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APPLICATION OF ENTERGY TEXAS, INC. FOR AUTHORITY TO CHANGE RATES	**§ § §**	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

SOUTHWESTERN PUBLIC SERVICE COMPANY'S RESPONSE BRIEF REGARDING PRELIMINARY ORDER ISSUE NOS. 68 AND 69

In accordance with Order No. 14, Intervenor Southwestern Public Service Company ("SPS") files this Response Brief regarding Preliminary Order Issues Nos. 68 and 69, and would respectfully show as follows:

Most respondents on Issues Nos. 68 and 69 agree that vertically-integrated utilities in Texas should be able to own, at least in some form, non-residential electric vehicle (EV) charging infrastructure.[1] The Office of Public Utility Counsel (OPUC) and Public Utility Commission of Texas (Commission) Staff, however, argue that there should be a blanket prohibition on such ownership. SPS respectfully disagrees. As recognized by many of the parties in this matter, including entities that compete in the EV charging market, permitting utility ownership of non-residential EV charging infrastructure could play a critical role in ensuring that Texas citizens have access to EV charging in all areas of the state. To the extent OPUC and Commission Staff express concerns regarding the impact utility ownership may have on the competitive market or that it may impose additional costs on non-participating customers, such concerns can be adequately addressed through the Commission's case-by-case evaluation of utility ownership proposals.

[1] SPS notes that there should also be no prohibition on utility ownership of residential EV charging facilities for reasons similar to those stated herein; however, specific reference is made here to non-residential facilities in light of the specific question posed by the Commission in Preliminary Order Issue No. 68.

I. The objections to utility ownership presume a robust competitive market exists for EV charging infrastructure; however, that is not true in many areas of the state.

A number of intervenors presume in their responses that a robust competitive market for EV charging facilities either currently exists, or will exist in the future, in all parts of Texas, and they assert that permitting utility ownership of charging facilities would create an unequal playing field and depress competition.[2] There are a number of unsupported presumptions underlying this argument, however, and it should be rejected.

First, this argument presumes that there is, or will be, a competitive market for the installation of EV charging facilities in *all* areas of the state. However, and as SPS detailed in its initial brief and supported with evidence in the record, the EV charging market that has developed to date has not shown robust development in more rural areas of the state, particularly with respect to the installation of fast-charging facilities.[3] To the extent Commission Staff and other intervenors appear to suggest that competitive markets will develop in the future in these more remote or rural areas in response to newer incentive programs, any such suggestion is entirely speculative as there is nothing in the record of this matter that supports this assertion.[4] Moreover, EVs have existed for many, many years, such that there is already sufficient information from which the Commission could reasonably conclude that a robust competitive market for EV charging has failed to develop in all areas of the state relying solely upon competitive market forces.[5] Accordingly, vertically-integrated utilities should be allowed to play a critical role in ensuring that needed facilities are

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[2] *See* Initial Brief of Americans for Affordable Clean Energy (AACE) at 5; Initial Brief of Commission Staff at 3.

[3] *See* Initial brief of SPS at 4-5.

[4] To the extent AACE argues the NEVI plan will spur growth in rural areas by private entities, see Initial Brief of AACE at 6, that is based on speculation as the NEVI plan does not provide full funding for installation of charging facilities in rural areas. Further, maintenance funding is contemplated to be provided for only five years, calling into question how private entities that build facilities in reliance on such funding intend to operate the facilities after the initial five-year period. *See* 5-year National Electric Vehicle Infrastructure Funding by State.

[5] See Initial Brief of SPS at 4-5.

installed in all areas of the state by offering services that foster or accelerate the build out of EV charging, particularly in underserved areas.

Second, the parties seeking to limit utility ownership fail to account for the fact that the Commission has oversight and approval authority over any proposals made by a vertically-integrated utility related to EV charging infrastructure. The Commission will be able to evaluate, based on the specific facts presented with each proposal, whether or not the utility's proposal is reasonable and justified in light of whatever competitive market may or may not exist related to the service at issue.[6] As such, it would not be proper to impose a blanket prohibition on utility ownership proposals. This is particularly true when there has been nothing offered into the record in this matter, other than speculation, that would support a finding that utility ownership will improperly depress or distort any competitive market that may or may not exist related to EV charging infrastructure.

