Control Number: 51415

Item Number: 438

Addendum StartPage: 0

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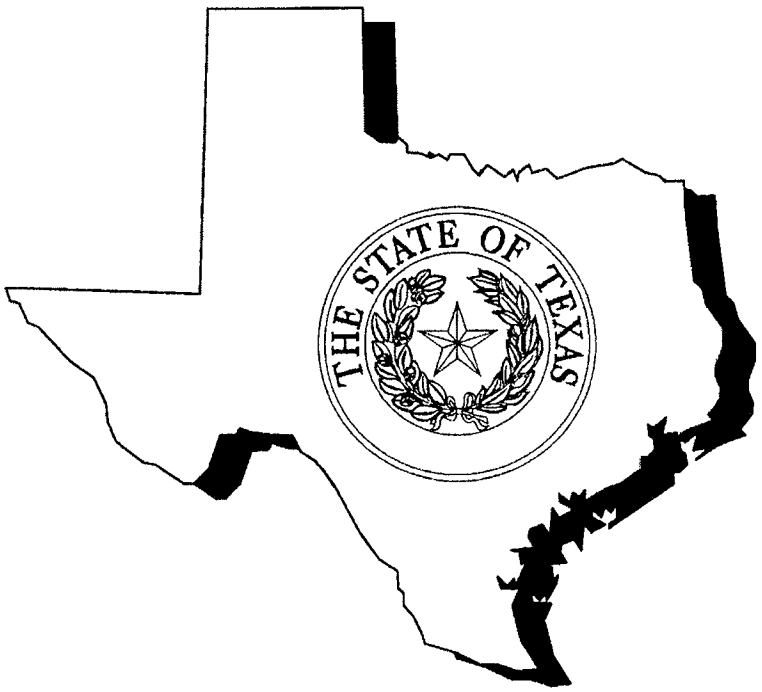
SOAH DOCKET NO. 473-21-0538
PUC DOCKET NO. 51415

APPLICATION OF SOUTHWESTERN ELECTRIC POWER COMPANY FOR AUTHORITY TO CHANGE RATES	§ § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS



SUPPLEMENTAL DIRECT TESTIMONY

OF

RUTH STARK

RATE REGULATION DIVISION

PUBLIC UTILITY COMMISSION OF TEXAS

MAY 5, 2021

438

TABLE OF CONTENTS

I. QUALIFICATIONS 1

II. SUMMARY OF REQUESTED RATE-CASE EXPENSES 2

III. REVIEW AND RECOMMENDATION 4

ATTACHMENTS

ATTACHMENT RS-1S — Office of the Attorney General Memorandum Dated December 9, 2016

ATTACHMENT RS-2S — Office of the Attorney General Memorandum Dated July 3, 2019

I. QUALIFICATIONS

Q. Please state your name and business address.

A. Ruth Stark, 1701 North Congress Avenue, Austin, Texas 78701.

Q. By whom are you employed and in what capacity?

A. I am employed by the Public Utility Commission of Texas as a Senior Regulatory Accountant in the Rate Regulation Division.

Q. Are you the same Ruth Stark that previously provided testimony in this proceeding?

A. Yes. I am.

Q. What is the purpose of your supplemental direct testimony in this proceeding?

A. The purpose of my testimony is to provide Staff's recommendation regarding the reasonableness of the rate-case expenses requested by Southwestern Electric Power Company (SWEPCO) and Cities Advocating Reasonable Deregulation (CARD) related to this proceeding, as well as those rate-case expenses incurred in Docket No. 50997,[1] Docket No. 49042,[2] and the costs incurred in the appeal of Docket No. 40443.[3] I am also addressing the request of CARD to recover expenses associated with Docket No. 47141[4] that were incurred after the cutoff date in that proceeding.

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[1] *Application of Southwestern Electric Power Company for Authority to Reconcile Fuel Costs,* Docket No. 50997 (pending).

[2] *Application of Southwestern Electric Power Company to Amend its Transmission Cost Recovery Factor,* Docket No. 49042, Order (July 18, 2019).

[3] *Application of Southwestern Electric Power Company for Authority to Change Rates and Reconcile Fuel Costs,* Docket No. 40443, Order on Rehearing (Mar. 6, 2014).

[4] *Review of Rate Case Expenses Incurred by Southwestern Electric Power Company and Municipalities in Docket No. 46449,* Docket No. 47141, Order (Aug. 27, 2020).

Q. What is the basis of your recommendation?

A. My recommendation is based on my review and analysis of the information filed in this proceeding by SWEPCO and CARD.

Q. What is the statutory basis for the recovery of rate-case expenses incurred by regulated electric utilities like SWEPCO and municipal intervenors such as CARD?

A. The statutory basis for the recovery of rate-case expenses incurred by a regulated utility is set forth in the Public Utility Regulatory Act, Tex. Util. Code Ann. (PURA) § 36.061. There is also a statutory foundation for the recovery of the expenses of municipalities incurred for participating in ratemaking proceedings before the Commission. This basis is presented in PURA § 33.023.

Q. What standards are you applying in the determination of the reasonableness of the requested rate-case expenses?

A I have applied the standards of 16 Texas Administrative Code (TAC) § 25.245, the Commission's substantive rule related to recovery of rate-case expenses.

II. SUMMARY OF REQUESTED RATE-CASE EXPENSES

Q. Please summarize SWEPCO's request in this proceeding.

A. As outlined in the direct and rebuttal testimonies of Lynn Ferry-Nelson, SWEPCO is requesting the following rate-case expenses in this proceeding, which reflect the costs recorded on SWEPCO's books for each docket through February 28, 2021:

1 **SWEPCO Total Requested Rate-Case Expenses**

Docket No.	Rate-Case Expense Request
51415	$ 1,081,376[5]
49042	$ 218,376[6]
40443	$ 190,573[7]
50997	$ 265,161[8]
TOTAL	$1,755,486

2 **Q. Please summarize CARD's request in this proceeding.**

3 A. CARD's requested rate-case expenses through March 31, 2021 are supported by the
4 direct testimony of Catherine J. Webking, and are summarized as follows:

5 **CARD Total Requested Rate-Case Expenses**

Docket No.	Rate-Case Expense Request
51415	$381,127
50997	$206,885
49042	$ 41,463
47141	$ 6,321
40443	$ 13,191
Total	$648,986[9]

[5] Direct Testimony of Lynn Ferry-Nelson (Ferry-Nelson Direct), Exhibit LFN-1 at 1 (Oct. 14, 2020); Rebuttal Testimony of Lynn Ferry-Nelson (Ferry-Nelson Rebuttal), Exhibit LNF-1R at 5 (Apr. 23, 2021).

[6] Ferry-Nelson Direct, Exhibit LFN-2 at 1.

[7] Ferry-Nelson Direct, Exhibit LFN-2 at 1; Ferry-Nelson Rebuttal, Exhibit LFN-1R at 5.

[8] Ferry-Nelson Rebuttal, Exhibit LFN-1R at 5.

[9] Direct Testimony of Catherine J. Webking (Webking Direct), Attachment CJW-2 at Attachment A to the Affidavit of Alfred R. Herrera (Apr. 8, 2020).

III. REVIEW AND RECOMMENDATION

Q. Please explain your review of the requested rate-case expenses.

A. I performed a review to confirm that the requested rate-case expenses meet the requirements of 16 TAC § 25.245. I reviewed the testimony and affidavits provided on behalf of SWEPCO and CARD, as well as the itemized rate-case expense invoices of both parties related to the dockets identified above. My review of the detailed billings included: the detailed descriptions of the work performed by attorneys and consultants, the number of hours billed for each activity for each day, the individual hourly billing rates charged, and expense items like copies, delivery charges, and travel expenses. Additionally, I reviewed the computation of the total fee billed for accuracy and determined that the work performed was within the scope of what would be expected in the relevant type of proceeding. I compared the invoices requested for reimbursement in this proceeding with those requested in Docket No. 50997 to determine that there are no duplicate requests between the two proceedings. Finally, I reviewed the terms of the stipulation and order in Docket No. 47141 to ascertain if CARD's request complies with the terms of the agreement approved by the Commission in that docket.

Q. As a preliminary matter, do you agree with the testimony of Ms. Ferry-Nelson that because outside attorneys who represent SWEPCO submit invoices with narrative descriptions of the work performed and the amount of time spent performing that work, and because its counsel uses the American Bar Association's Uniform Task-Based litigation codes combined with its own rate-proceeding specific billing codes, that the requirement to provide rate-case expenses by issue is satisfied?

A. No. I do not agree. The wording of 16 TAC § 25.245(b)(6) clearly requires that the total requested expense for each issue be provided:

> (6) the specific issue or issues in the rate case and the amount of rate-case expenses reasonably associated with each issue.

