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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**

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

Entergy Texas, Inc. ("ETI") submits the following response to Cities' Motion to Compel ETI's Response to Cities'[1] First Request for Information ("Cities' Motion"), and respectfully shows as follows:

I. BACKGROUND

On May 27, 2021, Cities served the following RFI on ETI:

Cities 1-3: Please provide the avoided cost of capacity and avoided cost of energy in Midcontinent Independent System Operator (MISO) Zone 9 (Entergy) in 2020.

ETI timely objected to this RFI on the grounds that the information sought is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. On June 15, 2021, Cities moved to compel ETI to respond to RFI No. 1-3. Pursuant to 16 Tex. Admin. Code ("TAC") § 22.144(f), responses to a motion to compel shall be filed within five working days after the receipt of the motion to compel. Accordingly, ETI's Response to Cities' Motion is timely filed.

[1] "Cities" refers to 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.

II. RESPONSE TO CITIES' MOTION TO COMPEL

A. Cities Has Failed to Show the Information Sought Is Relevant

The Commission's rules permit discovery of information that is not otherwise privileged or exempted, and that is relevant to the subject matter in the proceeding.[2] Texas Rule of Evidence 401 provides the test for relevant evidence: "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Cities claims that the information requested in RFI No. 1-3 is relevant to two issues in this proceeding: (1) whether ETI's requested Energy Efficiency Cost Recovery Rider ("EECRF") rates are reasonable and necessary;[3] and (2) whether ETI has met the criteria for a good cause exception to exceed its commercial cost caps.[4] However, because of the manner in which the Commission's energy efficiency rule requires the avoided costs of capacity and energy to be established, the requested information fails the relevance test.

The Commission's rules dictate precisely how the avoided costs of capacity and energy are to be established for use in EECRF proceedings. Pursuant to 16 TAC § 25.181(d)(2)(A)(i) and (ii), the avoided cost of capacity shall be calculated by Commission Staff as set forth in those subsections. And pursuant to 16 TAC § 25.181(d)(3)(A), the avoided cost of energy shall be calculated by the Electric Reliability Council of Texas ("ERCOT") as set forth in that subsection. Commission Staff and ERCOT must submit their respective calculations by November 1 of each year. Any party is permitted to file a petition challenging the mathematical correctness of the calculations of the avoided cost of capacity[5] and the avoided cost of energy[6] if such a petition is

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[2] 16 TAC § 22.141(a)

[3] Cities' Motion at 4.

[4] Cities' Motion at 5.

[5] *See* 16 TAC § 25.181(d)(2)(A)(iii).

[6] *See* 16 TAC § 25.181(d)(3)(A).

filed in Project No. 38578 within 45 days of the filing of Staff's and ERCOT's respective calculations.[7] In November 2020, Commission Staff filed its calculation of the avoided cost of capacity[8] and ERCOT filed its calculation of the avoided cost of energy.[9] No party, including Cities, filed a petition challenging these calculations within the prescribed 45-day timeframe. Accordingly, these calculations conclusively establish the avoided costs of capacity and energy to be used by utilities for EECRF program year 2021.

The EECRF Rule also allows utilities not subject to customer choice ("non-ERCOT utilities") to petition the Commission for authorization to utilize a different avoided cost of capacity or energy than established by the process detailed above.[10] With regard to the avoided cost of capacity, a utility must file a petition in Project No. 38578, within 45 days of the filing of Commission Staff's calculations. However, no utility, including ETI, filed such a petition. And even if non-utilities could file such a petition (which they cannot, as explained below), it is indisputable that the 45-day deadline has passed. Finally, the Rule provides that any alternative avoided cost of capacity "shall be based on a generation resource or purchase in the utility's resource acquisition plan."[11] Thus, Cities cannot establish the relevance of the avoided cost of capacity in MISO because only a utility may petition to use an alternative avoided cost of capacity, no utility filed such a petition, the time for filing such a petition has passed, and the MISO cost sought by Cities is not based on a "generation resource or purchase" in ETI's resource acquisition

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[7] *See Petition of the Steering Committee of Cities Served by Oncor Challenging Avoided Cost of Capacity Under 16 TAC § 25.181(d)(2)*, Docket No. 49095, Order at 3 (Apr. 18, 2019) ("The scope of any challenge brought under 16 TAC § 25.181(d)(2)(A)(iii) must be limited to evaluating whether Commission Staff erred in the application of the formula set out in 16 TAC § 25.181(d)(2)(A)(i) and (ii).")

