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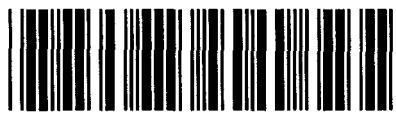

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PUC DOCKET NO. 29206

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

THE STATE OF TEXAS' INITIAL BRIEF ON SECOND THRESHOLD LEGAL / POLICY ISSUE, RELATED TO CAPACITY AUCTION TRUE-UP

HONORABLE COMMISSIONERS:

The State of Texas (the "State"), by and through the Office of the Attorney General, Consumer Protection Division, Public Agency Representation Section, files this initial brief in response to the Policy Development Division's Order Requesting Briefing (January 30, 2004). In accordance with the deadline set out in that Order, this pleading is timely filed.

The legal / policy question to be addressed is as follows:

> *Is an affiliated power generating company (PGC) eligible to reconcile the difference between the price of power obtained through capacity auctions and the power cost projections used in the excess cost over market (ECOM) model if the affiliated PGC has less than 400 megawatts of installed generation capacity and did not auction capacity pursuant to PURA § 39.153 and P.U.C. SUBST. R. 25.381?*

The short answer to this question is a simple "No." This answer is apparent from the plain language of PURA, reading §§ 39.153 and 39.262 in harmony, as well as from the intent behind SUBST. R. 25.263(i) – the sub-section of the true-up rule which implements the capacity auction true-up or "wholesale clawback."

The starting point for any analysis of this question must be to construe the pertinent statutes as written and, if possible, ascertain legislative intent from the statute's language. *Helena Chemical*

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Co. v. Wilkins, 47 S.W.3d 486, 493 (Tex. 2001). Words used in the statute are to be interpreted according to their ordinary meaning, and are not to be interpreted in an exaggerated, forced, or strained manner. *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 888 S.W.2d 921, 926 (Tex.App. –Austin 1994, writ denied). Additionally, the statute as a whole should be considered, and the interpretation "should not give one provision a meaning out of harmony or inconsistent with other provisions, although it might be susceptible to such a construction standing alone." *Helena Chemical Co.* at 493, citing *Barr v. Bernhard*, 562 S.W.2d 844, 849 (Tex. 1978). It is presumed that the Legislature intends an entire statute to be effective and that a just and reasonable result is intended. *Helena Chemical Co.* at 493. Based upon these principles, there is no basis for arguing that an entity which the legislature has specifically exempted from conducting any capacity auctions could be entitled to a capacity auction true-up.

In PURA § 39.262(d)(2) – the capacity auction true-up provision – an affiliated power generation company (PGC) is specifically directed to reconcile "any difference between the price of power obtained through the capacity auctions under Sections 39.153 and 39.156," and the power cost projections employed in the ECOM model. (Emphasis added.) Thus, the Legislature has explicitly incorporated PURA § 39.153 in the true-up provision by reference.[1] That provision, in turn, explicitly excludes any entity such as TNMP, or its PGC – *i.e.*, one with less than 400 MW of generating capacity – from the definition of "electric utility," and thus from any duty to conduct a capacity auction. It is undisputed that TNMP, in accordance with this provision, has not held any such auctions.

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[1] PURA § 39.156, also incorporated in the true-up provision, only applies to a utility or PGC owning or controlling more than 20% of generation capacity in a power region, and therefore has no applicability to TNMP or its affiliated PGC. *See* PURA § 39.156(b).

It is simply impossible to harmonize these provisions in such a way that an entity which has not conducted any capacity auctions could nonetheless lay claim to any differential in the price of power obtained through such auctions. It is apparent from the plain language (using an interpretation which is not "exaggerated, forced, or strained") that in order to "obtain" a price in an auction, an entity must actually conduct an auction. No capacity auction, no capacity auction price, no capacity auction true-up. Any other interpretation would divorce the exemption in § 39.153(a) from the entitlement in § 39.262(d)(2), bringing the two provisions into disharmony and creating a result which is unjust and unreasonable.

