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**SOAH DOCKET NO. 473-21-1892
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**APPLICATION OF SOUTHWESTERN § BEFORE THE STATE OFFICE
PUBLIC SERVICE COMPANY FOR § OF
AUTHORITY TO CHANGE RATES § ADMINISTARTIVE HEARINGS**

**ALLIANCE OF XCEL MUNICIPALITIES’
MOTION TO COMPEL RESPONSE TO AXM RFI NOS. 10-12 THROUGH 10-22 TO
SOUTHWESTERN PUBLIC SERVICE COMPANY**

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SOUTHWESTERN PUBLIC SERVICE COMPANY**

The Alliance of Xcel Municipalities (“AXM”) hereby files its Motion to Compel Responses to its Request for Information (“RFI”) Nos. 10-12 through 10-22 to Southwestern Public Service Company (“SPS”). Pursuant to 16 Tex. Admin. Code (“TAC”) § 22.144(e), motions to compel are due within five (5) working days from receipt of a party’s objections to discovery. AXM received SPS’s objection to AXM’s RFI 10-12 through 10-22 on Monday, July 26, 2021; thus, AXM’s Motion to Compel is due no later than August 2, 2021. Therefore, AXM’s Motion to Compel is timely filed.

I. GOOD FAITH NEGOTIATIONS

Counsel for SPS and AXM have engaged in good faith negotiations pursuant to 16 Tex. Admin. Code (“TAC”) § 22.144(d); however, the parties were unable to reach an agreement.

II. LEGAL STANDARDS

The Administrative Law Judges (“ALJs”) are well aware of the scope of discovery: A party may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action,¹ and may obtain discovery of information that is reasonably calculated to lead to the discovery of admissible evidence.²

SPS objected to AXM’s RFI Nos. 10-12 through 10-22 on the grounds of relevance and that these RFIs seek data that are outside of the scope of permissible discovery. In discovery disputes, relevance is a low threshold consistent with the purpose of “seek[ing] truth so that disputes may

¹ Texas Rules of Civil Procedure (“TEX. R. CIV. P.”, Rule 192.3; and 16 Tex. Admin. Code (“TAC”) § 22.141(a).

² *Id.*

be decided by facts that are revealed rather than concealed.”³ The scope of discovery is broader than the “relevance” standard under the Texas Rules of Evidence. 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 Crucially, 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 In fact, the information a party seeks through a discovery request is proper even if it is not admissible, so long as the request appears “reasonably calculated to lead to the discovery of admissible evidence.”⁶

Consequently, 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

III. REQUEST FOR INFORMATION TO WHICH SPS OBJECTED

The RFIs to which SPS objected are set out below:

- 10-12: Please provide the estimated extraordinary costs incurred by SPS for each day and total of the February 2021 winter weather event, along with supporting workpapers for the cost estimate.
- 10-13: Please provide the energy supply mix (MWh and percentage of total MWh) for the SPS system by resource type (e.g., coal, natural gas, purchased energy, wind energy) during the test year and during the February 2021 winter weather event.
- 10-14: Please discuss any new initiatives under evaluation or planned by SPS to mitigate damages related to extreme weather such as the February 2021 winter weather event.

³ *Tom L. Scott, Inc. v. McIlhany*, 798 S.W.2d 556, 559 (Tex. 1990).

⁴ Tex. R. Civ. P. 192.3(a).

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

⁶ Tex. R. Civ. P. 192.3(a). By contrast, Texas Rules of Evidence, Rule 401 states that 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.”

⁷ *Castillo*, 279 S.W.3d at 664.

- 10-15: Please provide the MWh and average cost of fuel (\$/MWh) supplied from each SPS generating unit for each day of the February 2021 winter weather event.
- 10-16: Please provide the data, duration, root cause and MWh lost for each forced outage incurred by SPS during February of 2021.
- 10-17: Please provide SPS's planned outage schedule including start date and end date of outages during February 2021.
- 10-18: Please provide SPS's system weighted average cost of gas for each day of February 2021.
- 10-19: Please provide the volume (MWh) and average cost of energy (\$/MWh) purchased by SPS from the SPP IM for each day of February 2021.
- 10-20: Please provide the regulatory filings by SPS to recover costs of the February 2021 winter weather event.
- 10-21: Please provide the documentation of SPS's winterization and freeze protection program for each power plan.
- 10-22: Please provide SPS's O&M and capital costs for winterization and freeze protection for each power plant for each of the last four calendar years and for 2021 to date.

