

Control Number: 25960



Item Number: 46

Addendum StartPage: 0

PUC DOCKET NO. 25960
SOAH DOCKET NO. 473-02-3537

RECEIVED
02 AUG 20 AM 11:56

APPLICATION OF BRAZOS
ELECTRIC POWER COOPERATIVE,
INC. TO CHANGE RATES FOR
WHOLESALE TRANSMISSION
SERVICE

§
§
§
§
§

BEFORE THE
PUBLIC UTILITY COMMISSION
OF TEXAS

TABLE OF CONTENTS

I.	Introduction.....	1
II.	Applicable Legal Standard	2
III.	Brazos Electric's ability to anticipate the need for and obtain prompt final relief, §22.125 (c) (1).....	4
	A. Brazos Electric's direct evidence	5
	B. Staff's direct evidence did not negate.	5
IV.	Availability of Other Remedies Under Law, §125 (c) (2).....	5
	A. Brazos Electric's direct evidence.....	6
	B. Staff's direct evidence did not negate.....	7
V.	Changed circumstances, §22.125 (c) (3).....	7
	A. Brazos Electric's direct evidence	7
	B. Staff's Direct Evidence.	8
VI.	Effect of granting the request on parties and public interest, §22.125 (c) (4)	8
	A. Brazos Electric's direct evidence	8
	B. Staff's direct evidence	9

VII. Whether interim relief necessary to effect uniform system-wide rates, §22.125(c)(5)	9
A. Procedural Rule §22.125 lists six factors for the presiding officer to take into account to determine whether “good cause” for interim relief has been shown.....	10
B. Brazos Electric’s direct evidence.....	10
C. Staff’s Direct Evidence.	12
VIII. Any other relevant factors, §22.125 (c) (6) 12
A. Brazos Electric’s Direct Evidence	12
B. Staff’s Direct Evidence	12
IX. Conclusion	21
ORDER	

PUC DOCKET NO. 25960
SOAH DOCKET NO. 473-02-3537

APPLICATION OF BRAZOS	§	BEFORE THE
ELECTRIC POWER COOPERATIVE,	§	
INC. TO CHANGE RATES FOR	§	PUBLIC UTILITY COMMISSION
WHOLESALE TRANSMISSION	§	
SERVICE	§	OF TEXAS

APPLICANT'S BRIEF FOR INTERIM RELIEF

I. Introduction

Almost three months ago, Brazos Electric filed its motion for interim implementation in this docket when it initiated the docket May 28, 2002. See Statement of Intent at 3, Bates 5. The May 28 statement of intent, testimony, and schedules show that Brazos Electric based its request for interim and final relief on test year data for the calendar year 2001, both by use of cost data from that year and use of the most recent ERCOT usage data (4CP, or 4 coincident peak methodology) from that date, as required by the Commission's rules and its instructions to the applicable filing package. (See Brazos Electric Exhibit 5.) The motion for interim implementation seeks to have the proposed transmission costs and usage data recognized in an interim TCOS rate effective on and after Brazos Electric's effective date, which was July 2, 2002. (See Brazos Electric Clarification filed in PUC Docket 25960 on May 31, 2002.)

Brazos Electric attempted to reach agreement with parties to the docket regarding a procedural schedule, including a ruling on the interim relief motion, but without success. It filed motions June 27 and July 15 seeking schedules moving toward a ruling on its interim motion. After certain orders by the PUC ALJ, the case was referred to SOAH, and the SOAH ALJ conducted an evidentiary proceeding to rule on the motion August 15, 2002. No party filed any motions or statements of position regarding the motion for interim relief except for the Commission Staff, which opposed the motion as reflected by the testimony of its sole solitary witness Matthew Troxle.

No party other than Brazos Electric and the Staff filed motions, testimony, or exhibits taking a position on the motion, and of the intervenors only the City of Garland engaged in cross-examination, questioning Staff witness Troxle. Brazos Electric agreed to a very short period for

written closing argument, and ceded its right to reply to other closing arguments, because of the need for the interim relief and the time that has elapsed since the request for interim relief was filed in late May.

Under these circumstances, Brazos Electric files this closing argument in compliance with the agreed schedule, and responds below to all arguments and testimony that have been made or even implied against the interim motion. But it cannot respond to any argument that was not disclosed in a written motion, an oral motion at the August 15 hearing, prefiled testimony and exhibits, or cross-examination.

As will be seen below, Brazos Electric met the requirements of the PUC's one rule governing any type of request for interim relief, PROC. R. §22.125, by the credible testimony of its Chief Financial Officer ("CFO"), Khaki Bordovsky, the official notice of the PUC's own documents in Court Exhibit 1, and the cross-examination of the only witness contesting the interim motion. The proposed order offered by Brazos Electric attached to this Brief as Exhibit "A" should be adopted and signed by the ALJ.

II. Applicable Legal Standard

Ruling on the motion of interim implementation should be founded on the underlying statutory provisions. With regard to the implementation of rates charged by "electric utilities" and to the extent that Chapter 36 of the Public Utility Regulatory Act ("PURA") governs wholesale transmission rates,¹ the Texas Legislature has provided, as follows:

- (a) an electric utility may not change its rates unless the utility files a statement of its intent with the regulatory authority that has original jurisdiction over those rates at least 35 days before the effective date of the proposed change. (PURA §36.102(a))
- (b) for "good cause" shown, the PUC may allow a rate change (other than a major change) to take effect "before the end of the 35-day period described in §36.102. (PURA §36.104(a)) (emphasis added)²
- (c) if a tariff changing rates is filed with the PUC, the PUC shall, on "complaint by an affected person," and may, on its own motion, "not later than the 30th day after the

¹ Electric cooperatives, such as Brazos Electric, are not "electric utilities" under Chapter 36 of PURA.

² For purposes of Interim Relief, Brazos has requested that the Interim rate have an effective date of July 2, 2002, which is 35 days after filing its application in this docket. Therefore, the Legislative requirement of "good cause" set forth in §36.104 is not applicable here. However, good cause exists for an effective date of January 1, 2002 for Brazos Electric's final rate in this docket, as will be discussed and briefed in connection with final relief.

effective date of the change³, enter on a hearing to determine the propriety of the change. (PURA §36.105(a))

- (d) the PUC must give preference to a hearing and to questions arising under Chapter 36, subchapter C (dealing with “General Procedure for Rate Changes Proposed by Utility”) over “any other question pending before it” and must “decide the question as quickly as possible”. (PURA §36.107(1) and (2))
- (e) pending the hearing and decision, the PUC may suspend the rate change for no longer than 150 days after the date the rate change would otherwise be effective.⁴ (PURA §36.108(a)(2))
- (f) the PUC may establish “temporary” (or interim) rates to be in effect during the applicable suspension period under §36.108.⁵ (PURA §36.109(a))

Given the Commission’s authority to effect temporary rates, there appears to be no dispute that the PUC rule applicable to Brazos Electric’s request for interim implementation is PUC PROC. R. §22.125. In fact, in referring this case to SOAH and setting out the pertinent issues in its preliminary order, the PUC delegated to the ALJ the authority to determine whether Brazos Electric meets the requirements of PUC PROC. R. § 22.125 for interim change to its TCOS rate.

Part (a) of the rule precludes interim relief for undocketed tariff filings, and is not applicable here. Part (b) of the rule requires the applicant to file the request for interim relief no later than 30 days before the interim relief is proposed to take effect. Brazos Electric requested interim implementation by motion on May 28, 2002. Part (d) of the rule requires the applicant in such a proceeding to show that the change proposed is at a “just and reasonable” level. That matter is not at issue in the ruling on Brazos Electric’s motion for interim implementation, since the parties at the interim hearing stipulated that the only evidence adduced as to the interim \$0.80362288 per KW rate for transmission service from Brazos Electric was the evidence provided by Ms. Bordovsky and further stipulated that if the ALJ granted interim relief, the

³ Brazos Electric filed its tariff changing rates with its Application on May 28, 2002. §36.105(a) clearly evidences the Legislative intent that the “effective date” of a rate change would preceed the hearing on the merits of the rate.

