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PUC DOCKET NO. 39068

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	§ § § § § § §	BEFORE THE PUBLIC UTILITY COMMISSION OF TEXAS

RESPONSE OF AEP TEXAS CENTRAL COMPANY AND AEP TEXAS NORTH COMPANY TO CPS ENERGY'S APPEAL OF ORDER NO. 9

NOW COME AEP Texas Central Company and AEP Texas North Company (together, AEP Texas) and file this response to the appeal of the City of San Antonio, acting by and through the City Public Service Board of San Antonio (CPS), of Order No. 9, which dismissed CPS' application. For the reasons discussed below, AEP Texas requests that the Public Utility Commission of Texas (Commission or PUCT) affirm Order No. 9 and deny CPS' appeal.

I. Introduction

In Order No. 9, the Administrative Law Judge correctly dismissed CPS' application as moot and obsolete and for failing to state a claim for which the Commission could grant relief. CPS' appeal of that order simply reiterates the same arguments that failed to persuade the ALJ to exercise jurisdiction that does not exist. The essence of CPS' position is that: 1) CPS' transmission rates were set at an incorrect level by the Commission's order in CPS' 1997 Transmission Cost of Service (TCOS) proceeding, Docket No. 15613, which was later set aside by the courts due to the Commission's lack of jurisdiction at that time to establish CPS' rates; 2) CPS' rates from 1997-2000 were based on this invalid TCOS order; 3) while CPS filed suit in court and reached a settlement that compensated it for the period up to September 1, 1999, CPS has had no opportunity to seek redress for the period September 1, 1999 — December 31, 2000; and 4) the instant application, filed 11 years later, presents the first and only opportunity for the Commission to address CPS' TCOS for that period.

CPS claims have no merit. Those claims depend on the premise that the Commission has the ability to retroactively increase CPS' TCOS for the period of January 1997 to September 1999 and establish Commission rates based on that TCOS for the period September 1999 to December 2000. As the ALJ correctly ruled, however, the Commission lacks authority to retroactively establish a new TCOS for that historic time period, because the courts have already

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ruled, at CPS' insistence, that the Commission had no jurisdiction to take that action. Indeed, CPS' past actions recognized that it had no remedy at the Commission. Once the courts ruled there was an absence of jurisdiction under PURA 95 to set CPS' rates, CPS did not seek redress at the Commission. Instead, it filed suit in court and obtained therein a settlement as the exclusive means to address its claims for the period during which the PUCT had no jurisdiction.

Equally important, CPS is foreclosed from retroactively seeking a change in its TCOS for the period September 1999 to December 2000 solely because it failed to timely exercise the remedy readily available to it to effect that relief. Prior to September 1999, the courts have ruled that the Commission had no jurisdiction to set municipal TCOS, with the result that CPS could have no valid PUCT transmission rate whatsoever. Effective beginning on September 1, 1999, however, PURA was amended to give the PUCT undisputed original jurisdiction to establish CPS' TCOS and transmission rates. At that time, CPS had the plainly applicable and fully sufficient remedy of filing a rate proceeding to set a new TCOS for the September 1, 1999 to December 31, 2000 period. Indeed, CPS recognized the availability of that remedy when it did file such a proceeding in 2000. CPS simply and unaccountably failed to exercise the legal remedy available to it.

II. Background

In 1996, in the wake of the passage of new PURA provisions designed to open up the wholesale market to competition, the Commission adopted Substantive Rules 23.67 and 23.70, related to wholesale transmission service (the 1996 Rules).[1] Pursuant to the 1996 Rules, the Commission held contested proceedings to establish a TCOS for each ERCOT Transmission Service Provider (TSP), including CPS in Docket No. 15613.[2]

While these proceedings were pending, CPS and Houston Lighting and Power Co. (HL&P) filed declaratory judgment court actions challenging the validity of the 1996 Rules and the PUCT's jurisdiction under PURA 95 to set their wholesale transmission rates.[3] CPS also

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[1] *See* 21 Tex. Reg. 1397 (1996), adopting 16 Tex. Admin. Code § 23.67 [hereinafter Rule 23.67], *and* 21 Tex. Reg. 3343 (1996), adopting 16 Tex. Admin. Code § 23.70 [hereinafter Rule 23.70].

