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APPLICATION OF CENTERPOINT ENERGY HOUSTON ELECTRIC, LLC FOR APPROVAL TO AMEND ITS DISTRIBUTION COST RECOVERY FACTOR	§ § § § §	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

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TEXAS COMPETITIVE POWER ADVOCATES'
<u>EXCEPTIONS TO THE PROPOSAL FOR DECISION</u>

Texas Competitive Power Advocates ("TCPA") timely submits these exceptions to the Proposal for Decision ("PFD") issued by the State Office of Administrative Hearings (SOAH) on January 27, 2023, and respectfully shows as follows:

I. Introduction and Summary

The Administrative Law Judges ("ALJs") found that CenterPoint Houston Electric's ("CEHE") application should be denied on multiple grounds.

TCPA agrees with the ALJs' determination that CEHE's application should be denied on multiple grounds. As discussed below, however, the record supports an additional ground for denial – CEHE's selection of Life Cycle Power ("LCP") as the winning bidder for the Long-Term lease was based on rigged data and CEHE failed to conduct reasonable due diligence of its "winning" bidder. In other words, even if one were to find that CEHE's Long-Term Lease procurement used a competitive bid process because it had the "right" framework (e.g., bidders were given a reasonable opportunity to respond; a sufficient number of bids were received), CEHE's selection of LCP was unreasonable and resulted in costs that should be denied.

The evidence in this docket clearly shows that Distributed Power Solutions ("DPS"), another bidder for CEHE's Long-Term Lease, offered the same generators as those procured for roughly half the cost that CEHE agreed to pay its "winning" bidder, LCP.[1] The evidence further established that CEHE manipulated DPS's bid for the Long-Term Lease to an extreme degree in order to make its pre-chosen bidder, LCP, look less expensive than DPS before presenting lease options to the CEHE Board of Directors. This means that, even if CEHE had adequately supported the basis for its massive 516 MW Long-Term Lease procurement—which the ALJs correctly pointed out that it did not—and even if CEHE intended to use its generators in a manner consistent with law—which the ALJs correctly found that it does not—CEHE still would have, and did, enter into Short-Term and Long-Term Lease agreements that were egregiously unfair to ratepayers from a cost standpoint, and that decision was therefore also imprudent.

Consequently, even if the Commission were to disagree with the ALJs' conclusions regarding the PFD's grounds for denial, CEHE's application should still be denied because it fails even the most generous interpretation of the prudence standard on the issue of cost. The Commission has consistently held that, "[t]o raise the price of its product, the utility must participate in a rate case and bear the burden of proving that each dollar of cost incurred was reasonably and prudently invested." *Entergy Gulf States, Inc. v. Public Util. Comm'n*, 112 S.W.3d 208, 214 (Tex. App.-Austin 2003, pet. denied) (*citing Public Util. Comm'n v. Houston Lighting & Power Co.*, 778 S.W.2d 195, 198 (Tex. App.-Austin 1989, no writ))." A utility enjoys no presumption that its expenditures have been prudently incurred by simply opening its books to inspection. *Id.* A utility has the burden to prove the prudence and reasonableness of its expenditures before a rate increase can be approved." *Coalition of Cities for Affordable Util. Rates v. Public Util. Comm'n*, 798 S.W.2d 560, 563 (Tex. 1990), cert. denied, 499 U.S. 983 (1991).

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[1] ARM-TCPA Ex. 1B (HSPM) at 24 (bates 000026).

II. Contested Issues - Temporary emergency electric energy facilities ("TEEEF")

A. Lease and Operation of Facilities

1. Procurement Process and Vendor Selection in Accordance with PURA § 39.918(f) [Supp. PO Issue 4(d)]

DPS's bid was much less expensive

DPS's lease price for the large generators was 44% lower than LCP's bid, and for the smaller generators, DPS's lease price was 60% lower.[2] Regarding this price differential, CEHE witness Erin Raben explained that in their respective bids, "[LCP had] provided a base monthly lease cost including all ancillary costs for movement, labor and fired hours (which are the hours the generating facility is operating on fuel), whereas [DPS had] provided a base lease cost with each ancillary service itemized."[3] In other words, Ms. Raben explained that LCP's base price was more expensive because it bundled the lease cost with the contingent operating costs.

