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PUC DOCKET NO. 49421

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

H-E-B, LP'S RESPONSE TO REQUEST FOR BRIEFING

H-E-B, LP ("H-E-B") files its *Response to Request for Briefing* in this docket. On November 15, 2019, the Commission issued a request for briefing related to the interaction between the proposed ring-fencing measure limiting payment of dividends and CenterPoint Energy Houston Electric, LLC's ("CenterPoint") adjustment of its equity ratio to comply with the Commission's proposed capital structure. The deadline for filing initial briefs is November 25, 2019; therefore, this pleading is timely filed.

I. REPLY TO BRIEFING

1. **Will CenterPoint's compliance with the Commission's tentative decision on CenterPoint's capital structure necessitate noncompliance with its decision on ring-fencing? In addressing this issue, please reference the specific provisions of PURA or the Commission rules that require CenterPoint to make its actual capital structure match the capital structure the Commission uses to set rates.**

No compliance issue will be created if the Commission exercises its authority to direct CenterPoint to adjust its capital structure and implement ring-fencing requirements. These actions are well within the Commission's authority to order and they are not mutually exclusive. CenterPoint alleges that the two provisions are in conflict because the only way for CenterPoint to adjust its capital structure to a 60/40 capital structure to conform to the Commission's decision is to make an $800,000,000 dividend to its parent company, CenterPoint Energy, Inc. ("CNP"). CenterPoint's complaint is that the Commission's decision will leave it with too much money. This excess cash on hand is the one issue that CenterPoint alleges, without support in the record and without evidence, should prohibit the Commission from exercising its authority to modify CenterPoint's capital structure, thus leaving ratepayers on the hook for paying returns on equity that are both unjust and unreasonable. Under CenterPoint's new theory, the only way that

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CenterPoint can liquidate excess cash is by upstreaming amounts in a dividend to shareholders. This is a novel argument; however, it is both unfounded and incorrect.

Multiple pathways exist for CenterPoint to implement a capital structure shift without violating any of the proposed ring-fencing provisions. CenterPoint's failure to raise its compliance concerns at any point throughout this proceeding, including through timely filing of Rebuttal Testimony, despite the fact that multiple parties, including H-E-B, supported both the Commission's standard capital structure and the ring-fencing requirements, makes it difficult to affirmatively identify the multitude of options available to CenterPoint for adjusting its capital structure within the bounds of a ring-fencing order. However, even with no factual development of this issue, the record evidence demonstrates that CenterPoint has the capability to both comply with an order to implement ring-fencing measures and modify its existing capital structure.

The most straightforward avenue for CenterPoint to attain compliance would be to spend the $800,000,000 or to incur additional debt. The $800,000,000 cash on hand is not working for ratepayers. It is sitting at the CenterPoint level and requiring ratepayers to pay returns on that equity. CenterPoint has many planned capital investments that could be undertaken on an expedited schedule to spend the $800,000,000 differential needed to reach a 60/40 capital structure. CenterPoint has projected capital expenditures of $1,208,000,000 in 2020 and CenterPoint has provided no evidence to suggest that it is unable to use the $800,000,000 differential to finance its 2020 capital expenditures. In addition, CenterPoint can also take on additional debt to adjust its capital structure and CenterPoint has provided no evidence to show it cannot incur additional debt in a timely manner to achieve or assist with a change. Done in tandem, these actions could enable CenterPoint to quickly come into compliance with the Commission's order and present no conflict with the ring-fencing provisions.

Another possible action is for CenterPoint to use the CenterPoint affiliate money pool to deposit CenterPoint's excess funds. During the November 14th Open Meeting, the Commissioners expressly contemplated allowing CenterPoint to continue to participate in the money pool, which enables CenterPoint to make its excess funds available to affiliate entities to borrow, and vice versa. Monies that are invested into or borrowed from the money pool are recorded in specific FERC accounts. However, because CenterPoint did not provide evidence on the accounting and operation of the money pool, the record does not reflect whether transfers to the money pool would be considered equity within CenterPoint's capital structure calculation.

