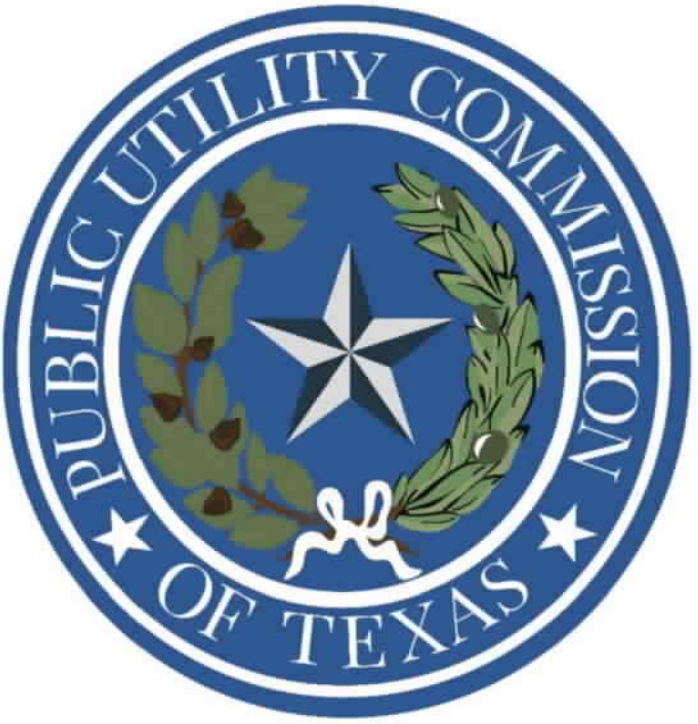

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SOAH DOCKET NO. 473-22-2353
PUC DOCKET NO. 53442

APPLICATION OF CENTERPOINT ENERGY HOUSTON ELECTRIC, LLC FOR APPROVAL TO AMEND ITS DISTRIBUTION COST RECOVERY FACTOR	§ § § § §	**BEFORE THE PUBLIC UTILITY COMMISSION OF TEXAS**

TEXAS COMPETITIVE POWER ADVOCATES' MOTION FOR REHEARING

TABLE OF CONTENTS

SOAH DOCKET NO. 473-22-2353
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TEXAS COMPETITIVE POWER ADVOCATES' MOTION FOR REHEARING

Texas Competitive Power Advocates ("TCPA") timely submits this Motion for Rehearing[1] to the final order of the Public Utility Commission of Texas ("Commission") and respectfully shows as follows:

I. INTRODUCTION

TCPA respectfully contends that the Commission should issue an order on rehearing and adopt the Administrative Law Judges' ("ALJs'") proposal for decision ("PFD"), with certain modifications as presented in TCPA's exceptions to the PFD and detailed below. As recommended in the PFD, the Commission should deny the application of CenterPoint Energy Houston Electric, LLC ("CEHE") to recover expenditures related to leases (both the "Short-Term Lease" and the "Long-Term Lease") for mobile generation that CEHE deployed to restore distribution service to certain customers during hurricane season in 2021. CEHE's leases facially did not satisfy the requirements of the applicable statute—Public Utility Regulatory Act ("PURA")[2] § 39.918—in numerous ways, and there was insufficient evidence to support a finding that CEHE acquired the leases through the required competitive bidding process or acted reasonably or prudently in executing the leases. Thus, the Commission's reversal of the PFD on these points and its approval

[1] *See* 16 TEX. ADMIN. CODE ("TAC") § 22.264 (requiring that motions for rehearing be filed under the timelines set out in the Administrative Procedure Act ("APA")) *and* TEX. GOV'T CODE § 2001.146 (requiring that motions for rehearing be filed not later than the 25th day after the date that is the subject of the motion is signed). The final order was signed on April 5, 2023. *See Application of CenterPoint Energy Houston Electric, LLC for Approval to Amend its Distribution Cost Recovery Factor*, Docket No. 53442, Order (Apr. 5, 2023).

[2] TEX. UTIL. CODE §§ 11.001-66.016 ("PURA").

of CEHE's application to recover the costs associated with the Short-Term and Long-Term leases constituted a plainly erroneous interpretation of PURA and established precedent, was arbitrary and capricious, unsupported by substantial evidence, and an abuse of discretion, *i.e.*, all reversible error under the Administrative Procedure Act ("APA").[3] Accordingly, and for all the reasons set forth below, TCPA respectfully requests that the Commission grant this motion for rehearing and adopt the PFD to deny CEHE's application to recover the costs for the leases, with certain modifications to the PFD based on the discussion below.

II. POINTS OF ERROR

Point of Error No. 1: The Commission acted arbitrarily and capriciously and without substantial evidence, abused its discretion, and adopted a plainly erroneous interpretation of PURA in finding that CEHE was permitted to lease mobile-generation units to ensure that temporary emergency electric energy was available to its customers and in furtherance of its obligation to serve every consumer in its certificated service area and provide continuous and adequate service in that area. (Finding of Fact ("FoF") 92A, 128; Conclusion of Law ("CoL") 20A, 20B, 23, 23A)

The Commission's finding that CEHE leased mobile generation units in order to ensure continuous and adequate service to customers under PURA § 37.151 was effectively an attempt to justify CEHE's actions based on a general, longstanding obligation in PURA, rather than the much more limited grant of authority in the applicable statute relating to leasing of mobile generation—PURA § 39.918. As detailed throughout this motion, CEHE failed to meet the standards for leasing mobile generation units under PURA § 39.918, and that statute, alone, empowers and sets up the applicable guardrails for transmission and distribution utilities ("TDUs") to lease mobile generation units. Thus, the Commission's reliance on the broad statutory language in PURA § 37.151 as support for CEHE's actions under PURA § 39.918 is arbitrary and capricious, an abuse of discretion, unsupported by substantial evidence, and a plainly erroneous interpretation of PURA.

[3] TEX. GOV'T CODE § 2001.174(2).

Utilities have been required to provide continuous and adequate service pursuant to PURA since its initial adoption in 1975,[4] as well as its recodification in 1997.[5] Notably, utilities had this obligation when the Legislature fundamentally altered the structure of the electricity market through Senate Bill ("SB") 7 in 1999.[6] SB 7 required the formerly integrated utilities (like CEHE's predecessor) to unbundle into competitive generation, competitive retail, and wires (*i.e.*, transmission and distribution) utility businesses,[7] and thereafter generally prohibited the natural monopoly wires business (*i.e.*, the only entity deemed a "utility" post SB 7) from engaging in competitive energy services, including owning and operating generating facilities[8] or participating in the market for electricity *in any way* except for the purpose of buying electricity to serve its own needs.[9]

The much more recent statute giving TDUs the temporary *option* to lease mobile generators[10]—PURA § 39.918—was codified only in 2021 via House Bill ("HB") 2483[11] and must

[4] Public Utility Regulatory Act, 64th Leg., R.S., ch. 721, 1975 Tex. Gen. Laws 2327, repealed by Act of April 5, 1995, 74th Leg., R.S., ch. 9 (SB 319), § 2(a), 1995 Tex. Gen. Laws 88 (PURA75). Specifically, Section 58 of PURA75 stated "The holder of any certificate of public convenience and necessity, whether a municipal utility, governmental subdivision, cooperative corporation, or other public utility, shall serve every consumer within its certified area and shall render continuous and adequate service within the area or areas."

[5] Act of May 8, 1997, 75th Leg., R.S., ch. 166 (SB 1751), § 9, 1997 Tex. Gen. Laws 713, 1018. The requirement for continuous and adequate service was recodified in 1997 in Section 37.151 of PURA as follows: "Except as provided by this section, Section 37.152, and Section 37.153, a certificate holder shall: (1) serve every consumer in the utility's certificated area; and (2) provide continuous and adequate service in that area."

[6] Act of May 27, 1999, 76th Leg., R.S., ch. 405 (SB 7), § 62, 1999 Tex. Gen. Law 2543, 2625.

[7] PURA § 39.051.

[8] In addition to the unbundling requirement, which required the separation of generation from transmission and distribution services (in PURA § 39.051), PURA defines an entity that owns or operates generating assets to offer into the wholesale market as a power generation company and prohibits such an entity from owning or operating wires assets except as essential interconnection facilities or other permissible purposes like self-service. See PURA § 31.002(10).

[9] PURA § 39.105(a).

[10] *See* PURA § 39.918(k) (stating that "[t]his section expires September 1, 2029").

[11] 87th Tex. Leg., R.S., House Bill 2483 (effective Sept. 1, 2021).

be interpreted in the context of the overall, existing market design set out in PURA.[12] In other words, PURA § 39.918 must be construed as a limited carve-out to the general prohibition against TDUs like CEHE operating generation for any purpose other than self-use, such as directly on behalf of end-use customers. The pre-existing obligation to provide continuous and adequate service is set out in chapter 37 of PURA related to certificates of convenience and necessity ("CCN") and, in the context of the post-SB 7 competitive market design, must be referring to continuous and adequate service to provide electric *delivery* service (*i.e.*, wires service). This general provision cannot be interpreted to override the specific restrictions of PURA § 39.918 for when the leasing of mobile *generation* by TDUs is allowed. Further, and as discussed in greater detail below, the requirements of PURA § 39.918 have not been satisfied in this case. Thus, the Commission's application of PURA § 37.151 to justify CEHE's request to recover its leasing costs for mobile generation is plainly erroneous.

In addition, the fact that TDUs were given the temporary option, rather than mandated, to lease mobile generators proves that TDUs are not required to lease mobile generators in order to meet their ongoing obligations to provide continuous and adequate service. On the other hand, utilities always have been, and still are:

- Required to impose only just and *reasonable* rates;[13]
- Allowed to recover only for capital investments that are *used and useful in providing service* to the public,[14] and

[12] *E.g.*, *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001) ("**Additionally, we must always consider the statute as a whole rather than its isolated provisions.** We should not give one provision a meaning out of harmony or inconsistent with other provisions, although it might be susceptible to such a construction standing alone. We must presume that the Legislature intends an entire statute to be effective and that a just and reasonable result is intended.") (emphasis added) (*citing* TEX. GOV'T CODE § 311.021(2), (3)).

[13] PURA § 36.003.

[14] PURA § 36.151.