⁴ The PUC has entered no order suspending the effective date of Brazos Electric’s proposed rate change, but, in any event, the 150-day suspension period would expire (based on a July 2, 2002 effective date) on November 29, 2002.

⁵ Note, there is no Legislative requirement of “good cause” for the PUC to grant interim relief *after* the 35-day period, as is required under §36.104(a) for rate relief *before* the 35 days. Thus, the Legislature set the “bar” for interim relief *after* the 35-day period, but *before* the expiration of the 150-day period fairly low, contrary to what Staff contends

interim rate would be \$0.80362288 per KW⁶, subject to refund and surcharge. (TR. At 36:12 ff.) Under (e) of that rule, interim rates are subject to refund or surcharge, or “resettlement” as termed by the Staff. Brazos Electric has noted that fact in its motion and the parties have noted it in their stipulation.

The real issues contested at the August 15 hearing originate in part (c) of PROC. R. §22.125, which allows the presiding officer to grant a contested request for interim relief on a showing of “good cause”. The PUC has not had and does not have different rules for interim certification and permitting, interim injunctive relief against a party, interim accounting orders, interim rate changes, and interim relief by a party appealing from some action of a municipality or other entity over which the PUC has appellate authority. It has the one general rule, 22.125, setting out the good cause requirement for any type of interim relief, and listing six criteria that the ALJ must “take into account” in determining whether good cause has been shown. The list in §22.125 is neither exhaustive, as evidenced by item (c)(6) (“any other relevant factor as determined by the presiding officer”) nor is it required that the presiding officer find that each item exists: the presiding officer is merely required to “take into account” whether each of the items exists in a particular case. It should be noted in this regard that item (c)(5) is of questionable relevance, as discussed elsewhere in this brief, and Staff’s witness, Troxle, was not sure of the purpose or applicability of item (c)(5). (TR 82:20; 109:6 to 111:7) As the interim hearing demonstrated, some factors may be more pertinent than others in a given case (and in fact some may be only marginally applicable or completely inapplicable), but the ALJ is to take into account or consider the applicability and effect, if any, of items (c)(1) through (5) and may take into account or consider any other relevant factors as the ALJ determines. Thus, having taken into account the matters identified in §22.125, the ALJ has broad discretion in finding “good cause” to grant interim relief.

In the section to follow, Brazos Electric addresses each of the six factors enumerated in PROC. R. § 22.125(c), recounts the evidence germane to each, and suggests the proper resolution of contested issues as to each of the factors.

⁶ The stipulation was without Staff or interveners waiving their respective rights to contest the rate at the final hearing on the merits, if any.

III. Brazos Electric's ability to anticipate the need for and obtain prompt final relief, §22.125 (c) (1)

A. Brazos Electric's direct evidence

Brazos Electric's witness, CFO Khaki Bordovsky, listed numerous reasons why Brazos Electric was unable to anticipate the need for and *obtain* final approval of relief in this docket prior to the time relief was reasonably needed under the PUC's regulation of transmission cost of service rates. In Brazos Electric Exhibit 2A at 17, she explained that though Brazos Electric's previous earnings monitoring report filed in 2001 with the PUC shows it earned appropriate revenues based on its cost of the transmission function. 2002 ERCOT usage data has decreased, resulting in Brazos Electric underrecovery. Since underrecovery triggers the question whether application to the regulatory authority for interim relief has become necessary, she added in Brazos Electric Exhibit 6 at 6 that the PUC's TCOS rate filing package requires cost data from the most recent calendar or fiscal year, which for Brazos Electric was calendar 2001. She noted that Brazos Electric has had transmission construction costs in 2001 which must under the PUC's requirements be completed (that is, must move from construction work in progress, or "CWIP", to used and useful plant, by the end of 2001) before they can be used as a basis for recovery through TCOS rates. That means the application could not be before January 2001. *Id.* Moreover, audit of the numbers for 2001 was not completed, available for scrutiny and adoption by the Brazos Electric board, and approved for use in a TCOS filing until late March 2002. *Id.* at 7. Finally, she observed that Brazos Electric acted with reasonable dispatch in preparing and filing the three volume application (including prefiled testimony of four witnesses), within 60 days after the approved audited figures which paint the need for TCOS relief. *Id.*

B. Staff's direct evidence did not negate.

Staff, the only party other than Brazos Electric to offer evidence on the issue of interim relief, failed to address or offer any evidence regarding Brazos Electric's ability to anticipate the need for and obtain prompt final relief, nor did it negate Brazos Electric's evidence on this point. (Staff Exhibit 1).

IV. Availability of Other Remedies Under Law, §125 (c) (2)

Part (c)(2) of the Commission's interim relief rule requires the ALJ to take into account the remedies under law that an applicant may have, other than interim relief from the

Commission. The rule applies under a wide set of circumstances, including those where an applicant has the ability to sue for overlapping relief in another forum. For example, in a complaint brought against a utility, the Commission can have original but not exclusive and comprehensive jurisdiction over the subject matter of the complaint, as the Commission determined in *Complaint of Corporate Pines Realty Corp. Against Houston Lighting and Power Company*, Docket No. 19640, Preliminary Order at 3 (Jan. 26, 1999) PUC Digest 3d at 4. There the Commission observed that the complainant's tort claim associated with the complaint lay before the County Court at Law. In the event of a contested motion under Rule 22.125 in such a proceeding, the availability and status of the complainant's plea for temporary injunction or other relief in the County Court at Law would have to be considered.

A. Brazos Electric's direct evidence.

Unlike *Corporate Pines*, the evidence in this proceeding shows that Brazos Electric does not have other remedies available under law. Khaki Bordovsky testified she was aware of no such relief and that Brazos Electric must obtain the PUC's approval to modify its TCOS rate to reflect updated data (Brazos Electric Exhibit 2A at 17 (Bates 56)). She was not cross-examined on this point. Likewise, Staff witness Troxle did not challenge the motion for interim implementation on the grounds that other relief is available at law. See Staff Exhibit 1 generally. Moreover, no party has argued that other relief is available, either in statement of position or implicitly in cross-examination.

To the extent the PUC has exclusive jurisdiction to set TCOS rates, there are no "other remedies available under law". Furthermore, PURA § 35.004 mandates that the Commission "ensure" that the transmission provider recovers its "reasonable costs in providing wholesale transmission services", and § 35.0004(d) grants to the Commission the authority to approve wholesale transmission rates that may be periodically adjusted to "ensure timely recovery of transmission investment."⁷ Unlike certain aspects of the regulatory roles which have historically been split between the PUC and other entities⁸, this authority is exclusive with regard to a

⁷ The Commission has implemented PUC Subst. R. 25.192(g)(1) pursuant to this authority, but the Legislative intent is clear that "timely recovery of transmission investment" is in the public interest.

⁸ For example, under full rate of return regulation, which was in effect when the Commission's interim relief rule was implemented, municipalities had original jurisdiction over the rate and services of a utility within their own boundaries. The PUC had appellate jurisdiction over the rate and service orders entered by the municipality, and

utility's TCOS rates⁹. Hence there should be no factual or legal dispute that Brazos Electric has no other remedy available under law to obtain the functional equivalent of interim TCOS relief.

