



Control Number: 51381



Item Number: 69

Addendum StartPage: 0

DOCKET NO. 51381

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APPLICATION OF ENTERGY TEXAS,
INC. TO ESTABLISH A GENERATION
COST RECOVERY RIDER RELATED
TO THE MONTGOMERY COUNTY
POWER STATION

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PUBLIC UTILITY COMMISSION
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OF TEXAS

**ORDER NO. 9
OVERRULING TIEC'S OBJECTION TO EFFECTIVE DATE OF INTERIM TARIFF
FILED BY ENTERGY TEXAS, INC.**

In this matter, Entergy Texas, Inc. seeks to establish a generation cost recovery rider (GCRR) related to its new Montgomery County power station. In an Interim Order filed on January 20, 2021, the Commission approved, on an interim basis, GCRR rates for the Montgomery County power station. On January 21, 2021, Entergy Texas filed with the Commission a clean copy of the approved interim GCRR rates, with an effective date of January 1, 2021. On January 22, 2021, Texas Industrial Energy Consumers (TIEC) objected to the January 1, 2021 effective date. This order overrules that objection.

I. Background

On December 16, 2020, the parties in this docket, including TIEC, entered into an Unopposed Stipulation and Settlement Agreement (the agreement). In the agreement, the parties agreed, among other things, that "the Commission should issue an Order approving [Entergy Texas's] application to establish a GCRR to begin recovering the Company's investment in [the Montgomery County power station] on the day [the station] is placed in service to [Entergy Texas's] customers."¹

At an open meeting held on January 14, 2021, the Commission orally approved the GCRR. The Commission memorialized that approval in an Interim Order filed on January 20, 2021. The Interim Order "approves the agreed GCRR rates on an interim basis."² The Commission directed Entergy Texas to provide a clean copy of the approved GCRR tariff schedules. The Commission also ordered this docket abated.

¹ Agreement at 2.

² Interim Order at 1.

69

On January 21, 2021, Entergy Texas filed with the Commission a clean copy of the approved GCRR tariff schedules. Those schedules state that the approved GCRR rates became effective on January 1, 2021, which Entergy Texas contends is the date that the Montgomery County power station was placed in service.

On January 22, 2021, TIEC filed its objection to the January 1, 2021 effective date. On January 29, 2021, Entergy Texas filed briefing responsive to TIEC's objection. On February 11, 2021, TIEC and the Office of Public Utility Counsel (OPUC) each filed briefing on the issues raised by TIEC's objection. On February 22, 2021, Commission Staff filed its briefing.

The administrative law judge (ALJ) lifts the abatement of this docket solely for the limited purpose of ruling on TIEC's objection.

II. Discussion

TIEC does not object to the GCRR rates and does not appear to dispute that, per the agreement, it consented to a GCRR enabling Entergy Texas to begin recovering its investment in the Montgomery County power station on the day "the station is placed in service to [Entergy Texas's] customers."³ Further, TIEC does not appear to challenge Entergy Texas's assertion that the Montgomery County power station was placed in service on January 1, 2021. Instead, TIEC's objection focuses on the fact that the effective date of the GCRR rates (January 1, 2021) precedes the date on which the Commission orally approved the GCRR rates (January 14, 2021). According to TIEC, by setting the effective date as January 1, 2021, Entergy Texas engaged in improper retroactive rulemaking because the effective date precedes the date on which the Commission approved the GCRR rates. TIEC contends that the Commission should make the GCRR rates effective solely for usage on and after January 14, 2021.

Because the statute authorizing the recovery of generation costs through a GCRR, PURA⁴ § 36.213, is relatively new, TIEC's objection raises a question of first impression.

All other parties disagree with TIEC and take the position that an effective date for GCRR rates that precedes the Commission order authorizing the rates is permissible under the text of the

³ Agreement at 2.