[2] *City Pub. Serv. Bd. of San Antonio Filing in Compliance with P.U.C. Subst. R. 23.67*, Docket No. 15613, Order (Aug. 11, 1997). The PUCT simultaneously held separate proceedings to determine generic TCOS issues and establish the initial "postage stamp" rates, using the aggregate TCOS results as an input. *Regional Transmission Proceeding to Establish Postage Stamp Rate and Statewide Loadflow Pursuant to Subst. Rule 23.67*, Docket No. 15840, Order (Aug. 11, 1997).

[3] *City Pub. Serv. Bd. of San Antonio and Houston Light & Power Co. v. Pub. Util. Comm'n of Tex.*, No. 97-02885 (consolidated) (98th Dist. Ct., Travis County, Tex. 1997).

appealed the Commission's final order in Docket No. 15613 on the ground that the PUCT lacked authority under PURA 95 to set its TCOS.[4] While this litigation was still pending, the Legislature passed SB 7 (which became part of PURA 99). Effective September 1, 1999, PURA 99 gave the Commission express original rate-setting jurisdiction under PURA Chapter 35[5] to establish TCOS for individual TSPs in ERCOT, including municipally owned utilities. CPS, in fact, filed a new TCOS case at the Commission under the new law, but waited until May of 2000 to do so.[6]

Subsequent to the passage of PURA 99, the CPS/HL&P challenge to the 1996 Rules was decided by the Texas Supreme Court in 2001.[7] The Court held that, while the PUCT had authority to initially set wholesale transmission rates for investor owned utilities, under PURA 95, the same authority did not extend to municipally owned utilities. The Court explained that, under PURA 95, the Commission was limited to oversight or dispute resolution authority to determine reasonable wholesale transmission rates for municipal utilities "once confronted with a dispute between utilities."[8] Based on this conclusion, among others, the Court invalidated portions of the 1996 Rules.[9] The Court noted, however, that the passage of PURA 99 limited the time period during which its holdings applied.[10]

Following the Supreme Court's decision, CPS' appeal of Docket No. 15613 was resolved. The district court held that the Commission's order setting CPS' TCOS was "void and invalid" as exceeding the PUCT's authority under PURA 95.[11] On June 12, 2003, the Austin Court of Appeals affirmed the district court's opinion and rendered judgment that the

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[4] That appeal was abated pending the resolution of the appeal of the CPS/HL&P declaratory judgment action.

[5] TEX. UTIL. CODE ANN. § 35.004(d), amended by Acts 1999, 76th Leg., ch. 405, § 17.

[6] *Application of City Pub. Serv. of San Antonio for Approval of Non-IOU Transmission Cost of Service Filing*, Docket No. 22532, Order (Feb. 2, 2001) (filed May 15, 2000).

[7] *Pub. Util. Comm'n of Texas v. City Pub. Serv. Bd. of San Antonio*, 53 S.W.3d 310 (Tex. 2001).

[8] *Id.* at 320.

[9] *Id.* at 325. CPS and HL&P subsequently entered into a settlement with other ERCOT entities (only recently approved by this Commission on January 19, 2011 in Docket Nos. 28870, 29044, and 38780) under which they collectively received over $7 million to compensate them for any over-payments they may have made in the period prior to September 1, 1999. *Supra* note 27.

[10] *Id.* at 321.

[11] *City Pub. Serv. Bd. of San Antonio v. Pub. Util. Comm'n of Tex.*, Cause No. 97-11665, Final Judgment (Aug. 6, 2002).

Commission lacked jurisdiction under PURA 95 to initially set CPS's TCOS.[12] Docket No. 15613 ***was not remanded*** to the Commission and there was no finding by the court that the PUCT had substantively erred in setting the level of CPS' TCOS. Accordingly, Docket No. 15613 is not before the Commission, and the order in that case is of no force or effect.

Over seven years after the Third Court declared the order in Docket No. 15613 setting CPS' TCOS void for lack of jurisdiction, and more than eleven years after the PUCT was granted original jurisdiction to set its rates, CPS now presents an application to set a new TCOS and wholesale transmission rates effective for the period September 1, 1999 – December 31, 2000, in an effort to "correct"[13] the outcome of Docket No. 15613. On April 7, 2011, AEP Texas, CenterPoint Energy Houston Electric, LLC, and Oncor Electric Delivery Company, LLC (collectively, Movants) each filed motions to dismiss on the ground that the Commission lacks jurisdiction to grant the retroactive relief requested. On May 5, Commission Staff filed a response in agreement with the motions to dismiss. On October 27, the ALJ issued Order No. 9 dismissing CPS' application with prejudice for the reasons asserted by Commission Staff and the Movants.

