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SOAH DOCKET NO. 473-02-3473

PUC DOCKET NO. 26195

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JOINT APPLICATION OF TEXAS
GENCO, LP AND CENTERPOINT
ENERGY HOUSTON ELECTRIC, LLC
TO RECONCILE ELIGIBLE FUEL
REVENUES AND EXPENSES
PURSUANT TO SUBST. R. 25.236

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BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

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January 21, 2003

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**SOAH DOCKET NO. 473-02-3473
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APPLICATION OF TEXAS GENCO, LP	§	BEFORE THE STATE OFFICE
AND CENTERPOINT ENERGY	§	
HOUSTON ELECTRIC, LLC TO	§	OF
RECONCILE ELIGIBLE FUEL	§	
REVENUES AND EXPENSES	§	ADMINISTRATIVE HEARINGS
PURSUANT TO SUBST. R. 25.236		

**TEXAS GENCO, LP AND CENTERPOINT ENERGY HOUSTON ELECTRIC, LLC'S
MOTION TO COMPEL AND REQUEST FOR EXPEDITED CONSIDERATION**

On December 15, 2003, Texas Industrial Energy Consumers ("TIEC") filed objections to Texas Genco, LP and CenterPoint Energy Houston Electric, LLC's (collectively, "CenterPoint Energy") third set of RFIs to TIEC. Specifically, TIEC objected to question number 3-88. CenterPoint Energy hereby files this motion to compel a response to this RFI, requests expedited consideration of this motion and would show as follows.

RFI CPE 3-88

Please provide a detailed description (dollars and personnel) of the "resources available to the TIEC Intervenor Group" referenced on page 16, line 4 [of Mr. Pollock's testimony].

This question was asked in response to Mr. Pollock's claim that TIEC's resources were insufficient to analyze the issue of imputed capacity payments during the normal procedural schedule in this proceeding. Specifically, the question was submitted to obtain information related to Mr. Pollack's assertion that "The resources available to the TIEC Intervenor Group" do not permit a comprehensive review of CenterPoint Energy's purchased power contracts.¹ TIEC has made this claim numerous times, including the discovery dispute

¹ See Direct Testimony of Pollock at 16, lines 4-5.

regarding RFI TIEC 2-1, the above-referenced testimony of Mr. Pollock, and its recent request for a separate proceeding to analyze the imputed capacity issue.² In fact, this argument is the very cornerstone of TIEC's request for a separate proceeding. CenterPoint Energy strongly disagrees with Mr. Pollock's claim that TIEC lacks resources. TIEC represents several large, well-financed industrial clients³ and has retained a large law firm⁴ and a large consulting firm⁵ for this proceeding. Occidental Chemical Corporation alone had more than \$1.1 billion in net income in 2001.⁶ It should be TIEC's burden to prove the truth of this claim before any separate proceeding is granted. For TIEC to now object to this request and, in essence, suggest that it should not have to supply any proof of its claim is amazing. The answer to this RFI is absolutely necessary to respond to TIEC's most basic argument for a separate hearing. CenterPoint Energy is entitled to a response to this RFI.

TIEC does not object to this question on the grounds of relevance. Indeed, such an argument would be spurious given Mr. Pollock's testimony and the fact that a similar claim of inadequate resources forms the basis for TIEC's request for a separate proceeding. Instead TIEC states that the question is vague, that the information sought is confidential and/or privileged, and that the question is unduly burdensome and propounded merely for harassment purposes. None of these objections are supported by any evidence or even a full explanation of how they apply in this instance. All of TIEC's objections should be denied. CenterPoint Energy responds individually to each objection below.

² Mr. Pollock makes this request in his direct testimony as well. However, Order No. 14 in this proceeding required TIEC to review information provided by CenterPoint Energy and then make a formal request for a separate proceeding if TIEC still thought it necessary. TIEC made that formal request on January 17, 2003.

³ These include Dow Chemical Company, Occidental Chemical Corporation, ExxonMobil Power & Gas Services, FMC Corporation and Air Products & Chemicals, Inc. (See TIEC's response to TIEC 2-72).

⁴ Andrews & Kurth, L.L.P.

⁵ Brubaker & Associates, Inc.

RFI CPE 3-88 is neither vague nor ambiguous.

This RFI clearly and unambiguously requests a description of the resources available to TIEC in this proceeding. TIEC claims it is unclear what is meant by the terms “dollars” and “available.” TIEC fully understands the context in which this question was propounded and should, therefore, have no trouble understanding the use of these terms in that context. Although it now objects based on ambiguity, TIEC has never requested clarification from CenterPoint Energy on this issue. Nevertheless, CenterPoint Energy will further explain its request at this time. CenterPoint Energy intends these terms to have their ordinary meaning. CenterPoint Energy is asking how much money (U.S. dollars) and how many people the members of the TIEC Intervenor Group have at their disposal that could be committed to their efforts in this case (whether or not they have actually decided to commit the funds and personnel to their efforts in this case).