⁴ Public Utility Regulatory Act, Tex. Util. Code §§ 11.001—66.016.

relevant statute and rule, and consistent with the caselaw on retroactive rulemaking. The ALJ agrees with the other parties and concludes that TIEC's objection should be overruled.

TIEC's argument relies on caselaw, primarily the Texas Supreme Court's decision in *Public Utility Commission of Texas v. GTE-Southwest, Inc.*⁵ Like all parties other than TIEC, the ALJ concludes that the facts and applicable law in *GTE-Southwest* are distinguishable from those in the present case.

In *GTE-Southwest*, the Commission had issued a final order in an electric utility rate case establishing new rates for GTE-Southwest, resulting in a \$59 million annual rate reduction for the company. The rate decision was based on the Commission's general ratemaking provisions which were, at the time, found at sections 42 and 43 of PURA. The Commission issued its final order on February 23, 1989, but the order specified that the new rates went into effect substantially earlier, on January 1, 1987. Accordingly, the Commission also ordered GTE-Southwest to refund \$140 million to its customers. The Texas Supreme Court ultimately concluded that, "[u]nder the circumstances present in this case," the Commission lacked the authority to make the new rates effective on a date prior to the issuance of the final rate order.⁶

The court's decision turned on the text of the general ratemaking provisions on which the Commission's decision as to GTE-Southwest's rates was based. PURA § 42 authorized the Commission to issue an order determining the just and reasonable rates to be charged by a utility, and provided that these rates are "to be *thereafter* observed and in force."⁷ Identical language was in PURA § 43. That section set out procedures by which the effective date for new rates proposed by an utility could be suspended for 150 days. If the Commission failed to make its final rate decision within the 150-day suspension period, the utility could implement its proposed rates. Once the Commission issued its final decision, however, if it found the utility's proposed rates to be unreasonable, the Commission could issue an order setting new rates and those new rates were "*thereafter* to be observed until changed."⁸ The word "thereafter" indicates prospective, not retroactive, application of rates.

⁵ *Pub. Util. Comm'n of Tex. v. GTE-Sw, Inc.*, 901 S.W.2d 401 (Tex. 1995)(*GTE-Southwest*).

⁶ *GTE-Southwest*, 901 S.W.2d at 404 and 408.

⁷ Emphasis added.

⁸ Emphasis added.

There is no analogous verbiage in the statute authorizing the recovery of generation costs through a GCRR, PURA § 36.213. Instead, the text of § 36.213 gives some indication that a GCRR can be applied retroactively. The section reads, in relevant part, as follows:

Sec. 36.213. RECOVERY OF GENERATION INVESTMENT BY NON-ERCOT UTILITIES.

...

(b) An electric utility may file, and the commission may approve, an application for a rider to recover the electric utility's investment in a power generation facility.

(c) An application under Subsection (b) *may* be filed by the electric utility and approved by the commission before the electric utility places the power generation facility in service.

(d) Any rider approved under Subsection (b) *shall* take effect on the date the power generation facility begins providing service to the electric utility's customers.⁹

The Commission rule that implements PURA § 36.213, 16 Texas Administrative Code (TAC) § 25.248, uses substantively similar verbiage. Under 16 TAC § 25.248(c)(3), “[a]ny GCRR established under this section *will* take effect on the date the power generation facility begins providing service to the electric utility’s customers.”¹⁰ Under 16 TAC § 25.248(g), the utility “*may* file an application for a GCRR before the electric utility places a power generation facility in service.”¹¹

The language of the statute and rule regarding when the GCRR becomes effective is mandatory (the rider “shall take effect,” “will take effect” on the date the facility is put into service), while the language as to when the application must be filed or decided upon is permissive (the application “may” be filed and “may” be approved before the generation facility is put into service). Thus, Commission Staff, OPUC, and Entergy Texas argue, and the ALJ agrees, that the plain language of the statute and rule mandate that the effective date of a GCRR must be the date that the facility is put into service, regardless of whether that date falls before or after the date the Commission takes final action on the application for the GCRR.

