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



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

§
§
§

BEFORE THE
PUBLIC UTILITY COMMISSION
OF TEXAS

**RIO GRANDE ELECTRIC COOPERATIVE INC.'S REPLY TO PETTY GROUP LLP'S
MOTION TO COMPEL RESPONSES TO ITS FIRST AND SECOND REQUESTS FOR
INFORMATION TO PETTY GROUP, LLP**

Rio Grande Electric Cooperative, Inc. ("RGEC") files this reply to Petty Group, LLP ("Petty") Response to RGEC's motion to compel response to request 1.26 from its First Set of Requests for Information and to requests 2.4 and 2.5 from its Second Set of Requests for Information. In support thereof, RGEC respectfully shows as follows:

***A. Emails and Documents at Issue Relate Directly to the Testimony and/or the Facts
Known or the Expert that Relate to Testimony***

1. Nathan Morgan

The motion to compel with respect to Mr. Morgan is now with items 60, 62, 68, 82, and 83. As an initial matter, Petty simply relies upon an argument that Mr. Morgan did not review or rely upon this information in anticipation of his testimony. This argument entirely fails to recognize that the documents identified on the privilege log *relate directly to the issues on which the witness filed testimony*. For instance, RGEC's RFI 1.26 asks for relevant information related to power quality issues at Petty Ranch. Nathan Morgan, for instance, specifically testifies as follows:

Q. WHAT DID YOU DO TO DIAGNOSE THE PROBLEM?

A. I spent several days trying to determine whether the lighting fixtures or the wiring was causing the problem. I went back and reviewed all of my work, checking all of the junctions and splices in the wiring. I was not able to find any defect in the installation that would explain the problem. I also replaced all of the LED lighting fixtures in one of the residences, which did not help. **I ultimately discovered that poor quality power from the RGEC system was causing the lights to malfunction.**

Q. WHO MADE THE DETERMINATION THAT POOR QUALITY WAS CAUSING THE LIGHT FIXTURES TO MALFUNCTION?

A. I did.¹

A simple cursory review of the privilege log shows that the communications with Nathan Morgan all occur around the time period that Mr. Morgan was attempting to diagnose the issues with the appliances at the Petty Ranch. This clearly is something he must have reviewed or relied upon because otherwise Mr. Morgan would not have the information that is included within his testimony. This is the very basis for his testimony and the same time frame when Mr. Morgan admits in his testimony that he was conducting his investigation into the cause of the appliance issues.² Clearly these emails relate to his expert testimony in this case. ***In fact, if Petty is correct in its assertion that this information is not discoverable, then RGEC likewise should not have to produce anything that was not specifically reviewed or relied upon in anticipation of testimony from its experts.*** Yet that is what Petty claims in its own Motion to Compel filed on May 11, 2020. As Petty has filed a motion to compel similar information, Petty simply cannot have it both ways.

Moreover, for expert witnesses, Petty completely fails to address the fact that a party may discover not just information provided to, reviewed by, or prepared by or for the expert in anticipation of a testifying expert's testimony, a party is also entitled 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 the case in which the discovery is sought, ***regardless of when and how the factual information was acquired.***"³ While Mr. Morgan may claim in his testimony that these facts did not "form the basis" for his testimony, they would clearly "relate" to his

¹ See Exhibit A, Direct Testimony of Nathan Morgan at p. 5.

² See *id.* line 9.

testimony, at the very least. Clearly, this information relates to Mr. Morgan's mental impressions and opinions and therefore is discoverable when or *how* the information was acquired.

Furthermore, Items 82 and 83 are not "core work product" subject to the attorney client privilege. Rule 503 does not apply because Morgan is not a "lawyer," "representative" or "employee" of Petty. Rule 503(b)(1) states as follows:

- (1) General Rule. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:
 - (A) between the client or the client's representative and the client's lawyer or the lawyer's representatives;
 - (B) between the client's lawyer and the lawyer's representative;
 - (C) by the client's lawyer and the lawyer's representative;
 - (D) between the client's representatives or between the client and the client's representatives; or
 - (E) Among lawyers and their representatives representing the same client.

