

BRACEWELL

February 13, 2023

VIA EFILING

Laurie Gharis, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, TX 78711-3087

Re: TCEQ Docket No. 2023-0164-AIR
Entergy Texas, Inc.
Air Quality Permit Nos. 166032, GHGPSDTX201, and PSDTX1598

Dear Ms. Gharis:

Enclosed for filing is the Applicant Entergy Texas, Inc.'s Response to Requests for Public Hearing in the above-referenced matter.

Very truly yours,



Whit Swift
Partner

WLS/aly

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TCEQ DOCKET NO. 2023-0164-AIR

APPLICATION BY § **BEFORE THE TEXAS COMMISSION**
ENERGY TEXAS, INC. FOR §
AIR QUALITY PERMIT NOS. § **ON**
166032, PSDTX1598, §
GHGPSDTX210 § **ENVIRONMENTAL QUALITY**

**ENERGY TEXAS, INC.’S RESPONSE
TO REQUESTS FOR PUBLIC HEARING**

TO THE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL
QUALITY:

Applicant Entergy Texas, Inc. (“Entergy Texas” or “Applicant”) files this Response to Requests for Public Hearing, and in support thereof, would respectfully show the following:

I. Introduction

Entergy Texas has applied to the Texas Commission on Environmental Quality (“TCEQ”) to obtain Air Quality Permit Nos. 166032, PSDTX1598, and GHGPSDTX210 (the “Permit”) to authorize the construction of the Orange County Advanced Power Station (“OCAPS”) within the property boundary of the existing Entergy Sabine Plant in Orange County, Texas.¹ OCAPS is a planned 1,215-megawatt, combined cycle power plant capable of powering more than 230,000 homes using natural gas and up to 30% hydrogen.

The Commissioners’ Integrated Database for this docket includes 471 filings that the TCEQ Chief Clerk has identified as “hearing requests.”² It is important from the outset to recognize that not a single filing on the OCAPS air permit application requests a contested case hearing. The “hearing requests” can be placed into two groups:

¹ The Entergy Sabine Plant is a power station with four natural gas-fired boilers and approximately 1,531 megawatts of generating capacity. The boilers were commissioned in the 1960s and 1970s and are authorized by and operate under separate air permits from the proposed OCAPS.

² <https://www14.tceq.texas.gov/epic/eCID/index.cfm?fuseaction=main.reportResults&requesttimeout=9000>.

- Group A: A single letter signed by representatives of seven organizations that is titled “Conservation Organizations’ Comments and Request for Public Meeting.” The letter cites only the TCEQ rule governing public meetings (30 T.A.C. § 55.154) and makes eight statements requesting a “public meeting.” In one instance, the letter uses the term “public hearing.” The letter does not request a contested case hearing.
- Group B: A group of 464 nearly identical form letters. The form letters were submitted as a group by a Sierra Club representative and are from individuals, other than the 13 anonymous form letters submitted by “concerned citizen.” Each letter makes three statements requesting that the TCEQ hold a public meeting on the application. Each letter also states that the TCEQ should “hold a public hearing.” The form letters do not request a contested case hearing.

The Chief Clerk has classified all 471 filings as both hearing requests and public meeting requests. All of the letters were filed during the first public comment period, in response to publication of the Notice of Receipt of Application and Intent to Obtain Permit (“NORI”). The Group A and Group B filings are properly characterized as public meeting requests, but they are not requests for a contested case hearing. The Executive Director held the requested public meeting on the OCAPS air permit application on August 1, 2022. No member of the public made any request for a contested case hearing in response to the publication of the Notice of Application and Preliminary Decision (“NAPD”), or during the public meeting. No member of the public made any request for a contested case hearing after the Executive Director issued its Response to Public Comment (“RTC”).

