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

APPLICATION OF ENTERGY TEXAS, INC. FOR AUTHORITY TO CHANGE RATES	§ § §	STATE OFFICE OF ADMINISTRATIVE HEARINGS
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**ENTERGY TEXAS, INC.’S RESPONSE TO OFFICE OF PUBLIC UTILITY
COUNSEL’S MOTION TO COMPEL**

The Administrative Law Judges (ALJs) should deny Office of Public Utility Counsel’s (“OPUC”) motion to compel Entergy Texas, Inc.’s (“ETI”) responses to OPUC’s First Set of Requests for Information (“RFI”) No. 1-14 and respectfully shows as follows.

I. INTRODUCTION

ETI received OPUC’s First Set of RFIs on July 19, 2022 and filed objections on July 29, 2022. OPUC filed a motion to compel on August 5, 2022 Consistent with Tex. Admin. Code § 22.144(f), this response is timely filed.

ETI objected to OPUC 1-14, which states:

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.

The scope of discovery encompasses matters that are “not privileged or exempted under the Texas Rules of Civil Evidence, the Texas Rules of Civil Procedure, or other law or rule, that is relevant to the subject matter in the proceeding.”¹ “Although the scope of discovery is broad, a request for information ‘must show a reasonable expectation of obtaining information that will aid the dispute’s resolution.’”²

OPUC 1-14 seeks information concerning plant in service adjustments and supporting workpapers and calculations at issue in prior rate-case dockets. This request is not reasonably tailored to obtain only information pertinent to this case. As such, it is not within the scope of permissible discovery which is limited to the subject matter of the pending action. ETI objected that OPUC 1-14 exceeds the scope of permissible discovery, is overbroad, and seeks information

¹ 16 Tex. Admin. Code (“TAC”) § 22.141.

² *In re Nat’l Lloyd’s Ins. Co.*, 532 S.W.3d 794, 807-08 (Tex. 2017).

that is not relevant and is not reasonably calculated to lead to the discovery of admissible evidence. Similarly, the information sought will not aid in the dispute's resolution in this case. As described herein, ETI's objections should be sustained and OPUC's motion to compel should be denied.

II. ARGUMENT

A. The information sought is not relevant to the subject matter of the pending action.

In short, OPUC 1-14 seeks irrelevant data about a relevant topic. OPUC's argument that the Commission has "a long-standing precedent relating to the exclusion of financially based incentive compensation" and thus "the issue of the potential inclusion of financially based incentive compensation is absolutely relevant to a rate case proceeding" is a red herring.³ No party disputes that incentive compensation is at issue and relevant in this proceeding. But that does not mean any request for information that touches on that topic is necessarily relevant or properly propounded. Relevance turns on the tendency of the requested information "to make a fact more or less probable than it would be" when that "fact is of consequence in determining the action."⁴ OPUC's 1-14 admittedly seeks information about ETI's treatment of specific dollar amounts not at issue in this case. But ETI's treatment of those historical amounts in prior periods does not and cannot change whether ETI's treatment of current incentive compensation amounts in *this case* comports with PURA, the Commission's Rules, and Commission precedent. Notably, ETI has provided all of the information requested for the period relevant to this case (January 1, 2018 – December 31, 2021). OPUC can apply the appropriate legal authorities to this data and form a position as to whether ETI's proposed treatment is appropriate. Again, however, whether ETI's treatment of a different set of costs in a prior period was right, wrong, or different, it will not make a fact of consequence in determining *this action* more or less probable.

As confirmed in its motion to compel, "OPUC is requesting historical information related to ETI's treatment of financially based incentive compensation going back to Docket No. 39896."⁵ But the Company's request for relief *in this case* seeks to include in base rates capital additions closed to plant in service from January 1, 2018 (the Test Year end for ETI's prior base rate case, Docket No. 48371) through December 31, 2021 (the Test Year end for this case).⁶ OPUC 1-14

³ Motion to Compel at 3.

⁴ See *In re Nat'l Lloyd's Ins. Co.*, 532 S.W.3d 794, 807-08 (Tex. 2017) (citing Texas Rules of Evidence).

⁵ Office of Public Utility Counsel's Motion to Compel ("Motion to Compel") at 3.

⁶ *Application of Entergy Texas, Inc. for Authority to Change Rates*, Docket No. 53719, Preliminary Order at 2 (Aug. 4, 2022).

seeks information concerning the Company's plant in service and corresponding adjustments made, reviewed, and subject to a final and non-appealable Commission order in prior proceedings, which is not relevant to the Company's request for relief in this proceeding.