B. Staff's direct evidence did not negate.

Staff, the only party other than Brazos Electric to offer evidence on the issue of interim relief, failed to address or offer any evidence regarding other remedies available under law, nor did it negate Brazos Electric's evidence on this point. (Staff Exhibit 1). Indeed, there should be no dispute on this issue.¹⁰

V. Changed circumstances, §22.125 (c) (3)

A. Brazos Electric's direct evidence

Brazos Electric CFO Khaki Bordovsky testified that the circumstances that prevailed when the current tariff was approved have changed. (Brazos Electric Exhibit 2A at 18.) She went into further detail on this factor in her testimony in Brazos Electric Exhibit 6 at pages 7-8, explaining that changing usage and costs since 1996, when the most recent TCOS tariff for Brazos Electric was approved, will result in an underrecovery for TCOS in 2002. (See usage figures at page 9, line 2 of Brazos Electric Exhibit 6.) Based on changed usage, changed costs and changed revenues under the 1996 tariff, Brazos Electric is underrecovering its reasonable and necessary 2001 TCOS of \$42,521,411 by \$5,336,146 annually, or approximately \$444,679 per month. (Brazos Electric Exhibit 6 at 5-6) Moreover, in addition to the changing circumstances of costs, usage, and revenue, the PUC on February 19, 2002, granted interim relief in Docket No. 25002, implementing an interim net transmission payment matrix for 2002 (see Brazos Electric Exhibit 6, Exhibit KJB-4 at Bates 37). That interim matrix lowered Brazos Electric's TCOS revenues, contributing significantly to the \$5,336,146 shortfall. (See Brazos Electric Exhibit 6 at 9-10) Brazos Electric submits that these certainly qualify as "changed circumstances" within the language of PUC PROC. R. § 22.125(c)(3), and no party cross-examined Brazos Electric's witness on this point. Her direct testimony should be credited by the ALJ.

original jurisdiction over the rates and services in unincorporated areas. E.g., see *Alameda Mall, Inc. v. Houston Lighting and Power Co.*, C.A. 5 (Tex.) 1980, 615 F. 2d 343, cert. denied 101 S. Ct. 208, 449 U.S. 870, 66 L. Ed. 2d 90. See also *City of Sherman v. Public Utility Commission of Texas* (Tex. 1983) 643 S.W.2d 681.

⁹ It should be noted that in a recent decision, the Travis County District Court ruled that the PUC did not have jurisdiction over the TCOS rates of a municipality prior to September 1, 1999.

B. Staff's Direct Evidence.

Staff, the only party other than Brazos Electric to offer evidence on the issue of interim relief, failed to specifically address or offer any evidence directly related to changed circumstances. (Staff Exhibit 1) To the extent that Staff's direct evidence might be construed to have indirectly addressed §22.125(c)(4), Brazos Electric has responded to Staff's evidence in connection with §22.125(c)(6), below. The only evidence of "changed circumstances" offered by Staff confirms that the need for interim relief. In Staff Exhibit 1, page 13, line 20, Mr. Troxle states, "The Interim Relief in Docket No. 25002 was approved to reflect the fact that as a result of competition, the level of TCOS reflected for several entities had significantly changed." The same can be said (and was said by Khaki Bordovsky), for Brazos Electric, thus justifying interim relief in this docket as well.

VI. Effect of granting the request on parties and public interest, §22.125 (c) (4)

A. Brazos Electric's direct evidence

Brazos Electric CFO Bordovsky testified that interim approval would have a positive effect on the parties and the public interest, because Brazos Electric's annual transmission costs of over \$42 million would be more accurately reflected in the tariffed rates being paid by transmission service customers in ERCOT. In contrast, the absence of interim implementation would send incorrect price signals to those customers. (Brazos Electric Exhibit 2A at 18) Moreover, the lack of timely recovery of transmission revenues by Brazos Electric could delay construction of transmission facilities needed in the ERCOT system. *Id.* See also Brazos Electric Exhibit 6, Exhibit KJB-6 (Bates 47), a July 15 letter from ERCOT which lays out the fact that strategic additions to the ERCOT transmission grid are necessary to meet future reliability needs for the DFW area (North Zone), and Brazos Electric Exhibit 6 at 11-12, where Ms. Bordovsky describes the transmission facilities Brazos Electric continues to build which are essential to the functioning of the ERCOT transmission grid in the North Zone. Brazos Electric has budgeted approximately \$70,000,000 in 2002-2004 for the benefit of the ERCOT North Zone. *Id. at 12* The absence of interim relief could thus have a significant negative impact on the public interest in a reliable transmission system in the North ERCOT zone in the 2002-2004 time frame.

¹⁰ An argument could be made that to the extent the Commission's jurisdiction to approve Brazos Electric's TCOS rates are derived from PURA Chapter 36, and since Chapter 36 is not applicable to electric cooperatives, such as Brazos Electric, Brazos Electric's TCOS is governed by Chapter 41 of PURA.

As to the effect on the parties to the case, all the intervenors are transmission service customers, and none presented direct evidence or cross-examination opposing the motion for interim implementation. Only the Commission staff visibly opposed the interim motion, and Brazos Electric submits that the Staff does not have a legally cognizable interest of its own to represent. It is charged with representing “the public interest”. As noted in the section to follow, the Staff did not offer much in the way of public interest arguments against the interim motion. It claimed that the interim rate might turn out to be too high (which Ms. Bordovsky effectively rebutted – Tr. at 116, line 13 to 119, line 17), or too low, but staff witness, Troxle admitted that such mismatch was common in utility ratemaking and is not a basis for denying interim relief (Tr. at 7, line 13 and Transcript page 86, line 12-17). And in any event, the interim TCOS rate would be subject to refund pursuant to the PUC’s PROC. R. § 22.125(e).

Instead, the Staff championed the Commission’s administrative convenience in setting interim rates (standard procedure when the Commission wants to, and “exceptional” relief when it does not). For its legal basis in opposing the motion, the Staff relied primarily on PROC. R. §22.125(c)(5), which -- as discussed below -- seems at best inapplicable to this case. Brazos Electric therefore submits that there is no appreciable negative effect on the Commission Staff, other than the inconvenience of having to act promptly on significant changes in transmission costs and usage data for all applicant TSPs.¹¹

VII. Whether interim relief necessary to effect uniform system-wide rates, §22.125(c)(5)

A. Procedural Rule §22.125 lists six factors for the presiding officer to take into account to determine whether “good cause” for interim relief has been shown. The fifth factor is “whether interim relief is necessary to effect uniform system-wide rates”. All transmission rates in ERCOT are by definition “uniform system-wide rates” since they are applied to the entire ERCOT transmission grid. Reviewing the history of PURA, one finds references to “uniform system-wide rates” in now repealed Article 1446c¹². A review of Article 1446c shows its application to split municipal/PUC jurisdiction over rates, operations and services. For example, Sec. 2.101 (e) historically granted the Commission “exclusive original jurisdiction over electric utility rates, operations, and services not within the incorporated limits of a municipality

¹¹ Cf. Court Exhibit 1, in which the Commission, its ALJs, and SOAH ALJs have implemented changes to TCOS figures and/or ERCOT-wide transmission rate matrices on interim or temporary bases, to be refunded, surcharged, or “reset” upon subsequent order. In fact, there is no evidence in this record that the Commission has ever denied such a request based on §22.125(c)(5).

exercising exclusive original jurisdiction over those rates, operations and services . . .”. When the rates in the Commission jurisdictional area conflicted with the rates of the municipality jurisdictional area, an appeal could be taken to the Commission of a city council’s rate determination.¹³ Section 2.108 (g) provided, in part,

Any rates, whether temporary or permanent, set by the commission shall be prospective and observed from and after the applicable order of the commission, *except interim rate orders necessary to effect uniform system-wide rates* or to provide the utility the opportunity to avoid confiscation during the period beginning on the date of filing of a petition for review with the commission and ending on the date of a final order setting rates.

References to “uniform system-wide rates” was brought forward in PURA 1997 in Subchapter C. Appeal Of Municipal Order in § 33.051 and following.¹⁴ Clearly, this provision is inapplicable to the proceeding before the presiding officer in this docket, as this is not a split jurisdiction appeal, and in fact, all ERCOT transmission rates became “uniform and system-wide” with the implementation of PURA 1995.

