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APPLICATION OF SOUTHWESTERN § BEFORE THE STATE OFFICE
ELECTRIC POWER COMPANY FOR § OF
AUTHORITY TO CHANGE RATES § ADMINISTRATIVE HEARINGS

SOAH ORDER NO. 10
DENYING MOTION TO STRIKE REBUTTAL TESTIMONIES;
ADDRESSING COURTESY COPIES

I. MOTION TO STRIKE REBUTTAL TESTIMONIES

On May 4, 2021, Eastman Chemical Company (Eastman) filed a motion to strike certain rebuttal testimonies filed by Southwestern Electric Power Company (SWEPCO) on the topic of behind-the-meter generation (BTMG). On May 11, 2021, SWEPCO filed a response. For the reasons discussed below, the motion to strike is **DENIED**.

The testimonies at issue relate to SWEPCO's change in practice to include load associated with retail BTMG in reporting transmission load to the Southwest Power Pool (SPP), and SWEPCO's proposed new transmission rate for certain customers with BTMG, including Eastman (collectively, the BTMG proposals). In particular, Eastman moves to strike the entirety of the rebuttal testimonies of Charles J. Locke and C. Richard Ross, and portions of the rebuttal testimonies of John Aaron and Jennifer Jackson on the basis that they should have been filed as part of SWEPCO's direct case, rather than in rebuttal. Alternatively, Eastman moves to strike portions of Mr. Locke's and Mr. Ross's rebuttal testimonies for the same reason.

Eastman alleges that SWEPCO failed to provide a prima facie case for the BTMG proposals in its direct case. Eastman points out that SWEPCO supported the proposals with only 21 lines of direct testimony divided between two witnesses (Mr. Aaron and Ms. Jackson), and that such testimony did not explain the basis for the changes. However, after Eastman and Texas Industrial Energy Consumers (TIEC) filed direct testimony challenging the proposals, SWEPCO

filed more than 40 pages of purported rebuttal testimony, including from two new witnesses, plus 83 pages of exhibits, which for the first time explain SWEPCO's rationale for the changes. Because this information was not provided until rebuttal, Eastman claims that it has been denied an opportunity to respond to what is essentially SWEPCO's direct case.

In response, SWEPCO asserts that the testimonies at issue respond to specific arguments of Eastman's and TIEC's witnesses and, therefore, are proper rebuttal. According to SWEPCO, Eastman overstates what is required to establish a prima facie case and would essentially require SWEPCO to anticipate and preemptively rebut issues other parties might raise. Instead, SWEPCO states that the Public Utility Commission of Texas's (Commission) standard is a "low burden" and requires that level of evidence from which the Administrative Law Judges (ALJs) can infer the fact at issue.¹

SWEPCO contends that it provided more support for the BTMG proposals than Eastman identified. In particular, SWEPCO points to direct testimony regarding its membership in SPP, SPP's control of SWEPCO's transmission system, the transmission charges SPP billed to SWEPCO, and SWEPCO's obligation to pay such charges. SWEPCO asserts that, pursuant to Commission precedent, proof that SPP billed the transmission charges and SWEPCO paid them is sufficient to demonstrate their reasonableness.² Accordingly, SWEPCO maintains that its direct testimony established a prima facie case on the BTMG proposals.

SWEPCO also contends Eastman has not demonstrated any deprivation of due process because it has neither alleged nor established any harm. SWEPCO points out that both Eastman and TIEC conducted discovery and filed direct testimony on the BTMG proposals, which indicates that they were not deprived of notice or an opportunity to respond.

¹ SWEPCO's Response to Eastman's Motion to Strike Rebuttal Testimony (SWEPCO's Response) at 5 (May 11, 2021) (citing *Application of Entergy Texas, Inc. for Authority to Change Rates, Reconcile Fuel Costs, and Obtain Deferred Accounting Treatment*, Docket No. 39896, Proposal for Decision (PFD) at 52-53 (Jul. 6, 2012)).

² SWEPCO's Response at 7 (citing *Application of Southwestern Electric Power Company for Approval of a Transmission Cost Recovery Factor*, Docket No. 42448, Order at Conclusion of Law No. 18 (Nov. 24, 2014)).

After considering the parties' arguments and cited authorities, the ALJs conclude that, while SWEPCO's direct case provided minimal support for its BTMG proposals, it was sufficient to establish a prima facie case. As SWEPCO states, establishing a prima facie case is a low burden,³ and one that does not require resolution of issues on the merits in SWEPCO's favor. Once the prima facie case was established, the burden of production shifted to the other parties.⁴ In this case, both Eastman and TIEC filed responsive testimonies. A review of SWEPCO's rebuttal testimonies indicates that they are responsive to Eastman's and TIEC's testimonies, and therefore, constitute rebuttal. Accordingly, Eastman's motion to strike is **DENIED**.

However, because the bulk of SWEPCO's support for the BTMG proposals was provided in rebuttal, particularly the rationale for the proposals, it is appropriate to allow the other parties to file supplemental testimony addressing SWEPCO's BTMG proposals.⁵ Accordingly, as set forth in SOAH Order No. 9, **no later than May 17, 2021**, the parties and Staff, other than SWEPCO, may file written supplemental direct testimony that responds to the BTMG proposals addressed in SWEPCO's rebuttal testimonies.

II. COURTESY COPIES

SOAH has implemented revised procedures relating to emailing courtesy copies to SOAH. Accordingly, the parties **SHALL NOT** email courtesy copies of any document to SOAH. The parties may file Word versions of their pleadings and testimonies on the Commission Interchange.⁶ If the ALJs need a Word version, they will either (1) download a Word version from the Interchange if it is available; or (2) convert the PDF version on the Interchange to a Word version. If that is insufficient, the ALJs will issue an order providing

³ Docket No. 39896, PFD at 52-53.


⁴ *Entergy Gulf States, Inc v Pub Util Comm'n*, 112 S.W.3d 208, 214-15 (Tex. App.—Austin 2003, pet. denied).

⁵ See 16 Tex. Admin. Code § 22.225(c).


⁶ See 16 Tex. Admin. Code § 22.72(i)(1) ("Electronic filings shall be made in accordance with the current list of preferred file formats available in Central Records and on the commission's World Wide Web site") and <https://www.puc.texas.gov/industry/filings/FilerFaq.aspx> (listing Microsoft Word as a common file type that the Commission Interchange supports).

instructions on how to submit courtesy Word versions to SOAH. The ALJs do not need a Word version of material covered by the Protective Order.

SIGNED May 13, 2021.



STEVEN H. NEINAST
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS



ROBERT H. PEMBERTON
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS