Control Number: 52067

Item Number: 20

Addendum StartPage: 0

SOAH DOCKET NO. 473-21-2424
PUCT DOCKET NO. 52067

2021 JUN 15 PM 2:55

APPLICATION OF ENTERGY TEXAS, INC. TO ADJUST ITS ENERGY EFFICIENCY COST RECOVERY FACTOR AND REQUEST TO ESTABLISH REVISED COST CAPS	§ § § § § §	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

CITIES' MOTION TO COMPEL ETI'S RESPONSE TO CITIES' FIRST REQUEST FOR INFORMATION

The Cities of Anahuac, Beaumont, Bridge City, Cleveland, Dayton, Groves, Houston, Huntsville, Liberty, Montgomery, Navasota, Nederland, Oak Ridge North, Orange, Pine Forest, Pinehurst, Port Arthur, Port Neches, Roman Forest, Rose City, Shenandoah, Silsbee, Sour Lake, Splendora, Vidor, West Orange, and Willis ("Cities") move to compel Entergy Texas, Inc. ("ETI" or "Company") to respond to Cities' Request for Information ("RFI") No. 1-3.

I. PROCEDURAL HISTORY

Pursuant to 16 Tex. Admin. Code ("TAC") § 22.144(e), motions to compel are due within five (5) working days from receipt of a party's objections to discovery. Cities received ETI's objection to Cities' RFI No. 1-3 on June 8, 2021; thus, Cities' Motion to Compel is due no later than June 15, 2021. Cities' Motion to Compel is timely filed.

II. NEGOTIATIONS

Counsel for Cities and ETI have engaged in negotiations to resolve their dispute diligently and in good faith pursuant to 16 TAC § 22.144(d), but the parties were unable to reach an agreement.

20

III. RELEVANCE AND THE SCOPE OF DISCOVERY

The Texas Supreme Court has long discouraged "gamesmanship and secrecy" in discovery, and has established that in all but the most narrow circumstances it is inappropriate to obstruct the search for truth by denying discovery.[1] Affording parties full discovery promotes the fair resolution of disputes by the judiciary, so that disputes are "decided by what the facts reveal, not by what facts are concealed."[2] Thus, by design the scope of discovery is broad, extending to "any unprivileged information that is 'relevant to the subject matter' of the pending action, even if inadmissible at trial, so long as the information 'appears reasonably calculated to lead to the discovery of admissible evidence.'"[3] The phrase "relevant to the subject matter" is to be liberally construed to allow the litigants to obtain the fullest knowledge of the facts and issues prior to trial.[4]

In explaining the broad scope of discovery, the Texas Supreme Court has specifically stated that a party is not required to show the viability of its claims before it is entitled to conduct discovery.[5] Rather, parties are "entitled to full, fair discovery" and to have their cases decided on the merits.[6] Preemptive denial of discovery is improper unless there exists "no possible relevant discoverable testimony, facts, or material to support or lead to evidence" that would support the claim or defense at issue.[7] The burden is on the party seeking to avoid discovery to plead a proper basis for exemption or immunity and to provide evidence supporting its claim.[8] ETI has failed to meet its burden and should be compelled to produce the information requested for the reasons set out below.

---

[1] *State v. Lowry*, 802 S.W.2d 669, 671 (Tex. 1991) (citing *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 553 (Tex.1990, orig. proceeding); *see also, e.g., Tom L. Scott v. McIlhany*, 798 S.W.2d 556 (Tex.1990, orig. proceeding); *Garcia v. Peeples*, 734 S.W.2d 343 (Tex.1987, orig. proceeding); *Jampole v. Touchy*, 673 S.W.2d 569, 573 (Tex.1984, orig. proceeding).

[2] *Lowry*, 802 S.W.2d at 671; *Tom. L. Scott, Inc. v. McIlhany,* 798 S.W.2d 556, 559 (Tex. 1990, orig. proceeding.).

[3] *See In re Nat'l Lloyds Ins. Co.*, 532 S.W.3d 794, 808 (Tex. 2017) (quoting Tex. R. Civ. P. 192.3(a)).

[4] *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 664 (Tex. 2009).

[5] *Castillo*, 279 S.W.3d at 664.

[6] *Id.* (quoting Able Supply Co. v. Moye, 898 S.W.2d 766, 776 (Tex. 1995, orig. proc.)).

