



Control Number: 37744



Item Number: 223

Addendum StartPage: 0

PUCT DOCKET NO. 37744
SOAH DOCKET NO. 473-10-1962

APPLICATION OF ENTERGY TEXAS,
INC. FOR AUTHORITY TO CHANGE
RATES AND TO RECONCILE FUEL
COSTS

§
§
§
§

PUBLIC UTILITY COMMISSION

OF TEXAS

RESPONSE OF ENTERGY TEXAS, INC. TO
APPEAL OF COTTONWOOD ENERGY COMPANY, L.P. OF
ORDER DENYING INTERVENTION OR, IN THE ALTERNATIVE,
MOTION FOR RECONSIDERATION

FILED
10 FEB 23 PM 2:25
CLERK

TABLE OF CONTENTS

I. PROCEDURAL MATTERS	3
II. ARGUMENT.....	3
A. Cottonwood Has Not Demonstrated a Justiciable Interest.	3
1. Background.....	3
2. The PPR and CGS Riders are Retail Tariffs.....	5
3. Opening the Door to Interventions by Other Wholesale Suppliers Would Be Bad Policy.	7
B. Commission Precedent Precludes Cottonwood's Intervention.....	8
1. Docket No. 34298	8
2. Docket No. 36931	9
3. Docket No. 23714	9
4. Docket No. 34800	11
C. Commission Precedent Cited by Cottonwood Does Not Support Cottonwood's Intervention.	12
D. The Commission Can Limit the Scope of an Intervention.	13
III. RELIEF REQUESTED	14

**PUCT DOCKET NO. 37744
SOAH DOCKET NO. 473-10-1962**

APPLICATION OF ENTERGY TEXAS, INC. FOR AUTHORITY TO CHANGE RATES AND TO RECONCILE FUEL COSTS	§ § § §	PUBLIC UTILITY COMMISSION OF TEXAS
---	----------------------------	---

**RESPONSE OF ENTERGY TEXAS, INC. TO
APPEAL OF COTTONWOOD ENERGY COMPANY, L.P. OF
ORDER DENYING INTERVENTION OR, IN THE ALTERNATIVE,
MOTION FOR RECONSIDERATION**

Entergy Texas, Inc. (ETI or the Company) files this response to the Appeal of Cottonwood Energy Company, L.P. (Cottonwood) of Order Denying Intervention, or, in the Alternative, Motion for Reconsideration (Cottonwood Appeal). The Cottonwood Appeal should be denied because, as the ALJs correctly determined, Cottonwood lacks standing to intervene in this docket.

Cottonwood is not a retail customer of ETI but is instead a wholesale power supplier that would like to sell power to ETI. In 2009, Cottonwood similarly sought to intervene in an ETI proceeding on the basis that it would be affected by the decision of the Commission.¹ Cottonwood's intervention was rejected in that proceeding, and here again Cottonwood has failed to show that it has a legal entitlement that may be adversely affected. The Commission has not previously granted intervenor status based on the type of non-justiciable interests presented by Cottonwood, and to start doing so now would create bad policy and precedent.

¹ See *Application of Entergy Texas, Inc. for Determination of 2008 System Restoration Costs*, Docket No. 36931, Order on Appeal of Order No. 8 (Jun. 26, 2009).

I. PROCEDURAL MATTERS

ETI received the Cottonwood Appeal on February 16, 2010. Pursuant to P.U.C. PROC. R. 22.123(a)(4), ETI's response is due within five working days of the filing of the appeal. Therefore, this response is timely filed on February 23, 2010.

II. ARGUMENT

A. Cottonwood Has Not Demonstrated a Justiciable Interest.

1. Background

A party has standing to intervene in a Commission proceeding if that person (1) has a right to participate that is expressly conferred by statute, Commission rule, or order or other law; or (2) has or represents persons with a justiciable interest which may be adversely affected by the outcome of the proceeding.² Cottonwood does not allege that it has been given a right to participate in this proceeding by a statute, Commission rule, order, or other law. Rather, Cottonwood attempts to show that it has a justiciable interest that may be adversely affected by the outcome of the proceeding. As explained below, however, Cottonwood's allegations fail to show an adequate entitlement to intervene.

