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| INC. TO AMEND ITS CERTIFICATE OF | § | BEFORE THE STATE OFFICE |
| CONVENIENCE AND NECESSITY TO | § | OF |
| CONSTRUCT ORANGE COUNTY | § | ADMINISTRATIVE HEARINGS |
| ADVANCED POWER STATION | § | |

**TEXAS INDUSTRIAL ENERGY CONSUMERS'
REPLY TO EXCEPTIONS TO PROPOSAL FOR DECISION**

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**TEXAS INDUSTRIAL ENERGY CONSUMERS’
REPLY TO EXCEPTIONS TO PROPOSAL FOR DECISION**

INTRODUCTION

In the past two years, ratepayers in Southeast Texas have seen ETI’s fuel factor grow from less than \$23/MWh to more than \$52/MWh,¹ largely due to the fact that ETI remains one of the most natural gas dependent utilities in the country. Ratepayers have also had \$93 million per year added to their bills through a generation rider to pay for ETI’s recent acquisition of the Montgomery County Power Station and Hardin natural gas plants,² and ETI has requested an additional \$131 million dollar base rate increase to be effective in December of this year.³

On top of all of these recent increases, ETI now seeks the Commission’s approval, over the objection of ETI’s residential, small commercial, and industrial customer groups, for the most expensive non-nuclear plant in its history, one that would increase base rates by \$200 million/year at the proposed capped level and by \$250 million/year or more if the proposed cost cap were removed.⁴ And while ETI has claimed that the plant will eventually produce savings that will offset the cost, ETI fails to note that (1) those savings largely occur in the 2040s and 2050s,⁵ and

¹ *Application of Entergy Texas, Inc. to Revise Fixed Fuel Factor (Schedule FF) in Compliance with Final Order in Docket No. 32915*, Docket No. 50568, ETI Clean Copy of Schedule FF (Apr. 27, 2020) (setting fuel factors through September 2020); *Application of Entergy Texas, Inc. to Revised Fixed Fuel Factor (Schedule FF) in Compliance with Order in Docket No. 32915*, Docket No. 53979, ETI’s Letter for Schedule FF (Aug. 26, 2022) (setting fuel factors as of September 2022).

² *Application of Entergy Texas, Inc. to Update its Generation Cost Recovery Rider to Reflect the Acquisition of the Hardin County Peaking Facility*, Docket No. 52354, Order at FoF 42 (Aug. 25, 2022).

³ *Application of Entergy Texas, Inc. for Authority to Change Rates*, Docket No. 53719, Preliminary Order at 1 (Aug. 4, 2022).

⁴ PFD at 135-137.

⁵ ETI Ex. 7A, 52487 Nguyen WP3_Exhibit PDN-3 OCAPS Economic Eval Model Low Gas No CO2_HSPM.

(2) the projected savings are compared to a completely unrealistic alternative that neither ETI nor any rational utility would pursue.⁶ The evidence in this case shows that the OCAPS facility, if approved by this Commission, would result in a net increase in rates (even accepting ETI's own overstated estimate of fuel savings) of over \$600 million in the first six years alone.⁷ ETI, on the other hand, would receive over \$1 billion in return over the next 30 years if the Commission were to approve OCAPS,⁸ an amount that only increases as the capital cost of OCAPS escalates.

Contrary to ETI's exceptions, OCAPS is far from the "best available choice" for addressing ETI's future capacity and energy needs.⁹ First, within three months after filing this case, ETI adopted plans for over [REDACTED] of new solar and storage capacity.¹⁰ This new capacity, which [REDACTED] the capacity that OCAPS would add, was not taken into account in ETI's assessments of whether OCAPS was necessary in its filing in this case. Second, there is ample capacity in MISO South, which had a 44.7% capacity margin in 2021,¹¹ and which ETI acknowledged would have a near [REDACTED] price for capacity through 2028.¹² This excess capacity presents the opportunity for both inexpensive bilateral capacity contracts and continued virtually free capacity through the MISO capacity auction through the mid- to late-2020s. Third, Congress recently passed legislation that would dramatically extend and expand the tax credits for renewable energy and storage.¹³ ETI's economic analysis for OCAPS in this case was based on an assumption that there would be no further renewable tax credits; that assumption, which is now clearly erroneous, was used to "wrongfully inflate the value of OCAPS in the economic analysis."¹⁴ Fourth, ETI's economic analysis in this case was based on comparing OCAPS to an absurdly expensive option that never has and likely never would be pursued by any utility.¹⁵ Finally, it is difficult to accept ETI's claim

⁶ TIEC's Exceptions at 33-38.

⁷ PFD at 137; TIEC Ex. 1, Griffey Dir. at 91-92 (Bates 094-095).

⁸ TIEC Ex. 1, Griffey Dir. at 9 (Bates 012).

⁹ ETI's Exceptions at 4-5.

¹⁰ TIEC Ex. 1, Griffey Dir. at 47 (Bates 050) (excerpt from ETI's 2022 Business Plan).