III. Argument

Because the issues in this case have been thoroughly briefed and correctly decided by the ALJ, this response will focus on two fundamental points: (1) the Commission lacks jurisdiction to grant the retroactive relief requested by CPS; and (2) CPS did not timely seek a revision to its TCOS in accordance with PURA and thus failed to properly invoke the remedy provided by PURA to address its complaints.

a. The Commission lacks jurisdiction to grant the retroactive relief requested by CPS

The Commission lacks jurisdiction to engage in the retroactive ratemaking CPS admittedly seeks.[14] As the ALJ explained in Order No. 9, the courts have determined that an agency may only set retroactive rates when doing so is both constitutional and permitted by the statute granting ratemaking power to the agency.[15] While there is no constitutional barrier to setting retroactive rates in the context of an invalid rate (such as the rate set in Docket

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[12] *Pub. Util. Comm'n of Tex. v. City Pub. Serv. Bd. of San Antonio*, 109 S.W.3d 130 (Tex. App.—Austin 2003, no pet.).

[13] CPS' Application at 7.

[14] CPS' Appeal at 5-6; CPS' Response to Motions to Dismiss at 6-7.

[15] Order No. 9 at 5-7.

No. 15613), the courts have expressly held that the PUCT lacks authority under PURA to set retroactive rates, except on remand.[16] This case, however, comes to the Commission by virtue of CPS' January 2011 petition and is not a remand. Indeed, the courts in reviewing the Commission's Docket No. 15613 order did not rule that the Commission had committed an error in setting rates that needed correction. Instead, the courts ruled that the Commission had no jurisdiction to set CPS' rates at all. Accordingly, the outcome of the court review of Docket No. 15613 in no way provides a platform for retroactively setting a new TCOS.

Seeking to skirt this straightforward reasoning, CPS claims that the "combined effect"[17] of the remand of the 1999 and 2000 ERCOT matrix dockets[18] and the reversal and rendition of Docket No. 15613 somehow "cleared the way"[19] for the Commission to set retroactive rates in this case. CPS is incorrect. This case is before the PUCT based solely on CPS' January 2011 retroactive TCOS application. This case is not and cannot be a remand of Docket No. 15613, since that docket was determined to be void and of no force and effect, due to lack of jurisdiction. Additionally, this case is not and cannot be based on the remand of the ERCOT matrix dockets, because those cases do not address any individual utility's TCOS. Agency jurisdiction cannot be cobbled together in this manner. Accordingly, the Commission lacks jurisdiction to grant the retroactive relief requested. As discussed below, absent a remand of Docket No. 15613, the only proper manner for CPS to address the level of its TCOS was to ***timely file*** a new TCOS case.

CPS claims that Order No. 9 "over-emphasizes the reference to 'remand'"[20] in interpreting the Third Court of Appeals' holding in *Southwestern Bell Telephone Company v. Public Utility Commission of Texas*.[21] In that case, the Third Court unambiguously defined the PUCT's jurisdiction to set rates retroactively, holding that "the Legislature intended, in its

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[16] Order No. 9 at 6 quoting *Southwestern Bell Telephone Company v. Public utility Commission of Texas*, 615 S.W.2d 947, 957 (Tex. Civ. App.—Austin 1981, writ ref'd n.r.e.) ("the Legislature intended, in its enactment of PURA and TAPTRA § 19, to allow for 'retroactive rate-making' to the limited extent of permitting, on remand, a meaningful proceeding to correct errors . . . .").

[17] CPS' Appeal at 5.

[18] *Proceeding to Modify ERCOT Transmission Rates for 1999 Pursuant to Substantive Rule 23.67*, Docket No. 20381, Order Denying Motions for Rehearing, Order Nunc Pro Tunc (Nov. 23, 1999); *Proceeding to Modify ERCOT Transmission Rates for 2000 Pursuant to Substantive Rule 23.67*, Docket No. 22055, Order (June 14, 2000).