Cottonwood asserts in its appeal that it has standing to intervene because (1) it would like to be a supplier of the Competitive Generation Service (CGS) that ETI is required by statute to propose, and (2) Cottonwood is an independent power producer located in ETI's service territory that, from time to time, sells power to ETI and that its ability to make such sales will allegedly be affected by the Company's proposed Purchased Power Recovery Rider (PPR), which is designed to recover purchased

² P.U.C. PROC. R. 22.103(b).

power costs. Cottonwood alleges that it has “an interest in the development of the proposed tariff that no other party can adequately address,”³ and that it has “an interest and a viewpoint that are not currently represented in this proceeding.”⁴

Cottonwood’s alleged unique viewpoint and interest do not satisfy the requirements to show standing. Merely having a unique position on an issue in a case, or having the ability and inclination to bring a different perspective to a case, does not translate to having a justiciable interest. The Commission has stated that a justiciable interest is instead a legal right, namely a property right, belonging to the intervenor that may be harmed by the outcome of the proceeding in question.⁵ Cottonwood has not demonstrated such interest.

ETI’s application in this docket affects its relationships, as defined by tariff, with its *retail* customers. Cottonwood is not an ETI retail customer; it is a retail customer of Jasper-Newton Electric Cooperative, Inc.⁶ Cottonwood’s status as a large generator and potential wholesale power vendor does not confer standing as a party to this proceeding any more than a large gas supplier’s status as a potential gas vendor to ETI would confer standing on it to intervene in ETI proceedings. Cottonwood identifies no legal right or property interest that equates to a justiciable interest that may be adversely affected here. Instead, Cottonwood identifies certain wishes and desires that

³ Cottonwood Appeal at 6 (Feb. 16, 2010).

⁴ Cottonwood Appeal at 8.

⁵ *Application of AEP Texas Central Company to Amend a Certificate of Convenience and Necessity for a 345-kV Double Circuit Transmission Line in Kenedy County, Texas*, Docket No. 34298, Order Denying Appeal of Order No. 5 at 3 (Oct. 29, 2009). See *Coastal Habitat Alliance v. Public Utility Comm’n of Texas*, 294 S.W.3d 276 (Tex. App. — Austin 2009, no pet.) (affirming Commission denial of motion to intervene).

⁶ See *Cottonwood Energy Company, LP*, Order Granting Petition for Declaratory Order, 118 FERC ¶ 61,198 (2007).

may be adversely affected in this proceeding. For example, Cottonwood states that it “would like to be a supplier of the [CGS],” that it “has an interest in the development of the proposed tariff . . .” and that it “wishes to be a potential provider of competitive services . . .”⁷ These types of unilateral desires do not rise to the level of legal or property rights and have not been found to be justiciable interests in the past. The Commission should not start down the path of allowing interventions premised on such claimed interests.

The mixed signals that Cottonwood’s pleadings send as to its agenda in this proceeding are exemplified on page seven of its appeal, where Cottonwood states that it “desires to present evidence regarding the prudence and reasonableness of Entergy’s purchased power and fuel costs that is directly relevant to the issues in this case.” Cottonwood, however, is not a retail customer who would be affected by ETI’s purchased power and fuel costs. Cottonwood has not and will not pay the fuel or purchased power costs to be reconciled in this proceeding. As such, the only real interest Cottonwood can prove is using this case as a means to gain leverage in its ongoing business relationships with ETI. Cottonwood’s stated desires in this respect are wholly unrelated to its real status and relationships with regard to ETI, let alone ETI’s retail customers.

