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PUC DOCKET NO. 27167
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APPLICATION OF FIRST CHOICE	§	**PUBLIC UTILITY COMMISSSION**
POWER, INC. TO INCREASE ITS	§	PUBLIC UTILITY COMMISSION FILING CLERK
PRICE TO BEAT FUEL FACTORS	§	**OF TEXAS**

CITIES' MOTION FOR REHEARING

TO THE PUBLIC UTILITY COMMISSION OF TEXAS:

The Cities of Alvin, Dickinson, Fort Stockton, Friendswood, La Marque, League City, Lewisville, and Texas City ("Cities"), intervenors in the above-named and numbered docket, file this Motion for Rehearing of the Final Order issued by the Public Utility Commission ("Commission") on February 3, 2003. Cities seek rehearing regarding the Final Order's approval of First Choice Power, Inc.'s ("First Choice" or "Company") requested fuel factor. First Choice has failed to fulfill requirements set forth by statute and the Commission's substantive rules to demonstrate that the market price of natural gas and purchased energy used to serve retail customers has significantly increased and that the existing fuel factor is inadequate. Cities seek rehearing on the Commission's decision to prohibit the reimbursement of Cities' reasonably incurred rate case expenses. In support thereof, Cities show as follows:

I. Introduction

The Final Order ignores the purpose of the PTB rate, is inconsistent with PURA, and attributes to the legislature an intent to allow a windfall at ratepayers' expense.[1] The Final Order

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[1] The PTB rate is a regulated rate designed to be a safe harbor for residential and small commercial customers. Representative Wolens, co-sponsor of SB 7, characterized the protection offered by the PTB as a "safe-harbor". *See,* Debate on Tex. SB 7 on the floor of the House, 76th Leg. R.S. (May 20, 1999 Tape 151). The Commission reiterated this fundamental aspect of the PTB statute in its brief to the Court of Appeals regarding Reliant's PTB rulemaking challenge, contending, "But perhaps the most serious flaw in Reliant's argument is its disregard of the other important legislative goal underlying the Price to Beat. Apart from providing a benchmark for new competitors, ***the Legislature intended that the Price to Beat give residential and small business customers a concrete benefit, lowering rates from their previously regulated level and ensuring the availability of those rates as a "safe harbor" for a 5-year period during the transition to competition.*** Brief of Appellee Public Utility Commission of Texas, No. 03-01-00195-CV, August 24, 2001 at 21–22 (emphasis added). Concerned that the primary beneficiaries of deregulation would be those using large amounts of power, the legislature ordered a six-percent rate reduction for residential and small commercial customers and challenged competitors to beat the regulated rate. In so doing, the legislature intended to "protect the public interest during the transition to and in the establishment of a fully competitive electric power industry." PURA § 39.001(a).

floods the PTB safe harbor intended by the legislature and changes the PTB fuel factor adjustment from a tool to prevent affiliated REPs from incurring significant losses to a profit-maximizing mechanism. The Commission's Order allows First Choice to substantially increase the fuel factor (18.58%) without any showing that such an increase is necessary to recover costs to serve customers or prevent a significant loss. This increase immediately follows a 22.69% increase in the fuel factor which means that First Choice's PTB rate has increased 11% in just one year. It is inconceivable that the legislature intended the PTB rate to be so easily manipulated.

The legislature certainly did not intend to permit an increase without a showing that there exists a need for the increase. First Choice did not put on any evidence indicating a need for a rate increase. First Choice refused to identify legitimate fuel costs or demonstrate that loss of revenues would be a problem under the existing PTB fuel factor. The Commission failed to make any findings concerning the adequacy of the existing fuel factor.

Moreover, the Commission erred in failing to require reimbursement of municipal rate case expenses pursuant to PURA § 33.023. Recently, the Austin Court of Appeals rejected the argument that use of the term "electric utility" precludes applicability of PURA to the utility's successor affiliates. Having initially decided that the affiliated REP is an "electric utility" for purposes of §§ 39.202 and 33.023, the PUC errs in failing to comply with that precedent without a rational basis for doing so.

