

1 AGENDA ITEM NO. 17

2 DOCKET NO. 27522 - PETITION OF TXU
3 GENERATION COMPANY LP TO MODIFY
4 CAPACITY AUCTION PROCEDURES

5 CHAIRMAN KLEIN: Let's go to
6 Agenda Item No. 17, Docket 27522.

7 COMM. PERLMAN: Did 16 get
8 consented?

9 COMM. PARSLEY: 16 got consented.

10 COMM. PERLMAN: It did? Okay. I
11 didn't write it down. Sorry.

12 CHAIRMAN KLEIN: All right. What
13 we have here is a proposed -- well, an order
14 that we would have before us -- and let me get
15 my notes real fast. Here, TXU is asking for a
16 change in our capacity auction process in order
17 to be able to do their supplementary auction to
18 auction those entitlements that weren't
19 available initially.

20 I did have a question about this, and
21 it had to do with -- and if somebody from TXU
22 can come up that can answer these capacity
23 auction questions -- because you have -- we have
24 a matrix on the number of entitlements that
25 would be offered for this additional capacity
26 auction, but I was just wondering -- do you have

1 or can you tell us what the total number of
2 entitlements would be so that the entitlements
3 that were offered in the original auction but
4 were not sold or were not bid on?

5 MR. MILLER: Yes, ma'am. Gary
6 Miller with TXU, Capacity Auction Manager.

7 CHAIRMAN KLEIN: Because those
8 you're going to reauction again, too, and
9 include.

10 MR. MILLER: Correct. I
11 believe -- let's see. You're asking how many
12 did not sell in the March auction?

13 CHAIRMAN KLEIN: Right. Yeah,
14 because here, all we have, as I understand this
15 matrix -- and I'm looking specifically at your
16 notice of the supplemental capacity auction on
17 Page 2 -- and as I read that matrix, what it
18 tells me is just the number of entitlements that
19 weren't sold the first time --

20 MR. MILLER: That should have --

21 CHAIRMAN KLEIN: -- included
22 because of the error.

23 MR. MILLER: Right. The number of
24 entitlements in the March auction that did not
25 sell is -- I don't have them totaled up, but

1 it's probably somewhere in the neighborhood of
2 60. There were quite a few entitlements that
3 did not sell in the March auction.

4 CHAIRMAN KLEIN: Okay. So 60 plus
5 the totals that you have here?

6 MR. MILLER: Correct. That's
7 correct.

8 CHAIRMAN KLEIN: Okay. And let me
9 ask you, too, because I didn't see where it was
10 delineated any place -- exactly what was that
11 error? It's characterized several times over as
12 being a simple error, but what was that?

13 MR. MILLER: Okay. We keep track
14 of the entitlements that we offered and that we
15 sold in the various types of auctions -- the
16 two-year auction, the one-year auction, the 12
17 monthlies, and then the quarterly auctions.

18 In doing the waterfall calculation for
19 the March auction, where we waterfall those
20 products that did not sell in those previous
21 auctions, what happened was that we
22 inadvertently took the number of entitlements
23 that -- the requirement for the 12 monthlies --
24 and put that in the sales where we should have
25 put the requirement for the quarterly auctions.

1 So we started with the baseline that
2 was incorrect when we added the waterfall
3 products to it. So it was simply a
4 copy-and-paste error in an Excel spreadsheet, is
5 what it was.

6 CHAIRMAN KLEIN: Okay.

7 COMM. PARSLEY: So that seems to
8 me, then, it doesn't go under (1). It seems
9 like it would need to be a waiver. I'm just
10 curious about the different distinction that
11 you-all seem to be drawing between (1) and a
12 waiver, because to me it seems like this is just
13 an error, which would be a waiver. (1) is to
14 better suit the needs of the competitive market.

15 I'm concerned about going under (1),
16 because I don't know that that type of a
17 spreadsheet error is the kind of thing that
18 better suits the needs of the competitive
19 market. It's something that we might want to
20 grant a waiver for, because it was an
21 inadvertent error. So I would like to figure
22 that out, too.

23 MR. ONEY: This is Tom Oney
24 representing TXU Generation. I think, to be
25 honest with you, we don't have a preference as

1 to which one it's granted under. We chose (1)
2 because the last time the Commission undertook a
3 capacity auction it kind of changed. That did
4 so under (1) instead of on a good-cause
5 exception.

6 Our idea was, under (1), that the
7 procedures -- the Commission's current
8 procedures do not allow an April auction. Well,
9 assuming that, if TXU Generation cannot hold the
10 April auction to auction these ones we failed to
11 auction before because of an error, then that
12 would hurt the market by not offering those peak
13 entitlements.

14 So, assuming all of that, by not
15 holding the April auction, that was bad for the
16 market. So a change to allow an April auction
17 would better suit the needs of the competitive
18 market. That was our idea. Now, honestly, the
19 goal is to simply hold the April auction under
20 whichever Substantive Rule the Commission would
21 like to use, but the goal was to hold the April
22 auction so those products can be auctioned.

