



Control Number: 49421



Item Number: 565

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**SOAH DOCKET NO. 473-19-3864  
PUC DOCKET NO. 49421**

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

APR 17 11:25 AM

**CENTERPOINT ENERGY HOUSTON ELECTRIC LLC'S  
MOTION TO STRIKE PORTIONS OF THE DIRECT TESTIMONY OF  
DARRYL TIETJEN AND WILLIAM B. ABBOTT**

**I. INTRODUCTION**

On June 12, 2019, Public Utility Commission of Texas (“Commission”) Staff filed the Direct Testimony of Darryl Tietjen. In his testimony, Mr. Tietjen recommends, among other things, that the Commission unilaterally impose financial protections or “ring-fencing” on CenterPoint Energy Houston Electric, LLC (“CenterPoint Houston” or the “Company”) in this rate case (“the Ring-Fencing Testimony”). The Company requests that the Administrative Law Judges strike the Ring-Fencing Testimony and related workpapers because Staff’s proposal to impose ring-fencing on CenterPoint Houston in this case exceeds the Commission’s statutory authority and therefore cannot be of consequence in the case. Facts that are not of consequence in a case are irrelevant and inadmissible. In addition, the Company requests that the Administrative Law Judges strike portions of the Direct Testimony of William B. Abbott related to rate case expenses because those issues have been severed from this docket.

**II. BACKGROUND ON PRELIMINARY ORDER ISSUE NO. 9**

The Commission’s Preliminary Order Issue No. 9 takes no position on whether Commission-imposed financial protections, also known as “ring-fencing,” are statutorily authorized under the Public Utility Regulatory Act (“PURA”). The language of Order Issue No. 9 is carefully drafted and precise:

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9. Are any protections, such as financial protections, *appropriate* to protect CenterPoint's financial integrity and ability to provide reliable service at just and reasonable rates?<sup>1</sup>

Whether it is “appropriate” for the Commission to unilaterally impose ring-fencing is a two-part question. First, the Commission must determine whether, as a threshold matter, the Legislature has granted the Commission authority to unilaterally impose financial protections or “ring-fencing” on a utility within the scope of a rate proceeding. Second, if such authority exists (which it does not), the Commission must determine whether the facts of this case support Commission-imposed ring-fencing as a matter of policy. Notably, Staff acknowledges and addresses this threshold legal issue in the Ring-Fencing Testimony<sup>2</sup> and, in fact, helps to illustrate that there is no legal basis for imposing ring-fencing in this case.

### III. MOTION TO STRIKE TESTIMONY OF DARRYL TIETJEN

- A. The Commission does not have the power to enforce ring-fencing because there is no express statutory authority and such a power is not necessary to carry out any expressly delegated duty.**

The Commission “is a creature of the Legislature and has no inherent authority.”<sup>3</sup> 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.”<sup>4</sup> 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.”<sup>5</sup> “Where a power is granted, and the method of its exercise is prescribed, the prescribed method excludes all others and must be followed.”<sup>6</sup>

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<sup>1</sup> Preliminary Order at 3 (emphasis added).

<sup>2</sup> Direct Testimony of Darryl Tietjen at 3:24-4:26.

<sup>3</sup> *Public Util. Comm'n v. GTE-Southwest, Inc.*, 901 S.W.2d 401, 407 (Tex. 1995).

<sup>4</sup> *Public Util. Comm'n v. City Pub. Serv. Bd.*, 53 S.W.3d 310, 316 (Tex. 2001).

<sup>5</sup> *Id.*

<sup>6</sup> *Cobra Oil & Gas Corp. v. Sadler*, 447 S.W.2d 887, 892 (Tex. 1968); *Tex. Mun. Power Agency v. PUC of Tex.*, 253 S.W.3d 184, 192-193 (Tex. 2007).

In the Ring-Fencing Testimony, Staff identifies two statutes as the source of the Commission’s presumed power to impose ring-fencing, PURA §§ 11.002 and 14.001.<sup>7</sup> Importantly, these provisions state the Commission’s general purpose and authority but make no mention of the Commission’s authority to impose financial protections or ring-fencing on an electric utility. Staff cites PURA § 14.001, however, for the proposition that the Commission may take any action and “do anything specifically designated or implied by this title that is necessary and convenient to the exercise of that power and jurisdiction.”<sup>8</sup> Because the Commission lacks any designated authority to impose financial protections or “ring-fencing” on an electric utility (and Staff identifies none), it can only be assumed that Staff believes such authority is implied under the statute. This position is wrong.

PURA § 14.001 explicitly states, and Texas case law reinforces, that an agency’s implied power must be necessary to carry out an expressly delegated responsibility.<sup>9</sup> Staff argues that the Commission’s responsibility to ensure an electric utility’s provision of reliable service at reasonable rates contemplates the imposition of financial protections and standards on an electric utility even if the utility opposes such measures.<sup>10</sup> Again, Staff is incorrect.

