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PUC DOCKET NO. 29206
SOAH DOCKET NO. 473-04-2459

APPLICATION OF TEXAS-NEW MEXICO POWER COMPANY, FIRST CHOICE POWER, INC., AND TEXAS GENERATING COMPANY, L.P. TO FINALIZE STRANDED COSTS UNDER PURA § 39.262	§ § § § § § §	**PUBLIC UTILITY COMMISSION OF TEXAS**

COMMISSION STAFF'S REPLY TO MOTIONS FOR REHEARING

NOW COMES Staff of the Public Utility Commission of Texas ("Commission Staff" or "Staff"), representing the public interest, in the above titled and numbered cause, to submit this Reply to Motions for Rehearing:

BACKGROUND

Following a limited remand of this case to address the calculation of interest on the stranded costs balance, the Commission issued its Order on Rehearing in this case on June 3, 2005. Power Resources Group, Inc., ("PRG"), the Applicants,[1] Cities,[2] and the State of Texas ("State") then moved for rehearing in this case.

REPLY TO PRG'S MOTION

In its second Motion for Rehearing, PRG has simply restated the same grounds for rehearing that it presented in its first Motion for Rehearing.[3] The Commission denied PRG's first Motion for Rehearing,[4] and Staff recommends that PRG's instant Motion for Rehearing be denied, as well.

PRG contends that the Commission's rules violate the federal Public Utility Regulatory Policy Act[5] ("PURPA")[6] and candidly explains that it has filed a Motion for Rehearing in this

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1 "Applicants" are Texas-New Mexico Power Company, First Choice Power, Inc. and Texas Generating Company, L.P.

2 "Cities" are the Cities of Dickinson, Friendswood, La Marque, League City, and Lewisville, Texas.

3 Motion for Rehearing of Power Resource Group, Inc. (June 17, 2005) at 1 ("To simplify matters[,] PRG is reproducing its original Motion for Rehearing of August 11, 2004 in this pleading with only those changes necessary to update the procedural status of the case.").

4 Order Granting Rehearing in Part and Remanding Interest Issue (Oct. 8, 2004) at 3.

5 16 U.S.C. §§ 2601-2645 (West 1998 and West Supp. 2004).

6 Motion for Rehearing of Power Resources Group, Inc. (June 17, 2005) at 1-2.

case to prevent a finding of waiver or estoppel in other pending litigation or in future litigation.[7] PRG appears concerned that, following a possibly favorable conclusion in another case, PRG will be able to seek certain, unidentified remedies in a proceeding before this Commission.[8]

PRG does not identify any specific error in the Order on Rehearing that requires a rehearing. PRG suggests that denial of its Motion to Intervene was inappropriate, but it does not present any rationale in addition to its previous appeal of that denial.[9] The ALJ's denial of PRG's Motion to Intervene was appropriate because PRG failed to show that it has a justiciable interest in this proceeding.[10] The Commission has already considered PRG's rationale for reversing the ALJ's denial of its Motion to Intervene and declined to consider the appeal.[11] Therefore, PRG's second Motion for Rehearing should be denied.

REPLY TO APPLICANTS' MOTION

Except for "Error No. 1" and "Error No. 2," the Applicants' grounds for its second Motion for Rehearing are basically identical to those of its first Motion for Rehearing, in which the Applicants objected to virtually all of the Commission's findings of fact and conclusions of law, with the few exceptions in which the Commission found in the Applicants' favor.[12]

The Applicants' first two exceptions relate to the calculation of interest on the stranded costs balance, the issue addressed on rehearing. In Error No. 1, the Applicants point out that the Order on Rehearing does not reflect Stacy Whitehurst's and Darryl Tietjen's errata and that the correct balances should be $39,166,214 under the "no *bona fide* transaction" theory and $42,514,910 under the "commercially reasonable means" theory.[13] Staff agrees that the

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7 *Id.* at 3-4.

8 *Id.*

9 *Id.* at attached Appeal of Denial of Motion to Intervene of Power Resource Group, Inc.

10 Order No. 13, Ruling on Power Resource Group, Inc.'s Motion to Intervene (Mar. 17,2004) at 4.

11 Memorandum from Lisa Cantu, Policy Development Division, Public Utility Commission of Texas, to Parties of Record (Apr. 8,2004); Order Granting Rehearing in Part and Remanding Interest Issue (Oct. 8, 2004) at 4.

