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SOAH DOCKET NO. 473-02-3473
PUC DOCKET NO. 26195

APPLICATION OF TEXAS GENCO, LP	§	**BEFORE THE STATE OFFICE**
AND CENTERPOINT ENERGY	§	
HOUSTON ELECTRIC, LLC, TO	§	
RECONCILE ELIGIBLE FUEL	§	**OF**
REVENUES AND EXPENSES	§	
PURSUANT TO SUBST. R. 25.236	§	**ADMINISTRATIVE HEARINGS**

STAFF'S INITIAL BRIEF

COMES NOW the Staff of the Public Utility Commission ("Staff"), representing the public interest, and files its initial brief.

I. Introduction

Staff does not intend to address the issue.

II. Kerr-McGee Costs

A. Nature of the Costs.

Staff does not intend to address the issue.

B. Does recovery of these costs in this proceeding violate the Stipulation and Final Order in Docket No. 18753 ?

An alternative way to pose this question is whether the Commission is authorized to make a finding of fact in this docket that is contrary to a finding of fact in a prior final Commission order. Staff contends that while the doctrines of *Res Judicata* and collateral estoppel do not apply in this case, the fact that neither doctrine would prevent the Commission from revisiting this issue is not an affirmative grant of authority to do so. To make a finding of fact that is contrary to a finding in a previous order the Commission must have express or

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implied authority from the Legislature to do so. Moreover, the findings in question in this briefing issue are adjudicative facts and not as susceptible to amendment as legislative facts. In any event, Applicants' request for regulatory treatment different than that ordered by the Commission in Docket No. 18753 is an impermissible collateral attack on that order.

THE FINAL ORDER IN DOCKET NO. 18753 FINDS IT REASONABLE TO RECLASSIFY THE KERR-MCGEE COAL COSTS FROM ELIGIBLE FUEL TO ELECTRIC PLANT IN SERVICE AND ORDERS THE RECLASSIFICATION

In 1998 HL&P obtained a final order in Docket 18753 reconciling its fuel expenses and revenues for the period August 1, 1994 through July 31, 1997.[1] The final order in Docket No. 18753 approved a unanimous stipulation and settlement ("Unanimous Stipulation") among the parties.[2] In part the Unanimous Stipulation provides that:

> The difference each year between: (a) the actual costs under the renegotiated contract and spot market coal purchases thereafter and (b) the specified yearly costs of the original contract *be capitalized and included in HL&P's Electric Plant in Service* until such time as the capitalized amount is reduced to $0.[3] (emphasis added).

It is clear from the language in the Unanimous Stipulation that the parties intended that the Kerr-McGee coal costs were to be treated as invested capital and accounted for as Electric Plant in Service and not as eligible fuel.

The final order in Docket No. 18753 adopted the parties' stipulation on this issue and ordered HL&P to:

> reclassify from eligible fuel expense...to invested capital and [shall] include in Electric Plant in Service all costs related to the following: ...(c) [Kerr-McGee coal costs]..."[4]

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[1] *Petition of Houston Lighting & Power Company to Reconcile Eligible Fuel Revenues and Expenses*, Docket No. 18753 (October 15, 1998).
[2] Docket No. 18753, Unanimous Stipulation Resolving All Fuel Reconciliation Issues at 4 (October 15, 1998) ("Unanimous Stipulation").
[3] Docket No. 18753, Order at 8 (FOF #32) (December 15, 1998).
[4] Docket No. 18753, Order at 14 (Ordering Paragraph #2) (December 15, 1998).

Because no motions for rehearing were filed in Docket No. 18753, the order became final by operation of law.[5]

THE APPLICANTS ARE ASKING THE COMMISSION TO RECONSIDER ITS PRIOR ORDER RECLASSIFYING THE KERR-MCGEE COAL COSTS FROM ELIGIBLE FUEL TO ELECTRIC PLANT IN SERVICE

Texas Genco, LP ("Genco") and Centerpoint Energy Houston Electric, LLC ("Centerpoint") (together "Applicants") have taken the position in this docket that because Applicants' predecessor utility was unable to recover the Kerr-McGee coal costs as envisioned in the Unanimous Stipulation, the Commission should allow Applicants to recover the Kerr-McGee coal costs as eligible fuel costs in this final fuel reconciliation proceeding.[6] This would require the Commission to reverse itself on the treatment of the Kerr-McGee coal costs in Docket No. 18573.