B. Brazos Electric’s direct evidence

To the extent that part (c)(5) of PROC. R. §22.125 can even be considered applicable to the Commission’s framework of an ERCOT-wide transmission rate matrix and individual TCOS rates for each TSP to be applied throughout ERCOT, Brazos Electric has shown that consideration of this factor by the ALJ should favor granting the motion for interim implementation. Brazos Electric CFO Khaki Bordovsky testified that interim implementation of the proposed TCOS rate would be consistent with the matrix in PUC Project 25002, and would promote uniformity of its operation in the TCOS payment system for ERCOT TSPs and transmission service customers. Brazos Electric Exhibit 2A at 18 (Bates 57).

Ms. Bordovsky has also explained that the Commission has since 1997, in setting TCOS rates and matrices for all the TSPs in the ERCOT system, favored interim rates. Brazos Electric Exhibit 6 at 13. Court Exhibit 1 contains numerous such interim and temporary TCOS rate and matrix orders, and they are all systemwide uniform¹⁵ rates to be charged by the TSP or TSPs and

¹² Repealed by Acts 1997, 75th Leg., ch. 166, §9, eff. Sept. 1, 1997.

¹³ Art. 1446-c, Subtitle C. Municipal Jurisdiction, Sec. 2.108.

¹⁴ See particularly § 33.055 (a)-(c) when “negative cash flow experienced by an electric utility at any time a rate case proceeding is pending is, by definition, “confiscation” for that Section.

¹⁵ They are “systemwide” in that they apply to each and every transmission service customer of the TSP in ERCOT, and they are “uniform”, in that the rate does not differ depending on the transmission customer’s location inside or

paid by the transmission service customers. Review of these orders shows that the new systemwide, uniform interim matrix or TCOS rate is superseding an old systemwide, uniform matrix or TCOS rate. No order by the Commissioners, a PUC ALJ or a SOAH ALJ has ever indicated that a matrix or TCOS rate being superseded by interim order was other than uniform and systemwide, yet in each temporary or interim order, the interim relief was granted. All the TCOS and transmission rate matrices are uniform and systemwide within ERCOT. Tr at 120-121.

Thus, not only do logic and the legislative history of PROC R. §22.125 show that the “uniform, systemwide” factor in part (c)(4) would not pertain to interim rates sought to replace an obsolete rate that was itself already uniform and systemwide in ERCOT, the experience of the PUC and SOAH shows the same thing. For examples of systemwide uniform TCOS rates and matrices in ERCOT superseded by subsequent temporary or interim order establishing different systemwide, uniform rates in ERCOT, see Court Exhibit 1, tab 2 at 6 (ordering paragraph 1); tab 3 at 1, 6-7 (Conclusions of Law 4 and 5), and 7 (ordering paragraph 1); tab 4 at 13-14 (Conclusion of Law 4) and 14 (ordering paragraph 1); and tab 5 at 1 and 14 (Conclusion of Law 6); tab 6 at 9¹⁶ (under “Relation to FERC Orders and Schedules”), 33 (Conclusion of Law 18¹⁷), 38 (Conclusion of Law 40), and 47 (ordering paragraph 1).

C. Staff’s Direct Evidence. While spending a substantial portion of its pre-filed direct testimony addressing “consistency” vs. “necessity” under §22.125(c)(5),¹⁸ Staff’s witness, Troxle, admitted that he did not understand either the meaning or the purpose of this provision. (Tr at 82:20)

Brazos’ “consistency” evidence also relates to §22.125(c)(4), in that it is in the interests of the parties and the public interest is furthered by granting interim relief that will send the proper pricing signals, as discussed elsewhere in this brief.

outside a municipality, or the nature of the customer’s business (investor owned utility, retail electric provider, power marketer, cooperative, or municipally owned electric provider, for example).

¹⁶ “It is also the Commission’s intention that its transmission rules apply to all transmission service in ERCOT, as the FPA permits the FERC to defer to the Commission on issues relating to pricing for ERCOT utilities.”

¹⁷ “The transmission pricing provisions in PUC. SUBST. R. 23.67 will result in a uniform rate, for each transmission provider, that applies to all users of the transmission system, including the transmission owner for its own bundled retail and wholesale service. This rate for transmission service is set by the Commission.”

VIII. Any other relevant factors, §22.125 (c) (6)

A. Brazos Electric's Direct Evidence

Brazos Electric CFO Khaki Bordovsky testified that the proposed TCOS rate would be just and reasonable, based on sound and timely historical data, accurately calculated¹⁹, and in other respects in compliance with PURA and the Commission's rules. (Brazos Electric Exhibit 2A at 18) She explained further in Brazos Electric Exhibit 6 that Brazos Electric has and is constructing transmission facilities that benefit ERCOT, including the North Zone which currently is inadequate to handle significant increases in new generation at existing generation sites and "must be improved" by ERCOT's own assessment. (Brazos Electric 6 at 11, and at KJB-6) Failure to grant the interim relief will cause Brazos Electric to be unable to construct the planned needed transmission facilities on a timely basis because of cash flow concerns. *Id. at 12-13*

B. Staff's Direct Evidence

Staff's witness declared that the interim relief Brazos Electric requested is not appropriate for a variety of reasons, none of which directly addressed the specified factors that the ALJ is to take into account under 22.125, except for item (c)(5), the meaning or purpose of which Staff's witness candidly admitted he did not understand, as discussed in section VI. C. above. Nonetheless, because Staff's testimony and evidence seem more to address the "any other relevant factors" provision of §22.125, Brazos responds accordingly, under each of the points set forth by Staff.

1. Staff Argument: Brazos is only permitted a "reasonable opportunity (not a guarantee) to earn a reasonable return" (Staff Exhibit 1, page 4, line 18 through page 5, line 2).

Brazos Electric is not seeking a "guarantee" that it will recover the exact amount of its transmission cost of service based on its historic 2001 test year. Brazos Electric recognizes that its transmission revenues are based upon:

- (i) its TCOS rate (i.e. the per KW rate that is approved in this docket), which has been calculated in accordance with the PUC-approved "presumed reasonable" return; and

¹⁸ As mentioned elsewhere in this brief, Staff failed to specifically address any of the grounds for interim relief in §22.125(c) other than item (5).

¹⁹ Indeed, she updated the calculations and rate from the stand at the interim hearing.

- (ii) its PUC-approved transmission charges and revenues in the annual “matrix” dockets each year.

Although Brazos Electric’s approved TCOS (\$ per KW) rate remains the same until another TCOS rate is ordered, the amounts Brazos Electric may charge and collect each year are set and determined by the PUC-approved matrix each year. However, the only evidence of Brazos Electric’s reasonable and necessary transmission cost of service for the historic test year of 2001 is \$42,521,411 (which includes Brazos Electric’s reasonable and necessary transmission relative operating expenses and the PUC-approved “presumed reasonable” return)(Brazos Exhibit 6, page 15, lines 19-20). Brazos Electric has no opportunity (much less a reasonable opportunity) of earning a reasonable return in excess of its operating expense during the “regulatory lag” period.