2. The PPR and CGS Riders are Retail Tariffs.

The PPR rider identified by Cottonwood as a basis for its intervention is a retail tariff that defines the relationship between ETI and its retail customers. Cottonwood will not pay the purchased power costs to be recovered from retail customers through the

⁷ Cottonwood Appeal at 5, 6, and 9.

proposed PPR rider. Rather, power sales by Cottonwood in ETI's service territory are wholesale power sales that, as described below, are subject to the exclusive jurisdiction of the Federal Energy Regulatory Commission (FERC). While Cottonwood alleges in conclusory fashion that "Entergy's ability to recover capacity costs and pass them through to the ratepayers has a direct effect on the economic terms it is willing to offer IPPs,"⁸ Cottonwood does not and cannot identify any legal entitlement it has to any particular tariff design or economic term. Cottonwood also does not explain how it differs from other potential wholesale power suppliers in this regard. While Cottonwood may have a self-interest in advocating for a beneficial tariff design or economic terms that might give it a competitive advantage over other wholesale suppliers, that desire does not create a justiciable interest.

Likewise, the CGS rider identified by Cottonwood as a basis for its intervention is a retail tariff that defines the relationship between ETI and the eligible retail customers that would take service under the rider. PURA § 39.452(b) expressly provides that under the CGS, the electric utility "shall . . . provide the generation at retail to the customer." The law does not contemplate that Cottonwood, an independent power producer, would make direct power sales to any retail customer.

Accordingly, any potential relationship between Cottonwood and ETI is a wholesale matter, which, like the transmission service relationship that was the basis for Cottonwood's attempted intervention in Docket No. 36931, is subject to the FERC's jurisdiction. Under longstanding United States Supreme Court authority, the FERC exercises exclusive jurisdiction to oversee wholesale power sales in interstate

⁸ Cottonwood Appeal at 4.

commerce.⁹ The Commission exercises jurisdiction only over ETI's retail rates, and, accordingly, the CGS rider defines only the nature of the relationship between ETI and its retail customers that are eligible to take service under the CGS rider.

Cottonwood urges that it should be allowed to intervene so that it can advocate its position on the type of wholesale suppliers who should be allowed to compete to provide power to ETI under the CGS program. Texas courts have found, however, that a potential competitive interest in the outcome of a state agency proceeding does not by itself create a justiciable interest.¹⁰ Moreover, it is the eligible retail customers who will, under PURA § 39.452, select competitive generation service, not Cottonwood. Customer groups are already represented by a number of intervenors in this docket who have a justiciable interest in the outcome of the proceeding and who will be able to advocate any number of designs for the CGS program.

3. Opening the Door to Interventions by Other Wholesale Suppliers Would Be Bad Policy.

Granting Cottonwood's intervention would open the door to allowing other potential utility vendors to intervene in the utility's retail rate cases based on speculation about the tangential impacts of retail rate schedules on their business activities. The Commission should reject such an expansive approach to standing because allowing intervention based merely on a general interest in the case would eviscerate the clear

⁹ See *Entergy Louisiana, Inc. v. Louisiana Public Service Comm'n*, 539 U.S. 39 (2003); *Mississippi Power & Light Co. v. Mississippi ex rel Moore*, 487 U.S. 354 (1988); and *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986).

¹⁰ *Railroad Comm'n of Texas v. Ennis Transportation Co.*, 695 S.W.2d 706 (Tex. App.— Austin 1985, writ ref'd n.r.e.) (holding that potentially affected contract carriers were not entitled to participate in the proceeding to protest applications for common carrier or contract carrier authority).

and well established requirement that intervenors demonstrate a legal right that would be affected by the retail rate determinations to be made.

For example, if Cottonwood's intervention is allowed, this precedent could potentially open the door for coal and gas suppliers to seek to intervene in fuel reconciliations and other fuel-related proceedings because the decisions in those cases might affect the utility's purchasing practices with those suppliers. Similarly, GE Energy might be very interested in intervening as a coal generation equipment manufacturer and supplier in utility rate cases because GE's desires to supply utilities with GE equipment might be adversely affected by cost recovery decisions in the rate cases of its utility clients. Competing suppliers might seek to intervene to argue for tariff terms that would be more favorable to one or the other and hold up settlement among the other parties due to issues wholly unrelated to the retail rates at issue. To avoid proceeding down this path, the Commission should deny the Cottonwood Appeal and intervention.

