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**SOAH DOCKET NO. 473-22-1074
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APPLICATION OF ENTERGY TEXAS, INC. TO AMEND ITS CERTIFICATE OF CONVENIENCE AND NECESSITY TO CONSTRUCT ORANGE COUNTY ADVANCED POWER STATION	§ § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
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**ENTERGY TEXAS, INC.’S RESPONSE TO TEXAS INDUSTRIAL
ENERGY CONSUMERS’ OBJECTIONS TO AND MOTION TO STRIKE
REBUTTAL TESTIMONY OF ELLEN LAPSON OR, IN THE ALTERNATIVE,
MOTION FOR LEAVE TO FILE SUPPLEMENTAL TESTIMONY**

COMES NOW, Entergy Texas, Inc. (“ETI” or the “Company”) and files this response to the motion of Texas Industrial Energy Consumers (“TIEC”) to strike the rebuttal testimony of Ellen Lapson (the “Motion”). By the Motion, TIEC seeks an order striking significant portions of Ms. Lapson’s rebuttal testimony or, in the alternative, an order granting TIEC leave to file supplemental testimony addressing the arguments raised in the portions of Ms. Lapson’s testimony to which TIEC objects. The Motion was filed on April 18, 2022, and the ALJs issued SOAH Order No. 7 setting the deadline for this response as on or before 10:00 a.m. on April 22, 2022; therefore, this response is timely filed. The Motion should be denied.

I. INTRODUCTION

The Motion essentially argues that based on testimony filed in a prior and separate proceeding in which ETI sought from the Public Utility Commission of Texas (“Commission”) an amendment to its Certificate of Convenience and Necessity (“CCN”) to construct and operate a solar photovoltaic generating facility (“Liberty County Solar Facility” or “LCSF”), ETI should have anticipated and foreseen the testimony provided by TIEC witness Charles Griffey in this case and preemptively rebutted that testimony in its filed application here. Ms. Lapson’s testimony was not necessary to establish a prima facie case in ETI’s application and on direct that the Orange

County Advanced Power Station (“OCAPS”), the combined cycle combustion turbine (“CCCT”) project at issue in this case, is necessary for the service, accommodation, convenience or safety of the public. Further, TIEC’s argument puts the cart before the horse and mischaracterizes the purpose of an applicant’s rebuttal testimony, which is to address specific arguments and evidence raised by opposing parties in their direct testimony. Ms. Lapson’s testimony does exactly that. Therefore, the Motion should be denied.

II. ARGUMENT

In its application and direct case, ETI provided extensive explanation and description of the process the Company went through to first determine the optimal resource(s) to meet ETI’s future capacity needs, and then to issue a request for proposals in 2020 (the “2020 RFP”) to execute on the plan to acquire the resource identified as the best resource option for ETI’s customers. The testimony filed on direct from the Independent Monitor (“IM”) Wayne Oliver and ETI witness Phong Nguyen set forth a prima facie case that the terms and conditions of the RFP, including the lease accounting provision that was later criticized by Mr. Griffey, were reasonable. As TIEC notes in its motion, ETI put forth significant evidence in its application regarding the 2020 RFP process and how it was structured and implemented.¹ This evidence shows how the 2020 RFP resulted in the selection of a prudent and economic generating resource alternative for meeting ETI customers’ needs.

Contrary to TIEC’s argument, proactively addressing, explaining, and justifying each specific parameter of the 2020 RFP as it relates to PPA bids (of which there are many) is not part of the statutory standard that the Company must meet to obtain a CCN amendment for OCAPS. The details of the lease accounting provision and justification for its inclusion in the 2020 RFP are

¹ See Motion at 1.

not part of the statutory factors the Commission must address in determining the necessity of OCAPS for the service, accommodation, convenience, or necessity of the public. Furthermore, there is no Commission rule or PURA provision requiring ETI to anticipate and address in direct testimony each and every issue that may be raised by intervening parties – this is not part of ETI’s burden of proof, which it met by producing evidence that set forth a prima facie case for the prudence of OCAPS as the right resource to meet ETI customer needs.

TIEC maintains that because a similar lease accounting provision appeared in the RFP for solar resources that resulted in the selection of Liberty County Solar Facility (the “LCSF RFP”) and was the subject of testimony in the docket where ETI sought a CCN amendment for that facility, ETI should have assumed that the provision in the 2020 RFP resulting in the selection of OCAPS would be a subject of the same dispute in this docket and therefore addressed it on direct. However, issues raised in prior proceedings involving different applications for different resources do not govern or set the standards for what evidence must be submitted in the direct case for this application. The issue became a contested issue in the LCSF docket because a bidder in the LCSF RFP changed its pricing for a purchase power agreement (“PPA”) option during commercial negotiations based on the requirement that ETI be allowed to terminate the PPA if it were ever to be regarded as debt on ETI’s balance sheet. That situation is not present here, and ETI could not be so prescient as to anticipate that TIEC, or any other party, would pivot from that argument to its current argument that the lease accounting provision acted as a deterrent to any PPA bid being submitted into the 2020 RFP. In any event, there was no specific finding or conclusion made by the Commission with regard to the lease accounting provision that was part of the LCSF RFP, and no decision had been made on the proposed LCSF CCN amendment in advance of ETI filing its direct case in the instant proceeding.

