



## Filing Receipt

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<b>APPLICATION OF ENTERGY TEXAS, INC. FOR AUTHORITY TO CHANGE RATES</b>	<b>§ § §</b>	<b>STATE OFFICE OF ADMINISTRATIVE HEARINGS</b>
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**EL PASO ELECTRIC COMPANY’S REPLY BRIEF**

El Paso Electric Company (EPE) files this Reply Brief and would respectfully show as follows:

**I. Timeliness of Filing**

Pursuant to SOAH Order No. 14, the due dates for reply briefs regarding Preliminary Order Issues 68 and 69 is January 27, 2023. Accordingly, this reply brief is timely filed.

**II. Introduction**

Preliminary Order Issue 68 provides: “Is it appropriate for an electric utility in a vertically integrated area to own vehicle-charging facilities or other transportation electrification and charging infrastructure, or should the ownership of such facilities be left to competitive providers?”

On October 26, 2022, EPE filed its statement of position in this proceeding regarding Preliminary Order Issue 68, stating that EPE believes it is appropriate for an electric utility in a vertically integrated area to own electric vehicle-charging facilities and other transportation electrification charging infrastructure. EPE further reserved the right to amend or supplement its position after review of the evidence and positions of other parties and the right to take further action in this proceeding, including through briefing.

On January 13, 2023, various parties filed initial briefs on Preliminary Order Issue 68. EPE appreciates the thoughtful briefing of the parties and provides the following reply points to a few of the arguments raised by Commission Staff, the Americans for Affordable Clean Energy (AACE), and the Office of Public Utility Counsel (OPUC). The failure of EPE to not address certain other parties and arguments should not be construed as agreement with such other parties and arguments.

### III. Reply to Commission Staff

In its initial brief, Commission Staff indicated that allowing utilities such as Entergy Texas, Inc. ETI to own electric vehicle (EV) charging stations would constitute the inappropriate provision of competitive services, citing to the “underlying principles of PURA” regarding the regulation of electric public utilities, among other things.<sup>1</sup> However, as ETI explained in its initial brief, absent a statutory exception, owning or operating EV charging equipment for compensation from others is an activity that, on its face, falls within the definition of “electric utility” in PURA.<sup>2</sup> In 2021, through Senate Bill 1202, the Texas Legislature adopted a statutory exception to the definition of “electric utility” for a person that “owns or operates equipment used solely to provide electricity charging service for consumption by an [electric vehicle].”<sup>3</sup> In adopting that exception, the legislature could have, but did not, prohibit utilities from participating in EV charging activities, and no other provision in PURA prohibits electric utilities in vertically integrated areas from owning or operating EV charging infrastructure.

In construing statutes and legislative intent, Texas courts presume the Legislature chooses a statute’s language with care, including each word chosen for a purpose, while purposefully omitting words not chosen.”<sup>4</sup> In that vein, the courts take statutes as they find them and refrain from rewriting the legislature’s text.<sup>5</sup> Similarly, the Commission should refrain from prohibiting electric utilities in vertically integrated areas from participating in owning and operating EV charging stations when the legislature itself, in addressing such activities, refrained from enacting any such prohibition.

Out of concern that utility participation may hinder competition, Commission Staff also urges, at most, a wait and see approach to utility participation with regard to owning and operating EV infrastructure. According to Staff, arguments that “Texas does not receive reasonable and

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<sup>1</sup> Staff Initial Brief at 2 and 3.

<sup>2</sup> ETI Initial Brief at 13, citing definition of electric utility at PURA § 31.002(6) (an “electric utility” is a person that “owns or operates for compensation in this state equipment or facilities to produce, generate, transmit, distribute, sell, or furnish electricity in this state.”)

<sup>3</sup> See PURA § 31.002(6)(J)(iv).

<sup>4</sup> *Cadena Comercial USA Corp. v. Texas Alcoholic Beverage Comm’n*, 518 S.W.3d 318, 325–26 (Tex. 2017); *TGS–NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011).