Confidentiality is not a basis for objection.

TIEC fails to explain why the requested information is confidential. That alone is sufficient reason to reject this argument. Even if the requested information were confidential, that is not a basis for objection. The protective order in this proceeding (See Order No. 4, August 16, 2002) was issued to protect the confidentiality of any relevant material that must be produced in this proceeding. No party disputes the relevance of the information requested. If TIEC is required to produce this information then it may be produced under the protective order, but TIEC cannot prevent production on the basis that the information is confidential.

⁶ See Occidental Chemical Corporation 2001 Annual Report (online version at http://media.corporate-ir.net/media_files/NYS/OXY/reports/ar_2001.pdf).

The requested information is not protected by any privilege.

TIEC again makes a blanket assertion without providing any evidence. TIEC has not discussed this claim with CenterPoint Energy and TIEC fails to explain in its objections why the requested information is privileged. It is difficult to see how any privilege could apply given the fact that TIEC itself has raised this issue and, most importantly, has chosen of its own volition to include in Mr. Pollock's testimony the allegation that TIEC does not have adequate resources and to use this issue as the cornerstone of its motion for a separate proceeding. In essence, TIEC wants to make an unsubstantiated claim, base its arguments for affirmative relief (the motion for separate proceeding) on that claim, and then hide behind privilege when asked to prove the claim. It is well established in Texas that a party cannot use privilege as both a sword and a shield.⁷ TIEC included in Mr. Pollock's testimony a claim that it lacked the resources to investigate the imputed capacity issue. TIEC's motion for a separate proceeding hinges on that claim. TIEC must now prove that claim and the only means of doing so is by providing the information requested in this RFI. TIEC has waived any privilege that might otherwise apply regarding the information needed to prove that claim. TIEC should be required to either withdraw the claim or answer the question.

The request is not unduly burdensome and was not asked to harass TIEC.

CenterPoint Energy has estimated the resources necessary to perform the analysis sought by TIEC.⁸ TIEC claims it lacks the resources necessary to perform this analysis.

⁷ See *Ginsberg v. 5th Ct. of Appeals*, 686 S.W.2d 105, 107 (Tex. 1985); *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 163 (Tex 1993).

⁸ See CenterPoint Energy's Response to Motion to Compel, filed December 23, 2002 (estimating that 600 manhours would be required to complete a manual review and summary of all of CenterPoint Energy's purchased power contracts). The amount of time needed will be considerably less than 600 manhours now that the summary information from the ETRM database has been provided.

CenterPoint Energy simply asked TIEC for the information necessary to quantify those resources in order to substantiate TIEC's claim. This is a valid basis for the question. This RFI was not propounded to harass TIEC.

TIEC has provided no evidence concerning the burden associated with answering this question. In making this objection, TIEC in essence makes a new claim that it lacks the resources to even answer this RFI. Again TIEC offers no proof. The fact is this RFI simply asks for a description of TIEC's resources – a description that TIEC should be able to provide with very little research and a few minutes drafting time. There is absolutely no basis for this undue burden objection.

CenterPoint Energy respectfully requests expedited consideration.

Having formally requested a separate proceeding for the imputed capacity issue based on its claim of insufficient resources, TIEC has the burden to provide evidence of its available resources. CenterPoint Energy respectfully requests that the ALJs order TIEC to answer this RFI before any decision on this separate proceeding is made. Further, CenterPoint Energy respectfully requests that the requested information be provided before the regularly scheduled hearing (beginning on February 4, 2003).

Conclusion

In its direct testimony and in a separate motion, TIEC has requested that a separate proceeding be set to address the imputed capacity issue. TIEC's basis for this request is its unsubstantiated assertion that it lacked the resources to adequately address this issue during the normal procedural schedule. When asked in this RFI to provide substantiating evidence

supporting its claim, TIEC has instead objected and sought to hide behind confidentiality and privilege. For the reasons stated above, CenterPoint Energy respectfully requests that either TIEC's objections be denied and CenterPoint Energy's motion to compel be granted, or, in the alternative, that TIEC's claim of insufficient resources be rejected as unsubstantiated. CenterPoint Energy further respectfully requests that it be granted all other relief to which it is entitled.

January 21, 2003

Respectfully submitted,



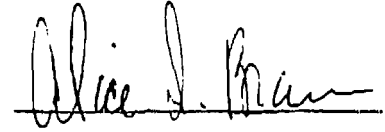
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CERTIFICATE OF SERVICE
SOAH Docket No. 473-02-3473
PUC Docket 26195

I hereby certify that a true and correct copy of the foregoing document was hand delivered, electronic mail or sent by overnight delivery or United States first class mail to all parties this 21ST of January, 2003.



Alice J. Mann