B. Commission Precedent Precludes Cottonwood's Intervention.

Cottonwood argues in its appeal that none of the Commission precedent previously cited by ETI is controlling. Contrary to Cottonwood's position, the Commission precedent previously cited by ETI and discussed below is directly on point, founded upon well-established Texas case law principles, and precludes Cottonwood's intervention in this case as well.

1. Docket No. 34298

Cottonwood criticizes the fact that ETI cites to a CCN proceeding, Docket No. 34298, in stating the legal standard for standing, implying that such standard applies only in CCN proceedings. However, when the Commission stated in Docket No. 34298

that a justiciable interest is “a legal right, namely a property right, belonging to the intervenor that may be harmed by the outcome of the proceeding in question,”¹¹ it based its statement on well-established standards in Texas case law, not merely on other CCN proceedings.¹² Thus, to suggest that this standard for standing is limited to CCN proceedings is wholly incorrect. Moreover, the grant of intervention to parties in the present case well illustrates the implementation of the general standard framed up in Docket No. 34298; in each instance, the parties allowed to intervene in this case have a statutory and regulatory prescribed relationship with ETI that will be directly affected by the outcome of the case. Cottonwood has alleged no such interest.

2. Docket No. 36931

As mentioned above, the Commission rejected Cottonwood’s intervention in Docket No. 36931, an ETI storm costs case, finding that Cottonwood’s alleged “unique” position did not satisfy the requirements of the Commission’s rules to show standing and that the proceeding would only address costs eligible for recovery from Entergy’s retail customers, not from its wholesale transmission customers like Cottonwood.¹³ Yet here, Cottonwood again trots out the same claim of “unique interest and point of view,” instead of a claimed legal right sufficient to provide standing.

3. Docket No. 23714

Cottonwood also described Docket No. 23714 as inapplicable here. In that case, the Commission rejected an attempt by Brazos Electric Power Cooperative, Inc.

¹¹ Docket No. 34298, Order Denying Appeal of Order No. 5 at 2-3 (Oct. 29, 2007).

¹² *Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex. 1984); *Housing Authority of the City of Harlingen v. State ex rel. Velasquez*, 539 S.W.2d 911, 913 (Tex. Civ. App. — Corpus Christi 1976, writ ref’d n.r.e.).

¹³ Docket No. 36931, Order on Appeal of Order No. 8 (Jun. 26, 2009).

(Brazos) to intervene in a docket in which Entergy Gulf States, Inc. (EGSI) applied to revise its semi-annual fuel factor as ordered by the Commission in a prior docket.¹⁴ Brazos claimed that it had a justiciable interest in the proceeding because it purchased wholesale power from EGSI and its participation would serve the public interest. EGSI objected to Brazos' motion to intervene, arguing that Brazos had no standing because the only issue in the case was whether EGSI complied with its obligation to accurately calculate its revised fixed fuel factor pursuant to the formula adopted in Docket No. 20150.¹⁵ EGSI also objected because Brazos was a wholesale customer and therefore would not be affected by the proceeding, which only concerned rates paid by EGSI's retail customers. The ALJ stated that she agreed with EGSI's arguments and that, as Brazos was a wholesale customer, the fuel factor at issue appeared to be inapplicable to Brazos.¹⁶ Based on the absence of any justiciable interest in the outcome, the ALJ denied Brazos' motion to intervene.

Cottonwood argues in its appeal that that the "limited nature of the case was the reason Brazos' intervention was denied — not the fact that it was not a retail customer." Regardless of whether the nature of the case is "limited" or not is irrelevant; the ALJ determined that Brazos did not have a justiciable interest because the case related to retail rates and not wholesale rates. The same holds true with regard to Cottonwood in the present case as well.