REHEARING POINT NO. 1

THE COMMISSION VIOLATED PURA § 39.202(*l*) AND COMMISSION RULE § 25.41(g)(l) BY FAILING TO REQUIRE FIRST CHOICE TO DEMONSTRATE THAT THE EXISTING FUEL FACTOR DOES NOT ADEQUATELY REFLECT SIGNIFICANT CHANGES IN THE MARKET PRICE OF NATURAL GAS AND PURCHASED ENERGY USED TO SERVE RETAIL CUSTOMERS

A. PURA § 39.202(*l*) And Commission Rule § 25.41(g)(l) Require Evidence Of The Affiliated REP's Price Of Natural Gas And Purchased Power Used To Serve Retail Customers

Under PURA § 39.202(*l*) and Commission Rule § 25.41(g)(l), it is not enough for the affiliated retail electric provider to demonstrate that the market price of natural gas has increased. This information, by itself, means nothing to the affiliated REP. To be eligible for an increase in the price to beat fuel factor, the affiliated retail electric provider must demonstrate, that is, put on evidence, that the existing fuel factor does not adequately reflect changes in the market price of natural gas and purchased power used to serve retail customers. The only way to know if the existing fuel factor adequately reflects changed natural gas and purchased power prices is to determine the price paid by First Choice for natural gas and purchased power to serve its residential and small commercial PTB customers. Armed with this information, the Commission can compare the price used to serve retail customers with the price embedded in the existing fuel factor. Only then can the Commission determine if the existing fuel factor is adequate.

Here, however, the Commission did not require First Choice to put on evidence of its natural gas or purchased energy costs, and instead, ruled that First Choice's fuel costs and revenues are "not relevant" in a PTB fuel factor proceeding.[2] According to the Order, First Choice only demonstrated that the market price of natural gas has, at least temporarily, increased as measured by the NYMEX Henry Hub average ten-day rolling price.[3] No findings were made by the Commission that the existing fuel factor is inadequate and must be increased. The Commission admits that the Order does not take into consideration First Choice's cost to serve retail customers and that it limited review to the "increase in the market price of natural gas."[4]

By incorporating the phrase "used to serve retail customers," the statute focuses the relevant inquiry upon costs borne by the affiliated REP in purchasing natural gas and purchased energy in the market. First Choice did not present any evidence that First Choice purchases its entire PTB power needs on the daily spot market or that First Choice's purchased energy contracts correlated with the price of natural gas. However, the Final Order's approval of the

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2 Order at 2-3; FOF 11; Order at 4-5, COL 6-7.
3 Order at 2; FOF 7-10.
4 PFD at 3.

NYMEX percentage increase to the entire PTB fuel factor that First Choice seeks in this proceeding necessarily assumes that both conditions must be true. A consistent reading of the statute holds that once the requisite showing of inadequacy has been made, *then* the statute permits the Commission to adjust the PTB fuel factor, presumably to cease current under-recoveries. The Commission's Order adopting the PTB rule mirrors this understanding, concluding that PURA § 39.202(*l*) is intended to protect against the affiliated REP "incurring significant losses."[5] Similarly, the Commission's Order adopting the PTB rule clearly contemplated that the fuel factor adjustment would serve to protect affiliated REPs from incurring substantial losses.[6] The Commission's interpretation of § 39.202(*l*) leads to absurd results -- large increases to the safe-harbor price to beat rate without ***any*** showing that a rate increase is necessary to recover power costs used to serve retail customers. In other words, the price paid by First Choice for natural gas and purchased power may be significantly less than the prices included in the existing fuel factor. If that is the case, any increase to the existing factor only exacerbates a windfall to First Choice.

The Commission's failure to implement that portion of the statute and Commission rule that requires a demonstration that the existing fuel factor is inadequate is error. In construing statutes, the objective is to ascertain and enforce legislative intent not to defeat, nullify, or thwart it.[7] To determine legislative intent, the reviewing court will look to the language in the statute as well as the history and purpose of the statute.[8] The entire act must be considered and given

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5 Order Adopting PTB Rule at 64.