- Obligated to act *reasonably and prudently*.[15]

CEHE's expenditures on over 500 megawatts ("MW") of leased mobile generation from Life Cycle Power were anything but reasonable, useful, or prudent. At a minimum, CEHE needed to prove that 500 MW was the correct number of MW to serve its purposes, and that if so, it chose the right types of generators to accomplish its purposes. CEHE further needed to prove that it selected the best vendor from which to lease the generators based on price and other qualitative criteria. Instead, as set forth in more detail in the discussion in Points of Error Nos. 3-9 and 11, CEHE did none of this.

The Commission should issue an order on rehearing and deny CEHE's application to recover costs related to the leases of mobile generation, as recommended in the PFD.

Point of Error No. 2 The Commission acted arbitrarily and capriciously and without substantial evidence, abused its discretion, and adopted a plainly erroneous interpretation of PURA in finding that CEHE complied with 39.918(g), which required CEHE to include in its emergency operations plan [EOP] filed with the commission, a *detailed* plan on CEHE's use of those facilities. (FoF 97, 141; CoL 12, 23)

PURA § 39.918(g) required CEHE to "include in [its] emergency operations plan ["EOP"] filed with the commission . . . ***a detailed plan*** on the utility's use of those facilities." (Emphasis added). The Commission implemented this provision of HB 2483 in 16 TAC § 25.53(e)(1)(H), which required CEHE to "include an annex that *details* its plan for the use of [the mobile generators]." (Emphasis added).

Notably, FoF 97 and CoL 12 do not state that CEHE included the required *detailed* plan on its use of its mobile generators, or that it included the required annex that *details* its plan. Rather, FoF 97 states that CEHE filed updates to its EOP that "included information pertaining to

[15] *See Entergy Gulf States, Inc. v. Public Util. Comm'n*, 112 S.W.3d 208, 214 (Tex. App.—Austin 2003, pet. denied) ("To raise the price of its product, the utility must participate in a rate case and bear the burden of proving that each dollar of cost incurred was reasonably and prudently invested.").

the use of the [mobile generators]." CoL 12 then baldly asserts that CEHE "satisfied the requirement under PURA § 39.918 that it provide a plan for use of mobile generation in its emergency operations plan filed with the Commission." Facially, a "plan" alone does not meet the statutory requirement, or the administrative requirement. CEHE was required to provide a *detailed* plan for its use of the mobile generators, and the required detailed annex. There is insufficient evidence that CEHE filed the required detailed plan, and thus, the Commission's findings and legal conclusions to the contrary are arbitrary and capricious, unsupported by substantial evidence, an abuse of discretion, and a plainly erroneous interpretation of applicable law. The Commission should grant rehearing, reverse the PFD on this point, and find that CEHE's EOP was not sufficient under PURA § 39.918(g).

Point of Error No. 3: The Commission acted arbitrarily and capriciously and without substantial evidence, abused its discretion, and adopted a plainly erroneous interpretation of PURA in finding (i) CEHE conducted a competitive bidding process to lease mobile generation under the Short-Term Lease (FoF 103, 111, 128; CoL 20, 23, 23A), and (ii) the response and delivery deadlines for the Short-Term Lease were "adequate under the circumstances." (FoF 105, 111, 128; CoL 20, 20A, 23, 23A).

The Commission's Order stated in various places that the two-and-a-half-day request for proposal ("RFP") process for the Short-Term Lease was "adequate under the circumstances" and "competitive enough under the circumstances"[16] without describing what "circumstances" rendered the process "adequate" or "competitive enough." Presumably, the Commission was referring to the 2021 hurricane season that was well underway at the time CEHE issued the two-and-a-half-day Short-Term Lease RFP. In any event, the Commission's finding that CEHE conducted a competitive bidding process for Short-Term Lease, and the Commission's finding that the response and delivery deadlines were "adequate under the circumstances" were arbitrary and

[16] *E.g.*, Docket No. 53442, Order at 3, 15 (Apr. 5, 2023).

capricious, unsupported by substantial evidence, an abuse of discretion, and plainly erroneous for the following reasons:

1. CEHE conceded that using a competitive bidding process to lease the mobile generation facilities in this case was reasonably practicable pursuant to PURA § 39.918.[17]

CEHE admitted at the Hearing that there was no emergency; that it was not necessary to use its emergency procurement process; and that using a competitive bidding process to lease the mobile generation facilities in this case was reasonably practicable.[18] Thus, there was no dispute that a *legitimately competitive bidding process* was required for the mobile generation lease in this case. PURA § 39.918 does not set the standard for competitive bidding as "competitive enough." Thus, if the Commission agrees that use of a competitive bidding process in the first place was reasonably practicable—as is undisputed by CEHE, then the Commission must find that the bidding process was either competitive, or not. As set forth below, the facts surrounding the procurement process for the Short-Term Lease contract demonstrated that it was not competitive.

2. The Short-Term Lease RFP arbitrarily narrowed the allowable technologies and imposed an unnecessarily quick equipment delivery requirement.

The Short-Term Lease RFP required the bidders to offer up to eight generators: (1) three of which were capable of providing at least 30 MW of power each; (2) five of which were capable of providing at least 5 MW of power each; (3) all of which were mobile; (4) all of which were of the gas turbine type; and (5) all of which had to be delivered by August 16, 2021.[19] Further, the RFP stated that proposals utilizing GE or Caterpillar/Solar Turbine equipment would receive

[17] Tr. at 386:20-24 (Raben Cross) (Oct. 19, 2022).

[18] Tr. at 385:15 – 386:24 (Raben Cross) (Oct. 19, 2022).

[19] Amended Direct Testimony and Exhibits of Martin W. Narendorf, CEHE Ex. 6, Exhibit MWN-4 at 4-5.

priority preference.[20] These oddly specific parameters of the RFP arbitrarily limited the qualifying technologies, which not only served to automatically disqualify a potentially lower-cost technology—such as Reciprocating Internal Combustion Engines ("RICE"),[21] but also served to further unnecessarily narrow the pool of potential bidders.

3. The Short-Term Lease RFP imposed an unreasonably quick response deadline.

CEHE's witness testified at the Hearing that CEHE had spoken with four potential bidders who expressed an intent to bid on the Short-Term Lease.[22] Thus, at the time that CEHE issued the Short-Term Lease RFP, it presumably expected bids from four bidders. CEHE sent an email transmitting the Short-Term Lease RFP at 5:01 PM on Tuesday, August 3, 2021.[23] Responses to the RFP were due on Friday, August 6, 2021 at noon, which was only 2½ days later.[24] In the RFP document that was transmitted to potential bidders, CEHE indicated that it would decide on the winning bidder by the following Monday, August 9, 2021.[25] Even CEHE's Rebuttal witness, Dean Koujak, admitted that this timeline for responses was shorter than even a very short process.[26]

4. The Short-Term Lease RFP imposed an unreasonably short timeline for delivery of the equipment.

The RFP required delivery of the equipment by August 16, 2021,[27] which was only six business days after the RFP *responses* were due,[28] and less than five business days after CEHE

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[20] CEHE Ex. 6, Exhibit MWN-4 at 5-6.

[21] Direct Testimony of Charles S. Griffey (Sep. 16, 2022), ARM-TCPA Ex. 1 at 21 (bates 00023).

[22] Tr. at 373:5 – 10 (Raben Cross) (Oct. 19, 2022).

[23] Tr. at 376:25 – 377:3 (Raben Cross) (Oct. 19, 2022); *see also* RFP transmittal email, HCC Ex. 25.

[24] Tr. at 373:11 – 22 (Raben Cross) (Oct. 19, 2022).

[25] TCPA Ex. 39 at 3 (bates TCPA 39_004).

[26] Deposition Testimony of Dean Koujak, HCC Ex. 34 at 12:16 – 13:6 (Oct. 11, 2022).

[27] Tr. at 460:19 – 24 (Raben Cross) (Oct. 19, 2022).

[28] TCPA Ex. 39 at 3 (bates TCPA 39_004).

claimed that it would make its *decision*.[29] Notably, the August 16, 2021 delivery date was also seventeen days *before* HB 2483 became effective.

Together, these RFP parameters required a vendor – within less than five business days after winning the bid—to have a fully negotiated and signed lease with CEHE for the delivery of tens of millions of dollars-worth of generators; to have chartered at least five 18-wheel trucks in order to transport the 5-MW generators[30]; and to have chartered multiple oversize trucks and to have secured multiple oversize load transportation permits in order to carry the several component parts of at least three 30-MW generators.[31] These parameters were so onerous that no vendor—aside from a single vendor already working surreptitiously on arrangements to meet the requirements well in advance of the RFP—could possibly satisfy the bid requirements, establishing unequivocally that the delivery deadlines were unreasonable and only served to artificially narrow the pool of bidders, rather than to create a "competitive" process as required by the statute. In response to the Short-Term Lease RFP, unsurprisingly given the strict parameters and timeline, CEHE received only two bids, one of which CEHE disqualified because it was unable to meet the RFP's delivery deadline—a deadline to which, as discussed below, CEHE would not ultimately hold the winning bidder. The artificial parameters that CEHE imposed on the Short-Term Lease RFP further undermine the reasonableness of concluding, as the Order did, that the process was nonetheless "competitive."

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[29] TCPA Ex. 39 at 3 (bates TCPA 39_004).

[30] Tr. at 316:11-20 (Narendorf Redirect).

[31] *See* CEHE Ex. 6 (Amended Narendorf Direct) Exhibit MWN-3 at 124-130 (where photos depict the component parts of the ~32 MW generators as being at least three times the size of one 18-wheel truck); *see also* ARM-TCPA Ex. 1 (Griffey Direct) at Bates 000052 (which is CEHE's response to HCC-RFI08-06, whereby CEHE admits that a "Super load permit" is required to transport the ~30 MW generators, and that the typical processing time for such permits is five business days).

5. CEHE's extremely quick decision on the award further negates the reasonableness of any conclusion that the RFP was "competitive."