IV. ARGUMENT

AXM RFI Nos. 10-12 through 10-22 seek information within the scope of permissible discovery because these RFIs seek information related to potential conditions that may occur during the Rate Year.⁸

Importantly, the Cities and the Commission are determining rates to be charged *prospectively*. Consequently, the rates need to capture conditions that may occur in the Rate Year. Given the focus on steps utilities, generators, and Transmission Distribution Utilities ("TDUs") are taking to mitigate the impact of extreme events like Texas experienced in February 2021, the data AXM seeks in RFI Nos. 10-12 through 10-22 are relevant and within the scope of this

⁸ See 16 Tex. Admin. Code § 25.5(101) (defining "Rate Year" as "The 12-month period beginning with the first date that rates become effective. The first date that rates become effective may include, but is not limited to, the effective date for bonded rates or the effective date for interim or temporary rates."). The effective date of rates resulting from this case is the date the Commission enters its final, appealable order in this proceeding. See PURA §§ 36.055(a); 36.111(b); and 36.211(c).

proceeding because the costs related to those actions will be locked into rates approved in this proceeding.

Further, the importance of the data AXM seeks is underscored by the Legislature's actions in the 2021 Regular Session related to, for example, HB 1510, one of the securitization bills.

Moreover, the amount that SPS spent on winterization costs is necessary to evaluate the prudence and effectiveness of winterization costs incurred by SPS in the Test Year that SPS is requesting in rates. The extent to which SPS's winterization programs/costs were or were not effective in preventing freeze related outages, informs what costs should or should not be included in rates.

Lastly and relatedly, SPS is seeking an upward adjustment to its ROE because of its quality of management. ROE is a prospective concept whose effect on rates will be felt prospectively. Therefore, how SPS performs going forward – that is, how management performs – again underscores the need for SPS's planned actions in the “rate year” and beyond.

V. RESPONSE TO SPS'S RELEVANCE OBJECTIONS

SPS objects to AXM RFI Nos. 10-12 through 10-22 on the grounds that each request seeks information concerning events and data that occurred after December 31, 2020, and argues the information AXM seeks is not reasonably calculated to lead to the discovery of admissible evidence.⁹

AXM RFI Nos. 10-12; 10-13; 10-15; 10-18; and 10-19 request the following information:

10-12: Please provide the estimated extraordinary costs incurred by SPS for each day and total of the February 2021 winter weather event, along with supporting workpapers for the cost estimate.

10-13: Please provide the energy supply mix (MWh and percentage of total MWh) for the SPS system by resource type (e.g., coal, natural gas, purchased energy, wind energy) during the test year and during the February 2021 winter weather event.

⁹ *Application of Southwestern Public Service Company for Authority to Change Rates*, Docket No. 51802, Southwestern Public Service Company's Objections to Alliance of Xcel Municipalities' Request for Information Nos. 10-12 through 10-22 at 2-8 (July 26, 2021).

10-15: Please provide the MWh and average cost of fuel (\$/MWh) supplied from each SPS generating unit for each day of the February 2021 winter weather event.

10-18: Please provide SPS's system weighted average cost of gas for each day of February 2021.

10-19: Please provide the volume (MWh) and average cost of energy (\$/MWh) purchased by SPS from the SPP IM for each day of February 2021.

SPS objects that the above requests are not relevant simply because each request seeks information concerning information about extraordinary costs, fuel costs, SPS's fuel supply mix, and the amount and average cost of energy SPS purchased from the SPP IM, during the February 2021 winter weather event. As discussed above, the question is not whether this information is admissible, but rather, whether the information is relevant to the subject matter of the pending action as long as the information is not privileged. Here, AXM and the Public Utility Commission of Texas ("Commission") are determining rates to be charged *prospectively*. Consequently, the rates need to capture conditions that may occur in the Rate Year.

Given the focus on steps utilities, generators, and Transmission Distribution Utilities ("TDUs") are taking to mitigate the impact of extreme events like Texas experienced in February 2021, the data concerning SPS's extraordinary costs, how much SPS spent on fuel during this event, what SPS's fuel mix consisted of during this weather event, and how much energy SPS purchased from the SPP IM during each day of the February 2021 winter weather event are highly relevant to this proceeding.