The rule requires that **the amount** of rate-case expenses associated with each issue be provided, not that amounts (plural) associated with each issue be provided. As a member of Commission Staff assigned to the rulemaking, I am certain that the intention of this language was that one amount for each issue be provided by the party requesting reimbursement for rate-case expenses. Text from the order adopting this section follows:

> The commission has determined that it is appropriate to adopt the requirement that the rate-case expenses are tracked and identified according to each litigated issue from the underlying rate case with which they are reasonably associated . . . .[10]
>
> The commission finds that adoption of this requirement will aid in the efficient processing of rate-case expense proceedings and will decrease the likelihood that a methodology, such as those found in subsection (d) of the adopted rule, will be required.[11]
>
> The commission finds that inclusion of this provision as part of the list of evidence that must be provided by a utility or municipality further clarifies that a sufficient application must include evidence necessary to associate rate-case expenses with each litigated issue from the underlying rate case.[12]
>
> Accordingly, the commission adopts a new subsection (b)(6), which states that the evidence presented with a request for rate-case expenses must show the specific issue or issues in the rate case and the amount of rate-case expenses reasonably associated with each issue.[13]

Q. Did SWEPCO nonetheless provide a segregation of its requested rate-case expenses by issue?

A. As noted by Ms. Ferry-Nelson, SWEPCO provided Duggins Wren Mann & Romero, LLP's (DWMR) legal expenses broken out by sub-issue for this proceeding.[14] She also

[10] *Rulemaking to Propose New Subst. R. § 25.245, Relating to Recovery of Expenses for Ratemaking Proceedings,* Project No. 41622, Order Adopting New § 25.245 as Approved at the July 10, 2014 Open Meeting at 59 (Aug. 6, 2014) (Order Adopting Rule § 25.245).

[11] *Id.*

[12] *Id* at 59-60.

[13] *Id.* at 60.

[14] Ferry-Nelson Rebuttal at 6-7.

stated that SWEPCO's outside consultants addressed discrete issues so their fees and expenses can be directly assigned to those issues.[15]

Q. Did CARD provide the amount of requested rate-case expense associated with each issue?

A. Not quite. CARD provided summaries of its legal and consultant billings for each attorney and consultant by day and assigned issue codes to each but did not aggregate all the charges assigned to each issue for all individuals who charged time to the issue.

Q. Did you identify other issues in your review of the rate-case expenses of SWEPCO and CARD?

A. Yes. I did identify other issues with respect to the requested rate-case expenses of both SWEPCO and CARD.

Q. Please discuss the issues you found in your review.

A. The first issue I noted was either overlap or duplication between the amounts of rate-case expenses requested by SWEPCO and CARD in this proceeding as well as between this proceeding and the amount that was requested and is pending approval in Docket No. 50997. I identified $60,925 of CARD's expenses that were also included in SWEPCO's request. These duplicate items are as follows:

Docket No.	Duplicate Amount
49042	$41,463 (total amount of CARD's request Docket. 49042)
50997	$15,468 (CARD exp. to be recovered in Docket. 50997)
40443	$ 3,994 (Invoice dated 12/8/2020)
Total	$60,925

[15] *Id*

Removing CARD's expenses from SWEPCO's request yields a SWEPCO adjusted request of $1,694,561 and eliminates the potential for double recovery of these amounts.

Q. Are you proposing any other adjustments to SWEPCO's requested rate-case expenses?

A. Yes. I am proposing an adjustment of ($6,868) associated with this proceeding (Docket No. 51415) and an adjustment of ($43,884) to SWEPCO's requested expenses associated with the appeal of Docket No. 40443 based on the criteria outlined in 16 TAC § 25.245(c). This results in a combined adjustment of ($50,752) to SWEPCO's request based on the first criterion set out in this section of the rule which is:

> (1) the extent to which the evidence shows that the fees paid to, tasks performed by, or time spent on a task by an attorney or other professional were extreme or excessive

Q. Please explain your proposed adjustment related to 16 TAC § 25.245(c)(1).

A. My proposed disallowance of $50,752 is related to the hourly billing rate for certain SWEPCO legal expenses in the two proceedings. With respect to Docket No. 51415, SWEPCO incurred $12,423 of legal expenses for services provided by Eversheds Sutherland US, LLP consisting of 10.1 hours billed at an hourly rate of $1,230. For the appeal of Docket No. 40443, the Company incurred legal expenses for services provided by Baker Botts, LLP, a portion of which included $96,354 for 95.4 hours billed at an hourly rate of $1,010. For the past few years, Staff has consistently recommended that any amount billed above an hourly rate of $550 an hour is excessive under 16 TAC § 25.245(c)(1). My adjustment of ($50,752) is the product of multiplying the number of hours billed in each case by the portion of the hourly billing rate that is above $550.

Q. Why did Staff begin recommending that any amount billed above an hourly rate of $550 per hour is excessive?

A. In June of 2013, Staff opened Project No. 41622 to develop a rule regarding the recovery of rate case expenses by utilities and municipalities. This project ultimately led to the adoption of 16 TAC § 25.245, cited above. At the July 19, 2013 open meeting, right after the project was opened, the Commission commented on the pending rulemaking as follows:

> ". . . we have a rulemaking open to -- you know, for us – for the Commission to start scrubbing attorney's fees."[16]
>
> ". . . I want us as a Commission to set up a more robust process for reviewing those attorney's fees that are submitted in rate cases because I think it's incumbent upon us to do that."[17]
>
> . . . This is my word of caution to all those who bring attorney's fees before us, and that includes everybody, and that is, we are fixing to start a new dawn here when it comes to that, and we're going to be looking at those attorney's fees for reasonableness, because it's apparent to me that when these cases come to us there's always a settlement and one party is getting attorney's fees and the other party is getting attorney's fees and so no one is really scrutinizing what those are . . .[18]
>
> ". . . the gravy train – you know, we are at the end of the road, you know, of the gravy train and going forward, folks, you need to really prove it up with real evidence from real experts . . ."[19]

Q. Do you have support for the use of $550 per hour as a reasonable limit for legal expenses?

A. Yes. In 2016 the Office of the Attorney General of Texas (OAG) issued a memorandum to state agencies, university systems, and institutions of higher education outlining

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[16] Open Meeting Tr. at 70:18-20 (July 19, 2013).

[17] *Id.* at 70:25 – 71:4.

[18] *Id.* at 75:9-18.

[19] *Id.* at 76:21-24

policies and procedures relating to the retention of outside legal counsel.[20] This memorandum states that unless expressly approved, the hourly rate for attorneys shall not exceed $525 per hour.[21] The OAG issued a subsequent memorandum in 2019 that superseded the original guidelines, but retained the limit on hourly rates for attorneys at $525 per hour.[22] As the state's legal counsel, the Attorney General has determined that legal services provided on behalf of the taxpayers of the State of Texas should be capped at $525 per hour. Additionally, the majority of the legal billings requested by SWEPCO and CARD in this proceeding relate to services provided by the firms DWMR, Herrera Law & Associates, PLLC, and Scott, Douglass & McConnico, LP at hourly attorney billing rates ranging from $250 per hour to $550 per hour.

The Commission's order adopting 16 TAC § 25.245 noted that "adopting clear evidentiary standards and specific criteria for the review and determination of the reasonableness of rate-case expenses will incentivize utilities and municipalities to act more like self-funded litigants, while still providing for recovery of reasonable rate-case expenses."[23] Additionally, the Proposal for Decision (PFD) in the rate-case expense proceeding in Docket No. 45979,[24] reiterates this point:

> Setting attorneys' fees in an RCE case based on the upper end of hourly rates charged by large, national law firms would remove the intended incentive for regulated public utilities to act more like self-funded litigants . . . National law firms may charge $600 and more per hour, and Sharyland is free to hire such firms to represent it before the PUC, but that does not mean that rates in that range are reasonable for practitioners before the

[20] Memorandum from Office of the Attorney General to State Agencies, University Systems, and Institutions of Higher Education (Dec. 9, 2016).

[21] *Id.* at 7.

[22] Memorandum from Office of the Attorney General to State Agencies, University Systems, Institutions of Higher Education and Prospective Outside Counsel at 7 (July 3, 2019).

[23] Project No. 41622, Order Adopting Rule § 25.245 at 13-14..

[24] *Review of Rate Case Expenses Incurred by Sharyland Utilities, L.P. in Docket No.* 45414, Docket No. 45979, Order of Dismissal (Aug. 8, 2019).

> PUC, and Sharyland's captive customers should not be expected to cover hourly fees at and above $550 per hour.[25]

Q. Has the Commission previously disallowed high attorney billing rates?

A. The Commission has approved a cap on attorney fees in some settled cases but has yet to rule on the issue in a contested proceeding.[26] While the Commission ultimately dismissed the proceeding in Docket No. 45979 cited above, the PFD in that case is still instructive:

> The ALJ agrees with Staff and OPUC that, in general, a cap on hourly fees charged by attorneys in utility rate cases before the Commission is appropriate and, in this case, the record supports a $550 per hour cap . . . While Rule 25.245(c)(1) does not specify a cap on attorneys' fees, it contemplates that fees paid to an attorney or other professional could be "extreme or excessive." Otherwise, there would be no purpose for Rule 25.245 to identify the level of fees paid to an attorney (or other professional) as a consideration under that rule.[27]

Additionally, the PFD observed:

> There is no evidence in the record of a fully and finally litigated case in which the Commission was asked to determine if an attorney's fee at or above $550 was reasonable. On the other hand, there is a good deal of evidence in the record from Staff's and OPUC's testimony showing that there are a number of highly experienced and qualified attorneys in the PUC bar who charge well under $550 per hour.[28]

Finally, the PFD explained:

> The ALJ has some reservations about recommending a $550 per hour cap for attorneys' fees in utility rate cases because this recommendation could lead some lawyers providing services in ratemaking proceedings to assume they can increase their hourly rates to $550. That is not the intent of this recommendation. **The $550 cap recommended by OPUC and Staff is a reasonable cap for the highest fees charged by the most experienced attorneys participating in this case.**[29]

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[25] Docket No. 45979, Proposal for Decision at 42 - 43 (Oct. 29, 2018).