As discussed above, responses to the Short-Term RFP were due on Friday, August 6, 2021,[32] and CEHE initially represented that it would decide on the winning bidder by Monday, August 9, 2021.[33] CEHE, only a couple of weeks before the hearing, filed the Rebuttal testimony of Erin Raben that included a procurement timeline ("Timeline") suggesting that CEHE took a week to decide on the winning bidder.[34] Ms. Raben then conceded at the hearing that CEHE had already decided to award the contract to Life Cycle Power by *at least* Tuesday, August 10, 2021, which was less than two business days after receiving the bids.[35] In short, the evidence established that the timeline was very fast, further negating any conclusion that the process was "competitive."

6. Improper communications occurred between CEHE and Life Cycle Power before and after issuing the Short-Term Lease RFP.

Additional evidence adduced in this case further undermines any conclusion that the process used by CEHE was "competitive" as required by PURA § 39.918 and thus makes the Commission's decision to uphold it as "competitive enough" for purposes of PURA § 39.918 (which, notably, is not even the applicable legal standard), arbitrary and capricious, unsupported

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[32] TCPA Ex. 39 at 3 (bates TCPA 39_004).

[33] *Id.*

[34] *See* Rebuttal Testimony, Exhibits, and Workpapers of Erin E. Raben, Exhibit EER-R-1 (Oct. 5, 2022), CEHE Ex. 11 (in which Ms. Raben claimed that CEHE assessed bids and negotiated with bidders between August 6-13); *see also* Tr. at 374:6-9 and 388:4-9 (Raben Cross) (October 19, 2022) (in which Ms. Raben again stated that CEHE took about a week assessing bids).

[35] Tr. at 468:19 – 469:17 and 472:8-20 (Raben Cross) (Oct. 19, 2022) (Confidential); *see also* HCC Ex. 27 (Confidential) (which is an email from Life Cycle Power to CEHE in which representatives from Life Cycle Power asked for "written confirmation" of its award of the RFP by referencing a call that had taken place two days earlier, on Tuesday, Aug. 10, 2021, whereupon Life Cycle Power had been notified that it had been awarded the RFP); *see also* HCC Ex. 19 at 50:11 – 52:8 (Oct. 12, 2022) (in which Ms. Raben admitted during her deposition that when CEHE makes a contract award, CEHE typically has a conversation with the vendor over the phone, and then follows up with emails memorializing their conversation and getting next steps started).

by substantial evidence, an abuse of discretion, and plainly erroneous. Specifically, the evidence strongly suggests that CEHE selected Life Cycle Power before the RFP was even issued. On Tuesday, August 3, 2021, at 12:00 PM (more than 5 hours *before* the Short-Term Lease RFP was issued), Jason Wells, the Chief Financial Officer for CEHE,[36] sent an email to an employee of Life Cycle Power saying: "Let's get past this short term lease process and then immediately turn our attention towards the longer term structure."[37] In response to this email, at 12:47 PM the same day, the Life Cycle Power employee responded by saying: "I will defer to you on when we should connect regarding the longer term structure/capitalization. We can certainly accommodate the cap lease structure *mentioned*."[38] During the hearing, CEHE witness, Erin Raben, admitted that "long term structure" referred to the Long-Term Lease.[39]

Importantly, when these two emails were exchanged between CEHE and Life Cycle Power, no RFPs had been issued; no responsive bids had been offered by any vendor; price and other important terms for any lease had not been discussed[40]; and supposedly, no contract awards had been made for either the Short-Term or Long-Term Leases.

When read together, the two emails described above strongly suggest that the contract award to Life Cycle Power was already a forgone conclusion, even without pricing information. The emails indicate that CEHE and Life Cycle Power intended to go through the motions of an RFP process for the Short-Term Lease before working out the terms of the Long-Term Lease, which was also already fixed in favor of Life Cycle Power.

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[36] Tr. at 374:21-22 (Raben Cross) (Oct. 19, 2022).

[37] HCC Ex. 26 at 3.

[38] *Id.* at 3-4 (emphasis added).

[39] Tr. at 377:21-378:2 (Raben Cross) (Oct. 19, 2022).

[40] HCC Ex. 22 at 45:19 – 48:10.

If it were not already clear, based on the communications and timeline set out above, that CEHE pre-determined to select Life Cycle Power from the very beginning, it became virtually undeniable once intervenors discovered the pre-existing relationship between Life Cycle Power's sales representative, Knoell Coombs, and CEHE's Chief Executive Officer ("CEO"), David Lesar. Under cross examination at the Hearing, CEHE witness Erin Raben, admitted that Knoell Coombs and David Lesar had an existing relationship, going back ten years to the time when the two worked together while they were at Halliburton.[41]

In light of: (1) the oddly specific parameters of the RFP, which arbitrarily limited the qualifying mobile generation technologies; (2) the anticipatory emails exchanged between CEHE's CFO and Life Cycle Power before the Short-Term Lease RFP was even disseminated; (3) the 2½ days given to bidders to submit bids; (4) CEHE's decision after only 1½ days to award a lease contract worth tens of millions of dollars to a veritable startup;[42] and (5) the pre-existing relationship between Knoell Coombs and David Lesar, it strains credulity to believe that CEHE did not always intend to award Life Cycle Power the Short-Term Lease. There is simply insufficient evidence in the record for the Commission to conclude that CEHE's process for the Short-Term Lease was competitive (or even "competitive enough," which, again, is not the legal standard).

Thus, the ALJs correctly found that the Short-Term Lease contract was not competitively bid, and the Commission's reversal of that finding and conclusion to the contrary was arbitrary and capricious, unsupported by substantial evidence, an abuse of discretion, and a plainly erroneous interpretation of PURA § 39.918. The Commission's application of a "competitive

[41] Tr. at 513:23 – 516:18 (Raben Cross - Confidential) (Oct. 20, 2022).

[42] ARM-TCPA Ex. 1 (Griffey Direct) at 24 (bates 000026) (stating that Life Cycle Power was only formed in 2020, and it had only operated 150 megawatts of mobile generation by the Spring of 2021).

enough" standard was also a plainly erroneous interpretation of the applicable statutory standard, which as detailed above, requires that if a competitive bidding process is reasonably practicable in the first place (which CEHE concedes it was), then it must be employed without exception. The Commission should grant rehearing and issue an order adopting the PFD on this point.

Point of Error No. 4: The Commission acted arbitrarily and capriciously and without substantial evidence, abused its discretion, and adopted a plainly erroneous interpretation of PURA in finding that CEHE conducted a competitive bidding process to lease mobile generation under the Short-Term lease Extension (FoF 110, 111, 128; CoL 20, 20A, 23, 23A)

CEHE concedes that no competitive bidding process at all was used to extend the Short-Term Lease, though such a process was reasonably practicable. The Commission's Order agreeing that no such process was required—without any legal or evidentiary basis—was arbitrary and capricious, unsupported by substantial evidence, an abuse of discretion, and plainly erroneous.

CEHE entered into the Short Term Lease on September 1, 2021, for a two-month term, which means it was scheduled to terminate on November 1, 2021. With the Short-Term Lease Extension, CEHE increased its mobile generator capacity from 124.5 MW to at least 214 MW (an increase of over 70%),[43] and increased the term of the Short-Term Lease from two months to eleven months (over quintupling the term length) with no competitive bidding process whatsoever. CEHE did not even pretend to conduct a competitive bidding process for this substantial addition to its fleet and lease term length. Rather, CEHE simply claimed the right to do this as "an administrative matter."[44] The Commission's Order adopts CEHE's "administrative matter" justification, but adds, without any evidence in the record, that "extending an existing lease **is a common business practice** that was reasonable in light of the long-term lease that was also being

[43] Docket No. 53442, Proposal for Decision at 9 (Jan. 27, 2023) ("PFD").

[44] CEHE Ex. 11 (Raben Rebuttal) at 23.

negotiated."[45] (Emphasis added). Not even CEHE claimed that extending leases as an administrative matter was a "common business practice." But even if CEHE had claimed that extending leases as an administrative matter was a common business practice and offered expert testimony in support of such a claim, it would not matter because the *statute* requires utilities to use a competitive bidding process when reasonably practical for mobile generation procurement. The controlling statute trumps any alleged "common business practices." Further, CEHE did not assert that it was not reasonably practical to conduct a competitive bidding process; rather, CEHE claimed only that it did not have to do so, but without citing any statutory justification. In short, CEHE was required to abide by PURA § 39.918(f) and did not, regardless of any supposed common business practices.

Accordingly, the ALJs correctly found that the Short-Term Lease Extension contract was not competitively bid, and the Commission's reversal of this finding was arbitrary and capricious, unsupported by substantial evidence, an abuse of discretion, and a plainly erroneous interpretation of PURA. The Commission should grant rehearing and issue an order adopting the PFD on this point.

Point of Error No. 5: The Commission acted arbitrarily and capriciously and without substantial evidence and abused its discretion in finding that during September of the 2021 hurricane season and in advance of the 2021-2022 winter season, there was a high demand for, and limited supply of, mobile generation. (FoF 107A, 107B, 128; CoL 20A, 23, 23A)

The Commission's Order seems to adopt two of CEHE's inherently conflicting arguments in support of the plainly erroneous conclusion that CEHE used a competitive bidding process for its leases of mobile generation. On the one hand, CEHE argued that it had to act quickly because the supply of mobile generators was limited. On the other hand, CEHE claimed that its bidding

[45] Docket No. 53442, Order at 3 (Apr. 5, 2023).

processes were competitive because of the number and quantity of mobile generation bids it obtained—two bids for the Short-Term Lease, and four bids for the Long-Term lease, constituting well over 1,000 MW worth of mobile generators. CEHE cannot have it both ways. In this case, CEHE failed to establish both that there was a high demand for mobile generation and that there was a limited supply of mobile generation. In making these findings, the Commission acted arbitrarily and capriciously, without substantial evidence, and abused its discretion.

1. Alleged high demand

CEHE witness, Martin Narendorf, claimed in his rebuttal testimony that "[CEHE's] research at the time indicated a higher demand for temporary emergency electric energy facilities due to the wildfire issues in California and Hurricane Ida that made landfall in Louisiana in August 2021."[46]

Wildfire issues in California: At the Hearing, Mr. Narendorf admitted the "research" he referenced involved talking to only one utility, which was California's PG&E,[47] and having his team provide "some articles from California that showed different amounts of MW that they were considering acquiring."[48] But when asked how many ME PG&E was using, Mr. Narendorf admitted that he did not know.[49] Mr. Narendorf further admitted that one of the articles that he referenced, that was part of CEHE's "research," stated that between 2020 and 2021, PG&E had actually *reduced* its fleet of mobile generation from 350 MW to 168 MW after implementing improved modeling.[50] When Mr. Narendorf was asked whether he knew that PG&E served 5 ½

[46] Rebuttal Testimony and Exhibits of Martin W. Narendorf Jr. (Oct. 5, 2022), CEHE Ex. 10, at 11:8-10.