Staff points to Chapter 36²⁰ for the foregoing argument, and for the precept that the PUC must “ensure” that rates are just and reasonable (Staff Exhibit 1, page 4, line 20), but ignores the requirements of Chapter 35 for wholesale transmission cases that require the PUC to “ensure” that Brazos Electric recovers its “reasonable costs in providing wholesale transmission services” so that Brazos Electric’s “other customers do not bear the costs of the service.” (PURA §35.004(c))

2. Staff Argument: Interim Relief is an “exceptional” form of rate relief. (Staff Exhibit 1, page 5, line 5)

While Staff witness Troxle defines “exceptional” as “different”, the common meaning is “rare” or “unusual”. As the evidence amply demonstrated, in the world of ERCOT wholesale transmission rate proceedings, interim relief is neither rare nor unusual, but is in fact the norm. Admittedly, the history of ERCOT wholesale transmission ratemaking has been a challenging and rocky road perhaps meriting a series of temporary measures; that history included the invalidation of the wholesale transmission rules²¹ made the basis for such rates from January 1, 1997 until September 1, 1999, when the Texas Legislature specifically adopted the postage-stamp method of pricing such services and mandated the formula for calculating them.²²

²⁰ PURA §36.003(a)

²¹ PublicUtil.Comm’n v. City Pub.Serv. Bd., 53 S.W.3d 310 (Tex. 2001)

²² PURA §35.004(d)

For purposes of this brief, Brazos Electric identifies the two separate, distinct, but interrelated aspects of wholesale transmission ratesetting: (i) TCOS rates²³ and (ii) ERCOT matrix rates²⁴.

Staff witness Troxle would not acknowledge that the ERCOT matrix cases were setting “rates,” but were only setting “transmission charges”. That position is untenable. PURA defines “rate” as follows (emphasis added):

"Rate" includes:

(A) any compensation, tariff, charge, fare, toll, rental, or classification that is directly or indirectly demanded, observed, charged, or collected by a public utility for a service, product, or commodity described in the definition of utility in Section 31.002 or 51.002; and

(B) a rule, practice, or contract affecting the compensation, tariff, charge, fare, toll, rental, or classification. [PURA §11.003(16)]

Furthermore, the final orders in the ERCOT matrix dockets themselves purport to be setting rates. For example, the final order for the very first ERCOT matrix rate case (PUC Docket No. 15840)²⁵ states (emphases added):

“This proceeding and the companion transmission cost-of-service proceedings were initiated to implement a provision of Senate Bill 373, which was adopted by the 1995 Texas Legislature. The purpose of these cases was to establish rates and other terms of service for transmission service provided by utilities to other utilities...”(Court’s Exhibit 1, tab 6, page 1 of the order)

“The principal purpose of this proceeding and the companion proceedings was to adopt transmission rates for ERCOT.” (Court’s Exhibit 1, tab 6, page 2 of the order)

“...this proceeding was initiated...to set the ERCOT transmission rates.” (Finding of fact No. 2, Court’s Exhibit 1, tab 6, page 11 of 49 of the order)

²³ TCOS rates refers to the individual dockets in which the PUC approves the transmission cost of service (TCOS) and the per KW rate of a particular transmission provider, such as Brazos Electric, as is being requested in this Docket No. 25960.

²⁴ ERCOT matrix rates refers to the annual proceedings in which ERCOT determines the average four coincident peaks for the months of June, July, August and September (ERCOT 4-CP) of the previous year, and calculates the amount each transmission provider will charge to and collect from transmission customers during the year for which the ERCOT matrix is approved by the PUC.

²⁵ Until September 1, 1999, the transmission charges in ERCOT was based upon a formula that included an access fee (70% postage-stamp calculation) and an impact fee (30% distance sensitive calculation). Effective September 1, 1999, all ERCOT transmission charges are based 100% on the postage-stamp method (i.e. like a postage stamp does not increase with the distance a letter is sent, the price of transmission is not affected by the distance of the location between the resource and the load)

“The load (megawatts) and impact (megawatt-mile) information provided by the ERCOT ISO is used to allocate the ERCOT transmission costs among transmission customers. This allocation is shown in the matrices attached to these orders. The transmission rates produced by this allocation are consistent with PURA and PUC Subst. R. 23.67 and are just and reasonable” (Conclusion of Law No. 71, Court’s Exhibit 1, tab 6, page 46 of 49 of the order)

The cost-of-service information, loads and megawatt-mile impacts shown in the attached matrices are adopted for use in calculating the transmission rates for ERCOT utilities that own transmission facilities. The rates shown in these matrices are approved, and the charges for each transmission owner to each transmission customer are approved for 1997.” (Ordering paragraph No. 1, Court’s Exhibit 1, tab 6, page 47 of 49 of the order)

Clearly, by definition and by the PUC’s own orders, the ERCOT matrix proceedings set wholesale transmission “rates” and therefore any interim relief in such proceedings represent “interim rate relief”. The profusion of such orders in Court Exhibit 1 shows that they are anything but “exceptional”.

The “companion” TCOS cases referred to in the Order in Docket No. 15840 were the very first TCOS cases filed in ERCOT in 1996, and are identified on Attachment A to the Order. (Court’s Exhibit 1, tab 6, Attachment A.) Each of the transmission providers identified on Attachment A were required to file a compliance tariff, as set forth on Attachment D to that Order. (Court’s Exhibit 1, tab 6, Attachment D.) All of these tariffs, which were from the identified TCOS cases, were filed on the dates shown on Attachment D, ranging from August 13, 1997 to August 20, 1997. In December 1996 the PUC granted interim relief to all transmission providers based on their individual TCOS cases.

Brazos Electric’s first TCOS case (PUC Docket No. 15641), and its Interim Order dated December 2, 1996, is contained as an attachment to its Final Order dated July 7, 1997. (Court’s Exhibit 1, tab 8) Note in the style of the “Consolidated Interim Order” is a list of the various TCOS dockets (primarily electric cooperatives) that were all granted interim relief²⁶. In Brazos Electric’s Interim Order the PUC approved Brazos Electric’s transmission cost of service “on an interim basis, subject to modification in order to bring the TCOS into compliance with the

²⁶ IOUs were also granted interim relief, e.g. see Court’s Exhibit 1, tab 7 (TU Electric) and tab 12 (HL&P).

Commission's existing and future rulings in Docket No. 15840" (the 1997 ERCOT matrix rate case). (Court's Exhibit 1, tab 8, page 4 of the Consolidated Interim Order).

These interim TCOS rates were approved in July 1997 (most, if not all, were approved on July 7, 1997, including Brazos Electric's)²⁷ and were effective January 1, 1997. The ERCOT matrix rates were not approved until August 11, 1997. The PUC had no difficulty in making ERCOT transmission rates effective January 1, 1997 by its order entered August 11, 1997 or in granting interim relief not only in the 1997 TCOS cases, but also for the next year of 1998. In this latter regard, the Order in Docket No. 15840 stated:

Each transmission provider's cost of service and the rates established in this case shall remain in effect for each transmission provider until it files a new TCOS case. Transmission charges are affected by the load and resource nominations and the transition mechanism, and the charges will change on an annual basis. (Court's Exhibit 1, tab 6, page 7 of 49 of the order)²⁸

Beginning with the final order in PUC Docket No. 18459, (the second ERCOT matrix rate case) and in every ERCOT matrix rate case since, the PUC provided for interim relief for the following year, by including ordering paragraph No. 1, which in the case of Docket No. 18459 reads:

The charges shown in these matrices are approved for 1998. In the event that the Commission does not establish the transmission charges for 1999 before January 1, 1999, transmission customers shall continue paying the amounts shown in the attached matrices for service in 1999. Payments made in 1999 pursuant to this Order will be subject to refund and surcharge, if the charges adopted by the Commission for 1999 are different than the charges established under this Order. (Ordering Paragraph No. 1 of the Final Order in Docket No. 18459, Court's Exhibit 1, tab 5, page 15 of the order)²⁹

It is worth noting that the PUC Staff is the "Applicant" in all of the ERCOT matrix rate cases, and that the PUC has routinely (i.e. always) granted interim relief *in advance*, because it is an "administrative fiction" to state the rates become interim "in the event the Commission does not

²⁷ E.g. See Court's Exhibit 1, tab 9 (LCRA), tab 10 (Texas New Mexico), and tab 11 (City of Garland).

