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APPLICATION OF CPS ENERGY FOR ADJUSTMENT OF RATES TO COLLECT INCREMENTAL WHOLESALE TRANSMISSION COST REVENUE FOR THE LAST FOUR MONTHS OF 1999 AND FOR 2000	**§**	**PUBLIC UTILITY COMMISSION OF TEXAS**

COMMISSION STAFF'S REPLY TO CPS ENERGY'S RESPONSE TO MOTIONS TO DISMISS OF CENTERPOINT, ONCOR AND AEP TEXAS

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COMES NOW the Commission Staff (Staff) of the Public Utility Commission of Texas (Commission or PUC), representing the public interest, in the above titled and numbered cause, to submit this Staff's Reply to CPS Energy's Response to the Motions to Dismiss filed by AEP Texas Central and North Companies (collectively "AEP"), Oncor Electric Delivery Company LLC ("Oncor"), and CenterPoint Energy Houston Electric LLC ("CenterPoint"), and shows that, contrary to CPS Energy's claims, the application by CPS Energy should be dismissed for failure to timely file its petition and for principles prohibiting retroactive ratemaking:

I. Introduction

On January 19, 2011, the City Public Service Board of San Antonio ("CPS Energy") filed a petition to adjust rates to collect incremental wholesale transmission cost revenue for the last four months of 1999 and for 2000("CPS Energy's TCOS filing").[1] CPS Energy proposes that, in light of the reversal and rendition of the Commission's order in Docket No. 15613[2] and the reversal and remand of the matrix orders for 1999 and 2000, valid transmission charges must be established based on a revised transmission cost for service for CPS Energy for the time periods in question.[3] CPS Energy seeks to recover revenues in the amount of $15,059,133 by means of an adjustment or surcharge to its wholesale transmission charges set out in the approved matrix

[1] *Application of CPS Energy for Adjustment of rates to Collect Incremental Wholesale Transmission Cost Revenue for the Last Four Months of 1999 and for 2000,* Docket No. 39068 (CPS Energy's Petition)(January 19, 2011).
[2] *City of Public Service Board of San Antonio Filing in Compliance with P.U.C. Subst.R. 23.67,* Docket No. 15613 (Aug. 11, 1997).
[3] CPS Energy's Petition at 5-6.

for 2011, plus interest calculated from the date of provision of these transmission services at the interest rate applicable to underbillings.[4]

CPS Energy currently seeks to adjust rates to collect incremental wholesale transmission cost revenue for the last four months of 1999 and for 2000 in its TCOS filing.[5] CPS Energy's original TCOS covering the years 1997 through 2000 was determined in Docket No. 15613, which established a TCOS for CPS Energy of $26,476,886.[6] CPS Energy does not seek to reset or correct the TCOS rate for the period of 1997 through September 1, 1999, as it has already settled any claims related to its TCOS for those years.[7]

Oncor[8], CenterPoint[9] and AEP[10] (collectively "movants") timely filed motions to dismiss on April 7, 2011. Staff and CPS Energy filed responses to the motions to dismiss on May 5, 2011.[11] Replies to responses to the Motions to Dismiss are due May 20, 2011. Staff now files this Reply to CPS Energy's Response to movants' motions to dismiss.

II. CPS Energy's Response to Motions to Dismiss

In response to the Motions to Dismiss filed by Oncor, CenterPoint and AEP, CPS Energy argues that its current TCOS application is not barred by the principles of retroactive ratemaking, laches, or any other ground raised by the movants. CPS Energy further urges that it has appropriately invoked the Commission's jurisdiction as it existed in 1997 ("oversight jurisdiction") and equitable concerns require that the Commission exercise its oversight jurisdiction to correct the unlawful order regarding its past TCOS. CPS Energy's petition should be dismissed for failure to timely file a TCOS for the time period requested and because it violates governing principles barring retroactive rate making.

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[4] *Id.* at 6.

[5] CPS Energy's Petition at 5.

[6] *Tex. Pub. Util. Comm'n, City of Public Service Board of San Antonio Filing in Compliance with P.U.C. Subst. R. 23.67,* Docket No. 15613 (Final Order Aug. 11, 1997).

[7] CPS Energy's Petition at 5.

[8] Oncor Electric Delivery Company LLC's Motion to Dismiss Claims by CPS Energy for Adjustment of Rates to Collect Incremental Wholesale Transmission Cost Revenue For the Last Four Months of 1999 and 2000 ("Oncor's Motion to Dismiss")(April 7, 2011).

[9] Motion to Dismiss of CenterPoint Energy Houston Electric LLC ("CenterPoint's Motion to Dismiss")(April 7, 2011).

[10] Motion to Dismiss of AEP Texas Central Company and AEP Texas North Company ("AEP's Motion to Dismiss")(April 7, 2011).