In order to achieve the result urged by TNMP in its application, one has to assume that the statutory language – "price of power obtained through the capacity auctions under Section[] 39.153" – is a reference to some amalgamation of the prices obtained by some or all of the non-exempt entities which actually did conduct capacity auctions. However, this is not the interpretation which is being applied to any entity which actually conducted such auctions. *See* PUC SUBST. R. 25.263(i)(1)(C), stating that the "capacity auction price" used in the calculation "shall be the APGC's total capacity auction revenues . . . divided by that APGC's total MWh sales. . . ." (Emphasis added.) Thus, each entity which did conduct auctions is performing the true-up based upon its own specific results. It would be inconsistent, and therefore contrary to basic principles of statutory construction, to give this statutory phrase one meaning when applied to TNMP and its affiliated PGC, but an entirely different meaning when applied to other utilities and APGCs.

In its application, TNMP bases its claim to the wholesale clawback on a hyper-technical reading of PUC SUBST. R. 25.263(i)(2), which states:

> If, as a result of not having participated in capacity auctions pursuant to §25.381(h)(1) of this title, an APGC is unable to determine a company-specific capacity auction price, the APGC may request in its true-up application a method

> using prevailing capacity auction prices from other APGCs for the calculation in paragraph (1) of this subsection.

See Pre-filed Direct Testimony of Larry P. Gunderson at 2.

While this is certainly a clever afterthought by TNMP, it is decidedly not an interpretation which was ever suggested by that utility in the course of the true-up rulemaking. The language of 25.263(i)(2) was not in the proposed rule as originally published, and TNMP never even hinted that any such amendment was needed in order to make it eligible for a capacity auction true-up. When asked – before the true-up rule's initial publication – whether the Commission's SUBST. R. 25.381, relating to capacity auctions, "adequately address[es] the specific requirements of PURA 39.262(d)(2)," TNMP responded with a resounding: "No current position." PUC Project No. 23571, Texas New-Mexico Power Company's Responses to Commission Questions, at 4 (March 30, 2001). After publication of the proposed rule, in its comments (July 16, 2001) and its reply comments (July 30, 2001), TNMP continued to take no position on the capacity auction true-up, and offered no statement whatsoever regarding any amendment to §25.263(i).

Moreover, TNMP's current belated interpretation is inconsistent with the Commission's stated rationale for amending the true-up rule by adding sub-section (i)(2). The reason for the addition was AEP's concern that, due to its divestiture of three CPL generation facilities,

> CPL would no longer have actual capacity auction prices that could be used in determining its ECOM/capacity auction true-up. . . . Hence, CPL requested that it be allowed to propose in its true-up filing a methodology for arriving at an ECOM/capacity auction true-up that reflects its unique circumstances.

Project No. 23571, Order Adopting New § 25.263, at 90 (December 3, 2001).

Although agreeing that, "where possible, company-specific prices should be used in companies' true-up applications," the Commission stated that a company showing "unique circumstances" may request a method using prevailing capacity auction prices to determine an

appropriate surrogate. *Id.* at 91. In context, it does not appear that the Commission intended such "unique circumstances" to include the circumstance where an entity was entirely exempt from conducting a capacity auction. Instead, the Commission merely intended to fill a gap in the data available to an entity which was statutorily required to carry out these auctions. Significantly, although AEP made its comment on July 16, 2001,[2] TNMP did not take up the issue in its July 30, 2001 Reply Comments, in order to claim that it too presented unique circumstances. As noted earlier, this silence is a further indication that TNMP had not yet conceived of the possibility that it or its affiliated PGC would have any right to claim the proceeds from a capacity auction true-up proceeding.

In sum, it is apparent from the plain language of the statute – reading the two pertinent provisions in harmony as required by fundamental canons of statutory construction – that an entity which was exempt from conducting capacity auctions under PURA § 39.153, and did not do so, has no entitlement to conduct a capacity auction true-up under § 39.262(d)(2). This conclusion is bolstered by TNMP's utter indifference to the issue during the true-up rulemaking, an unmistakable indication that its current claim is of recent vintage. More importantly, this interpretation of the statute and rule is consistent with the Commission's statements in the preamble to the true-up rule itself, explaining its rationale for adding sub-section (i)(2) to SUBST. R. 25.263. For all these reasons, the answer to the threshold question posed by the Policy Development Division is "No."

Dated February 10, 2004

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[2] Project No. 23571, Comments of American Electric Power Company, Inc., at 29-30.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **State of Texas' Initial Brief on Second Threshold Legal / Policy Issue, Related to Capacity Auction True-Up** has been served upon all parties of record by hand delivery, facsimile, or First Class U.S. Mail, on or before February 10, 2004.

Bryan L. Baker

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