²⁸ In the final order in PUC Docket No. 18459 (the PUC's second ERCOT matrix rate case), the PUC interpreted this to mean that "the 1997 rates should remain in effect until a transmission service provider files a new transmission cost of service *or* the Commission initiates a transmission rate review" (i.e. a new ERCOT matrix rate case)(emphasis added) (Court's Exhibit 1, tab 5, page 2 of the order)

²⁹ This same ordering paragraph, changing only the applicable years, is repeated in every final order in each of the subsequent ERCOT matrix rate cases (Docket No. 20381 for 1999 ERCOT transmission charges – Court's Exhibit 1, tab 4, page 14 of 15; Docket No. 22055 for 2000 ERCOT transmission charges – Court's Exhibit 1, tab 3, page 7 of 8; Docket No. 24418 for 2001 ERCOT transmission charges – Court's Exhibit 1, tab 2, page 6).

establish transmission charges” for the following year before January 1st of that year: the Commission has never established ERCOT matrix rates before January 1st of the year for which the ERCOT matrix is being approved, and realistically it never anticipates doing so if the usage data will not be available until after September of that year.

The following chart summarizes the dates on which the Commission has “established the transmission charges” for a matrix year:

ERCOT matrix Docket	Matrix Year	Effective Date	Final Order Date
15840	1997	January 1, 1997	August 11, 1997 ³⁰
18459	1998	January 1, 1998	September 17, 1998 ³¹
20381	1999	January 1, 1999	October 13, 1999 ³²
22055	2000	January 1, 2000	June 14, 2000 ³³
24418	2001	January 1, 2001	December 17, 2001 ³⁴

In the ERCOT matrix rate case to establish transmission charges for 2002 (PUC Docket No. 25002), the PUC entered a separate Interim Order³⁵ granting interim relief.³⁶ Noteworthy in this Interim Order is fact that the ALJ granted interim relief based on PUC Proc. R. §22.125, thereby acknowledging its applicability to ERCOT matrix rate cases and thus that interim matrix rate cases are subject to the criteria in §22.125(c). Notably, the ALJ did not feel constrained to find compliance with *all* of the items listed in §22.125.³⁷

After the 1996 initial TCOS case filings, in which all transmission providers were granted interim relief, very few TCOS cases were filed until 2000. In that year, because of retail customer choice enacted by Senate Bill 7 commencing January 1, 2002, the Texas Legislature

³⁰ Court’s Exhibit 1, tab 6, page 49.

³¹ Court’s Exhibit 1, tab 5, page 16.

³² Court’s Exhibit 1, tab 4, page 15.

³³ Court’s Exhibit 1, tab 3, page 8.

³⁴ Court’s Exhibit 1, tab 2, page 7.

³⁵ Court’s Exhibit 1, tab 1

³⁶ This was in addition to and modifying the interim relief it had granted the previous year in the ordering paragraph No. 1 of final order in Docket No. 24418, making the rates interim effective January 1 of the next year.

³⁷ It appears that the ALJ relied only on “changed circumstances” of §22.125(c)(3), or perhaps on the “other relevant factors” provisions of §22.125(c)(6).

and the PUC required IOUs to unbundled their electric business into separate generation, transmission and distribution companies. IOUs were also required to file “unbundled cost of service” (or “UCOS”) cases, which included seeking approval of wholesale transmission service costs based on a “forecasted 2002” test year, rather than the traditional historic test year. Other utilities that were not required to file UCOS cases were permitted to file TCOS cased based on a forecasted 2002 test year. But, in order to do so, the PUC-approved rate filing package instructions permitted a non-IOU transmission provider to use a 2002 forecasted test year only if it filed its TCOS application by May 15, 2000, and only if it agreed to extend the effective date to January 1, 2002.³⁸ (Transcript page 78, line 11) Therefore, none of the transmission providers filing TCOS using a 2002 forecasted test year requested “interim relief”, since they agreed to extend the effective date to January 1, 2002, and were precluded from asking for such relief. Disregarding such forecasted TCOS cases, it remains true that the history of wholesale transmission TCOS cases, interim relief has been granted in the vast majority of cases.

3. Staff argument: Interim relief could cause Brazos’s rates to be based on the 2001 4-CP as determined in Docket No. 25002 rather than the 2002 4-CP. (Staff Exhibit 1, page 6, line 15).

Although Staff witness Troxle tries to distance himself from this point by arguing that everyone misunderstood his testimony, this staff argument is a direct quote from his testimony. On cross by City of Garland and Brazos attorneys, Mr. Troxle claimed that much of his testimony (presumably from page 6, line 15 through page 8, line 8) merely illustrates the immateriality of the fact that Brazos’ interim tariff would be consistent with the matrix in Docket No. 25002 (Staff Exhibit 1, page 6, line 9). Since Mr. Troxle later admitted he understood neither the meaning nor the purpose of §22.125(c)(5), his testimony relating to this section is neither pertinent nor credible.³⁹ Moreover, Ms. Bordovsky made it clear that the cost and useage data should be from the same time period for accounting and ratemaking purposes. Tr at 114-115.

³⁸ General Instructions to the *Transmission Cost of Service Rate Filing Package for Non-Investor Owned Transmission Service Providers in the Electric Reliability Council of Texas (Non-IOU TCOS-RFP)* Pursuant to §25.192, adopted by the PUC in Project No. 21276 on December 16, 1999.

³⁹ This admission is remarkable in view of the amount of space in Mr. Troxle’s testimony devoted to §22.125(c)(5) (in fact that is the only item addressed, unless Staff’s other points relate to §22.125(c)(6)). The admission is made more remarkable in light of his qualifications as pointed out in the ALJ’s clarifying question that his responsibilities include “reviewing and analyzing the performance of market participants including compliance with Commission rules”. (Staff Exhibit 1, page 3, line 17). Mr. Troxle’s lack of understanding of this Commission rule may stem from his further admission that this interim request was the first in which he has participated since being employed at the PUC. (TR at 111:24)

4. Staff Argument: Brazos did not present financial integrity as the justification for its need for Interim Relief like LCRA did. (Staff Exhibit 1, page 9, line 9)

Regarding the other recent TCOS cases in which interim relief was requested,⁴⁰ Mr. Troxle claimed in his pre-filed testimony (at 8, line 21-23), that the grant of to LCRA was justified “because LCRA made a showing that interim relief was necessary to protect its financial integrity.” But on cross examination, Mr. Troxle candidly admitted that a showing of necessity to protect financial integrity is not required for interim relief under §22.125, and testified that interim relief for LCRA was based on the “agreement of the parties” rather than financial integrity concerns.⁴¹ Although Mr. Troxle testified that Brazos did not present financial integrity as the need for their interim rates (Staff Exhibit 1, page 9, line 8-9), he now admits that that is not necessary for the ALJ to grant Brazos interim relief (Tr 88:18 to 89:21)

5. Staff Argument: Brazos did not elect to revise its transmission rates pursuant to PUC Subst. R. 25.192(g)(1), which may have resulted in “faster” implementation of a new wholesale transmission rate (as was the case with Oncor). (Staff Exhibit 1, page 10, line 13-17)

Khaki Bordovsky testified that a filing under §25.192(g)(1) would not give Brazos the rate relief it seeks in this docket. (Tr. At 125). Again, Mr. Troxle’s testimony lacks credibility.

6. Staff Argument: The relief available to Brazos is the filing of a rate case to establish a new TCOS rate. (Staff Exhibit 1, page 11, line 15 and lines 21-23)

This point is nonsensical – Brazos has filed a rate case to establish a new TCOS rate! That is precisely what this docket is about. Staff’s argument appears to be tied to its notion that Brazos is not “guaranteed” that it will collect every dollar of its precise TCOS (Staff Exhibit 1, page 11, line 14) and that “regulatory lag” is something every utility faces when it attempts to change rates. While this was addressed previously, it is worthy of repetition that without interim relief, Brazos has NO opportunity (much less no reasonable opportunity) to recover its reasonable and necessary transmission cost of service, which were incurred in test year 2001 and continue into and throughout 2002, unless its rates once finally approved, will be effective January 1, 2002 and can be collected from ERCOT transmission customers during that period. Denial of interim relief during regulatory lag is inconsistent with the Legislative mandate in

⁴⁰ LCRA (PUC Docket No. 25421- Court’s Exhibit 1, tab 13) and Oncor (PUC Docket No. 25385 – Court’s Exhibit 1, tab 14).