As explained herein, none of the 471 filings that the Chief Clerk has categorized as “hearing requests” in this matter comply with TCEQ’s regulatory requirements for contested case hearing requests, nor do any of the filings demonstrate a right to a contested case hearing on the OCAPS air permit application. **None of the letters filed in this matter actually seek a contested case hearing.** The public meeting sought by the requesters has been held, and the Executive Director has responded to the comments filed on the application and draft permit. Entergy Texas respectfully requests that the Commissioners deny all “hearing requests” in this matter and issue

the Permit authorizing construction of OCAPS.

II. Procedural Background

TCEQ received Entergy Texas’s permit application on July 29, 2021 and declared the application administratively complete on August 4, 2021. The Notice of Receipt of Application and Intent to Obtain Air Permit (“NORI”) for the application was published in English on August 14, 2021 in the *Orange Leader*, and in Spanish on August 15, 2021 in *El Perico*. The NORI contained clear and specific instructions for public participation, including how to request a contested case hearing on the application.

The Notice of Application and Preliminary Decision (“NAPD”) was published in English on June 29, 2022 in the *Orange Leader*, and in Spanish on June 29, 2022 in *El Perico*. Like the NORI, the NAPD also contained clear instructions on how to request a contested case hearing. Notice of a public meeting was mailed on July 1, 2022. TCEQ held a public meeting on August 1, 2022, at Lamar State College, in Orange, Texas. The public comment period closed on August 1, 2022.

The Executive Director filed the Response to Public Comment (“RTC”) with the TCEQ Chief Clerk on November 29, 2022, and the Chief Clerk issued a letter on December 6, 2022 transmitting the RTC and alerting interested persons of the Executive Director’s decision that the application meets the requirements of applicable law for permit issuance. The RTC addressed all possible relevant and material concerns identified by persons who filed comments on the application in writing or during the August 1, 2022 public meeting.

On February 1, 2023, the Chief Clerk issued a letter stating that the “hearing requests” will be considered by the Commissioners on March 8, 2023. Entergy Texas hereby provides its response in accordance with Commission rules.

III. Legal Standards for Review of Requests for Contested Case Hearing

Texas law and TCEQ rules identify the legal standard for participation in a contested case hearing, along with the required elements of a valid contested case hearing request. To be granted a contested case hearing, the request must be made by an “affected person,”³ it must “request a contested case hearing,”⁴ and the request must be timely.⁵

A. The Request Must Be Made by an Affected Person

1. Affected Persons

The Texas Clean Air Act and Texas Water Code only allow an “affected person” to participate in a contested case hearing on air permit applications.⁶ The Texas Legislature has defined the universe of “affected persons” who may validly demand that a contested case hearing be held by or on behalf of the Commission. Only those persons who have “a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing” may be granted a hearing.⁷ “An interest common to members of the general public does not qualify as a personal justiciable interest.”⁸

TCEQ rules specify the factors that must be considered in determining whether a person is an affected person. Those factors are:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed

³ 30 TEX. ADMIN. CODE § 55.201(b)(4).

⁴ 30 TEX. ADMIN. CODE § 55.201(d)(3).

⁵ 30 TEX. ADMIN. CODE § 55.211(c)(2)(B). To be timely, a request for contested case hearing must be filed no later than 30 days after the TCEQ Chief Clerk mails (or otherwise transmits) the Executive Director’s decision and response to comments on an application and draft permit. *See* 30 TEX. ADMIN. CODE § 55.201(a).

⁶ *See* TEX. HEALTH & SAFETY CODE § 382.056; TEX. WATER CODE § § 5.556; 5.115.

⁷ TEX. WATER CODE § 5.115(a); *see also* 30 TEX. ADMIN. CODE § 55.203(a).