Throughout this proceeding, CenterPoint consistently denied the parties' requests to extend the statutory deadline to conduct discovery on contested issues. CenterPoint agreed to extend the statutory deadline solely for the self-serving purpose of considering this compliance issue. Because CenterPoint did not raise this issue until the last minute at the November 14, 2019 Open Meeting, the parties have had no opportunity to review, ask discovery, or provide their own evidence with respect to this issue. What is clear, however, is that even if CenterPoint does not spend its excess money on capital expenditures or incur additional debt, it is arguable whether any dividend to CNP would result in this instance. CenterPoint can meet the Commission's preferred capital structure by recapitalizing and reorganizing its debt and equity mixtures. The Commission has well established authority to impose capital structure requirements on a utility. PURA § 14.001 grants the Commission "the general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by this title that is necessary and convenient to the exercise of that power and jurisdiction." The Commission has long interpreted this authority to encompass the ability to determine what types of debt and equity are included in a utility's debt-to-equity ratio.[1] A State Court of Appeals recently reaffirmed the Commission's authority to reasonably establish a utility's capital structure. The court held that:

> [i]n setting rates for a public utility company, the Commission is required to establish the utility's overall revenues at an amount that will permit the utility a reasonable opportunity to earn a reasonable return on the utility's invested capital. (PURA 36.051). Part of this rate-setting process is determining the appropriate capital structure for the utility.[2]

Further, it is not uncommon for the Commission to order a market participant to make changes to its current capital structure as part of the Commission's regulatory authority.

The Commission has both the authority to determine the appropriate capital structure for a utility and the authority to require a utility to implement and meet the capital structure the

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[1] *Joint Report and Application of Oncor Electric Delivery Company and Texas Energy Future Holdings Limited Partnership Pursuant to PURA § 14.101*, Docket No. 34077, Order on Rehearing at 16 (Apr. 24, 2008).

[2] Southwestern Pub. Serv. Co. v. *Pub. Util. Comm'n of Tex*, No. 07-17-00146-CV, 2018 Tex. App. Lexis 2991 at *5 (Tex. App.—Amarillo 7th Dist. Apr. 26, 2018) (mem. op.) citing *Pioneer Nat. Res. USA, Inc. v. Pub. Util. Comm'n of Tex.*, 303 S.W.3d 363, 370 (Tex. App – Austin 2009, no pet.).

Commission has determined is appropriate.[3] Utilities often accomplish this by recapitalizing and reorganizing their debt and equity mixtures. Staff witness Mr. Tietjen acknowledged the same at the Commission's November 14, 2019 Open Meeting. For example, all utilities in ERCOT were required to recapitalize their debt and equity mixtures to meet the Commission's ordered capital structure in Docket No. 22344 to reach the 60/40 debt to equity structure when the market moved to competition.

CenterPoint has not shown why it cannot recapitalize and reorganize its debt and equity mixture to meet the Commission's mandate.

Because PURA gives the Commission the authority to determine the appropriate capital structure for a utility, it follows in turn that the Commission has the authority to require a utility to make its actual capital structure match the capital structure the Commission has determined is appropriate.[4] It is also within the Commission's discretion to determine that a utility's actual capital structure should not be the capital structure used for rate-making purposes. The Commission has considerable discretion and latitude to determine what capital structure is appropriate for a utility. Indeed, a State Court of Appeals recently found that:

> if the Commission were bound to dogmatically accept a utility's actual capital structure in every instance, there would be no need for the Commission to review any utility's capital structure. If such were the rule, the Commission's obligation to ensure that the rate it sets is just and reasonable would be vitiated. *See* PURA 36.003(a).[5]

Once determined by the Commission, it becomes the obligation of the utility to comply with the Commission's directive. However, it is also within the Commission's discretion to recognize and acknowledge that the nature of a utility's day-to-day actual capital structure is such that the ratio will fluctuate and will not, at any given time, be precisely the ratio ordered by the Commission.

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[3] *See* PURA § 36.002 (requiring utilities to comply with Commission rate setting directives).

[4] *See* Id.

[5] Southwestern Pub. Serv. Co. v. *Pub. Util. Comm'n of Tex,* No. 07-17-00146-CV, 2018 Tex. App. Lexis 2991 at *7-8 (Tex. App.—Amarillo 7th Dist. Apr. 26, 2018) (mem. op.)

