Control Number: 36416

Item Number: 112

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Docket No. 36416

AEP ENERGY PARTNERS' APPEAL OF THE DECISION OF THE ERCOT BOARD ASSIGNING OKLAUNION GENERATING STATION TO THE WEST ZONE AND REQUEST FOR EXPEDITED CONSIDERATION AND EMERGENCY REMAND WITH INSTRUCTIONS	§	**PUBLIC UTILITY COMMISSION OF TEXAS**

POST HEARING BRIEF OF DIRECT ENERGY, L. P., CPL RETAIL ENERGY, L.P., AND WTU RETAIL ENERGY, L. P.

NOW COME Direct Energy, L. P., CPL Retail Energy, L. P., and WTU Retail Energy, L. P. ("the Direct Companies") and file this Post Hearing Brief and would respectfully show the following:

BACKGROUND

On November 19, 2008, AEP Energy Partners ("AEP") filed an appeal of the 2009 Commercially Significant Constraints ("CSCs"), Congestion Zones, Closely Related Elements, and Boundary Generation Resources decision by the Electric Reliability Council of Texas ("ERCOT") which maintains the Oklaunion Plant in the West Congestion Zone – where it has always been. Order No. 2 issued on November 26, 2008 established December 11, 2008, as the date for interventions. The Direct Companies' intervention was granted by Order No. 4. The intervenors met several times and crafted a Stipulation ("the Stipulation") which was filed January 12, 2009. Subsequent to that, the Public Utility Commission ("PUC" or "Commission") determined that it desired further development of facts in this case. Order No. 12 issued setting a procedural schedule for the remainder of the case. A hearing on the merits convened on May 8,

2009, and Post Hearing Briefs were required by May 12, 2009. This Post Hearing Brief is, therefore, timely filed.

SUMMARY

The Direct Companies respectfully request that the Commission affirm the choice by the ERCOT Board of Scenario 3i as the appropriate scenario for congestion management in 2009. Scenario 3i was the choice of the ERCOT stakeholders and ERCOT Staff as the optimal CSC scenario for 2009. The record indicates that Scenario 3i was procedurally and substantively consistent with the ERCOT Protocols. Scenario 3i was developed with the intent to address ERCOT operational concerns, not with the intent to discriminate against AEP.

The Direct Companies were active participants in the stakeholder deliberations regarding the 2009 CSC scenarios. The Direct Companies represent a variety of interests: they serve load in all classes in all zones; they have thermal generation in the North and South Zones; they have approximately 800 MWs of wind Power Purchase Agreements, 200 MW of which were moved from the West Zone to the North Zone by the 2009 CSC decision and 600 of which remain in the West Zone. Consequently, when the Direct Companies evaluate an ERCOT decision, such as the CSC decision, they must evaluate it from many angles. When ERCOT Staff states it has operational concerns about a proposal, the Direct Companies feel compelled to listen and to try to find a solution that addresses ERCOT's operational concerns.

AEP claims the adoption of Scenario 3i was tainted by procedural or substantive infirmities in the application of the ERCOT Protocols. They further claim that such action was "discriminatory." The Direct Companies will address these assertions and show that the actions that led to the development and adoption of Scenario 3i were proper – both procedurally and substantively and did not discriminate against AEP

ARGUMENT

The Preliminary Order raised a number of issues to be addressed by the parties. The Direct Companies in this Post Hearing Brief respond to Issues 1, 2, 3, 4(l) and (m).

I. Allegation of Improper/Unusual/Inappropriate Meetings

First and foremost, the Direct Companies will address the allegation of improper meetings raised in Issues 4(l) and (m). The Direct Companies note that AEP no longer asserts that there was an improper meeting from which it was excluded nor communications between ERCOT Staff and other market participants that were inappropriate.[1] However, AEP does characterize some of those communications as "unusual"[2] and the Commission has expressed concern about the form of those meetings.

The Direct Companies emphatically submit that there was nothing inappropriate related to any discussions between stakeholders and ERCOT staff that produced Scenario 3i. The Direct Companies are highly concerned about this perception because integrity is an essential component of the stakeholder process. The ERCOT stakeholder process is one that necessarily relies on communications between ERCOT Staff and market participants. The record is replete with references to the many calls Ms. Garza received during the timeframe between August 29 and September 4. Beth Garza testified that AEP was comfortable communicating with ERCOT staff about market issues.[3] AEP had as much opportunity as any other stakeholder to initiate discussion with ERCOT staff and other market participants regarding ERCOT's operational concerns. At the technical conference, however, AEP characterized its communications with

[1] AEP Exhibit, Direct Testimony of Ross at p. 18.
[2] Id. at p. 25, l. 2 and 7.
[3] Technical Conference Transcript at p. 15, l. 17-19.

