



Control Number: 41235



Item Number: 15

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SOAH DOCKET NO. 473-13-3021
PUCT DOCKET NO. 41235

2013 MAR 15 PM 1:02

APPLICATION OF ENTERGY §
TEXAS, INC. FOR APPROVAL OF §
TRANSMISSION COST §
RECOVERY RIDER §

BEFORE THE STATE
OFFICE OF ADMINISTRATIVE
HEARINGS

**CITIES' RESPONSE TO ORDER REQUESTING BRIEFING
ON THRESHOLD LEGAL/POLICY ISSUES**

The Cities of Anahuac, Beaumont, Bridge City, Cleveland, Conroe, Dayton, Groves, Houston, Huntsville, Liberty, 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 Response to Order Requesting Briefing on Threshold Legal/Policy Issues in the above styled and numbered docket. In support of the motion, Cities state the following:

INTRODUCTION

Cities initially note that the Application filed by Entergy Texas, Inc. ("ETI"), although styled as a transmission cost recovery rider, is in reality a request to increase base rates governed by PUC Proc. R. 22.243, which requires the utility to file a statement of intent with each regulatory authority having jurisdiction over the utility's rates as will be addressed in Cities' List of Issues to be filed today. Cities respond below to the specific threshold legal/policy issues requested to be addressed by the Commission.

- 1. Subsequent to ETI's transfer of operational control of its transmission assets to the MISO RTO and the transfer of ownership of its transmission assets to ITC, will ETI be operating solely within MISO?**

Yes. However, PURA § 39.902 limits the eligibility of utilities seeking a transmission cost recovery factor ("TCRF") to utilities that operate solely outside of ERCOT in areas included in the Southeastern Electric Reliability Council, among other NERC reliability regions. ETI's service area is currently located within the SERC

Reliability Corporation's (formerly known as "Southeastern Electric Reliability Council, Inc.") region. At the time Senate Bill 1492 was passed, ETI was (and remains) the only Texas utility within the SERC region. As such, the reference to SERC was intended to encompass ETI's service area.

ETI witness Jay Lewis testifies that ETI will continue to operate solely outside of ERCOT and participate in SERC.¹

- 2. Are step-up transformers and a protective device associated with the interconnection from a generating station to the transmission network, *transmission facilities* under PURA § 36.209 and or Commission Rule 25.239? In answering this question, please address the applicability of P.U.C. SUBST. R. 25.192(c)(1)(A).**

No. Consistent with PURA § 39.251(3); PUC Subst. R. 25.5(54); and PUC Subst. R. 25.192(c)(1)(A), electrical interconnections of the generation plant to the transmission system are generation facilities.

- 3. Does P.U.C. SUBST. R. 25.239 (c) provide the exclusive avenue of recovery of a utility's transmission costs outside of base rates under PURA § 36.209? If so,**

Yes. The Commission's interpretation of PURA § 36.902 is embodied in PUC Subst. R. 25.239. The Commission conducted a rulemaking, Project No. 33253, to interpret and implement PURA § 36.902 consistent with PURA. The Commission's rulemaking is the exclusive interpretation of PURA § 36.902. Given that the Legislature has knowledge of the Commission's interpretation of PURA § 36.902, and has amended the provision since the Commission adopted the Rule, and has not attempted to revise the mechanics of the provision or alter the Commission's interpretation, the Legislature is

¹ Direct Testimony of Jay Lewis at 7-8.

assumed to have accepted the interpretation.² Although the Commission is not limited to its current interpretation of PURA § 36.902, any modification to the Commission's current interpretation should be made through a rulemaking proceeding.

- a) **does the language limiting a utilities recovery of transmission cost to the changes in wholesale transmission charges to the electric utility under a tariff approved by a federal regulatory authority preclude ETI's proposed rider to the extent it seeks to include in the rider (after its next base-rate case) the total amount of the transmission service charges?**

Yes. PUC Subst. R. 25.239(f) requires that the TCRF be set to zero upon the completion of a base rate case. This issue was addressed in the Commission's rulemaking to implement the provisions of PURA § 36.902.³ The Commission's Order Adopting PUC Subst. R. 25.239 determined "that the TCRF should be an interim measure between rate cases."⁴

- b) **are carrying charges accrued on any over- and under-recoveries included in ETI's proposed rider precluded by the definition of approved transmission charges in P.U.C. SUBST. R. 25.239(b)(1)?**

Yes. PUC Subst. R. 25.239 does not include carrying charges on over recovery and under recovery balances as an approved transmission charge. Moreover, the Rule only permits the refund of overcharges.⁵ Pursuant to the Commission's Order Adopting PUC Subst. R. 25.239, the Legislature did not intend to permit the surcharge of under collections.⁶ PUC Subst. R. 25.239 is silent as to the inclusion of interest on over-recoveries.