23 COMM. PARSLEY: Okay.

24 CHAIRMAN KLEIN: I agree with you,
25 though. I think it is more appropriately suited

1 for a waiver, because this is not standardizing
2 any kind of process that would be new or
3 changing the way that the normal capacity
4 auction is conducted.

5 COMM. PARSLEY: I see what you're
6 getting at now, but it does still seem to me
7 like it's a correcting an error. I just want to
8 make sure, because as you say, in the past, how
9 we handled these going forward, we're setting
10 precedent as this goes on. So I just would like
11 to be able to delineate which side it falls.

12 But I know that the proposed order is
13 for (1), and I was wondering what your thinking
14 was on that, Mark -- not that you defend it or
15 anything, but you did make that choice.

16 JUDGE GENTLE: I did. Several,
17 kind of, points -- in the cover memorandum I
18 said I basically wasn't happy with the process
19 at all because it happened so fast -- that not
20 much deliberation was possible. This is one of
21 those areas.

22 If you were to apply, for example, the
23 construction of statutes in the Government Code
24 to this situation, the more specific would
25 control over the more general. So you have in

1 your rule, which came later than the good-cause
2 exception, a provision that lays out the
3 specifics as to the findings that the Commission
4 would have to make in order to grant a
5 modification of any of the procedures. That's a
6 specific criteria.

7 That, seems to me, would be a better
8 practice than to grant an overall a good cause.
9 It would be better if one could harmonize the
10 rationale of a good cause, but you still have to
11 have good cause even under the general provision
12 under the Substantive Rules to grant any kind of
13 a waiver.

14 So if you don't have the good cause
15 that is specified in the rule, you would be
16 hard-pressed to find really much of a good cause
17 at all. That was the way I was looking at it.
18 The purpose statement in the Substantive Rules
19 says that "the more generation that you make
20 available the better for competition," in a
21 nutshell. That's the purpose of the capacity
22 auction rule.

23 So you're left with the dilemma of
24 comparing what they are proposing to do with
25 what they should have done or what the situation

1 is now. So I thought that it was just a better
2 practice to say, "Look, at the end of the day,
3 all they are really wanting is a four-week
4 rather than a 60-day notice period for the
5 capacity auction."

6 I believe that the Substantive Rule in
7 the capacity auction that allows the waivers
8 broad enough to encompass what they have done --
9 and they have some findings on that -- if we
10 want to kick that away and just go with the
11 overall good cause, I'm afraid that that would
12 open the door to other people thinking that good
13 cause was good enough and you didn't have to
14 meet the criteria of the "better suited for the
15 market."

16 I think that it would just -- also, in
17 the 381 waiver provision, the Commission has to
18 make the finding. In a general good-cause
19 waiver, I can do that administratively if nobody
20 objects. So I would rather have it come to you
21 and to review it under the criteria in the rule
22 rather than be evaluating a whole host of
23 potential good-cause waivers to the rule.

24 That's way more than you probably
25 wanted, but if you want to know what I was

1 thinking, that was it.

2 CHAIRMAN KLEIN: Well, hopefully,
3 it won't get to a point where we're seeing a
4 whole host of good-cause waivers to the rule.

5 I think whether this meets the standard
6 of "it's better suited for the market", you
7 know, I think that we can easily say that's the
8 case, especially given all our conversations in
9 the past amongst us and also with stakeholders
10 just with liquidity problems.

11 COMM. PARSLEY: I assume that
12 these products are needed in the market -- that
13 this is something -- this is a North zone, these
14 are peaking products?

15 MR. MILLER: I think we can safely
16 that's true, yes.

17 MR. ONEY: Some are products that
18 market participants assumably want, yeah --
19 presumably want.

20 COMM. PARSLEY: I understand what
21 you are saying. I still think it probably is
22 more of a good-cause exception than in (1), all
23 things being equal, but I can -- I mean, I don't
24 know how -- either one -- if you --

25 CHAIRMAN KLEIN: No, I'm agreeing

1 with you. I think you're --

2 COMM. PARSLEY: I think it would
3 be good if anybody ever does this again, for
4 them to explain a -- I know this isn't the time,
5 but if they -- explaining it in their pleadings
6 is very helpful, and the pleadings are a little
7 bare here. Thank you for coming and talking
8 with us about this, because trying to proceed
9 correctly is important.

10 CHAIRMAN KLEIN: And let me
11 clarify, because -- you know, being (1) is
12 associated with -- better suits the needs of the
13 market. I guess my point was that this is an
14 important facet for the market overall. And
15 so -- but I do agree with you that I think
16 better suiting the needs of the market, I think,
17 within the context of 25.381(1) really relates
18 to more of a -- a more --

19 COMM. PARSLEY: Right.

20 CHAIRMAN KLEIN: -- and process
21 change for the capacity auction and the conduct
22 of the capacity auction instead of this episodic
23 happening.