Moreover, the relevance of the data AXM seeks is underscored by the Legislature's actions in the 2021 Regular Session related to, for example, HB 1510, one of the securitization bills enacted by the Legislature. HB 1510 creates a new non-profit special purpose public corporation overseen by the Commission to issue bonds and borrow money as authorized by a Commission financing order to help electric utilities outside of the ERCOT region, such as SPS, recover certain costs. Therefore, knowing what extraordinary costs SPS incurred, its energy supply mix, and the energy costs SPS incurred during the February 2021 winter weather event are relevant for purposes of discovery so AXM and the Commission may assess what conditions may be during the Rate Year.

Lastly, with the exception of AXM 10-12, SPS also objects to RFIs 10-13; 10-15; 10-18; and 10-19 as being outside the scope of this proceeding because SPS is not seeking to recover the costs of fuel or purchased power in this proceeding. Again, SPS conflates the scope of permissible discovery with the relevance standard under the Texas Rules of Evidence. Irrespective of whether SPS is attempting to recover the costs of fuel or purchased power in this proceeding, AXM's request for SPS's energy supply mix during the test year is within the scope of discovery as the scope of discovery is broader than the "relevance" standard under the Texas Rules of Evidence. As explained above, a party may obtain discovery regarding *any matter* that is not privileged and is relevant to the subject matter of the pending action. SPS's energy supply mix during the test year is within the scope of this proceeding to shed light on how effectively and prudently SPS is operating its system.

As well, the supply mix of fuel, the cost of SPS's fuel, SPS's system-weighted-average cost of gas, and the average cost of energy SPS purchased from the SPP IM are within the scope of this proceeding because SPS asserts that it prudently and cost effectively managed its system for such events during the test year. In the direct testimony of Bennie F. Weeks, Mr. Weeks testifies that SPS switched from Strategist to EnCompass for its costing analysis model. EnCompass "is a production costing model that uses an algorithm to determine the least-cost resource for a utility system from a prescribed set of resource technologies under given sets of constraints and assumptions."¹⁰ Thus, the energy supply mix, the average cost of fuel supplied from each SPS generating unit, the weighted-average cost of gas, and the cost of energy purchased by SPS from the SPP IM, all during the February 2021 winter weather event are crucial in determining whether SPS's EnCompass system is effectively recommending a least-cost resource mix. If the information the EnCompass model was providing SPS during the test year led to the problems SPS experienced during the February 2021 winter weather event, then the EnCompass model is not incorporating the proper data inputs and ultimately causing ratepayers to pay more.

Therefore, because the data AXM seeks through AXM RFI Nos. 10-13, 10-15, 10-18, and 10-19 will help determine how effective and accurate SPS's EnCompass Model is, these discovery requests are relevant and properly within the scope of this proceeding.

¹⁰ Direct Testimony of Bennie F. Weeks at 17.

AXM RFI Nos. 10-14, 10-16, and 10-17 respectively request the following:

10-14: Please discuss any new initiatives under evaluation or planned by SPS to mitigate damages related to extreme weather such as the February 2021 winter weather event.

10-16: Please provide the data, duration, root cause and MWh lost for each forced outage incurred by SPS during February of 2021.

10-17: Please provide SPS's planned outage schedule including start date and end date of outages during February 2021.

SPS objects to AXM RFI Nos. 10-14, 10-16, and 10-17 on the grounds that because AXM seeks information concerning the initiatives SPS is implementing to mitigate damages the February 2021 winter weather event caused as well as the forced and planed outages SPS experienced during February of 2021, these RFIs are irrelevant because the February 2021 winter weather event took place after the end of the test year. As discussed above, relevance is a low threshold consistent with the purpose of "seek[ing] truth so that disputes may be decided by facts that are revealed rather than concealed."¹¹

In this case, SPS is seeking an upward adjustment to its Return on Equity ("ROE") because of the quality of its management. SPS has put forth the testimony of Jess Totten who, relying on the testimony of Mr. Richard Starkweather, testifies in support of a "bonus" ROE based on the quality of SPS's service and management.¹² Mr. Starkweather describes SPS's relative performance when compared with other utilities in Texas and across the United States on a variety of efficiency and quality-of-management metrics for different areas of utility operations.¹³ ROE is a prospective concept whose effect on rates will be felt prospectively. Therefore, how SPS performs going forward – that is, how management performs – again underscores the need for SPS's planned actions in the "rate year" and beyond.