WHILE *RES JUDICATA* AND COLLATERAL ESTOPPEL DO NOT PREVENT THE COMMISSION FROM RECONSIDERING ITS PRIOR DECISION, THE LEGISLATURE HAS NOT AUTHORIZED THE COMMISSION TO DO SO

As a general proposition the doctrines of *Res Judicata* and collateral estoppel apply to the decisions of administrative agencies.[7] Both doctrines, however, require that the issue of interest be one that was actually litigated.[8] Moving the Kerr-McGee coal costs from eligible fuel to Electric Plant in Service in Docket No. 18753 was not the result of litigation but rather a compromise and settlement. Because they are inapplicable, the doctrines of *Res Judicata* and collateral estoppel, *could not* bar a Commission review, in this proceeding, of whether the Kerr-McGee coal costs should be returned to eligible fuel. However, even though these doctrines

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[5] TEX. GOV'T. CODE ANN. §§ 2001.144(a)(1).
[6] Direct Testimony of Charlene Thomas, CNP Exh. 4 at 13 of 19.
[7] *Ramirez v. Texas State Bd. of Medical Examiners*, 99 S.W.3d 860, 864 (Tex. App.—Austin 2003, pet. denied) ("both claim-preclusion [*Res Judicata*] and issue-preclusion [collateral estoppel]...apply alike in judicial and administrative-agency contexts..."); Coalition *of Cities for Affordable Utility Rates v. Public Util. Comm'n of Texas*, 798 S.W.2d 560, 562 (Tex. 1990), *cert. denied*, 499 U.S. 983, 111 S.Ct. 1641 (1991).
[8] *Id.* at 563.

could not be applied to prevent the Commission from reopening this issue, there is simply no legislative authority, express or implied, for doing so.

Whether an administrative agency has the power to reconsider an earlier adjudicative order is determined by the statute which vests the agency with administrative power.[9] In the *Coalition of Cities for Affordable Utility Rates*[10] decision, which involved a review of the Commission's attempt to reserve for a later rate case the issue of whether some of the costs of a power plant were reasonable, the Texas Supreme Court emphasized that the PUCT must have specific authority before it may revisit an earlier decision:

> The only legislative authorization for PUC reexamination of an earlier determination concerns the power to revoke or amend a certificate of convenience and necessity under certain circumstances outlined in PURA section 62(a). This section represents a clear delegation of authority for the PUC to reopen a matter previously considered. *The legislature was, thus, quite capable of expressly approving the PUC reexamination of earlier determinations, but chose not to extend this authority to ratemaking*. (emphasis added).

The court distinguished between "historical investment facts," which do not change over time and cannot be revisited once addressed by the Commission, and such things as operating expenses and rate of return, which do change over time and are revisited in calculating rates that apply on a prospective basis only.[11]

Since the *Coalition* decision in 1990, the Legislature has expressly authorized the Commission to revisit several types of prior decisions.[12] However, to date the Legislature has simply not authorized the Commission to revisit prior final orders concerning the FERC

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[9] *Sexton v. Mount Olivet Cemetery Association*, 720 S.W.2d 129, 138 (Tex.Civ.App.—Austin 1986, writ ref'd n.r.e)
[10] 798 S.W.2d at 564.
[11] 798 S.W.2d at 563, fn. 5 and 563.
[12] To suspend, revoke, or amend the registration or certification of certain market participants (PURA § 39.356 and § 17.052(2)); to modify a market power mitigation plan (PURA § 39.156(h)); to update certain transition to competition plans (PURA § 39.402(d)); *See also, Public Utility Comm'n of Texas v. Brazos Electric Power Cooperative, Inc.*, 723 S.W.2d 171, 173 (Tex.Civ.App.—Austin 1987, writ ref'd n.r.e.) ("The Public Utility

accounting treatment of a particular utility's coal contract for a historical time period. It is important to note what is not at issue in the current docket: whether the Commission can alter a prior order *on a prospective basis only*, concerning the accounting treatment of a particular utility's coal contract. Instead, the issue in the current docket is whether the Commission can alter such an order on a retrospective basis, i.e., apply it to the Applicants' historical fuel reconciliation period ending on December 31, 2001.

At first glance this prohibition against revisiting final orders appears to interfere with an agency's ability to revise public policy through the contested case process – a cornerstone of the administrative process. However, as a general proposition, state agencies may change, in subsequent contested cases, statements of policy contained in prior final orders.[13] These general statements of policy are often in the form of "legislative" findings of fact and stand in contrast to "adjudicative" facts which answer the more specific questions of who, what, where, when, how, and why.[14] Adjudicative facts are party-specific and concern things or conditions in the past. Legislative facts, however, do not concern only the immediate parties and are statements of general applicability that help an agency shape law and policy prospectively.

