Filing Receipt

Filing Date - 2025-04-29 02:38:24 PM

Control Number - 57172

Item Number - 97

SOAH DOCKET NO. 473- 25-05322
PUC DOCKET NO. 57172

COMMISSION STAFF'S PETITION	**§**	**BEFORE THE STATE OFFICE**
TO ESTABLISH A SECONDARY CAP	**§**	
ON PERFORMANCE BONUSES	**§**	**OF**
UNDER 16 TAC § 25.182(e) FOR THE	**§**	
2024 PROGRAM YEAR	**§**	**ADMINISTRATIVE HEARINGS**

JOINT UTILITIES' REPLY BRIEF

TABLE OF CONTENTS

SOAH DOCKET NO. 473- 25-05322
PUC DOCKET NO. 57172

COMMISSION STAFF'S PETITION TO ESTABLISH A SECONDARY CAP ON PERFORMANCE BONUSES UNDER 16 TAC § 25.182(e) FOR THE 2024 PROGRAM YEAR	§ § § § §	**BEFORE THE STATE OFFICE** **OF** **ADMINISTRATIVE HEARINGS**

JOINT UTILITIES' REPLY BRIEF

I. INTRODUCTION

AEP Texas Inc. ("AEP Texas"), El Paso Electric Company ("EPE"), Entergy Texas, Inc. ("ETI"), and Southwestern Electric Power Company ("SWEPCO") (collectively "Joint Utilities") file this reply brief, in response to the initial briefs of Commission Staff and the Steering Committee of Cities Served by Oncor ("OCSC"), and the Joint Post Hearing Initial Brief of the Office of Public Utility Counsel & the City of El Paso ("OPUC/CEP"), and would respectfully show as follows:

For the most part, the Joint Utilities' Initial Brief already addresses the arguments made by Staff, OCSC and OPUC/CEP in their initial briefs. The Joint Utilities will not repeat the arguments presented in its initial brief, but there are a few points raised by the initial briefs of Staff, OCSC and OPUC/CEP that call for a response. Each of these parties contend that the record heat of the summer of 2023 lead to higher avoided costs that support a finding of good cause for deviating from the requirements of the energy efficiency rule for determining the performance bonus (16 Tex. Admin. Code ("TAC") § 25.182(e)) and setting a secondary cap on utility performance bonuses. But to the contrary, as discussed in the Joint Utilities' Initial Brief, energy prices in 2023 reflect a pattern based on a number of trending factors, such as a new ancillary service and "conservative operations" in the Electric Reliability Council of Texas ("ERCOT"), an upward trend in summer temperatures in Texas, and increasing electrical demand in Texas, all of which are likely to continue to result in higher avoided costs in the foreseeable future, rather than as these parties claim, reflecting unprecedented or extraordinary circumstances limited to the summer of

2023. Staff acknowledges there were a number of factors operating to affect energy prices in 2023.[1]

The Commission's energy efficiency rule anticipated energy price volatility, so an avoided cost that reflects a volatile market would not constitute "good cause" to deviate from the rule. The Commission was well aware that the provision for determination of avoided cost would result in fluctuations depending on the market. During the rulemaking to amend the energy efficiency rules in Project No. 39674, the Commission updated the avoided cost of energy calculation to account for the transition to a nodal market design. The Commission rejected a mechanism that would be less volatile and clearly thought it was appropriate for the avoided cost to track ERCOT market fluctuations:

> CORE proposed that a formula be used for avoided energy costs, based on the expected cost of gas times the heat rate of a combustion turbine. The commission believes that this avoided cost is not consistent with the fact that energy prices in the ERCOT region are determined by competitive forces and may be higher or lower than the formula proposed by CORE. *The avoided cost being adopted by the commission should provide higher avoided costs and the possibility of higher incentives for energy efficiency measures, when generation resources are in short supply and energy prices are high, and will provide lower avoided costs and lower incentives for energy efficiency measures, when the supply of generation resources is adequate and energy prices are low. The commission concludes that in this market environment, the price response in the rule that is being adopted is appropriate.* The rule that is being adopted makes it clear that the avoided energy costs will be based on the prices in the ERCOT real-time market . . . .[2]

Staff, OCSC, and OPUC/CEP are attempting in this case to second guess the market.