¹⁴ *Application of Entergy Gulf States, Inc. to Submit Revised Fixed-Fuel Factor (Schedule FF) and Supporting Attachments in Compliance with the Commission's Order Issued on June 29, 1999, in Docket No. 20150*, Docket No. 23714, Motion to Intervene of Brazos Electric Power Cooperative, Inc. (Mar. 29, 2001).

¹⁵ Docket No. 23714, Entergy Gulf States, Inc.'s Objection to Motion to Intervene of Brazos Electric Power Cooperative, Inc. (Apr. 3, 2001).

¹⁶ Docket No. 23714, Order No. 2: Denying Brazos Electric Power Cooperative, Inc.'s Motion to Intervene (Apr. 18, 2001).

4. Docket No. 34800

Finally, in EGSI's recent base rate case (Docket No. 34800), a group of generation and transmission electric cooperatives (East Texas Cooperatives) that were wholesale customers of EGSI sought to intervene based upon their concern that parties in the proceeding might attempt to shift some of the cost burden to EGSI's wholesale customers, including the cooperatives.¹⁷ That rate case was no less complex than the supposed "rate case plus" that is before the Commission in the present docket. In particular, that case also included a number of riders including both a CGS proposal as well as a PPR rider designed to recover all purchased power capacity costs.¹⁸

In Docket No. 34800, EGSI objected to the East Texas Cooperatives' motion to intervene, arguing that: (1) the cooperatives had no justiciable interest in the docket because they were wholesale customers and would not be affected by a change in retail rates; and (2) the wholesale rates that the cooperatives pay were subject to the FERC's jurisdiction.¹⁹ The ALJs denied the East Texas Cooperatives' motion to intervene but encouraged the cooperatives to use the Commission's Interchange to monitor the case.²⁰ Cottonwood too can monitor this docket through the daily filings posted on the Interchange. However, Cottonwood should not be allowed to intervene in this case and thus seek relief with regard to wholesale market issues.

¹⁷ *Application of Entergy Gulf States, Inc. for Authority to Change Rates and to Reconcile Fuel Costs*, Docket No. 34800, East Texas Cooperatives' Motion to Intervene (Nov. 7, 2007).

¹⁸ Docket No. 34800, Application at 5-6 (Sept. 26, 2007).

¹⁹ Docket No. 34800, Entergy Gulf States, Inc.'s Objection to East Texas Cooperatives' Motion to Intervene (Nov. 14, 2007).

²⁰ Docket No. 34800, Order No. 11 Regarding East Texas Cooperatives' Motion to Intervene (Nov. 19, 2007).

Cottonwood has not demonstrated any greater legal interest in this case than it, Brazos, or the East Texas Cooperatives demonstrated in the prior cases described above. Allowing parties with wholesale-only interests to participate in retail rate cases as sought by Cottonwood is contrary to Commission precedent. Accordingly, Cottonwood's intervention here should similarly be rejected.

C. Commission Precedent Cited by Cottonwood Does Not Support Cottonwood's Intervention.

Cottonwood cites to Order No. 5 in Docket No. 25802, *Application of TXU Energy Retail Company to Increase Price to Beat (PTB) Fuel Factors*, in support of its intervention. That precedent, which involved the effect of the PTB fuel factor on the then-newly implemented retail competition framework in ERCOT, is wholly inapplicable to ETI's service area, which is outside of ERCOT, and this proceeding.

As the Commission stated at the time, Docket No. 25802 was the first case transferred to SOAH in which an affiliated retail electric provider (REP) sought to increase its PTB fuel factor.²¹ The Commission had previously granted the intervention of retail electric providers in PTB fuel factor cases, but in Docket No. 25802, the Office of Public Utility Counsel (OPUC) opposed the interventions of various REPs. OPUC's arguments opposing the interventions did not focus on whether the REPs had demonstrated a *justiciable* interest but on whether the REPs would be harmed, whether the REPs had shown that they compete in TXU Energy's service area for PTB customers, and whether the interventions would lead to antitrust violations.²² ETI is not making any of those arguments here.

²¹ Docket No. 25802, Order at 3 (Aug. 26, 2002).

