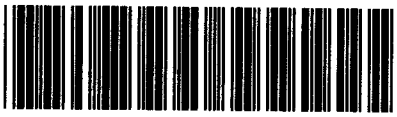

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SOAH Docket No. 473-10-1962
PUC Docket No. 37744

APPLICATION OF ENTERGY TEXAS, INC. FOR AUTHORITY TO CHANGE RATES AND RECONCILE FUEL COSTS	§ § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

CITIES' REPLY BRIEF

The Cities of Anahuac, Beaumont, Bridge City, Cleveland, Conroe, Groves, Houston, Huntsville, Montgomery, Navasota, Nederland, Oak Ridge North, Orange, Pine Forest, Pinehurst, Port Arthur, Port Neches, Rose City, Shenandoah, Silsbee, Sour Lake, Splendora, Vidor, and West Orange ("Cities") file this Reply Brief in the above referenced proceeding and would respectfully show as follows:

I. INTRODUCTION

ETI has proposed a competitive generation service tariff designed to fail. ETI's proposal for limited competition is nothing more than ETI's standard LIPS Service. ETI's is willing to provide CGS service to LIPS customers, but the Entergy Operating Committee is unwilling to change any of the supply options the Company currently has contracted for or would otherwise procure for customers.[1] ETI also would not change any of the contract terms or pricing that ETI currently has with any of the prospective CGS suppliers.[2] In other words, ETI will only provide competitive generation if ETI buys the competitive generation first for its use to serve its own load—including the load of the CGS customer.[3] Then the CGS customer and the CGS supplier may settle any financial arrangements between themselves.[4] So for ETI, it would be monopoly

[1] Initial Brief of ETI at 13-15; Tr. Vol. 3 at 20:7-10.
[2] *Id.*
[3] *See id.*
[4] Tr. Vol. 3 at 52:3 to 53:7.

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as usual, with CGS customers working out their own financial arrangements with CGS suppliers while other customers would be expected to pay CGS customers' generation and purchased capacity costs.

As may be seen from Initial Briefs, ETI's proposal includes unauthorized reallocations of costs of service designed to pit customers who are not eligible to participate or receive any benefits from the CGS program against the proposal. For justification, ETI claims that the Company is required to be "kept whole" by PURA 39.452(b). ETI also claims that Federal Law would preempt any modification to ETI's proposal regarding who may be a CGS supplier and that PURA requires ETI's proposed special recovery riders.[5] ETI states that if "the Commission determines that the benefits of a CGS program cannot be attained without affecting the System Agreement, or result in the Company's recovery of any unrecovered costs, the Commission should reject the CGS program outright as a matter of public policy."[6] Because no party supports the Company's proposal, the CGS program must be rejected.

The CGS proposal filed in this proceeding is reminiscent of ETI's transition to competition case, Docket No. 33687.[7] There, as here, ETI was trying to maintain its control over its captive customers. Also in Docket No. 33687, ETI was required to file a plan for transitioning to competition under PURA 39.452. ETI made a proposal for competition that no customer group could accept,[8] and ETI claimed any modification would contravene the system

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[5] Initial Brief of ETI at 8-9.
[6] *Id.* at 13.
[7] *Application of EGSI for Approval of a Transition to Competition Plan*, Docket No. 33687. Coincidentally, House Bill 1567 was the original Legislation that required both the filing made in Docket No. 33687 as well as the requirement to file a competitive generation services rider. As stated in opening arguments in this case, House Bill 1567 was a compromise Legislation agreed to by EGSI, ETI's predecessor.
[8] *Application of EGSI for Approval of a Transition to Competition Plan*, Docket No. 33687, Open Meeting Tr. at 52:2-6. (Excerpt Attached as Attachment A).

agreement and be preempted.[9] There, as here, ETI read into the statute provisions that would guarantee ETI special cost recovery.[10] These tactics prompted one Commissioner to state, that if it is the Company's position that the only way of going forward with competition is with ETI's proposal—or else run afoul of FERC jurisdiction—then ETI has not "negotiated any of this in good faith."[11]

If it was true then, then certainly it is true here. All parties recommend the rejection of ETI's proposal as filed. All parties have presented alternatives to ETI's proposal in the event the Commission approves of a CGS. With each modification presented, ETI provides rebuttal that the modification would contravene FERC jurisdiction over the Entergy System Agreement and the System Operating Company or else the modification does not meet with the statutory requirements of PURA. As was the case in Docket No. 33687, the Commission could spend years attempting to drag the Company toward a competitive plan that the Company is not willing to implement, or it may consider "putting a stake through this and rejecting Entergy's plan."[12] After the Commission held its open meeting to approve reject or modify ETI's transition to competition plan in Docket No. 33687, the proceeding continued for almost two years before it was finally dismissed.[13]

As stated in Cities' Initial Brief, Cities oppose ETI's CGS tariff and recommend that it be rejected at this time. The purpose of Cities' Reply Brief is to respond to various parties' modifications to ETI's CGS proposal as well as to respond to arguments made by ETI in its Initial Brief. The evidence supporting expanding the CGS suppliers to IPP's in the manner

[9] Application of EGSI for Approval of a Transition to Competition Plan, Docket No. 33687, Tr. at 530-541 (Excerpt Attached as Attachment B).
[10] *See id.* at 535:25 to 536 8; and 538:17 to 540:7 (Excerpt Attached as Attachment B).
[11] *Id.* at 530:16-21 (Excerpt Attached as Attachment B).
[12] Docket No. 33687, Open Meeting Tr. at 65:1-8. (Excerpt Attached as Attachment A).
[13] *See Application of EGSI for Approval of a Transition to Competition Plan*, Docket No. 33687, Order of Dismissal (July 30, 2009).