In addition, the Commission's energy efficiency rule addresses energy price volatility by using data from the winter and summer seasons over a two-year period to account for any abnormalities such as changes in wholesale prices and weather. Moreover, the rule already has an overall cost cap and a cap on the level of the performance bonus as compared to program benefits.

It is evident from the initial briefs of Staff, OCSC and OPUC/CEP that their underlying complaint is with the rule itself. Their complaint is that the provisions of the rule concerning the

[1] Commission Staff Initial Brief at 13-16 ("Staff Brief").

[2] *Rulemaking Proceeding to Amend Energy Efficiency Rules*, Project No. 37623, Order Adopting Amendment to § 25.181 as Approved at the July 30, 2010 Open Meeting at 40 (Aug. 9, 2010) (emphasis added).

calculation of the performance bonus provide for a performance bonus that they subjectively claim will be excessive, undeserved, or a windfall.[3]

It is particularly evident from Staff's brief that their dispute is with the rule. This is most evident when Staff addresses Dr. Zarnikau's testimony that the data shows there is a trend of increasing temperatures and increasing avoided costs. Among other arguments, Staff states, "At best, his testimony suggests that Commission Staff may need to file a petition similar to the one in this proceeding every year for the foreseeable future."[4] Such a statement does not comport with Staff's claim that they are attempting to address a unique situation. Similarly, despite the fact that the Commission's rule provides for non-ERCOT utilities to use the ERCOT determined avoided costs, several times, Staff points out that the non-ERCOT utilities operate in a different market than ERCOT:

- ". . . circumstances that led to high avoided cost of energy based on the summer of 2023 were specific to the ERCOT region and do not reflect the energy prices experienced by utilities outside of the ERCOT region. For those utilities, ETI, SPS, SWEPCO, and EPE, the energy prices in summer 2023 are particularly distortive to the evaluation of their energy efficiency programs."[5]
- "First, ECRS was only applicable to the ERCOT region and therefore does not apply to three of the four utilities. . . ."[6]
- "Furthermore, conservative operations as a concept is specific to the ERCOT region and would not affect the energy prices experienced by the four utilities that are outside of ERCOT, even though they are permitted to use ERCOT's avoided cost of energy values."[7]
- "Customers outside of the ERCOT region were not subject to any ERCOT-specific price effects, such as conservative operations or ECRS. Therefore, there is a

---

[3] OPUC & City of El Paso's Joint Post Hearing Initial Brief at 6 ("OPUC/CEP Brief").

[4] Staff Brief at 14-15.

[5] Staff Brief at 6.

[6] Staff Brief at 8.

[7] Staff Brief at 15.

disconnect between the actual energy prices for customers outside of ERCOT utilities and the calculated effectiveness of their energy efficiency programs."[8]

Obviously, when the rule was adopted, the Commission was aware that the non-ERCOT utilities operated in markets other than ERCOT and were subject to different circumstances and different prices. However, the rule still specifically allows non-ERCOT utilities to utilize the avoided cost of capacity and energy in ERCOT in the calculations of their EECRFs. In fact, no non-ERCOT utility has ever petitioned to utilize an alternative avoided cost calculation. Accordingly, any arguments that these avoided costs or the circumstances influencing those avoided costs are not applicable to the non-ERCOT utilities are without merit.

As indicated in Joint Utilities' Initial Brief, 16 TAC § 25.182(a) provides that one of the purposes of the rule is to implement an incentive to reward an electric utility that exceeds its demand and energy reduction goals at a cost that does not exceed the cost caps established in subsection (d)(7). With the support of the performance bonuses allowed and implemented under the rule, the energy efficiency programs administered by the state's eight investor-owned electric utilities have proven extremely successful.[9] These programs have consistently achieved overall demand reduction that has exceeded the Legislative goal for energy efficiency[10] in a cost-effective manner.[11]

For the reasons detailed in the Joint Utilities Initial Brief and below, the relief sought by Staff in its petition should be denied. The proposed after-the-fact changes to the bonus calculation lean in the direction of retroactive ratemaking. Finally, even if the circumstances at issue are viewed as unprecedented or extraordinary and deserving of a good-cause exception to impose a secondary cap on performance bonuses, the proposed cap level is unreasonable, arbitrary, and not

---

[8] Staff Brief at 19.