12 *Cf.* Applicants' Motion for Rehearing (Aug. 11, 2004).

13 Applicants' Motion for Rehearing of June 3, 2005 Order on Rehearing (June 23, 2005) at 4.

Applicants' requested "Error No. 1" changes are appropriate: Staff made the same request in its own Motion for Rehearing.[14]

The Applicants' "Error No. 2," however, is not an appropriate basis for rehearing. The Applicants contest the Commission's decision to adopt Staff's recommended interest rate.[15] The Applicants contend that the Commission erroneously construed the March 11, 2005, Proposal for Decision ("Rehearing PFD"), ignored evidence, and changed the ALJ's findings of fact and conclusions of law "without providing a legitimate means for doing so."[16] As Staff outlined in its initial and reply briefs following rehearing and in its exceptions to the PFD, the evidence and the controlling law in fact support Staff's recommended rate of 10.93%.[17] On the grounds outlined in those briefs and exceptions, pertinent sections of which Staff incorporates by reference in the interest of economy, Staff contends the Applicants' Error No. 2 should be rejected.

With respect to the balance of the Applicants' purported errors, the Applicants largely reproduce their first Motion for Rehearing, repeatedly asserting that the Commission ignored relevant evidence or misinterpreted the statute and rules. Contrary to those assertions, the Order on Rehearing, the Initial PFD, and the Rehearing PFD amply demonstrate that both the ALJ and the Commission carefully considered the record evidence, the positions of the parties, the proper constructions of statutory and rule language, and that the Commission reached its conclusions based on careful and close reasoning. The Commission has appropriately weighed the evidence and properly construed the statutory language controlling this case.

REPLY TO CITIES' MOTION

The Cities' second Motion for Rehearing is, for the most part, a reiteration of positions that they have urged in prior briefing and in their first Motion for Rehearing and that have already been fully considered and rejected by the Commission.[18] As with the Applicants'

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14 Commission Staff's Motion for Rehearing on Order on Rehearing (June 17, 2005) at 1-3.

15 Applicants' Motion for Rehearing of June 3, 2005 Order on Rehearing (June 23, 2005) at 4-5.

16 *Id.* at 5.

17 Commission Staff's Initial Post-Hearing Brief on Remanded Interest Issue (Dec. 17, 2004) at 9-10; Commission Staff's Reply Brief on Remanded Interest Issue (Jan. 7, 2005) at 5-6; Commission Staff's Exceptions to Remand Proposal For Decision Mar. 24, 2005) at 5-7.

18 *Cf.* Cities' Motion for Rehearing (Aug. 11, 2004) 6-9, 13-15.

numerous protestations that the Commission did not adequately consider the evidence or did not properly construe the statutory and regulatory requirements, the PFD and the Order demonstrate that the ALJs and Commission carefully considered the evidence proffered by Cities and their arguments for construction of the controlling statutory and rule language. Staff incorporates into this Reply its prior responses to those grounds for rehearing.[19]

An additional ground for rehearing urged by the Cities is that the interest rate of 10.93% approved following rehearing in this case is "grossly unfair and excessive when compared to the 1.17%-4.93% approved interest rates" for TNMP's fuel balance.[20] Cities urge adoption, instead, of their proposed interest rate of 7.5%, a rate which Staff's witness Darryl Tietjen also proposed as an alternative.[21] While Mr. Tietjen took the position that an interest rate of 7.5% would be adequate to make TNMP whole given the low risk of non-recovery associated with stranded costs,[22] Staff proposed that either its "UCOS-base" rate of 10.93% or a "risk-adjusted" rate of 7.5% would be appropriate.[23] Staff contends that the Commission's decision to use an interest rate of 10.93% is reasonable and supported by the facts.

REPLY TO STATE'S MOTION

The State moved for rehearing on two grounds. First, the State contends the Order on Rehearing is not final because it presents two alternative stranded cost quantifications.[24] Second, the State contends that TNMP failed to meet its burden of proof and, therefore, is not entitled to recovery of any stranded costs.[25]

The State contends the Order on Rehearing cannot be final because it contains "two mutually exclusive outcomes," it "does not 'fix the parties' legal relationship,'" and it offers two different true-up balance numbers without a way to determine "which the Commission itself

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19 Staff's Reply to Motions for Rehearing (Aug. 23, 2004) at 3-5.