ERCOT as "limited" after the August 20th WMS meeting[4] The decision of other stakeholders to engage actively with market participants and ERCOT Staff regarding ERCOT's operational concerns should not be considered improper.

The record indicates that the genesis of informal discussions between ERCOT Staff and stakeholders regarding Scenario 3i was ERCOT operational concerns.[5] The Direct Companies were open to any suggestions for resolving ERCOT's operational concerns.[6] Whether or not a solution to ERCOT's operational concerns resulted in Oklaunion remaining in the West Zone did not matter to the Direct Companies. The Direct Companies would have considered other options to resolve ERCOT's operational concerns, such as a Special Protection Scheme, had they been raised in timely manner.

Additionally, AEP argues that "it seems odd that the other market participants and the ERCOT Staff would decide the fate of a market participant in discussions without including that market participant."[7] The Direct Companies respectfully submit that none of the discussions of which AEP complains "decided" anything. Scenario 3i was an additional CSC scenario for consideration only. Scenario 3h continued to exist after the introduction of Scenario 3i. Votes were taken by WMS, TAC, and the ERCOT Board that decided to adopt Scenario 3i – all of them by decisive margins.

II. Scenario 3i is Procedurally Consistent with the Protocols

Direct Energy submits that the record indicates that Scenario 3i was the result of proper procedural application of the ERCOT Protocols. Protocol Sections 7.1 and 7.2 address the

[4] Technical Conference Transcript p. 164, 165 - Mr. Ross says, "I can speak to my own [phone conversations] which were fairly limited." Mr. Aldridge said, "No, I had no phone calls with any market participant or ERCOT Staff between the WMS meeting and the 3i meeting that I recall. . ."
[5] HOM Transcripts at p. 265-271.
[6] HOM Transcript at p. 271.
[7] AEP Exhibit, Direct Testimony of Ross at p. 25, l. 4-6.

stakeholder procedure for determining CSCs, Congestion Zones, and CREs. Specifically, the stakeholder review of the CSC process is addressed in three provisions of Sections 7.1 and 7.2.

Section 7.2, CSC Zone Determination Process, of the ERCOT Protocols states: "By November 1 of each year, the appropriate ERCOT subcommittee will report to the TAC and the ERCOT Board with recommended CSC designations, resulting Congestion Zone boundaries with any granted exemption noted, CRE designations and associated Boundary Generation Resources for ERCOT Board review and approval." The record indicates that the Wholesale Market Subcommittee (WMS) is the subcommittee designated by TAC to meet the requirement in Section 7.2 of the ERCOT Protocols.[8] The WMS reported to the TAC on October 8, 2008, with recommended CSC designations, resulting Congestion Zone boundaries with any granted exemption noted, CRE designations and associated Boundary Generation Resources. The TAC also reported to the ERCOT Board on October 21, 2008 with recommended CSC designations, resulting Congestion Zone boundaries with any granted exemption noted, CRE designations, and associated Boundary Generation Resources for ERCOT Board review and approval. Therefore, the record indicates that the stakeholder process was procedurally consistent with Section 7.2.

Section 7.2.1(2), Process for Determining CSCs, of the ERCOT Protocols states: "The appropriate ERCOT Technical Advisory (TAC) Subcommittee will review the results and the process followed above to determine the list of constraints to be recommended for the approval to the TAC and the Board." The WMS is the subcommittee designated by TAC to meet the requirement in Section 7.2.1(2) of the ERCOT Protocols. The WMS reviewed the results and the process followed in Section 7.2 for Scenario 3i on October 8, 2008. Therefore, the record indicates that the stakeholder process was procedurally consistent with Section 7.2.1(2).

[8] Stipulation No. 26.