24 COMM. PARSLEY: Right. I think
25 that's right. There are a couple of other

1 issues, but I don't know if Brett wants to
2 address the (1) or --

3 COMM. PERLMAN: No. I'm fine with
4 whatever you guys want to do.

5 COMM. PARSLEY: There is also the
6 clawback paragraph and AEP's standing to
7 intervene. I don't think we need to include
8 that particular finding in an order. This is
9 going to be kind of a combination of the
10 proposed order between Staff's proposed order
11 and, I think, Mark's proposed order -- I mean,
12 from my standpoint of what I'm looking at.

13 I don't think the clawback ordering
14 paragraph should be there, because I think
15 pretty clearly that's been settled.

16 JUDGE GENTLE: My reading is that
17 it's off the table.

18 COMM. PARSLEY: It's off the
19 table.

20 MS. ROHR: Rosa Rohr with the
21 Staff. That is true. The clawback is off the
22 table.

23 COMM. PARSLEY: And then the other
24 thing on the AEP intervention, I think, is
25 probably -- I think that probably AEP does have

1 the justiciable interest -- a sufficient
2 justiciable interest in order to intervene here,
3 in that they are a participant in the market,
4 the offerings could have some effect on them.

5 I know that it might not be a real
6 tangible interest, but it is at least an
7 indirect interest that I think is sufficient for
8 an agency proceeding. It's sort like if you're
9 looking at some sort of an air quality permit --
10 although, I know we don't do those -- but
11 somebody is going to complain because it's going
12 to increase the odor on their property --
13 although they are a mile away -- they don't have
14 really -- that might not be a legal
15 justification for a court, but it would be
16 something where you would be able to intervene
17 in the administrative proceeding and be able to
18 be heard.

19 It kind of depends, in my mind, in
20 terms of justiciable interest, about what you're
21 really looking at -- what kind of right you're
22 looking at. And, here, we have someone seeking
23 to have a supplemental capacity auction and
24 another participant in that particular market
25 would be affected, and I think should be heard

1 on that.

2 So that's, actually, where I was
3 talking about kind of being kind of piecemeal on
4 those issues. That's just my thought on that.

5 CHAIRMAN KLEIN: Okay. So that
6 would be just -- to make that more concrete --
7 then deleting Finding of Fact 19 related to the
8 clawback true-up issue, and agree with your
9 intervention analysis. So that would delete
10 Conclusion of Law No. 2.

11 COMM. PARSLEY: There may be an
12 ordering paragraph.

13 CHAIRMAN KLEIN: Yes, Ordering
14 Paragraph No. 1.

15 COMM. PARSLEY: Yes.

16 CHAIRMAN KLEIN: Okay. And, then,
17 probably -- do we need to add procedural
18 findings related to the intervention issue?

19 JUDGE GENTLE: Chairman, I
20 completely concur with Commissioner Parsley's
21 evaluation of AEP's standing. What the Staff
22 briefed was judicial standing, not
23 administrative agency standing.

24 So I completely concur with your
25 analysis, Commissioner, on that. So as I

1 drafted the proposed order, it allows AEP Gen to
2 intervene. So I don't think we need to modify
3 that --

4 CHAIRMAN KLEIN: Okay -- make
5 conforming changes?

6 JUDGE GENTLE: No, ma'am.

7 CHAIRMAN KLEIN: All right.

8 MR. JOURNEYAY: Just as a point of
9 clarity, the proposed order that you-all are
10 addressing is the one drafted by Judge Gentle
11 and not -- so we should not be --

12 CHAIRMAN KLEIN: That's the one we
13 seek to modify.

14 MR. JOURNEYAY: Okay. That one did
15 not have the clawback provisions in it.

16 JUDGE GENTLE: That's right.

17 There was --

18 COMM. PARSLEY: I was just saying
19 that we don't want to include --

20 MR. JOURNEYAY: Yeah, we don't need
21 to delete the ones out of the one proposed by
22 Staff.

23 CHAIRMAN KLEIN: Oh, I thought the
24 one I was looking at was yours, but obviously
25 not. Okay.

1 MR. JOURNEYAY: So the scope of the
2 changes, then, would basically be to change the
3 language in the proposed order from the
4 justification of Subsection (1) to a good-cause
5 exception under 25.5, I believe.

6 CHAIRMAN KLEIN: Right. Okay.
7 Are you okay with that?

8 COMM. PERLMAN: Yeah.

9 CHAIRMAN KLEIN: Great. Anything
10 else?

11 MS. JOHNSON: Commissioners, I
12 simply wanted to clarify my inference that --
13 similar to your discussion of the episodic
14 nature, Chairman Klein. You're also
15 contemplating that (1) would be something that
16 applied broadly, not just to a single entity
17 conducting an auction but to more than one
18 company that's participating -- a general
19 modification to the auction procedures.

20 I just wanted to clarify that I
21 understood that correctly. Thank you.

22 CHAIRMAN KLEIN: Yes. All right.
23 Then, I'll entertain a motion to approve the
24 order consistent with our discussion.

25 COMM. PERLMAN: So moved.

1 COMM. PARSLEY: Agreed.

2 CHAIRMAN KLEIN: And approved.

3 Thank you all very much.

4 MR. MILLER: Thank you.

5 MR. ONEY: Thank you.

6