Furthermore, as to the lease accounting provision on which Mr. Griffey opines and that Ms. Lapson discusses on rebuttal, there has been a significant change in the accounting rules, of which Mr. Griffey is apparently unaware, since those rules would have been applied to a similar resource. For the 2020 RFP that led to the selection of OCAPS, the rule had been adopted and would make a long-term PPA a lease to be capitalized on ETI's balance sheet. ETI did not "lay behind the log" regarding the lease accounting provision in the 2020 RFP, as TIEC misleadingly contends. The 2020 RFP, which was discussed in depth by the IM and Mr. Nguyen in their direct testimony and provided as an exhibit to Mr. Nguyen's testimony, clearly indicated that ETI would not enter a PPA that would result in such a long-term liability, and that term was vetted and ultimately approved by the IM. Given that evidence and disclosure on direct, TIEC had ample opportunity to provide evidence on the lease accounting provision, and it did so through Mr. Griffey's testimony. Any insinuation in the Motion that TIEC has not had the opportunity to be heard on the issue is baseless.

In a disingenuous attempt to support its motion, TIEC repeatedly cites an order from Commission Docket No. 45188.² This order striking rebuttal evidence was the only precedent cited in the Motion as support for TIEC's request to strike Ms. Lapson's rebuttal testimony. But the order cited by TIEC was issued by the Commission administrative law judge, and it was subsequently overturned by the Commission, which found on appeal that the issue covered by the rebuttal testimony was adequately addressed on direct and was an appropriate rebuttal topic because it was raised in the direct testimony of opposing parties.³ Similarly here, Ms. Lapson's

² Motion at 5 and fn 28-30.

³ *Joint Report and Application of Oncor Electric Delivery Company LLC, Ovation Acquisition I, LLC, Ovation Acquisition II, LLC, and Shary Holdings, LLC for Regulatory Approvals Pursuant to PURA §§ 14.101, 37.154, 39.262(l)-(m), and 39.915, Order Granting Appeal of Order No. 14 (Jan. 7, 2016).*

testimony discusses in much greater detail and in direct response to Mr. Griffey's criticism of a provision of the 2020 RFP that was adequately addressed in ETI's direct case. Ms. Lapson's testimony is also limited to answering and responding to particular issues concerning that provision raised by Mr. Griffey in his direct testimony, which is the purpose of rebuttal – to disprove facts put into evidence by an adverse party.⁴

Ms. Lapson's testimony does not introduce any new issues or positions, but directly and succinctly responds to Mr. Griffey's opinion testimony regarding ETI's inclusion of the lease accounting provision in the 2020 RFP. Ms. Lapson's testimony addresses specific issues – the risk ETI sought to mitigate with the lease accounting provision and the uncertainty of the impact on ETI customers of capitalization of such a PPA determined to be a lease – that Mr. Griffey placed into contention through his direct testimony. Her rebuttal defends the lease accounting provision that was described in direct testimony while refuting Mr. Griffey's arguments regarding such provision. Her testimony is therefore well within the scope of proper rebuttal testimony.

III. CONCLUSION

Ms. Lapson's testimony was not required on direct in order to put on a prima facie case showing that OCAPS meets the statutory standard for a CCN amendment. The testimony from Ms. Lapson that the Motion seeks to strike is appropriate rebuttal testimony because it directly and narrowly responds to specific issues raised by Mr. Griffey in his direct testimony. The fact that the subject matter of the rebuttal testimony was generally at issue in a previous docket involving a different application (albeit the question in that case was how the lease accounting provision might apply to a much smaller, intermittent renewable resource as opposed to a 1,200 MW dispatchable resource with a much larger total cost) does not make the testimony part of ETI's

⁴ 16 Tex. Admin. Code § 22.203(b)(2); *In re Bledsoe*, 41 S.W.3d 807, 813 (Tex.App.-Ft. Worth, orig. proceeding).

burden of proof in this case. TIEC was put on notice through ETI's direct case of the applicability of the lease accounting provision in the 2020 RFP and thus had an opportunity to and did in fact address it through its direct case; Ms. Lapson's rebuttal testimony is no basis to allow TIEC another chance to provide more testimony on the same issue. Therefore, the Motion should be denied.

Respectfully submitted,

George G. Hoyt
State Bar No. 24049270
Erika N. Garcia
State Bar No. 24092077
Laura B. Kennedy
State Bar No. 24041234
ENERGY SERVICES, LLC
919 Congress Avenue, Suite 701
Austin, Texas 78701
Office: (512) 487-3945
Facsimile: (512) 487-3958
ghoyt90@entergy.com
egarci6@entergy.com
lkenn95@entergy.com

Lino Mendiola III
Jeffrey Stuart
EVERSHEDS SUTHERLAND (US) LLP
600 Congress Avenue, Suite 2000
Austin, Texas 78701
(512) 721-2720
(512) 721-2656 (fax)
linomendiola@eversheds-sutherland.us
jeffreystuart@eversheds-sutherland.us

Jay Breedveld
Casey Bell
Carey Olney
DUGGINS WREN MANN & ROMERO, LLP
One American Center
600 Congress Avenue, Suite 1900
P.O. Box 1149
Austin, Texas 78767-1149
(512) 744-9300
(512) 744-9399 (fax)
jbreedveld@dwmrlaw.com
cbell@dwmrlaw.com
colney@dwmrlaw.com

By: 

Casey Bell

Attorneys for Entergy Texas, Inc.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Agreed Report was served by electronic delivery on all parties of record in this proceeding on April 21, 2022.

A handwritten signature in black ink, appearing to be 'C. J. Lee', is written above a horizontal line.