¹¹ TIEC Ex. 1, Griffey Dir. at 35 (Bates 038).

¹² TIEC Ex. 1A, Griffey Dir. (HSPM) at 52 (Bates 020).

¹³ 26 U.S.C.A. §§ 45, 45X-45Z, 48 (West).

¹⁴ TIEC Ex. 1, Griffey Dir. at 77 (Bates 080).

¹⁵ TIEC's Exceptions at 33-38.

that OCAPS is the best choice when its request for proposal (RFP) process systematically excluded any prospect of competition and resulted in not a single other bid.

The rejection of a CCN for a specific facility does not mean that the utility should take no action to address future needs. ETI can and should assess its needs in light of its newly announced generation and storage additions, the dramatic changes to the tax incentives for new generation and storage, and the continuing availability of inexpensive capacity in MISO South. If that analysis shows that ETI needs capacity beyond what is now planned, it will have the opportunity to enter into a Purchased Power Agreement, which does not require CCN approval, or, if the analysis and a competitive RFP process shows that new ETI-owned generation is the best option, to obtain a CCN from the Commission in ample time. To the extent ETI needed to fill any gap from 2026 to 2027 in spite of the fact that it has recently added [REDACTED] of planned new capacity to be brought on during this period, it could extend the life of Sabine 4 for a year or two and still retire it at the age of 54 years, far earlier than the 60-year or more planned retirement age for most similar plants, which ETI itself had considered reasonable until it decided to pursue a CCN for OCAPS.¹⁶ ETI could also pursue short-term PPAs or continue its longstanding practice of availing itself of inexpensive capacity through the MISO Capacity Auction. But ETI should not be permitted to lock its ratepayers into an additional \$200-250 million annual rate increase and a commitment to pay for OCAPS for the next 30 years.

ETI has failed to meet its burden of proof to show that OCAPS is necessary for the service to the public, that it would provide net benefits to customers, or that it would result in the probable lowering of costs to customers. Its request for a CCN should be denied.

VIII. HYDROGEN CO-FIRING CAPABILITY

A. Costs and Benefits of Dual Fuel and Fuel Storage Capabilities (P.O. Issue Nos. 23, 27, 39, 41-44)

The ALJs are correct to recommend denial of ETI's request to spend \$91 million or more¹⁷

¹⁶ TIEC's Exceptions at 9-13.

¹⁷ See ETI Ex. 8A, Ruiz Dir. (HSPM) at Ruiz Supp. Exhibit CR-8 (Bates 45-46 of 2120) (Section 1.45), (Bates 52 of 2120) (Section 33.3), (Bates 57 of 2120) (Section 5.8), (Bates 1609-1616 of 2120) (Attachment B-7), Bates 1986-1995) (Exhibit S) ("If the hydrogen option is selected by Owner, a Change Order will be issued that modifies the Contract as stated below. The Contract Price stated below as part of the revised language in Article 7 Section 7.1 is Contractor's estimated price to Owner as of the Effective Date to invoke the Hydrogen Option. This price was developed based on initial design and procurement specifications and Contractor's knowledge of hydrogen

of its ratepayers' money to add partial hydrogen co-firing capability to OCAPS,¹⁸ which is already a woefully uneconomic proposal.¹⁹ Not only did ETI fail to include a 2x1 CCGT with hydrogen in its 2019 portfolio analysis,²⁰ making it impossible to determine whether a 2x1 CCGT with hydrogen provides greater net benefits than alternatives, but adding hydrogen capability to OCAPS would mean it generates [REDACTED] electricity at [REDACTED] marginal cost.

ETI did not conduct any economic or cost-benefit analysis showing that the hydrogen component is justified.²¹ To be clear, that means that all of the purported net benefits that ETI claims in its (flawed) economic analysis are based on OCAPS burning natural gas, not hydrogen.²² There is simply no analysis supporting certification of an OCAPS that burns hydrogen, much less an analysis that supports spending nearly \$100 million more to add that capability. As the ALJs put it, "the potential benefits of hydrogen capability cannot be properly analyzed because ETI failed to provide any economic analysis including the costs of burning hydrogen or any forecast for hydrogen prices."²³

ETI did not provide any analysis showing that the hydrogen component is worth the cost, and the only evidence in the record on this point indicates that ETI's requested hydrogen capability would be uneconomic. The latest quotes for hydrogen obtained by ETI in the record show that co-firing hydrogen at 30% could [REDACTED] the marginal cost of operating OCAPS,²⁴ and, since ETI did not forecast the price of hydrogen on a dollar per mcf or MMBtu basis,²⁵ hydrogen could become even less economic as time goes on. In addition to [REDACTED] fuel costs, co-firing

firing technology as it existed at the time such price was developed. **Owner acknowledges that such price may require adjustment as hydrogen firing design continues and**, to reduce the amount of contingency that Contractor would otherwise carry to cover this uncertainty, **is not fixed.**") (emphasis added).