[8] *Energy Efficiency Implementation Project Under 16 TAC § 25.181(q)*, Project No. 38578, Avoided Cost of Capacity and Energy for the 2021 Program Year (Nov. 4, 2020).

[9] Project No. 38578, ERCOT Calculation of the Avoided Cost of Energy for 2021 (Nov. 2, 2020).

[10] 16 TAC § 25.181(d)(2)(A)(iii); 16 TAC § 25.181(d)(2)(B).

[11] 16 TAC § 25.181(d)(2)(A)(iii).

plan.

With regard to the avoided cost of energy, the EECRF Rule similarly permits a non-ERCOT utility to petition to use a cost other than the default cost calculated by ERCOT.[12] Again, however, no such petition was filed. Accordingly, pursuant to the EECRF Rule, only the avoided cost of energy filed by ERCOT in Project No. 38578 may be used and no other avoided cost of energy is relevant to this proceeding.

Contrary to Cities' claims, ETI has met its burden by establishing that the information sought in Cities' RFI No. 1-3 is irrelevant to the current docket. ETI utilized the avoided costs of capacity and energy consistent with the EECRF Rule (which Cities does not contest)[13] as it and other utilities have done consistently for years and has not petitioned to use alternative avoided costs. Cities attempts to manufacture relevance by speculating that *had* ETI petitioned the Commission to use an alternative avoided cost calculation, and *had* ETI received such authorization, and *had* ETI then used those alternative avoided cost inputs, then perhaps its resulting EECRF rates might have been more reasonable. But those things did not happen. Thus, the avoided costs of capacity and energy in MISO do not make any fact pertaining to the proper calculation of ETI's EECRF in this proceeding more or less probable and are of no consequence in this proceeding. A party's discovery requests must show a reasonable expectation of obtaining information that will aid in the resolution of the dispute,[14] which RFI No. 1-3 does not. Accordingly, ETI should not be compelled to produce the avoided costs of capacity and energy in

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[12] 16 TAC § 25.181(d)(3)(B). Unlike subsection (d)(2)(A)(iii) (regarding avoided cost of capacity), subsection (d)(3)(B) does not specify that the utility's petition must be filed in a particular project or within 45 days of the filing of ERCOT's avoided cost of capacity calculation. It is unclear, and ultimately irrelevant, whether the Commission intended the same docket and deadline restrictions to apply in subsection (d)(3)(B) because the Rule is clear that only a "utility" can make such a petition.

[13] *See* Cities' Motion at 3.

[14] *In re CSX Corp*, 124 S.W.3d 149, 152 (Tex. 2003)

MISO.

B. Cities' Interpretation of the EECRF Rule Is Contrary to the Rules of Statutory Construction and Should Be Rejected

Cities' attempt to nullify an express term ("utility") in the EECRF Rule is specious, at odds with the very rules of statutory construction cited by Cities, and, in actuality, is the interpretation that leads to an absurd result.

Subsections 25.181(d)(2)(A)(iii) and (d)(3)(B) of the EECRF Rule specify the limited circumstances in which an alternative cost of capacity or energy, respectively, may be proposed. Both subsections begin with the same unambiguous language: "A *utility* in an area in which customer choice is not offered may petition the commission...."[15] Nevertheless, Cities argues that ETI is incorrect in reading the EECRF Rule as providing a process by which only a non-ERCOT *utility* may petition the Commission to use alternative avoided costs of capacity and energy.[16] Cities' assertion that ETI's "literal reading of the EECRF Rule is at odds with the rules of construction"[17] ignores the first rule of statutory construction:[18] that one first looks to "the plain and common meaning of the statute's words."[19] If a statute's meaning is unambiguous, then it is generally interpreted according to its plain meaning.[20] There are instances where the literal meaning of a statute may be disregarded; but only where it is perfectly plain that the literal sense

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[15] 16 TAC § 25.181(d)(2)(A)(iii) and (d)(3)(B) (emphasis added).

[16] *See* Cities' Motion at 4-5.