suggested by the Company in Initial Briefs is lacking and would only serve to prolong this case. CGS suppliers from whom ETI is required to purchase power under PURA 39.452(b) should not be limited to the suppliers that are already providing their power to ETI. TIEC's Initial Brief also states that the QF puts could be made to ETI from QFs outside of ETI's service territory,[14] despite the evidence of Company witnesses and TIEC's own witness as to the ability of the Commission to order ETI to expand the list of CGS suppliers.[15] Cities also respond to ETI's arguments that ETI must continue to procure the same level of resources to serve customers, whether or not some customers have switched to competitive generation, and must collect the generation revenue it would have collected from CGS customers from all other customers. Under ETI's proposal, all generation costs would be considered unavoidable by the Company—which they are not—and would be charged to other customers. The following Reply Brief will outline the problems that arise and must be addressed further from each of the proposed modifications.

II. ELIGIBLE CUSTOMERS

Cities recommend that the Commission reject ETI's proposal to limit the eligibility of customers for the CGS program to any one customer class. Instead, the program should be available to any customer who has the demand and the resources to contract for competitive generation. This will not be every customer, as evidenced by physical, financial, and demand qualifications that vary from customer to customer. But the Commission should not accept ETI's limited view of eligible customers as it is a generalized view and not based in fact.

[14] Initial Brief of TIEC at 21.
[15] Tr. Vol. 4 at 287:1-14.

In its Initial Brief, ETI lists a number of factors it considers as limitations to customer participation in a CGS program.[16] These factors include (1) the technical expertise of those customers to support their participation as CGS customer in entering into sophisticated contractual arrangements; (2) the need for interval data recording meters and back-up meters to measure consumption; (3) the increased start up and ongoing administrative costs that would be passed on to non-participating customers, and (3) the need for a minimum block of 5 MW, based upon Mr. Pollock's understanding of the willingness of suppliers in the wholesale market.

ETI may be under the impression that LIPS customers are the only retail customers that possess or are capable of acquiring "technical expertise" and are "sophisticated" enough to enter into a competitive contract, but customers disagree. Surely the Commission does not share the same opinion as ETI regarding non-LIPs customers' ability to function and contract for power in a limited competitive market.

ETI also cites the need for interval data recording meters as a threshold requirement for participation in a CGS program. Cities do not oppose the requirement of an IDR meter for those customers that need them to measure the customer's demand for purposes of participating in the CGS program, but it should not be a requirement for those customers whose demands are constant and therefore not needed for participation in the CGS program. Company witness May stated that he was not aware of any load that would not fluctuate and an IDR meter is needed to match up the load to the CGS supply on an hour by hour basis.[17] Mr. May overlooks the fact that there are retail customers whose demand is fixed. For instance the City of Beaumont has about 10,000 street lights that it is billed for each month which do not have meters because their demand is calculated by multiplying the number of lights times the average hours they would be

[16] Initial Brief of ETI at 12.
[17] Tr. Vol. 3 at 156:2-11.

in use. Such a customer does not need an IDR meter. Nonetheless, the point is that only the particular facts that would enable or prevent each customer from participating in the CGS program should dictate who is eligible to participate. The CGS program should not be limited to any particular customer class.

ETI's final reason for limiting the CGS program to the LIPS class is that the start-up and ongoing administrative costs that would be passed on to other customers would be increased. However, as will be discussed later, Cities join with TIEC in proposing that the start-up costs and ongoing costs be charged to the CGS customers participating in the program,[18] albeit on a kWh basis. So ETI's final concern should be alleviated.

ETI also cites to TIEC witness Jeffry Pollock's comment during the hearing that any CGS customer would have to require at least 5 MW in order for a QF to contract with the customer.[19] This may or may not be true in all situations, but the Commission should not foreclose customers whose demand is less than 5 MW from participating if they are able to contract for competitive power. Moreover, customers whose demand (or combined demand) is greater than 5 MW, but are not classified as LIPS customers, should also be eligible to participate.

III. ELIGIBLE SUPPLIERS

A. IPPs Under Contract With ETI

In the Initial Brief of TIEC, TIEC recommends that one method of expanding the supply options is for the Commission to expand the CGS supply options to IPPs that are currently dedicated to serving ETI.[20] Although Cities support expanding the CGS supply options, the

[18] *See* TIEC Initial Brief at 20.
[19] ETI Initial Brief at 12.
[20] TIEC Initial Brief at 21.

evidence demonstrates that limiting the CGS supply options to IPPs that are currently dedicated to serving ETI could have the effect of allowing the CGS customers to skim the lowest cost resources away from captive retail customers.[21]

Limiting CGS supply options to QFs that can put to ETI and IPPs that are currently dedicated to serving ETI does not promote competition among power producers, as the power is already under contract by ETI or is required to be purchased by ETI. Moreover, making such a limitation would not work logistically. ETI witness John Hurstell testified that in order to avoid conflict with the system agreement, "the CGS must be limited to power that is already allocated to ETI under the terms of the System Agreement."[22] Because the quantity of power scheduled from an IPP would be subject to the control of the System Operating Committee, TIEC's proposal introduces substantial uncertainty for CGS customers and increases the risk that CGS customers will be subject to Unserved Energy payments.[23] Although TIEC's customers may be okay with this risk, other CGS customer participants may not wish to be so constricted as PURA 39.452(b) requires that ETI "*shall purchase* competitive generation, *selected by the customer*, and provide the generation at retail to the Customer."[24] PURA does not limit the power supply options to power that is already contracted for by ETI in the quantities and at the price negotiated by ETI.