¹⁸ See PURA § 39.003; Docket No. 51215, Final Order at FoF 70, 72 (Oct. 19, 2021).

¹⁹ PFD at 98.

²⁰ See ETI Ex. 4 (Weaver Dir.), Exh. ABW-8 at 1 (Bates 247 of 260) (HSPM).

²¹ TIEC Ex. 1A, Griffey Dir. at 94 (Bates 045); TIEC Ex. 1B, Griffey Workpapers at 2 (Bates 002).

²² See TIEC Ex. 1A, Griffey Dir. at 94 (Bates 045); TIEC Ex. 1B, Griffey Workpapers at 2 (Bates 002).

²³ PFD at 99.

²⁴ TIEC Ex. 1A, Griffey Dir. (HSPM) at 95 (Bates 046); TIEC Ex. 1C, Griffey Workpapers (HSPM) at Bates 013 to 014.

²⁵ TIEC Ex. 1B, Griffey Workpapers at 5 (Bates 005).

hydrogen at 30% would [REDACTED] the capacity of OCAPS by [REDACTED] MW (or [REDACTED] compared to co-firing 100% natural gas and would [REDACTED] OCAPS' heat rate.²⁶

Making matters worse, ETI did not show that hydrogen co-firing capability would decrease carbon emissions, notwithstanding the purported “sustainability benefits” touted by ETI.²⁷ ETI anticipates using hydrogen produced from natural gas upon initial operations.²⁸ If green hydrogen fails to ever become economical and gray hydrogen is used at OCAPS, ETI's own hydrogen expert believes that it would be expected that there would be no reduction in greenhouse gas emissions and that it wouldn't be surprising for OCAPS to actually *increase* CO2 emissions.²⁹ In fact, ETI's own projections show that co-firing gray hydrogen would [REDACTED] CO2 emissions on a per MWh basis unless ETI contracts for [REDACTED].³⁰

ETI argues that the disadvantages of hydrogen—higher costs, [REDACTED] output, and potentially higher carbon emissions—are justified by hydrogen's dual fuel reliability benefits.³¹ But ETI performed no study to compare the dual fuel benefit of hydrogen against other dual fuel capabilities.³² ETI did not even compare hydrogen to a liquid fuel backup, because that would run contrary to ETI's internal sustainability goals.³³ There is no evidence in the record to support the notion that hydrogen co-firing capability would give ratepayers the best bang for their buck to improve reliability.

Notably, House Bill (H.B.) 1510 does not mandate that *any* reliability benefit, no matter how small, justifies added costs.³⁴ To take an obvious example, a utility could not use H.B. 1510 to justify co-firing dollar bills on the basis that this would be a second fuel source for the plant. H.B. 1510 also does not require that the Commission approve a dual fuel option when there is no

²⁶ TIEC Ex. 1A, Griffey Dir. (HSPM) at 94 (Bates 045).

²⁷ ETI's Exceptions at 12.

²⁸ TIEC Ex. 1, Griffey Dir. at 94 (Bates 097).

²⁹ Tr. at 428:25-429:14 (Hebner Cross) (June 30, 2022).

³⁰ TIEC Ex. 53 and attachment TP-52487-00OPC001-X015_HSPM.xlsx.

³¹ ETI's Exceptions at 7-8, 11-14.

³² TIEC Ex. 1B, Griffey Workpapers at Bates 017.

³³ TIEC Ex. 1, Griffey Dir. at 98 (Bates 101).

³⁴ H.B. 1510 merely includes consideration of reliability benefits from dual fuel capability as one portion of one factor that the Commission considers when evaluating CCN applications. House Bill 1510, Legislative Session 87R, eff. June 1, 2021; PURA § 37.056(c)(4)(E).

analysis showing that the dual fuel option should be selected, or is the most cost-effective dual fuel technology. Reliability must be weighed against the probable improvement of service or lowering of cost, and that's exactly what the ALJs did.³⁵ The PFD rightly concludes that the purported reliability benefits of hydrogen co-firing capability are outweighed by investment and operation costs, among other considerations.³⁶

IX. THE PROBABLE IMPROVEMENT OF SERVICE OR LOWERING OF COST TO CONSUMERS IN THE AREA IF THE CERTIFICATE IS GRANTED

B. Economic Evaluation (P.O. Issue Nos. 19, 22)

The only economic analysis of the cost of OCAPS that ETI presented in this case was the outdated and deeply flawed comparison to an entirely unrealistic alternative—a fleet of hydrogen-enabled combustion turbines that would never be built and that would make any conceivable alternative appear economical.³⁷ The PFD even acknowledges that “[t]here is no evidence that . . . a hydrogen-enabled CT is the lowest cost alternative.”³⁸ In ETI’s analysis, the effect of using this hypothetical fleet of hydrogen-enabled CTs as the benchmark is magnified by assuming that the CTs would cost even more per kW to install than OCAPS, while operating only a few hours per year (and at a high heat rate).³⁹

The PFD attempted to deal with the problem of comparing OCAPS to a fleet of expensive peaker plants that no rational utility would ever build by stating that, in order to make the comparison appropriate, ETI should have assumed that the peaker plants would run 80 to 90% of the time, just as ETI assumes OCAPs would do.⁴⁰ The PFD acknowledges that there is nothing in the record to show the effect of changing that assumption.⁴¹

³⁵ PFD at 99 (“Although it is undisputed that hydrogen capability would provide increased reliability benefits in the event that natural gas supply is constrained, this must be considered in light of the probable improvement of service or lowering of cost—both in terms of money and environmental impact.”).