⁴¹ Mr. Troxle testified that it was LCRA’s claims of financial integrity concerns that caused the parties to agree to interim relief.

PURA §35.004(c) that the PUC “ensure” that Brazos recovers its reasonable costs in providing wholesale transmission services so that the its other customers do not bear the costs of the service.

7. Staff Argument: Big Country (PUC Docket No. 25718) and Magic Valley (PUC Docket No. 26181), both electric cooperatives, did not request Interim Relief. (Staff Exhibit 1, page 12, line 12)

While this point is irrelevant and Staff offered no evidence of its relevance, it should be noted that Big Country filed its TCOS case on April 2, 2002, and is scheduled to receive final approval on August 23, 2002 (Tr at 96:23 – 97:8). Big Country, while not asking for (and apparently not needing) interim relief, did file for expedited approval.

8. Staff Argument: It will “lower the bar” for future requests for interim relief. (Staff Exhibit 1, pg. 15, line 7)

While acknowledging that Brazos is under-recovering (Staff Exhibit 1, page 8, line 6), and that the interim relief granted in Docket No. 25002 was due in large part to the fact that “the level of TCOS reflected for several entities had significantly changed” (Staff Exhibit 1, page 13, line 22) – Mr. Troxle clarified on cross that by “changed” he meant “increased” – Tr at 103:23), Staff continues to resist Brazos’ request for interim relief, despite the fact that Brazos is subject to the same “competition,” and similar cash flow concerns (see Tr at 120-121) that has resulted in the significant changes in the transmission rate matrices and TCOS rates of those other entities.

Mr. Troxle carefully avoided the term “interim” when discussing the relief granted in all of the ERCOT matrix cases to date; he did not care for the phrase “subject to refund and surcharge,” which is inherent in interim rate relief orders, preferring instead to use such terms as “reconciliation” (Staff Exhibit 1, page 10, line 2) and “resettle” (Staff Exhibit 1, page 13, line 10 and page 14, line 12), supposedly believing that such phrases would conceal the “interim relief” nature of the prior grants of the PUC.

As to “lowering the bar” (Staff Exhibit 1, page 15, line 7), as previously observed, the Legislature set the bar on temporary rates fairly low, not even requiring a showing of “good cause” unless the utility requested implementation *before* the 35-day period. Likewise, PUC Proc. R. 22.125 permits interim relief “based on the agreement of the parties,” thereby removing any suggestion that grave public policy issues are at stake, requiring a “high bar” to be overcome

by the applicant. Broad discretion is permitted the presiding officer to find “good cause” based on “any other relevant factors as determined by the presiding officer”. (§22.125(c)(6)) Finally, the PUC and Staff have allowed themselves a “low bow” in granting interim relief in prior TCOS cases and all ERCOT nature cases.

It is not Brazos that is trying to “lower the bar” – rather it is the Staff that is attempting to “raise the bar” to one or more standards not sufficiently recognized to be reduced to a written policy, and certainly not supplied to the ALJ as required by SOAH Rule 155.23. If interim relief may be granted “based on the agreement of the parties” under standards not specified in the rule, then surely it can be based upon the determination of the presiding officer that “good cause” exists on the other relevant factors presented here.

IX. Conclusion

There is no dispute as to the standards governing the motion for interim implementation. PURA §35.004 gives the Commission the authority and obligation to “ensure” that transmission service providers recover their reasonable costs, and the authority to adjust the transmission rates “periodically to ensure timely recovery of transmission investment.” (See part (d) of §35.004.) The Commission has a rule applicable to all types of interim relief, PROC. R. §22.125, and it has been applied by the Commission more as an aid than an impediment to grant interim TCOS rates and interim transmission rate matrices, with little evident concern for the application of the factors in the rule.

In this docket, the factors in 22.125(c) have become more important because of the Staff’s opposition to the motion. Nonetheless, Brazos Electric has demonstrated by testimony and documentary evidence (much of the latter from the Commission’s own many orders setting temporary or interim rates for transmission service in ERCOT) that there is good cause for granting the motion. The Staff argued in opening statement that Brazos must show it would be unable to pay its reasonable cash operating expenses and continue operating during the pendency of this rate proceeding without granting interim relief (Tr. at 21), but this is not what the rule requires, and Staff offered no evidence that the Commission has ever been so fastidious in assuring the timely recovery of transmission costs as required by PURA § 35.0004(d).

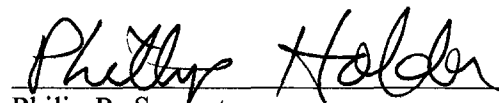
The Staff witness did not rely on the negative cash flow theory of the Staff attorney⁴², instead basing his recommendation of denial on a rule provision in PROC. R. § 22.125(c)(5) he found mysterious, and which has in none of the many interim transmission orders in Court Exhibit 1 ever been invoked. As Brazos Electric has shown, it was properly not invoked, because it applies to a historical feature of full rate of return regulation by the PUC in decades past, the setting of temporary rates in appeals from municipal rate orders where the Commission's original jurisdiction resulted in a set of rates based on system-wide data, and where lack of an interim order would result in disparate treatment of similarly situated customers based on the happenstance of their location inside or outside the city limits.

This rule provision logically does not and cannot apply to TCOS rate and matrices, which are by their nature always uniform and systemwide within ERCOT. The Commission has repeatedly replaced systemwide uniform transmission rates with other systemwide uniform transmission rates, and almost always on a temporary or interim basis. If 22.125(c)(5) were an obstacle to this, there would be either no such stack of interim orders as compiled in Court Exhibit 1, or the stack would be augmented by substantial amounts of explanation in the orders why 22.125(c)(5) did not prevent the interim order, as Mr. Troxle imagines it must in this docket.

Brazos Electric has met the requirements of good cause as well as or better than any of the TSPs affected in the orders in Court Exhibit, and prays that the ALJ adopt and enter the proposed order attached hereto as Exhibit A.

Respectfully submitted,

SEGREST & SEGREST, P. C.



Philip R. Segrest
State Bar No. 17996000
J. David Carpenter
State Bar No. 03845800
28015 West Highway 84
McGregor, Texas 76657
(254) 848-2600
(254) 848-2700 (FAX)

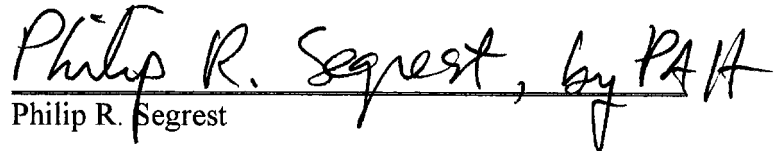
⁴² In fact, the Staff attorney's theory probably violates PURA §35.004(c), which charges the PUC with assuring the customers of the TSP other than transmission service customers do not bear the costs of the transmission service because of inadequate TCOS rates.

Phillip A. Holder, Of Counsel
State Bar No. 09833400
Sullivan & Worcester, LLP
P. O. Box 5024
Austin, Texas 78763-5024
(512) 453-3864
(512) 374-9438 (Fax)

Attorneys for **BRAZOS ELECTRIC POWER
COOPERATIVE, INC.**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Response was mailed by United States mail, postage prepaid, or delivered via Facsimile, Federal Express, or hand delivery, on the 20th day of August, 2002, to all parties of record in Docket 25960.