⁹ Emphasis added.

¹⁰ Emphasis added.

¹¹ Emphasis added.

It is also apparent from *GTE-Southwest* that the court would not have prohibited the retroactive ratemaking if the underlying statutes had authorized it. “In determining whether the PUC has the authority to make GTE’s new rates effective on a date prior to the issuance of the final rate order in this case, we first must consider whether sections 42 or 43 of PURA confer such authority upon the PUC.”¹² The court concluded that it could find “no express provisions” in PURA §§ 42 or 43 authorizing retroactive rates in the circumstances at issue in that case.¹³ However, the court identified, with apparent approval, a number of other provisions in PURA § 43 that authorized the Commission to set a retroactive effective date for a rate change in various contexts that were not applicable to GTE-Southwest’s circumstances.¹⁴

In *GTE-Southwest*, the court also pointed out that the purpose of setting a retroactive effective date for a rate is to compensate for regulatory lag. However, the court concluded that “it is not necessary to imply authority in PURA for the PUC to set a retroactive effective date for a rate change,” because PURA § 43 already “provides a detailed procedure to avoid regulatory lag.”¹⁵ By contrast, the legislative history of PURA § 36.213, makes it plain that the entire purpose of the GCRR statute is to avoid regulatory lag. As pointed out by Entergy Texas, “[i]n 2019, the Texas Legislature passed HB 1397, enacted as PURA § 36.213, in order to ‘reduce regulatory lag—the time period between the date that infrastructure is placed in service and the date a utility may start recovering its investment.’”¹⁶ The legislature’s decision to make a GCRR tariff effective on the date a new facility begins providing service effectively accomplishes the goal of reducing regulatory lag.

TIEC also worries that if PURA § 36.213 is interpreted to allow the Commission to approve a GCRR with an effective date that precedes the date of the Commission order authorizing the GCRR, then “utilities could wait months or even years after a new plant went into service before filing for a GCRR.”¹⁷ The ALJ does not consider this to be a meaningful risk. The purpose of

¹² *GTE-Southwest*, 901 S.W.2d at 406.

¹³ *GTE-Southwest*, 901 S.W.2d at 407-08.

¹⁴ *GTE-Southwest*, 901 S.W.2d at 407.

¹⁵ *GTE-Southwest*, 901 S.W.2d at 408.

¹⁶ Entergy Texas’s Response to TIEC’s Objection to the Effective Date of the GCRR Tariff at 1 (*quoting* Senate Bus. & Commerce Comm., Bill Analysis, Tex. H.B. 1397, 86th Leg., R.S. (2019)).

¹⁷ TIEC’s Objection to Effective Date of Interim Tariff Filed by Entergy Texas, Inc., at 2; *see also*, TIEC’s Brief in Support, at 6.

PURA § 36.213 is to minimize regulatory lag. Utilities have no incentive to wait months or years to avail themselves of the benefits provided by PURA § 36.213.

Finally, TIEC contends that if Entergy Texas had been worried that the Commission would not have taken final action on its GCRR application until after the Montgomery County power station had been placed in service, then it should have requested “an interim-rate [GCRR] order prior to the in-service date.”¹⁸ However, PURA § 36.213 and 16 TAC § 25.248 do not provide for such an interim rate process and, because GCRRs are subject to subsequent reconciliation, they are themselves effectively interim in nature.

For the reasons outlined above, TIEC’s objection is overruled.

As specified in the Interim Order issued on January 20, 2021, this matter remains abated.

Signed at Austin, Texas the 5th day of March 2021.

PUBLIC UTILITY COMMISSION OF TEXAS



HUNTER BURKHALTER
CHIEF ADMINISTRATIVE LAW JUDGE

¹⁸ TIEC’s Objection to Effective Date of Interim Tariff Filed by Entergy Texas, Inc., at 3.