<sup>5</sup> *Cadena Comercial USA Corp. v. Texas Alcoholic Beverage Comm’n*, 518 S.W.3d 318, 325–26 (Tex. 2017); *Entergy Gulf States v. Summers*, 282 S.W.3d 433, 443 (Tex. 2009).

adequate service of transportation electrification and charging infrastructure and thus the Commission should allow ETI and other vertically integrated utilities to join the competitive market are . . . premature.”<sup>6</sup> On page 10 of its brief, Staff contends that “given the early stages of deployment, it is premature to assume that implementation of the [Texas Electric Vehicle Infrastructure Plan] requires participation by ETI or other vertically integrated utilities in order for TxDOT to ensure that reasonable and adequate service can be provided by the otherwise competitive market.”

Contrary to a wait and see approach, EPE believes that utilities should be proactive to prepare for the increasing numbers of EVs in their service areas. In the bill analysis supporting Senate Bill 1202, referenced above, the Senate Research Center explained as follows:

- Electric vehicle adoption is accelerating in the country and in Texas. Electric vehicles are less than one percent of all vehicle sales in Texas, but adoption rates in the last several years have doubled on a year-over-year basis. Increased adoption of personal use vehicles, medium-duty commercial fleets, and potentially heavy-duty long-haul trucking fleets is changing fuel consumption patterns and consumer needs.<sup>7</sup>

The Texas Electric Vehicle Infrastructure Plan also indicates that the need for EV charging infrastructure development is increasingly urgent:

- [O]ver a quarter of electric vehicles are 2021 models. Electric vehicles currently constitute under 1% of all vehicles registered in Texas. However, since 2020, the total number of electric vehicles across Texas has nearly tripled as more people adopt the technology. With rapidly growing adoption rates, it is necessary to ensure Texas will be able to meet the demand of these new vehicles on the road.<sup>8</sup>

On December 22, 2022, the Board of Directors of the National Association of Regulatory Utility Commissioners (“NARUC”) issued a press release announcing that:

- [A] new national resolution recognizing the urgent need for resources, infrastructure, stakeholder collaboration and equity to address the rapid growth of transportation electrification was shared with the Department of Energy, the Department of Transportation and the new Joint Office of Energy and Transportation. The *Resolution on Urgency of Preparing for Widespread Transportation Electrification*, passed by the National Association of Regulatory Utility Commissioners at its November Annual

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<sup>6</sup> Staff Initial Brief at 1.

<sup>7</sup> A copy of the analysis is available at:  
<https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=87R&Bill=SB1202>.

<sup>8</sup> A copy of the Texas Electric Vehicle Infrastructure Plan was attached as Exhibit JWC-3 to the direct testimony of Jeremiah Cunningham, SPS Exh. 1.

Meeting, recommends increased coordination of new investments; effective, efficient and equitable grid upgrades; and stakeholder engagement.<sup>9</sup> [Emphasis added.]

Moreover, in the context of broadband access that several briefing parties mentioned,<sup>10</sup> a wait and see approach has been a failed approach in delivering reasonable access to rural Texas citizens and further legislative action has been required to address the inadequacy infrastructure in rural areas. The record shows that development of EV charging infrastructure has already been largely centered on urban and high-income areas because these areas tend to have higher concentrations of early adopters of new technology that make those locations more attractive to competitive market participants.<sup>11</sup> In a state as large as Texas, with not infrequent natural disasters, the need for Texas citizens to have a robust and reliable EV charging network throughout the state is obvious and demands more than a wait and see approach at this point. There should be no need to wait until, for example, a hurricane evacuation results in unfortunate outcomes to see that a proactive approach, allowing utilities as well as non-utilities to own and operate EV charging infrastructure now, is the better policy choice and is appropriate to encourage development of a more robust development of EV charging infrastructure.

#### **IV. Reply to AACE and OPUC**

In its initial brief, AACE contends that it is appropriate for an electric utility in a vertically integrated area to own make-ready EV charging infrastructure but that it is not appropriate for such an electric utility to own EV charging stations.<sup>12</sup> In support of its contention regarding the ownership of EV charging stations, AACE states that PURA “requires that the provision of generation and retail services be subject to a competitive market,” citing to PURA §§ 31.001(c) and 39.001(a),<sup>13</sup> and arguing that allowing a vertically integrated electric utility to partake in an EV charging market would be in direct opposition to the policy and purpose of PURA. However,

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<sup>9</sup> A copy of the press release is available at <https://www.naruc.org/about-naruc/press-releases/naruc-urges-greater-federal-state-ev-collaboration-in-new-resolution-and-letter-to-doe-dot/#:~:text=The%20Resolution%20on%20Urgency%20of.grid%20upgrades%3B%20and%20stakeholder%20engagement>.