Third, the objecting parties' presumption that vertically-integrated utilities will have a clear competitive advantage is also based on speculation. While the regulatory compact is intended to ensure that utilities have a reasonable *opportunity* to earn a fair rate of return on invested capital; such a return is by no means guaranteed.[7] Further, with respect to EV charging, utilities will still be required to compete in the open market with respect to matters such as equipment pricing and the siting of facilities. Finally, unlike competitive entities, vertically-integrated utilities are regulated in their rates, and are therefore constrained in ways a purely competitive entity is not.

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[6] *See, e.g, Amtel Communications, Inc. v. Pub. Util. Comm'n of Tex.*, 687 S.W.2d 95, 101 (Tex. App.—Austin 1985, no writ) ("the Legislature intended the Commission to make, where necessary and desirable in the particular case, whatever adjustments and accommodations it considers necessary to effectuate the public interests underlying both competition and monopoly power").

[7] TEX. UTIL. CODE § 36.051.

Finally, and regardless of whether a competitive market does exist, a vertically-integrated utility may be uniquely positioned to offer services related to EV charging to its customers in a manner that serves the needs of its customers and the public interest; this includes serving Texas's stated policy goal of increasing and accelerating access to EV charging. For example, and as SPS explained in its initial brief, vertically-integrated utilities in Texas are specially situated to offer programs to assist their customers in the adoption of EVs by facilitating installation of residential charging equipment with no or low initial costs.[8] Prohibiting utility ownership of EV charging facilities entirely would impede utilities' ability to offer these important services.

II. The Commission may regulate utility services offered in a competitive market without imposing a wholesale bar on utility participation.

OPUC and Commission Staff take the position that the Commission should address the potential impact utility ownership of EV infrastructure may have on competition by imposing a wholesale ban on utility participation in such ownership.[9] This position goes too far. It is the Commission's role to regulate how utilities may or may not offer services that are in competition with the market. Such regulation should occur on a case-by-case basis, not through blanket prohibitions.

OPUC and Commission Staff suggest that PURA § 11.002 and 16 TAC § 25.1 should be read so as to limit utilities to providing services in only those markets where a competitive market either does not exist or has been entirely displaced by utility regulation. However, there is no authority to support the proposition that a vertically-integrated utility should be barred from

[8] See Initial Brief of SPS at 14.

[9] See Initial Brief of Commission Staff at 2; Initial Brief of OPUC at 2.

offering services in areas where a competitive market for such services may also exist.[10] Rather, it is telling that the term "affected person" in PURA is defined to include "a competitor of a public utility with respect to a service performed by the utility."[11] This necessarily presumes a regulated utility can provide services for which they have competitors. Nor is it unheard of for vertically-integrated utilities to compete to provide services; for example, vertically-integrated utilities already provide services—such as the construction of new transmission—in which they must compete with other entities.[12] In this matter, the Commission should find the appropriateness of utility ownership of EV infrastructure is best considered on a case-by-case basis, following a fact-based inquiry.

Further, vertically-integrated utilities are not *per se* barred from providing a service simply because it may be viewed as creating an unequal playing field with entities who compete to provide a similar service. Indeed, even if a proposal concerning ownership of EV charging infrastructure by a vertically-integrated utility is perceived to provide some type of competitive advantage to the utility, the Commission could approve the proposal if the specific facts presented adequately demonstrated that the proposal was reasonable and served the public interest. As the Austin Court of Appeals once held:

> the principles of monopoly, competition, equal treatment, and discrimination are not absolute, but only relative and abstract principles evidencing competing public policies which PURA implicates in varying ways in the several functions of the Commission.... *Such principles acquire meaning only in a particular factual context.*[13]

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[10] To the extent AACE cite PURA §§ 31.001 and 39.001 for the proposition that "generation and retail services" must be subject to a competitive market, they appear to be referencing the deregulated ERCOT market; that proposition is not applicable to vertically-integrated utilities in non-ERCOT areas, such as SPS.

[11] TEX. UTIL. CODE § 11.003.

[12] *See, e.g., NextEra Energy Capital Holdings, Inc. v. Lake*, 48 F.4th 306, 319 (5th Cir. 2022) ("In the market for transmission of electricity, vertically integrated utilities and transmission-only companies compete and offer the same services: building, operating, and owning transmission lines").

