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**SOAH DOCKET NO. 473-22-09196  
PUC DOCKET NO. 53267**

<b>APPLICATION OF AEP TEXAS INC. FOR</b>	<b>§</b>	<b>BEFORE THE STATE OFFICE</b>
<b>APPROVAL OF A WHOLESALE</b>	<b>§</b>	
<b>DISTRIBUTION SERVICE</b>	<b>§</b>	<b>OF</b>
<b>DISTRIBUTED GENERATION TARIFF</b>	<b>§</b>	
	<b>§</b>	<b>ADMINISTRATIVE HEARINGS</b>

**SMT MCALLEN LLC’S RESPONSE TO AEP TEXAS INC.’S MOTION TO LIFT  
ABATEMENT, SCHEDULE A PREHEARING CONFERENCE, AND REESTABLISH A  
PROCEDURAL SCHEDULE**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES:

SMT McAllen LLC (“SMT”) hereby files this Response to the Motion to Lift Abatement, Schedule a Prehearing Conference, and Reestablish a Procedural Schedule (“**Motion to Lift**”) filed by AEP Texas, Inc. (“AEP”).

**I. SUMMARY OF RELIEF REQUESTED**

SMT opposes AEP’s Motion to Lift and asks that the Administrative Law Judges (ALJs) continue to abate this proceeding until the Commission resolves Project No. 54224, Cost Recovery for Service to Distributed Energy Resources (the “**DER Rulemaking**”). As SMT more fully sets forth herein: (i) the abatement should not be lifted automatically on AEP’s motion; (ii) the basis for the original grant of the abatement still applies; (iii) maintaining the abatement is more efficient than attempting to resolve the same issues simultaneously in a contested hearing and in a rulemaking project; (iv) maintaining the abatement avoids a ruling that may prove inconsistent with the Commission’s directives in the DER Rulemaking; and (v) abating until the resolution of the DER Rulemaking does not prejudice any relief that AEP may be entitled to, as such relief would be applied retroactively to May 24, 2022 in accordance with Order No. 5. Accordingly,

SMT asks that the ALJs deny AEP's Motion to Lift in its entirety. In the alternative, SMT requests a hearing to further evaluate the merits of AEP's Motion, or, if the ALJs grant AEP's motion to lift the abatement, SMT requests an opportunity following the ALJ's ruling to propose a procedural schedule different from the one proposed in AEP's Motion to Lift.

## **II. THE ABATEMENT SHOULD NOT BE LIFTED AUTOMATICALLY**

AEP may object that the Agreed Motion to Abate Proceeding (the "**Agreed Motion**") filed by AEP, Hunt Energy Network, L.L.C. ("**Hunt**"), Broad Reach, and SMT provided that "[t]he abatement may be lifted on motion of any party that concludes this proceeding should move ahead to address AEP Texas' application"<sup>1</sup>, but the abatement should not be automatically lifted in response to AEP's motion. The Agreed Motion provided that the abatement "may" be lifted; not that it "shall" be lifted,<sup>2</sup> and accordingly it is appropriate for SMT to ask the ALJs to deny AEP's motion to lift the abatement. In any event, the ALJs are not estopped from denying AEP's Motion to Lift on its merits.

## **II. THE ORIGINAL BASIS FOR ABATEMENT STILL APPLIES**

SOAH Order No. 3 granted the Agreed Motion to abate the proceeding "while the Public Utility Commission of Texas (Commission) considers issues concerning distributed energy resources, relevant to this case, in other projects."<sup>3</sup> The DER Rulemaking may be taking longer than AEP would prefer, but that rulemaking proceeding remains relevant to distributed energy issues in this case and has not been concluded or withdrawn.

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<sup>1</sup> SOAH Docket No. 473-22-09196, PUC Docket No. 53267, Agreed Motion to Abate Proceeding at 1 (Oct. 27, 2022).

<sup>2</sup> See e.g., TEX. GOVT. CODE § 311.016(1)-(2), which in the context of interpreting statutory codes provides that "may" creates discretionary authority or grants permission or a power, whereas "shall" imposes a duty.

<sup>3</sup> SOAH Order No. 3, SOAH Docket No. 473-22-09196, Referring Agency No. 53267 (October 28, 2022).

AEP appears to favor lifting the abatement because “it is unclear **when or if** a final rule addressing the cost recovery issue in this case may be proposed.”<sup>4</sup> However, AEP has not provided any evidence that it is unclear “if” the Commission intends to issue a final rule; they have only identified uncertainty as to “when” the rulemaking will conclude.

As AEP acknowledged in AEP’s Motion to Lift, the DER Rulemaking is merely “on hold until the technical requirements project (Project No. 54233) [is] completed”, which makes sense, given that the technical findings in that project (entitled “Technical Requirements and Interconnection Processes for Distributed Energy Resources (DERS)” (emphasis added)) may inform the Commission’s decisions in the DER Rulemaking that also addresses distributed energy issues. The DER Rulemaking has not yet completed, and so the Commission is still considering issues relevant to this case; accordingly, the Agreed Motion’s justification for abatement remains intact and should continue to be upheld.