[11] Response of CPS Energy to Motions to Dismiss of CenterPoint, Oncor and AEP Texas ("CPS Energy's Response")(May 5, 2011); Commission Staff's Response to Motions to Dismiss ("Staff's Response")(May 5, 2011).

CPS Energy contends that the prohibition against retroactive rate making applies to circumstances in which there is an effort to recoup past gains or losses incurred under prior legal rates, not under CPS Energy's 1997 TCOS rate as it was determined to be invalid. The district court determined that the final order in Docket No. 15613 (CPS Energy's 1997 TCOS docket) exceeded the Commission's authority under PURA 1995, declaring the order "void and invalid," and reversing and vacating the order.[12] This decision was affirmed by the Austin Court of Appeals on June 12, 2003; however, the court noted that, because the appropriate remedy in the case was reversal or remand to the Commission, *as opposed to vacating the order*, the judgment was modified to, "reverse the agency order and render judgment in favor of San Antonio that the Commission was without authority to initially set rates."[13] CPS Energy asserts that, because the order was declared invalid, an exception for retroactive rate making is an appropriate remedy for past action. CPS Energy further contends that it did not unreasonably delay the filing of its revised TCOS because "seven years of delays in the remands of the matrix dockets ensued after" the Austin Court of Appeals reversal of the order in Docket No. 15613.[14]

CPS Energy asserts that the Commission is required to exercise the oversight jurisdiction it had pursuant to the Public Utility Regulatory Act of 1995 ("PURA 1995") in determining CPS Energy's TCOS rate from September 1, 1999 through 2000. CPS argues that disputes, both actual and implied, are sufficient to satisfy the prerequisites for the Commission's exercise of its oversight jurisdiction in light on the pre-emptive transmission program. CPS Energy bases its position on the fact that the TCOS set by the Commission in 1997 was in effect for a four year period, through 2000, therefore the jurisdiction held by the Commission at the time the rate was first set is applicable to the entire time period of the rate.[15] In response to the argument that CPS Energy could have and should have sought redress by filing a new TCOS on September 1, 1999, CPS Energy states that such a filing "would have done nothing to address the under-recovery occurring in the prior 32 months."[16]

Lastly, CPS Energy asserts that fairness and equity require that it be permitted to go forward with its TCOS filing and that the Commission "exercise its oversight jurisdiction as the

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[12] *Id.*

[13] *Pub. Util. Comm'n of Tex. v. City Pub. Serv. Bd. Of San Antonio,* 109 S.W. 130, 138(Tex. App.-Austin 2003, no writ).

[14] CPS Energy's Response at 8.

[15] *Id.* at 18.

[16] *Id.* at 19.

Court's guidelines and remands have provided."[17] CPS Energy states that it has established over a number of years the foundation for presenting its TCOS claims and the fairness requires that the action go forward.

III. Staff's Reply to CPS Energy's Response to Motions to Dismiss

CPS Energy's arguments in response to the motions to dismiss are essentially; (1) the current TCOS application is not barred by retroactive rate making principles, (2) was not unreasonably delayed because it was the culmination of years of litigation, and (3) CPS Energy should be permitted to file a TCOS eight years after the final decision of their appeal of the original TCOS docket due to fairness and equitable concerns.

CPS Energy's assertion that the remand of the matrix dockets finally provided the basis to implement a new TCOS for September 1, 1999 through 2000 is untenable. CPS Energy asserts that the matrix remand proceedings, "and especially the invalidation of the CPS Energy TCOS and of the two matrix orders that incorporated the TCOS" established authorization for the Commission to consider a proper replacement TCOS.[18] CPS Energy fails to note that the invalidation of the TCOS was finally adjudicated in 2003 by the Austin Court of Appeals. CPS Energy's assertion that it had to wait years to file a new TCOS application is unsupported, and CPS Energy offers no plausible explanation for the delay.

Moreover, CPS Energy's response to the argument that it should have filed a new TCOS in 1999 is also problematic. As stated, CPS Energy argues that the filing of a TCOS by September 1, 1999 would not have redressed "the previous 32 months of under-recovery," however, that is not at issue in this matter because CPS Energy has already settled all claims related to the TCOS rate established from 1997-August 31, 1999. It stands to reason that, by CPS Energy's own admission, a timely TCOS application by September 1, 1999 would have provided CPS Energy the opportunity to redress any alleged under-recovery for the time period at issue in this matter. Thus, not only did CPS Energy fail to timely file a TCOS application by September 1, 1999 to address the alleged under-recovery, it also failed to timely file a new TCOS application in 2003 following the invalidation of the TCOS established in Docket No. 15613.

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[17] *Id.* at 20.

[18] CPS Energy's Response at 4.