6 Order Adopting PTB Rule at 64. "If the threshold is set too high, affiliated REPs will be unable to meet it without first incurring significant losses. The commission believes such a result is contrary to the intent of PURA § 39.202." *See also* Order at 53. "None of the proposals considered by the Commission should result in Texas experiencing the problems experienced in California over the past 12 months. . . the monthly pass-through of average spot market prices (as occurred for San Diego Gas and Electric customers) cannot occur in Texas while there is price to beat protection. . . Conversely, under no circumstance is the price to beat the "hard" rate cap under which PG&E and Southern California Electric were forced to operate."

7 *City of Mason v. West Texas Utilities Company*, 237 S.W.2d 273, 278 (Tex. 1951); see also, *Gilbert v. El Paso County Hospital District*, 38 S.W.3d 85 (Tex. 2001) (essential task is determining legislative intent); *Southwestern Bell Telephone Company v. Public Utility Commission of Texas*, 31 S.W.3d 631, 637 (Tex. App.--Austin 2000, pet. granted).

8 *Cash America Intern, Inc. v. Bennet*, 35 S.W.3d 12, 16 (Tex. 2000); *Badouh v. Hale*, 22 S.W.3d 392, 395 (Tex. 2000).

effect.[9] PURA § 39.202(*l*) was not intended to increase a fuel factor that is already adequate. Increasing a fuel factor that already recovers fuel costs also works an absurd and illogical remedy for consumers to obtain competitive benefits by "increasing the (price-to-beat) to a level that exceeds the rate that these customers would have paid with continued deregulation."[10] An interpretation of a statute that leads to inconsistent or absurd results must be rejected and a court should not attribute to the legislature an intention to work an injustice.[11] Cities' interpretation of the statute, that First Choice must provide evidence demonstrating that its PTB fuel factor inadequately recovers the market price of natural gas used to serve its retail customers, gives effect to every word of the statute and leads to consistent and reasonable results. The Commission has illegally failed to give effect to every word in § 39.202(*l*) and in Commission Rule § 25.41(g)(l) and, in so doing, has authorized a substantial windfall to First Choice. The Commission's failure to investigate the adequacy of the existing fuel factors violates PURA § 39.202(*l*) and Commission Rule § 25.41(g)(l). The Commission's failure to comply with the order establishing the PTB rule is error. Upon rehearing, the Commission should apply that part of the statute and rule requiring First Choice to demonstrate that the existing fuel factor is inadequate.

B. The Commission's Decision Fails To Accomplish The Purpose Of PURA § 39.202(*l*) And Authorizes A Windfall For First Choice

The Commission's failure to require evidence that the existing fuel factor fails to recover the REPs' costs contradicts the very purpose of the price to beat rate. The Commission's decision fails to take into account that the PTB rate is a regulated rate which can only be increased if necessary and in accordance with the statute. The price to beat rate is to provide smaller electric users, residential and small commercial customers, a rate decrease and is to serve

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[9] *Continental Casualty Insurance Company v. Functional Restoration Associates*, 19 S.W.3d 393, 398 (Tex. 2000); *SWB v. PUC*, at 640.

[10] *Reliant Inc. v. Public Utility Comm'n of Texas*, 62 S.W.3d 833, 842 (Tex.App.-Austin, 2001, no pet.).

[11] *Cornyn v. Universe Life Insurance Company*, 988 S.W.2d 376, 379 (Tex.App.-Austin 1999, pet. denied); *Southwestern Bell Tel. Co. v. Public Utility Comm'n of Texas*, 888 S.W.2d 921 (Tex.App.-Austin 1994, writ denied).

as a safe-harbor for these less sophisticated customers during the confusing, complicated, and chaotic transition to competition. The unnecessary rate increase granted by the Commission floods the safe-harbor designed to protect those customers needing protection the most. As a result of the Commission's decision, an average residential customer now pays more for electricity than under regulation, assuming the same or similar price of natural gas.