[26] *See Application of El Paso Electric Company to Change Rates,* Docket No. 46831, Finding of Fact No. 64 (Dec. 18, 2017).

[27] Docket No. 45979, Proposal for Decision at 41-42.

[28] *Id* at 42.

[29] *Id* at 43 (emphasis added).

Q. How did SWEPCO address these hourly rates in its testimony?

A. The testimony provided by SWEPCO did not specifically address the services provided by either Eversheds Sutherland or Baker Botts or their hourly billing rates.

Q Does your recommendation imply that SWEPCO cannot pay more than $550 per hour to its outside legal counsel?

A. No. My recommendation does not limit SWEPCO from paying higher rates for legal counsel. My recommendation is only intended to be a cap on the amount that should reasonably be recovered from ratepayers.

Q. Do you have any proposed adjustments to the rate-case expenses requested by CARD?

A. Yes. CARD requested $6,321 for expenses associated with Docket No. 47141 that were incurred after April 13, 2020. The amended unanimous settlement in that proceeding capped CARD's reimbursement of such expenses at $2,500:

> The parties agreed that SWEPCO would recover $5,429,804.52 in rate-case expenses. This black-box amount includes reimbursement to CARD in the amount of $1,086,322.14 through April 13, 2020. In addition, the black-box amount includes reimbursement to CARD for actual expenses incurred in this docket after April 13, 2020 but caps that reimbursement at $2,500.[30]

Additionally, the agreement provided that SWEPCO and CARD would not seek any additional recovery for expenses associated with Docket No. 47141:

> SWEPCO and CARD agreed not to request any additional recovery for rate-case expenses incurred in this docket, in litigation before the Commission in Docket Nos. 40443 and 46449, and in Docket Nos. 48233 and 47553.[31]

[30] Docket No. 47141, Finding of Fact No. 78.

[31] *Id.* at Finding of Fact No. 79.

Because the Commission's order in Docket No. 47141 prohibits recovery of any additional expenses related to that proceeding, I propose an adjustment of ($6,321) to CARD's requested rate-case expenses.

Q. Do you have any other issues with respect to CARD's requested rate-case expenses?

A. I noted that some time entries that appear to be related to the fuel reconciliation, Docket No. 50997, were included in the requested rate-case expenses for this rate case and that one time entry that appeared to be related to this case was included in the expenses for the appeal of Docket No. 40443. However, I am not proposing any adjustments as they would not impact the overall amount of rate-case expense requested or the amounts eligible for recovery.

Q. Would you please summarize your recommendation with respect to the rate-case expenses requested by SWEPCO and CARD?

A. Yes. Subject to the same caveat in my original testimony in this proceeding related to the reasonableness of the rate-case expenses taken as a whole, I recommend the following as eligible for recovery:

SWEPCO Recoverable Rate-Case Expenses

Docket No.	Rate-Case Expense Request
51415	$1,074,508
49042	$ 176,913
40443	$ 142,695
50997	$ 249,693
TOTAL	$1,643,809

CARD Recoverable Rate-Case Expenses

Docket No.	Rate-Case Expense Request
51415	$381,127
50997	$206,885
49042	$ 41,463
47141	$ -0-
40443	$ 13,191
Total	$642,665

As noted in my original direct testimony in this proceeding, I recommend that the administrative law judge (ALJ) hold open the record in this proceeding for the limited purpose of allowing SWEPCO and CARD to update their rate-case expenses.

Q. Do you agree with SWEPCO's proposal to recover through its rate case surcharge rider projected rate-case expenses incurred after the cut-off date and through final order in this proceeding?

A. No. I do not recommend that the Commission allow recovery of any projected rate-case expenses related to this proceeding through SWEPCO's rate case surcharge rider. The Commission has previously rejected the recovery of projected or estimated rate-case expenses. In adopting 16 TAC § 25.245 it explained:

> The commission declines to adopt Oncor Cities' proposal relating to the reimbursement of a municipality's expected future rate-case expenses. Recent commission precedents, including Docket No. 40295, expressly state that approving estimated future rate-case expenses for municipal parties is not in the public interest. Accordingly, the commission declines to adopt any provision that would permit the approval of estimated future expenses.[32]

[32] Project No. 41622, Order at 142.

1 The order in Docket No. 40295 cited above states:

2 > Consistent with Commission precedent, it is not in the public interest to
3 > permit recovery of estimated rate-case expenses.[33]

4 As explained in my original direct testimony, leaving the record open and allowing
5 SWEPCO and CARD to update their rate-case expenses after the hearing and closer to
6 the time a final order is issued will limit the amount of trailing rate-case expenses
7 resulting from this proceeding that could be subject to review and recovery in a future
8 proceeding. I recommend that the Commission authorize the Company to establish a
9 regulatory asset to record both SWEPCO's and CARD's trailing rate-case expenses from
10 this proceeding.

11 **Q. Does this conclude your testimony?**

12 A. Yes.

[33] *Application of Entergy Texas, Inc. for Rate Case Expenses Pertaining to PUC Docket No. 39896,* Docket No. 40295, Conclusion of Law No. 10 (May 21, 2013).

KEN PAXTON
ATTORNEY GENERAL OF TEXAS

Memorandum

To: State Agencies, University Systems, and Institutions of Higher Education

From: Office of the Attorney General—General Counsel Division

Date: December 9, 2016

Re: Outside Counsel Contract Rules and Templates

Pursuant to subsection 402.0212(f) of the Texas Government Code, the Office of the Attorney General ("OAG") has adopted administrative rules related to outside legal counsel contracts of state agencies, university systems, and institutions of higher education (individually "agency" and collectively "agencies"). In light of recent changes made to the processes and procedures governing these contracts, the OAG is taking this opportunity to inform agencies of these updates and direct agencies to visit the OAG's website[1] to access the revised forms and templates.

New Policies and Procedures

Request to Retain Outside Legal Counsel. The Attorney General serves as the state's legal counsel; therefore, the OAG serves as legal counsel to all agencies. Agencies may not retain or utilize services provided by outside counsel without first receiving authorization and approval from the OAG. If an agency requires legal services from any outside counsel whatsoever, regardless of the source of funds that would be used to pay for such legal services or the party engaging such counsel, it must first electronically submit to the OAG through DocuSign a Request to Retain Outside Counsel ("RtR") and a proposed Outside Counsel Contract ("OCC").[2] Any questions regarding the RtR and OCC DocuSign process should be sent to the following e-mail address:

general.counsel@oag.texas.gov.

Upon receipt of the electronic RtR and OCC documents, the OAG will review them to determine whether the requested legal services should be provided by the OAG or whether retaining outside counsel would be in the best interests of the state. Within ten (10) business days after receiving the electronic documents, the OAG will process the RtR and OCC documents or notify the agency in writing that its request has been denied, or that additional information is required to make a decision.

[1] www.texasattorneygeneral.gov/agency/publications

[2] Currently available at: https://na2.docusign.net/member/PowerFormSigning.aspx?PowerFormId=0834844b-35cc-4867-ba31-1277dc86a5d8. Please review the OAG's how-to information sheet for more information on this electronic submission process.

New policies governing:

Requests to Retain Outside Counsel

a. Designation of Responsible Attorney

Agencies must designate a responsible attorney employed by or representing the agency to handle all matters and correspondence with the OAG. The designated attorney must be familiar with all aspects of the RtR and maintain familiarization with any resulting OCC throughout the life of the contract to avoid any delay in processing the RtR and maintaining the contract. Agencies must ensure the contact information for a designated attorney is updated as necessary throughout the duration of the OCC.

b. Requirement for System-Wide Contracts for Universities

University systems and institutions of higher education may no longer submit on behalf of the system's or institution's individual member schools separate RtRs involving the same or similar legal services provided by the same outside counsel attorney or outside counsel firm. For example, a system may not submit a RtR for two of its member universities, (*x*) university and (*y*) university, for the same or similar legal services to be provided by the same outside counsel or outside counsel firm. Instead, all RtRs submitted by a system must contain the system as the contracting party and include the entire amount of the proposed limitation of liability applicable to both (*x*) university and (*y*) university. Legal services to be provided by outside counsel under a system OCC, whether immigration, intellectual property, real estate, etc., must be applicable to all of system's universities to which the services will pertain—in this example, both (*x*) university and (*y*) university.

c. Start and end dates for Outside Counsel Contracts

Unless OAG determines that compelling circumstances exist, the requested start date for an OCC must not be earlier than the first day of the calendar month in which the RtR is submitted for OAG review. Also, except for OCCs involving litigation legal services, OCCs should terminate no later than the end of the fiscal biennium for which the contract is requested. The term of contracts for litigation legal services may extend beyond the end of the immediate biennium or until the litigation concludes, as determined by the agency in consultation with OAG.

d. Documents that Must Accompany Requests to Retain

Along with the RtR, an agency must attach: (1) an outside counsel's signed conflict disclosure statement; (2) the agency's affirmation statement that it has reviewed the disclosure statement and is satisfied with its choice of outside counsel notwithstanding anything contained in the disclosure statement; and (3) documentation of the eligibility of the requested lead counsel to practice law in the State of Texas, where required, or in the jurisdiction in which the services will be performed. Any RtRs not accompanied by these documents will be rejected, and agencies may be required to submit a new RtR along with the required documents. Outside counsel's disclosure statement must

be dated no more than thirty (30) calendar days earlier than the date on which the RtR is submitted or the date the OAG receives the statement, whichever occurs later.

e. Rules for Scopes of Service in Requests to Retain and Contracts

In the RtR, the proposed scope of services must be narrowly tailored so as to provide the OAG with enough information to make an informed decision about whether the proposed outside counsel representation is appropriate, while also being broad enough to fulfill the agency's objectives through the representation. Failure to narrowly tailor the scope of services will result in a delay in processing the RtR, and could result in the RtR being rejected—which would require the agency to submit a new RtR. Agencies should carefully draft the scope of services in order to obtain the results it desires from the proposed outside counsel representation. Finally, no single RtR may contain a scope of services that permits legal representation across multiple practice areas, unless each is clearly related to the central subject matter of the representation and so described in the proposed scope of services.

f. Deviation from the OAG Contract Template

Although the OAG generally will not approve any deviation from the OCC template, the OAG recognizes that exceptional and compelling circumstances could necessitate such changes in rare cases. As a result, the OAG reserves the right to grant exceptions to this policy if the OAG determines it is in the State's best interest to do so. Because the electronic submission process does not allow for any changes to be made to the OCC template, agencies wishing to deviate from the OAG's OCC template must contact the OAG seeking approval for the specified changes.

