



## Filing Receipt

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**SOAH DOCKET NO. 473-22-04394**  
**PUC DOCKET NO. 53719**

<b>APPLICATION OF ENTERGY TEXAS,</b>	<b>§</b>	<b>BEFORE THE STATE OFFICE</b>
<b>INC. FOR AUTHORITY TO CHANGE</b>	<b>§</b>	<b>OF</b>
<b>RATES</b>	<b>§</b>	<b>ADMINISTRATIVE HEARINGS</b>

**OFFICE OF PUBLIC UTILITY COUNSEL’S**  
**MOTION TO COMPEL**

The Office of Public Utility Counsel (“OPUC”) files this motion to compel the response of Entergy Texas, Inc. (“ETI” or the “Company”) to OPUC’s request for information (“RFI”) No. 1-14 in full. ETI filed objections to OPUC RFI No. 1-14 on July 29, 2022. Pursuant to 16 Texas Administrative Code (“TAC”) § 22.144(e), the party seeking discovery shall file a motion to compel no later than five working days after the objection is received. Thus, this motion to compel is timely filed.

**I. OPUC’S RESPONSE TO ETI’S**  
**OBJECTIONS TO RFI NO. 1-14**

On July 19, 2022, OPUC propounded RFI No. 1-14 on ETI to request a schedule that shows the adjustments to plant in service to remove financially based incentive compensation by year since the final order in Docket No. 39896, ETI’s rate case from 2011/2012.<sup>1</sup> OPUC RFI No. 1-14 specifically states:

**1-14.** Please refer to the Direct Testimony of Ms. Lofton, pages 22-23. Please provide a schedule that shows the adjustment to plant in service to remove all financially based incentive compensation by year for each of the years since Docket No. 39896. Please provide this information by FERC account. Also, please provide all underlying workpapers which show the calculation of the adjustment by year.

ETI objects to OPUC RFI No. 1-14 on the grounds that the request is not relevant and is overbroad. As discussed in further detail below, ETI’s objections are without merit. Accordingly,

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<sup>1</sup> The Final Order in Docket No. 39896 was signed on September 14, 2012, and the Order on Rehearing was signed on November 1, 2012.

the Administrative Law Judges (“ALJs”) should overrule ETI’s objections and compel the Company to answer OPUC RFI No. 1-14.

#### **A. LEGAL STANDARD AND SCOPE OF DISCOVERY**

As a general matter, in a discovery dispute, the party seeking to avoid discovery bears the burden of proving why the discovery should be avoided.<sup>2</sup> Therefore, the burden lies on ETI to demonstrate that OPUC’s RFI 1-14 is irrelevant and overbroad, a task at which OPUC believes ETI has failed.

The scope of relevancy for discovery in contested case proceedings before the Public Utility Commission of Texas (“Commission”) and State Office of Administrative Hearings (“SOAH”) is governed by Rule 192.3 of the Texas Rules of Civil Procedure (“TRCP”)<sup>3</sup> and 16 TAC § 22.141(a).<sup>4</sup> These legal authorities establish that a party may obtain discovery *regarding any matter* that is not privileged and is *relevant to the subject matter of the pending action*.<sup>5</sup> TRCP 192.3(a) provides that “[i]t is not a ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” Thus, the legal standard for determining relevancy in the context of discovery is broader than the legal standard for determining the admissibility of evidence at trial.<sup>6</sup>

Furthermore, with respect to discovery, the Texas Supreme Court has stated that “[t]he ‘relevant to the subject matter’ and ‘reasonably calculated to lead to admissible evidence’ tests are liberally construed to allow the litigants to obtain the fullest knowledge of the facts and issues

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<sup>2</sup> *In re Waste Mgmt.*, 2011 WL 3855745, at 5 (Tex. App. – Corpus Christi 2011) (“We note that this Court and others have placed the burden of proof regarding relevance, or lack thereof, on the party seeking to avoid discovery.”).

<sup>3</sup> Tex. R. Civ. Proc. 192.3.

<sup>4</sup> In adopting its discovery rules, the Commission expressly stated that its discovery rules are not intended as a substitute for appropriate reliance on the Texas Rules of Civil Procedure, except to the extent that the Commission rules expressly provide different requirements for matters also covered by the Texas Rules of Civil Procedure. 18 Tex. Reg. 6644 (Sep. 28, 1993).

<sup>5</sup> Tex. R. Civ. Proc. 192.3(a); 16 TAC § 22.141(a).

<sup>6</sup> *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 553 (Tex. 1990) (concluding relevancy is liberally construed in the context of discovery).

prior to trial.”<sup>7</sup> Consistent with this well-established precedent, the Texas Supreme Court reiterated as recently as 2017 that the scope of discovery is broad and that a request for information must simply show a reasonable expectation of obtaining information that will aid the dispute’s resolution.<sup>8</sup>

**B. ETI’s HISTORICAL TREATMENT OF FINANCIALLY BASED INCENTIVE COMPENSATION IS RELEVANT TO THIS PROCEEDING**

ETI contends OPUC RFI No. 1-14 is not relevant to this proceeding. However, the Commission has a long-standing precedent relating to the exclusion of financially based incentive compensation.<sup>9</sup> Therefore, the issue of the potential inclusion of financially based incentive compensation is absolutely relevant to a rate case proceeding.