Petty claims that Rule 503 applies to Items 82 and 83. However, it is of note that Morgan is not an employee of Petty, he is a general contractor and founder of MC Electric.⁴ But he is a testifying expert in this case and was an author or recipient of these documents. Morgan is clearly not an employee or lawyer, and also not a "client representative" within the meaning of Rule 503. Rule 503 requires proof of more than that the recipient of the document is an employee. The party seeking the protection of privilege must prove "the recipient employee to be a representative: that the person was authority to obtain or to act on legal advice."⁵ Rule 503(a)(2) defines a "client representatives" as:

- (A) *a person who has the authority to obtain professional legal services for the client or to act for the client on the legal advice rendered; or*
- (B) another person who to facilitate the rendition of professional legal advice to the client makes or receives a confidential communication while acting in the scope of employment for the client.

This Commission and Courts in Texas have rejected assertion of privilege under Rule

³ Tex. R. Civ. Proc. 192.3(e).

⁴ See Exhibit A at p. 1, lines 6-10.

503(a)(2)(A) where the party claiming privilege offers insufficient evidence to establish that the individual is a "representative" under Rule 503.⁶ Clearly, Morgan was not in a position to obtain or act on legal advice for Petty nor did he have the authority to obtain professional legal services on behalf of Petty.

Moreover, this Commission and Courts have also found that Morgan is not the type of person that would fall into part of the "control group" contemplated by Rule 503(a)(2)(B).⁷ Subpart A of section 503(a)(2) adopts what is known as the "control group" test for determining who falls within the coverage of the privilege afforded to communications with client representatives, while Subpart B adopts a broader "subject matter test."⁸ Under the "control group" test, the person must be in a position to control or take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney.⁹ Morgan in no position to control or even take a substantial part in any action upon which Petty may take on the advice of counsel. There has been no power of attorney or other delegation of legal responsibility to Morgan by Petty. Morgan is not employed by Petty, much less in any managerial capacity that would render him competent to act on legal advice provided to Petty. Therefore, Items 82 and 83 are not subject to the attorney client privilege.

Bobby Grubb

The motion to compel with respect to Bobby Grubb is with respect to Privilege Log Items 72, 73, 74, 82, and 83.¹⁰ Bobby Grubb is essentially a consulting expert whose opinions have

⁵ *Cigna Corp. v. Spears*, 838 S.W.2d 561, 567-568 (Tex. App.—San Antonio 1992, no pet.)

⁶ See Docket 43734, *Petition of Murphy Oil Corporation for Declaratory Order Regarding Service to the Murphy Oil Eagle Ford Leasehold Area*, Order on Appeal of SOAH Order No. 11 ((January 25, 2018); *Cigna Corp. v. Spears*, 838 S.W.2d 561, 567-568 (Tex. App.—San Antonio 1992, no pet.).

⁷ See Docket 43734, *Petition of Murphy Oil Corporation for Declaratory Order Regarding Service to the Murphy Oil Eagle Ford Leasehold Area*, Order on Appeal of SOAH Order No. 11 ((January 25, 2018); *In re Tex. Health Res.*, 472 S.W.3d 895, 902 (Tex. App.—Dallas 2015, orig. proceeding).

⁸ See *id.*

⁹ See *National Tank*, 851 S.W. 2d at 19.

¹⁰ Petty produced Privilege Log items 75, 77, 78, 79, 80, 81, 84, 85, and 86. On May 11, 2020. To the extent they have been produced, RGEC withdraws its motion to compel these items.

been reviewed or relied upon by a testifying expert, Robert Grubb. As shown in RGEC's motion to compel, Bobby Grubb did all of the analysis that lead to the conclusion that harmonics were the cause of the problem with Petty's appliances. Petty has 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 Grubbs testimony. For the same reasons, the information is discoverable with respect to Mr. Morgan, this information should be discoverable with respect to Bobby Grubb.

Furthermore, Items 82 and 83 are not "core work product" subject to the attorney client privilege for the same reasons as Mr. Morgan. He is employed by Grubb Engineering, Inc., not Petty, He has no ability to act on or obtain legal advice for Petty. Therefore, these documents are not subject to the attorney client privilege.