An option that would promote more competition is to permit the CGS supply options from IPPs and QFs that do not currently have capacity contracts with ETI. Designating IPPs' generation that is not currently under contract with ETI would promote the type of competition envisioned by the Legislature among power producers and with ETI. According to Company

[21] Tr. Vol. 3 at 129:20 to 130:1.
[22] ETI Exhibit 73, Rebuttal Testimony of John Hurstell at 11:16 to 12:8.
[23] *Id.* at 13:1-3.
[24] PURA § 39.452(b) (emphasis added).

witness John Hurstell, the Company only has capacity contracts with two-fifths of the IPPs in ETI's service territory, at most.[25] Designating IPPs that do not currently have capacity contracts with ETI may open up the supply options to levels sought by TIEC witness Jeffry Pollock, without providing CGS customers with the opportunity to skim the lowest priced ETI resources away from captive customers. Utilizing non-ETI suppliers as CGS suppliers would promote competition among the power producers located in ETI's service territory, as well as promoting competition with ETI who would be competing to retain the customers' business.

ETI would, no doubt, argue that allowing the CGS customer to select generation service from a power producer other than those that the System Operating Committee would already take power from would interfere with the Entergy System Agreement, and therefore be preempted.

B. Interference with System Agreement

ETI's refusal to modify the CGS proposal from the proposal it has submitted make s the CGS plan unworkable and inefficient. Under ETI's proposal, neither ETI nor the CGS customer may rely on the firm generation provided. Therefore, ETI claims, ETI is required to acquire the same levels of firm generation resources to serve the CGS customer as it would have if the CGS customer were a LIPS customer.[26] This results in ETI and the CGS supplier each providing firm generation service to the CGS customer.

ETI claims that the Commission is preempted from modifying ETI CGS proposal in any way that would conflict with the System Operating Committee's interpretation and operation under the Entergy System Agreement.[27] According to ETI, this means: (1) the QFs are limited to

[25] Tr. Vol. 3 at 54:1-24.
[26] *Id.* at 20:7-10.
[27] Initial Brief of ETI at 9.

QFs located within ETI's service area;[28] (2) any IPPs would be limited to IPPs already under contract by ETI; (3) IPP generation would be limited to quantities purchased by the System Operating Committee; and (4) IPP power would only be available at times selected by the System Operating Committee.[29] ETI's proposal sets up a dichotomy where the CGS customer could either (1) purchase power from a QF for firm delivery to the CGS customer but still not be considered firm by ETI or (2) the CGS customer could purchase from an IPP where ETI may consider the capacity firm, but the CGS customer may not consider it firm because it is subject to the determination of the System Operating Committee how much power will be purchased and when. Therefore, neither option allows ETI or the CGS customers to plan resources in an effective and cost efficient manner. Both the CGS supplier and ETI will be duplicating efforts to provide firm generation service to the CGS customer. And according to ETI, there is no other option.

IV CGSUSC RIDER AND CGSC RIDER

A. CGSUSC RIDER

ETI's proposed rates for a CGS customer include the LIPS base rate charge with the generation charges removed.[30] In other words, the CGS customer will not be charged any of the base rate production costs of ETI under ETI's proposal. However, ETI proposes to maintain the same levels of firm generation service for CGS customers as it provides to LIPS customers.[31] The only difference is that LIPS customers will pay base rate generation rates and the CGS customers will not. None of the remaining CGS tariffs proposed to be charged to CGS customers compensate the utility for the firm generation service it provides to the CGS

[28] *Id.* at 14.
[29] *Id.* at 13-14.
[30] ETI Exhibit 9, Direct Testimony of Phillip May at 14:1-8.
[31] Tr. Vol. 3 at 63:14-15; *see also* Tr. Vol. 3 at 20:1-10.

customers. Charging CGS customers a rate that is insufficient to recover the utilities fully embedded cost of service is equivalent to charging a discount rate, which is prohibited by PURA 39.452(b). ETI somehow believes that by charging the revenue shortfall to other customers, ETI may shirk its responsibility to avoid generation costs where possible and charge CGS customers for their full costs of providing service.

The discount rate provision, PURA § 36.007, states in part: "On application by an electric utility, a regulatory authority may approve wholesale or retail tariffs or contracts containing charges that are less than rates approved by the regulatory authority but not less than the utility's marginal cost."[32] PURA § 39.452(b) prohibits ETI from charging a discount rate to CGS customers. In other words, the CGS customer must reimburse ETI for the fully allocated embedded cost of serving the CGS customer that may not be avoided by the Company. The CGS provision provides that "the tariffs subject to this subsection may not be considered to offer a discounted rate or rates under Section 36.007."[33] Despite this prohibition, ETI's Initial Brief makes clear that ETI intends on charging CGS customers a rate that is insufficient to recover its fully embedded cost of providing service to CGS customers.[34] That is not what was intended by the Legislature's prohibition against charging a discount rate.

When construing a statute, the primary objective is to give effect to the Legislature's intent.[35] PURA requires an electric utility's rates to be "just and reasonable"[36] and not

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[32] PURA § 36.007.
[33] PURA § 39.452(b).
[34] ETI states that the "CGS customer would avoid the . . . portion of the Company's retail rates that represent embedded production costs. ETI Initial Brief at 6. ETI then states that ETI will still provide firm production service to the CGS customer despite the fact that it is receiving power from other sources, and will charge the embedded generation costs of serving the CGS customers to all other customers. ETI Initial Brief at 7.
[35] *Centerpoint Entergy Houston Electric, LLC v. Gulf Coast Coalition of Cities*, 263 S.W.3d 448, 460 (Tex.App.—Austin 2008, pet. granted).
[36] PURA § 36.003(a).

