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APPLICATION OF SOUTHWESTERN ELECTRIC POWER COMPANY FOR AUTHORITY TO CHANGE RATES	§ § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
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EAST TEXAS SALT WATER DISPOSAL COMPANY EXCEPTIONS

COMES NOW East Texas Salt Water Disposal Company (“ETSWD”) and replies to the Proposal for Decision (“PFD”) issued in this docket. ETSWD notes that the fifteen (15) day deadline for response fell on a weekend date, and therefore this pleading is timely filed.

I. INTRODUCTION

ETSWD appreciates the work done by the Administrative Law Judges (“ALJs”) in preparing the PFD and agrees with much that has been recommended. ETSWD, however, continues to believe that an updated Class Cost of Service (“CCOS”) study is necessary to accurately determine billing determinants in light of the COVID-19 pandemic and its effect on consumption patterns across various customer classes. As acknowledged by Southwestern Electric Power Company (“SWEPCO”), the CCOS study filed with the original Application that the PFD recommends the Public Utility Commission (“Commission”) rely upon in allocating costs and designing rates includes only one week of data from the pandemic.¹ In other words, fifty-one (51) out of fifty-two (52) weeks of the data relied upon in SWEPCO’s CCOS study reflect consumption patterns before the pandemic hit. The pandemic continues to affect the lives and consumption patterns of businesses and residential users today, approximately seventy-five (75) weeks after the end date of the SWEPCO CCOS. ETSWD’s request is simple—have SWEPCO update its CCOS

¹ ETSWD Ex. 1, Pevoto Dir. at KP-4.

study to reflect actual usage patterns over the last year. If SWEPCO is correct that consumption patterns have returned to normal, then the new CCOS study will reflect that. But at this time, the original CCOS study that virtually ignores one of the largest disruptions of the economy in American history cannot be reasonably relied upon.

II. EXCEPTIONS

As noted above, ETSWD excepts to the PFD's recommendation that SWEPCO allocate costs and set rates based on a test year ending March 2020 and that includes virtually none of the economic impacts of the COVID-19 pandemic.² Notably, ETSWD asks only that SWEPCO update the study using the exact same methodology as used to prepare the original study in order to avoid relying on data that is now more than 19 months old. Below, ETSWD demonstrates this point and responds to specific statements contained in the PFD.

The ALJs conclude that SWEPCO, Staff, OPUC and CARD have presented credible evidence and argument that the continuing effects of COVID-19 are transitory and unknown...ETSWD impliedly concedes as much when it argues that “an updated run of the analyses ‘is not likely’ to show a return to normalcy.” ETSWD’s own words—‘is not likely—shows the speculative nature of its request.’”³

The PFD appears to confuse the known and measurable standard with ETSWD’s request to update the CCOS study. ETSWD asks only that SWEPCO update its CCOS study using the same methodology as used to prepare the original study. As such, the results of the updated study will be “known and measurable” by definition; there is nothing “speculative” about it. Significantly, the record shows that as of December 31, 2020, actual consumption patterns

² PFD at 265.

³ PFD at 263-264.

materially differed from those resulting from the original CCOS study.⁴ For instance, residential sales were up by more than 3% while industrial sales, the group to which ETSWD belongs, were down by almost 7% and commercial customers down by 4.3%.⁵ Thus, based on principles of cost causation, had new rates been set in December 31, 2020 using SWEPCO's original CCOS study, ETSWD and other industrial customers would have been allocated 7% more costs than they actually caused and commercial customers allocated more than 4%. So, there can be no doubt that at least as of the end of last year, the original CCOS study was significantly obsolete to the detriment of ETSWD and other commercial and industrial consumers. No other new data has been included in the record. In addition, while SWEPCO made some conclusory statements in rebuttal testimony that these trends had "flipped," it provided no data to back up this claim. Thus, the only data in the record showing consumption patterns after the test year and during the pandemic show that commercial and industrial customers are being over-allocated costs.

The PFD incorrectly labels ETSWD's recommendation as "speculative." While ETSWD has requested an updated CCOS study, it does not and cannot know the results of the CCOS study before it has been updated because it has no access to the necessary data. But this fact does not render the results from an updated study "speculative," any more than the original study can be described as "speculative." The results from the updated CCOS study will be "known" because they will rely on actual data representing real-life experience over the last 12 months, and the results will be "measurable" because they will result from the same methodology SWEPCO used previously.

Even if a more recent study shows a change in customers' usage, which a new study could show despite a pandemic situation,

⁴ Direct Testimony of Kit Pevoto, ETSWD Ex. 1 at 5.