Robert Grubb

Petty produced Item 79 on May 11, 2020. Therefore, RGEC withdraws its motion to compel this document.

2. Justin Lankutis

At issue with respect to Mr. Lankutis is Privilege Log Item 70. Mr. Lankutis testified that he was hired by Petty on June 5, 2020 to investigate engineering solutions resulting from alleged harmonic distortions.¹¹ This is the same date as the item on Privilege Log Item 70. Therefore it would appear that this relates to the "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 the case."¹² Therefore, for the same reasons discussed with respect to Mr. Morgan, this information should be discoverable. However, to the extent it does relate to an unrelated issue, then it would not be responsive to the RFI and the ALJ is able to review that correspondence to make that

¹¹ See Exhibit B, Direct Testimony of Justin Lankutis at p. 1, line 12.

determination.

B. Petty Waived Objections to RFI 2.4 and 2.5

Furthermore any objections to RFI 2.4 and 2.5 are waived because *Petty failed to assert any privilege with respect to RFI 2.4 and 2.5*. RFI 2.4 asks for all text messages, emails or other communications between any representative of Petty and Nathan Morgan. RFI 2.5 asks for relevant communications between Petty and its construction manager. Petty produced responses to the Second RFIs on April 8, 2020. Petty failed to produce its privilege log for these RFIs until April 15, 2020. It is disingenuous to claim that RGEC should not have additional time to file a privilege log for documents spanning back ten years, while Petty, faced with a much more narrow RFI, failed to do so itself.¹³

However, even if Petty had timely asserted objections and timely asserted a privilege log (which it did not do within 2 days of the RFIs), this information is not privileged for the same reasons discussed above.

CONCLUSION

Petty has inappropriately applied the attorney-client communications privilege and the work product privilege to RGEC's proper requests for documents and other information related to Justin Lankutis, Nathan Morgan and Bobby Grubb. Therefore, RGEC moves for an order compelling Petty to immediately produce all items for which Robert Grubb, Nathan Morgan or Bobby Grubb are identified on the Privilege Log as a Preparer/Custodian, Sender, or Recipient.

¹² Tex. R. Civ. Proc. 192.3(e).

¹³ Although raised in RGEC's Motion to Compel, rather than focus on this issue during times when all attorneys are experiencing issues related to COVID. RGEC focused on the merits of the objections. However, Petty should be held to the same standard as RGEC if it is to focus on procedural issues.

Respectfully submitted,

Shea & Associates, PLLC

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**ATTORNEYS FOR RIO GRANDE
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CERTIFICATE OF SERVICE

I hereby certify that a copy of this document will be served on all parties of record on May 13, 2020 in accordance with 16 TAC § 22.74 and the Commission's Orders regarding electronic filing and service.

/s/ Tammy Shea

EXHIBIT A

1 **Q. WERE THE ELECTRICAL SYSTEMS AT THE RANCH DESIGNED FOR**
2 **TYPICAL RESIDENTIAL USE?**

3 **A.** Yes. The electrical infrastructure I installed at the Petty Ranch is designed to support
4 standard residential load, which includes operating A/C systems, water heaters,
5 household appliances, lighting fixtures, and the like.

6 **Q. WHEN DID YOU FIRST BECOME AWARE THAT ELECTRICAL EQUIPMENT**
7 **WAS MALFUNCTIONING AT THE PETTY RANCH?**

8 **A.** I first became aware that the electrical equipment was malfunctioning at the Petty Ranch
9 in February 2019 when I first energized one of the newly-constructed residences. I
10 noticed that the LED lighting fixtures were not operating properly. Some of the lights
11 came on very late after switching the power on, and some of them never came on at all. I
12 then energized a second new residence and experienced the same problems with the LED
13 lighting fixtures.

14 **Q. WHAT DID YOU DO TO DIAGNOSE THE PROBLEM?**

15 **A.** I spent several days trying to determine whether the lighting fixtures or the wiring was
16 causing the problem. I went back and reviewed all of my work, checking all of the
17 junctions and splices in the wiring. I was not able to find any defect in the installation that
18 would explain the problem. I also replaced all of the LED lighting fixtures in one of the
19 residences, which did not help. I ultimately discovered that poor quality power from the
20 RGEC system was causing the lights to malfunction.

