution of any matter at issue in this case. Accordingly, as SWEPCO explained in its objections, these requests are not reasonably calculated to lead to the discovery of admissible evidence.<sup>15</sup>

### **III. CONCLUSION**

For the foregoing reasons, SWEPCO respectfully requests that the ALJs deny Sierra Club's motion to compel responses concerning Sierra Club's Sixth Set of RFIs. SWEPCO further requests any other relief to which it may be justly entitled.

Respectfully submitted,

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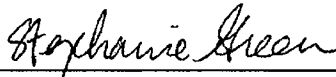
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**AMERICAN ELECTRIC POWER SERVICE  
CORPORATION**

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<sup>15</sup> Tex. R. Civ. Proc. 192.3(a).

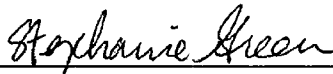
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**ATTORNEYS FOR SOUTHWESTERN  
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**CERTIFICATE OF SERVICE**

I certify that, unless otherwise ordered by the presiding officer, notice of the filing of this document was provided to all parties of record via electronic mail on May 14, 2021, in accordance with the Second Order Suspending Rules issued in Project No. 50664 and Order No. 1 in this matter.

  
Stephanie Green