REHEARING POINT NO. 2

THE COMMISSION ERRED IN FAILING TO MAKE FINDINGS CONCERNING THE ADEQUACY OF THE EXISTING FUEL FACTOR

First Choice failed to put on evidence concerning the adequacy of its existing fuel factor. Instead, First Choice simply showed that natural gas prices increased.[12] The Commission did not require First Choice to put on evidence of the costs it incurred purchasing natural gas or purchased energy to serve retail customers.[13] First Choice did not even attempt to establish that the existing fuel factor would lead to lost revenues. As a result, there is no evidence that the existing fuel is, in any way, inadequate. All First Choice has shown is that for a particular point in time, natural gas prices have, at least temporarily, increased. Whether such increase in generic natural gas prices adversely affected First Choice was not demonstrated. First Choice does not claim and did not show that the price adopted by the Commission is the price paid by First Choice to serve retail customers. Indeed, the Order does not reflect that First Choice demonstrated the inadequacy of the existing fuel factors. The Commission is required to make findings supporting conclusions made on contested issues.[14] The Commission made no such findings.

REHEARING POINT NO. 3

THE COMMISSION VIOLATED PURA § 33.023 AND COMMISSION PRECEDENT BY FAILING TO REQUIRE FIRST CHOICE TO REIMBURSE CITIES FOR REASONABLE RATE CASE EXPENSES INCURRED IN THIS PROCEEDING

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[12] Order at 2; FOF 8-10.
[13] Order at 2-3; FOF 11.
[14] APA § 2001.141.

Cities are entitled to the reimbursement of reasonable rate case expenses incurred in the prosecution of PTB fuel factor proceedings. The Commission, in Docket Nos. 23950, 24195, and 24335, has already conclusively addressed this issue. In Docket No. 23950, Reliant contested its responsibility to reimburse cities' expenses. The Administrative Law Judge issued Order Nos. 8 and 9 affirming cities' right to recover rate case expenses and Reliant's obligation to reimburse the expenses. The ALJ's order specifically found that the PTB fuel factor proceedings were "ratemaking proceedings"[15] and that the affiliated REP was to be considered an "electric utility" for purposes of the PTB fuel factor. Reliant appealed the decision to the Commission. Reliant's appeal, challenging the determination that the affiliated REP was to be considered an "electric utility" for purposes of the PTB statute and § 33.023, was rejected by the Commission. In Docket Nos. 24195 and 24335, the Commission's Final Order concludes, as a matter of law, that:

> This fuel factor case will change the compensation ***a utility*** can receive from its customers and is a ratemaking proceeding pursuant to Southwestern Public Service Co. v. Public Utility Comm. of Texas, 962 S.W.2d 207, 218-220 (Tex. App.-Austin 1998, pet. denied). Cities should recover all reasonable expenses of litigating this case as permitted under PURA § 33.023 for ratemaking proceedings.[16]

The Commission's rate case expense decisions in Docket Nos. 23950, 24195 and 24335 regarding reimbursement of rate case expenses were not appealed and are final. These cases serve as precedent upon which parties are entitled to rely. It is a violation of due process for an agency to fail to follow precedent without a rational basis for doing so. That is the holding of the Austin Court of Appeals in *Flores v. Employees Retirement System of Texas*, 74 S.W.3d 532, 543-545 (Tex. App.-Austin 2002, pet. filed) and *Langford v. Employees Retirement System of Texas*, 73 S.W.3d 560, 566 (Tex. App.-Austin 2002, pet filed). In those cases, an order of the

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[15] In making the determination that the PTB fuel factor proceeding was a ratemaking proceeding for purposes of PURA § 33.023, the ALJ relied upon *Southwestern Public Service Co. v. Public Utility Comm'n*, 962 S.W.2d 207 (Tex.App.-Austin 1998, pet. denied).

[16] Docket No. 24335, Final Order at 27, COLs 8 and 9; Docket No. 24195, Final Order at COL 11, emphasis added.