[7] *Id.*

[8] *Lowry*, 802 S.W.2d at 671 (citing Tex.R.Civ.P. 166b(4) and *Loftin v. Martin*, 776 S.W.2d 145, 147 (Tex.1989, orig. proceeding)).

IV. RESPONSE TO ETI'S OBJECTION

ETI specifically objected to Cities' RFI No. 1-3, which asked: "Please provide the avoided cost of capacity and avoided cost of energy in Midcontinent Independent System Operator (MISO) Zone 9 (Entergy) in 2020."

a. The information requested in Cities RFI No. 1-3 is relevant to the question of whether ETI's requested EECRF rates are reasonable and necessary.

As ETI explains, "the avoided costs of capacity and energy are used to determine the cost-effectiveness of an electric utility's energy efficiency programs, and in turn, the performance bonus received by the utility under the Commission's energy efficiency rules."[9] Yet, ETI argues that the avoided cost of capacity and energy in MISO—*the regional transmission organization in which ETI operates*—is irrelevant to these proceedings.

To support its argument, ETI points out that it used the values published by the Commission Staff and by ERCOT for avoided cost of capacity and avoided cost of energy, respectively, as is set out in the EECRF Rule.[10] Cities do not dispute that the EECRF Rule establishes these values as inputs to the EECRF formula, and that the Rule sets out a process for challenging them. However, the EECRF Rule also contemplates that different avoided cost values may be more appropriate for utilities—like ETI—that operate in areas in which customer choice is not offered. ETI itself advocated for these exceptions in the rulemaking project that established the current language found in 16 TAC § 25.181(d)(2)(B) and (d)(3)(B). The Commission summarized ETI's arguments as follows:

> EPE and Entergy opposed the use of an arbitrary calculation of the avoided cost of energy as it does not reflect the utilities' actual costs. They noted these utilities are not in the ERCOT region, and there is no correlation between the market clearing price for balancing energy in ERCOT and their avoided cost of energy. Entergy further stated that it is impractical to force one single set of avoided capacity and energy numbers, as they operate in discrete markets that each have distinct avoided energy costs . . . . Entergy suggested the use of modified formulae for the non-ERCOT utilities, due to these differences in market conditions. Entergy urged the commission to allow non-ERCOT utilities to seek good cause exceptions or permit

---

[9] ETI's Objections to Cities' First Set of Requests for Information at 2 (June 8, 2021).

[10] ETI's Objections at 3. The Commission's rules governing EECRF filings can be found at 16 TAC § 25.181 and 25.182. For the purpose of clarity, they will be referred to collectively in this motion to compel as the "EECRF Rule."

other methodologies for calculating avoided costs, because of the unique assumptions and market conditions that utilities encounter.[11]

The Commission acknowledged the differences between the ERCOT market and the regulated markets in which non-ERCOT utilities operate and agreed with ETI that the accuracy of an avoided cost calculation is important.[12] With this goal of accuracy in mind, the Commission modified the proposed rule to permit non-ERCOT utilities to petition for the use of alternative avoided costs values in the EECRF calculation.[13]

The EECRF Rule is silent as to the rights of Commission Staff or other interested parties to petition for more accurate avoided costs to be utilized in a non-ERCOT utility's EECRF calculation. ETI implies with the use of italics in quoting the language of the rule that only a utility can petition the Commission to use alternative avoided costs, and that other interested parties have no recourse if a non-ERCOT utility opts not to petition for more accurate avoided cost inputs.[14] However, ETI's literal reading of the EECRF Rule is at odds with the rules of construction that an administrative rule should be interpreted in the context of the rule as a whole, and that "a rule should not be construed in a way that leads to absurd or unreasonable results if another more reasonable construction is possible."[15]

The scope of an EECRF proceeding explicitly includes "the extent to which the costs recovered were reasonable and necessary to reduce energy and demand growth; and a determination of whether the costs to be recovered through an EECRF are reasonable estimates of the costs necessary to provide energy efficiency programs and to meet or exceed the utility's energy goals." The information requested in Cities' RFI No. 1-3 goes directly to the question of whether ETI's requested performance bonus and other costs are reasonable and necessary, particularly if ETI has opted to use inaccurate avoided costs in its EECRF calculation. Additionally, ETI's interpretation of the Rule leads to the absurd and unreasonable result that non-

---

[11] *Rulemaking Proceeding to Amend Energy Efficiency Rules*, Project No. 37623, Order Approving Rule at 36-37 (Aug. 9, 2010).