⁵ *Id.*

ETSWD has not shown that a more recent study would be more apt to show the usage that will prevail into the future before SWEPCO's rates are re-set in its next base rate case.⁶

The above statement misunderstands the legal standard applicable to ETSWD's request. The PFD suggests that ETSWD must show, before any new study has been conducted, that the new study will "be more apt to show the usage that will prevail into the future" up until SWEPCO's next rate case.⁷ No such standard exists.

Commission Rules explain that known and measurable adjustments can be appropriate, specifically noting:

Rates will be determined using revenues, billing and usage data for a historical test year *adjusted for known and measurable changes*, and costs of service as defined in §25.231 of this title (relating to Cost of Service).⁸

ETSWD asks for an adjustment wholly consistent with those contemplated in 16 TEX. ADMIN. CODE § 25.234(b).

The goal of cost allocation and rate design is to set rates that describe the conditions that will prevail in the future when the rates go into effect.⁹ In fact, in *Oncor Elec. Delivery Co. LLC v. Public Utility Commission of Texas*, the court finds that the regulator *must* make known and measurable changes. Note that nothing in the *Oncor* opinion mentions the requirement of knowing what conditions will prevail in the future after the rates go into effect or until the next rate case,

⁶ PFD at 264.

⁷ *Id.*

⁸ 16 TEX. ADMIN. CODE § 25.234(b) (emphasis added).

⁹ *See Oncor Elec. Delivery Co. LLC v. Public Util. Comm'n*, 406 S.W.3d 253, 263 (Tex. App. 2013) ("These test year expenses must be adjusted for known and measurable changes to ensure they will more accurately reflect future costs."). ETSWD notes that during cross examination, Staff witness Narvaez agreed with the statement that the goal of cost allocation is to have as accurate a picture as possible when rates go into effect (Tr. at 1404)

and indeed such clairvoyance would be impossible. Retail rates are forward looking, and the regulator can only rely on information that it knows at the time the rates become effective.¹⁰ A requirement that a proposed adjustment fully capture future events that cannot be known at the time makes no sense. No study, including the CCOS study included with SWEPCO's application, can guarantee what conditions will prevail at some indefinite time in the future when SWEPCO decides to file another rate case. The existing SWEPCO CCOS study cannot even describe the conditions that prevailed a month after it was filed. So, the premise of this nebulous "standard" is flawed from the beginning.

This statement also incorrectly suggests that ETSWD has the burden of proving that the results of the requested update to the CCOS study will better reflect future conditions. As an initial matter, it is self-evident that a CCOS study updated to reflect the last 12 months of consumption data will better describe conditions that will prevail when the rates go into effect in November 2021 than a study relying on information largely from 2019 before COVID-19 had any impact. Moreover, this is not ETSWD's burden to carry. SWEPCO has the burden of proof on all aspects of its rate case,¹¹ including that its CCOS study accurately reflects reality. While SWEPCO's initial CCOS study may have satisfied its *prima facie* case, that CCOS study has now been challenged with specific evidence provided by the utility itself.¹² The rules of evidence require that SWEPCO overcome this evidentiary challenge with specific evidence of its own to prove that its CCOS study remains sufficient to render just and reasonable rates.¹³ In other words, SWEPCO must prove that the conditions that it has admitted are materially different from those captured in

¹⁰ See Tr. at 1451 (OPUC witness Georgis agrees that the further in time away from actual data, the harder it is to reflect actual conditions that prevail).

¹¹ PURA § 36.006.

¹² Direct Testimony of Kit Pevoto, ETSWD Ex. 1 at 5.

¹³ See *Entergy Gulf States, Inc. v. Public Util. Comm'n*, 112 S.W.3d 208, 214-15 (Tex. App. 2003).

its initial study have “returned to normal.” The burden is not on ETSWD to prove that the current “abnormal” conditions will continue until the next rate case. SWEPCO has provided no such evidence, just an unsupported conclusory statement with little evidentiary value that “the narrative is flipped.” This vague statement is insufficient to overcome actual data showing that the original CCOS study over-allocates costs to the commercial and industrial classes in a material way.

SWEPCO’s evidence shows, based on April 2021 data, that the “narrative is flipped” with residential sales moving down as commercial and industrial sales move up “significantly.”¹⁴

This statement suggests that SWEPCO has provided more recent data than the evidence in the record supplied by SWEPCO in discovery that as of December 31, 2020, the impact of the pandemic had caused commercial and industrial load to decrease by 5-7%. This is inaccurate. The only actual data in the record is the original CCOS study and the response to discovery that SWEPCO provided showing that costs are being over-allocated to commercial and industrial customers. The PFD relies upon the conclusory rebuttal statement of a SWEPCO witness suggesting that as of April 2021, the narrative had “flipped.”¹⁵ Of course, the fact that the hearing occurred virtually instead of in person belied this rosy characterization. During cross-examination it was clear that the witness did not provide any actual data, whether as part of his rebuttal testimony or at the hearing.¹⁶ Nor did the witness provide any detail beyond the generality that the trend had “flipped.” So, the record is devoid of any actual data supporting this statement. “Flipped” could mean that the discrepancy is now 6% instead of 7%, which would still be a material impact. The only way to determine what the actual consumption data is since the pandemic began is to

¹⁴ PFD at 264.