² See *Complaint of WECO on Behalf of Dunn Equipment Against Southwestern Bell Telephone Company*, Docket No. 14935, Order No. 4 (holding that since the Commission's interpretation of PURA § 3.204, the Legislature has had two opportunities to change the provision; and because the Legislature chose not to change the provision, the Commission's interpretation remained in effect).

³ Project No. 33253, Order Adopting New § 25.239 at 25.

⁴ *Id.*

⁵ PUC Subst. R. 25.239(f).

⁶ Project No. 33253, Order Adopting New § 25.239 at 28.

c) must wholesale charges have already been approved by FERC before included in approved transmission charges?

Yes. Pursuant to PUC Subst. R. 25.239, wholesale charges must have been approved by FERC and *actually incurred* by the utility before inclusion in a TCRF.⁷

4. May the Commission grant a good-cause exception to allow recovery of wholesale transmission charges pursuant to PURA § 36.209 based on a future test year? If so, is it a good public policy to grant a good-cause exception to allow ETI recovery under a future test year in this circumstance?

No. The Commission determined, in its Order Adopting PUC Subst. R. 25.239, that PURA § 36.209 requires “a determination of the reasonableness and necessity of the transmission expenditure, before they are recovered through the TCRF.”⁸ Moreover, the Commission determined that the Legislatures use of the term “reasonable and necessary” required a specific finding that would not be subject to later true-up or reconciliation such as in a fuel factor proceeding.⁹ A final reasonableness determination of the actual expenses cannot be made based upon projections of future expenses. Therefore, ETI’s request to recover future wholesale charges through the proposed rider does not only violate PUC Subst. R. 25.239, but also violates PURA § 36.209. The Commission may grant a good cause exception to its own rules, but may not grant a good cause exception to compliance with PURA.

Even if it were permissible, it is also not good public policy to permit ETI’s rate mechanism designed to charge customers projected future costs for all the reasons set out in this response as well as Cities’ List of Issues filed today.

⁷ PUC Subst. R. 25.239(c). *See also* PUC Subst. R. 25.239(b) (limiting transmission investment to “as booked” amounts in certain FERC accounts).

⁸ Project No. 33253, Order Adopting New § 25.239 at 32.

⁹ *Id.*

5. **Assuming for purposes of this question that P.U.C. SUBST. R. 25.239 does not provide the exclusive means that the Commission may authorize recovery of certain transmission cost outside of a base-rate proceeding, would it be good public policy for the Commission to allow a utility to recover transmission costs through a rider that does not strictly comply with that rule?**

No. The entire purpose of the Rule and rulemaking proceedings is to develop the Commission's interpretation of the statute as well as the public policy implications arising from implementation of the statute. While it may be acceptable to allow slight deviations from the rule when good cause exists, ETI is not simply requesting slight deviations from the Rule. To the contrary, ETI's request does not make the slightest attempt to comply with any provision of the Rule.

ETI's application does not even cite to PUC Subst. R. 25.239. ETI's application seeks an increase to base rate charges¹⁰—not a TCRF rate to be applied to customer billing determinates. ETI's application does not quantify the transmission investment costs embedded in current rates,¹¹ and so cannot be said to calculate the net change in transmission investment costs. ETI's application proposes to use a forward looking test period with projected costs,¹² as opposed to a historical test period with actual costs as contained in the TCRF Rule.¹³ The TCRF Rule requires a finding of reasonableness,¹⁴

¹⁰ See Direct Testimony of Jay Lewis, Exhibit JAL-2, Proposed Tariff at Attachment A (determining a percentage increase to the base rate revenues determined in ETI's last rate case).

¹¹ See *id.* at Attachment B, page 4 of 4 (quantifying a percentage of base rate revenues argued to be transmission related).

¹² Direct Testimony of Jay Lewis at 4.

¹³ PUC Subst. R. 25.239(b) (limiting transmission investment to "as booked" amounts in certain FERC accounts).

¹⁴ PUC Subst. R. 25.239(c); see also Order Adopting New § 25.239 at 34 ("[T]he commission interprets § 36.209 to require a determination of the reasonableness and necessity of the transmission expenditure, before they are recovered through the TCRF.").

and only permits a refund of TCRF over collections.¹⁵ ETI's proposal cannot viably result in a reasonableness determination as it is based upon projected future costs.