20 Cities' Second Motion for Rehearing (June 23, 2005) at 6.

21 *Id.* at 19-21.

22 Staff Exh. 1-R, Direct Testimony of Darryl Tietjen at 9-10.

23 Commission Staff's Initial Post-Hearing Brief on Remanded Interest Issue (Dec. 17, 2004) at 8-10.

24 The State of Texas' Motion for Rehearing of the Order on Rehearing (June 23, 2005) at 1-4.

25 *Id.* at 4-6.

believes to the be 'right' number." [26] As the State notes, "[a]dministrative orders are generally final and appealable if 'they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process.'"[27] Contrary to the State's assertion, there is a clear way to determine which balance number the Commission believes to be the "right" one. Finding of Fact No. 33 states, "In accordance with the formula provided in § 25.263(1) the true-up balance is $125,036,285 subject to adjustment for carrying charges on additional depreciation."[28] By augmenting its analysis with a discussion of the theory that TNMP failed to use commercially reasonable means in selling TNP One, it has provided an additional basis for establishing TNMP's stranded costs, even if a reviewing court determines that the Commission erred in its determination that TNMP failed to establish the value of TNP One through a *bona fide* transaction. Under a straightforward reading of Findings of Fact Nos. 33 and 33A, the true-up balance specified in Attachment A will apply unless a reviewing court rejects the "no *bona fide* transaction" analysis. If the Commission is not reversed through judicial review, Balance A will remain TNMP's stranded costs true-up balance. This failsafe provision does not preclude the Order on Rehearing from becoming final and appealable.

With respect to the State's second ground for rehearing, Staff contends that the Commission's earnest efforts to determine the appropriate market value are within the authority granted the Commission in the statute and are consistent with the Legislative intent in adopting the true-up provision of Senate Bill 7. Stranded costs are defined as "the positive excess of the net book value of generation assets over the market value of the assets, taking into account all of the electric utility's generation assets, any above market purchased power costs, and any deferred debit related to a utility . . ."[29] Adoption of the State's contention would necessarily imply the conclusion that TNP One had *no* market value. As the Commission explains in its Order, construction of § 39.262 must be consistent with the Legislative intent underlying Senate Bill 7.[30] Whatever errors the Applicants may have committed in selling its plant, the conclusion that

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26 *Id.* at 3.

27 *Texas-New Mexico Power Company v. Texas Industrial Energy Consumers*, 806 S.W.2d 230, 232 (Tex. 1991) (citation omitted).

28 Order on Rehearing at 78, FOF ¶ 33.

29 PURA § 39.251(7).

30 Order on Rehearing (June 3, 2005) at 9-10, 22.

the generation facility had no market value would be a draconian interpretation at odds with the statutory statements of Legislative intent that "[a]n electric utility is allowed to recover all of its net, verifiable, nonmitigable stranded costs . . ."[31] and that the public interest is served by "allow[ing] utilities with uneconomic generation-related assets . . . to recover the reasonable excess costs over market of those assets . . ."[32]

CONCLUSION

The Commission should grant only a limited a rehearing to revise the true-up balance amounts so that they reflect Mr. Tietjen's errata, as requested by both Staff and the Applicants; because no additional evidence is necessary to support this change, no hearing will be necessary to effect this revision.

Respectfully submitted

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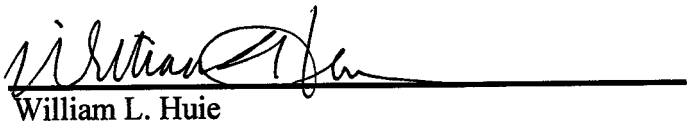
31 PURA § 39.252(a).

32 *Id.* at § 39.001(b)(2).

CERTIFICATE OF SERVICE

I certify that a copy of this document was served on all parties of record by first class U.S. mail, postage pre-paid on this date, June 30, 2005, in accordance with P.U.C. Procedural Rule 22.74.



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