[17] *Id.* at 3.

[18] Texas courts construe administrative rules, which have the same force and effect as statutes, in the same manner as statutes. *Texas Mut. Ins. Co v. Vista Community Medical Cntr, LLP,* 275 S.W.3d 538, 548 (Tex. App.—Austin 2008, pet. denied) (*citing Rodriguez v Service Lloyds Ins Co.*, 997 S.W.2d 248, 254 (Tex. 1999)).

[19] *State ex rel. State Dept. of Highways and Public Transp v. Gonzalez*, 82 S.W.3d 322, 327 (Tex. 2002); *Fitzgerald v Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865 (Tex. 1999) (quoting *Liberty Mut. Ins. Co v Garrison Contractors, Inc* , 966 S.W.2d 482, 484 (Tex. 1998); *State v Shumake*, 199 S.W.3d 279, 284 (Tex. 2006).

[20] *Gonzalez,* 82 S.W.3d at 327; *Shumake,* 199 S.W.3d at 284 ("If the statute is clear and unambiguous, we must apply its words according to their common meaning without resort to rules of construction or extrinsic aids.").

works an absurdity or manifest injustice.[21] That is not the case here. The Rule is permissive as to utilities' rights to avail themselves of this petition process and, as Cities notes,[22] it was participating *utilities* that sought this right in the EECRF rulemaking. Thus, it is anything but "absurd" to interpret the Rule as meaning exactly what it says in granting this petition right to utilities. The language of the Rule is clear and unambiguous, and thus should be interpreted according to its plain meaning. A plain reading of 16 TAC §§ 25.181(d)(2)(B) and (d)(3)(B) confirms that only a non-ERCOT "utility" can petition the Commission to request authorization to use a different methodology to calculate the avoided cost of capacity or energy. The Rule expressly uses the term "utility" and mentions the actions that a "utility" can take multiple times within the Rule.

Cities' characterizes the EECRF Rule as "silent" as to other entities' rights to petition the Commission to use alternative avoided costs and suggests that silence is most reasonably interpreted as permission.[23] But the Rule is not silent as to which parties may petition the Commission – it specifically uses the term "utility" on multiple occasions. Cities' interpretation renders meaningless these express uses of the term "utility" within the Rule. Cities also argues that the EECRF Rule "should be interpreted in the context of the rule as a whole." But this principle also weighs against Cities' interpretation. As noted above, the EECRF Rule contains provisions allowing a petition to challenge the mathematical correctness of Commission Staff's and ERCOT's respective calculations of avoided costs, and those provisions contain no limiting language regarding who may file such a petition.[24] By contrast, with respect to the ability to

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[21] *Texas Dept of Protective and Regulatory Services v. Mega Child Care, Inc.*, 145 S.W.3d 170, 177 (Tex. 2004) (*citing Gilmore v. Waples*, 188 S.W. 1037, 1039 (Tex. 1916)).

[22] Cities' Motion at 3-4.

[23] Cities' Motion at 4.

[24] *See* 16 TAC §§ 25.181(d)(2)(iii) and (d)(3)(A).

petition for the use of an alternative calculation, the Rule is clear that these provisions apply only to "[a] utility in an area in which customer choice is not offered."[25] When reading an administrative rule, "we must read the rule as a whole, giving meaning and purpose to every part."[26] It is an "elementary rule of construction that we give effect to every word of a statute so that no part is rendered superfluous,"[27] and "presume that the legislature chooses a statute's language with care, purposefully choosing each word it includes, while purposefully omitting words not chosen."[28] To ignore the use of the word "utility" in 16 TAC §§ 25.181(d)(2)(B) and (d)(3)(B), especially when other similar provisions of the Rule contain no such qualifier, would be contrary to these requirements.

For these reasons, the administrative law judge should disregard Cities' attempt to misapply the rules of statutory construction to circumvent the plain language of the EECRF Rule.