Competitive Procurement Process

Unless good cause exists, an agency is required to publish a Request for Qualifications ("RFQ") before selecting outside counsel, regardless of the anticipated maximum liability of the OCC. The RFQ must be published in the Electronic State Business Daily for a minimum of thirty (30) calendar days. The RFQ may also be placed in other publications, such as the Texas Register, at the agency's discretion. Because the OAG will not review or approve an agency's RFQ, the agency is not required to provide a copy of the RFQ to the OAG. Likewise, it is up to the respective agency to determine how long a response to a published RFQ will be valid, consistent with RFQ limitations.

If an agency would like an exemption from the RFQ process requirements, it must certify in its RtR that good cause or a reasonable justification exists for the exemption. Reasonable justifications include emergency situations or situations involving continuing legal services under a previously approved OCC that were not able to be completed within the term of the previous agreement through no fault of either the agency or outside counsel.

Outside Counsel Disclosure Statement Regarding Conflicts of Interest

As mentioned above, the outside counsel disclosure statements must be attached to the agency's electronic submission of the RtR and must be dated no earlier than thirty (30) days before the date the RtR is submitted or the OAG receives the statement, whichever occurs later. Outside counsel must sign the statement and attest to its completeness and accuracy. The agency must separately affirm it has reviewed the disclosure statement and is satisfied with the choice of the proposed outside counsel notwithstanding anything contained in the disclosure statement.

As a point of clarification, present policy requires that outside counsel disclose any and all conflicts that the entire firm (including any offices located outside the State of Texas) has to any and all agencies of the State of Texas, not merely the agency that is a party to the OCC. That obligation continues throughout the life of the contract. Outside counsel must monitor its conflicts for the duration of its representation and disclose to the agency and OAG any existing or potential conflicts that arise concerning the agency, OAG, or the State of Texas.

The OAG will not modify, alter, waive, or allow agencies to waive this disclosure requirement absent exceptional and compelling circumstances unique to the specific law firm or representation sought.

Administrative Fee

Pursuant to subsection 402.0212(c) of the Texas Government Code, outside counsel must pay an administrative fee to the OAG for the review of invoices. The fee is non-refundable and is due each fiscal biennium. Outside counsel may not charge or seek reimbursement from the agency for the fee.

The initial administrative fee is due to the OAG within thirty (30) calendar days of the date the proposed OCC is approved by the OAG and returned to the agency. If outside counsel has not submitted the required administrative fee within that time, the OAG's approval will be withdrawn, and the OCC will be rendered void. Any invoice submitted to the OAG for review prior to the receipt of the administrative fee will be deemed ineligible for payment until outside counsel submits the requisite administrative fee to the OAG. For OCCs that cross the State's fiscal biennium, separate administrative fees are due to the OAG on September 1 of each subsequent biennium covered by the term of the contract. *Please note that an administrative fee is not due for each invoice submitted.*

The OAG has granted a limited exemption from the administrative fee and invoice review to university systems and institutions of higher education regarding certain legal services that are <u>solely</u> related to the prosecution and management of system or institution intellectual property, which includes patents, trademarks, and copyrights. This limited exemption does not apply to the enforcement of intellectual property rights—including litigation—or corporate legal services relating to the monetization of intellectual property. The OAG may rescind this limited exemption at any time. If the OAG decides to conduct periodic testing of invoices under an OCC that qualified for this limited exemption, the exemption will be deemed rescinded and the applicable non-refundable administrative fee is immediately due upon notice by the OAG that testing will occur.

The administrative fee is set on a sliding scale, based on the contract cap amount, as follows:

Limitation of Liability Amount	Administrative Fee
Less than $2,000.00, but more than $0.00	$100.00
Equal to or greater than $2,000.00 but less than $10,000.00	$200.00
Equal to or greater than $10,000.00 but less than $50,000.00	$500.00
Equal to or greater than $50,000.00 but less than $150,000.00	$1,000.00
Equal to or greater than $150,000.00 but less than $1,000,000.00	$1,500.00
Equal to or greater than $1,000,000.00	$2,000.00

Please note that no administrative fee is due on a contract with a maximum liability of $0.00.

If the OCC is amended and the original limitation of liability amount is increased to an amount that would require a higher fee, outside counsel shall pay the difference between the original lesser fee, if already paid, and the new higher fee within thirty (30) calendar days of the date the amendment is approved by the OAG and returned to the agency.

Outside counsel must submit the administrative fee to the following address:

Outside Counsel Invoice
Office of the Attorney General
P.O. Box 13175
Austin, TX 78711-3175

Checks or money orders must be made payable to the "Office of the Attorney General" and reference the OCC Number.

Invoices for Legal Services and Expenses

Outside counsel will prepare and submit to the agency correct and complete "Invoices" and "Invoice Summaries" for legal services and expenses in accordance with the OCC and the OAG's administrative rules. Invoices cannot be paid by the agency, regardless of the source of funds used, without the prior approval of the OAG. Therefore, after the agency reviews and approves an outside counsel invoice in accordance with the administrative rules, it must seek approval from the OAG to pay the invoice.

When an agency determines that an invoice, or a portion thereof, should be paid, the agency must complete a Request for Voucher Approval, which is available on the OAG's website.[3] The completed Request for Voucher Approval, a copy of the subject invoice, and all other information required to be submitted by the administrative rules should be sent to the following e-mail address:

OCCInvoice@oag.texas.gov.

[3] https://www.texasattorneygeneral.gov/files/agency/voucher_approval_request_word.doc

Note that an agency should submit one Request for Voucher Approval form per billing period per contract, but one request form may be used for multiple invoices from the same billing period. Also note that all invoices within one billing period must be submitted together on a per-contract basis. Separate invoices or separate Requests for Voucher Approval that cover the same time period as other invoices and Requests for Voucher Approval, for the same contract, will be rejected as incomplete, and may result in an invoice not being approved for payment.

Outside Counsel must submit the invoice to the agency for review within one calendar month from the end of the relevant billing period covered by the invoice. The agency must submit the Request for Voucher Approval form and other required information to the OAG within ten (10) business days of the agency's receipt of a correct and complete invoice from the outside counsel. Outside counsel's failure to timely submit each invoice constitutes a breach of the outside counsel contract. Failure to timely submit invoices to OAG for review may result in OAG declining to approve payment of the invoice, unless OAG determines that good cause exists for the delay.

Once the Request for Voucher Approval form and other information are received and reviewed by the OAG, the invoice(s), or a portion thereof, will either be approved or rejected, or the agency will be notified that more information is required. If approved, the OAG will issue a Voucher Approval to the agency. The agency may then enter the payment information into the Uniform Statewide Accounting System ("USAS") or, if permitted, otherwise proceed to pay the invoice. Agencies should use Comptroller Code 7258 when entering payment information into USAS. Once an agency receives a Voucher Approval from the OAG, payment can occur when the agency enters the payment information and approves the documentation in USAS.

If an invoice is rejected, or if the OAG has questions regarding an invoice, it will contact the agency to attempt to resolve the issue. The OAG will not discuss invoice issues with outside counsel.

Policies and Procedures Remaining In Force

Obtaining the OAG's Approval of the Outside Counsel Contract

As described above, if an agency determines that a change to the OCC template is required in a particular extraordinary instance, the agency must contact the OAG; the electronic submission process does not allow for any changes to be made to the OCC template.

Agencies should not sign engagement letters with any potential outside counsel because such letters do not comply with applicable laws, rules, and procedures, and are not compatible with the OAG's contract template.

When completing the electronic RtR, please be mindful of the following:

Total Liability to Outside Counsel—The limitation of liability amount specified in the contract.

- Legal service fees and expenses cannot exceed the limitation of liability amount.
- All amounts paid to outside counsel, regardless of source, cannot exceed the limitation of liability amount.
- All amounts paid for expenses under a contract must count toward the limitation of liability specified in that contract, regardless of whether outside counsel was reimbursed for said expenses or whether such expenses were paid by the agency directly.
- Under no circumstances will expenses or fees relating to the representation be exempted from the limitation of liability.

Contract Term—The start date and end date of the contract term.