21 **Q. WHO MADE THE DETERMINATION THAT POOR POWER QUALITY WAS**
22 **CAUSING THE LIGHT FIXTURES TO MALFUNCTION?**

23 **A.** I did.

24 **Q. WHEN DID YOU START TO SUSPECT THAT RGEC'S POWER QUALITY WAS**
25 **THE SOURCE OF THE PROBLEM?**

26 **A.** After I finished checking the electrical installation for defects, we switched the residences
27 onto a backup generator to determine whether the power source was causing the problem.

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COMPLAINT OF PETTY GROUP, LLP AGAINST RIO GRANDE ELECTRIC COOPERATIVE, INC.	§ § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
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DIRECT TESTIMONY OF NATHAN MORGAN

Q. PLEASE STATE YOUR NAME, OCCUPATION AND ADDRESS.

A. My name is Nathan Morgan. I am a licensed master electrician. My home address is 1180 North 4th Street, Uvalde, Texas 78801.

Q. PLEASE DESCRIBE YOUR PROFESSIONAL EXPERIENCE.

A. I began my career as an electrician out of high school and have been installing and repairing electric supply systems for residential and commercial customers for nearly 18 years. In 2008, I founded MC Electric, an electrical contracting business, with my business partner Charles Chisolm. We are the primary electric contractor for MC Builders, a general contracting firm.

Q. DO YOU HOLD ANY PROFESSIONAL LICENSES?

A. Yes, I hold master electrician and electrical contractor licenses from the State of Texas. I have been a licensed electrician since 2007 and a licensed electrical contractor since 2008.

Q. HAVE YOU PREVIOUSLY TESTIFIED BEFORE THIS COMMISSION?

A. No.

Q. ON WHOSE BEHALF ARE YOU SUBMITTING THIS TESTIMONY?

A. I am testifying on behalf of Petty Group, LLP ("Petty").

Q. WAS THIS TESTIMONY PREPARED BY YOU OR UNDER YOUR DIRECT SUPERVISION AND CONTROL?

A. Yes.

DIRECT TESTIMONY OF NATHAN MORGAN

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EXHIBIT B

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COMPLAINT OF PETTY GROUP, LLP	§	BEFORE THE
AGAINST RIO GRANDE ELECTRIC	§	STATE OFFICE OF
COOPERATIVE, INC.	§	ADMINISTRATIVE HEARINGS

DIRECT TESTIMONY OF JUSTIN LANKUTIS

1
2 **Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

3 **A. My name is Justin Lankutis. My business address is 11400 Westmoor Circle, Suite 325,**
4 **Westminster, Colorado 80021.**

5 **Q. BY WHOM ARE YOU EMPLOYED AND WHAT IS YOUR POSITION?**

6 **A. I am employed by Kahuna Ventures, LLC ("Kahuna"), a private firm providing**
7 **engineering, design and consulting services for natural gas midstream projects. I serve as**
8 **the Vice President of Electrical & Instrumentation at Kahuna.**

9 **Q. ON WHOSE BEHALF ARE YOU SUBMITTING THIS TESTIMONY?**

10 **A. I am testifying on behalf of Petty Group, LLP ("Petty").**

11 **Q. WHAT IS YOUR RELATIONSHIP TO PETTY GROUP, LLP?**

12 **A. On or about June 5, 2019, Petty engaged Kahuna to investigate possible engineering**
13 **solutions to the harmonic distortion it was experiencing at the Petty Ranch. I led that**
14 **investigation, along with assistance from my engineering team, which I will describe in**
15 **my testimony. Petty also requested that I testify in this proceeding.**

16 **Q. WAS THIS TESTIMONY PREPARED BY YOU OR UNDER YOUR DIRECT**
17 **SUPERVISION AND CONTROL?**

18 **A. Yes.**

19 **Q. PLEASE SUMMARIZE YOUR EDUCATIONAL AND PROFESSIONAL**
20 **BACKGROUND.**

21 **A. I am a professional electrical engineer with over 23 years of experience. I received a**
22 **Bachelor of Science degree in Electrical Engineering from Colorado School of Mines. I**