[9] Direct Testimony of Jay Zarnikau, Joint Utilities Ex. 1 at 6:13-14 (using the Bates number located at the top center of the page), citing J. Zarnikau, S. Isser, A. Martin, Energy efficiency programs in a restructured market: The Texas framework, *The Electricity Journal* (2015). Available at: https://www.sciencedirect.com/science/article/pii/S1040619015000287 (last accessed Apr. 17, 2025).

[10] Public Utility Regulatory Act, Tex. Util. Code Ann. § 39.905 (PURA).

[11] Joint Utilities Ex. 1 at 6:14-16, citing the series of Evaluation, Measurement and Verification (EM&V) documents posted at: https://texasefficiency.com/emv-docs/ (last accessed Apr. 17, 2025), for insights into the cost-effectiveness of the programs.

appropriately aligned with the purported purpose of Staff's petition or with past levels of approved performance bonuses.

II. PRELIMINARY ORDER ISSUES

A. Issue No. 1: Did Commission Staff provide sufficient notice of the petition?[12]

No party contested the notice or provision of notice.

B. Issue No. 2: Is it appropriate for the Commission to grant the petition?

1. No. As detailed in Section IV.C. of Joint Utilities' Initial Brief, the direct testimony of Joint Utilities' witness Jay Zarnikau demonstrates that the higher energy prices are part of a trend driven by a number of factors, not an anomaly. Further, trending factors are more appropriately addressed through rulemaking processes.

Winter Storm Uri

The Staff and OCSC in their initial briefs refer to the Commission's action after Winter Storm Uri as an example of a good cause exception being granted to address higher than normal avoided costs that will be used in the energy efficiency proceedings.[13] In fact, OCSC suggests the Commission should follow the same path and reduce avoided costs in this proceeding to the same level.[14] However, these suggestions are misguided in that the situation presented by the summer of 2023 energy prices and the situation presented by Winter Storm Uri are much different. First, the Commission action in that case was the result of a settlement and the Commission explicitly stated that it was not endorsing anything underlying the settlement:

> Entry of this Order is premised on the unique circumstances caused by the February 2021 winter-weather event, as detailed in this Order, and does not indicate the Commission's general endorsement or approval of any principle or methodology that may underlie the setting of the avoided cost of energy for energy-efficiency programs for the 2022 program year . . . .[15]

---

[12] *See* 16 Tex. Admin. Code § 22.55 (TAC).

[13] Staff Brief at 17; Steering Committee of Cities Served by Oncor's Initial Brief at 4 ("OCSC Brief").

[14] OCSC Brief at 6.

[15] *Commission Staffs Petition for a Good Cause Exception to 16 Texas Administrative Code § 25.181(d)(3)(A) and to set the Avoided Cost of Energy Under § 25.181(d)(3)(A) for 2022 Electric Utility Energy Efficiency Programs*, Docket No. 52871 Order at Ordering Paragraph 6 (May 12, 2022).

But perhaps more notable, Winter Storm Uri was an unprecedented and tragic singular incident lasting six days that is much different than the events of the summer of 2023. The Commission described the event as follows:

> From February 12 through 17, 2021, Winter Storm Uri brought extreme cold weather conditions to Texas, resulting in extensive generator outages and derates across Texas. ERCOT real-time energy prices were at or very near the high system-wide offer cap of $9,000 per MWh from February 15 through 19, 2021.[16]

In contrast, as Staff concedes in its brief, the ERCOT energy prices in the summer of 2023 were driven by a number of factors, including permanent changes to the ERCOT market structure and a *summer-long* heat-wave, not a single isolated and unprecedented storm. Accordingly, it is not appropriate to draw parallels between these two events, or suggest that by approving the settlement agreement in Docket No. 52871, the Commission has in any way endorsed the use of good cause exceptions to adjust energy efficiency calculations any time a party has concerns with the outcome of those calculations.