⁸ *Id.*

and the activity regulated;

(4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;

(5) likely impact of the regulated activity on use of the impacted natural resource by the person;

(6) for a hearing request on an application filed on or after September 1, 2015, whether the requestor timely submitted comments on the application that were not withdrawn; and

(7) for governmental entities, their statutory authority over or interest in the issues relevant to the application.⁹

The Commission may also consider additional factors in determining whether a person is an affected person, including:

(1) the merits of the underlying application and supporting documentation in the commission's administrative record, including whether the application meets the requirements for permit issuance;

(2) the analysis and opinions of the executive director; and

(3) any other expert reports, affidavits, opinions, or data submitted by the executive director, the applicant, or hearing requestor.¹⁰

In considering evidence to apply the above factors to a given request, the Third Court of Appeals explained that TCEQ “enjoys the discretion to weigh and resolve matters that may go to the merits of the underlying application, including the likely impact the regulated activity . . . will have on the health, safety, and use of property by the hearing requestor and on the use of natural resources.”¹¹ TCEQ’s application of the factors described above “may include reference to the permit application, attached expert reports, the analysis and opinions of professionals on its staff, and any reports, opinions, and data it has before it” and specifically may include air modeling

⁹ 30 TEX. ADMIN. CODE § 55.203(c).

¹⁰ 30 TEX. ADMIN. CODE § 55.203(d).

¹¹ *Sierra Club v. Tex. Comm'n on Env'tl. Quality*, 455 S.W.3d 214, 223 (Tex. App.—Austin 2014, pet. denied).

reports.¹² In making these determinations, the court was applying the Texas Supreme Court’s 2013 decision in *Texas Commission on Environmental Quality v. City of Waco*, which affirmed TCEQ’s discretion to rely on such information in making an affected person determination.¹³

2. Affected Group or Association

In certain limited circumstances, a group or association can qualify as an “affected person.”

A group or association will only have standing to participate in a contested case hearing if the following four requirements are met:

- (1) comments on the application are timely submitted by the group or association;
- (2) the request identifies, by name and physical address, one or more members of the group or association that would otherwise have standing to request a hearing in their own right;
- (3) the interests the group or association seeks to protect are germane to the organization's purpose; and
- (4) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.”¹⁴

A contested case hearing request filed by a group or association must identify an individual who is a member of the group or association who is an “affected person” for purposes of the application that has a personal justiciable interest in the application that is not an interest shared with members of the general public.

B. The Request Must “Request a Contested Case Hearing”

A member of the public who seeks to participate in a contested case hearing on an application must, under TCEQ rules, “request a contested case hearing” on the application.¹⁵

¹² *See id.*

¹³ *Id.*

¹⁴ 30 TEX. ADMIN. CODE § 55.205(b).

¹⁵ 30 TEX. ADMIN. CODE § 55.201(d)(3).

C. The Request Must Be Filed Timely with the TCEQ

TCEQ rules provide that a request for contested case hearing must be filed no later than 30 days after the Chief Clerk mails (or otherwise transmits) the Executive Director’s decision and RTC and provides instructions for requesting that the Commission reconsider the decision or hold a contested case hearing.¹⁶ TCEQ’s rules do not provide a cure period or other opportunity to correct deficient hearing requests.

D. The Required Elements of a Request for Contested Case Hearing

TCEQ rules at 30 TEX. ADMIN. CODE § 55.201(d) identify the requirements for a request for contested case hearing:

A hearing request must substantially comply with the following:

- (1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number, and, where possible, fax number, who shall be responsible for receiving all official communications and documents for the group;
- (2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;
- (3) request a contested case hearing;
- (4) for applications filed: ...

