

The Public Utility Commission of Texas (commission) adopts an amendment to §22.144 relating to Requests for Information and Requests for Admission of Facts with no changes to the proposed text as published in the July 7, 2000 *Texas Register* (25 TexReg 6450). The rule will clarify and modernize these discovery procedures. This revised rule was adopted under Project Number 21248.

The commission received comments from AT&T Communications of Texas L.P. (AT&T), Southwestern Bell Telephone Company (SWBT), Reliant Energy HL&P (Reliant), El Paso Electric Company (EPE), Southwestern Public Service Company (SPS), Texas Industrial Energy Consumers (TIEC), Entergy Gulf States, Inc. (EGSI), Central Power and Light, Southwestern Electric Power Company and West Texas Utilities Company, together as the "AEP Companies", TXU Electric Company (TXU), GTE Southwest Incorporated doing business as Verizon Southwest (Verizon), and TXU Telephone Company (TXU Telephone).

In comments, AT&T, Reliant, EPE, SPS, AEP, TXU, Verizon, and TXU Telephone question the need for a detailed index to voluminous materials in §22.144(h)(4), suggesting that such a requirement would add time and expense to the producing party and could lead to additional discovery disputes. These commenters generally oppose the new index provided for in §22.144(h)(4). AT&T urges maintenance of the status quo with regard to voluminous materials in commission proceedings. Reliant, SPS, AEP, and TXU criticized the rule adoption process as failing to provide an opportunity to hold informal

workshops to evaluate the index requirement. EGSI proposed an amendment to the rule providing for a five day extension of time for the filing of the index when the responsive documents consists of more than ten documents.

The commission disagrees with the comments of AT&T, Reliant, SPS, AEP, TXU and TXU Telephone concerning the effect of requiring an index to voluminous materials. Inefficiencies caused by disorganized, "box-car" responses to request for information (RFIs) will be eliminated through the requirement of an index. It is a basic and well-established practice for a producing party to maintain a log of materials responsive to discovery requests in complex litigation. Without such an index, inadvertent disclosure of confidential or privileged material could arise. Similarly, such logs or lists of produced documents are used as accountability tools in assuring full and fair production of documents. Also, when making documents available for review in a contested case, the producing party should, as a practical matter, maintain some sort of log, list or index of documents as a monitoring devise to assure proper control over the documents at the site of review. Such a log is typically created in the course of identifying responsive documents maintained in the records of the producing party. The revised rule requires no more than a summary description and identifying information concerning material responsive to a discovery request in those instances in which the material is too voluminous to file under current commission rules. Rather than creating discovery disputes, this requirement will likely avoid discovery disputes by facilitating full and fair examination of available responsive materials in a timely manner. The amendment offered by EGSI raises a valid point concerning the potential need for additional time to create an index to the responsive documents; however, the threshold for permitting any deviation from

the index requirement should be on a case by case basis, allowing the parties and the administrative law judge to make any needed exception. The commission declines to adopt EGSI's proposed amendment.

SWBT opposes the requirement of a detailed index provided in §22.144(h)(4), fearing that such a requirement would place an undue burden on producing parties and could lead to abuse of the discovery process. SWBT also opposes the amendment to §22.144(h)(1) that clarifies the requirement that non-voluminous materials be filed and asserts that RFI responses served on the commission are not public information.

The commission disagrees with SWBT. In opposing the index to voluminous materials, SWBT assumes that parties will be driven by a malicious disregard of the discovery process by parties to a contested commission proceeding. There is no basis for such a presumption of malice. Nothing in this adopted rule diminishes the ability of any party to object to improper discovery. The commission disagrees with the arguments advanced by SWBT in opposition to the filing of RFI responses under §22.144(h)(1). SWBT ignores the explicit requirement of §22.71 relating to Filing of Pleadings, Documents and Other Materials that requires the filing of discovery requests and responses. Similarly, the commission disagrees with SWBT's suggestion that RFI responses provided to commission staff are not public information. Such a radical departure from the basic requirements of open government would not create public confidence in the decisions made at the commission. Any RFI response that is not filed under confidential seal is both public information and a state record. For support, SWBT generally refers to unidentified rules of the State Office of Administrative Hearings (SOAH) and the Railroad

Commission of Texas (Railroad Commission) as expressly providing that discovery responses not be filed with those agencies. These examples do not support the arguments advanced by SWBT. Typically, the Railroad Commission is not a party to the cases subject to its rules, and would not have a need for the discovery. Similarly, in the case of commission proceedings, there is no need for SOAH to have a duplicate set of the materials filed and made available through the systems established for discovery by the commission.