¹¹ *Tom L. Scott, Inc. v. McIlhany*, 798 S.W.2d 556, 559 (Tex. 1990).

¹² Direct Testimony of Jess Totten at 6; 22.

¹³ See Direct Testimony of Richard D. Starkweather at 7-8.

Consequently, initiatives that SPS's management is planning to undertake to mitigate the damage the February 2021 winter weather event caused is relevant to this proceeding because it will undoubtedly shed light on how SPS's management is performing in the Rate Year.

Similarly, data showing the forced and planned outages that SPS experienced during February of 2021 will reveal facts surrounding how efficiently and effectively SPS is managing its system, which in turn will help verify the accuracy of Mr. Starkweather's testimony and Mr. Totten's proposed bonus ROE.

It would be unfair to ratepayers to shoulder rates incorporating a higher ROE, without knowing how SPS's management plans to address the aftermath of the February, 2021 winter weather event during the Rate Year and beyond. Therefore, AXM RFI Nos. 10-14, 10-16, and 10-17 are relevant to this proceeding.

AXM RFI Nos. 10-20 through 10-22 request the following information:

10-20: Please provide the regulatory filings by SPS to recover costs of the February 2021 winter weather event.

10-21: Please provide the documentation of SPS's winterization and freeze protection program for each power plant.

10-22: Please provide SPS's O&M and capital costs for winterization and freeze protection for each power plant for each of the last four calendar years and for 2021 to date.

SPS objects to AXM RFI Nos. 10-20 through 10-22 on the basis that because AXM is requesting data concerning SPS's handling of the February 2021 winter weather event that this information is irrelevant to this proceeding because it occurred after the updated test-year period ended.

As noted above, the relevance threshold for discovery is extremely low. Without repeating its arguments, AXM notes that SPS's request for an upward adjustment to its ROE makes SPS's regulatory filings and data concerning its winterization and freeze protection program relevant for purposes of discovery. These data shed light on SPS management's handling of a winter weather event that may have ramifications on rates during the Rate Year and beyond.

Additionally, and crucially, the information AXM seeks through RFI Nos. 10-20 through 10-22 are relevant in that the requested information is necessary to evaluate the prudence and

effectiveness of winterization costs SPS incurred in the test year at issue in this proceeding. If the very winterization programs and costs SPS is defending as prudent and seeking a recovery of in the instant case were inadequate in *preventing* freeze related outages not even 2 months after the end of the updated test year, then this brings into question SPS's recovery of the O&M and capital costs for winterization and freeze protection incurred during the test year.

Therefore, AXM RFI Nos. 10-20 through 10-22 are relevant to determining whether the winterization costs SPS incurred during the test year were prudent and effective.

VI. CONCLUSION AND PRAYER

For the above reasons, AXM requests the ALJs to overrule SPS's objections to AXM's RFI Nos. 10-12 through 10-22 and grant AXM's Motion to Compel.

Respectfully submitted,

HERRERA LAW & ASSOCIATES, PLLC

PO Box 302799

Austin, Texas 78703

4524 Burnet Road

Austin, Texas 78756

512-474-1492 (Voice)

512-474-2507 (Fax)

By: /s/ Sergio E. Herrera

Alfred R. Herrera

State Bar No. 09529600

aherrera@herreralawpllc.com

Brennan J. Foley

State Bar No. 24055490

bfoley@herreralawpllc.com

Sergio E. Herrera

State Bar No. 24109999

sherrera@herreralawpllc.com

service@herreralawpllc.com

**ATTORNEYS FOR THE ALLIANCE OF
XCEL MUNICIPALITIES**

CERTIFICATE OF SERVICE

I certify that I have served a copy of *AXM'S Motion to Compel Response to AXM RFI Nos. 10-12 through 10-22* upon all known parties of record by fax and/or first class mail on this the 30th day of July, 2021.

/s/ *Leslie Lindsey*

Leslie Lindsey