To be relevant the information must be probative to the resolution of the issue in *this proceeding*.⁷ As noted above, relevance turns on the tendency of the information "to make a fact more or less probable than it would be" with that information when that "fact is of consequence in determining the action."⁸ OPUC is requesting the actual granular data and underlying work papers related to plant in service that is not subject to adjudication in this case. That information does not provide any assistance in analyzing the issues or determining whether ETI has complied with the provisions of PURA, Commission precedent, or has carried its burden seeking relief in this proceeding.

Whether issues concerning financially-based incentive compensation arose in those dockets does not make the actual data related to those past dockets sought by OPUC 1-14 relevant to the determination of issues in this one.⁹ The outcomes of those past dockets, Commission and court precedent, and the Commission's Rules (all of which OPUC has equal access to) may provide relevant information. But the requested out-of-period data itself does not have a tendency to make more or less probable a fact that is of consequence in determining the issues for decision in this case.¹⁰ Plant in service and related adjustments to those costs going back several rate case dockets (to Docket No. 39896) through the end of the Test Year in ETI's most recent rate case, Docket No. 48371, were part of the rate requests before the Commission in those prior proceedings and do not bear on the costs at issue in this case or the appropriateness of ETI's treatment thereof. Invested capital associated with those cases from those periods have already been reviewed and determined

⁷ Tex. R. Civ. P. 192.3(a) ("[A] party may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action . . .") (emphasis added); *see also* 16 TAC § 22.141 (identifying the scope of discovery as matters "relevant to the subject matter in the proceeding") (emphasis added).

⁸ *See In re Nat'l Lloyd's Ins. Co.*, 532 S.W.3d 794, 807-08 (Tex. 2017) (citing Texas Rules of Evidence).

⁹ The prior dockets for which information is sought are final. OPUC is precluded from seeking further review or relitigation of the Commission's decisions in those cases. *Cf. State v. Pub. Util. Comm'n of Texas*, 3 S.W. 2d 190, 199 (Tex. 1994) ("Fundamental in the utility ratemaking process is the principle that utility rates are set for the future, not the past.").

¹⁰ Tex. R. Evid. 401. "Information is patently irrelevant when reasonable minds would not differ that it has no tendency to prove or disprove any issue involved in the subject matter of the suit . . ." *In re Sun Coast Rest., Inc.*, 562 S.W.3d at 146. Even construed liberally, OPUC's 1-14 seeks information from prior dockets that has no tendency to prove the issues as to the Company's application in this docket.

to be prudent and reasonable.¹¹ Indeed, OPUC candidly admits that the historical information sought relates to three prior ETI rate cases that include one “fully litigated” rate case and two “settled dockets.”¹²

As noted in its motion, OPUC “would like to see ETI’s treatment of financially based compensation going back to Docket No. 39896,” “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.” But this rationale fails to show how the data related to ETI’s adjustments to plant in service in prior dockets has any bearing on whether the Company’s requested relief should be granted in this case. Notably, OPUC’s motion to compel confirms this request does not seek to determine whether ETI has complied with the Commission’s orders in prior cases.¹³ The request seeks to compare *ETI’s* adjustments to invested capital then and now. But ETI’s handling of this issue in prior irrelevant periods does not change whether ETI, in this instance, has complied with PURA, the Commission’s Rules, prior Commission orders, and other controlling authority.

Thus, for those periods prior to January 1, 2018 (the end of the Test Year in the Company’s last base rate case), ETI objects to this overreaching request because the information sought to be obtained will not aid in the resolution of any dispute in this case.¹⁴ OPUC’s desire to analyze “an evolution in ETI’s treatment of financially based incentive compensation” is simply not probative of whether the Company’s treatment *in this case* complies with PURA, Commission precedent, or other controlling authorities. Nor is this information necessary to the ALJs or the Commission’s review and decision on this issue in this docket. Fatal to OPUC’s motion, a request for information must be relevant “to the subject matter of the *pending* action.”

B. OPUC’s request is not reasonably tailored to obtain only pertinent information.

ETI further objects that OPUC 1-14 is overbroad. A party seeking discovery is ultimately

¹¹ See, e.g., *Application of Entergy Texas, Inc. for Authority to Change Rates and Reconcile Fuel Costs*, Docket No. 41791, Order at Finding of Fact 38 (May 16, 2014) (“ETI’s invested capital as presented in the application is reasonable, necessary, and used and useful.”); *Entergy Texas, Inc.’s Statement of Intent and Application for Authority to Change Rates*, Docket No. 48371, Order at FoF 43 (Dec. 20, 2018) (“ETI’s capital additions that were closed to plant in service through December 31, 2017 are used and useful and reasonable and were prudently incurred.”).

¹² Motion to Compel at 3. OPUC refers to the issue of financially-based incentive compensation arising in another proceeding as well (Docket No. 51381), which is similarly irrelevant to the issues for decision in this case.