TIEC generally supports the adoption as published, but would make additional amendments to the rule. Specifically, TIEC seeks the elimination of those rule provisions permitting the withholding of voluminous materials, including §22.144(h)(2), (3) and (4). TIEC believes a better practice is to utilize advanced technology and allow the documents to be made available in electronic form. TIEC also recommends the elimination of §22.144(a)(2) that requires parties to file letters stating that they want to receive copies of all RFI responses.

The commission believes that the modifications of the discovery rule advanced by TIEC should not be made at this time. Elimination of the rules relating to voluminous documents requires a more thorough analysis. The requirement that a party indicate its desire to receive RFI responses is not a burdensome matter.

This amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 1998, Supplement 2000) (PURA), which provides the Public Utility

Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §14.052.

§22.144. Requests for Information and Requests for Admission of Facts.

(a) **Availability.** At any time after an application is filed, and subject to the provisions of §22.141 of this title (relating to Forms and Scope of Discovery), any party may serve upon any other party written requests for information and requests for admission of fact.

(b) **Making requests for information.**

(1) **Contents.** A request under this section shall identify with reasonable particularity the information, documents or material sought. A request seeking inspection of documents or property shall describe with reasonable particularity the documents to be produced or the property to which access is requested, and shall set forth the items to be inspected by individual item or by category.

(2) **Service.** A copy of each request for information shall be served upon all parties to the proceeding. Requests for information may be served by facsimile transmittal on the recipient of the request if the recipient has a facsimile machine available for use in the proceeding. Requests for information that are received after 3:00 p.m. shall be deemed to have been received the following business day. Responses to requests for information shall be served on the requesting party and any party that has requested, in writing, to be served.

(c) **Responding to requests for information.**

- (1) **Time for response.** The party upon whom a request is served shall serve a full written response to the request within 20 days after receipt of the request. The presiding officer, on motion and for good cause shown, may extend or shorten the time for providing responses.
- (2) **Requirements of response.**
 - (A) Each response to discovery under this subsection shall identify the preparer or person under whose direct supervision the response was prepared, and the sponsoring witness, if any.
 - (B) Each request for information shall be answered separately. Responses to requests for information shall be preceded by the request to which the answer pertains.
 - (C) Responses to requests for production of documents, property, or other items, shall state, for each item or category of items for which an objection has not been raised, that inspection or other requested action will be permitted at a mutually convenient time at the location where the documents, property, or other items are maintained. If compliance with the request is impossible, a written response shall be filed stating the reasons for the unavailability of the information.
 - (D) Where the response to a request for information may be derived or ascertained from local public records, the responding party shall not be obligated to produce the documents for the requesting party. It shall be sufficient answer to

identify with particularity the public records that contain the requested information.

(E) Where a request may be answered by production of or reference to information that currently exists in the form of a document, computer record, or other existing tangible thing that is voluminous, as defined in subsection (h) of this section, it is a sufficient answer to the request to specify the records from which the answer may be derived or ascertained and to afford a reasonable opportunity to the requesting party to examine, to audit or to inspect such records and to allow the requesting party to make copies, compilations, abstracts or summaries from such records. The specification of records provided shall include sufficient detail to permit the requesting party to locate and to identify, as readily as can the responding party, the records from which the answers may be ascertained.

(F) Responses to requests for information shall be filed under oath, unless the responding party stipulates in writing that responses to requests for information can be treated by all parties as if the answers were filed under oath.

(d) **Objections to requests for information.** Parties shall negotiate diligently and in good faith concerning any discovery dispute prior to filing an objection. The objections shall include a statement that negotiations were conducted diligently and in good faith. If negotiation fails, objections to requests for information, if any, shall be filed within ten calendar days of receipt of

the request for information. The objections shall state the date the request for information was received.

- (1) The objections shall be a separate pleading and entitled "Objections of (name of objecting party) to (style of RFI objected to)." The request for information to which an objection is being filed shall be stated and the specific grounds for the objection shall be separately listed for each question. If an objection pertains only to a part of a question, that part shall be clearly identified. All arguments upon which the objecting party relies shall be presented in full in the objection.
- (2) If the objection is founded upon a claim of privilege or exemption under the Texas Rules of Civil Procedure, the objecting party shall file within two working days of the filing of the objections, an index that lists, for each document: the date and title of the document; the preparer or custodian of the information; to whom the document was sent and from whom it was received; and the privilege(s) or exemption(s) that is claimed. A full and complete explanation of the claimed privilege or exemption shall be provided. The index shall be sufficiently detailed to enable the presiding officer to identify the documents from the list provided. The index and explanations shall be public documents and shall be served on all parties who are entitled to receive copies of responses to requests for information under subsection (b)(2) of this section. If a document is to be provided pursuant to the terms of a protective order, the responding party need not comply with the procedures of this paragraph.