OPUC is requesting historical information related to ETI’s treatment of financially based incentive compensation going back to Docket No. 39896, because that docket was ETI’s most recent rate case that went through full litigation and contained issues related to financially based incentive compensation.<sup>10</sup> ETI’s two subsequent rate cases since 2012 were both settled dockets.<sup>11</sup> Docket No. 48371, ETI’s most recent base rate case, even though ultimately settled, had issues related to financially based incentive compensation.<sup>12</sup> Additionally, ETI’s initial Generation Cost Recovery Rider case also involved issues related to the exclusion of financially based incentive

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<sup>7</sup> *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 553 (Tex. 1990) (citing *Gutierrez v. Dallas Indep. School Dist.*, 729 S.W. 2d 691, 693 (Tex. 1987)); see also *In re Nat’l Lloyds Ins. Co.*, 532 S.W.3d 794, 808 (Tex. 2017).

<sup>8</sup> *In re Nat’l Lloyds Ins. Co.*, 532 S.W.3d 794, 808 (Tex. 2017).

<sup>9</sup> See: *Application of Southwestern Electric Power Company for Authority to Change Rates*, Docket No. 46449, Order on Rehearing at FOF Nos. 129-135 (Mar. 19, 2018); *Application of Southwestern Public Service Company for Authority to Change Rates*, Docket No. 43695, Order on Rehearing at 5-6, FOF Nos. 83A-84A (Feb. 23, 2016); *Application of Southwestern Electric Power Company for Authority to Change Rates and Reconcile Fuel Costs*, Docket No. 40443, Order on Rehearing at 13, FOF No. 147 (Mar. 6, 2014); *Application of Entergy Texas, Inc. for Authority to Change Rates, Reconcile Fuel Costs, and Obtain Deferred Accounting Treatment*, Docket No. 39896, Order on Rehearing at 5, 7-8, FOF Nos. 60-61, 128-133 (Nov. 2, 2012); *Application of AEP Texas Central Company for Authority to Change Rates*, Docket No. 33309, Order on Rehearing at FOF No. 82 (Mar. 4, 2008); *Application of AEP Texas Central Company for Authority to Change Rates*, Docket No. 28840, Order at FOF Nos. 164-70 (Aug. 15, 2005).

<sup>10</sup> *Application of Entergy Texas, Inc. for Authority to Change Rates, Reconcile Fuel Costs, and Obtain Deferred Accounting Treatment*, Docket No. 39896, Order on Rehearing at 5 – 6 (Nov. 1, 2012).

<sup>11</sup> *Application of Entergy Texas, Inc. for Authority to Change Rates and Reconcile Fuel Costs*, Docket No. 41791, Order (May 16, 2014); *Entergy Texas Inc's Statement of Intent and Application for Authority to Change Rates*, Docket No. 48371, Order (Dec. 20, 2018).

<sup>12</sup> *Entergy Texas Inc's Statement of Intent and Application for Authority to Change Rates*, Docket No. 48371, OPUC’s Redacted Direct Testimony of Constance T. Cannady at Schedule CTC-8A (Aug. 1, 2018).

compensation.<sup>13</sup> OPUC would like to see ETI's treatment of financially based incentive compensation going back to Docket No. 39896 in order to compare and determine if there is an evolution in ETI's treatment of financially based incentive compensation or if the same issues are recurring on a repeated basis. This will assist OPUC's experts in this docket to determine if it is likely or not that the inclusion of financially based incentive compensation continues to be an issue for ETI in its filings and how to look for and analyze such treatments.

**C. OPUC'S REQUEST FOR ETI'S TREATMENT OF FINANCIALLY BASED INCENTIVE COMPENSATION IS NOT OVERLY BROAD**

As previously discussed, OPUC's request is specifically tailored to the previous ten years going back to ETI's last fully litigated rate case, Docket No. 39896. The purpose is to analyze ETI's ongoing treatment of financially based incentive compensation, which goes directly to potential issues in the current docket and is therefore tailored to the subject matter of the pending action.

**II. CONCLUSION AND PRAYER**

OPUC respectfully requests that the ALJs overrule ETI's objections, grant OPUC's motion to compel ETI's response to OPUC RFI No. 1-14, and order ETI to produce the requested information without delay. OPUC further requests that the ALJs grant any other and additional relief to which OPUC may be entitled.

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<sup>13</sup> *Application of Entergy Texas, Inc. to Establish a Generation Cost Recovery Rider Related to the Montgomery County Power Station*, Docket No. 51381, Direct Testimony of Constance T. Cannady at 13 (Dec. 7, 2020).

Date: August 5, 2022

Respectfully submitted,

Chris Ekoh  
Interim Chief Executive & Public Counsel  
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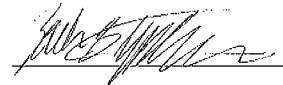
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ATTORNEYS FOR THE  
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**CERTIFICATE OF SERVICE**

SOAH DOCKET NO. 473-22-04394  
PUC DOCKET NO. 53719

I hereby certify that a copy of the foregoing document was served on all parties of record in this proceeding on this 5th day of August 2022 by facsimile, electronic mail, and/or first class, U.S. Mail.



Zachary Stephenson