When questions were raised about how LCP's bid became the cheapest option when lease options were presented to the CEHE Board for approval, Ms. Raben explained that as a result of the bids' differing structures, they were "rationalized" for comparison in a workpaper included with her Rebuttal testimony (Workpaper).[4] In other words, Ms. Raben made some assumptions about operations in order to estimate DPS's operating costs. At the Hearing, the evidence demonstrated that, in order to make LCP's bid appear cheaper, not only did CEHE deliberately impute several unrealistically high assumptions regarding operating costs to DPS's bid,[5] but it also

[2] ARM-TCPA Ex. 1B (HSPM) at 24 (bates 000026).

[3] CEHE Ex. 11 at 15 and 17.

[4] Rebuttal Testimony, Exhibits, and Workpapers of Erin. E. Raben, CEHE Ex. 11 at 15.

[5] *See* TCPA Ex. 17 (in which CEHE witness, Narendorf, admitted that CEHE assumed that the generators would run 8 hours per month (*i.e.*, 96 hours per year), and that they would be moved tree times per year); *See also* Tr. 266:1-267:3 (Narendorf Cross) Oct. 19, 2022 (in which Mr. Narendorf admitted that none of the generators actually ran for 8 hours per month); *see* Tr. at 502:24 – 503:17 (Raben Cross) Oct, 20, 2022 (Confidential) (in which

compared the *sums* of the lease payments plus operating costs for each bid over the 7.5 year leases, as opposed to the more appropriate metric, which is the *present values* of the lease payments plus operating costs.[6] CEHE's decision to use the sums of the costs rather than the present values was unreasonable and imprudent.[7] If Ms. Raben had instead treated the *present values* of the lease payments plus operating costs as the appropriate metric for comparison of the two bids, rather than the sums, then this consideration alone would have shown DPS's bid to be $5 million cheaper than LCP's bid.[8] If Ms. Raben also had imputed *reasonable assumptions regarding operating costs* to DPS's bid for purposes of comparison, instead of inexplicably unrealistic assumptions, then, as discussed below, this would have shown DPS's bid to be $147 million cheaper than LCP's bid.[9]

<u>Unrealistically high assumptions regarding fired hours each year</u>

In her Workpaper, Ms. Raben assumed that *all* 20 of the generators—five with a 5.7 MW capacity and 15 with a 32 MW capacity, totaling 516 MW—would run 96 hours per year.[10] Ms. Raben used 96 hours per year as the assumed run hours in her Workpaper for DPS's bid because CEHE used *a single 5.7 MW generator* to power the Lake Jackson Civic center for 96 hours after

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Ms. Raben admitted that the actual number of movements per year for the 32 MW generators was about 0.3 and for the 5.7 MW generators it was about 0.9); *see also* TCPA Ex. 89 at bates 89_003.

[6] Tr. at 487:4-494:25 (Raben Cross) (Oct. 20, 2022) (Confidential).

[7] *See Application of Entergy Texas, Inc. to Amend a Certificate of Convenience and Necessity for the Acquisition of a Solar Facility in Liberty County*, Docket No. 51215, Order at 7 (Oct. 19, 2021) (finding that ETI failed to act reasonably when it failed select the lowest cost alternative based on a present value calculation).

[8] Tr. at 494:14-21 (Raben Cross) (Oct. 20, 2022) (Confidential); *see also* TCPA 36 (Native File) (HSPM) (*see* tab called "Summary," and reference cell F48 for DPS's bid, and C48 for LCP's bid).

[9] TCPA 97 (Native file) (HSPM) (*see* tab called "Summary," and reference cell F48 for DPS's bid, and C48 for LCP's bid).