¹³ This is not one of the purposes for which the information is sought as outlined in the motion to compel. Motion to Compel at 3-4.

¹⁴ See *In re Nat’l Lloyd’s Ins. Co.*, 532 S.W.3d at 807-08 (“Although the scope of discovery is broad, a request for information ‘must show a reasonable expectation of obtaining information that will aid the dispute’s resolution.’”).

charged with tailoring requests to obtain information on matters relevant to the case.¹⁵ Moreover, discovery requests “may not be used simply to explore.”¹⁶ That is precisely what OPUC seeks to do.¹⁷ The test for overbreadth is whether the request could have been tailored “to avoid including tenuous information and still obtain the necessary, pertinent information.”¹⁸ Complying with this request requires the Company to create a schedule that does not exist and compile of multiple years’ worth of information that will not help prove or disprove the appropriateness of ETI’s treatment of the costs are relevant in this case.¹⁹ Here, OPUC 1-14 asks ETI to “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.”²⁰ This request is not limited to the time frame relevant to this case nor is it tailored to “the subject matter of the pending action,” but rather is directed to costs unrelated to the pending action—for the years following the conclusion of Docket No. 39896 through the end of the Test Year in Docket No. 48371.

While the request could have been written to address only that plant in service at issue in this proceeding, OPUC 1-14 primarily concerns data that was the subject of prior proceedings.²¹ This is inconsistent with the requirement that requests be tailored “to the relevant time, place, and subject matter.”²² Again, ETI has provided all of the information requested for the period relevant to this case (January 1, 2018 – December 31, 2021). To properly limit the scope of OPUC 1-14 consistent with the scope of permissible discovery under the Commission’s rules, ETI’s objection to the provision of the requested information pertaining to the prior period related to past dockets not at issue in this proceeding should be sustained.

¹⁵ *In re Am. Optical Corp.*, 988 S.W.2d 711, 713 (1998) (describing tribunal’s responsibility to impose limits on breadth of discovery requests).

¹⁶ *In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex. 2003) (per curiam).

¹⁷ Motion to Compel at 3 (seeking to determine “if there is an evolution of *ETI*’s treatment”) (emphasis added).

¹⁸ *Id.*

¹⁹ See, e.g., Tex. R. Civ. P. 192.3(b); *In re Preventative Pest Control Houston, LLC*, 580 S.W.3d 455,460 (Tex. App.—Houston [14th Dist.], orig. proceeding) (stating parties “cannot be forced to create documents that do not exist for the sole purpose of complying with a request for production”).

²⁰ The Order on Rehearing in Docket No. 39896 was issued Nov. 2, 2012. *Application of Entergy Texas, Inc. for Authority to Change Rates, Reconcile Fuel Costs, and Obtain Deferred Accounting Treatment*, Docket No. 39896, Order on Rehearing (Nov.2, 2012).

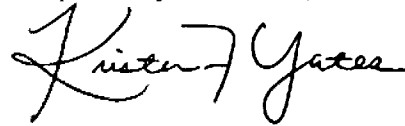
²¹ Tex. R. Civ. P. 192.3(a); 16 TAC § 22.141.

²² *In re Master Flo Valve Inc.*, 485 S.W.3d 207, 213 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (“Discovery requests must be limited to the relevant time, place and subject matter.”); see also *In re CSX Corp.*, 124 S.W.3d at 152 (explaining requests “may not be used simply to explore”); *In re Sun Coast Rest., Inc.*, 562 S.W.3d 138, 146-47 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (“Requests not so reasonably tailored as to time, place, and subject matter are overbroad as a matter of law.”); *In re Jarvis*, 431 S.W.3d 129, 134 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (“Because discovery is limited to matters relevant to the case, requests for information that are not reasonably tailored as to time, place, and subject matter amount to impermissible ‘fishing expeditions.’”).

III. CONCLUSION AND PRAYER

For the above-stated reasons, ETI requests OPUC's motion to compel be denied. ETI further requests that it be granted any such other relief to which it may be entitled.

Respectfully submitted,



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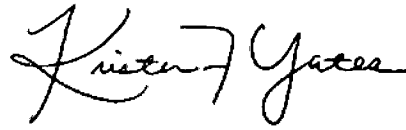
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ATTORNEYS FOR ENTERGY TEXAS, INC.

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 July 12, 2022 pursuant to the Second Order Suspending Rules issued in Project No. 50664.

A handwritten signature in black ink, reading "Kristen F. Yates". The signature is written in a cursive, flowing style. The first name "Kristen" is written in a larger, more prominent script, followed by "F." and "Yates".

Kristen F. Yates