Legislative facts are a primary tool of an agency for formulating law and policy. It is expected that an agency will revise its statements of legislative fact from time to time to reflect changes in policy. Moreover, limiting the practice of changing prior final orders to changing only legislative facts strikes a good balance between the need for regulatory certainty (that party-specific findings will not be disturbed) and the Commission's need to adjust policy in response

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Commission lacks statutory authority or any implied power to review in any judicial capacity its orders which have become final.").

[13] *Ramirez*, 2003 WL 22721659 at 3; *See also*, TEX. GOV'T. CODE ANN. §§ 2003.049(g)(2) ("Notwithstanding Section 2001.058, the commission may change a finding of fact or conclusion of law made by the administrative law judge or vacate or modify an order issued by the administrative law judge only if the commission ...determines that a commission policy or a prior administrative decision on which the administrative law judge relied is incorrect or should be changed.").

to a changing environment. Preserving the sanctity of adjudicative facts will also encourage the settlement of contested cases. Parties are less likely to settle a matter if there is substantial risk that party-specific stipulations will be amended.

The findings in Docket No. 18753 that the Applicant's are requesting the Commission to reverse are adjudicative, and not legislative in nature. The expenses in question are coal-related costs from a specific contract entered into by HL&P only. No other utilities are affected by this contract or by any related findings in Docket No. 18753. Also, the accounting treatment approved by the Commission in Docket 18753 for these expenses is specific to this transaction and affects no other coal contracts or utilities. Furthermore, the Applicants seek to revise the accounting treatment for these expenses for a historical period, and are not seeking revised treatment on a prospective basis. Accordingly, the Commission should not enter findings in this docket concerning the Kerr-McGee coal costs contrary to its related findings in Docket No. 18753.

IN ANY EVENT, APPLICANTS' REQUEST TO REVISIT THE COMMISSION ORDER IN DOCKET NO. 18753 WOULD CONSTITUTE AN IMPERMISSIBLE COLLATERAL ATTACK ON THAT ORDER

If the Legislature has not authorized an administrative agency to revisit an order that has become final and no longer reviewable, then any attempt to modify that order constitutes an impermissible collateral attack.[15] The prohibition against collateral attacks also applies to PUCT final orders.[16] Accordingly, Staff believes that the Applicants' request to make findings contrary

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[14] *Flores v. Employees Retirement System of Texas*, 74 S.W.3d 532, 539 (Tex.App.—Austin 2002, pet. denied); *Texas State Bd. of Medical Examiners v. Dunn*, 2003 WL22721659 at 3 (Tex. App.—Austin 2003, no pet. hist.).

[15] *Corzelius v. Harrell*, 186 S.W. 2d 961, 967 (Tex. 1945); *See also, Entex v. Railroad Commission of Texas*, 18 S.W.3d 858, 862 (Tex.App—Austin 2000, pet. denied) (citing *Public Util. Comm'n v. Brazos Elec. Power Coop., Inc.*, 723 S.W.2d at 173, for the proposition that any review by the PUCT, in a judicial capacity, of its orders that have become final constitutes an unlawful collateral attack).

[16] *Public Utility Comm'n of Texas v. Brazos Electric Cooperative, Inc.*, 723 S.W.2d at 173 ("We agree with the trial court that the Public Utility Commission lacks statutory authority or any implied power to review in any judicial capacity its orders which have become final. In an early case, this Court held that the Railroad Commission was without power to review its own orders. This same rule applies to orders of the Public Utility Commission which have become final, as here.").

to those in Docket No. 18753 is an impermissible collateral attack on that order and should be rejected by the Commission.

C. Are these costs properly recoverable, or in fact already recovered through any other mechanism?

1. Price-To-Beat
2. ECOM
3. UCOS
4. 2004 True-up Proceeding

D. If challenged amounts are not otherwise an eligible fuel expense, is a special circumstances exception warranted under section 25.236(a)(6) of the fuel rule?

III. Imputed Capacity

B. 2. The Fuel Rule

P.U.C. SUBST. R. 25.236(a)(4) specifically excludes demand or capacity costs in purchased power agreements from eligible fuel expenses.[17]

D. Issues relating to the calculations

Staff contends that the appropriate methodology for calculating the capacity component of an energy-only purchased power agreement is one that uses a utility's marginal cost of production calculated using the utility's least-efficient generating unit, which equates to the most expensive energy. This is the same position Staff has taken on this issue in El Paso Electric Company's current fuel reconciliation proceeding.[18] Staff urges the Commission to adopt this methodology.