[10] *See* TCPA Ex. 17 (in which CEHE witness, Narendorf, admitted that CEHE assumed that the generators would run 8 hours per month (*i.e.*, 96 hours per year)); *see also* Tr. 495:2-9 (Raben Cross) (Confidential) Oct. 20, 2022 (in which Ms. Raben admitted that CEHE assumed 96 annual run hours for all generators for the purpose of analyzing DPS's bid) *and see* TCPA 36 (Native File) (HSPM) (showing the 96 annual run hours assumption in the tab called "DPS Bid Confirmation," and cell C7 concerning "Annual Hours Used").

Hurricane Nicholas.[11] The use of a single 5.7 MW generator, on one occasion and in one year, did not provide a reasonable basis for Ms. Raben to assume in her Workpaper that all 20 generators totaling 516 MW would run for 96 hours every single year during the 7.5 year lease. For this to have been a reasonable assumption, one would have to believe that a hurricane will make landfall in CEHE's territory *every single year* during the next 7.5 years of the lease, and further, that the hurricane will make landfall every year in such a way that each of the 20 generators will just happen to be located exactly where the damages occur so as to be potentially useful, and further, that the damaged locations each year are all so damaged that all 20 generators will run for a full 96 hours before any repairs will be made by CEHE to its facilities. This is a truly fantastical assumption.

Ms. Raben admitted during cross examination that over CEHE's 13-month record of run times for each generator, the actual run time was an average of between 2.9 and 3.5 hours per year for each of the 32 MW generators.[12] Notably, the total outage hours for which CEHE executed load shed during Winter Storm Uri was 71 hours.[13] Even if one assumed that a historical event like Uri occurred every 7.5 years, which is the length of the lease, then this would equate to an average of 9.5 hours of outages per year during the lease period. Adding these 9.5 hours per year to CEHE's actual average run hours per year would still amount to less than 14 hours per year of

[11] Tr. 522:22–523:20, and 525:7–527:22 (Raben Cross) Oct. 20, 2022 (Confidential); *see also* TCPA Ex. 89 at bates 89_003.

[12] Tr. at 499:13–501:13 (Raben Cross) Oct. 20, 2022 (Confidential); *see also* TCPA Ex. 89 at bates 89_003; *and see* Tr. 64:8–13 (Narendorf Cross) Oct. 18, 2022 (describing CEHE's total procurement as fifteen 32 MW generators and five 5.7 MW generators for a total of 516 MW); The 32 MW generators constitute 75% of the generators and 93% of the total megawatts procured because 32 MW x 15 generators = 480 MW, and 480/516 = 93% of the total megawatts procured.

[13] Tr. 495:23 – 496:9 (Raben Cross) Oct. 20, 2022; *see also* HCC Ex. 2.

total run hours for the generators, which is many fewer than the 96 hours per year that Ms. Raben assumed in her Workpaper for DPS's bid.[14]

<u>Unrealistically high assumptions regarding annual mobilizations/demobilizations (i.e., movements)</u>

In her Workpaper, Ms. Raben further assumed that each of the 32 MW generators would be mobilized and demobilized (*i.e.*, moved around) three times per year, and that each of the 5.7 MW generators would be moved around four times per year.[15] CEHE offered no explanation for assuming such frequent movements, and Ms. Raben admitted that during CEHE's 13-month record of leasing the generators, the actual number of movements per year for the 32 MW generators was about 0.3 and for the 5.7 MW generators it was about 0.9.[16] Consequently, the evidence in the record demonstrates that imputing three movements per year for the 32 MW generators, and four movements per year for the 5.7 MW generators, in the Workpaper for DPS's bid was unreasonable and imprudent for purposes of comparing the bids because it served to artificially drive up the cost of DPS's bid.

Ms. Raben confirmed that the above-described assumptions regarding run times and movements were included in her Workpaper comparing the cost of the LCP and DPS bids.[17] During the Hearing, Ms. Raben then participated in an exercise, whereby these assumptions in her Workpaper were changed. The 96 annual run hours for the generators assumed for the DPS bid

[14] Tr. 495:2-9 (Raben Cross) Oct. 20, 2022 (Confidential) (in which Ms. Raben admitted that CEHE assumed 96 annual run hours for all generators for the purpose of analyzing DPS's bid).