- In most cases, the contract term should end on or before August 31st of a biennium.
- The start of the contract term may be no earlier than the first day of the month in which the OAG received the RtR.
- Contracts for litigation legal services may be allowed to end, regardless of the biennium, at a date beyond the biennium in which the contract is executed. For example, if the contract involves litigation that has an indiscernible duration, it is acceptable to use a date such as "8/31/2030" or "8/31/2040" or similar dates to account for the uncertainty.

Addendum B to the Contract:

Timekeeper Rates—Unless expressly approved by the First Assistant Attorney General in advance, hourly rates for attorneys shall not exceed $525/hour, while hourly rates for paralegals shall not exceed $225/hour.

- Outside counsel may not bill for administrative staff, law clerks, or interns. Billing for administrative support is not allowed under Section 5.5 of the OCC.
- "Not to exceed"—Agencies that wish to use hourly rates to identify an entire classification of employees must now use a "not to exceed" rate. For example, such a rate would appear as "Partners' rates shall not exceed $300/hr." If, however, the agency wants to ensure that certain individuals are providing the legal services, naming each individual and their specific hourly rate may be preferred. An example of identifying a particular individual, the individual's classification, and the individual's hourly rate would be "Susan Smith, Partner, not to exceed $250/hr."

Fixed Fee or Fee Schedule for Projects or Matters—Instead of using hourly rates, some legal services, such as immigration, bond, or intellectual property work, may be appropriately billed by a fixed fee per project. An example of a fixed fee per project would be "H-1B Visa Petition is $900." In the event a proposed outside counsel contract involves both fixed fee and hourly rates, an agency must draft and upload a new Addendum B that includes language specifically directing

when either the fixed fee or hourly rate ranges will be used. For example, under the previous example, a contract involving both fixed fees for H-1B Visa Petitions and hourly rates for other services would state "Preparation of H-1B Visa Petition is $900. All other services are governed by the identified hourly rates."

Billing Period—The billing period is the interval specified in the contract, which determines the frequency outside counsel will submit invoices to the agency. The agency and outside counsel will determine the billing period for a particular contract. For most contracts, the billing period will likely be monthly. Outside counsel must submit invoices timely. Any untimely invoices will delay processing and may constitute a breach of the contract, which could result in an invoice being disapproved for payment. Agencies likewise must review and forward invoices to the OAG in a timely manner. As noted below, agencies must submit invoices to the OAG within ten (10) business days of receiving them.

Travel Rate—The agency and outside counsel are permitted, but not required, to pay for time spent traveling to or from a place where legal services are to be provided to agency by setting hourly travel rates. Note that an attorney's travel rate may not exceed half of that attorney's standard hourly rate under the OCC. OAG does not consider it a best practice for attorneys to provide legal services while traveling; however, if an attorney is providing legal services while traveling, the attorney may charge the standard hourly rate for the time spent providing those legal services.

Contract Number—The OAG establishes a contract number for each OCC. An agency may establish its own contract number in addition to the OAG's contract number; however, an agency must note the OAG contract number in all correspondence with the OAG.

Texas Law License—An attorney must be licensed by the State Bar of Texas in order to provide legal services and advice concerning Texas law, regardless of whether the attorney is actually located in Texas. If an OCC requires outside counsel to provide legal services and advice on Texas law, then a Texas-licensed attorney must be utilized and named as lead counsel in Addendum B of the OCC. A law firm with no Texas-licensed attorneys will not be authorized to provide legal services and advice concerning Texas law. Only in limited circumstances will the OAG approve an outside counsel firm with no attorneys licensed in Texas, such as when the scope of legal services to be performed is strictly limited to federal law practice.

Expenses

If outside counsel bills for allowable expenses, copies of actual, itemized receipts must be submitted. The following are examples of expenses that are not reimbursable: gratuity; alcohol; non-coach class airfare or premium or preferred benefits related to airfare; routine copying charges; fax charges; routine postage; office supplies; telephone charges; local travel (within 20-mile radius of office), including mileage, parking, and tolls; all delivery services incurred by internal staff; air-conditioning; electricity or other utilities; and internet charges.

Amending an Outside Counsel Contract

Any change to an executed and OAG-approved OCC must be supported by a written amendment. Any amendment to an existing OCC must also be approved by the OAG. An agency wishing to amend a contract must first submit to the OAG a completed amendment that is signed by the agency and outside counsel. A fillable electronic amendment template is available on OAG's website.[4]

Reasons to amend an existing outside counsel contract include increasing the limitation of liability amount or expanding the scope of legal services. If the limitation of liability amount is being increased, the agency should enclose a proper justification in its e-mail requesting the increase. The amendment and any supporting documentation should be submitted electronically through the fillable template on the OAG's website or, if necessary, sent to the following e-mail address:

general.counsel@oag.texas.gov.

Should you have any questions regarding these matters, please do not hesitate to contact the OAG's General Counsel Division. The OAG's website may be updated from time to time with additional information. Please consider periodically reviewing that resource. Thank you for your attention to these important matters.

[4] https://na2.docusign.net/Member/PowerFormSigning.aspx?PowerFormId=939e7086-75bf-4288-85db-6a0191f554c3/.

Important Addresses and Contact Information

The Request to Retain Outside Counsel and the Outside Counsel Contract:

general.counsel@oag.texas.gov

The Request for Voucher Approval:

OCCInvoice@oag.texas.gov

Mail may be sent to:
Outside Counsel Contracts
Office of the Attorney General
General Counsel Division, Mail Code 074
Post Office Box 12548
Austin, Texas 78711-2548

Outside Counsel must submit administrative fees to:
Outside Counsel Invoice
Office of the Attorney General
P.O. Box 13175
Austin, TX 78711-3175

Questions may be directed to **James Burkhart, Outside Counsel Contract Coordinator,** General Counsel Division—Telephone Number (512) 475-4291.

KEN PAXTON
ATTORNEY GENERAL OF TEXAS

Memorandum

To: State Agencies, University Systems, Institutions of Higher Education and Prospective Outside Counsel for any of the aforementioned

From: Office of the Attorney General—Financial Litigation & Charitable Trusts Division

Date: July 3, 2019

Re: Outside Counsel Contract Rules and Templates

Pursuant to subsection 402.0212(f) of the Texas Government Code, the Office of the Attorney General ("OAG") has adopted administrative rules related to outside legal counsel contracts of state agencies, university systems, and institutions of higher education (individually "agency" and collectively "agencies"). In light of recent changes made to the processes and procedures governing these contracts, the OAG is taking this opportunity to inform agencies of these updates and direct agencies to visit the OAG's website[1] to access the revised forms and templates. Please note that the guidance in this letter updates and supersedes the previously issued Letter to State Agencies dated December 9, 2016.

New Policies and Procedures

Request to Retain Outside Legal Counsel. The Attorney General serves as the state's legal counsel; therefore, the OAG serves as legal counsel to all agencies. Agencies may not retain or utilize services provided by outside counsel without first receiving authorization and approval from the OAG. If an agency requires legal services from any outside counsel whatsoever, regardless of the source of funds that would be used to pay for such legal services or the party engaging such counsel, it must first electronically submit to the OAG a Request to Retain Outside Counsel ("RtR") through the link available on the OAG's website.[2] Any questions regarding the Outside Counsel Contract ("OCC") process should be sent to the following e-mail address:

FLDContracts@oag.texas.gov.

Upon receipt, the OAG will review the RtR to determine whether the requested legal services should be provided by the OAG or whether retaining outside counsel would be in the best interests of the state. Within ten (10) business days after receiving the electronic documents, the OAG will

[1] https://www.texasattorneygeneral.gov/divisions/financial-litigation-and-charitable-trusts/outside-counsel-contracts

[2] Click on the "Request to Retain Outside Counsel" link available at https://www.texasattorneygeneral.gov/divisions/financial-litigation-and-charitable-trusts/outside-counsel-contracts

either process the RtR and OCC documents or notify the agency in writing if its request has been denied or if additional information is required to make a decision.

Requests to Retain Outside Counsel

a. Designation of Agency Contact and Responsible Attorney

Agencies must designate an individual employed by the agency to act as the agency contact and handle all matters and correspondence with the OAG related to the RtR and any resulting contract. To the extent the agency contact is not an attorney, the agency must also designate a responsible attorney, employed by the agency's Office of General Counsel, or otherwise representing the agency, who must be familiar with all aspects of the RtR and maintain familiarization with any resulting OCC throughout the life of the contract to avoid any delay in processing the RtR and maintaining the contract. Agencies must ensure the contact information for the designated agency contact and/or the responsible attorney is updated as necessary throughout the duration of the OCC.

b. Requirement for System-Wide Contracts for Universities

University systems and institutions of higher education may not submit on behalf of the system's or institution's individual member schools separate RtRs involving the same or similar legal services provided by the same outside counsel attorney or outside counsel firm. For example, a system may not submit a RtR for two of its member universities, (*x*) university and (*y*) university, for the same or similar legal services to be provided by the same outside counsel or outside counsel firm. Instead, all RtRs submitted by a system must identify the system as the contracting party and include the entire amount of the proposed limitation of liability applicable to both (*x*) university and (*y*) university. Legal services to be provided by outside counsel under a system OCC, whether immigration, intellectual property, real estate, etc., must be applicable to all of system's universities to which the services will pertain—in this example, both (*x*) university and (*y*) university.