"unreasonably preferential, prejudicial, or discriminatory."[37] More specifically, PURA § 39.001 contains the legislative policy and purpose behind Chapter 39, which sets out the guidelines for restructuring Texas' electric industry. Section 39.001(b)(3) states, "The legislature finds that it is in the public interest to...ensure that the benefits of the competitive market reach *all* customers." (emphasis added) Chair Senator Fraser echoed this intent in the Senate Committee Meeting reviewing the latest changes to § 39.452(b) when he asked PUC Chairman Smitherman a series of questions to ensure that residential customers would be "well-served" by the proposed CGS program.[38]

ETI's interpretation of § 39.452(b) directly contradicts these stated policies by allowing one customer class—the LIPS class—to enjoy the benefits of the competitive market at the expense of all other customers. If the Legislature does not explicitly state that one provision controls over the others, it must be presumed that the Legislature intended all of the statutes to be fully effective.[39] Therefore, any interpretation that fails to harmonize all of the statutes must be rejected as against legislative intent.[40] The proper way to interpret § 39.452(b) is to interpret it consistent with PURA's stated policies regarding rate setting and the restructuring of Texas' electric industry.

Employing the proper statutory construction, the intent behind the prohibition against charging a discount rate is not to protect ETI's shareholders from being forced to absorb unrecovered costs, as ETI argues. Rather, the intent is to make sure that the rates charged under the CGS program are fully compensatory. In other words, the tariff and program should have

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[37] PURA § 36.003(b).
[38] *See* TIEC Initial Brief, Attachment 1, Transcript of Proceedings before the Texas State Senate 81st Legislature, Senate Committee on Business and Commerce at 9-11 (April 14, 2009). Video of the proceedings can be found at http://www.senate.state.tx.us/75r/senate/commit/c510/c510.htm.
[39] *Centerpoint*, 263 S.W.3d at 461.
[40] *Id.*

been structured so that ETI could either avoid incurring generation costs as well as recover its full cost of service from the rates charged to CGS. PUC decisions interpreting the discount rate statute draw a distinction between discount rates and reduced rates that reflect an inferior service or avoid costs for the utility.[41] When rates recover less than the utility's fully embedded cost of service, the rates are determined to be discount rates.[42] However, when a rate is less than the standard tariff but the service results in reduced or avoided costs for the utility, such as an interruptible service rate, the rate is not considered a discount rate because it is already designed to recover the fully embedded cost of service.[43] As such, there are no unrecovered costs to be charged to shareholders or other customers.[44] Interestingly, in Docket 16705, even though the Commission found that EGS's interruptible service rate was not a discount rate, it nonetheless reduced the credits allowed to interruptible service customers and froze interruptible service demand and energy charges to minimize improper cost-shifting to firm customers.[45] Therefore, Commission precedent is to avoid inter-class subsidization even where the discount rate statute does not apply.

In order for the CGS rates to recover their fully embedded cost of service, ETI must fully charge CGS customers for the firm generation service that it provides to those customers or it must provide non-firm generation service to those customers and reduce its rates accordingly. For instance, if the CGS customer would agree to be interruptible to the extent that the CGS

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[41] *See, e.g., Application of Entergy Texas for Approval of its Transition to Competition Plan and the Tariffs Implementing the Plan, and for the Authority to Reconcile Fuel Costs, to Set Revised Fuel Factors, and to Recover a Surcharge for Under-Recovered Fuel Costs*, Docket No. 16705, Second Order on Rehearing at CoL 54 & 55.

[42] *Id.*

[43] *Id.* at FoF 248 (holding that a reduced rate that is inferior to the firm rate would not be considered a discount rate), 249-252 (holding that reduced rates providing the same level of service are considered discount rates), 255, 256 & 260A (holding that interruptible service customers avoid costs for the utility), & page 35 ("This treatment recognizes that the IS Rates are not discount rates, thereby precluding the charge of any excess credits to the EGS shareholders.").

[44] *Id.*

[45] *Id.* at 34-35, and FoF 267, 267A, and 267B.

supplier were unable to provide service, then ETI would not have to plan to provide firm power service to the CGS customer as was the case in Docket No. 16705. Under either of these scenarios, the CGS rate could be designed to recover the fully embedded cost of service for CGS customers.

Unlike ETI's interpretation of the statute, where one class would be subsidized by all the other classes, this interpretation comports with the legislative intent expressed in PURA §§ 36.003, that rates be "just and reasonable" and not "unreasonably preferential, prejudicial, or discriminatory." Finally, this interpretation follows Commission precedent of avoiding inter-class subsidization.[46] Therefore, the Commission should reject ETI's CGSUSC rider and require that ETI structure its CGS program to collect its fully allocated, and unavoidable, embedded cost of service for CGS customers solely from CGS customers.