(B) on or after September 1, 2015, list all relevant and material disputed issues of fact that were raised by the requestor during the public comment period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the executive director's responses to the requestor's comments that the requestor disputes, the factual basis of the dispute, and list any disputed issues of law; and

- (5) provide any other information specified in the public notice of

¹⁶ 30 TEX. ADMIN. CODE § 55.201(a)&(c).

application.¹⁷

TCEQ rules regarding the scope of contested case hearings also provide that the Commission may not refer an issue to SOAH for a contested case hearing unless the Commission determines that the issue:

- (1) involves a disputed question of fact or a mixed question of law and fact;
- (2) was raised during the public comment period, and, for applications filed on or after September 1, 2015, was raised in a comment made by an affected person whose request is granted; and
- (3) is relevant and material to the decision on the application.¹⁸

IV. Application of the Legal Standards for Review of Requests for Contested Case Hearing to the Letters Filed in this Matter

A. Group A: The Conservation Organizations' Comments and Request for Public Meeting

The Group A letter is titled “Conservation Organizations’ Comments and Request for Public Meeting” and is signed by representatives of seven organizations: Sierra Club, Environmental Integrity Project, Air Alliance Houston, Environment Texas, Clean Energy Fund of Texas, Inc., Texas Campaign for the Environment, and Port Arthur Community Action Network. The Chief Clerk classified the letter as both a public meeting request and a hearing request. Other than the use, one time, of the term “public hearing,” there is no request for a contested case hearing, and no indication in the Conservation Organizations’ letter that they seek anything other than a public meeting.

The letter requests a public meeting eight different times, and includes the following paragraph that apparently led the Chief Clerk to classify the letter as a hearing request:

These comments, which include at least 90 individualized sets of comments on

¹⁷ 30 TEX. ADMIN. CODE § 55.201(d).

¹⁸ 30 TEX. ADMIN. CODE § 50.115(c).

the proposed gas plant, make clear that there is “significant degree of public interest” in the Application, and TCEQ must therefore hold a public hearing. 30 T.A.C. § 55.154(c)(1).¹⁹

The rule cited by the Conservation Organizations (30 T.A.C. § 55.154) is the rule governing public meetings, not contested case hearings, and the “significant degree of public interest” standard cited by the Conservation Organizations is one of the standards for holding a public meeting. Neither has anything to do with whether or not there is an “affected person” that has demonstrated the kind of personal justiciable interest that would support standing in a contested case hearing. The Conservation Organizations have not requested a contested case hearing. They have used, one time, the phrase “public hearing” and have given no indication that they seek a contested case hearing on the OCAPS air permit application.

The Conservation Organizations have not made the requisite showing that any of the organizations is an affected group or association. The letter wholly fails to meet the regulatory requirements for a request for contested case hearing. It does not identify any individual member of any organization that would otherwise have standing to request a hearing in their own right.²⁰ It does not identify a person by name, nor does it give the physical address of any individual member. It does not assert any personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the OCAPS air permit application. The Conservation Organizations’ letter is devoid of any demonstration of compliance with Sections 55.201 (Request for Reconsideration or Contested Case Hearing) or 55.205 (Request by Group or Association).

Because the Conservation Organizations failed to meet the requirements for demonstrating

¹⁹ Conservation Organizations’ Comments and Request for Public Meeting at 3-4 (Sept. 14, 2021) (emphasis added).
²⁰ 30 TEX. ADMIN. CODE § 55.205(b)(3). The Conservation Organizations’ letter includes a footnote reference to the Group B form letters and characterizes them only as “requesting a public meeting.” As described in Section IV.B. below, none of the form letters – including what the Conservation Organizations describe as the “92 individual, personal comments” – identify a mailing address for the person whose name is on the form letter, identify any personal justiciable interest in the application, or request a contested case hearing.

affected group or association standing under statute and TCEQ rules, to the extent that the Conservation Organizations' letter is considered a request for contested case hearing, the Conservation Organizations' request should be denied.