[19] CPS' Response to Motions to Dismiss at 4.

[20] CPS' Appeal at 5.

[21] *Supra* note 16.

enactment of PURA and TAPTRA § 19, to allow for 'retroactive rate-making' ***to the limited extent of permitting, on remand***, a meaningful proceeding to correct errors . . . ."[22] The ruling of the court is clear, and CPS asserts no provision of PURA and no contrary or distinguishing Texas case that would lead to a different result.

CPS also urges that the ALJ indulged an overly restrictive construction of the Commission's statutory authority to fashion a remedy sufficient to its circumstances.[23] CPS concludes, "Clearly, the PUC has the power to correct prior jurisdictional errors that the courts have pointed out, when the jurisdictional predicate—here, the re-filing of the rate as initiated by the transmission service provider—not the PUC, occurs."[24] The problem with this position, however, is that the court rulings in question clearly provide that the Commission had no jurisdiction. When there is an absence of jurisdiction, the remedy is for the agency not to take action at all.[25] Hence there was no remand, and no basis for further PUCT action of the type suggested by CPS. The implication of CPS' position is astounding—that the PUCT can "correct" errors made in closed cases, at any point in the future, without a valid procedural vehicle for doing so.

Equally as unsupported, CPS asserts that the Commission can use the current application to return to the time period in which Docket No. 15613 was decided, hypothesize that a specific dispute between CPS and a transmission purchaser existed, and on the basis of those imagined hypothetical facts exercise the limited "oversight" jurisdiction, as it existed under PURA 95, in order to set a new TCOS effective for the subsequent period governed by PURA 99.[26] CPS' theory flies in the face of the ALJ's unchallenged conclusion that no dispute existed at the time of Docket No. 15613 to invoke the Commission's jurisdiction.[27] Accordingly, CPS' position must depend on the obviously erroneous assumption that once the courts have decided the Commission lacks any jurisdiction over a matter (as occurred in the judicial review of Docket No. 15613), hypothetical facts, which never existed and which formed no part of the courts'

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[22] *Id.* at 956 (emphasis added).

[23] CPS' Appeal at 5-6.

[24] CPS' Appeal at 6.

[25] *See State v. Morales*, 869 S.W.2d 941, 949 (Tex. 1994) ("When a court lacks jurisdiction, its only legitimate choice is to dismiss.").

[26] CPS' Appeal at 6.

[27] Order No. 9 at 8.

inquiry, can be conjured years after the fact as the means to manufacture jurisdiction anew and thereby undo the prior court rulings. When the courts intend for agencies to correct errors, they direct them to do so through remands. The Commission should reject CPS' invitation to effectively re-litigate a case that it had no jurisdiction to entertain in the first instance.

b. CPS failed to timely seek a revision to its TCOS in accordance with PURA

CPS is not in the position it occupies due to the lack of a remedy. Up until September 1, 1999, the Commission had no jurisdiction to set CPS' TCOS rates, and CPS was able to successfully sue in court to recover monies it had to pay out as a result of the Commission's ultra vires action.[28] As a result of the amendment of PURA effective September 1, 1999, however, the PUCT gained undisputed authority to initially establish CPS' TCOS and transmission rates. At that time, CPS had the right and the responsibility to seek a new TCOS, which would have addressed the same relief it now seeks 11 years too late.

Because the Commission lacks jurisdiction to grant the retroactive relief that CPS seeks, the reasons for CPS' decade-long delay in bringing this filing are immaterial. Nevertheless, in an attempt to persuade the Commission to ignore the absence of jurisdiction based on equitable considerations, CPS blames its delay in seeking a new TCOS to be effective September 1, 1999 on the drawn-out resolution of litigation related to the PUCT's 1996 Rules:

> CPS Energy's rate filing made January 19, 2011 is a necessary and appropriate culmination of the series of litigation matters that resulted in, and flowed from, the invalidation of the [PUCT's 1996 Rules]. . . . These proceedings, considered together, and especially the invalidation of the CPS Energy TCOS and of the two matrix orders that incorporated that TCOS, have **cleared the way for,** and ***established an authorization and responsibility*** of the PUC to consider, a proper TCOS to replace the TCOS invalidated by the courts.[29]

Simply put, CPS claims that the pendency of this related litigation somehow prevented it from seeking a new TCOS to be effective on September 1, 1999 before January 2011. That litigation, however, applied to a completely different time frame (pre-September 1, 1999), under a different version of PURA (which did not give the Commission initial rate setting jurisdiction).