Section 7.2.2(4), Congestion Zone & Zonal Shift Factor Determination Methodology, of the ERCOT Protocols states: "The appropriate ERCOT Technical Advisory Committee (TAC) Subcommittee will review the results and the process followed above to determine the Congestion Zones to be recommended for approval to the TAC and the Board." The WMS is the subcommittee designated by TAC to meet the requirement in Section 7.2.1(4) of the ERCOT Protocols. The WMS reviewed the results and process followed to determine the Congestion Zones on October 8, 2008. Therefore, the record indicates that the stakeholder process was procedurally consistent with Section 7.2.2(4).

Chairman Smitherman has voiced concern over the propriety of the Joint Meeting of the WMS and the TAC on October 8,[9] although it is not part of AEP's complaint.[10] Direct Energy believes that holding a joint meeting is not the preferred method of deliberation.[11] However, holding a joint meeting is not prohibited by the ERCOT Protocols and the record indicates that October 8, 2008 was not the first time that the WMS and TAC have held a joint meeting.[12] From a practical standpoint, holding a joint meeting was the only way to meet the procedural requirements of the Protocols to adopt a CSC plan by November 1 within the timeframe presented.[13] The Board vote on September 16, 2008 to remand the TAC recommendation required ERCOT staff to compile a significant amount of information regarding Scenarios 3b, 3h, and 3i.[14] Given the time required for notice of a meeting at which a vote will be taken, the

[9] HOM Transcript at p. 280, l. 17-23
[10] AEP Exhibit, Direct Testimony of Ross at 18.
[11] HOM Transcript at p. 265.
[12] HOM Transcript at 57, 58.
[13] ERCOT Protocol 7.2.1 requires, "CSCs and resulting Congestion Zones will be reassessed annually by November 1 of each year."
[14] ERCOT Exhibit 5, Direct Testimony of Garza at 12.

joint meeting on October 8, 2008 was a logical decision of TAC and WMS leadership. AEP also did not object to the joint meeting as improper.[15]

The meeting minutes reflect that notice of the Joint Meeting issued September 17, 2008 (21 days before the meeting); delivery of initial materials was accomplished on October 1 (7 days before the meeting); and delivery of additional materials was made on October 3, October 6, October 7, and October 8 (5, 2, 1, and 0 days before the meeting, respectively). The minutes further reflect "the preference stated at the beginning of the meeting that WMS address business first, followed by TAC, and to which there were no objections."[16] Thus, it is clear that this Joint Meeting was actually two meetings held sequentially. The fact that WMS insisted on "going first" is evidence that they were neither intimidated nor influenced by TAC.

As for the timing of delivery of materials, there is no requirement that all materials must be delivered one week prior to a meeting. The Technical Advisory Committee Procedures at Section IV.D require that meeting notices shall be sent at least 2 weeks in advance of a meeting "and all agenda items requiring a vote of TAC, must be published at least one week prior to the meetings. . ." Section V. D, of those Procedures provides that for subcommittees such as WMS, "meeting notices shall be sent. . . at least one (1) week prior to the meeting. . ." Both of those requirements were met. The record also indicates the Section IV.D has been consistently interpreted by ERCOT to require notice of voting items only one week prior to meeting, not delivery of all material supporting the voting item.[17]

[15] HOM Transcript at p. 171-172.
[16] Minutes of the October 8, 2008 Joint TAC/WMS Meeting, at p. 5 of 6.

III. Scenario 3i is Substantively Consistent with the Protocols

At the August 20 WMS meeting, ERCOT Staff voiced operational concerns about the use of scenario 3h to manage congestion. In discussions over the next week, various solutions were considered, among them, including the Oklaunion-Fisher Road/Fisher Road-Bowman 345 kV line ("the Bowman Line") as part of the North to West and West to North CSC definition and the use of a post-contingency model to perform the clustering analysis for the zones.[18] Designation of the Bowman Line as a candidate CSC was rejected because flows on that line are not indicative of zonal transfers.[19] As a result, a post-contingency model was used to perform the clustering analysis for Scenario 3i.

ERCOT Staff's recommendation to use a post-contingency model was thoroughly supportable and should not be overturned by the Commission. ERCOT's decision had a reasonable basis behind it and the Commission should not substitute its own judgment in place of that expert determination.