Philip R. Segrest

DOCKET NO. 25960
SOAH DOCKET NO. 473-02-3537

APPLICATION OF BRAZOS ELECTRIC	§ BEFORE THE STATE OFFICE
POWER COOPERATIVE, INC. TO CHANGE	§
RATES FOR WHOLESALE TRANSMISSION	§ OF
SERVICE	§ADMINISTRATIVE HEARINGS

ORDER NO. 4

GRANTING MOTION FOR INTERIM IMPLEMENTATION OF TCOS RATE

On May 28, 2002 Brazos Electric Power Cooperative, Inc. ("Brazos Electric") filed an application seeking modification of its transmission cost of service ("TCOS") tariff. That matter was docketed by the Public Utility Commission of Texas ("Commission" or "PUC"), and on July 9, 2002 referred to the State Office of Administrative Hearings ("SOAH").

With its Statement of Intent seeking TCOS relief, Brazos Electric filed a request that the TCOS rate be implemented on an interim basis, pending final order, and subject to refund or surcharge if the final TCOS rate set by the Commission differs from the interim rate. The undersigned ALJ conducted an evidentiary prehearing conference on August 15, 2002, pursuant to a schedule agreed to by all the parties. Brazos Electric presented testimony by its Chief Financial Officer Khaki Bordovsky, and the Commission Staff presented the testimony of its witness Matthew Troxle. The interim relief proceeding took approximately half a day, and the parties filed closing arguments August 20, 2002. The ALJ presided over the evidence, asked clarifying questions, has read and considered the written evidence and the arguments of the parties, and enters this order ruling on Brazos Electric's May 28 motion. The ALJ finds that the motion has merit under the PUC's PROC. R. § 22.125, and GRANTS the motion, effective *July 2, 2002*. The interim rates are subject to refund or surcharge upon final order by the Commission if the final rates differ from those specified in this order. The ALJ's reasons for this ruling follow.

The parties agreed that the only dispute at the August 15 proceeding was whether the proposed interim rate meets the requirements of PROC. R. §22.125, not the appropriate \$ per KW figure that would constitute the interim rate if granted. Brazos Electric CFO Bordovsky provided the only testimony as to the appropriate \$ per KW figure, and that is the rate that should be observed in this docket pending final order.

Under PROC. R. §22.125, interim relief of any kind is subject to a showing that the request is supported by “good cause.” Good cause is subject to the presiding officer’s consideration of several factors, some of which may be more important than others, and some of which may not be pertinent to the interim request in the particular case. The ALJ lists the factors below and states her findings as to each.

Applicant’s ability to anticipate the need for and obtain prompt final relief, §22.125 (c) (1)

Brazos Electric showed through Ms. Bordovsky’s testimony that Brazos Electric could not reasonably have anticipated the need for the TCOS increase prior to its filing the interim implementation request. Brazos Electric 2A at 17; Brazos Electric Exhibit 6 at 6-7. Staff witness Troxle did not contest this evidence, nor did any party cross-examine Ms. Bordovsky on this point.

Availability of other remedies under law, §22.125(c) (2)

Through evidence and legal argument, Brazos Electric showed that it has no avenues for relief other than the interim motion, since the Commission has exclusive original jurisdiction over the setting of TCOS rates, under PURA § 35.004. Brazos Electric Exhibit 2A at 17. No other party contested this issue by testimony or cross-examination.

Changed circumstances, §22.125 (c) (3)

Brazos Electric showed through the testimony of its CFO that its costs for providing transmission service in ERCOT changed as of the end of 2001, as did its revenues under its existing TCOS tariff, set in 1996 by the Commission. No other party offered evidence or cross-examination to refute this assertion.

Effect of granting the request on parties and public interest, §22.125 (c) (4)

Brazos Electric showed that interim approval would have a positive effect on the parties and the public interest, because Brazos Electric’s annual transmission costs of over \$42 million would be more accurately reflected in the tariffed rates being paid by transmission service customers in ERCOT. The absence of interim implementation would send incorrect price signals to those customers. Brazos Electric Exhibit 2A at 18. Moreover, the lack of timely recovery of transmission revenues by Brazos Electric could delay construction of transmission facilities needed in the ERCOT system. Id. See also Brazos Electric Exhibit 6, Exhibit KJB-6 (Bates 47), a July 15 letter from ERCOT documenting that strategic additions to the ERCOT transmission grid

are necessary to meet future reliability needs for the DFW area (which is in the ERCOT North zone), and Brazos Electric Exhibit 6 at 11-12, where Ms. Bordovsky described the transmission facilities Brazos Electric continues to build which are essential to the functioning of the ERCOT transmission grid in the ERCOT North Zone. Brazos Electric has budgeted approximately \$70,000,000 in 2002-2004 for the benefit of the ERCOT North Zone. Id. at 12. The absence of interim relief could thus have a significant negative impact on the public interest in a reliable transmission system in the ERCOT North zone in the 2002-2004 time frame.

The Staff argued that there would be administrative inconvenience resulting from “lowering the bar” for interim relief, but the ALJ notes that the Commission has repeatedly set interim TCOS rates and interim transmission rate matrices without strict use of the factors in PROC. R. §22.125. The ALJ finds that administrative convenience as a public interest effect is outweighed by the statutory mandate to effect rates which reflect the transmission service providers’ costs and do not cause those costs to be borne by other types of customers. PURA §35.004(c).

Whether interim relief is necessary to effect uniform system-wide rates, §22.125 (c) (5)

The Staff witness based his objection to the interim motion largely on this factor, arguing that Brazos Electric had not shown the interim relief “necessary” to effect systemwide and uniform rates. The problem with this argument is that the factor does not pertain to TCOS rates and transmission rate matrices, which appear always to be uniform and systemwide within ERCOT. Numerous interim and temporary orders of the Commission, its ALJs, and SOAH were officially noticed (as Court Exhibit 1), and many of them subsequently superseded by interim order either state or can be inferred to provide that the TCOS rates or matrices are uniform and systemwide within ERCOT. Hence the subsequent interim order could never be seen as necessary to effect systemwide and uniform rates, and this factor as construed by the Staff has never been satisfied in situations where the Commission set interim TCOS rates or transmission rate matrices.

The ALJ is persuaded that this factor is inapplicable to this motion, and was promulgated by the PUC to address the historical situation where municipal rate ordinances set rates different from those outside the city limits, and the Commission set interim rates in the appeal so as to eliminate rate differences that were based on the happenstance of the customer’s location.

Any other relevant factors, §22.125 (c) (6)

Brazos Electric's CFO testified that the proposed TCOS rate would be just and reasonable, based on sound and timely historical data, accurately calculated, and in other respects in compliance with PURA and the Commission's rules. Brazos Electric Exhibit 2A at 18. Brazos Electric has and is constructing transmission facilities that benefit ERCOT, including the ERCOT North Zone, which "must be improved" by ERCOT's own assessment. Brazos Electric 6 at 11, and at KJB-6. The interim relief will enable Brazos Electric to construct the planned needed transmission facilities on a timely basis, and avoid Brazos Electric's cash flow concerns created by changes in usage, costs, revenues, and the Commission's interim matrix in Project 25002.

The Staff raised several "other factor" arguments, but they were effectively refuted by Brazos Electric's evidence and argument in closing brief.

The ALJ finds that Brazos Electric has met the requirements of PROC. R. § 22.125, and that its proposed interim TCOS rate of \$803.62288 per MW is approved effective *July 2, 2002*. Brazos Electric SHALL file with the Commission filing clerk tariff sheets showing this rate, the date of implementation set by this order, and the fact that the rate is an interim rate, subject to refund or surcharge upon final order of the Commission.

Issued this ____ day of August, 2002.

Deborah L. Ingraham
Administrative Law Judge
State Office of Administrative Hearings