<sup>10</sup> Staff Initial Brief at 5; ETI Initial Brief at 2; SPS Initial Brief at 11.

<sup>11</sup> SPS Exh. 1 at 23.

<sup>12</sup> AACE Initial Brief at 2.

<sup>13</sup> AACE Initial Brief at 4.

a closer review of the statutes cited by AACE makes clear that these provisions do not stand for what AACE suggests, but rather show the exact opposite.

First, with regard to PURA § 31.001(c), EPE notes that this provision addresses only wholesale electric competition, not retail services. Further, with regard to wholesale competition, the final sentence of PURA § 31.001(c) makes clear that utilities are not prohibited from participating in the market but are rather expressly allowed to do so. The final sentence of PURA § 31.001(c) states: “The development of a competitive wholesale electric market that allows for increased participation by electric utilities and certain nonutilities is in the public interest.” PURA § 31.001(c) thus envisions that electric utilities will participate, increasingly even, in the competitive wholesale electric market. Accordingly, contrary to AACE’s argument, PURA § 31.001(c) does not stand for the proposition that allowing electric utilities to participate in the EV charging services market would be contrary to PURA, but rather, if anything, PURA § 31.001(c) indicates that increased participation by electric utilities would be in the public interest.

Further, with regard to PURA § 39.001(a), while this provision addresses both the production and sale of electricity, AAEC appears to ignore that retail competition as addressed in Chapter 39 is inapplicable to each of the vertically integrated areas of Texas.<sup>14</sup> The Texas Legislature expressly delayed retail competition in each of the vertically integrated areas, and, with just a few exceptions not relevant to AACE’s argument, Chapter 39 does not apply to the vertically integrated areas.<sup>15</sup> Accordingly, any argument that allowing a vertically integrated electric utility to participate in an EV charging market would be in direct opposition to the policy and purpose of PURA § 39.001(a) is also clearly off-base.

Additionally, AACE argues that allowing regulated utilities to own and operate EV charging stations creates an uneven playing field because the utility can recover the costs of providing EV charging stations from its other ratepayers.<sup>16</sup> OPUC also raises concerns regarding the potential for shifting costs related to the EV charging infrastructure services onto non-participating

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<sup>14</sup> See PURA §§ 39.402, 39.452, 39.502, and 39.552.

<sup>15</sup> *Id.*

<sup>16</sup> AACE Initial Brief at 4.

customers.<sup>17</sup> However, these arguments and concerns appear to ignore or discount Commission review of the utility rates for such services. Because the Commission applies cost-causation principles in reviewing and setting rates, improper subsidies would be prohibited. AACE even admits to as much on page six of its initial brief where it urges the Commission to require that the costs created by ETI's proposed rider not be allocated to ratepayers through ETI's rate base and that the utility should maintain these expenses and other associated costs in a separate account.

EPE agrees that separate accounting should be employed for utilities that own and operate EV charging infrastructure, including charging stations. Separate cost accounting is regularly employed by public utilities. EPE believes that such separate accounting, in conjunction with the requisite review by regulatory authorities, appropriately and sufficiently addresses concerns regarding the potential of an uneven playing field or the shifting of costs onto non-participating customers. No further limitations, such as prohibiting electric utilities from participating in providing EV charging station services, should be required at this time.

## **V. Conclusion**

For the reasons discussed above, EPE continues to believe that it is appropriate for an electric utility in a vertically integrated area to own electric vehicle-charging facilities and other transportation electrification charging infrastructure, and requests that the Commission conclude similarly as well.

Respectfully submitted,

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<sup>17</sup> OPUC Initial Brief at 3.

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing document was served on all parties of record via email on January 27, 2023 pursuant to the Second Order Suspending Rules issued in Project No. 50664.

*/s/Rosanna Al-Hakeem*

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Rosanna Al-Hakeem