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[28] The Commission approved the settlement between CPS, HL&P, and other ERCOT in three dockets: *Remand of Docket No. 15840 (Regional Transmission Proceeding to Establish Statewide Load Flow Pursuant to SUBST. R. 23.67)*, Docket No. 28870; *Remand of Docket No. 18459 (Proceeding to Modify ERCOT Transmission Rates for 1998 Pursuant to Substantive Rule 23.67)* Docket No. 29044; *Remand of Docket No. 20381 (Proceeding to Modify ERCOT Transmission Rates for 1999 Pursuant to SUBST. Rule 23.67)*, Docket No. 38780, Order (Jan. 19, 2011).

[29] CPS' Response to Motions to Dismiss at 3-4 (citations omitted and emphasis added).

Moreover, as discussed above, CPS' position is belied by the fact that this pending litigation did not prevent CPS from seeking a Commission-approved TCOS in ***May 2000*** (*see* Docket No. 22532), before any of these proceedings had been resolved. In other words, not only should CPS have sought a new TCOS prior to the resolution of any of these proceedings, CPS in fact did just that. The only difference between what CPS should have done (file a TCOS case in 1999) and what it did do (file a TCOS case in 2000) is the timing of the filing. Ultimately, regardless of the outcome of these proceedings, the passage of Senate Bill 7, which gave the PUCT initial rate-setting authority over MOUs under Chapter 35, required CPS to seek a new PUCT-approved TCOS as of September 1, 1999. CPS failed to make such a filing in a timely manner.[30]

IV. Conclusion

The courts have determined that the Commission had no jurisdiction to set CPS' TCOS prior to September 1, 1999. Furthermore, there is no remand before the Commission from any prior court proceeding authorizing the Commission to address CPS' TCOS for any past period. In these circumstances, the Commission lacks authority to retroactively alter CPS' TCOS for the time period between September 1, 1999 and December 31, 2000. Additionally, CPS has had at all times an adequate remedy to fully address any alleged inadequacy in its TCOS rates once the Commission acquired jurisdiction to set those rates as an initial matter effective September 1, 1999, as confirmed by CPS' own TCOS filing in May 2000 in Docket No. 22532. CPS' prior actions further demonstrate that pending litigation related to the PUCT's 1996 Rules was no barrier to CPS filing this request more than a decade ago.

Accordingly, Order No. 19 should be affirmed and CPS's application should be dismissed as moot and obsolete and for failing to state a claim for which the Commission can grant relief.

[30] CPS cites no authority and no logical basis for its claim that it was authorized to delay the filing of its rate case and seek retroactive rate relief because the Commission's rate-setting rules at the time it acquired jurisdiction over municipalities were not to CPS' liking. Moreover, CPS overstates the extent to which those rule prevented CPS from filing its case based on its preferred cash flow methodology. *See* AEP Texas' Motion to Dismiss at 10; AEP Texas Reply to CPS' Response to Motions to Dismiss at 9, n. 23.

Dated: December 8, 2011

Respectfully submitted,

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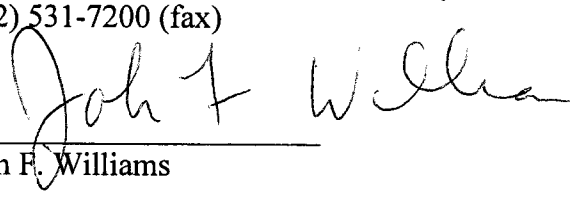

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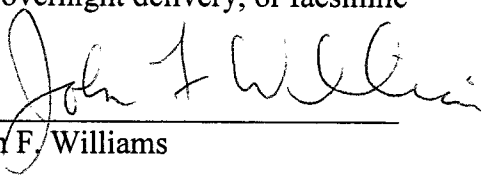
ATTORNEYS FOR AEP TEXAS CENTRAL COMPANY AND AEP TEXAS NORTH COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on all parties of record via U.S. first-class mail, hand delivery, overnight delivery, or facsimile transmission on this 8th day of December, 2011.



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