B. Group B: The Individual Requests for Public Meeting

Group B is comprised of 464 nearly identical form letters submitted as a group by Joshua Smith of Sierra Club – though the transmittal email that accompanies the form letters is not specific as to whether the individuals whose names are on the letters are members of a particular organization, and the persons whose names are typed on the individual letters do not identify themselves as members of any group or association. The form letters do not request a contested case hearing. Like the letter from the Conservation Organizations, the form letter, on a single occasion, uses the term “public hearing,” and there is no indication in the individual request letters that those persons seek anything other than a public meeting.²¹

The 465 form letters are identical in key respects: they all open by requesting that the TCEQ “host a public meeting” on the application, and close by requesting that TCEQ “schedule a public meeting” on the application. The letters also all include the following statement:

TCEQ should immediately make the application available to the public and hold a public hearing so that the agency and public can make a transparent and informed decision about approving this major source of pollution.

The form letters make no reference to a contested case hearing, nor do the persons whose names are on the form letters attempt to demonstrate a personal justiciable interest in the application.

The persons whose names are on the form letters provide only a name, city, and zip code.

None of the form letters identify a mailing address or residential address for the person making

²¹ Approximately 92 of the form letters include an additional paragraph that is unique, ranging from 2-3 words to 2-3 sentences in length. The unique paragraphs in two of the form letters (from Joyce Kelly and John Beard) make an additional request for “public hearing.” None of the unique paragraphs in any of the form letters request a contested case hearing.

the request.²² The form letters identify cities and zip codes all across the State of Texas, and make no attempt to show a personal interest in the OCAPS air permit application that is not common to members of the general public.

The form letter requests do not “substantially comply” with the elements set forth in Section 55.201(d) of the Commission’s rules:

- They do not provide an address or telephone number for the person filing the request;²³
- They do not provide a written statement explaining in plain language the requestor’s location and distance relative to the proposed facility;²⁴
- They do not explain why the requestor believes that they will be adversely affected by the proposed facility in a manner not common to members of the general public;²⁵ and
- They do not “request a contested case hearing.”²⁶

Because the Group B form letter public meeting requests fail to meet the requirements for demonstrating standing under statute and TCEQ rules, to the extent that the request letters submitted on behalf of Group B individuals are considered requests for contested case hearing, the Group B individuals’ requests should be denied.

²² One of the persons whose name is on an individual form letter, Ellen Buchanan, is shown on the Commissioners’ Integrated Database as separately requesting to be added to the mailing list for this docket. That mailing list request identifies a mailing address for Ellen Buchanan. The address included on the mailing list request is located approximately 35 miles from the proposed OCAPS site, and Ellen Buchanan’s form letter fails to identify a personal justiciable interest in this matter that is not common to the general public. Ellen Buchanan is not an affected person for purposes of the application.

A second person whose name is on an individual form letter, John Beard, is also shown on the Commissioners’ Integrated Database as separately requesting to be added to the mailing list for this docket. The mailing list request filed by John Beard identifies a Post Office Box in Port Arthur for the mailing address but no street or residential address, and does not identify a personal justiciable interest in this matter that is not common to the general public. John Beard is not an affected person for purposes of the application.

²³ 30 TEX. ADMIN. CODE § 55.201(d)(1).

²⁴ 30 TEX. ADMIN. CODE § 55.201(d)(2).

²⁵ *Id.*

²⁶ 30 TEX. ADMIN. CODE § 55.201(d)(3).

V. Conclusion and Prayer

For the reasons discussed above, Entergy Texas respectfully requests that the Commission deny the public hearing requests, adopt the Executive Director's Response to Public Comments, and issue Air Quality Permit Nos. 166032, PSDTX1598, GHGPSDTX210.

Respectfully Submitted,



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ATTORNEYS FOR ENTERGY TEXAS,
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Entergy Texas, Inc.'s Response to Requests for Public Hearing was electronically filed with the Texas Commission on Environmental Quality on February 13, 2023. I further certify that copy of the foregoing was sent to all persons on the attached mailing list either through U.S. mail or email.



Whitney L. Swift

**MAILING LIST
ENTERGY TEXAS, INC.
DOCKET NO. 2023-0164-AIR;
PERMIT NOS. 166032, GHGPSDTX210, AND PSDTX1598**

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