[47] Tr. at 84:11-24 (Narendorf Cross) (Oct. 18, 2022).

[48] Tr. at 83:17 – 84:24 (Narendorf Cross) (Oct. 18, 2022).

[49] Tr. at 83:25 – 84:2 (Narendorf Cross) (Oct. 18, 2022).

[50] Tr. at 255:16 – 258:21 (Narendorf Cross) (Oct. 19, 2022).

million customers, he said he didn't know.[51] When asked whether he knew that PG&E was using the 2 MW reciprocating engines as its technology of choice, he also said he didn't know, even though this information was also contained in one of the articles that constituted part of his "research."[52]

Hurricane Ida that made landfall in Louisiana: At the Hearing, Mr. Narendorf was asked whether he had talked to Entergy Louisiana about its own procurement of mobile generation after Ida, and he admitted that he had not.[53] Mr. Narendorf was then questioned about whether he had talked to Mississippi Power about its own procurement of mobile generation after Ida, and he again admitted that he had not.[54] Mr. Narendorf was then questioned about whether, to his knowledge, either Entergy Louisiana or Mississippi Power had actually sought to procure mobile generation after Ida, and he admitted that he did not know.[55]

There is simply insufficient evidence to support CEHE's claim of a high demand for mobile generators. The only utility with whom CEHE actually communicated was not only reducing its fleet, despite its ongoing wildfire problem, but it also was using a type of generator that CEHE claimed would not work for CEHE.[56] With respect to the states that were impacted by Hurricane Ida, CEHE admitted that it had not talked to any of the potentially impacted utilities about their potential mobile generation procurement, and CEHE did not know whether those utilities had ever sought to procure mobile generation.

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[51] Tr. at 25:4-9 (Narendorf Cross) (Oct. 19, 2022).

[52] Tr. at 279:16 – 280:18 (Narendorf Cross) (Oct. 19, 2022).

[53] Tr. at 86:16 – 87:2 (Narendorf Cross) (Oct. 18, 2022).

[54] Tr. at 87:3-6 (Narendorf Cross) (Oct. 18, 2022).

[55] Tr. at 87:7-12 (Narendorf Cross) (Oct. 18, 2022).

[56] Tr. at 276:12 – 277:7 (Narendorf Cross) (Oct. 19, 2022).

2. Alleged limited supply

CEHE admitted that it relied on representations by the *salespersons* of the vendors for CEHE's assertion that mobile generation supply was "limited."[57] Even if the vendors had made these representations, claiming that "supply is limited" is a popular sales tactic, and it was not prudent for CEHE to rely upon such statements to justify its rushed procurement process. In reality, however, the capacity was not limited and CEHE knew it. Two of CEHE's witness, Erin Raben and Martin Narendorf, testified at the hearing that each of CEHE's four potential bidders had mobile generation capacity to meet the 125 MW that CEHE initially sought.[58]

In light of this testimony, it was clearly not true that the supply was limited. Instead, the fact that two out of the four potential vendors did *not* ultimately bid on the Short-Term Lease, despite having supply, tends to indicate that other aspects of the Short-Term Lease parameters were problematic, as detailed earlier under Point of Error No. 3.

On the other hand, even if it were really true (despite the evidence to the contrary) that there was a "limited supply" of mobile generation, then, as the REP Coalition aptly noted in its post-hearing initial brief, "it would not be reasonable to incorporate the use of [mobile generation] facilities into a TDU's obligation to provide continuous and adequate service."[59] This is because, with a genuinely "limited supply," some utilities would be unable to procure the mobile generation necessary to meet its obligation to provide continuous and adequate service. This adds further support for the fact that mobile generators are not necessary for utilities to meet their obligation

[57] *See* CEHE Ex. 10 at 11:4-13 (Narendorf Rebuttal) (in which Mr. Narendorf testified that "[CEHE] also heard from the vendors during discussions with them that they were expecting shorter supply due to higher demand.").

[58] Tr. at 383:11 – 384:16 (Raben Cross) (Oct. 19, 2022); and Tr. at 23:7 – 57:24 (Narendorf Cross) (Oct. 18, 2022).

[59] Docket No. 53442, Texas Energy Association for Marketers and Alliance for Retail Markets' Post-Hearing Initial Brief at 15 (Nov. 16, 2022).

under PURA § 37.151 to provide continuous and adequate service, as discussed in Point of Error No. 1 herein.

In short, the Commission acted arbitrarily and capriciously and without substantial evidence and abused its discretion in adopting as "fact" CEHE's unsubstantiated assertions regarding the high demand and limited supply of mobile generation, which contradict CEHE's claim that its bidding process was also competitive due to the supposedly ample number of bids it received. The Commission should grant rehearing and adopt the PFD on this issue by striking those findings.

Point of Error No. 6: The Commission acted arbitrarily and capriciously and without substantial evidence and abused its discretion in finding that CEHE conducted a competitive bidding process to lease mobile generation under the Long-Term Lease. (FoF 103, 115, 128; CoL 20A, 23, 23A)

The Commission erroneously adopted the ALJs' determination that the Long-Term Lease was competitively bid. The Commission's adoption of this finding was in error because the ALJs determined that the Long-Term Lease was competitively bid based solely on the fact that CEHE gave 30 days for bidders to respond to the Long-Term Lease RFP (as contrasted with 2 ½ days for the Short-Term Lease), and the fact that fifteen vendors were given the chance to bid on the Long-Term Lease RFP (as contrasted with four vendors for the Short-Term Lease). The ALJs' entire opinion on the competitiveness of the bidding process for Long-Term Lease was as follows:

> With respect to the Long-Term Lease, for which 15 bidders were given 30 days to respond and several proposals were submitted, the ALJs find that CEHE showed it to be the result of a competitive bidding process. There is no substantial evidence that the potentially improper pre-communications made during the Short-Term Lease RFP process were repeated in seeking the Long-Term Lease, and those concerns are mitigated by the more robust Long-Term Lease RFP process.[60]

[60] PFD at 17 (Jan. 27, 2023).

Not only is it questionable to believe that the concededly "improper pre-communications" that occurred during the Short-Term Lease RFP process did not repeat themselves during the Long-Term Lease RFP process,[61] but there also was more than ample evidence presented at the Hearing to clearly establish that no reasonable utility manager would have selected Life Cycle Power over Distributed Power Solutions (DPS) absent some illegitimate motive.

Rather than grapple with this evidence and conclude that the Long-Term Lease was nonetheless somehow competitively bid, the PFD simply concludes that it was in the few sentences quoted above, which were then accepted in the Order as true without further analysis. The point of a competitive RFP is to select some combination of the lowest-cost bidder, the most qualified and reputable bidder, or the bidder whose offer is the best fit for the solicitor's needs. The evidence shows that on all of these counts that the bidder CEHE selected was inferior to a well-documented alternative. For the Commission's important role in making judgments about whether CEHE has fulfilled its statutory obligation, it is arbitrary to assess the competitiveness of a solicitation merely on the basis of the time over which the process unfolded, without inquiring about the substance of whether the process of selecting from the bids received was, in fact, competitive. Yet that is what the Commission has done in its order.

As discussed below, there were *many* reasons that CEHE should have chosen DPS over Life Cycle Power for the Long-Term Lease, thus establishing that, like the Short-Term Lease, the Long-Term Lease was not competitively bid. The Commission's conclusion to the contrary—in adopting the PFD on this point, which, in turn, contained no analysis on the extensive record evidence discussed below—was thus arbitrary and capricious, unsupported by substantial evidence, and an abuse of discretion.

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[61] *Supra* notes 36-39 and accompanying text.

1. Reason 1 – Cost

DPS's bid was substantially less expensive than Life Cycle Power's bid. DPS's lease price for the large generators was 44% lower, and for the smaller generators was 60% lower, than Life Cycle Power's bid.[62] Regarding this price differential, CEHE witness Erin Raben explained that in their respective bids, "[Life Cycle Power had] provided a base monthly lease cost including all ancillary costs for movement, labor and fired hours (which are the hours the generating facility is operating on fuel), whereas [DPS had] provided a base lease cost with each ancillary service itemized."[63] In other words, Ms. Raben explained that Life Cycle Power's base price was more expensive because it bundled the lease cost with the contingent (i.e., *potential*) operating costs.

When questions were raised about how Life Cycle Power's bid managed to become the cheapest option when lease options were presented to the CEHE Board for approval, Ms. Raben explained that as a result of the bids' differing structures, they were "rationalized" for comparison in a workpaper included with her Rebuttal testimony (Workpaper).[64] In other words, Ms. Raben made some assumptions about future (i.e., *potential*) operations in order to estimate DPS's operating costs. At the Hearing, the evidence demonstrated that, in order to make Life Cycle Power's bid appear cheaper, not only did CEHE deliberately impute several unrealistically high assumptions regarding operating costs to DPS's bid,[65] but it also compared the *sums* of the lease payments plus operating costs for each bid over the 7.5 year leases, as opposed to the more

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[62] ARM-TCPA Ex. 1B (Griffey Direct) (HSPM) at 24 (bates 000026).

[63] CEHE Ex. 11 (Raben Rebuttal) at 15 and 17.

[64] *Id.* at 15.