c. Start and end dates for Outside Counsel Contracts

Unless OAG determines that compelling circumstances exist, the requested start date for an OCC must not be earlier than the first day of the calendar month in which the RtR is submitted for OAG review. Also, except for OCCs involving litigation legal services, OCCs should terminate no later than the end of the fiscal biennium for which the contract is requested. The term of contracts for litigation legal services may extend beyond the end of the immediate biennium or until the litigation concludes, as determined by the agency in consultation with OAG.

d. Documents that Must Accompany Requests to Retain

Along with the RtR, an agency must attach: (1) an outside counsel's signed conflict disclosure statement; (2) the agency's affirmation statement that it has reviewed the disclosure statement and is satisfied with its choice of outside counsel notwithstanding anything contained in the disclosure

statement; and (3) documentation of the eligibility of the requested lead counsel to practice law in the State of Texas, where required, or in the jurisdiction in which the services will be performed. Any RtRs not accompanied by these documents will be rejected, and agencies may be required to resubmit the RtR along with all required documents. Outside counsel's disclosure statement must be dated no more than thirty (30) calendar days earlier than the date on which the RtR is submitted or the date the OAG receives the statement, whichever occurs later.

e. Guidance for Scopes of Service in Requests to Retain and Contracts

In the RtR, the proposed scope of services must be narrowly tailored so as to provide the OAG with enough information to make an informed decision about whether the proposed outside counsel representation is appropriate, while also being broad enough to fulfill the agency's objectives through the representation. Failure to narrowly tailor the scope of services will result in a delay in processing the RtR, and could result in the RtR being rejected—which would require the agency to submit a new RtR. Agencies should carefully draft the scope of services in order to obtain the results it desires from the proposed outside counsel representation. Finally, no single RtR may contain a scope of services that permits legal representation across multiple practice areas, unless each is clearly related to the central subject matter of the representation and so described in the proposed scope of services.

f. Deviation from the OAG Contract Template

Although the OAG generally will not approve any deviation from the OCC template, the OAG recognizes that exceptional and compelling circumstances could necessitate such changes in rare cases. As a result, the OAG reserves the right to grant exceptions to this policy if the OAG determines it is in the State's best interest to do so. Because the electronic submission process does not allow for any changes to be made to the OCC template, agencies wishing to deviate from the OAG's OCC template must contact the OAG directly to seek approval for the specified changes.

Competitive Procurement Process

Unless good cause exists, an agency is required to publish a Request for Qualifications ("RFQ") before selecting outside counsel, regardless of the anticipated maximum liability of the OCC. The RFQ must be published in the Electronic State Business Daily for a minimum of thirty (30) calendar days. The RFQ may also be placed in other publications, such as the Texas Register, at the agency's discretion. Because the OAG will not review or approve an agency's RFQ, the agency is not required to provide a copy of the RFQ to the OAG. Likewise, it is up to the respective agency to determine how long a response to a published RFQ will be valid, consistent with RFQ limitations.

If an agency would like an exemption from the RFQ process requirements, it must certify in its RtR that good cause or a reasonable justification exists for the exemption. Reasonable justifications include emergency situations or situations involving continuing legal services under a previously approved OCC that were not able to be completed within the term of the previous agreement through no fault of either the agency or outside counsel. The OAG is not responsible for determining what amounts to good cause or a reasonable justification. Such determinations

must be made independently by the agency in consultation with agency's internal legal counsel and/or agency leadership.

Outside Counsel Disclosure Statement Regarding Conflicts of Interest

As mentioned above, the outside counsel disclosure statements must be attached to the agency's electronic submission of the RtR and must be dated no earlier than thirty (30) days before the date the RtR is submitted or the OAG receives the statement, whichever occurs later. Outside counsel must sign the statement and attest to its completeness and accuracy. The agency must separately affirm it has reviewed the disclosure statement and is satisfied with the choice of the proposed outside counsel notwithstanding anything contained in the disclosure statement.

As a point of clarification, present policy requires that outside counsel disclose any and all conflicts that the entire firm (including any offices located outside the State of Texas) has to any and all agencies of the State of Texas, not merely the agency that is a party to the OCC. That obligation continues throughout the life of the contract. Outside counsel must monitor its conflicts for the duration of its representation and disclose to the agency and OAG any existing or potential conflicts that arise concerning the agency, OAG, or the State of Texas.

The OAG will not modify, alter, waive, or allow agencies to waive this disclosure requirement absent exceptional and compelling circumstances unique to the specific law firm or representation sought.

Invoices for Legal Services and Expenses

Outside counsel will prepare and submit to the agency correct and complete "Invoices" and "Invoice Summaries" for legal services and expenses in accordance with the OCC and the OAG's administrative rules. Invoices cannot be paid by the agency, regardless of the source of funds used, without the prior approval of the OAG. Therefore, after the agency reviews and approves an outside counsel Invoice in accordance with the Outside Counsel Contract and the administrative rules, it must seek approval from the OAG to pay the Invoice.

When an agency determines that an Invoice, or a portion thereof, should be paid, the agency must complete a Request for Voucher Approval, which is available on the OAG's website.[3] The completed Request for Voucher Approval, a copy of the subject Invoice(s), and all other information required to be submitted by the administrative rules make up one "Voucher Packet".

An agency should submit one Voucher Packet per billing period per contract. However, one Voucher Packet may include multiple Invoices from the same billing period. Multiple Voucher Packets covering the same time period as other Voucher Packets for the same contract will be rejected as incomplete, and may result in an Invoice not being approved for payment.

Voucher Packets should be sent to the following e-mail address: **OCCInvoice@oag.texas.gov**.

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[3] Click on the "Request for Voucher Approval" link available at https://www.texasattorneygeneral.gov/divisions/financial-litigation-and-charitable-trusts/outside-counsel-contracts

Outside counsel must submit Invoice(s) to the agency for review within one calendar month from the end of the relevant billing period covered by the Invoice. Pursuant to Section 402.0212 of the Texas Government Code, the agency must submit Invoices and the corresponding Request for Voucher Approval to the OAG within twenty-five (25) days of the agency's receipt of a correct and complete Invoice from the outside counsel. The 25-day-period begins once the last, timely, correct and complete Invoice for the relevant billing period has been received by the agency. "Correct and complete Invoice" is defined in Texas Administrative Code Rule §57.6(b).

Outside counsel's failure to timely submit each Invoice constitutes a breach of the outside counsel contract. Failure to timely submit a Voucher Packet to OAG for review may result in OAG declining to approve payment of the Invoice(s) included in the Voucher Packet, unless OAG determines that good cause exists for the delay. *No late Voucher Packets or Voucher Packets that include late Invoices will be reviewed by the OAG unless a reasonable justification for the delay has been provided.*

Once the Voucher Packet is received and reviewed by the OAG, the Invoice(s), or a portion thereof, will either be approved or rejected, or the agency will be notified that more information is required. If approved, the OAG will issue a Voucher Approval to the agency. The agency may then enter the payment information into the Uniform Statewide Accounting System ("USAS") or, if permitted, otherwise proceed to pay the Invoice. Agencies should use Comptroller Code 7258 when entering payment information into USAS. Once an agency receives a Voucher Approval from the OAG, payment can occur when the agency enters the payment information and approves the documentation in USAS.

If any Invoices under a Voucher Packet are rejected, or if the OAG has questions regarding a Voucher Packet, it will contact the agency to attempt to resolve the issue. The OAG will not discuss invoice issues with outside counsel.

Administrative Fee

Pursuant to subsection 402.0212(c) of the Texas Government Code, outside counsel must pay an administrative fee to the OAG for the review of Invoices. The fee is non-refundable and is due each fiscal biennium. Outside counsel may not charge or seek reimbursement from the agency for the fee.

The initial administrative fee is due to the OAG within thirty (30) calendar days of the date the proposed OCC has received final approval by the OAG and returned to the agency. If outside counsel has not submitted the required administrative fee within that time, the OAG's approval may be withdrawn, rendering the OCC void. Any Invoice submitted to the OAG for review as part of a Voucher Packet prior to the receipt of the administrative fee will be deemed ineligible for payment until outside counsel submits the requisite administrative fee to the OAG. For OCCs that cross the State's fiscal biennium, separate administrative fees are due to the OAG on September 1 of each subsequent biennium covered by the term of the contract. *Please note that an administrative fee is not due for each Invoice submitted.*

The OAG has granted a limited exemption from the administrative fee and Invoice review to university systems and institutions of higher education regarding certain legal services that are solely related to the prosecution and management of system or institution intellectual property, which includes patents, trademarks, and copyrights. This limited exemption does not apply to the enforcement of intellectual property rights—including litigation—or corporate legal services relating to the monetization of intellectual property. The OAG may rescind this limited exemption at any time. If the OAG decides to conduct periodic testing of Invoices under an OCC that qualified for this limited exemption, the exemption will be deemed rescinded and the applicable non-refundable administrative fee is immediately due upon notice by the OAG that testing will occur.

The administrative fee is set on a sliding scale, based on the contract cap amount, as follows:

Limitation of Liability Amount	**Administrative Fee**
Less than $2,000.00, but more than $0.00	$100.00
Equal to or greater than $2,000.00 but less than $10,000.00	$200.00
Equal to or greater than $10,000.00 but less than $50,000.00	$500.00
Equal to or greater than $50,000.00 but less than $150,000.00	$1,000.00
Equal to or greater than $150,000.00 but less than $1,000,000.00	$1,500.00
Equal to or greater than $1,000,000.00	$2,000.00

Please note that no administrative fee is due on a contract with a maximum liability of $0.00.