B. Unrecovered Costs

PURA 39.452(b) requires that ETI propose base rates to "recover any costs unrecovered as a result of implementation of the tariff."[47] As stated in Cities' Initial Brief costs unrecovered as a result of implementation of the tariff are limited to start-up and ongoing costs of the program. ETI proposes to charge a rider designed to recover the costs of implementing the program and ongoing costs that are as of yet unknown.[48] TIEC and Staff propose to reject this rider because the costs are not known and measurable at this time.[49] Rejecting ETI's proposed

[46] *See also* Staff's Initial Brief at 4-5.
[47] PURA 39.452(b).
[48] Initial Brief of TIEC at 7-8 (citing Tr. Vol. 3 at 20).
[49] *Id.* at 19-20;

rider is also consistent with 39.452(b), which requires ETI to adjust base rates to recover the costs associated with the CGS program—not a piecemeal rate rider.[50]

In the event the Commission implements Rider CGSC, Cities agree with TIEC that the implementation costs should only be charged to CGS participants. This arrangement would best align the costs of the program with the customers benefiting from the program.[51]

Cities agree with the Company that implementation and ongoing costs should be billed to customers based upon kWh usage.[52] This would allow the costs of the program to be spread among the participants in relation to their usage under the program. TIEC recommends that the CGS costs be based upon a fixed monthly charge.[53] Cities oppose a fixed monthly charge as it would unfairly benefit the largest customers who have the most to gain from utilizing the program at the expense of smaller customers. A fixed monthly customer charge would also stifle competition for some customers as it would prevent their participation in the program. CGS customers should be expected to pay for their share of CGS program costs in relation to the benefits they would receive under the program. The benefits they would receive would be in direct relation to the amount of power they receive under the program.

V. UNSERVED ENERGY

ETI proposes an unserved energy rate based upon a fixed heat rate applied to market gas prices at the plant.[54] ETI claims that this unserved energy rate gives the CGS customer certainty as to the rate to be charged as well as provides incentives to the CGS customer against switching back to ETI service whenever it suits the CGS customer. Cities' and OPC's witnesses testified

[50] *See* Cities Initial Brief at 13 (citing Bill Analysis, House Committee Substitute to House Bill 1567 at 2).
[51] *See* Initial Brief of TIEC at 20.
[52] *See* ETI Exhibit 9, Direct Testimony of Phillip May, Exhibit PJM-1 (CGSC Rider).
[53] Initial Brief of TIEC at 20.
[54] Initial Brief of ETI at 24.

that ETI's rates may be too low and could cause non-CGS customers to subsidize CGS customers. OPC witness Clarence Johnson proposed that the rate be combined with a demand charge.[55]

TIEC recommends that the unserved energy be provided at the standby maintenance service rates, which is comprised of a demand charge, a non-fuel energy charge, and a fuel charge based upon ETI's avoided costs.[56] However, the standby maintenance service rate is only available in limited circumstances that do not apply to the CGS customer.[57]

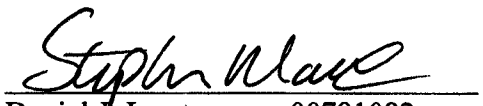
The unserved energy rate should not only be designed to provide an incentive to CGS customers to stay on the CGS rate, but it also should provide adequate assurances for ETI and customers that ETI's cost of providing back up service to customers is recovered by ETI. The unserved energy rate should also be designed to ensure that non-CGS customers are not subsidizing the back-up service of the CGS customers.

VI. PRAYER

For the above stated reasons, Cities respectfully request that the CGS proposed by ETI be rejected. In the alternative, Cities respectfully request that the CGS program proposed by ETI be modified as proposed above and in Cities' Initial Brief, and all other relief to which they may show themselves to be justly entitled.

[55] OPC Exhibit 4, Cross-Rebuttal Testimony of Clarence Johnson at 11:19 to 13:8.
[56] Initial Brief of TIEC at 18.
[57] ETI Exhibit 73, Rebuttal Testimony of John Hurstell at 17:1 to 18:10. *See also* Tr. Vol. 3 at 64:24 to 65:21.

Respectfully submitted,
LAWTON LAW FIRM



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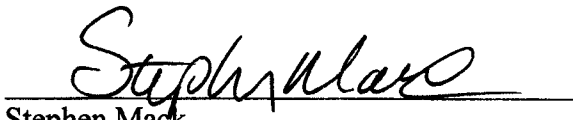
CERTIFICATE OF SERVICE

I hereby certify that a copy of this document was served on all parties of record in this proceeding on this the 16th day of August, 2010, by First Class, U.S. Mail, facsimile transmission, or hand delivery.



Stephen Mack

ATTACHMENT A

AGENDA ITEM NO. 15

DOCKET NO. 33687 - APPLICATION OF ENTERGY GULF STATES, INC.'S FOR TRANSITION TO COMPETITION PLAN (TTC PLAN) AND APPENDED DOCUMENTS

CHAIRMAN HUDSON: Okay. We're going to go back on the record on Item No. 15. As the two of you know, this proceeding is to determine how EGSI will serve its customers in the future. And we've referred to the centerpiece of this case as the transition to competition plan.

PURA 39.452(h) directs the Commission to approve, modify or reject the transition to competition plan. Subsection (h) also states the transition to competition plan shall be updated or amended annually, subject to Commission approval, and grants the Commission to authority in approving or modifying the transition to competition plan to require the electric utility to take reasonable steps to facilitate the development of a wholesale generation market.

I think, if you'll recall, from some of my remarks at the hearing, that I feel pretty strongly that the Commission should reject the plan. I found

Entergy's plan to be a moving target as we worked our way through the process itself. Clearly, the level of disenchantment of -- with the plan was well represented amongst the intervenor community, with only the Applicant and with the Alliance for Retail Choice in full support of the plan. I had actually hoped to get a plan that I felt like I could support at the outset because I have a rather strong interest in trying to move this area to competitive markets. As you know, we've got an Entergy rate case before us that's going to leave their ratepayers, potentially, depending upon our actions, with rates that are 4 cents or so above the best available competitive rate in the marketplace today and I think that's unfortunate. But neither the plan nor the comparisons of that plan against its alternatives -- for example, the SPP option and the reliability alternative plan -- were rich enough for me to reach any conclusion other than rejection.