³⁶ PFD at 100.

³⁷ TIEC Ex. 1, Griffey Dir. at 56-57 (Bates 059-060).

³⁸ PFD at 112.

³⁹ Tr. at 368:15-369:9 (Nguyen Cross) (CONF) (June 30, 2022).

⁴⁰ PFD at 108-109.

⁴¹ PFD at 109.

ETI excepts to this portion of the PFD by attempting to recast the ALJs concern as a “misunderstanding” of TIEC’s position, and then ETI defines that position as limited to the fact that ETI assumed a higher per kW cost for the CTs than for OCAPS.⁴² That mischaracterizes TIEC’s position. TIEC’s concern was with the attempt to justify OCAPS by a comparison to an unreasonable alternative that ETI admits was never intended to identify the best option to serve load.⁴³ If, as the record demonstrates, ETI’s alternative of a fleet of hydrogen-enabled CTs would make any alternative appear preferable in comparison,⁴⁴ it is of no value in analyzing the reasonableness of any particular alternative, including OCAPS.

ETI suggests in its exceptions that any concern about the comparison to three CTs was addressed by running a comparison to a fleet of CTs where the per kW cost was slightly below the per kW cost of OCAPS.⁴⁵ Of course, this “sensitivity” used an outdated estimate of the cost of OCAPS.⁴⁶ It also continued to use an unreasonably high cost for the CTs.⁴⁷ But more importantly, running sensitivities of an economic analysis that is based on an absurd premise to begin with (that the alternative to OCAPS is a fleet of hydrogen-enable CTs) is of no value.

ETI also excepts to the PFD’s conclusion that it was unreasonable to compare the cost of OCAPS to CTs that had been equipped with the capability to burn hydrogen.⁴⁸ The folly of adding capital-intensive hydrogen capability to a plant that will operate only a few hours of the year is readily apparent, and there is good reason that ETI could not identify a single such plant.⁴⁹ ETI asserts that since it has chosen to burden its OCAPS proposal with hydrogen capacity, it must do the same with the CTs to make an “apples-to-apples” comparison.⁵⁰ But the addition of tens of millions of dollars in fixed costs to a peaker plant that might operate only ■■■ percent of the time

⁴² ETI’s Exceptions at 14.

⁴³ Tr. at 414:19-22 (Nguyen Redirect) (June 30, 2022).

⁴⁴ TIEC Ex. 1, Griffey Dir. at 57 (Bates 060).

⁴⁵ ETI’s Exceptions at 15.

⁴⁶ PFD at 105 (“There is no more recent analysis to reflect the June cost estimate of \$1.58 billion.”).

⁴⁷ ETI Ex. 7A, 52487 Nguyen WP4_PD N Rebuttal HSPM OCAPS Economic Evaluation Model 220412 Ref Gas Ref CO2_Escalation Update.

⁴⁸ ETI’s Exceptions at 15; PFD at 111-112.

⁴⁹ Tr. at 364:20-22 (Nguyen Cross) (CONF) (June 30, 2022).

⁵⁰ ETI’s Exceptions at 15.

adds [REDACTED] as much to the per kWh cost as it would to a plant that operates maybe 80% of the time, as ETI projects OCAPS to do.⁵¹ Under ETI's logic, if it wanted to compare the economics of a proposed nuclear plant to that of a CT, it would have to add nuclear capacity to the CT to make an apples-to-apples comparison. ETI should have compared OCAPS to a realistic alternative, not to an already uneconomic fleet of CTs that is then further burdened by uneconomic fixed costs to enable the use of hydrogen as a fuel.

ETI next excepts to the PFD's conclusion that ETI inflated the costs of the three-CT alternative by artificially increasing the annual fixed operations and maintenance (O&M) cost from [REDACTED] to [REDACTED].⁵² This unsupported increase is yet another way ETI inflated the cost of the fanciful three-CT alternative. ETI's only support for the dramatic increase was that some unidentified person in one of ETI's organization talked with an unidentified third party at a construction company.⁵³ This is one more example of ETI's cavalier approach to meeting its burden of proof to support a plant that would cost Texas ratepayers more than \$1.5 billion.