[15] TCPA 36 (Native File) (HSPM) (in the tab called "DPS Bid Confirmation," showing in cell C12, three annual mobilizations/demobilizations for the 32 MW generators, *i.e.*, the TM2500s, and showing in cell C183, four annual mobilizations/demobilizations for the 5.7 MW generators, *i.e.*, the SMT50); *see also* Tr. at 495:13-19 (Raben Cross) Oct, 20, 2022 (Confidential).

[16] Tr. at 502:24 – 503:17 (Raben Cross) Oct, 20, 2022 (Confidential); *see also* TCPA Ex. 89 at bates 89_003.

[17] Tr. at 495:2-19 (Raben Cross) Oct, 20, 2022 (Confidential).

was changed to a more realistic average of 14 annual run hours.[18] This was a more realistic estimate for run hours because it was based on actual outage hours during Winter Storm Uri and CEHE's own data regarding run hours. In the same exercise, the annual movement assumptions were changed from three per year for the 32 MW generators, and four per year for the 5.7 MW generators, to a more realistic average of one movement per year for each generator.[19] One movement per year was more realistic because it was based CEHE's actual data regarding movements.

As previously discussed, when calculating the present values of the two bidders lease payments plus operating costs instead of the sums, DPS had a price advantage of $5 million, even while retaining the aforementioned unrealistic assumptions regarding average annual run hours and average annual movements.[20] Once the unrealistic assumptions were changed to the more realistic numbers discussed herein, and at the Hearing, the overall impact on DPS's bid was dramatic—DPS's price advantage went from over $5 million to almost $147 million.[21] ***In other words, once the present value comparison was applied, and once the unrealistic operating cost assumptions were changed to more realistic assumptions, DPS's bid was $147 million cheaper than LCP's bid.***

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[18] Tr. at 501:5 – 505:17 (Raben Cross) Oct. 20, 2022 (Confidential). These changes were memorialized in TCPA Ex. 97 (Native File) (HSPM) (in the tab called "DPS Bid Confirmation," showing in cell C7, 14 Annual Hours Used).

[19] *Id.* Tr. at 501:5 – 505:17 (Raben Cross) Oct. 20, 2022 (Confidential). These changes were memorialized in TCPA Ex. 97 (Native File) (HSPM) (in the tab called "DPS Bid Confirmation," showing in cell C12, one annual mobilization/demobilization for the 32 MW generators, *i.e.*, the TM2500s, and showing in cell C18, one annual mobilization/demobilization for the 5.7 MW generators, *i.e.*, the SMT50).

[20] Tr. at 494:14-21 (Raben Cross) (Oct. 20, 2022) (Confidential); *see also* TCPA 36 (Native File) (HSPM) (*see* tab called "Summary," and reference cell F48 for DPS's bid, and C48 for LCP's bid).

[21] TCPA 97 (Native file) (HSPM) (*see* tab called "Summary," and reference cell F48 for DPS's bid, and C48 for LCP's bid).

DPS was reputable company whereas LCP was not

Given the choice between an established, experienced corporation and a small company with questionable leadership, CEHE chose to invest hundreds of millions of its ratepayer's dollars with the latter. In addition to offering a cheaper bid, according to CEHE's own statements, DPS was backed by an extremely large and well respected company.[22] By contrast, LCP was barely more than a sole proprietorship that was controlled by a convicted felon.[23] LCP was only formed in 2020, and it had only operated 150 MW of mobile generation before entering into the leases with CEHE.[24] CEHE's procurement witness, Ms. Raben, admitted that she had never heard of LCP before the passage of HB 2483.[25]

In defense of CEHE's selection of LCP as the vendor, Ms. Raben claimed in her rebuttal testimony that CEHE had conducted due diligence on LCP that was "more robust than standard practice due to the nature of the procurement," but this claim was rebutted with substantial evidence at the Hearing.[26] With that said, the PFD does not contain any findings that CEHE conducted adequate due diligence on LCP. Rather, the PFD instead concludes that risk mitigation provisions within the lease in question mitigated the need to conduct due diligence on individuals employees or officers of LCP and that such due diligence is not standard industry practice.[27]

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[22] ARM-TCPA Ex. 1 at 26 (bates 00028).