> When a court is applying the substantial evidence standard of review to an agency decision, the issue for the reviewing court is not, whether the agency's decision was correct, but whether the record demonstrates some reasonable basis for the agency's action. The test here is primarily one of rationality. **If the Commission based its order on substantial relevant evidence and it has made no clear error of judgment, we are not authorized to overturn that order.** . . . . An agency's interpretation of its own regulations is entitled to deference by the courts, even though that interpretation is not binding. **We will reverse the Commission when it fails to follow the clear, unambiguous language of its own regulation**, that is, when its actions are arbitrary and capricious. Thus, **absent evidence that the commission is disregarding the plain language of its rules, we look to its expertise in calibrating various policy considerations. The agency responsible for regulating an industry must be afforded sufficient flexibility to determine and carry out its clear legislative mandate."**[20] (citations omitted)

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[17] HOM Transscript at p. 259-260.
[18] Stipulation No. 41.
[19] Stipulation No. 42.

In this instance, there is no plain language of the rules (or Protocols) that says ERCOT must use a pre-contingency model. Instead, the Protocols are silent on whether a pre- or post-contingency analysis was required. As a result, ERCOT Staff relied upon its expertise as it made the decision to support using a post-contingency model and the Commission should give deference to that preference.

Additionally, the court in *Bexar* clearly recognized that an agency must be provided "sufficient flexibility to determine and carry out its clear legislative mandate."[21] The Stipulation reflects, "The Congestion Management Zones can and do change from time to time based on changes in system topology."[22] Without specific requirements on how to perform the clustering analysis, it is reasonable (and acceptable) to expect that ERCOT must remain flexible as it undertakes its mandates in the face of changing topologies. The Stipulation reflects that multiple discussions were had over a number of weeks regarding ERCOT Staff's analyses of the 2009 Commercially Significant Constraints (CSCs) and Congestions Zones but that no consensus was reached on the proposed CSCs and Congestion Zones.[23] After discussion at the August 20, 2008, WMS meeting expressing concerns about the Scenario 3h grouping,[24] two alternatives to Scenario 3h were developed addressing operational concerns created by that Scenario.[25] *Bexar*'s recognition of the need for flexibility supports ERCOT's adoption of Scenario 3i.

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[20] *Bexar Metropolitan Water District v. Texas Commission on Environmental Quality ("Bexar")*, 185 S.W.3d 546, 550 (Tex.App.—Austin 2006, pet. denied) (emphasis added)
[21] *Bexar* at 550.
[22] Stipulation No.32
[23] Stipulation No.29
[24] Stipulation No.36
[25] Stipulations No. 38 and 41

Similarly, the same court in another case says, "But **if there is vagueness, ambiguity, or room for policy determinations in the regulation, we will defer to the agency's interpretation unless it is plainly erroneous or inconsistent with the language of the rule."**[26] ERCOT's actions taken to develop and support Scenario 3i were arbitrary and capricious, plainly erroneous, or inconsistent with the language of its protocols. Relevant ERCOT Protocols do not require a pre-contingency analysis nor the use of a steady state flow model in the clustering phase. Given that there is no direction as to the type of analysis to be used in the clustering phase when there is very precise direction as to the type of analysis to be used in the determination of CSCs,[27] it is reasonable to conclude that there is room for a policy determination in the methodology to be applied in the clustering phase.

In its Reply Brief, AEP cited *Flores v. Employees Retirement System ("Flores")*[28] for the proposition that an agency must explain its departure from earlier "administrative policy or where there exists an apparent inconsistency in agency determinations."[29] While the decision in *Flores* is an important one, it is inapposite for several reasons. ERCOT did explain the reason it acted as it did. The meeting minutes of the Joint WMS/TAC meeting as well as the first and second Board meetings describe the deliberations of the many stakeholders and the reasoning of the Board as it voted to adopt Scenario 3i. ERCOT has met any obligation it had to set forth the reasons for its decisions

IV. Scenario 3i Does Not Unlawfully Discriminate Against AEP

AEP argues that the adoption of Scenario 3i was "discriminatory" toward AEP. At no point, however, does AEP point to a definition of "discrimination" that would support its

[26] *BFI Waste Systems Etc. v. Martinez Environmental Group*, 93 S.W.3d 570, 575 (Tex. App.—Austin 2002, pet. denied) (emphasis added)
[27] ERCOT Protocol 7.2.1
[28] *Flores v. Employees Retirement System*, 74 S.W.3d 532 (Tex.App.—Austin 2002, pet. denied)

allegation. The linchpin of AEP's discrimination argument is the claim that the adoption of Scenario 3i will cause AEP financial harm. However, there is not any legal basis to rely upon financial harm alone as producing discrimination. It is not unusual that an ERCOT decision has a financial impact on the market and individual market participants. The annual process to select the "Commercially Significant Constraints" appears to assume that the CSC selection process will have a commercial impact on the market and individual market participants.