¹⁵ Tr. at 1496: 20 - 1497: 1 (Cross-examination Burnett Rebuttal).

¹⁶ *Id.*

update the study. ETSWD also notes that SWEPCO witness Burnett's conclusory statement is not a sufficient basis on which to base a finding of fact and therefore is not sufficient evidence to overturn actual record data that shows the initial CCOS to be materially wrong.¹⁷ As such, the PFD should not seek to rely on this conclusory statement and it should be modified accordingly.

In addition, since the hearing in this rate case, Texas and the entire country have experienced a significant increase in the virulence of the pandemic due to the spread of the Delta variant. ETSWD acknowledges that there is no data of the impacts from the Delta variant in the record, but the increase in severity certainly undermines the credibility of statements by SWEPCO, Staff, and OPUC that everything has returned to normal.¹⁸ In fact, witnesses from each testified that the effects of COVID-19 continued to impact the situation at the time of hearing,¹⁹ which hearing occurred more than a year after the test year SWEPCO relies on for its CCOS study. Neither the ALJs nor the Commission are required by the rules of evidence or Commission precedent to ignore the world around them in this instance. ETSWD is not asking the Commission to make an adjustment in a vacuum. As previously explained, the adjustment will be based on actual data using the same methodology SWEPCO previously used. As such, the rules of evidence and Commission precedent will be satisfied.

The ALJs also decline to recommend approval of ETSWD's proposals because approval could serve as future precedent whereby an adjusted test year-based cost of service study filed in accordance with the Commission's rules and historical practice is essentially abandoned and replaced with a new cost of service study (or at least

¹⁷ See *Cities of Abilene v. Public Util. Comm'n*, 854 S.W.2d 932, 948 (Tex. App. 1993) (citing *Texas Health Facilities Comm'n v. Charter Medical-Dallas, Inc.*, 665 S.W.2d 446, 452 (Tex. 1984) (setting out the criteria to examine findings of underlying fact).

¹⁸ Staff Ex. 4b (Cross-Rebuttal Testimony Narvaez) at 12; SWEPCO Ex. 53 (Rebuttal Burnett) at 4; Tr. at 1149, 1453 (Cross-examination Georgis).

¹⁹ Tr. at 1409 (Cross-examination Narvaez); Tr. at 1453 (Cross-examination Georgis); Tr. at 1497 (Cross-examination Burnett Rebuttal).

new billing determinants) shortly after the close of the applicable test year.²⁰

This statement suggests that to update the CCOS in this case would represent a huge sea-change in policy that would set new precedent in all future cases. Such a concern is incorrect. The Commission updates test year numbers all the time, and updates for known and measurable adjustments have been anticipated in numerous sections of the Commission’s Substantive Rules for decades, as evidenced by Commission Substantive Rule § 25.234 previously cited. In fact, in this very case SWEPCO has asked the Commission to update its return on equity (“ROE”) analysis to account for changes in the market that have occurred due to the COVID-19 pandemic.²¹ There is no rational basis to contend that COVID-19 affects financial markets and to simultaneously claim that the same pandemic does not affect the electricity usage of the same business enterprises whose lost production affects those financial markets. Moreover, any worry of establishing “precedent” in this case overlooks the circumstances in which ETSWD makes the request. The COVID-19 pandemic has caused huge personal and economic disruptions for the last year and a half with no real end in sight. Thus, ETSWD’s request would be clearly distinguishable from the type of lesser situation referred to in the PFD. And should such a significant and long-lasting crisis occur again, then it likely should lead to an updated CCOS study to ensure that costs are allocated based on accurate data that reflects the situation when the rates go into effect.

²⁰ PFD at 264.

²¹ SWEPCO Brief at 35 (citing Rebuttal Testimony of Dylan D’Ascendis, SWEPCO Ex. 38 at 6:4-5). *See also*, SWEPCO Brief at 52 (criticizing Wal-Mart’s ROE witness for failing to make updates to account for COVID-19).

III. CONCLUSION

For the reasons described herein, ETSWD respectfully asks the Commission to instruct SWEPCO to update its CCOS and resulting rates with the most current data available, rather than assuming that 19 month old, pre-COVID 19 data represents the world in which SWEPCO will operate in the fourth quarter of this year.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of this document was served by email, facsimile, hand-delivery, overnight delivery, or 1st Class U.S. Mail on all parties of record in this proceeding on September 13, 2021.

/s/ Dane McKaughan

Dane McKaughan