Under PURA, the prescribed method for protecting a utility’s financial integrity occurs in the rate setting process—the Commission can set a capital structure and return on equity through its Chapter 36 rate-setting powers. When the Legislature has prescribed certain methods for exercising a power, other methods are not to be implied out of necessity.<sup>11</sup> The Commission’s established and statutorily prescribed methods for setting rates remain sufficient for protecting a utility’s financial integrity. Further, while TIEC has argued in response to the Company’s Motion

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<sup>7</sup> Direct Testimony of Darryl Tietjen at 3:26-27.

<sup>8</sup> PURA § 14.001.

<sup>9</sup> *GTE–Southwest, Inc.*, 901 S.W.2d at 407.

<sup>10</sup> Direct Testimony of Darryl Tietjen at 6:21-27.

<sup>11</sup> *Cobra Oil & Gas Corp.*, 447 S.W.2d at 892; *Tex. Mun. Power Agency*, 253 S.W.3d at 192-193.

to Strike Portions of the Direct Testimony of Charles S. Griffey and Michael P. Gorman that the Commission has issued orders containing conditions on non-rate issues in other Chapter 36 rate proceedings, none of those conditions were contested or subject to appeal and review. A utility's acquiescence in certain situations to the Commission issuing an order beyond its statutory authority cannot grant the Commission authority not granted by statute.<sup>12</sup>

Additionally, Staff discusses the steps that the Commission has taken in sale-transfer-merger ("STM") proceedings to insulate utilities from a parent company's bankruptcy risk.<sup>13</sup> Staff argues that the Commission action in those cases justifies a conclusion that the Commission can impose ring-fencing in all cases. This argument, however, ignores the fact that the statutory power given to the Commission in an STM proceeding under PURA §§ 39.262 and 39.915 *does not* allow the Commission to impose ring-fencing requirements unilaterally. Rather, the Commission's authority is limited to the approval or denial of the transaction based on its determination of whether the transaction is in the public interest.<sup>14</sup> While the Commission may consider ring-fencing commitments offered by parties to the transaction and it may condition approval of the transaction on the parties' acceptance of ring-fencing conditions, it may not impose ring-fencing conditions on parties over parties' objection.<sup>15</sup> Thus, it is incorrect to say that the Commission has "ordered ring-fencing provisions"—parties have simply agreed to accept such provisions and the Commission included these agreed to protections in its orders.<sup>16</sup> Here, however, if the Commission were to order ring-fencing conditions—presumably by ordering CenterPoint Houston to execute particular governance documents and credit agreements—it would be imposing such

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<sup>12</sup> *GTE-Southwest, Inc.*, 901 S.W.2d at 407.

<sup>13</sup> Direct Testimony of Darryl Tietjen at 7:12-8:2; 16:1-17:10.

<sup>14</sup> PURA §§ 39.262(m) and 39.915(b).

<sup>15</sup> See PURA §§ 39.262(o) and 39.915(d) which also gives the Commission the authority to enforce conditions and commitments made by parties to a proposed transaction.

<sup>16</sup> Direct Testimony of Darryl Tietjen at 7:14-15.

conditions over CenterPoint Houston’s objection. This, in turn, causes serious interference with CenterPoint Houston’s property rights and raises constitutional issues inviting appeal. In short, Commission precedent on ring-fencing is not applicable here.

Staff also mischaracterizes the testimony and RFI responses that CenterPoint Houston provided in its last comprehensive rate case.<sup>17</sup> CenterPoint Houston’s testimony and RFI responses in that case do not discuss ring-fencing *imposed* by the Commission. Even the passages selectively quoted by Staff confirm that the subject was ring-fencing provisions employed by CenterPoint Houston, not ring-fencing imposed by the Commission.<sup>18</sup> The parts of the RFI response that are not quoted by Mr. Tietjen are also clear on this point. After CenterPoint Houston stated “PURA and the Commission’s Substantive Rules require CEHE to employ such practices,” it quoted statutory and rule requirements that apply to all utilities such as the requirement that “[c]osts are to be separated and allocated in accordance with regulatory rules” and the Commission’s affiliate rules.<sup>19</sup> This is not the controversial type of “ring-fencing” recommended by Staff, which includes such provisions as a dividend restriction commitment (also known as a dividend stopper).<sup>20</sup> Furthermore, the comments made by witnesses in a prior proceeding cannot change the Commission’s statutory authority. The Legislature did not grant that power to the Commission in PURA, either expressly or by implication.

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<sup>17</sup> Direct Testimony of Darryl Tietjen at 9:1-32.

<sup>18</sup> Direct Testimony of Darryl Tietjen at 9:17-19 (“Ring-fencing occurs when a regulated public utility business financially *separates itself* from its parent or an affiliate ...”) (emphasis added).

<sup>19</sup> *Application of CenterPoint Energy Houston Electric, LLC for Authority to Change Rates*, Docket No. 38339, Order on Rehearing (June 23, 2011); CenterPoint Houston’s Response to GCCC 1-17 at 107.

<sup>20</sup> Direct Testimony of Darryl Tietjen at 14:15-17.

**B. Because Staff's recommendations cannot lawfully be imposed by the Commission, the Ring-Fencing Testimony is of no consequence to this proceeding and is irrelevant.**

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."<sup>21</sup> To determine relevancy, the Commission must look at the purpose for offering the evidence.<sup>22</sup>

Here, the purpose of the Ring-Fencing Testimony is to recommend that the Commission impose ring-fencing.<sup>23</sup> As shown above, the Commission cannot impose ring-fencing, so these proposals cannot influence the Commission's action in this case and therefore those portions of the testimony are irrelevant. Irrelevant testimony is inadmissible.<sup>24</sup> Accordingly, CenterPoint Houston moves to strike Page 3, line 24 through Page 17, line 10 of the Direct Testimony of Darryl Tietjen. CenterPoint Houston also moves to strike the workpapers cited by Staff as support for the Ring-Fencing Testimony:

- Moody's January 28, 2019 Report (redacted)
- Fitch Ratings' November 2, 2018 Report (redacted)
- S&P Global Rating's February 1, 2019 Report (redacted)
- Excerpt (one page) from Rebuttal Testimony of John J. Reed, Docket No. 38339
- CEHE Response (three pages) to GCCC RFI 1-07, Docket 38339
- CEHE Response (one page) to TIEC RFI 2-06
- CEHE Response (one page) to TIEC RFI 2-07
- CEHE Response (one page) to TIEC RFI 2-08
- CEHE Response (one page) to TIEC RFI 2-09
- CEHE Response (one page) to TIEC RFI 2-10
- CEHE Response (one page) to Staff RFI 13-03
- CEHE Response (one page) to Staff RFI 13-04
- CEHE Response (one page) to Staff RFI 13-05

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<sup>21</sup> Tex. R. Evid. 401(a)-(b).

<sup>22</sup> *Rhey v. Redic*, 408 S.W.3d 440, 460 (Tex. App—El Paso 2013, no pet.).

<sup>23</sup> Direct Testimony of Darryl Tietjen at 14:1-15:33.

<sup>24</sup> Tex. R. Evid. 402.

#### **IV. MOTION TO STRIKE TESTIMONY OF WILLIAM B. ABBOTT**

On June 12, 2019, Commission Staff filed the Direct Testimony of William B. Abbott. In the testimony, Staff raises rate case expense issues that have been severed from this docket.<sup>25</sup> Accordingly, the rate case expense issues discussed in the testimony are not to be decided in this case, and that portion of testimony is therefore irrelevant. Consistent with standard Commission practice, and to prevent confusion of the issues, all rate case expense issues should be raised and appropriately decided in Docket No. 49595, *Review of Rate Case Expenses Incurred by CenterPoint Energy Houston Electric, LLC in Docket Nos. 38339, 45747, 47032, 47364, 48226, and 49421*. CenterPoint Houston moves to strike the following portions of the Direct Testimony of William B. Abbott:

- Page 23, line 12 through Page 24, line 21
- Page 25, line 10 beginning with “and CenterPoint” through page 25, line 11

#### **V. CONCLUSION**

CenterPoint Houston respectfully requests that the Administrative Law Judges strike the above-referenced portions of the Direct Testimony of Darryl Tietjen and the Direct Testimony of William B. Abbott for the reasons stated herein, and that it be granted such further relief to which it has shown itself entitled.

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<sup>25</sup> SOAH Order No. 5, Granting Motion to Sever Rate Case Expense Issues and Establishing a New Docket at 2 (Jun. 4, 2019).



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, 19<sup>th</sup> Floor  
Houston, Texas 77002  
713.207.7231  
713.454.7197 (fax)  
mickey.moon@centerpointenergy.com

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

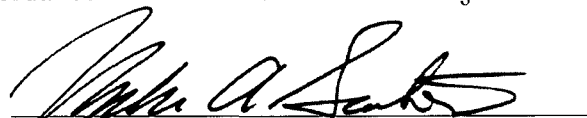


Ann M. Coffin  
State Bar No. 00787941  
Mark A. Santos  
State Bar No. 24037433

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

**CERTIFICATE OF SERVICE**

I hereby certify that on this 17<sup>th</sup> 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