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Received - 2021-10-01 04:34:28 PM
Control Number - 51802
ItemNumber - 608

SOAH DOCKET NO. 473-21-1892
PUC DOCKET NO. 51802

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

SOAH ORDER NO. 7
GRANTING TIEC’S MOTION TO STRIKE
OPUC’S CROSS-REBUTTAL TESTIMONY

On September 23, 2021, Texas Industrial Energy Consumers (TIEC) filed a motion to strike a portion of the cross-rebuttal testimony of Office of Public Utility Counsel (OPUC) witness Evan Evans. OPUC responded to the motion on September 29, 2021.

In its motion, TIEC objects to and moves to strike Section III of Mr. Evans’s cross-rebuttal testimony on the basis that it is improper rebuttal. TIEC contends that, rather than rebutting issues raised by intervenors or Staff of the Public Utility Commission of Texas (Commission), this portion of Mr. Evans’s testimony agrees with Alliance of Xcel Municipalities (AXM) witness Karl Nalepa’s direct testimony opposing Southwestern Public Service Company’s (SPS’s) proposed allocation of load dispatching expense. TIEC states that, if Mr. Evans was going to take issue with SPS’s direct testimony, he should have done so in his direct testimony. According to TIEC, Section III of Mr. Evans’s cross-rebuttal should be viewed as a late or improper supplementation of his direct testimony. Under the Commission’s rules, supplemental testimony may be excluded if it “raises new issues or unreasonably deprives opposing parties of the opportunity to respond to the supplemental testimony.”¹ TIEC contends opposing parties are denied an opportunity to respond to Mr. Evans’s points on load dispatching expense because they were raised in rebuttal.

In response, OPUC notes that, under the Commission rule TIEC cites, “[o]ral or written supplementation of pre-filed testimony and exhibits may be allowed prior to or during the hearing provided that the witness is available for cross-examination.”² Therefore, OPUC concludes that Mr. Evans is allowed to supplement his testimony as long as he is available for

¹ 16 Tex. Admin. Code § 22.225(c).


² *See id.*

cross-examination. Further, because he will be available for cross-examination, OPUC disagrees with TIEC's contention that the parties would be deprived of the ability to respond to his testimony. In addition, OPUC contends that Mr. Evans did not propose any new position not already taken by AXM witness Nalepa, and thus, did not raise new issues. OPUC also argues that allowing a party to agree with another party's expert testimony in its rebuttal testimony is not prohibited and contributes to a fully developed record. Finally, OPUC asserts that Mr. Evans's testimony should be considered in substance as a rebuttal of the positions taken by Staff witness William Abbott and TIEC witness Jeffrey Pollock in favor of allocation using the AED-4CP methodology.

The Administrative Law Judges (ALJs) find that the objected-to testimony is not proper cross-rebuttal testimony, as it does not rebut a position taken by an adverse party.³ Instead, the testimony is late-filed direct testimony and raises new points to support Mr. Nalepa's direct testimony. The ALJs also decline to view Mr. Evans's testimony as a rebuttal of positions taken by Staff and TIEC witnesses, as OPUC did not identify any specific testimony of these witnesses that Mr. Evans was rebutting.⁴ Accordingly, TIEC's motion to strike is **GRANTED**, and the following portions of Mr. Evans's cross-rebuttal testimony are **STRICKEN**: page 5, line 19 through page 6, line 2; page 7, line 3 through page 11, line 7; and page 48, line 14 through line 15.

SIGNED October 1, 2021.


CASSANDRA QUINN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS


ROSS HENDERSON
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

³ See *Valley Indus., Inc. v. Cook*, 767 S.W.2d 458, 462 (Tex. App.—Dallas 1988, writ denied) (“[R]ebuttal evidence is evidence given to disprove facts given in evidence by an adverse party.”).

⁴ Staff witness Abbott does not appear to have addressed the issue of load dispatching expense. TIEC witness Pollock addressed the issue in his cross-rebuttal testimony, but the ALJs do not consider Mr. Evans's cross-rebuttal to be a rebuttal of such testimony, as the testimonies were filed on the same date. See Cross-Rebuttal Testimony of Jeffrey Pollock at 20-24 (Sept. 14, 2021) (responding to Mr. Nalepa's direct testimony on load dispatching expense).