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APPLICATION OF CENTERPOINT § BEFORE THE STATE OFFICE
ENERGY HOUSTON ELECTRIC, LLC § OF
FOR AUTHORITY TO CHANGE RATES § ADMINISTRATIVE HEARINGS

2019 JUN 10 PM 2:32
PUC UTILITY COMMISSION
FILING CLERK

**CENTERPOINT ENERGY HOUSTON ELECTRIC LLC'S MOTION TO STRIKE
PORTIONS OF THE DIRECT TESTIMONY OF
CHARLES S. GRIFFEY AND MICHAEL P. GORMAN**

CenterPoint Energy Houston Electric, LLC ("CenterPoint Houston" or the "Company") files this motion to strike portions of the direct testimony of Charles S. Griffey and Michael P. Gorman filed on behalf of Texas Industrial Energy Consumers ("TIEC").

I. INTRODUCTION

On June 6, 2019, Charles S. Griffey and Michael P. Gorman filed direct testimony on behalf of TIEC. The Company requests that the Administrative Law Judges strike portions of the witnesses' direct testimony.

II. MOTION TO STRIKE

A. Portions of Mr. Griffey's and Mr. Gorman's testimony are not of consequence in determining the outcome of this proceeding.

Evidence is relevant only if "it has a tendency to make a fact more or less probable than it would be without the evidence, and the fact is of consequence in determining the action."¹ To determine relevancy, the Commission must look at the purpose for offering the evidence.²

Here, Mr. Griffey and Mr. Gorman offer testimony for a clearly stated purpose that is not of consequence in determining this action. Namely, they propose that the Commission impose "ring-fencing" protections on CenterPoint Houston.³ As shown below, the Commission cannot

¹ Tex. R. Evid. 401(a)-(b).

² *Rhey v. Redic*, 408 S.W.3d 440, 460 (Tex. App.—El Paso 2013, no pet.).

³ Direct Testimony of Charles S. Griffey at 23:13-19. Direct Testimony of Michael P. Gorman at 6:14-21.

impose ring-fencing within the context of a rate proceeding, so Mr. Griffey's proposals cannot influence the Commission's action in this case and therefore those portions of his testimony are irrelevant. Irrelevant testimony is inadmissible.⁴

B. The portions of testimony identified below are irrelevant because The Public Utility Commission of Texas ("Commission") does not have the statutory authority to order the ring-fencing the witnesses propose.

The Commission "is a creature of the Legislature and has no inherent authority."⁵ Like other state administrative agencies, the Commission "has only those powers that the Legislature expressly confers upon it" and "any implied powers that are necessary to carry out the express responsibilities given to it by the Legislature."⁶ The agency may not "exercise what is effectively a new power, or a power contradictory to the statute, on the theory that such a power is expedient for administrative purposes."⁷

Here, the Chapter 36 rate-setting provisions do not expressly authorize the Commission to impose ring-fencing conditions.⁸ And, because the Commission has previously set rates without imposing ring-fencing conditions, such a power is not necessary to carry out the Commission's express responsibilities. Thus, the Commission does not have the statutory authority to impose ring-fencing conditions within the context of a Chapter 36 rate case.

Importantly, each example of ring-fencing that Mr. Griffey discusses in his direct testimony was considered by the Commission through its authority to review and approve certain sale, transfer, and merger transactions under the Public Utility Regulatory Act ("PURA") §§ 39.262, 39.915, or 14.101. Specifically, PURA §§ 39.262(o) and 39.915(d) state that "the

⁴ Tex. R. Evid. 402.

⁵ Public Util. Comm'n v. GTE-Southwest, Inc., 901 S.W.2d 401, 407 (Tex. 1995).

⁶ Public Util. Comm'n v. City Pub. Serv. Bd., 53 S.W.3d 310, 316 (Tex. 2001).

⁷ *Id.*

⁸ See PURA Chapter 36.

commission may enforce a stipulation, representation, or commitment . . .” made by a person seeking commission approval of a sale, transfer, or merger that is subject to the Commission’s jurisdiction under those sections or section 14.101. Accordingly, in those cases, if the Commission determines that a proposed transaction requires that a utility be ring-fenced, the parties to the transaction can commit to creating those ring-fencing protections, and the Commission can enforce those commitments. This specific statutory scheme is limited to review of certain transactions and it further illuminates why ring-fencing is not statutorily authorized in a rate case.