ETI's next exception is to the PFD's conclusion that ETI failed to support its unreasonably high level of assumed transmission costs for the three-CT option. TIEC witness Mr. Griffey pointed out in testimony that ETI's assumed high interconnection costs were unfounded.⁵⁴ ETI's testimony in response was completely conclusory, as noted by the ALJs.⁵⁵ Mr. Griffey testified that the assumption on interconnection costs, in conjunction with the dramatic increase in fixed costs and one other assumption, added hundreds of millions of dollars to the cost of the three-CT alternative.⁵⁶

Next, ETI excepts to the PFD's finding that it was unreasonable for ETI to include a carbon-tax assumption in its economic analysis. Consistent with Commission precedent,⁵⁷ the

⁵¹ Tr. at 368:15-369:9 (Nguyen Cross) (CONF) (June 30, 2022); TIEC Ex. 1A, Griffey Dir. (HSPM) at 80 (Bates 036).

⁵² TIEC Ex. 1A, Griffey Dir. (HSPM) at 59 (Bates 025).

⁵³ ETI's Exceptions at 16.

⁵⁴ PFD at 111; TIEC Ex. 1, Griffey Dir. at 58 (Bates 061).

⁵⁵ PFD at 111.

⁵⁶ TIEC Ex. 1, Griffey Dir. at 59 (Bates 062).

⁵⁷ Docket No. 51215, Order at FoF 102 (Oct. 19, 2021); Docket No. 49737, Order at FoF 64 (July 2, 2020); Docket No. 47461, Order at FoFs 96, 97 (Aug. 13, 2018).

ALJs properly rejected ETI's assumption that a carbon tax will be adopted.⁵⁸ Congress has never enacted a carbon tax,⁵⁹ and ETI has not provided any credible evidence that such a tax is in the offing. Contrary to ETI's assumption, when Congress has addressed carbon in the past, it has done so by incentivizing renewable generation through tax credits, rather than by penalizing carbon-emitting resources.⁶⁰ In fact, at the time intervenors submitted testimony in this case, Congress had extended the Production Tax Credit (PTC) for wind generation over ten times, and the Investment Tax Credit (ITC) for solar generation three times.⁶¹ Nevertheless, ETI's analysis assumed both that (1) an unprecedented carbon tax would be adopted, and (2) there was a zero percent chance Congress would again extend or augment renewable-energy tax credits.⁶² Notably, both of these assumptions inflate the projected value of OCAPS in the modeling.⁶³ ETI's complaints that assuming a carbon-tax was reasonable ring hollow, particularly given its one-sided approach.⁶⁴

Any doubt on this score was removed with the passage of the Inflation Reduction Act (IRA), as the ALJs recognized.⁶⁵ As with prior federal efforts to address carbon emissions, the IRA does not include a carbon tax.⁶⁶ But it does extend and expand renewable tax credits.⁶⁷ ETI's assumptions on these points have now been rendered demonstrably false. TIEC notes that ETI's self-serving carbon-tax assumption was included not only in the three-CT economic analysis it

⁵⁸ PFD at 126-127.

⁵⁹ ETI Ex. 7, Nguyen Dir. at 17-18 (Bates 19-20 of 136); Tr. at 173:20-25, 174:1-3 (Nguyen Recross) (June 20, 2022); Griffey Dir. at 74

⁶⁰ TIEC Ex. 1, Griffey Dir. at 74-77 (Bates 077-080).

⁶¹ TIEC Ex. 1, Griffey Dir. at 75-76 (Bates 078-079).

⁶² TIEC Ex. 1, Griffey Dir. at 77 (Bates 080).

⁶³ TIEC Ex. 1, Griffey Dir. at 77 (Bates 080).

⁶⁴ ETI's Exceptions at 17.

⁶⁵ PFD at 127.

⁶⁶ See Inflation Reduction Act of 2022, Pub. L. 117-169, 136 Stat. 1818 (2022).

⁶⁷ 26 U.S.C.A. §§ 45, 45V, 45X-45Z, 48 (West).

presented in its application,⁶⁸ but also in the 2019 portfolio analysis.⁶⁹ Thus, from the beginning, ETI's analysis of the costs and benefits of OCAPS has been infected with this flaw.

ETI also excepts to the PFD's determination that ETI did not meet its' burden of proving that "discounting the operations and maintenance (O&M) costs for OCAPS relative to its generic 2x1 CCGT was reasonable," and that ETI's improper adjustment therefore inflated the purported benefits of OCAPS.⁷⁰ ETI inflated OCAPS' variable supply cost savings by assuming that OCAPS would have O&M costs that are just one-fifth the costs assumed in the Aurora model.⁷¹ ETI also inflated OCAPS' fuel costs savings by assuming that O&M and capital costs for OCAPS would be [REDACTED] less than those of a generic 2X1 CCGT, an assumption that ETI made without any credible support.⁷² Mr. Griffey estimated that ETI's improper post-hoc O&M adjustment overstated the energy savings of OCAPS by \$ [REDACTED] million NPV.⁷³

ETI has not provided a valid reason for assuming that OCAPS' O&M costs would be significantly lower than the O&M costs of the generic 2x1 CCGT ETI used in its production cost runs, and there is none. ETI's exceptions do not even attempt to disprove the PFD's conclusion that "Mr. Nguyen's testimony is conclusory and fails to justify the level of adjustment."⁷⁴ ETI's half-hearted exceptions on this issue provide no basis whatsoever to justify its disparate treatment of O&M costs between OCAPS and a generic 2x1 CCGT. The PFD's recommendation should be adopted on this point.