2. **If the answer to question 1 is yes, what are the Commission's options to avoid or mitigate this conflict while maintaining the Commission's proposed ring-fencing requirement and capital structure?**

Although H-E-B asserts that CenterPoint has multiple options in implementing both an adjusted capital structure and ring-fencing provisions, H-E-B offers recommendations for proceeding if the Commission determines that a conflict exists between the two requirements. H-E-B suggests that the most efficient and flexible option is to open a compliance docket as recommended in the Proposal for Decision and to approve the PFD's provision that grants CenterPoint a 90-day grace period to come into compliance with the ring-fencing provisions and the Commission's order.[6] Using a compliance docket is a standard Commission practice, offers a simple and efficient method for the Commission to monitor CenterPoint's progression to a 60/40 capital structure, and can be implemented without the need to gather further evidence to supplement the record. This action would be consistent with the Commission's discretion in determining appropriate enforcement of its order requiring CenterPoint to maintain the Commission's approved capital structure, just as the Commission has discretion in enforcing compliance with any other component of a Commission order.

Such action was recommended in the PFD and CenterPoint did not take issue with the 90-day period in its Exceptions. The PFD recommends that the Commission grant CenterPoint a compliance grace period of 90 days. During this 90-day grace period, CenterPoint would be able to take actions to adjust its capital structure without concern for any of the ring-fencing provisions. CenterPoint could dividend the $800,000,000 to CNP during this time period without violating any ring-fencing provision; however, doing so instead of taking one of the other steps at the same time as ring-fencing is implemented, would reduce the overall value to the CenterPoint entity. H-E-B does not believe that CenterPoint requires any special changes to comply with these requirements. However, in the event the Commission disagrees, the Commission could require CenterPoint to open a compliance docket, potentially allow CenterPoint a grace period of no more than 90 days as recommended in the PFD, and in any event, require monthly status updates of CenterPoint's progress in coming into compliance with the Commission's order as required by the PFD.

[6] PFD at 470 (finding that no later than 90 days after an order is issued, CenterPoint shall have implemented and be adhering to all ring-fencing provisions).

Changes in capital structures are not novel issues and the proposed 90-day grace period in conjunction with a compliance docket is a very simple and straightforward solution that follows Commission precedent. For instance, the Commission previously ordered Oncor in Docket No. 46957 to make compliance filings related to its capital structure.[7] In Docket No 46957, Oncor's last rate case, the parties agreed that Oncor's approved capital structure should be 57.50% debt and 42.50% equity. However, Oncor did not believe that it would be able to meet the approved capital structure by the proposed effective date of the rate change. Thus, the Commission ordered Oncor to measure its actual regulatory debt to equity ratio at the beginning of each month and make periodic compliance filings updating the Commission of the status of its capital structure. The Commission can order the same for CenterPoint in this proceeding.

Putting on new evidence to support or contest CenterPoint's ability to comply with a Commission directive would be unnecessarily expensive and time consuming for the Commission, Staff and Intervenors. CenterPoint should have raised this as an issue early in the case to allow parties to fully investigate CenterPoint's claim that an $800,000,000 dividend to its affiliates is the only available option for CenterPoint to comply with the tentative capital structure decision. CenterPoint could have identified these issues during the proceeding. Therefore, if the Commission grants CenterPoint any additional opportunities to relitigate these issues, CenterPoint alone should bear any costs CenterPoint or intervenors incur on account of any extension to the procedural schedule, reopening of the record or additional proceedings These costs should not be recoverable in rates.

II. CONCLUSION

CenterPoint has multiple paths for shifting its capital structure that do not involve a dividend to affiliates. Further, the PFD provides a 90-day grace period for CenterPoint to come into compliance with the proposed ring-fencing provisions. CenterPoint can use this transition timeframe to conduct all necessary actions for attaining a 60/40 debt-to-equity ratio. CenterPoint failed to alert any parties to this proceeding of its concern that compliance with capital structure changes would conflict with ring-fencing provisions. CenterPoint should not be rewarded for its failure to raise the issue timely if it was an issue for CenterPoint. There is no evidence in the

[7] *Application of Oncor Electric Delivery Company LLC for Authority to Change Rates*, Docket No. 46957, Order at 7-8 (Oct. 13, 2017).

record to show that CenterPoint is entitled to a grace period beyond the 90-day period provided in the PFD or other special dispensation or good cause waiver to meet the Commission's directives, despite the fact that the burden is on CenterPoint to request a compliance grace period and timely provide evidence that actually shows good cause in support of such request. H-E-B would recommend that the Commission not grant additional time to CenterPoint to comply with Commission directives; however, should the Commission decide to grant CenterPoint a grace period to comply with the Commission's directives, H-E-B would ask that such grace period not exceed the 90-day period provided in the PFD.

Sincerely,

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