Weather Trend

Both Staff and OPUC/CEP in their initial briefs do not deny that, as Dr Zarnikau demonstrated, summer temperatures in Texas are trending upward. But both attempt to dismiss the import of that fact with the apparent reasoning that, because the summer temperatures in 2023 were above Dr. Zarnikau's trend line, the trend does not have any relevance to interpreting whether the summer of 2023 temperatures were unique or anomalous.

On pages 7 and 8 of its initial brief, Staff presents three charts from Mr. Zarnikau's testimony. Staff claims that those charts shows that the 2024 avoided costs were an anomaly and the 2023 temperatures were unusually hot and not part of a trend. Despite the fact that those charts clearly show a distinct upward trend, the only apparent explanation of Staff's assertion is simply that the data point for 2023 is above that line. OPUC/CEP make similar claims when they argue:

> …the trend presented by the Joint Utilities would expect a temperature of approximately 85.3 degrees Fahrenheit for summer 2023. The actual average summer temperature was 87.7 degrees Fahrenheit, meaning it would take approximately 24 years for summer 2023 to be on the trendline presented by the Joint Utilities.[17]

---

[16] *Id.* at Finding of Fact No. 20.

[17] OPUC/CEP Brief at 5.

No one can reasonably expect the weather to result in data points exactly on the trend line every year. As all those graphs show, the temperature varies from year to year, with data points scattered both below and above the line. And, as those graphs show, both the lower data points and higher data points are trending higher. Yet, apparently, Staff and OPUC/CEP would consider the temperatures of summer 2023 to *not* be "unique" or "anomalous" or not an outlier only if that data point had fallen exactly on the line.

While Staff acknowledges the trend of increasing temperatures and that such a trend would increase the expected values, Staff then contends that Dr. Zarnikau presented no statistical analysis to show the summer of 2023 was NOT an outlier.[18] This is an interesting contention. If a statistical analysis is necessary, then Staff should had presented such an analysis to show that the summer of 2023 temperatures fall outside of a reasonable expected range to meet its own standard because Staff has the burden of proof in this case. Yet, it has presented no such statistical analysis to support its contentions.

Bonus Amounts

There is a theme running through the Staff's, OCSC's and OPUC/CEP's initial briefs that bonuses calculated as provided by the Commission's rule for performance year 2024 would be unjustified and undeserved. For instance, Commission Staff contends that, "corrective action" is necessary "to ensure that performance bonuses for PY2024 are based on energy efficiency program achievements—not circumstances,[19] and that, ". . .when the reason for the performance bonus is due to factors other than 'the utility's energy efficiency achievements,' a reduction in performance bonus is the preferred solution."[20] Similarly, OCSC claims that "[w]hen there is an anomaly that causes a drastic increase in avoided costs, this not only results in an overstated performance bonus, but signals that the utility's energy efficiency programs are more effective than they actual are due

[18] "Therefore, it is noteworthy that Dr. Zarnikau failed to provide any analysis suggesting that the high temperatures during the summer of 2023 were either within or outside some expected range. The existence of an upward trend would merely shift the expected range upwards, but Dr. Zarnikau appears to be relying on the existence of an upward trend itself as sufficient to consider those values as non-outliers. However, Commission Staff is unaware of any statistical principle that excludes the concept of an outlier from data on a trend line, and Dr. Zarnikau has failed to identify any such principle." Staff Brief at 14.

[19] Staff Brief at 6.

[20] Staff Brief at 11 (citation omitted).

to external factors and not the program itself."[21] One would get the impression that the avoided costs that ERCOT has calculated were made up and not reflective of reality. No one disputes that the energy prices in ERCOT during the summer of 2023 were the actual prices that were paid for energy and that, to the extent that the utilities' energy efficiency programs resulted in savings, customers were able to avoid paying those prices. The bonuses were earned based on the savings achieved, with the benefit being determined by ERCOT's competitive market. That is why it was logical to tie the size of performance bonuses not only to the utility's costs of providing programs and those programs' effectiveness in reducing energy consumption, but also to the avoided cost of that energy. In other words, an increasing avoided cost of energy does not distort utility performance bonus. The Commission clearly intended for the avoided costs and thus the bonuses to reflect the actual market prices from a competitive market, not some price that after the fact someone believes is better. Moreover, the Commission already implemented what it determined would be the appropriate deviations from the market by imposing cost caps on the EECRF and limiting the performance bonus to 10% of the utility's total benefits.[22]