The above errors in ETI's economic analysis identified by the PFD only compound ETI's fundamental error, which is that it chose a completely unrealistic alternative against which to compare OCAPS. But having chosen that alternative, ETI then made numerous unsupported assumptions, as found by the PFD, and those assumptions added hundreds of millions in costs to the three-CT alternative. In light of these errors, there is no basis for concluding that ETI has met

⁶⁸ ETI included the carbon-tax assumption in its reference and high gas cases. TIEC Ex. 1, Griffey Dir. at 74 (Bates 077).

⁶⁹ TIEC Ex. 1, Griffey Dir. at 18 (Bates 021).

⁷⁰ PFD at 128.

⁷¹ TIEC Ex. 1A, Griffey Dir. (HSPM) at 78 (Bates 034).

⁷² TIEC Ex. 1A, Griffey Dir. (HSPM) at 79 (Bates 035).

⁷³ TIEC Ex. 1A, Griffey Dir. (HSPM) at 80-81 (Bates 036-037).

⁷⁴ ETI's Exceptions at 18; PFD at 128.

its burden to prove that the proposed OCAPS facility, even at the outdated cost estimate of \$1.37 billion, is in the public interest.

XII. POTENTIAL CONDITIONS IF THE COMMISSION APPROVES THE APPLICATION AND OTHER ISSUES (P.O. ISSUE NOS. 7, 48)

A. Cost Cap

As the Preliminary Order in this case recognizes, to demonstrate that a new plant is necessary under the CCN standard,⁷⁵ the utility must show that it is the appropriate alternative to meet any need that the utility may have.⁷⁶ The ALJs concluded that ETI demonstrated that OCAPS was the best option to meet ETI's needs, but only at the capped cost.⁷⁷ While TIEC disagrees with the ALJs' overall conclusion, their cost-cap recommendation is entirely consistent with the regulatory construct, and recognizes that even when a plant might be deemed to be in the public interest at a given cost, it might not be at a higher cost. As the ALJs put it with respect to cost-escalation issues in this case, at some point, "alternatives may need to be revisited."⁷⁸ ETI's exceptions to the ALJs' cost-cap analysis should be denied.

The Commission has authority to implement a cost cap, as the courts have already found.

ETI begins this section of its brief with an argument against Commission precedent on cost caps, while failing to even acknowledge that precedent. Specifically, ETI argues that implementing a cost cap in a CCN proceeding is generally inconsistent with PURA's regulatory construct.⁷⁹ That is incorrect.

In Docket No. 33891, the Commission approved a cost cap on the Turk Plant over SWEPCO's objections.⁸⁰ SWEPCO appealed the case, making many of the same arguments regarding ratemaking and the regulatory construct that ETI makes here.⁸¹ SWEPCO's arguments

⁷⁵ PURA § 37.056.

⁷⁶ Preliminary Order at 4 at Issue No. 17b, 20. (Dec. 16, 2021).

⁷⁷ PFD at 147-48.

⁷⁸ PFD at 148.

⁷⁹ ETI's Exceptions at 19-20; *see also id* at 3-4.

⁸⁰ *Application of Southwestern Electric Power Company for a Certificate of Convenience and Necessity for Authorization for Coal Fired Power Plant in Arkansas*, Docket No. 33891, Final Order at 20, Ordering Paragraph 2 (Aug. 12, 2008).

⁸¹ *See Sw. Elec. Power Co. v. Pub. Util. Comm'n of Tex.*, 419 S.W.3d 414 (Tex. App.—Amarillo 2011, pet. denied) (Oct. 15, 2013).

were rejected by the court of appeals, which upheld the Commission's order imposing the cap, holding:

The PUC's interpretation that would allow it to impose cost caps to shield captive Texas ratepayers from costs in excess of an amount the PUC deemed reasonable is a reasonable interpretation of the PUC's own authority in light of these provisions.⁸²

The Texas Supreme Court denied SWEPCO's petition for review,⁸³ and the Commission has applied the Turk Plant cost cap in SWEPCO's subsequent rate cases.⁸⁴ This precedent is directly on point as to the Commission's authority to implement cost caps in CCN proceedings, but it is not even referenced in ETI's exceptions.