[65] *See* TCPA Ex. 17 (in which CEHE witness, Narendorf, admitted in an RFI response that CEHE assumed that the generators would run 8 hours per month (*i.e.*, 96 hours per year), and that they would be moved three times per year); *see also* Tr. at 266:1-267:3 (Narendorf Cross) (Oct. 19, 2022) (in which Mr. Narendorf admitted that none of the generators actually ran for 8 hours per month); *and* Tr. at 502:24 – 503:17 (Raben Cross) (Oct. 20, 2022) (Confidential) (in which Ms. Raben admitted that the actual number of movements per year for the 32 MW generators was about 0.3 and for the 5.7 MW generators it was about 0.9); *see also* TCPA Ex. 89 at bates 89_003 (showing the actual run hours and movements for each generator and for each month over the 13 months).

appropriate metric, which is the *present values* of the lease payments plus operating costs.[66] CEHE's decision to use the sums of the lease payments plus operating costs, rather than the present values of the same, was unreasonable and imprudent.[67] If Ms. Raben had instead treated the *present values* of the lease payments plus operating costs as the appropriate metric for comparison of the two bids, rather than the sums, then this consideration alone would have shown DPS's bid to be $5 million cheaper than Life Cycle Power's bid.[68] If Ms. Raben also had imputed *reasonable assumptions regarding potential operating costs* to DPS's bid for purposes of comparison with Life Cycle Power, instead of inexplicably high and unrealistic assumptions, then, as discussed below, this would have shown DPS's bid to be $147 million cheaper than Life Cycle Power's bid.[69]

Unrealistically high assumptions regarding fired hours each year

In her Workpaper, Ms. Raben assumed that *all* 20 of the leased generators—five with a 5.7 MW capacity and fifteen with a 32 MW capacity, totaling 516 MW—would run 96 hours per year.[70] Ms. Raben used 96 hours per year as the assumed run hours in her Workpaper for DPS's bid because CEHE used *one single 5.7 MW generator* to power the Lake Jackson Civic center for

[66] Tr. at 487:4-494:25 (Raben Cross) (Oct. 20, 2022) (Confidential).

[67] *See Application of Entergy Texas, Inc. to Amend a Certificate of Convenience and Necessity for the Acquisition of a Solar Facility in Liberty County*, Docket No. 51215, Order at 7 (Oct. 19, 2021) (finding that ETI failed to act reasonably when it failed select the lowest cost alternative based on a present value calculation).

[68] Tr. at 494:14-21 (Raben Cross) (Oct. 20, 2022) (Confidential); *see also* TCPA Ex. 36 (Native File) (HSPM) (*see* tab called "Summary," and reference cell F48 for DPS's bid, and C48 for Life Cycle Power's bid).

[69] TCPA Ex. 97 (Native file) (HSPM) (*see* tab called "Summary," and reference cell F48 for DPS's bid, and C48 for Life Cycle Power's bid).

[70] *See* TCPA Ex. 17 (in which CEHE witness, Narendorf, admitted that CEHE assumed that the generators would run 8 hours per month (*i.e.*, 96 hours per year)); *see also* Tr. 495:2-9 (Raben Cross) (Oct. 20, 2022) (Confidential) (in which Ms. Raben admitted that CEHE assumed 96 annual run hours for all generators for the purpose of analyzing DPS's bid) *and see* TCPA 36 (Native File) (HSPM) (showing the 96 annual run hours assumption in the tab called "DPS Bid Confirmation," and cell C7 concerning "Annual Hours Used").

96 hours after Hurricane Nicholas.[71] The use of a single 5.7 MW generator, *on one occasion and in one year*, did not provide a reasonable basis for Ms. Raben to assume in her Workpaper that all 20 of CEHE's generators, totaling 516 MW, would run for 96 hours per year, every single year during the 7.5 year term of the lease. For this to have been a reasonable assumption, one would have to believe that a hurricane will make landfall in CEHE's territory *every single year* during the next 7.5 years of the lease, and further, that the hurricane will make landfall every year in such a way that all 20 generators will just happen to be located exactly where the damages occur so as to be potentially useful to their fullest capacity, and further, that the damaged locations each year are all so damaged that all 20 generators will run for a full 96 hours before any repairs will be made by CEHE to its facilities. This is a truly fantastical assumption. Alternatively, one would have to assume that a winter storm *worse* than Winter Storm Uri will happen every single year for each of the next 7.5 years— considering that Winter Storm Uri's load shed event lasted for 71 hours[72]—and that, again, the generators will just happen to be located exactly where they are needed so as to be potentially useful to their fullest capacity. This is also a truly fantastical assumption.

Ms. Raben admitted during cross examination at the Hearing that over CEHE's 13-month history of leasing the generators, the actual run times averaged between 2.9 and 3.5 hours per year for the 32 MW generators.[73] Again, the total outage hours for which CEHE executed load shed

[71] Tr. at 522:22 – 523:20, and 525:7–527:22 (Raben Cross) (Oct. 20, 2022) (Confidential); *see also* TCPA Ex. 89 at bates 89_003.

[72] Tr. at 495:23 – 496:9 (Raben Cross) (Oct. 20, 2022); *see also* LLCC Ex. 2.

[73] Tr. at 499:13 – 501:13 (Raben Cross) (Oct. 20, 2022) (Confidential); *see also* TCPA Ex. 89 at bates 89_003; *and see* Tr. at 64:8-13 (Narendorf Cross) (Oct. 18, 2022) (describing CEHE's total procurement as fifteen 32 MW generators and five 5.7 MW generators for a total of 516 MW); The 32 MW generators constitute 75% of the generators and 93% of the total MW capacity procured because 32 MW x 15 generators = 480 MW, and 480/516 = 93% of the total MW capacity procured.

during Winter Storm Uri was 71 hours.[74] Even if one assumed that a historical event like Winter Storm Uri occurred once every 7.5 years, which is the length of the Long-Term Lease, then this would equate to an average of 9.5 hours of outages per year during the lease period. Adding the potential 9.5 hours per year of average run time due to a winter storm, to CEHE's actual average run hours per year would still amount to less than 14 hours per year of total run hours for the generators. This is 85% lower and many fewer than the 96 hours per year that Ms. Raben assumed in her Workpaper for DPS's bid.[75]

Unrealistically high assumptions regarding annual mobilizations/demobilizations (i.e., movements of the generators)

In her Workpaper, Ms. Raben further assumed that each of the 32 MW generators would be mobilized and demobilized (*i.e.*, moved around) three times per year, and that each of the 5.7 MW generators would be moved around four times per year.[76] CEHE offered no explanation for assuming such frequent movements, and Ms. Raben admitted that during CEHE's 13-month record of leasing the generators, the actual number of movements per year for the 32 MW generators was about 0.3 and for the 5.7 MW generators was about 0.9.[77] Consequently, the evidence in the record demonstrates that imputing three movements per year for the 32 MW generators and four movements per year for the 5.7 MW generators, to DPS's bid in the Workpaper for purposes of

[74] Tr. at 495:23 – 496:9 (Raben Cross) (Oct. 20, 2022); *see also* HCC Ex. 2.

[75] Tr. at 495:2-9 (Raben Cross) (Oct. 20, 2022) (Confidential) (in which Ms. Raben admitted that CEHE assumed 96 annual run hours for all generators for the purpose of analyzing DPS's bid).

[76] TCPA Ex. 36 (Native File) (IISPM) (in the tab called "DPS Bid Confirmation," showing in cell C12, three annual mobilizations/demobilizations for the 32 MW generators, *i.e.*, the TM2500s, and showing in cell C183, four annual mobilizations/demobilizations for the 5.7 MW generators, *i.e.*, the SMT50); *see also* Tr. at 495:13-19 (Raben Cross) (Oct. 20, 2022) (Confidential).

[77] Tr. at 502:24 – 503:17 (Raben Cross) (Oct. 20, 2022) (Confidential); *see also* TCPA Ex. 89 at bates 89_003.

comparing the bids, was unreasonable, imprudent, and not competitive because it served to artificially drive up the cost of DPS's bid relative to Life Cycle Power's bid.

Ms. Raben confirmed that the above-described assumptions regarding run times and movements were included in her Workpaper for the purpose of comparing the cost of the Life Cycle Power and DPS bids.[78] During the Hearing, Ms. Raben then participated in an exercise, whereby these assumptions in her Workpaper were changed. The 96 annual run hours for the generators assumed for the DPS bid was changed to a more realistic average of 14 annual run hours.[79] This was a more realistic estimate for run hours because it was based on actual outage hours during Winter Storm Uri and CEHE's own data regarding run hours. In the same exercise, the annual movement assumptions were changed from three per year for the 32 MW generators, and four per year for the 5.7 MW generators, to a more realistic average of one movement per year for each generator.[80] One movement per year was more realistic because it was closer to, though still higher than, CEHE's actual data regarding movements.

As previously discussed, when calculating the present values of lease payments plus operating costs for each bidder instead of the sums, DPS had a price advantage of $5 million, even while retaining the aforementioned significantly unrealistic assumptions regarding average annual run hours and average annual movements.[81] Once the unrealistic assumptions were changed to the

[78] Tr. at 495:2-19 (Raben Cross) (Oct. 20, 2022) (Confidential).

[79] Tr. at 501:5 – 505:17 (Raben Cross) (Oct. 20, 2022) (Confidential). These changes were memorialized in TCPA Ex. 97 (Native File) (HSPM) (in the tab called "DPS Bid Confirmation," showing in cell C7, 14 Annual Hours Used).

[80] *Id.* Tr. at 501:5 – 505:17 (Raben Cross) (Oct. 20, 2022) (Confidential). These changes were memorialized in TCPA Ex. 97 (Native File) (HSPM) (in the tab called "DPS Bid Confirmation," showing in cell C12, one annual mobilization/demobilization for the 32 MW generators, *i.e.*, the TM2500s, and showing in cell C18, one annual mobilization/demobilization for the 5.7 MW generators, *i.e.*, the SMT50).

[81] Tr. at 494:14-21 (Raben Cross) (Oct. 20, 2022) (Confidential); *see also* TCPA Ex 36 (Native File) (HSPM) (*see* tab called "Summary," and reference cell F48 for DPS's bid, and C48 for Life Cycle Power's bid).

much more realistic numbers discussed herein and at the Hearing, the overall impact on DPS's bid was dramatic—DPS's existing price advantage went from over $5 million to almost $147 million.[82] ***In other words, once the present value comparison was applied, and once the unrealistic operating cost assumptions were changed to more realistic assumptions, DPS's bid was $147 million cheaper than Life Cycle Power's bid.***

Nevertheless, CEHE continuously claimed that it got a better deal from Life Cycle Power than DPS because Life Cycle Power offered a 24% "discount" for the prepayment of the entire 7.5 year lease term, but this claim is wholly unsupported by the record. As shown in the Workpaper, DPS actually offered a better version of the larger generators for a lower price than Life Cycle Power's supposed "discounted" prepayment price. Life Cycle Power's large generators were 32 MW whereas DPS's large generators were 35 MW. Ms. Raben's Workpaper shows that, even after accounting for Life Cycle Power's purported 24% "discount" on the lease price in exchange for CEHE's prepayment for the entire lease at once, (notionally, a *present value discount* for paying today rather than in the future) DPS's bid for the 35 MW generators was 16% cheaper than Life Cycle Power's bid for the 32 MW generators,[83] and DPS's bid for the 5.7 MW generators was 18% cheaper than Life Cycle Power's bid for exactly the same 5.7 MW generators.[84]

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[82] TCPA Ex. 97 (Native file) (HSPM) (*see* tab called "Summary," and reference cell F48 for DPS's bid, and C48 for Life Cycle Power's bid).