So I haven't changed my position from the hearing. The cost recovery mechanisms proposed by EGSI, even if the Commission found reasonable, I think exceed the Commission's authority to implement. The approvals needed from FERC are not routine. Favorable rulings would be lengthy and, I think, perhaps

Company. And they can make -- they could make a filing with FERC that looks a lot like this and we would have no control over it.

COMM. SMITHERMAN: Well, wouldn't we get an opportunity to --

COMM. PARSLEY: We would be able to get an opportunity to file comments, but I'm just saying the track record on filing petitions to get approved on these kinds of matters have not been strong with the Company. And I'm just -- again, it's that whole panoply of there's not really a good answer.

(Laughter)

You know, Paul, I really thought you were going to grab the desk and push back and say, "Y'all talk about it," but you didn't, so I have to buy Journeay lunch now.

(Laughter).

MR. JOURNEAY: I'll bring you a doggie bag.

CHAIRMAN HUDSON: You know, we've been at this a long time with this Company. And my experience is they're a difficult company to drag toward anything. The SPP option is one that they clearly resist. It permeates their filings. It's one that they clearly don't favor.

And so, I mean, I feel like this Commission has spent a number of years now trying to drag this Company toward something and that we'll continue to perpetuate that if we continue forward under the types of options that you're talking about. So I'll just ask one more time, perhaps one of y'all will think about putting a stake through this and rejecting Entergy's plan.

COMM. SMITHERMAN: I'm not through talking yet.

(Laughter)

Anything that we've spent this much time on, we can't just kill this fast.

You know, I think to be honest about it, though, it's a very complicated situation.

COMM. PARSLEY: It is.

COMM. SMITHERMAN: You know, the Legislature has commanded that we have a plan that takes them to competition, full customer choice is still in the statute. So we can't ignore that in my opinion.

Secondly, you know, this company's service area abuts Houston. You know, we're -- and I love the Panhandle and I love Northeast Texas, but those areas do not have near the growth and load that

ATTACHMENT B

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
PUBLIC UTILITY COMMISSION OF TEXAS
AUSTIN, TEXAS

APPLICATION OF ENTERGY GULF STATES, INC.'s TRANSITION TO COMPETITION PLAN	PUC DOCKET NO. 33687

PREHEARING/OPEN MEETING/HEARING ON THE MERITS
TUESDAY, MAY 22, 2007

BE IT REMEMBERED THAT AT approximately 9:10 a.m., on Tuesday, the 22nd day of May 2007, the above-entitled matter came on for hearing at the Offices of the Public Utility Commission of Texas, 1701 North Congress Avenue, William B. Travis Building, Commissioners' Hearing Room, Austin, Texas 78701, before PAUL HUDSON, Chairman, JULIE C. PARSLEY and BARRY SMITHERMAN, Commissioners, and ANDREW KANG, Administrative Law Judge; and the following proceedings were reported by Patricia Gonzalez and Evie Coder, Certified Shorthand Reporters of:

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know we have several days to go, but, you know, I'm reminded of Sam Houston or someone at the Battle of San Jacinto, you know, told Deaf Smith to go cut the bridges -- right -- so no one would have an escape route, including his own men. You know, at some point you get married, you're committed to marriage and you just stick with it, and I think we've got to do this here. I think we -- if there's going to be off ramps, they've got to be narrowly defined and it can't be a unilateral option on the part of the company.

Q (Parsley) Exactly. I mean, it appears to be entirely unilateral to me. And I guess since we're here now, PURA --

COMM. SMITHERMAN: Jump to the end.

COMM. PARSLEY: Yeah -- well, yeah.

Q (Parsley) PURA clearly, wouldn't you agree, gives us the ability to modify the plan you filed?

A (Domino) Yes, it does.

Q (Parsley) And that means materially modify your plan. Right?

A (Domino) Yes, you can.

Q (Parsley) I mean, there's no modifier to -- it says "modify." So we can do -- we can modify it however we would see fit, I would assume, but Mr. Neinast said yesterday that if we materially

modify the plan, you-all are out of here.

Now, I don't see how exactly you can do that legally. I assume that what we're going to do is write an order and sign it, and, therefore, you have a binding order by the Commission. And I'm curious what legal authority you have that would allow you to ignore an existing Commission order --

A (Domino) I'm not a lawyer.

Q (Parsley) -- in that way.

A (Domino) Yeah. I'm not a lawyer. I'd have to ask my lawyer.

COMM. PARSLEY: Steve?

(Laughter)

CHAIRMAN HUDSON: Steve said it in his opening statement. I mean, his core opening statement was "We're a FERC jurisdictional utility. We don't have to abide by this order."

COMM. PARSLEY: Okay. Let's talk about this for a minute because this is very important. We are not -- okay. If we don't have jurisdiction over this, Paul, why the hell are we here?

No. Really. I mean, we have jurisdiction over something.

CHAIRMAN HUDSON: Let me summarize my big picture right here.

COMM. PARSLEY: No, no. Wait. Wait. Wait. Let me just --

(Simultaneous discussion)

CHAIRMAN HUDSON: Let me give you my position. All right?

We've got actual costs that are very, very real in front of us. We've got a lack of authority on monetary recovery, as I see it under state law. There's multiple things outside the Commission control. And the plan that the company has represented by way of exit ramps is absolutely unworkable. And I measure that against theoretical cost savings, which I have some real questions about the way the cost savings have been calculated; theoretical reliability and Homeland Security benefits; and theoretical benefits of competition.