Indeed, it is ETI's implications that the Commission lacks authority to protect ratepayers through a cost cap that are contrary to the regulatory construct. Under statute, the Commission is to grant approval of a CCN application "only if the Commission finds that the certificate is *necessary* for the service, accommodation, convenience, or safety of the public."⁸⁵ The Legislature directed the Commission to consider a number of factors in making a necessity determination, including costs to customers.⁸⁶ As noted, a core part of a CCN case is determining whether a proposed resource is the best alternative to meet any need that the utility has demonstrated.⁸⁷

When the Commission grants CCN approval, it necessarily provides limits on the plant it is approving. For example, if the Commission approved a 600 MW natural gas plant, the utility would not be free to disregard the order and instead build 1000 MW of wind generation capacity. In this example, the Commission found that the 600 MW gas plant was necessary, not the 1000 MW wind project. The implementation of a cost cap is similar, particularly where there are

⁸² *Id.* at 428.

⁸³ <https://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=bc775772-843b-4508-99b9-8f0b1d2afe6d&coa=cossup&DT=PET%20FOR%20REVIEW%20DISP&MediaID=3517bb56-9faf-4d9d-9940-c52083d262e4> .

⁸⁴ *E.g., Application of Southwestern Electric Power Company for Authority to Change Rates, Order on Rehearing at FoFs 72-77 (Mar. 19, 2018).*

⁸⁵ PURA § 37.056(a) (emphasis added).

⁸⁶ *Id.* § 37.056 (c)(4)(E) (referencing the "probable improvement of service *or lowering of costs* to consumers (emphasis added)).

⁸⁷ Preliminary Order at 4 at Issue No. 17b, 20. (Dec. 16, 2021).

concerns over rising costs. In such a situation, the Commission recognizes that a proposed plant might pass CCN muster (including being better than alternatives) at one cost, but fail the necessity test (and be worse than alternatives) at a higher cost. If the utility believes that the cost cap is too low, it is free to choose to not build the plant, and instead present the Commission with alternatives. ETI's complaints over cost caps are in essence arguments against the entire pre-approval CCN regime, which is mandated by statute. Indeed, if these issues could only be addressed in a rate case after the plant is constructed (and under the deferential prudence review construct), there would be no need to consider the costs of competing alternatives in a CCN case in the first place.

ETI's arguments regarding alternatives are meritless.

ETI argues that the ALJs' recommended cost cap is inappropriate because no other party provided a "viable" alternative to OCAPS.⁸⁸ This makes no sense. ETI is the monopoly utility with the duty to engage in responsible resource planning and the party with the burden of proof in this case. If there is an issue with a lack of ready-made alternatives for the Commission to consider in this case, that is because ETI failed to present any. Indeed, the only economic analysis it presented in its application was a comparison of OCAPS to the construction of three incredibly expensive CTs, a comparison that ETI itself admits was not intended to identify the best option to serve load.⁸⁹

But the problems with ETI's failure to properly consider alternatives go beyond the scant analysis it provided in its application. As discussed in TIEC's exceptions, the RFP process should have allowed ETI to assess (and then present to the Commission) all of the various options to provide capacity that the market had to offer.⁹⁰ But ETI limited the RFP to such an extent that it received literally zero outside bids.⁹¹ Notably, another utility—that did not impose the RFP limitations that ETI did—held a very successful RFP for capacity in MISO South during the same year.⁹² ETI's approach effectively eliminated all competition from the RFP process, thus making it impossible for the Commission and parties to know what alternatives the market would have

⁸⁸ ETI's Exceptions at 23.

⁸⁹ Tr. at 414:19-22 (Nguyen Redirect) (June 30, 2022); TIEC Ex. 1, Griffey Dir. at 57 (Bates 060).

⁹⁰ TIEC's Exceptions at 23-24.

⁹¹ TIEC Ex. 1, Griffey Dir. at 32 (Bates 035).

⁹² TIEC Ex. 1, Griffey Dir. at 32-33 (Bates 035-036).

offered. Having done so, ETI cannot now credibly argue that the absence of alternatives somehow invalidates the application of a cost cap.

ETI also spends much of its exceptions arguing that the 2019 portfolio analysis supports overturning the ALJs' recommendation that a cost cap be applied, though its arguments are anything but clear. On the one hand ETI argues that a cost cap would be especially inappropriate because ETI "evaluated a range of reasonable portfolios."⁹³ But on the other hand, ETI implies that the level of the cost cap recommended by the ALJs is inappropriate (as apparently any level would be) because there are no viable alternatives to OCAPS that have been presented.⁹⁴ In fact, ETI repeatedly refers to Portfolio 5—the portfolio that was the closest to the OCAPS portfolio (Portfolio 2) in ETI's 2019 analysis as an unreasonable choice.⁹⁵

In any event, none of ETI's arguments about the portfolio analysis support its position on the cost cap (or on certification more generally). The 2019 portfolio analysis was flawed, as described in TIEC's exceptions.⁹⁶ TIEC will not reiterate all of those points here, but notes that a threshold problem with the 2019 analysis is that it is now almost four years old. There have been major developments since 2019 that impact the economics of future generation resources, including the enactment of the IRA, an issue on which ETI opposed additional testimony and briefing.⁹⁷ ETI's 2019 analysis supports neither its selection of OCAPS nor its opposition to a cost cap.