C. The Requested Information Is Not Required for Cities to Develop Its Claims

Cities claims that without the information requested in RFI No. 1-3, it will be "hampered from rebutting ETI's claim that it is entitled to a good cause exception."[29] In support, Cities states that "it's possible that if ETI had petitioned to use MISO's avoided cost of energy in its application it would not have seen such a tremendous increase in its total costs"[30] and thus not required a good cause exception. Cities' contention in this regard is speculative and irrelevant. As explained above, ETI has correctly applied the provisions of the EECRF Rule in this proceeding, in exactly the same manner as it has done in all prior EECRF proceedings, and in the same manner as all

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[25] 16 TAC §§ 25.181(d)(2)(B) and (d)(3)(B).

[26] *Texas Mut Ins. Co*, 275 S.W.3d at 549.

[27] *Heritage on San Gabriel Homeowners Ass'n v. Tex. Comm'n on Environmental Quality,* 393 S W.3d 417, 427 (Tex. App.—Austin 2012, pet. denied) (emphasis added).

[28] *Id* at 424-25.

[29] Cities' Motion at 5.

[30] Cities' Motion at 5.

other utilities. While Cities is entitled to challenge ETI's request for a good cause exception to exceed its commercial cost caps (an exception being sought by other utilities this year),[31] it is not entitled to do so by using irrelevant information.

D. Cities' Claim That the EECRF Rule Allows for "Gamesmanship" Is a Baseless Collateral Attack and Should Be Disregarded

Cities' claim that non-ERCOT utilities may "game the system"[32] by "choosing" the avoided cost methodology that gets them the highest bonus is speculative, unwarranted, and is a collateral attack on the express terms of the EECRF Rule as adopted by the Commission. Cities ignores the fact that no non-ERCOT utility has ever petitioned to utilize an alternative avoided cost of capacity or energy[33] for any reason, let alone to "game the system" by doing so to attain a larger bonus. Cities further ignores the fact that the bonus awarded in a particular year counts as a cost of the utility's energy efficiency programs in a subsequent year for the purposes of calculating a future bonus. Thus, all else equal, a larger bonus will tend to lower that future bonus.

ETI is applying the plain meaning of the EECRF Rule in this proceeding as it has done in every prior EECRF proceeding without any objections or allegations of gamesmanship from Cities. Cities' opportunity to assert its concern that the rule promotes gamesmanship was during the rulemaking. Cities should not be allowed to successfully assert that ETI is engaging in gamesmanship in the midst of a contested docket where Cities has acknowledged that ETI is in fact following the terms of the rule for calculating the avoided costs of capacity and energy.[34]

Ironically, it is Cities that is engaging in gamesmanship by seeking to explore alternative

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[31] *See e g , Application of Southwestern Electric Power Company to Adjust Energy Efficiency Cost Recovery Factor and Related Relief*, Docket No. 52073, Application at 4 (Apr. 30, 2021); *Application of El Paso Electric Company for Approval To Revise Its Energy Efficiency Cost Recovery Factor and Request to Establish Revised Cost Caps*, Docket No. 52081, Application at 2-5 (May 3, 2021).

[32] Cities' Motion at 5.

[33] *See* Project No. 38578.

[34] Cities' Motion at 3.

methodologies for calculating avoided costs only when it believes the result may make it opportune to do so. Cities has intervened in every EECRF docket filed by ETI for over ten years, and until this year has never once asserted that ETI should have requested Commission authorization to use MISO's or any other alternative method of calculating the avoided costs of capacity or energy. By contrast, ETI is using the same approach to calculating the avoided costs of capacity and energy provided by the EECRF Rule and that ETI and all other utilities have consistently used for years.

III. CONCLUSION

As demonstrated above, the discovery sought by Cities is irrelevant to this docket, Cities has misapplied the EECRF Rule and the rules of statutory construction, and Cities itself has engaged in gamesmanship by seeking to explore alternative methodologies only when it may be opportune for it to do so. Therefore, ETI respectfully requests that its objection be sustained and Cities' Motion to Compel be denied. ETI further requests that it be granted such other relief to which it may be justly entitled.

Respectfully Submitted,

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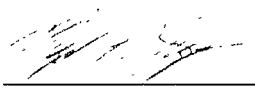
CERTIFICATE OF SERVICE

I certify that a true and correct copy of this *Entergy Texas Inc.'s Response to Cities' Motion to Compel ETI's Response to Cities' First Request for Information* was served by email, facsimile, hand-delivery, overnight delivery, or First-Class U.S. Mail on all parties of record in this proceeding on June 22, 2021.



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