Moreover, because ETI's proposal relies upon projected future costs for determining a revenue requirement, the true-up provision under ETI's proposal only reconciles actual revenues with the *estimated or projected* revenue requirement.¹⁶ If the projected revenue requirement turns out to overestimate actual costs, the overcharges would not be refunded to customers under ETI's proposal as would have been required under a TCRF mechanism and PURA § 36.209.¹⁷

ETI's application also goes far beyond the cost recovery mechanisms adopted in the TCRF Rule and requires 1) the creation of a regulatory asset,¹⁸ 2) recovery of amortization and carrying costs of the regulatory asset,¹⁹ 3) an annual filing and procedures inconsistent with the filing requirements and procedures of PUC Subst. R. 25.239,²⁰ 4) interim adjustments in contravention of PUC Subst. R. 25.239(f),²¹ 5) provisions for the recovery of under-recovered revenue requirements in contravention of

¹⁵ PUC Subst. R. 25.239(f).

¹⁶ Direct Testimony of Jay Lewis, Exhibit JAL-2, Proposed Tariff at Attachment B, page 3 (citing the proposed estimated future revenue requirement stated on Attachment B page 1 of the proposed tariff as the value being true-up).

¹⁷ PUC Subst. R. 25.239(f). Because the TCRF Rule uses actual costs in determining a TCRF revenue requirement, any revenue in excess of the proposed revenue requirement in a TCRF proceeding would also be revenues in excess of actual costs.

¹⁸ Direct Testimony of Jay Lewis, Exhibit JAL-2, Proposed Tariff at 4.

¹⁹ Direct Testimony of Jay Lewis, Exhibit JAL-2, Proposed Tariff at Attachment B, page 1, lines 3-4.

²⁰ Compare Direct Testimony of Jay Lewis, Exhibit JAL-2, Proposed Tariff at 2-3, with Order Adopting New § 25.239 at 32 ("The commission finds that the establishment of a procedural schedule is not warranted at this time. Each utility will have different levels of costs that will need to be reviewed in the initial TCRF filings and the procedural schedule should be set by the participating parties to reflect the amount of time for an appropriate review. In addition, because of the requirements for notice and hearing before commission approval of the recovery of transmission expenditures that must be reasonable and necessary, the commission interprets § 36.209 to require a determination of the reasonableness and necessity of the transmission expenditure, before they are recovered through the TCRF. As a result, a non-ERCOT TCRF proceeding is not analogous to a fuel factor proceeding in which issues of reasonableness and necessity of expenditures are deferred until a subsequent fuel reconciliation proceeding.").

²¹ Direct Testimony of Jay Lewis, Exhibit JAL-2, Proposed Tariff at 4.

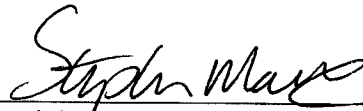
PUC Subst. R. 25.239(f),²² and 6) carrying costs on under-recovery balances at the before tax weighted average cost of capital.²³ Each of these requested provisions contradict the Commission's TCRF Rule and may only be requested, if at all, through a rule change or through a statement of intent proceeding.

For the foregoing reasons, ETI's application is not a TCRF filing pursuant to PUC Subst. R. 25.239. Rather, ETI's application is a request to change base rates governed by PUC Proc. R. 22.243, which requires the utility to file a statement of intent with each regulatory authority having jurisdiction over the utility's rates.

PRAYER

For the above stated reasons, Cities respectfully request that Cities' Responses to the Commission's Request for Briefing be incorporated into the Commission's Preliminary Order and Final Order in this proceeding and all other relief to which they may show themselves to be justly entitled.

Respectfully submitted,
LAWTON LAW FIRM, P.C.



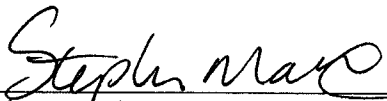
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²² Direct Testimony of Jay Lewis, Exhibit JAL-2, Proposed Tariff at 4. PUC Subst. R. 25.239(f) ("[T]he commission shall not order the surcharge of any under-recovery."). *See also* Order Adopting New § 25.239 at 28 ("The statutory language regarding the recovery of non-ERCOT transmission infrastructure improvement costs explicitly prohibits over-recoveries, but does not explicitly require a provision for under-recoveries. Therefore, the commission finds it necessary for the rule to require a refund of such over-recoveries.").

²³ Direct Testimony of Jay Lewis, Exhibit JAL-2, Proposed Tariff at Attachment B, page 3, lines 10 & 11.

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 15th day of March 2013, by First Class, U.S. Mail, facsimile transmission, or hand delivery.



Stephen Mack