IV. Out Of Merit Replacement Capacity (OOMC)

A. Nature of the costs

[17] purchased power agreements are accounted for in FERC Account 555 (18 CFR Part 101 (April 1, 1997) under the PUCT fuel rule.

[18] *Application of El Paso Electric Company for Authority to Reconcile Fuel Costs,* Docket No. 26194, Commission Staff's Initial Brief at 11.

1. **Are OOMC costs purchased power expenses?**
2. **Are OOMC costs capacity costs?**
3. **Are OOMC costs redispatch fees?**

Staff contends that OOMC costs are re-dispatch fees. Please see Staff's explanation in Section IV. C, below.

C. Does the fuel rule permit recovery of OOMC cost in eligible fuel expense?

Commission precedent firmly establishes that the expenses referred to as "OOMC costs" in this docket are eligible fuel expenses.

In each of the Price-To-Beat ("PTB") fuel factor cases where the issue of congestion management fees was fully litigated (WTU[19], TXU[20], and CPL[21]) the Commission found that congestion management fees charged by ERCOT were eligible fuel expenses properly recorded in FERC account 565.

In Reliant's PTB fuel factor case[22] the ALJ also found congestion management fees to be properly recorded in FERC account 565 as re-dispatch fees:

> The ALJ finds that congestion management costs are not a phenomenon caused by the new single control area. Transmission congestion could have occurred within a service area prior to deregulation and was controlled through "redispatch." Redispatch is an eligible fuel expense.

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[19] *Application of West Texas Utility Company to Implement the Fuel Factor Component of the Price to Beat Rates* Docket No. 24335 (December 21, 2001) (FOF#42B: "WTU's estimate of $598,000 in expenses for congestion management fees, based on its monthly energy forecast and ERCOT's 7.2 cent per MWh fee, is a reasonable fuel expense, properly recorded in FERC Account 565.").

[20] *Application of TXU Electric Company to Implement Price to Beat Fuel Factor,* Docket No. 24040 (December 21, 2001) (FOF#69: "CMCs [congestion management costs] are not a generally new phenomenon caused by the new single control area. Transmission congestion occurred within service areas prior to restructuring and was controlled through re-dispatch. Costs associated with re-dispatch are eligible fuel expenses appropriate assigned to FERC Account 565.")

[21] *Application of Central Power & Light Company to Implement the Fuel Factor Component of Price to Beat Rates,* Docket No. 24195 (December 21, 2001) (FOF#48: CPL's estimate of $1.724 million in expenses for the Congestion Management Fee, based on CPL's monthly energy forecast and ERCOT's 7.2 cent per MWh fee, is a reasonable fuel expense, properly recorded in FERC Account 565.").

[22] The case settled after the PFD was filed. The Commission approved the settlement agreement without opining on the OOMC issue.

The OOMC costs referred to in this docket are essentially no different than the "congestion management costs" used to estimate future fuel costs in the PTB fuel factor cases. Both are re-dispatch fees. According to Applicants' witness, Adrian Pieniazek:

> The term 're-dispatch' refers to the process of dispatching generation units in a manner that is different than the normal dispatching order. Before single control area operation was implemented, 'redispatching' referred to the process by which integrated utilities dispatched the generation units in their service territory in a manner that was inconsistent with their normal least-cost dispatching. This was done to alleviate congestion for other reasons associated with maintaining system reliability. As detailed above, that is precisely what ERCOT does when it dispatches OOM service in single control area operations. OOMC is a re-dispatch fee. It is related to transmission service, and it is administered by the ISO. [23]

Accordingly, Staff believes that like the congestion management fees in the PTB fuel factor cases, the OOMC costs at issue in this docket are re-dispatch fees and therefore eligible fuel expenses, as a matter of law.

C. If OOMC costs are not otherwise an eligible fuel expense, is a special circumstances exception warranted under section 25.236(a)(6) of the fuel rule?

Staff does not intend to address the issue.

V. Joint Operating Agreement

Staff does not intend to address the issue.

VI. Conclusion and Recommendations

Staff does not intend to address the issue.

[23] Direct Testimony of Adrian Pieniazek, CNP #2 at 6 of 11.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jeffrey T. Pender, staff attorney, certify that a copy of this document was served on all parties of record in this proceeding on December 9, 2003, in the following manner: mail and facsimile transmission.

Jeffrey T. Pender