[83] CEHE Ex. WP 11c Raben (HSPM) (under tab "A.1," cells M9-M23, showing Life Cycle Power's "discounted" lease price for the 32 MW generators, for a total of 471.9 MW, and under tab "D.1," cells M9-M23, showing DPS's lease price for the 35 MW generators, for a total of 525 MW. DPS's price per MW for the large generators was still 16% lower than Life Cycle Power's "discounted" prepayment bid and DPS could have delivered within the same time frame that Life Cycle Power delivered its large generators).

[84] CEHE Ex. WP 11c Raben (HSPM) (under tab "A.1," cell R25, showing the cumulative monthly cost of the fifteen 32 MW generators, and cell R33, showing the cumulative monthly cost of the five 5.7 MW generators, and cell R35 showing the total cumulative monthly cost for both, and then dividing the amount shown in cell R33, which is for the 5.7 MW generators, by cell R35, which is the total monthly cost for both, and arriving at 8.3%).

Finally, it does not require complicated math to determine that the harm caused by CEHE's refusal to compare the present values of the lease payments plus operating costs for both bidders was compounded by the fact that ***CEHE actually prepaid Life Cycle Power the entire cost of the lease at the beginning of the lease***. In other words, CEHE could have paid a lower price, over the course of 7.5 years if it had selected the significantly cheaper bid by DPS, but instead, it chose to pay a higher price, *now*, to Life Cycle Power. That logic is at odds with the common business practice of incorporating the time value of money into financial decisions, and is clearly imprudent.

In light of the price differential, there is no conceivable justification for CEHE's lease of its entire fleet from Life Cycle Power—especially the large generators—other than CEHE having pre-decided to contract with Life Cycle Power, potentially due to the CEO's pre-existing relationship with Life Cycle Power's salesperson, whom he has known for over ten years. At a minimum, CEHE could have leased the large generators from DPS and the small generators from Life Cycle Power, or it could have opted to lease the 2 MW generators that DPS also offered, but, inexplicably, it chose to pay—and ultimately for Texas electricity customers to pay—more. CEHE's choice of Life Cycle Power at a much higher cost than DPS demonstrates that the Long-Term Lease procurement was not competitively bid, and instead was fixed in favor of Life Cycle Power from the outset.

2. Reason 2 – DPS was reputable company; Life Cycle Power was not.

Given the choice between an established, experienced corporation and a small company with questionable leadership, CEHE chose to risk hundreds of millions of its ratepayer's dollars with the latter. In addition to offering a cheaper bid, according to CEHE's own statements, DPS

was backed by an extremely large and well respected company.[85] By contrast, Life Cycle Power was barely more than a sole proprietorship that was controlled by a convicted felon.[86] Life Cycle Power was only formed in 2020, and it had only operated 150 MW of mobile generation before entering into the leases with CEHE for over 500 MW.[87] CEHE's procurement witness, Ms. Raben, admitted that she had never heard of Life Cycle Power before the passage of HB 2483.[88]

In light of the substantial evidentiary record that DPS was the far better choice—considering every relevant criterion for an RFP—than CEHE's selected bidder, Life Cycle Power, in adopting the PFD's determination (with almost no analysis) that the Long-Term Lease was competitively bid, the Commission acted arbitrarily and capriciously and without substantial evidence and abused its discretion. The Commission should grant rehearing and reverse the PFD on this point.

Point of Error No. 7: The Commission acted arbitrarily and capriciously and without substantial evidence and abused its discretion in failing to overturn the finding by the ALJs that the Short-Term Lease and the Long-Term Lease (collectively, "Leases") contained risk mitigation provisions that served to protect CEHE against Life Cycle Power's breach of performance obligations.

The ALJs concluded that risk mitigation provisions within the Long-Term Lease contract mitigated the need for CEHE to conduct due diligence on individual employees or officers of Life Cycle Power and that such due diligence (on individual executives) is not standard industry practice.[89] In other words, the ALJs effectively acknowledged that CEHE conducted no due

[85] ARM-TCPA Ex. 1 at 26 (bates 00028).

[86] *See* ARM-TCPA Ex. 10 at 25 (bates 000027) (stating that "[Life Cycle Power's] co-founder and CEO was a convicted felon who had previously been in prison for five years after a 2012 conviction for environmental crimes and subsequently on probation for three years. His sentencing was more severe because the Judge determined that he had not given truthful testimony during the trial. Evidence indicated that he ordered employees to divert wastewater into the Red River and the Shreveport water system and had individuals lie to auditors and inspectors.").

[87] ARM-TCPA Ex. 1 at 24 (bates 000026).

[88] Tr. at 395:7-9 (Raben Cross) (Oct. 19, 2022).

[89] PFD at 17-18 (Jan. 27, 2023).

diligence on the principals of Life Cycle Power, although it was a small, start-up company. The ALJs also did not make an affirmative finding that CEHE conducted adequate due diligence on Life Cycle Power, the corporate entity, but were simply silent on this issue.

While the PFD was silent on this issue, cross-examination of Ms. Raben at the Hearing clearly established that CEHE also conducted no due diligence on Life Cycle Power, the corporate entity. In fact, all of the questioning at the Hearing regarding CEHE's due diligence effort concerned Life Cycle Power, the corporate entity, not its leadership.[90] Under cross-examination, Ms. Raben who is responsible for the procurement of all goods and services utilized by CEHE and its affiliate utilities,[91] admitted that nearly every document that CEHE produced, which purported to show its due diligence efforts regarding Life Cycle Power before entering into the lease contracts, actually *post-dated* the execution of the Long-Term Lease contract, and many of the documents did not concern Life Cycle Power at all.[92] In other words, the documents that CEHE produced in an effort to show its due diligence efforts on Life Cycle Power, instead demonstrated CEHE's *lack* of due diligence. In any event, the finding that the Leases contained risk mitigation provisions that served to protect CEHE against Life Cycle Power's breach of performance obligations was arbitrary and capricious, unsupported by substantial evidence, and an abuse of discretion.

Ms. Raben alleged in her Rebuttal testimony that CEHE had negotiated a wide range of "risk mitigation provisions" to protect itself, including a "security interest in the leased Equipment as collateral security for the payment and performance by [Life Cycle Power] of its obligations

[90] Tr. at 396:5 – 402:6; 406:22 – 420:24 (Raben Cross) (Oct. 19, 2022).

[91] CEHE Ex. 11 (Raben Rebuttal) at 3 (in which Ms. Raben testified that she is "currently responsible for the procurement of all goods and services utilized by [CEHE's] electric, natural gas, and generation utilities.")

[92] *See id.*

under the Lease Agreement."[93] When questioned about this provision, Ms. Raben admitted that she did not know what this meant and she did not know how it protected CEHE. She did agree, however, that CEHE is not permitted to own the mobile generators.[94] Thus, if the "protection" CEHE claims is a security interest in the ownership of Life Cycle Power's mobile generation, it is an interest that CEHE could never exercise given PURA § 39.918(b)(1) allows a utility to "lease and operate," but not own, mobile generation (and, of course, as a TDU in ERCOT, CEHE is otherwise prohibited from owning generation for use to serve customers).

Ms. Raben claimed in her Rebuttal testimony that another risk mitigation provision CEHE negotiated was to require a letter of credit, which has a current face value of $67 million. When questioned about this provision, Ms. Rabin admitted that she did not know the circumstances under which CEHE would be able to draw upon this letter of credit. She also admitted that CEHE had prepaid Life Cycle Power approximately $200 million, and that the face value of the letter of credit was less than what it had already paid to Life Cycle Power.[95]

Ms. Raben claimed that another risk mitigation provision CEHE negotiated was to require Life Cycle Power to obtain $50 million of excess or umbrella insurance coverage, name CEHE as an additional insured party, and require Life Cycle Power to maintain other customary types of insurance, and to deliver the certificates of insurance at closing. When questioned about this provision, Ms. Rabin admitted that she did not know what excess or umbrella insurance covers, or whether it would cover CEHE in the event of Life Cycle Power's default on the lease, or whether it covers breach of contract issues or business disputes.[96] She also admitted that CEHE did not

[93] CEHE Ex. 11 (Raben Rebuttal) at 19-21.

[94] Tr. at 422:10 – 424:3 (Raben Cross) (Oct. 19, 2022).

[95] Tr. at 424:13 – 426:13 (Raben Cross) (Oct. 19, 2022).

[96] *Id.* at 426:14 – 427:22.

possess copies of any insurance policies. She further admitted that she does not know whether there are any policies of insurance that are still in effect that are for the benefit of CEHE.[97]

The record does not contain any substantive or credible evidence that CEHE took reasonable and adequate risk mitigation measures in negotiating the Long-Term Lease terms. Thus, the Commission's adoption of the PFD's finding that the risk mitigation provisions within the Long-Term Lease contract mitigated the need for CEHE to conduct due diligence on individual employees or officers of Life Cycle Power was arbitrary and capricious, unsupported by substantial evidence, and an abuse of discretion.

Point of Error No. 8: The Commission acted arbitrarily and capriciously and without substantial evidence and abused its discretion in finding that (i) CEHE based its determination of the amount of mobile-generation capacity to lease on CenterPoint's experience during Winter Storm Uri (FoF 122, 128; CoL 20A, 23, 23A), and (ii) mobile generation, in conjunction with other load-shed initiatives, aids in load rotation. (FoF 125B, 128; CoL 20A, 23, 23A)

The process that CEHE followed was not competitive. Even if it were, CEHE also would have to demonstrate the reasonableness of another significant driver of the costs of its mobile-generation program, which is the quantity for which it solicited and ultimately leased and capitalized. However, CEHE's selection of this quantity—500 MWs—was arbitrary, without any contemporaneous supporting documentation, and even without any sufficient ex post rationalization through the course of this proceeding. The Commission's sanction of this unreasonable selection by CEHE is arbitrary and capricious, unsupported by substantial evidence, and an abuse of discretion.