[12] Project No. 37623, Order Approving Rule at 41.

[13] Project No. 37923, Order Approving Rule at 41.

[14] *See* ETI's Objections at 3.

[15] *Tex. Mut. Ins. Co. v. Vista Community Medical Cntr, LLP*, 275 S.W.3d 538, 549 (Tex. App.—Austin 2008, pet. denied); *see also Tex. Indus. Energy Consumers v. CenterPoint Energy Houston Electric, LLC*, 324 S.W.3d 95, 104 (Tex. 2010).

ERCOT utilities may "game the system" by choosing which avoided costs get them the highest bonus each year, and customers and their representatives would have no recourse to challenge the utility's self-serving exercise of discretion. The more reasonable interpretation of this rule is that non-ERCOT utilities may choose not to petition for more accurate avoided costs, but a utility's decision not to file such a petition does not preclude other interested parties from questioning whether the resulting proposed EECRF rates are fair and reasonable to customers.

b. The information requested in Cities' RFI No. 1-3 is relevant to ETI's request for a good cause exception to raise its cost cap.

Cities' request is also directly relevant to ETI's request for a good cause exception to raise its cost cap for commercial rate classes.[16] The Commission has explained:

> The purpose of a performance bonus is to reward exceptional achievement in administering energy efficiency programs and to provide an incentive to a utility to achieve successful energy efficiency programs. However, the commission also notes, as mentioned by Joint Utilities, that a good-cause exception is generally granted by the commission when circumstances outside the utility's control prevent it from meeting the requirements of the rule.[17]

ETI argues in its petition that the recent high avoided cost of energy in the ERCOT market has resulted in a higher 2020 performance bonus than in past years, which represents "a tremendous increase in the total costs for ETI's energy efficiency program."[18] ETI requests a good cause exception to raise its cost cap for the commercial rate classes so that it will be able to meet its cost goals, and thus will be eligible for a performance bonus next year.[19] However, it is possible that if ETI had petitioned to use MISO's avoided cost of energy in its EECRF application, it would not have seen such a tremendous increase in its total costs, and therefore it would have no need to now request a good cause exception in these proceedings. If such is the case, it is hardly beyond ETI's control that it cannot meet the requirements of the EECRF Rule, and ETI's request for a good cause should be denied. Without the requested facts, however, Cities will be hampered from rebutting ETI's claim that it is entitled to a good cause exception.

---

[16] Application at 4.

[17] *Rulemaking Proceeding to Amend Energy Efficiency Rules*, Project No. 39674, Order Approving Rule at 75 (Oct. 17, 2012).

[18] Application at 4.

[19] *Id.*

c. Conclusion

The Company's relevance objection to Cities' RFI No. 1-3 runs counter to the long-standing discovery policy in Texas that disputes should be "decided by what the facts reveal, not by what facts are concealed."[20] Suppression of the requested information would hinder Cities from fully developing reasonable arguments against ETI's application as detailed above, and would deprive Cities of the right to have their claims heard and decided on the merits. ETI has not met its burden to show that it is entitled to an exemption from the broad scope of discovery, and therefore it should be compelled to produce the information requested in Cities RFI No. 1-3.

V. PRAYER

For the above stated reasons, Cities respectfully request that Cities' Motion to Compel be granted along with all other relief to which they may show themselves to be justly entitled.

Respectfully submitted,
LAWTON LAW FIRM, P.C.

Daniel J. Lawton 00791082
danlawtonlawfirm@gmail.com
Molly Mayhall Vandervoort 24048265
molly@mayhallvandervoort.com
12600 Hill Country Blvd., Suite R275
Austin, Texas 78738
(512) 322-0019
(512) 329-2604 Fax
ATTORNEY FOR CITIES

[20] *Lowry*, 802 S.W.2d at 671; *Tom. L. Scott, Inc. v. McIlhany*, 798 S.W.2d 556, 559 (Tex. 1990, orig. proceeding.).

CERTIFICATE OF SERVICE

I hereby certify that a copy of this document was served on all parties of record in this proceeding on this the 15th day of June, 2021, in accordance with 16 TAC § 22.74.

Molly Mayhall Vandervoort