If the OCC is amended and the original limitation of liability amount is increased to an amount that would require a higher fee, outside counsel shall pay the difference between the original lesser fee, if already paid, and the new higher fee within thirty (30) calendar days of the date the amendment is approved by the OAG and returned to the agency.

Outside counsel must submit the administrative fee to the following address:

Outside Counsel Invoice
Office of the Attorney General
P.O. Box 13175
Austin, TX 78711-3175

Checks or money orders must be made payable to the "Office of the Attorney General" and reference the OCC Number.

Obtaining the OAG's Approval of the Outside Counsel Contract

As described above, if an agency determines that a change to the OCC template is required in a particular extraordinary instance, the agency must contact the OAG; the electronic submission process does not allow for any changes to be made to the OCC template.

Agencies should not sign engagement letters with any potential outside counsel because such letters do not comply with applicable laws, rules, and procedures, and are not compatible with the OAG's contract template.

When completing the electronic RtR, please be mindful of the following:

Total Liability to Outside Counsel—The limitation of liability amount specified in the contract.

- Legal service fees and expenses cannot exceed the limitation of liability amount.
- All amounts paid to outside counsel, regardless of source, cannot exceed the limitation of liability amount.
- All amounts paid for expenses under a contract must count toward the limitation of liability specified in that contract, regardless of whether outside counsel was reimbursed for said expenses or whether such expenses were paid by the agency directly.
- Under no circumstances will expenses or fees relating to the representation be exempted from the limitation of liability.

Contract Term—The start date and end date of the contract term.

- In most cases, the contract term should end on or before August 31st of a biennium.
- The start of the contract term may be no earlier than the first day of the month in which the OAG received the RtR.
- Contracts for litigation legal services may be allowed to end, regardless of the biennium, at a date beyond the biennium in which the contract is executed. For example, if the contract involves litigation that has an indiscernible duration, it is acceptable to use a date such as "8/31/2030" or "8/31/2040" or similar dates to account for the uncertainty.

Addendum B to the Contract:

Timekeeper Rates—Unless expressly approved by the First Assistant Attorney General in advance, hourly rates for attorneys shall not exceed $525/hour, while hourly rates for non-attorney legal work (limited to paralegals, legal assistants, and other timekeepers performing similar legal work) shall not exceed $225/hour.

- Outside counsel may not bill for administrative staff, law clerks, or interns. Billing for administrative support is not allowed under Section 5.5 of the OCC.
- "Not to exceed"—Agencies that wish to use hourly rates to identify an entire classification of employees must now use a "not to exceed" rate. For example, such a rate would appear as "Partners' rates shall not exceed $300/hr." If, however, the agency wants to ensure that certain individuals are providing the legal services, naming each individual and their specific hourly rate may be preferred. An example of identifying a particular individual, the individual's classification, and the individual's hourly rate would be "Susan Smith, Partner, not to exceed $250/hr."

Fixed Fee or Fee Schedule for Projects or Matters—Instead of using hourly rates, some legal services, such as immigration, bond, or intellectual property work, may be appropriately billed by a fixed fee per project. An example of a fixed fee per project would be "H-1B Visa Petition is $900." In the event a proposed outside counsel contract involves both fixed fee and hourly rates, an agency must draft and upload a new Addendum B that includes language specifically directing when either the fixed fee or hourly rate ranges will be used. For example, under the previous example, a contract involving both fixed fees for H-1B Visa Petitions and hourly rates for other services would state "Preparation of H-1B Visa Petition is $900. All other services are governed by the identified hourly rates."

Please note, fixed fees should be treated as set amounts, rather than as not-to-exceed limitations. For any Invoices with amounts deviating from the fees established by the Outside Counsel Contract, the reason(s) for the deviation(s) must be clearly identified on the Invoice itself. Otherwise, the OAG will be unable to approve payment of the Invoice.

If a subcontractor is providing legal services at a fixed fee, a statement must be provided to the OAG certifying that the time spent on the flat fee work was, at minimum, comparable to what would have been spent had the firm been billing at the maximum hourly rate allowed under Addendum B of the Outside Counsel Contract.

Billing Period—The billing period is the interval that determines the frequency outside counsel will submit Invoices to the agency. The agency and outside counsel will determine and specify the billing period in each specific contract. For most contracts, the billing period will likely be monthly - beginning with the first day of the calendar month and ending with the last day of the calendar month. Additionally, as noted above, outside counsel must submit the Invoice(s) to the agency within one calendar month from the end of the relevant billing period covered by the Invoice. Any untimely invoice submissions by Outside counsel will delay processing and may constitute a breach of the contract, which could result in an Invoice being disapproved for payment. Agencies likewise must review Invoices and submit Voucher Packets to the OAG in a timely manner.

Travel— By setting hourly travel rates in a contract, the agency and outside counsel are permitted, but not required, to pay for time spent traveling to or from a place where legal services are to be provided to the agency. Note that an attorney's travel rate may not exceed half of that attorney's standard hourly rate under the OCC. OAG does not consider it a best practice for attorneys to provide legal services while traveling; however, if an attorney is providing legal services while traveling, the attorney may charge the standard hourly rate for the time spent providing those legal services.

Additionally, any attorneys or other timekeepers who are traveling for work under the contract must either be named or fall under one of the timekeeper classifications in Addendum B of the contract. This applies even if the firm is typically only providing work under a fixed fee schedule.

Contract Number—The OAG establishes a contract number for each OCC. An agency may establish its own contract number in addition to the OAG's contract number; however, an agency must note the OAG contract number in all correspondence with the OAG.

Texas Law License—An attorney must be licensed by the State Bar of Texas in order to provide legal services and advice concerning Texas law, regardless of whether the attorney is actually located in Texas. If an OCC requires outside counsel to provide legal services and advice on Texas law, then a Texas-licensed attorney must be utilized and named as lead counsel in Addendum B of the OCC. A law firm with no Texas-licensed attorneys will not be authorized to provide legal services and advice concerning Texas law. Only in limited circumstances will the OAG approve an outside counsel firm with no attorneys licensed in Texas, such as when the scope of legal services to be performed is strictly limited to federal law practice.

Expenses

If outside counsel bills for allowable expenses, copies of actual, itemized receipts must be submitted to the Agency. The following are examples of expenses that are not reimbursable: gratuity; alcohol; non-coach class airfare or premium or preferred benefits related to airfare; routine copying charges; fax charges; routine postage; office supplies; telephone charges; local travel (within 20-mile radius of office), including mileage, parking, and tolls; all delivery services incurred by internal staff; air-conditioning; electricity or other utilities; and internet charges.

Pursuant to Texas Government Code §402.0212, the OAG shall review outside counsel's Invoices only to determine whether the legal services for which the agency is billed were performed within the term of the contract and are within the scope of the legal services authorized by the contract and are therefore eligible for payment. Agencies shall submit to the OAG a statement with each Invoice confirming the agency-approved amounts to be paid to outside counsel for legal services and expenses allowed under the contract and the amount of any expenses allowed under the contract which were paid for directly by the agency or any party other than outside counsel.

Pursuant to Texas Government Code §402.0212, the agency shall also include with any Voucher Packet (and associated Invoices) submitted to OAG for approval, a written certification, as provided by the Request for Voucher Approval, that the legal services for which the agency is billed were performed within the term of the contract, are within the scope of the legal services authorized by the contract and are reasonably necessary to fulfill the purpose of the contract.

Amending an Outside Counsel Contract

Any change to an executed and OAG-approved OCC must be supported by a written amendment. Any amendment to an existing OCC must also be approved by the OAG. An agency wishing to amend a contract must first submit to the OAG a completed amendment, using the fillable electronic amendment template is available on OAG's website.[4]

Reasons to amend an existing outside counsel contract include increasing the limitation of liability amount or expanding the scope of legal services. If the limitation of liability amount is being increased, the agency should enclose a proper justification (for example, if at least 75% of the

[4] Click on the "Amendment to Outside Counsel Contract" link available at https://www.texasattorneygeneral.gov/divisions/financial-litigation-and-charitable-trusts/outside-counsel-contracts

current limitation of liability has been spent) in its e-mail requesting the increase. The amendment and any supporting documentation should be submitted electronically through the fillable template on the OAG's website.

Should you have any questions regarding these matters, please do not hesitate to contact the OAG's Financial Litigation and Charitable Trusts Division. The OAG's website may be updated from time to time with additional information. Please periodically review that resource. Thank you for your attention to these important matters.

Important Addresses and Contact Information

The Request to Retain Outside Counsel and the Outside Counsel Contract:

FLDContracts@oag.texas.gov

The Request for Voucher Approval:

OCCInvoice@oag.texas.gov

Mail may be sent to:
Outside Counsel Contracts
Office of the Attorney General
Financial Litigation and Charitable Trusts Division, Mail Code 074
Post Office Box 12548
Austin, Texas 78711-2548

Outside Counsel must submit administrative fees to:
Outside Counsel Invoice
Office of the Attorney General
P.O. Box 13175
Austin, TX 78711-3175

Questions may be directed to **Mari Gomez, Outside Counsel Contract Coordinator,** Financial Litigation and Charitable Trusts Division—Telephone Number (512) 475-1849.