PURA does not have a definition of discrimination, nor do the ERCOT Protocols. Texas courts, however, have looked at the concept of prohibited discrimination under PURA. Notably, the courts have found

> The antidiscriminatory principle is not only statutory, it is a common law principle as well. But **the principle includes a permissible range of unequal treatment which, while literally discriminatory, is not unlawfully so.** The dividing line is generally that drawn by the rule of reasonableness, for **mere inequality is not itself unlawful discrimination.** That is to say, the different treatment practiced by the public utility must be founded upon a substantial and reasonable ground of distinction between the favored and disfavored classes or individuals. The ground of distinction may rest upon such factors as:
>
> > the cost of service, the purpose for which the service or product is received, the quantity or amount received, the different character of the service furnished, the time of its use or any other matter which presents a substantial difference as a ground of distinction.
>
> **'There is no rule of thumb by which to determine whether the conditions of utility service are similar or dissimilar. It is a question of fact to be determined from the testimony in each case, and the burden of proof is on the complaining party.'** (citations omitted; emphasis added) *Amtel Communications, Inc. v. Public Utility Com.*, ("*Amtel*"), 687 S.W.2d 95, 102 (Tex. App--Austin 1985, no pet.)

In short, disparate treatment is not necessarily unlawful discrimination, but "[t]he different treatment practiced by the public utility must be founded upon a substantial and

[29] AEP Initial Brief at p. 17

reasonable ground of distinction between the favored and disfavored classes or individuals."[30] ERCOT has set forth a number of substantial and reasonable reasons to justify its support for Scenario 3i.[31] There is not evidence in the record to suggest that Scenario 3i was a deliberate attempt to leave AEP in the West Zone.

The record also indicates that ERCOT had substantial and reasonable reasons to use post-contingency clustering to address ERCOT operational concerns.[32] The use of post-contingency clustering may have resulted in unequal financial treatment for AEP, but mere inequality itself is not unlawful discrimination. The use of post-contingency clustering revealed that there was a substantial and reasonable ground of distinction between AEP and other market participants. Clustering is a technical exercise that produces results that cannot be altered due to motive or preference. Oklaunion is the only resource that moves from the North to West Zone using post-contingency analysis because the operational impact of Oklaunion to the grid is not the same as the other resources that cluster in the North Zone using pre and post-contingency clustering. AEP concedes that placement of the Oklaunion Plant in the West Zone ". . . in itself does not violate the Protocols. The Oklaunion power plant is not the only coal unit that varies its output in response to dispatch instructions or prices."[33] Direct Companies submit that the record does not provide any evidence to indicate that Scenario 3i unlawfully discriminates against AEP.

CONCLUSION

The Direct Companies believe that Scenario 3i was the result of proper procedural and substantive application of the ERCOT Protocols and that Scenario 3i does not unlawfully discriminate against AEP. The Direct Companies submit that the ultimate objective of the CSC

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[30] *Amtel* at p. 102
[31] Stipulation No. 58; see ERCOT Exhibit 5, Direct Testimony of Garza at pp. 18-20.
[32] ERCOT Exhibit 5, Direct Testimony of Garza at pp. 7-10.
[33] AEP Exhibit, Direct Testimony of Ross at p. 26.

process is to determine the best congestion management solution for ERCOT. The Direct Companies believe the broad-based stakeholder support for Scenario 3i, as well as ERCOT staff support, is the best indication that Scenario 3i provides in the best congestion management solution for ERCOT. A different result may arise next year, but for 2009, Scenario 3i is the proper solution.

WHEREFORE, PREMISES CONSIDERED, the Direct Companies respectfully request that the Commission affirm ERCOT's selection of 2009 CSCs, and grant such other and further relief to which the Commission deems appropriate..

Respectfully submitted,

Kathleen E. Magruder by eh with permission

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Certificate of Service

I certify that a copy of this document was served on all parties of record in this proceeding on May 12, 2009, by regular mail, facsimile transmission or hand-delivery.

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