Staff maintains the position that the Commission lacks authority to now consider a new application to establish rates for CPS Energy for the period spanning September 1, 1999 through December 31, 2000. Staff's position is based in part on CPS Energy's failure to file a timely TCOS application pursuant to PURA requirements. PURA requires that a TCOS rate proceeding be filed *prior to the utilities' proposed rate increase* and the TCOS be charged on a *prospective basis.* The appellate court's failure to remand CPS Energy's appeal of the TCOS order also supports this position.

In affirming the District Court's determination that the Commission's order in Docket No. 15613 was "void and invalid," the Austin Court of Appeals noted that, because the appropriate remedy in the case was reversal or remand to the Commission, *as opposed to vacating the order*, the judgment was modified to, "reverse the agency order and render judgment in favor of San Antonio that the Commission was without authority to initially set rates."[19] Thus, the court did not remand the matter back to the Commission for further action. Notably, the court had just determined that the Commission lacked jurisdiction to initially set rates, so remanding the matter for further Commission action would be contrary to the court's stated ruling. Additionally, as noted by the Supreme Court of Texas in its holding on CPS Energy's declaratory judgment action, the holding was limited to the time period prior to the enactment of PURA 1999, which bestowed express authority to set rates upon the Commission.

Accordingly, CPS Energy's TCOS petition should be dismissed as the Commission lacks the authority to retroactively apply a new TCOS eleven years after the requested time period of September 1, 1999 through 2000. CPS Energy's assertion that the retroactive rate making concerns are not implicated because the Commission is correcting a previous order are not persuasive to Staff for two reasons. First, as stated above, CPS Energy bore the responsibility to seek redress for the time period at issue in this matter on September 1, 1999, but it failed to do so. Second, CPS Energy's assertion that the TCOS order must be corrected because the Commission lacked the jurisdiction to set its TCOS rate in 1997 does not apply to the time period that CPS Energy requests a new rate. Moreover, the authority CPS Energy cites regarding instances where exceptions are made to allow retroactive application of rates do not contemplate instances where the party has failed to promptly redress its claims following final adjudication of

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[19] *Pub. Util. Comm'n of Tex. v. City Pub. Serv. Bd. Of San Antonio,* 109 S.W. 130, 138 (Tex. App.-Austin 2003, no writ).

those claims.[20] Likewise, the number of years CPS Energy has pursued claims related to its TCOS rate do not excuse its failure to file a timely application for its TCOS or to promptly seek redress following the resolution of its appeal of the TCOS, and therefore do not provide an equitable basis for review and retroactive application of a new TCOS for September 1, 1999 through 2000.

IV. Conclusion and Prayer

CPS Energy's request that a revised TCOS for the time period of September 1, 1999 through 2000, be retroactively applied, does not state a claim for which the Commission has the authority or jurisdiction to grant at this time. CPS Energy was required to file its request for a revised TCOS amount no later than 35 days prior to the requested effective date[21] and that rate could only be applied prospectively, not retroactively.

WHEREFORE PREMISES CONSIDERED, Staff urges the ALJ's to dismiss CPS Energy's application with prejudice for lack of jurisdiction and failure to state a claim for which relief can be granted.

Dated: May 20, 2011

[20] *See* CPS Energy's Response at 12 *citing Western Resources, Inc., v. Federal Energy Regulatory Commission,* 72 F.3d 147 (D.C. Cir. 1995). In *Western,* the court held that where a Commission decision is invalidated, the present of a court challenge provides adequate notice for purposes of the rule against retroactive ratemaking of the possibility of entry of an alternative tariff. Staff notes that the Federal Energy Regulatory Commission (FERC) approved the re-filed 1988 tariff in *1991,* just three years following the entry of the original tariff and immediately following the *remand* of the proceedings to the FERC. This matter is distinguishable as CPS Energy did not immediately file a new TCOS proceeding following the final adjudication of its appeal of the TCOS in 2003. Rather, it waited eight years to request a replacement TCOS. Furthermore, it does not move to replace the TCOS for the time period the Commission was determined to lack jurisdiction, but instead only requests a replacement TCOS for the time period the Commission's jurisdiction was not in question.

[21] This constitutes a failure to prosecute the petition in a timely manner, which serves as another ground for dismissal pursuant to P.U.C. PROC.R. 22.181 (a)(1).

Respectfully Submitted,

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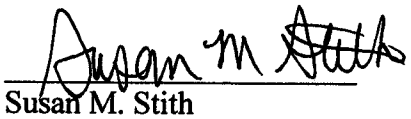

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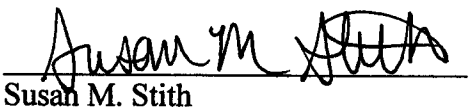
CERTIFICATE OF SERVICE

I certify that a copy of this document will be served on all parties of record on May 20, 2011, in accordance with P.U.C. Procedural Rule 22.74.



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