[23] ARM-TCPA Ex. 10 at 25 (bates 000027) (stating that "[LCP's] co-founder and CEO was a convicted felon who had previously been in prison for five years after a 2012 conviction for environmental crimes and subsequently on probation for three years. His sentencing was more severe because the Judge determined that he had not given truthful testimony during the trial. Evidence indicated that he ordered employees to divert wastewater into the Red River and the Shreveport water system and had individuals lie to auditors and inspectors.").

[24] ARM-TCPA Ex. 1 at 24 (bates 000026).

[25] Tr. at 395:7-9 (Raben Cross) (Oct. 19, 2022).

[26] Tr. 396:5 – 402:6; 406:22 – 430:25 (Raben Cross) Oct. 19, 2022.

[27] *Application of CenterPoint Energy Houston Electric, LLC for Approval to Amend its Distribution Cost Recover Factor*, Docket No. 53442, Proposal for Decision at 17-18 (Jan. 27, 2023) (PFD).

Thus, it is clear that the ALJs agreed that CEHE conducted virtually no due diligence on LCP's principals. Rather, the ALJs found simply that CEHE's lack of due diligence did not impact CEHE's decision.

Notably, however, the evidence presented at the Hearing established that CEHE also conducted no due diligence on LCP, the corporate entity. In fact, all of the questioning at the Hearing regarding CEHE's due diligence effort concerned LCP, not its CEO.[28] Under cross-examination, Ms. Raben admitted that nearly every document that CEHE produced, which purported to show its due diligence efforts regarding LCP before entering into the contracts, actually *post-dated* the execution of the Long-Term Lease contract, and many of the documents did not concern LCP at all.[29] Thus, CEHE's failure to conduct due diligence on LCP – the company—as contrasted with its principals, provides further support for the denial of CEHE's application.

TCPA respectfully disagrees with the finding that the leases contain risk-mitigation provisions that serve to protect CEHE against LCP's breach of performance obligations as this finding is against the weight of the evidence presented at the Hearing. At the Hearing, Ms. Raben was questioned about every risk mitigation provision that she described in her rebuttal testimony in defense of CEHE's selection of LCP.[30] Her response was consistent in that, for each alleged protection, she did not know whether or how the provision actually protected CEHE from LCP's default on its obligations under the lease.[31]

[28] Tr. 396:5 – 402:6; 406:22 – 420:24 (Raben Cross) Oct. 19, 2022.

[29] *See id.*

[30] Tr. 420:25 – 430:25 (Raben Cross) Oct. 19, 2022.

[31] *Id.*

Finally, an important point of clarification for the Commission is that the roughly $200 million that CEHE seeks in this application is only for the 345 MW worth of generators that CEHE claims were used and useful during the last few months of calendar year, 2021.[32] This is not the full cost of the generators. On February 22, 2022, CEHE highlighted for its shareholders that its mobile generation would add $700 million to its capital spending plan.[33] In fact, based on information included in a workpaper filed with CEHE's amended DCRF application, as of September 1, 2022, the total cost of the facilities, including capitalized return and capitalized operation and maintenance (O&M) costs, is $818 million.[34] CEHE certainly intends to file an application in 2023 for the remaining generators that were delivered in calendar year 2022. If the Commission approves this application, it will lay the foundation for the approval of CEHE's next application for mobile generation as well.

CONCLUSION

In sum, in addition to the reasons discussed in the PFD, CEHE's application should be denied because CEHE used rigged data to select LCP as the winning bidder for the Long-Term Lease, resulting in unreasonable costs. Further CEHE failed to conduct reasonable due diligence on LCP, and it failed to include contract provisions in the Long-Term Lease that would protect against LCP's default.

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[32] Docket No. 53442, PFD at 2.

[33] ARM-TCPA Ex. 1 at 16 (bates 000018).

[34] *Id.* at 6 (bates 000008).

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of February 2023, a true and correct copy of the foregoing document was served upon all parties of record.

Stacie Bennett