I mean, from a big picture perspective -- and I hate to lay this out there this early in the hearing because I've got a lot more facts to hear -- I look at those two things and the balance isn't even close, and, you know, were we to make the decision today, I'm prepared to reject this plan.

COMM. PARSLEY: Okay.

COMM. SMITHERMAN: How do you really feel?

(Laughter)

COMM. PARSLEY: Yeah.

All right. Let's go back to jurisdiction for a minute. And I appreciate -- and I don't disagree with what you're saying, particularly about the off ramps, but this is what I don't understand, is that if we don't have jurisdiction, I don't know why we're having this hearing, number one.

Number two --

COMM. SMITHERMAN: Well, the statute tells us to, first of all.

COMM. PARSLEY: Well -- right. But we're not going to tell -- we're not going to order you to join ERCOT. We're going to order you to make a filing with FERC to join ERCOT.

Now, I understand your argument is it's your position we don't have the authority to do that.

MR. NEINAST: Yes, Commissioner.

COMM. PARSLEY: Because if it is, if that is your position, then I don't think you've negotiated any of this in good faith.

MR. NEINAST: The issue we face is that there are two regulatory agencies that we're dealing with here. There's the FERC -- let's put Louisiana aside, but there's the FERC and the PUC. As

Commissioner Smitherman said, we've been ordered, under 1567, to file a plan --

COMM. PARSLEY: Legislation, which, by the way, you negotiated.

MR. NEINAST: Yes.

COMM. PARSLEY: Yes. And agreed to.

And if you knew at the time that your argument was going to be that we didn't have jurisdiction in order -- and not do what the statute tells us to do, that is bad faith.

MR. NEINAST: I believe there are provisions in that statute that speak to the Commission not doing something that is contrary to the jurisdiction of the Federal Energy Regulatory Commission.

COMM. PARSLEY: And that was supposed to trump everything we're doing here in this proceeding?

MR. NEINAST: No, ma'am, in no way.

What we're trying to do is serve two masters, which has been difficult for us to do. We need to satisfy both the state statute but we also have the obligations in the FERC jurisdiction that does apply to the company. So what we're trying to do is come up with a plan that we can all work out together so that it's something that both masters are

going to be happy with and that can work for the entire system.

COMM. PARSLEY: That's not how I read the application. How I read the application is "Entergy likes the plan or you're out of here," and that's not what I think the statute intends. It's certainly not what we intend. Because we have a duty to do what's in the public interest, and I can tell you, what's in this filing is not necessarily in the public interest, in my opinion. Walking away from $200 million in transmission costs and having it all be uplifted into ERCOT is not in the public interest, in my opinion. So it really -- in case you can't tell from my tone of voice, I'm really offended by the idea that you're sitting here today after all the expenditure of time, resources and money on this particular proceeding and what you're saying is that we don't have, at the end of the day, the ability to write an enforceable order and have you do what we're telling you to do when it is not going to be something that is in FERC's jurisdiction. It's going to be you go ask FERC to do this, if we can do this, for that permission, for that ability.

It is -- I think those are two very distinctive things, and I think we do have the

jurisdiction to tell you to do that, particularly because I think you submitted to our jurisdiction to do that, frankly, because it's not subject matter jurisdiction that FERC has because FERC has subject matter jurisdiction if we're ordering you to do it or not, and that's not what we're doing.

So we need to work this out in some way or form or shape, because as far as I'm concerned, we can stop right here if what you're saying is we can go through all of this and write an order and then you're not going to comply with it because we don't have jurisdiction over it.

MR. NEINAST: If I can step back a little bit.

When we had the protocols case before the Commission -- was heard before the Commission back in 2003, I believe, we had a similar issue come up with regard to balancing energy. And not to get into too many details, but there was a big push by a number of intervenors to require us to go to FERC to request a certain form of -- a certain level of bandwidths with regard to balancing energy and penalty provisions.

I think the Commission at that time realized that ordering the company to go to the FERC

to do something that was not necessarily in the best interest of the company was not something permitted by the law, frankly. There's a federal court case out of Massachusetts that says that state agencies -- as I remember it, that state agencies cannot require a utility subject to their jurisdiction to go to FERC to file something that the state agency wants the utility to do unless the utility is on board with it.

And so I'm not saying --

COMM. PARSLEY: So did the Legislature understand that that was the state of the law when they passed this law? Do you think somebody made them aware of the fact that they were passing the law asking us to do something that you at the end of the day were going to make -- might say, no, we're not going to do?

MR. NEINAST: I can't speak to that, but, again, there are provisions in HB 1567 that speak to the Commission not taking actions that are contrary to the jurisdiction of the FERC.

COMM. PARSLEY: But my whole point is: If this entire statute is contrary to FERC's jurisdiction, then that one provision overrides everything else.

MR. NEINAST: I don't believe the

statute is contrary to the FERC's jurisdiction. The statute is going to two parts.

COMM. PARSLEY: No. It gives us the ability to have this and order you to do something, and if that's against -- contrary to FERC jurisdiction, then the statute is void, essentially, of meaning.

MR. NEINAST: The --

COMM. PARSLEY: I don't know. This off-ramp concept --

COMM. SMITHERMAN: Well, I don't think we can resolve that right here. I mean, I think that's a legal question that we probably need to have briefed and those terms briefed.

COMM. PARSLEY: Well, all I can say is that if it's the position of the company that if they don't like our order because it doesn't give them everything that they want and that they can walk away from it, then I'm not willing to accept that -- I mean, as a fundamental proposition.