[97] *Id.* at 427:23 – 427:24.

1. There is insufficient evidence that CEHE based its determination of the amount of mobile generation capacity on its experience during Winter Storm Uri.

There is no question that Winter Storm Uri was a traumatic event for the state and one that no one wants to see repeated. However, despite the Commission's repeated references to Winter Storm Uri as a justification for CEHE's entering the leases at issue,[98] there is simply no credible evidence that CEHE engaged in any meaningful analysis to tie the quantity of mobile generation it chose to procure to its experience during Winter Storm Uri.

CEHE expressed interest in having an amount of mobile generation available for the last part of the hurricane season of 2021 that was based only on market availability,[99] not its experience with Winter Storm Uri. CEHE did not perform any analysis concerning the amount of mobile generation to lease, or the reasonableness of the cost of the mobile generation.[100] CEHE admitted that it also "did not perform any numerical analysis to demonstrate the value or benefit to customers of the mobile generation facilities."[101] CEHE stated simply that, "[i]n its assessments, the Company identified that having approximately 500 MW of mobile generation facilities, along with other options the Company is pursuing, would have been sufficient to meet the load shed demands caused by Winter Storm Uri."[102] When asked for its "assessments" to corroborate this statement, CEHE admitted that "[n]o drafted assessments or analysis were performed."[103] Instead CEHE stated that its assessment as to the amount of mobile generation needed was "done in a

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[98] *E.g.*, Docket No. 53442, Order at 1-3, 17, 21 (Apr. 5, 2023).

[99] ARM-TCPA Ex. 1 (Griffey Direct) at 8 (bates 000010).

[100] *Id.* at 11 (bates 000013).

[101] *Id.*

[102] *Id.*

[103] *Id.*

meeting in the form of verbal discussions."[104] The ALJs correctly concluded that CEHE did not meet its burden of proving that its lease of over 500 MW was prudent, either through contemporaneous evidence or through retrospective analysis.[105]

In exceptions, CEHE's response to the Intervenors and the ALJs was effectively that they are all wrong because CEHE's engineers said so.[106] If this were an adequate basis for a prudence finding, then there would be no need for rate cases. Utilities could simply provide affidavits from their engineers stating that everything the utility did was prudent, and that would be the end of it. Of course, this is not how it works. CEHE was required to provide some evidence in the form of contemporaneous documentation of its decision-making process. CEHE could not do this because it had none.[107] Given the absence of any supporting evidence, the Commission thus acted arbitrarily and capriciously and without substantial evidence and abused its discretion in finding that CEHE's determination was, in fact, based on its experience in Winter Storm Uri.

2. There is insufficient evidence that CEHE's leased mobile generation would aid in load shed.

CEHE conducted no analysis whatsoever regarding the usefulness of its generators to aid in load shed. Nevertheless, in its application and in its Exceptions brief, CEHE baldly asserted:

> 500 MW of [mobile generation] *allowed* [CEHE] to 'close the gap' between the capacity [CEHE] had and the capacity it needed to rotate *all* customers during the winter storm to avoid prolonged outages. (Emphasis added).[108]

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[104] *Id.*

[105] PFD at 35-38.

[106] CEHE's Exceptions at 7 (in which CEHE claims its engineers made the decisions, but then provided no analysis as to how) and at 19-20 (in which CEHE essentially claims that because its engineers know its system well and they decided that 500 MW was needed, that should be the end of it, but again, providing no analysis).

[107] *See id. See also* PFD at 20-21 (in which CEHE states well-known facts about Winter Storm Uri, and concludes therefrom that more "numerical analysis would not change these undeniable facts") and at 23-24 (in which CEHE claims that, because outages cause hardships, a "traditional cost-benefit analysis is not applicable or needed").

[108] CEHE's Exceptions at 20.

CEHE's 516 MW procurement certainly has done no such thing at this point, and CEHE has provided insufficient evidence that it even could, or that a load shed event of the magnitude of Winter Storm Uri is likely to recur. CEHE has leased 20 generators, but it has *hundreds* of substations.[109] CEHE located the generators "around its service territory,"[110] but the record contains insufficient evidence regarding the methodology by which CEHE distributed such generators or whether their size and location would enable service (*e.g.*, limitation of exposure to rotating outages) to all customers connected to those substations (*e.g.*, limiting the duration of exposure to rotating outages). In its Application, CEHE stated that as a result of Winter Storm Uri, "1,412 total electric circuits locked out, 1,254 total electric fuses went out, and four substations were out of service."[111] However, there is insufficient evidence in the record demonstrating how a mobile generator would be useful if it were located at a substation suffering from those conditions. For example, the record does not contain engineering studies, tests, simulations, or other evidence that support the substation locations CEHE chose for its mobile generation units or whether such locations will maximize the usefulness of the units during load shed. This lack of evidence is only a tiny sampling of the analyses that CEHE should have but failed to conduct. Instead, as several of the Intervenors have demonstrated and the ALJs found, CEHE simply went on a spending spree to acquire everything CEHE thought it could, without regard to its usefulness or cost.

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[109] *See Application of CenterPoint Energy Houston Electric, LLC for Authority to Change Rates*, Docket No. 49421, Proposed Finding of Fact 36 (Sep. 16, 2019) (stating that CEHE has 234 substations).

[110] CEHE's Exceptions at 7.

[111] Amended Direct Testimony of Brad A. Tutunjian (July 1, 2022), CEHE Ex. 5 at 5.

Thus, the Commission acted arbitrarily and capriciously and without substantial evidence and abused its discretion in finding that the mobile generation leased by CEHE could assist in load shed. The Commission should grant rehearing and adopt the PFD on this point.

Point of Error No. 9: The Commission acted arbitrarily and capriciously and without substantial evidence, abused its discretion, and adopted a plainly erroneous interpretation of PURA in finding that CEHE demonstrated that the $199,566,430 that CEHE invested in leasing and operating temporary emergency electric energy facilities through December 31, 2021 were reasonable and necessary costs. (FoF 126, 128; CoL 20, 20A, 23, 23A) (and in deleting the ALJs' FoF 129, and in modifying CoL 23).

CEHE bears the burden of proving that costs incurred are reasonably and prudently incurred.[112] It enjoys no presumption that its expenditures have been prudently incurred.[113] CEHE appears to take the position that holding an RFP demonstrates the reasonableness of the cost.[114] However, for the reasons previously discussed, such RFPs were not competitive and thus there should be no presumption that their resulting costs were reasonable and prudent. Moreover, after receiving responses to both the Short-Term and Long-Term Lease RFPs, CEHE admitted that it did not re-evaluate the total MW capacity of mobile generation it sought to procure in an effort to bring down the cost.[115]

Consequently, for the reasons set forth in Points of Error Nos. 3, 4, and 6, regarding CEHE's failure to conduct a legitimately competitive bidding process for either the Short-Term Lease, the Short-Term Lease Extension, or the Long-Term Lease; Points of Error Nos. 6 and 7, regarding CEHE's indefensible choice to prepay its entire 7.5 year lease to the riskiest and most expensive vendor, without conducting any due diligence whatsoever on that vendor or its

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[112] *Entergy Gulf States, Inc. v. Public Util. Comm'n*, 112 S.W.3d 208, 214 (Tex. App.-Austin 2003, pet. denied) (*citing Public Util. Comm'n v. Houston Lighting & Power Co.*, 778 S.W.2d 195, 198 (Tex. App.-Austin 1989, no writ)).

[113] *Id.*

[114] *Id. See also* TCPA Ex. 4.

[115] Tr. at 128:5-25 (Narendorf Cross) (Oct. 18, 2022).

principles, and without including any effective risk mitigation provisions in its lease contracts; and Point of Error No. 8, regarding CEHE's arbitrary decision to procure 500 MW of mobile generators; the Commission acted arbitrarily and capriciously and without substantial evidence, abused its discretion, and adopted a plainly erroneous interpretation of PURA in finding that CEHE demonstrated that the $199,566,430 that CEHE expended in leasing and operating temporary emergency electric energy facilities through December 31, 2021 were reasonable and necessary costs. The Commission should grant rehearing and adopt the PFD on this point.

Point of Error No. 10: The Commission acted arbitrarily and capriciously and without substantial evidence, abused its discretion, and adopted a plainly erroneous interpretation of PURA in finding that CEHE's use of a mobile generator at the Lake Jackson civic center was in compliance with PURA § 39.918(b). (CoL 22) (and in deleting the ALJs' FoF 102 and CoL 21, and in modifying CoL 22 and 23)

Both the PFD[116] and order[117] contain findings, consistent with the record, confirming that CEHE's use of a mobile generator at the Lake Jackson civic center was the result of the outage that location experienced due to damages to CEHE's distribution system and not due to a load shed order from ERCOT or damage to CEHE's transmission system. Facially, this use would violate PURA § 39.918(b)(1), which allows for operation of mobile generation if, and only if, it is used during a widespread power outage in which: (A) the independent system operator has ordered the utility to shed load; or (B) the utility's distribution facilities are not being fully served by the bulk power system under normal operations. The definition of "bulk power system" is a critical issue in this case and is another area on which the PFD[118] and the Commission's order[119] agree, both

[116] Docket No. 53442, PFD at 62 (FoFs 100 and 101) (Jan. 27, 2023).

[117] Docket No. 53442, Order at 14-15 (FoFs 100 and 101) (Apr. 5, 2023).

[118] Docket No. 53442, PFD at 61 (FoF 98) (Jan. 27, 2023).

[119] Docket No. 53442, Order at 14 (FoF 98) (Apr. 5, 2023).

noting in FoF 98 that the North American Energy Reliability Corporation (NERC) defines "bulk power system" as:

> a. facilities and control systems necessary for operating an interconnected electric energy transmission network (or any portion thereof); and
>
> b. electric energy from generation facilities needed to maintain transmission system reliability. The term does not include facilities used in the local distribution of electric energy.