### **III. THE ABATEMENT IS EFFICIENT**

AEP’s proposed procedural schedule introduces two possibilities: (i) this proceeding will issue a final order before the DER Rulemaking is concluded; or (ii) the DER Rulemaking will conclude while this proceeding is underway. Neither outcome is efficient.

If a final order is issued in this proceeding prior to the completion of the DER Rulemaking, then any relief granted by this proceeding will likely be appealed by parties to the extent the results of the DER Rulemaking prove more favorable. Simply waiting for regulatory certainty provided by the DER Rulemaking could avoid the delay and expense of such appeals.

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<sup>4</sup> AEP’s Motion to Lift at 2 (emphasis added).

Alternatively, if the DER Rulemaking is concluded while this proceeding is actively following an adopted procedural schedule, the “mid-stream” introduction of a new and relevant substantive rule would invite revision and extension of the procedural schedule to revise existing testimony, add new testimony, conduct additional discovery, and address related disputes. By contrast, continuing to abate this proceeding is efficient because it avoids the parties wasting time and resources (including the ALJ’s time and SOAH’s resources) addressing arguments and facts that could prove irrelevant or insufficient once a relevant substantive rule is adopted.

The DER Rulemaking was initiated by a vote of the Commission following a Memorandum filed by Commissioner Glotfelty, in which the Commissioner stated in part that “rather than address these issues in a piecemeal fashion through contested cases which increase the potential for contradictory policies, I believe we are better served by addressing these important policies up front in a form in which all market participants can participate.”<sup>5</sup> The Commissioner spoke directly to the issue at hand, advocating avoiding contradictory policies in piecemeal proceedings, and instead focusing on developing a unified policy. Lifting the abatement would run directly counter to the Commissioner’s justification for initiating the DER Rulemaking and would create broadly applicable precedent in a proceeding where only a few interested market participants are participating. If the abatement is lifted, SMT would be faced with the need to actively participate in this proceeding while also monitoring and participating in the DER Rulemaking, thereby duplicating efforts to advocate a position common to both proceedings.

*[continued on following page]*

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<sup>5</sup> *Revision of Wholesale Electric Market Design*, Project No. 52373, Memorandum filed by Commissioner Glotfelty on April 30, 2022; March 31, 2022 Open Meeting Agenda Item 25.

#### **IV. THE ABATEMENT AVOIDS CONFLICTING RULINGS**

A ruling in this proceeding made ahead of the Commission's conclusion of the DER Rulemaking could prove contrary to the Commission's final rulemaking in the DER Rulemaking. As explained in the previous section, ruling on the novel issues in this proceeding before the Commission has completed the DER Rulemaking invites delay and dispute to address any differences between this proceeding's ruling and the substantive rule once adopted. Although AEP seems to be asking for the abatement to be lifted to promote expediency, there is ample reason to presume that it would take more time to untangle conflicting rulings than it would to have this proceeding administrate implementation of the DER Rulemaking's substantive rule once available. It is likely that an applicable substantive rule would resolve disagreements between the parties and greatly reduce the scope of this proceeding.

#### **V. THE ABATEMENT DOES NOT PREJUDICE AEP'S RELIEF**

The Commission's Order No. 5 in this proceeding provided that "[o]nce the Commission issues a final order in this docket, AEP Texas will be able to surcharge customers for the period between May 24, 2022, the relate back date, and the date of the final order."<sup>6</sup> Accordingly, any delay caused by abatement does not prejudice AEP's relief; whenever the final order is issued, AEP will be made whole. If the final order in this proceeding reflects the Commission's guidance in a formally adopted substantive rule, it avoids dispute on the appropriate surcharge. By contrast, if the final order in this proceeding is not consistent with the relevant substantive rule, AEP's

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<sup>6</sup> PUCT Docket No. 53267, Order No. 5 Finding Application Sufficient for Further Review, Notice Sufficient, Approving Interim Rates, and Establishing Procedural Schedule at 1 (March 30, 2022)

entitlement to relief would be subject to ongoing argument and debate, and contest over whether amounts previously and inappropriately remitted to AEP should be disgorged.

## **VI. CONCLUSION**

As set forth above, granting AEP's Motion to Lift would introduce inefficiencies and regulatory uncertainty, invite further conflict, and would not create any reliable benefit in terms of expediency. By contrast, maintaining the abatement until the resolution of the DER Rulemaking would avoid piecemeal ratemaking, efficiently use the parties' and the ALJs' time and resources, and promote certainty. Accordingly, SMT asks that the ALJs deny AEP's Motion to Lift. In the alternative, SMT requests a hearing regarding whether AEP's Motion to Lift should be granted, or, if the ALJs elect to grant AEP's Motion, SMT requests that additional time be provided for other parties to propose alternative procedural schedules.

Respectfully submitted,

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**ATTORNEYS FOR:  
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### **CERTIFICATE OF SERVICE**

I certify that a true and correct copy of this document was served on all parties of record on this \_\_\_\_ day of \_\_\_\_\_, 2023 via email in accordance with the Commission's order in Docket No. 50664 suspending 16 TAC § 22.74.

/s/ Sean Farrell  
Sean Farrell