Now, if FERC says, "No. You can't separate" and FERC says, "No. You can't go to ERCOT," and if FERC says, "No. We're not going to relinquish our jurisdiction over your wholesale markets, then, yes, that's an appropriate off ramp. But if we aren't

going to give you a CWIP rider, which I am not supporting -- I don't know if anybody else does, but I would not support a CWIP rider. So if we don't give you a CWIP rider and you say, "Oh. We're walking away" -- well, I'm horribly offended by that in the first place, but in the second place, that just doesn't seem that it's appropriate, that you can just ignore a Commission order.

And I haven't played a lot at FERC. I mean, that's obvious. So maybe this is just our -- maybe our jurisdiction is really meaningless in this regard, and if it is, then we have wasted a lot of resources, time and money.

A (Domino) Well, Commissioner, the CWIP rider in the financial recovery is an off ramp because -- well, financial recovery is an off ramp for us because if we cannot get the recovery, then I'm not -- there's -- in all likelihood, we cannot finance the construction.

Q (Parsley) What about third-party bids? What about competitive bidding?

A (Domino) That would be great. If somebody wants to build this plan for us, we're open for it, provided that they can get it done in the time that the Commission says and the operations and design,

meets the criteria of reliable service. We welcome someone building the entire plan.

COMM. PARSLEY: Well, see, and this is the problem, is, even if we were going to say that you could build part of it, if that was going to be an appropriate thing, it seems like you want all the certainty in the world and you're not willing to give us any. I mean, you want certainty of recovery. You want certainty of how this is going to happen. And you could walk away on this in two years on an off ramp and we'd be stuck. I mean, certainty has to work both ways. I mean, that's why you have final appealable orders and why you operate under them.

A (Domino) Yeah. I understand what you're saying. And my only point was, there's -- two main issues in this is whether or not we can get through all of the FERC approvals required and whether or not the financial recovery is there so that the company can finance the construction required in order to do this, and there are several off ramps in there that address FERC issues. One is --

Q (Parsley) Right. And --

A (Domino) -- system agreement, one has to do with --

Q (Parsley) I understand that.

A (Domino) -- contracts, one has to do with jurisdiction. And then there's the other one in there about financial recovery. And, you know, there's a number of off ramps, but those two categories are the main ones.

And then we have to get jurisdictional separation. That's another one. If we can't do that, we can't go forward, and so -- but it gets down to the one that's -- that I think is a go/no-go for us is whether or not we can finance the construction. Because we cannot go down this path and try to finance millions of dollars of construction with the balance sheet that the company will have. We have testimony for that. Unless there's some other mechanism, whether it's a third party building it, securitization CWIP -- some way.

Q (Smitherman) I thought I heard you say -- maybe I imagined it -- that the statute as presently written gave you -- or gave us the tools necessary to help you finance this. I know initially you wanted to get some legislative relief. That has not panned out in this session. But I thought I heard you say that you were prepared to go forward the way the statute is written now, or is it your position that in the next legislative session you would seek those things that

you sought this time?

A (Domino) Actually, if the Commission determines that those financial recovery mechanisms can be put in place so that we can go forward, there would be no need for the legislation. The legislation would only be there to give the Commission authority that it has determined that it does not presently have. And the reason we backed off the legislation was an honest feel from -- of the comments in other Open Meetings that possibly that authority was there to do it.

I mean, if we were going to be joining ERCOT and we needed cost recovery similar to ERCOT and we're in the process of joining ERCOT, if that cost recovery could be made possible for us, even though we're not, quote, "officially" in ERCOT but in the process of joining ERCOT, that would go a long ways to taking care of the financial concerns, if the Commission could do that.

Q (Parsley) Well, let's go back to CWIP. There's a financial integrity provision for CWIP, but it requires you to come in and tell us. It doesn't allow you to recover CWIP in a rider. I don't see how, statutorily, we can prove that costs have been expended prudently and the -- about the financial

integrity at that point in time by giving you a rider now. It's something you're going to have to come in and prove, not just a matter of law. That's not even my reference.

The reason I'm against it is because it's -- a rider isn't permitted by the statute, in my opinion, but it's an off ramp. And so I'm really frustrated by this, because, Joe, this is a conversation we had long before this was filed, that you came to my office -- people from Entergy come to my office; we've talked about this. We've talked -- we were holding hands and singing "Kumbaya" about this whole deal, about filing and your willingness to really explore these options and to come to ERCOT if that was the right thing to do.

When we had the conversation, there was no discussion about the DC tie for Entergy. Maybe for the co-ops. So that kind of cropped up. But then I get this filing and it looks -- it is 180 degrees from what we talked about. And so I have private conversations with Entergy about these things. You-all are willing and helpful and you want to do all the right things and then you make a filing that's offensive. And I don't know what exactly to do about that. It's really frustrating because we end up stuck

completely in the middle between what we're being told privately and what we believe; then what's being filed and then whatever is being said to the Legislature that we can't even participate in.

So I don't really know what we're supposed to do. And I guess this is my moment of personal privilege, just to express my frustration with the process and with the company over this, because I really thought we had an understanding, and it's not reflected here and it's not reflected in the testimony. And, I mean, not an understanding like a decision had been made but an understanding that you were willing to let us work on this and make a decision. And if your -- if your position is now that we don't have an ability to make that decision and to work with you on this if it's not everything that you want, then that is 180 degrees different than what we agreed -- what I thought we had talked about and what I thought the company was willing to do.

So my moment has ended, but -- and a lot of this --

COMM. SMITHERMAN: Do you feel better?

COMM. PARSLEY: I do.

(Laughter)

COMM. PARSLEY: And a lot of my arm