STAFF TOTAL SWEPCO RATE-CASE EXPENSES

	Initial LFN-2	Suppl.	Total Requested	Total	Less CARD	TOTAL Less CARD & Disallowed
Dkt 51415						
Consultant Expenses	$ -	239282.77	$ 239,282 77			
Legal Expenses	$ 111,505 06	500943 78	$ 612,448.84			
Other Expenses	$ 6,987 50	219472 9	$ 226,460 40			
Employee Expenses		3183.97	$ 3,183.97			
Total	$ 118,492 56	$ 962,883.42	$ 1,081,375.98	$ 1,081,375 98	$ 1,081,375.98	$ 1,074,507.98
Dkt 49042						
CARD Expenses	$ 41,462.67		$ 41,462.67			
Legal Expenses	$ 147,578 99		$ 147,578 99			
Other Expenses	$ 28,720.08		$ 28,720 08			
Employee Expenses	$ 614 24		$ 614.24			
Total	$ 218,375.98		$ 218,375 98	$ 218,375.98	$ 176,913.31	$ 176,913 31
PUCT Dkt 50997						
CARD Expenses		$ 15,468.00	$ 15,468.00			
Legal Expenses		$ 210,212.58	$ 210,212.58			
Consulting Expenses		$ 20,904 00	$ 20,904.00			
Other Expenses		$ 18,484.10	$ 18,484 10			
Employee Expenses		$ 91.97	$ 91.97			
Total SWEPCO Request		**$ 265,160.65**	$ 265,160.65	$ 265,160 65	$ 249,692 65	$ 249,692.65
Appeal Dkt 40443						
CARD Expenses	$ 4,313.00	$ 3,994.45	$ 8,307 45			
Legal Expenses	$ 5,879.43	$ 176,386.33	$ 182,265 76			
Consulting Expenses						
Employee Expenses						
Total	$ 10,192.43	$ 180,380.78	$ 190,573 21	$ 190,573.21	$ 186,578 76	$ 142,694 76
	$ 347,060.97	$ 1,408,424.85	$ 1,755,485.82	$ 1,755,485 82		
				$ (41,462 67)		
				$ (15,468.00)		
				$ (3,994 45)		
				$ 1,694,560 70	$ 1,694,560 70	**$ 1,643,808.70**

WP/RCE 1

STAFF TOTAL CARD RATE-CASE EXPENSES

	CARD Request	Staff Disallowed	Staff Total
Docket 51415	$ 381,126.70		$ 381,126.70
Docket 40443	$ 13,191.05		$ 13,191.05
Docket 47141	$ 6,320.50	$ (6,320.50)	$ -
Docket 49042	$ 41,462.67		$ 41,462.67
Dcoket 50997	$ 206,885.04		$ 206,885.04
TOTAL	$ 648,985.96	$ (6,320.50)	$ 642,665.46

WP/RCE 2

DKT 51415 RATE-CASE EXPENSES

SWEPCO	Initial LFN-2	Suppl.	TOTAL	Staff Disallowance	Staff Recommended	
Dkt 51415						
Consultant Expenses	$ -	239282.77	$ 239,282.77		$ 239,282.77	
Legal Expenses	$ 111,505.06	500943.78	$ 612,448.84	$ (6,868.00)	$ 605,580.84	Disallowed >$550/HR
Other Expenses	$ 6,987.50	219472.9	$ 226,460.40		$ 226,460.40	
Employee Expenses		3183.97	$ 3,183.97		$ 3,183.97	
Total	$ 118,492.56	$ 962,883.42	$ 1,081,375.98	$ (6,868.00)	$ 1,074,507.98	
CARD						
		Attachment A				
Dkt 51415						
11/10/2020		$ 44,029.80	$ 44,029.80		$ 44,029.80	
12/11/2020		$ 47,671.75	$ 47,671 75		$ 47,671.75	
1/11/2021		$ 23,582.45	$ 23,582.45		$ 23,582.45	
2/9/2021		$ 31,855.95	$ 31,855 95		$ 31,855.95	
3/17/2021		$ 112,845.45	$ 112,845 45		$ 112,845.45	
4/6/2021		$ 121,141.30	$ 121,141.30		$ 121,141 30	
Total CARD Request	$ -	$ 381,126.70	$ 381,126 70		$ 381,126 70	

WP/RCE 3

0000038

DKT 40443 RATE-CASE EXPENSES

SWEPCO	Initial LFN-2		Suppl. Pge 2 of 476		TOTAL	Duplicate & Staff Disallowance	Staff Allowed	
Appeal Dkt 40443								
CARD Expenses	$ 4,313.00	6/30/2020	$ 3,994 45	01/12/2021	$ 8,307 45	$ (3,994 45)	$ 4,313 00	Duplicate
Legal Expenses	$ 5,879 43		$ 176,386.33		$ 182,265.76	$ (43,884.00)	$ 138,381.76	Disallowed > $550/HR
Consulting Expenses								
Employee Expenses								
Total	$ 10,192 43		$ 180,380.78		$ 190,573 21	$ (47,878 45)	$ 142,694 76	
CARD								
			Attachment A					
Appeal Dkt 40443								
11/10/2020			$ 3,391 00		$ 3,391 00		$ 3,391.00	
12/8/2020			$ 3,994.45		$ 3,994 45		$ 3,994.45	
1/11/2021			$ 4,965.60		$ 4,965.60		$ 4,965.60	
4/7/2021			$ 840 00		$ 840 00		$ 840 00	
Total CARD Request			$ 13,191 05		$ 13,191 05		$ 13,191 05	

WP/RCE 4

CARD Dkt 47141 Request

Dkt 47141 CARD Expenses	Attachment A	Staff Disallowed	Staff Resommended
05/13/2020	$ 1,656.50	$ (1,656.50)	$ -
06/09/2020	$ 3,273.50	$ (3,273.50)	$ -
07/20/2020	$ 834.00	$ (834.00)	$ -
09/07/2020	$ 556.50	$ (556.50)	$ -
TOTAL	$ 6,320.50	$ (6,320.50)	$ -

Not allowed per Dkt 47141 Stipulation

WP/ RCE 5

DKT 49042 RATE-CASE EXPENSES

SWEPCO and CARD Dkt 49042 Request

SWEPCO Dkt 49042	Initial LFN-2	Duplicate	Staff Recommended
CARD Expenses	$ 41,462.67	$ (41,462.67)	$ -
Legal Expenses	$ 147,578.99		$ 147,578.99
Other Expenses	$ 28,720.08		$ 28,720.08
Employee Expenses	$ 614.24		$ 614.24
Total	$ 218,375.98	$ (41,462.67)	$ 176,913.31
CARD Dkt 49042	Attachment A		
1/2/2019	$ 999.00		$ 999.00
2/7/2019	$ 8,500.90		$ 8,500.90
3/8/2019	$ 8,591.60		$ 8,591.60
4/3/2019	$ 19,920.57		$ 19,920.57
5/6/2019	$ 2,009.10		$ 2,009.10
6/6/2019	$ 409.00		$ 409.00
8/7/2019	$ 1,032.50		$ 1,032.50
Total CARD Request	$ 41,462.67		$ 41,462.67

WP/ RCE 6

SWEPCO and CARD RCE Requests for Dkt 50997

AMOUNTS REQUESTED IN DKT 50997

SWEPCO PUCT Dkt 50997	Original TJL-6	1st Supp. FKB-6	2nd Supp. FKB-6	Total SWEPCO Request
CARD Expenses	$ -	$ 700.00	$ -	$ 700.00
Legal Expenses	$ 36,999.50	$ 209,327.65	$ 41,315.22	$ 287,642.37
Consulting Expenses	$ -		$ -	$ -
Employee Expenses	$ -		$ -	$ -
Total	$ 36,999.50	$ 210,027.65	$ 41,315.22	$ 288,342.37
PUCT Dkt 49974				
CARD Expenses	$ -			$ -
Legal Expenses	$ 22,632.72			$ 22,632.72
Consulting Expenses	$ 12,463.60			$ 12,463.60
Employee Expenses	$ 6.00			$ 6.00
Total	$ 35,102.32	$ -	$ -	$ 35,102.32
Total SWEPCO Request	$ 72,101.82	$ 210,027.65	$ 41,315.22	**$ 323,444.69**

CARD PUC Dkt 50997	CJW-3 Total CARD Request
6/2020	$ 700.00
7/2020	$ 33,640.05
8/2020	$ 10,190.20
9/2020	$ 15,765.50
10/2020	$ 15,100.50
11/2020	$ 15,468.00
12/2020	$ 75,422 10
Total CARD Request	**$ 166,286.35**

AMOUNTS REQUESTED IN DKT 51415

SWEPCO PUCT Dkt 50997	Supp. Filing Total SWEPCO Request	Duplicate	Staff Recomm.
CARD Expenses	$ 15,468.00	$ (15,468.00)	$ -
Legal Expenses	$ 210,212.58		$ 210,212 58
Consulting Expenses	$ 20,904.00		$ 20,904.00
Other Expenses	$ 18,484.10		$ 18,484.10
Employee Expenses	$ 91 97		$ 91 97
Total SWEPCO Request	$ 265,160.65	$ (15,468 00)	$ 249,692.65

CARD PUCT Dkt 50997	Total CARD Request		
1/2021	$ 137,713.90		$ 137,713 90
2/2021	$ 48,889.64		$ 48,889.64
2/2021	$ 20,281.50		$ 20,281.50
Total CARD Request	$ 206,885 04		$ 206,885 04

WP/ RCE 7