The Joint Utilities addressed in their initial brief that despite Staff's contention that larger bonuses may lead to a reduction in energy efficiency efforts the record evidence in this proceeding does not support Staff's contention. In their initial brief, OPUC/CEP argue that "[u]tilities gauge program expenditures in a given year pursuant to the cap in order to maintain program expenditures below the cap in a future PY, and reduce associated expenditures in order to fully take advantage of a prior year's bonus."[23] The citation for this declaration is, not to evidence in the proceeding, but rather to the Staff's petition. Beyond there being no evidence to support this statement in the record, Staff does not even make this declaration in their petition, rather qualifying it as the utilities "may" have this response or would be incentivized to reduce their expenditures.

[21] OCSC Brief at 2.

[22] *See* 16 TAC § 25.182(d)(7) for the overall EECRF cost cap and 16 TAC § 25.182(e)(3) for the 10% cap for bonuses.

[23] OPUC/CEP Brief at 4.

C. Issue No. 3: Is there good cause to impose a secondary cap on EECRF performance bonuses for program year 2024?[24]

a. **Did any unprecedented or extraordinary circumstances affect summer 2023 energy prices? If so, identify each circumstance.**
   i. **How did each circumstance affect summer 2023 energy prices?**
   ii. **What was the aggregate effect of the circumstances on summer 2023 energy prices?**
   iii. **Did the circumstances result in energy price fluctuations that were significant in comparison to price fluctuations affecting previous summer energy prices?**

b. **Did unprecedented or extraordinary circumstances affect summer 2023 energy prices to the extent that there is good cause to deviate from the formula used to calculate EECRF performance bonuses for program year 2024? If so, please address the following subissues:**
   i. **What is the appropriate means of addressing the impact of summer 2023 energy prices on the calculation of performance bonuses for program year 2024?**
   ii. **Will capping program year 2024 performance bonuses at a percentage of a utility's overall spending for program year 2024 address the impact of the 2023 energy prices? If so, is it appropriate to set the cap at 25% of a utility's overall spending for program year 2024?**

Summer 2023 Energy Price

In its initial brief, Staff says "[w]ithout question, high energy prices lead to higher performance bonuses. While straightforward and not substantially in dispute, it is important to emphasize. For example, an overall savings of 10 megawatt-hours (MWh) during PY2023 would appear to be worth $911.50, whereas that same reduction during PY2024 would appear to be worth $1,662.0024-an increase of 82.3%."[25]

While ERCOT's avoided cost calculation for program year 2024 was $166.20, which was approximately 82% greater than the avoided cost calculated for program year 2023; Staff fails to mention that, as shown in the chart on page 10 of Ms. Ramaswamy's direct testimony, ERCOT's avoided cost calculation for program year 2019 was $113.66, which was approximately 124% greater than the avoided cost calculated for program year 2018. Accordingly, the year over year increase in the avoided costs calculated for program year 2024 was not unprecedented. Summer 2023 energy prices did not result in an unprecedented rise in avoided costs.

---

[24] 16 TAC. § 25.3(b); § 25.182(c).

[25] Staff Brief at 11.

ECRS

In its brief, Staff, while acknowledging that "ECRS is now a permanent feature of the ERCOT market" contends ". . . it would be highly speculative to presume that its effects on the market will remain static, especially considering that it is a new product."[26] To the contrary, it would be speculative to assume this permanent feature will not continue to have an impact, when according to analysis by the Independent Market Monitor ("IMM") for ERCOT, Potomac Economics, the ECRS impacted prices in both 2023 and 2024.[27] Particularly in the context of considering whether the avoided costs for 2023 were so anomalous that it constitutes good cause to deviate from the Commission's energy efficiency rule, the record evidence shows that the ECRS impacts continued past 2023 into 2024 and there is no record evidence indicating that this the impact will go away.