²² See Docket No. 25802, Order No. 5 at 1-2 (May 6, 2002).

Moreover, not only was the PTB fuel factor at issue in Docket No. 25802 a retail rate, but the intervening REPs themselves also provided retail electric service, unlike the wholesale-market offerings of Cottonwood. Further, the ALJ explained that at least some of the REPs' rates were actually tied to the PTB charged by the applicant and concluded that "[b]ecause the *rates* of [the REPs] may be affected by the outcome of this proceeding, these parties have shown a justiciable interest sufficient to intervene."²³ (Emphasis added.) Here, however, Cottonwood has shown no such direct tie to or interest.

Finally, no party appealed Order No. 5 and thus it is not known how the Commission would have decided the issue. In contrast, ETI has cited multiple dockets above in which the Commission itself has rejected interventions such as Cottonwood's for cases affecting ETI's service area, where, unlike in the ERCOT areas at issue in Docket No. 25802, there is a dividing line between the Commission's jurisdiction over retail issues and the FERC's jurisdiction over wholesale issues. In the cases cited by ETI, the Commission has considered and rejected interventions by wholesale market participants, including Cottonwood.

D. The Commission Can Limit the Scope of an Intervention.

As noted by Cottonwood on page 12 of its appeal, ETI asks that Cottonwood's intervention, if granted, be limited in scope to only those areas where it demonstrates a justiciable interest. Cottonwood asserts that the Commission has no authority for granting a request for a limited scope of intervention. Commission rules and precedent indicate that Cottonwood is incorrect.

²³ *Id.* at 2-3.

The Commission's rules expressly provide that a presiding officer has "broad discretion in conducting the course, conduct, and scope of the hearing. The presiding officer's authority includes, but is not limited to, the power to . . . take any other action not prohibited by law or by commission rule which is necessary for an efficient and fair hearing."²⁴ Well within these enumerated powers granted to presiding officers is the power to limit the scope of participation of an intervenor under the present circumstances. Further, these rules do not prescribe the full extent of the Commission's authority, but simply the authority that the Commission has by rule conveyed on a presiding officer.

Moreover, the Commission has previously limited the scope of an intervenor's participation in just the manner ETI requests: limiting the intervention of the Communications Workers of America (CWA) in a rate case to those specific subject areas in which CWA had expressed a particular interest.²⁵ The Commission and its presiding officers likewise have the authority here to limit the participation of Cottonwood to certain issues as requested by ETI.

III. RELIEF REQUESTED

For the reasons state above, ETI requests that the Commission deny the Cottonwood Appeal and grant the Company such other relief to which it is entitled. Further, if the Commission nevertheless allows Cottonwood to intervene, ETI asks that Cottonwood's intervention be limited to those issues that the Commission determines are related to Cottonwood's justiciable interest.


²⁴ P.U.C. PROC. R. 22.202(c).

²⁵ *Application of Mid-State Telephone Co. for a Rate Increase*, Docket No. 2323, 4 Tex. P.U.C. Bull. 1898, 1899 (1979).

Respectfully submitted,

Steven H. Neinast
Assistant General Counsel
ENTERGY SERVICES, INC.
919 Congress Avenue, Suite 701
Austin, Texas 78701
(512) 487-3957 telephone
(512) 487-3958 facsimile

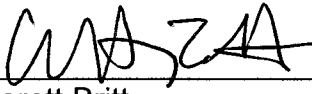
John F. Williams
Jay Breedveld
CLARK, THOMAS & WINTERS,
A Professional Corporation
300 W. 6th Street, 15th Floor
P.O. Box 1148
Austin, Texas 78767-1148
(512) 472-8800 telephone
(512) 474-1129 facsimile

By: 
Everett Britt
State Bar No. 24001789

ATTORNEYS FOR
ENTERGY TEXAS, INC.

CERTIFICATE OF SERVICE

I certify that a copy of this document was served upon the Commission's Legal Counsel and all parties of record on February 23, 2010 by facsimile transmission or hand-delivery.



Everett Britt