Stated simply, "bulk power system" cannot mean an issue isolated to only a utility's distribution system. Thus, while the PFD took the above definition to its logical conclusion in finding that CEHE's deployment of mobile generation at the Lake Jackson civic center was not in compliance with PURA § 39.918(b), the Commission's Order, without any legal basis or stated rationale, reached the opposite conclusion. Therefore, the Commission acted arbitrarily and capriciously and without substantial evidence, abused its discretion, and adopted a plainly erroneous interpretation of PURA in finding that CEHE's use of a mobile generator at the Lake Jackson civic center was in compliance with PURA § 39.918(b). The Commission should grant rehearing and adopt the PFD on this point.

Point of Error No. 11: The Commission acted arbitrarily and capriciously and without substantial evidence, abused its discretion, and applied a plainly erroneous interpretation of applicable law in finding that CEHE met its burden to demonstrate through contemporaneous documentation, or independent, retrospective analysis, that the lease and operation of the mobile generation in this proceeding is reasonable and prudent. (FoF 126, 128; CoL 20, 20A, 22, 23, 23A)

For the reasons set forth at length in this Motion, the ALJs correctly found that CEHE failed to meet its burden to demonstrate through contemporaneous documentation or independent, retrospective analysis that the lease and operation of the mobile generation was reasonable and prudent. In contrast, the Commission's Order, without detailing what specific evidence CEHE submitted as contemporaneous documentation or independent, retrospective analysis, perfunctorily concludes that CEHE somehow nonetheless "met its burden to demonstrate through

contemporaneous documentation or independent, retrospective analysis that the lease and operation of the mobile generation in this proceeding is reasonable and prudent."[120] Instead of identifying any evidence, the Commission's Order repeatedly refers to CEHE's experience during Winter Storm Uri and its history with hurricanes as providing a basis for its determination to lease the units at issue,[121] without explaining how that experience translates into contemporaneous documentation or independent, retrospective analysis. The Commission thereby acted arbitrarily and capriciously and without substantial evidence, abused its discretion, and employed a plainly erroneous interpretation of the law.

The Commission's Order sets out the applicable legal standard,[122] which was also set out in the PFD as follows:[123]

> Prudent decision-making may be demonstrated in one of two ways. The first is through contemporaneous documentation of the utility's decision-making process; that is, documentation compiled at the time the utility was considering whether to enter into the transaction.[124] Accordingly, utilities are advised to keep appropriate documentation so that such determinations can be made.[125] The second is an independent, retrospective analysis of the decision.[126] A utility without contemporaneous evidence of prudence, however, faces a heavy burden, and the Commission will subject the utility's after-the-fact, retrospective justifications to rigorous review.[127]
>
> As with the contemporaneous approach, in the retrospective analysis "the utility must demonstrate that a reasonable utility manager, having investigated all relevant factors and alternatives as they existed at the time the decision was made, would have found the utility's actual decision a reasonably prudent one."[128]

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[120] Docket No. 53442, Order at 17 (FoF 128), 21 (CoL 20A) (Apr. 5, 2023).

[121] *Id.*

[122] *Id.* at 20-21 (CoL 14-19) (Apr. 5, 2023).

[123] Docket No. 53442, PFD at 36 (Jan. 27, 2023).

[124] *Gulf States*, 841 S.W. 2d at 476.

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.*

As detailed in the PFD,[129] CEHE offered *no contemporaneous documentation* of the methodology used in determining the need for 500 MW of mobile-generation capacity and submitted insufficient documentation in support of the determination regarding the appropriate technology required to deploy mobile generation during outages. CEHE "did not perform any numerical analysis to demonstrate the value or benefit to customers of the mobile generation facilities"[130] and, instead, conducted an "assessment" in the form of "a meeting" with "verbal discussions."[131] Additionally, in choosing the type of technology to acquire, CEHE's "assessment" consisted of a seven-page PowerPoint presentation detailing different fuel types, voltage amounts, and types of generators,[132] but *with no analysis* to compare those options. Thus, CEHE presented *no credible evidence* of any contemporaneous documentation in support of its decision-making process regarding either the amount or type of mobile generation to lease.

As the ALJs correctly found,[133] CEHE also failed to present sufficient evidence of an independent, retrospective analysis. Although the CEHE claimed to base the amount of mobile generation (500 MW) on its experience during Winter Storm Uri—a claim on which the Commission's Order appears to base its finding of prudence—CEHE simply offered no credible evidence to support that claim. For example, CEHE did not establish that it studied the probability of a load-shed event of Winter Storm Uri's severity occurring during the term of the Long-Term Lease (*i.e.*, the upcoming 7.5 years). And, CEHE's witness's claim that CEHE reasonably based

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[129] Docket No. 53442, PFD at 37-38 (Jan. 27, 2023).

[130] ARM-TCPA Ex. 1 (Griffey Dir.) at 11 (bates 000013) (*quoting* CEHE Response to ARM-TCPA RFI No. 1-03); *see also* TCPA Ex. 3 (which is CEHE's response to ARM-TCPA 1-03).

[131] *Id.* at Bates 000062 (which may also appear as Bates "000069" due to photocopying overlaps) (for avoidance of doubt, the document referenced is CEHE's Response to TEAM RFI No. "TEAM01-07").

[132] CEHE Ex. 10 (Narendorf Rebuttal), Exh. MWN-R-1.

[133] Docket No. 53442, PFD at 37-38 (Jan. 27, 2023).

its calculation of 500 MW on "an actual event, and actual system constraints" does not amount to an "independent, retrospective analysis" sufficient to establish prudence—other TDUs (*e.g.*, Oncor and PG&E) obtained far less mobile generation despite having more customers than CEHE and despite having also lived through that same experience. Moreover, Winter Storm Uri was a single, anomalous event. As correctly found by the ALJs, CEHE did not offer sufficient evidence that its decision to acquire 500 MW of mobile generation was reasonably made "in light of the circumstances, information, and available options existing at the time."[134]

Despite the absence of *any* sufficient evidence to establish prudence under the well-established legal standard—which the Order concedes applies and is a "heavy burden" for utilities, requiring "rigorous" analysis by the decision-makers—the Order nonetheless perfunctorily finds that CEHE met the standard to provide contemporaneous documentation or an independent, retrospective analysis in support of prudence. That determination is arbitrary and capricious, unsupported by substantial evidence, an abuse of discretion, and plainly erroneous. The Commission should grant rehearing and adopt the PFD on this point.

Point of Error No. 12: The Commission acted arbitrarily and capriciously and without substantial evidence, abused its discretion, and adopted a plainly erroneous interpretation of PURA in finding that (i) the Commission processed CenterPoint's application in accordance with the requirements of PURA, the Administrative Procedure Act, and Commission rules (CoL4), (ii) CEHE demonstrated compliance with PURA § 39.918. (CoL 23), and (iii) the rates approved in its Order are just and reasonable under PURA § 36.003(a). (CoL 23A).

As discussed in detail throughout this Motion, the Commission's Order approving CEHE's application for mobile generation costs under PURA § 39.918 and finding that the costs incurred by CEHE were prudently and reasonably incurred and that the resulting rates were just and

[134] *Pub. Util. Comm'n v. Tex. Indus. Energy Consumers*, 620 S.W. 3d 418, 428 (Tex. 2017).

reasonable was arbitrary and capricious, unsupported by substantial evidence, an abuse of discretion, and a plainly erroneous interpretation of applicable law:

- The Order agrees that the mobile generation was used for a distribution outage, but then concludes, without substantial evidence and contrary to PURA, that CEHE nonetheless complied with PURA § 39.918 when it deployed mobile generation for a distribution-level issue, notwithstanding that PURA § 39.918 allows mobile generation to be used only for transmission-level outages impacting distribution or ERCOT-issued load shed orders;
- The Order instead points to the general duty of CEHE to provide continuous and adequate service—which has existed in PURA since its initial adoption in 1975—to justify CEHE's leasing of mobile generation, notwithstanding that the generation did not meet the requirements of the very limited carve-out in PURA § 39.918 allowing for TDUs to operate generation.
- The Order ignores the significant evidence that CEHE's process for bidding the Short-Term Lease and Lease Extension and the Long-Term Lease was not competitive and instead finds that the process was "competitive enough"—which is not a legal standard—and overlooks the uncontested fact that a competitive bidding process (not a "competitive enough" process) was reasonably practicable and thus was required under PURA § 39.918.
- The Order finds CEHE's expenditures on the mobile generation lease to be prudent and reasonable, without conducting the requisite "rigorous analysis" and despite CEHE's failure to meet its "heavy burden" to establish prudence by producing contemporaneous documentation or independent, retroactive analysis to support its

actions. Instead, the Order generally discusses Winter Storm Uri and effectively defers to CEHE's determination, in a verbal meeting, based on its "experience" during Winter Storm Uri of the need, amount, and type of mobile generation to procure.

- The Order then erroneously concludes that the resulting rates requested by CEHE are just and reasonable, despite the lack of evidence to show that CEHE incurred them for a permissible purpose, through the requisite process, or with the appropriate supporting analysis.

Any of these errors, standing alone, is reversible error under Section 2001.174 of the APA. The Commission should grant rehearing and adopt the PFD, with the modifications discussed in this Motion, and deny CEHE's requested recovery of mobile generation costs.

III. CONCLUSION

For the reasons set out in detail above, the Commission's order rejecting the PFD in part and adopting the PFD in part with respect to CEHE's application to recover costs for leasing mobile generation under PURA § 39.918 constitutes reversible error under the APA, because the Order is arbitrary and capricious, unsupported by substantial evidence, an abuse of discretion, and a plainly erroneous interpretation of applicable law. The Commission should grant rehearing and deny, in its entirety, CEHE's application for recovery of mobile generation costs.

WHEREFORE, TCPA respectfully requests that the Commission grant rehearing and enter an order consistent with this Motion, and grant any other such relief as the Commission deems just and proper.

Respectfully submitted.

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ATTORNEYS FOR TEXAS COMPETITIVE POWER ADVOCATES

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of May 2023, a true and correct copy of the foregoing document was served upon on all parties of record by email, in accordance with the Order Suspending Rules, issued in Project No. 50664.

Stacie Bennett