As a matter of statutory construction, if the Commission had a general implied power to enforce ring-fencing, the specific grant of statutory authority given to the Commission in its review of certain transactions would be redundant and a functional nullity. Moreover, Texas courts have already determined there is not a general power to enforce ring-fencing provisions. In *Nucor Steel-Texas v. Public Utility Comm’n of Texas*,⁹ the court held that, “[P]rior to the enactment of subsection 39.262(o), the Commission had no express statutory authority to enforce stipulations filed as part of a notification of a proposed transaction under section 14.101.” However, “section 39.262(o) granted the Commission the additional authority to enforce stipulations made as part of a filing under section 14.101.”¹⁰ In other words, prior to the enactment PURA § 39.262(o) and 39.915(d) there was no authority to enforce ring-fencing. Moreover, the enactment created that authority for a specific purpose: the review and approval of certain transactions that are subject to the Commission’s jurisdiction. That new authority does not extend to the Commission’s exercise of its ratemaking jurisdiction.

Additionally, in the case where a potential transaction is under review by the Commission, if a party (or the Commission) suggests ring-fencing provisions are necessary, the parties to a

⁹ 363 S.W.3d 871 (Tex. App.—Austin 2012, no pet.).

¹⁰ *Id.* at 883.

transaction can evaluate the proposal and decide whether or not to close the transaction with such ring-fencing in place. Put differently, the Commission may require certain ring-fencing as a condition of approval, but it cannot unilaterally impose ring-fencing conditions. For example, as Mr. Griffey concedes in his testimony, the Commission did not impose ring-fencing conditions that it thought were necessary in Docket No. 46238.¹¹ Rather, the Commission denied the proposed transaction. In contrast, Mr. Griffey is proposing that the Commission unilaterally impose ring-fencing conditions in this case. Even if this were a situation where the Commission could rely on PURA § 39.262(o) or 39.915(d), which it is not, Mr. Griffey's recommendation goes beyond the statutory authority granted in those provisions.

In sum, the actions that Mr. Griffey and Mr. Gorman propose that the Commission take are not authorized by statute, so those portions of testimony are not relevant to this proceeding. Accordingly, CenterPoint Houston moves to strike the following portions of testimony:

Charles S. Griffey

1. Page 3, line 12 through line 18
2. Page 7, line 9 beginning "As seen in" through line 14
3. Page 12, line 3 through line 4, ending "utility."
4. Page 12, line 13 through line 15
5. Page 12, line 16-21
6. Page 13, line 1 through Page 16, line 14
7. Page 18, line 8, through Page 24, line 5
8. Page 28, line 18 through Page 29, line 9

Michael P. Gorman

1. Page 6, line 14 beginning "TIEC witness Charles" through line 18 ending "Indeed"

¹¹ Direct Testimony of Charles S. Griffey at 16:1-8.

2. Page 6, line 18 “these ring-fencing separations, and”
3. Page 6, line 21 beginning “Therefore, separating” through Page 7, line 6
4. Page 22, line 13 beginning “However, CEHE’s” through Page 27, line 26
5. Page 32, line 21 through Page 37, line 2

III. CONCLUSION

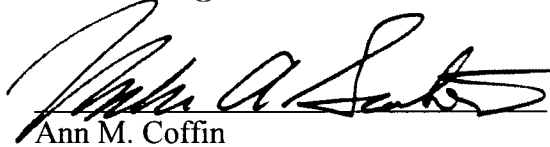
CenterPoint Houston respectfully requests that the Administrative Law Judges strike the above-referenced portions of the testimonies of Charles S. Griffey and Michael P. Gorman for the reasons stated herein, and that it be granted such further relief to which it has shown itself entitled.

Respectfully submitted,

Patrick H. Peters III
Associate General Counsel and
Director of Regulatory Affairs
CenterPoint Energy, Inc.
1005 Congress Avenue, Suite 650
Austin, Texas 78701
512.397.3032
512.397.3050 (fax)
patrick.peters@centerpointenergy.com

Mickey Moon
Assistant General Counsel
CenterPoint Energy, Inc.
1111 Louisiana, 19th Floor
Houston, Texas 77002
713.207.7231
713.454.7197 (fax)
mickey.moon@centerpointenergy.com

Coffin Renner LLP
1011 West 31st Street
Austin, Texas 78705
512.879.0900
512.879.0912 (fax)
ann.coffin@crtxlaw.com
mark.santos@crtxlaw.com



Ann M. Coffin
State Bar No. 00787941
Mark A. Santos
State Bar No. 24037433

**COUNSEL FOR CENTERPOINT ENERGY
HOUSTON ELECTRIC, LLC**

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of June 2019, a true and correct copy of the foregoing document was served on all parties of record in accordance with 16 Tex. Admin. Code § 22.74.



Mark A. Santos