Future Load Growth

Staff argues that ". . . it is inappropriate and unnecessary to evaluate summer 2023 energy prices in the context of future forecasts" because its Petition is directed solely to PY2024 . . . ."[28] But it is Staff's contention that the ERCOT market prices were anomalous, resulting from "unique" circumstances, so it is in fact relevant to measure how unusual those prices against what is expected to come.

As explained in the Joint Utilities' Initial Brief, Dr. Zarnikau concurs with Ms. Ramaswamy that increasing demand or load growth likely contributed to high prices in the summer of 2023.[29] Yet, even higher demand growth is expected in future years, as can be seen in ERCOT's latest load forecasts, as reported on the two figures (from an ERCOT report) presented in Mr. Zarnikau's direct testimony.[30] Demand growth over the past couple of years was not an anomaly.

---

[26] Staff Brief at 9.

[27] Joint Utilities Ex. 1 at 11:15-17, citing Potomac Economics, Item 8: IMM 2023 State of the Market Report for ERCOT Electricity Markets (Jun. 18, 2024), available at: https://www.ercot.com/files/docs/2024/06/11/8%20Independent%20Market%20Monitor%20(IMM)%202023%20State%20of%20the%20Market%20Report%20for%20the%20ERCOT%20Electricity%20Markets%20v2.pdf (last accessed Apr. 17, 2025) (emphasis added).

[28] Staff Brief at 12.

[29] Joint Utilities Ex. 1 at 14:5-6.

[30] Joint Utilities Ex. 1 at 14:6-8. Joint Utilities understand that more recent forecasts announced by ERCOT project even more robust levels of growth. *See* https://ercot.new.swagit.com/videos/303514 (Item 5) (last accessed Apr. 21, 2025).

The record indicates that increased demand will place upward pressure on prices if supply cannot keep pace.[31]

Alternatives to 25% Cap

Staff states that, while not preferable, it does not oppose either Sierra Club's 15% cap or OCSC's proposal to restate the avoided cost as an alternative solution.[32] Much like the 25% cap proposed by Staff, these alternatives are second-guessing the market-based prices and should likewise be rejected. There is no record evidence to support the 15% cap, and it would be well below the long-term historical average as seen in the data presented in Ms. Ramaswamy's direct and rebuttal testimonies. And OCSC's proposed restatement of avoided costs is arbitrary and based on the Commission's response to Winter Storm Uri. As discussed above, the Commission ruling in that case is clearly distinguishable.

III. CONCLUSION

Staff, OCSC, and OPUC/CEP have failed to demonstrate that good cause exists for deviating from the Commission's energy efficiency rule and impose a secondary cap on performance bonuses. The evidence in this proceeding shows that the ERCOT market prices in 2023 reflect trending factors, not unprecedented or extraordinary circumstances. To the extent Staff's concerns require changes to the current energy efficiency framework established by the Commission's rules, such changes are more appropriately addressed in a forward-looking manner in a rulemaking. To the extent the Commission concludes that a secondary cap is necessary for bonuses reflecting program year 2024 achievements, Staff's proposed cap level is unsupported and arbitrary and should not be approved.

Joint Utilities request that the Commission deny Staff's petition and grant Joint Utilities such further relief to which they are entitled.

[31] Joint Utilities Ex. 1 at 14:6-8.

[32] Staff Brief at 19; OCSC Brief at 1, 3, and 6.

Respectfully submitted,

Everett Britt
State Bar No. 24001789
Duggins Wren Mann and Romero, LLP
600 Congress Avenue, Suite 2700
Austin, Texas 78701
P: (512) 744-9300
F: (512)744-9399
E: ebritt@dwmrlaw.com

ATTORNEY FOR ENTERGY TEXAS, INC. ON BEHALF OF JOINT UTILITIES

CERTIFICATE OF SERVICE

I certify that on April 29, 2025, a true and correct copy of this document was served on all parties of record by electronic service in accordance with the Commission's Second Order Suspending Rules issued on July 16, 2020 in Project No. 50664.

Everett Britt