Finally, ETI's contentions regarding alternatives ignore the evidence that there are options it could pursue to fulfill capacity and reliability needs short of locking ratepayers into an extremely expensive, long-term resource during a time of global tumult and cost uncertainty. For example, Mr. Griffey testified that there is ample surplus capacity in MISO South, and that ETI could enter into purchased power agreements (PPA) to meet its needs while evaluating whether a long-term addition is truly necessary.⁹⁸ He also testified that a combination of shorter-term resources, such

⁹³ ETI's Exceptions at 5.

⁹⁴ ETI's Exceptions at 6.

⁹⁵ ETI's Exceptions at 6, 23. ETI also appears to write off the other portfolios as reasonable alternatives at this stage. *Id.* at 5 (referring to OCAPS and Portfolio 5 as the only alternatives that remain).

⁹⁶ TIEC's Exceptions at 20-23.

⁹⁷ ETI's Letter to ALJs Regarding TIEC's Letter Requesting Additional Briefing (Aug. 25, 2022).

⁹⁸ TIEC Ex. 1, Griffey Dir. at 52 (Bates 055).

as PPAs from existing power plants and the extension of Sabine 4 for a few years, could lead to greater net benefits to customers and lower rates.⁹⁹ Unfortunately, ETI refused to consider these types of alternatives, and structured its RFP to eliminate all competition to OCAPS whatsoever. Having done so, it cannot now weaponize its own failure to consider and present viable alternatives to OCAPS as grounds to reject a cost cap. Indeed, these failures should result in the denial of ETI's application altogether.

ETI's remaining arguments fail.

In its exceptions, ETI argues that OCAPS has a “known estimated cost”¹⁰⁰ and that any cost cap should have an exception for force majeure events.¹⁰¹ These arguments ignore the cost-escalation risks associated with the project. Even after ETI completes the true-up process and issues a Limited Notice to Proceed, engineering, procurement, and construction (EPC) contract costs can continue to escalate for various reasons, including the very force majeure events that ETI seeks to exclude from a cost cap.¹⁰² ETI's witness Carlos Ruiz testified at hearing that force majeure events have already occurred and increased the cost of OCAPS,¹⁰³ and that some force majeure events (like the war in Ukraine) are still occurring.¹⁰⁴ Accordingly, the prospect of further cost escalations due to force majeure events is no mere technicality. Under the circumstances presented here, it is a clear and ongoing risk to the project. Further, the non-EPC costs are completely unfixed.¹⁰⁵ These costs are subject to continued escalation until they are incurred. OCAPS remains an unreasonably risky proposition for ratepayers.

XIII. CONCLUSION

The process that led to ETI's selection of its own self-build proposal was one that ensured that there would be no competition. In the absence of any real competition to test the economics

⁹⁹ TIEC Ex. 1, Griffey Dir. at 36 (Bates 039).

¹⁰⁰ ETI's Exceptions at 4.

¹⁰¹ *Id.* at 26.

¹⁰² Tr. at 195:13-22, 196:17-22 (Ruiz Cross) (June 29, 2022).

¹⁰³ Tr. at 239:7-13 (Ruiz Cross) (June 29, 2022).

¹⁰⁴ Tr. at 239:7-13 (Ruiz Cross) (June 29, 2022).

¹⁰⁵ ETI Ex. 8, Ruiz Dir. at 14 (Bates 17 of 64). At the time that ETI's Third Periodic Report on Market Escalation was filed, EPC costs comprised 71% of the total estimate, with non-EPC costs comprising the remaining 29%. However, the final breakdown between these two categories would not be known until the costs were actually incurred. Tr. at 201:25-203:5 (Ruiz Cross) (June 29, 2022); ETI Ex. 8, Ruiz. Dir. at 18-19 (Bates 21-22 of 64).

of its own proposal, ETI concocted a fanciful comparison to an extraordinarily expensive fleet of hydrogen-enabled CTs, the likes of which had never been seen and likely never will be. That was the basis for ETI's economic evaluation in this case. It was a comparison that would make virtually any conceivable alternative look economical. It was also a comparison that ignored both ETI's subsequent plans to add far more generation capacity than OCAPS would provide and the dramatic changes in law that made the economics of OCAPS even worse.

ETI seeks a blank check for a plant that has not been shown to be economical compared to any realistic alternative and that now far exceeds the original cost estimate. The Commission and the ratepayers of Texas deserve more from a utility that seeks approval to build a plant that will raise rates by at least \$200-250 million. ETI's request for a CCN should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Benjamin B. Hallmark, Attorney for TIEC, hereby certify that a copy of this document was served on all parties of record in this proceeding on this 20th day of October, 2022 by electronic mail, facsimile, and/or First Class, U.S. Mail, Postage Prepaid.

/s/ Benjamin B. Hallmark

Benjamin B. Hallmark