[13] *Amtel Communications,* 687 S.W.2d at 102.

In evaluating the matters before it, the Commission is vested with the authority "to decide what public interest means in a particular case."[14] Further, "the achievement of social policies through utility regulation" is a factor that may be considered by the Commission in evaluating a utility proposal.[15] Given all of this, there may be cases in which the Commission reasonably determines that achievement of a recognized social policy—such as Texas's stated policy goal of increasing access to EV charging in *all* areas of the state—is served by approving a proposal for a vertically-integrated utility's ownership of EV infrastructure.[16]

III. To the extent some parties advocate for limiting utility ownership to "make ready" infrastructure, it is not appropriate to impose this blanket limitation in this case.

Intervenor ChargePoint, Inc. suggests that utility ownership should be limited to "make ready" EV charging infrastructure, with private site hosts selecting the actual charging equipment.[17] While such proposals may be one viable model for vertically-integrated utility ownership of EV charging infrastructure, it would be improper to impose such a blanket limitation on utility ownership in this discrete rate case. Rather, consideration of this type of ownership model, as well as alternative models that may involve utility ownership of EV charging infrastructure, is best resolved on a case-by-case basis. For example, there may be cases where limiting a vertically-integrated utilities to this type of "make ready" ownership model limits the expansion of EV charging within the utility's service territory in a manner that is contrary to the public interest—this could be particularly true in traditionally underserved areas of the state.

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[14] *Pub. Util. Comm'n of Tex. v. Tex. Tel. Ass'n,* 163 S.W.3d 204, 213 (Tex. App.—Austin 2005, no pet.).

[15] *Amtel Communications*, 687 S.W.2d at 102–03.

[16] *See, e.g., City of Abilene v. Pub. Util. Comm'n of Tex.*, No. 03-02-00569-CV, 2003 WL 549297, at *3 (Tex. App.—Austin Feb. 27, 2003, pet. denied) (In context of allegation of discriminatory rates, finding that "[s]ome differentiation in treatment may be warranted in some circumstances…In those instances, unequal treatment neither violates PURA nor invalidates an agency action").

[17] Initial Brief of ChargePoint, Inc. at 4.

Notably, Intervenor FlashParking, Inc. acknowledges that its support of a ETI's rider proposals in this matter turn upon the specifics of the riders put at issue in this case.[18] In that vein, the Commission should find that proposed ownership of EV infrastructure by vertically-integrated utility is an issue that must be evaluated based on the facts presented in each particular case, and not through the imposition of blanket limitations.

IV. Concerns regarding how customers may or may not bear costs related to utility ownership of EV charging infrastructure should be addressed on a case-by-case basis.

Finally, OPUC objects to ETI's proposed riders in significant part based on assertions that the riders may shift costs to customers who may not directly benefit from EV charging infrastructure.[19] As an initial matter, SPS reiterates that it takes no position on whether or not ETI"s requested riders should be approved. However, concerns related to cost-shifting or alleged discriminatory rates can be addressed by the Commission on a case-by-case basis; they are not a valid reason for imposing a wholesale bar on utility ownership of EV infrastructure.

Indeed, there could be many instances where a vertically-integrated utility proposes a rate concerning EV infrastructure that the Commission finds reasonably allocates costs, and the Commission is always empowered to deny approval of a proposed rate that it finds does not appropriately allocate costs or is otherwise unreasonable. Moreover, the Commission has broad discretion in reviewing and approving rates; rates that treat classes of customers differently are not *per se* unreasonable and can be justified based on the specific circumstances presented in a particular case.[20]

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[18] Initial Brief of FlashParking at 4.

[19] Initial Brief of OPUC at 3-4.

[20] *Tex. Alarm & Signal Ass'n v. Pub. Util. Comm'n*, 603 S.W.2d 766, 773 (Tex. 1980) ("the Commission has discretion to determine relevant factors in a rate design problem").

V. Conclusion

SPS respectfully requests that the Commission find that vertically-integrated utilities are not prohibited from owning EV charging infrastructure.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 27, 2023, a true and correct copy of the foregoing instrument was served on all parties of record by electronic service, hand delivery, Federal Express, regular First Class mail, certified mail, or facsimile transmission.

/s/ Jeremiah W. Cunningham