- (3) A party raising objections on the grounds of relevance as well as grounds of privilege or exemption is not required to file an index to the privileged or exempt documents at the time the objections are filed. A party may instead include an objection to the filing of the index. The objections shall show good cause for postponement of the filing of the index. An index to the privileged or exempt documents shall be due within five working days of receipt of an order denying the relevance objection or overruling the objection to the filing of an index.
 - (4) The requirement to respond to those requests, or portions thereof, to which objection is made shall be postponed until the objections are ruled upon and for such additional time thereafter as the presiding officer may direct.
 - (5) In the interests of narrowing discovery disputes, the responding party may agree to provide certain information sought by a request while objecting to the provision of other information sought by the request.
- (e) **Motions to compel.** The party seeking discovery shall file a motion to compel no later than five working days after the objection is received. Absence of a motion to compel will be construed as an indication that the parties have resolved their dispute. The presiding officer may rule on the motion to compel based on written pleadings without allowing additional argument.

- (f) **Responses to motions to compel.** Responses to a motion to compel shall be filed within five working days after receipt of the motion, and shall include all factual and legal arguments the respondent wants to present regarding the motion.
- (g) **In camera inspection.** If an objection is founded on a claim of privilege or an exemption under the Texas Rules of Civil Procedure, the burden is on the objecting party to request an in camera inspection and to provide the documents for review. Any request shall be filed within three working days of the receipt of the motion to compel. The request shall contain the factual and legal basis to support the claimed exemption or privilege. The objecting party shall review the documents and note with specificity any portions to which the claimed privilege or exemption claim does not apply. The objecting party shall provide the documents to the presiding officer, under seal, no later than one working day after it requests an in camera inspection. Documents submitted for in camera review shall not be filed with the commission filing clerk. Documents submitted for in camera review shall be submitted to the presiding officer and enclosed in a sealed and labeled container accompanied by an explanatory cover letter. The cover letter shall identify the control number and style of the proceeding and explain the nature of the sealed materials. The container shall identify the control number, style of the case, name of the submitting party, and be marked "IN CAMERA REVIEW" in bold print at least one inch in size. Each page for which a privilege is asserted shall be marked "privileged."

(h) **Production of voluminous material.** The following procedures shall apply to production of voluminous materials:

- (1) Responses to particular questions that consist of less than 100 pages are not voluminous and shall be filed in full.
- (2) Subject to paragraph (3) of this subsection, the responding party shall make available all voluminous material provided in response to a request for information at a designated location in Austin.
- (3) A party will be released from its obligation to make available the requested voluminous material at a designated location in Austin, only if the volume of the material exceeds eight linear feet. In that event, the party shall make the material available where the material is located.
- (4) The party providing the voluminous material shall file with its response a detailed index of the voluminous material responsive to a particular question and shall organize the responses and material to enable parties to efficiently review the material, including labeling of material by request for information number and subparts and sequentially numbering the material responsive to a particular question. The index shall include:
 - (A) information sufficient to locate each individual document by page number, file number, and box number;
 - (B) the date of each document;
 - (C) the title of the document, or, if none exists, a description of the document;
 - (D) the name of the preparer of each document; and

- (E) the length of each document.

- (i) **Duty to supplement.** A responding party is under a continuing duty to supplement its discovery responses if that party acquires information upon the basis of which the party knows or should know that the response was incorrect or incomplete when made, or though correct or complete when made, is materially incorrect or incomplete. The responding party shall amend its prior response within five working days of acquiring the information.

- (j) **Requests for admission of facts.** Requests for admission of facts shall be made in accordance with the Texas Rules of Civil Procedure.

- (k) **Modifications of deadlines.** Modification of the deadlines for responses, objections, and motions to compel may be modified by agreement of the affected parties, by filing a letter or other document evidencing the agreement.

This agency hereby certifies that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority. It is therefore ordered by the Public Utility Commission of Texas that §22.144 relating to Requests for Information and Requests for Admission of Fact is hereby adopted with no changes to the text as proposed.

ISSUED IN AUSTIN, TEXAS ON THE 21st DAY OF NOVEMBER 2000.

PUBLIC UTILITY COMMISSION OF TEXAS

Chairman Pat Wood, III

Commissioner Judy Walsh

Commissioner Brett A. Perlman