Retirement System Board was reversed when the board failed to "give notice before the hearing of its intention not follow previous decisions and failing to adequately explain the reasoning for its change in position."[17]

The Commission's Final Order claims that the affiliated REP is not an electric utility for purposes of this proceeding, and thus cannot be ordered to reimburse Cities' rate case expenses.[18] However, in Docket No. 23950, and others, the Commission concluded that the affiliated REP that charges the PTB is to be considered an electric utility for purposes of the PTB fuel factor proceedings. The Commission specifically held that the PTB fuel factor proceeding was a ratemaking proceeding because "it will establish the fuel prices the affiliate REP will charge customers after January 1, 2002."[19]

The Commission's conclusion that PURA § 33.023 is inapplicable because an affiliated REP is not any electric utility[20] leads to absurd results. The Commission has recognized that public policy supports reimbursement of municipalities for participation in rate case proceedings. The purpose of PURA § 33.023 is to encourage municipalities to participate in ratemaking proceedings to protect the utility's customers. This case involves substantially increased rates to a vast majority of citizens and businesses located within city limits. The Austin Court of Appeals recently rejected AEP's argument that affiliated generation power companies and affiliated REPs need not mitigate stranded cost because the statute requires the "electric utility" to mitigate stranded costs.[21] The Court noted that the legislature "sometimes used the term 'electric utility' to refer to an integrated utility's successor affiliates."[22] The Court of Appeals' interpretation is the same as the Commission's previous interpretation that in PTB fuel factor cases the "electric utility" refers to the affiliated REP.

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17 *Flores* at 545.

18 Order at 5; COL 13.

19 Docket No. 23950, *Petition of Reliant Energy, Inc. to Establish Price to Beat Fuel Factor and Request for Good Cause Exception to Subst. R. 25.41*, Order No. 8 at 3.

20 Order at 5; COL 13.

21 *Reliant Energy, Incorporated and American Electric Power Company v. Public Utility Commission of Texas*, No. 03-02-00001-CV, February 6, 2003.

22 *Id.* at 12.

The statute authorizes the recovery of municipal rate case expenses for cities "participating in or conducting ***a ratemaking proceeding***."[23] The PTB statute specifically and unequivocally requires that an affiliated REP "shall make available to residential and small commercial customers...***rates*** that, on a bundled basis, are six percent lower...".[24] The statute further mandates that "These ***rates*** on a bundled basis shall be known as the "price to beat"...except that the "price to beat" for a utility is the ***rate*** in effect as a result of a settlement approved by the commission...".[25] Commission Substantive Rule 25.41, implementing PURA § 39.202, similarly characterizes the PTB as a "rate" throughout the entirety of the rule.[26]

The overarching mandate of statutory construction is to give effect to the intention of the legislature.[27] In interpreting the statute, the legislature is presumed to have used every word intentionally with a meaning and purpose.[28] Therefore, the legislature's use of the word "rate" within PURA § 39.202 is presumed to be intentional and must be given deference. Furthermore, the language in the statute is presumed to be deliberately selected and used with care.[29] Absent clear indication of a contrary intention by the legislature, the PTB "rate" should be presumed to fall within this definition. Stated another way, if the legislature had intended to exclude the PTB rate from the statutory definition of "rate", then § 39.202 would have been worded differently so as not to describe the PTB as a "rate" to be charged by the affiliated REP.

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23 PURA § 33.023 (emphasis added).

24 § 39.202(a) (emphasis added).

25 *Id.*

26 See e.g. § 25.41(e)(1)("All current and future residential customers, as defined by this section, shall be eligible for the ***price to beat rate***(s)..."); § 25.41(e)(2)(B)("All small commercial customers, as defined by this section, shall be eligible for the ***price to beat rate***(s)..."); § 25.41(f)(1)(A)("Residential: A ***price to beat rate*** shall be calculated..."); § 25.41(f)(1)(A)(i)-(v); § 25.41(f)(1)(B)(i)-(v); § 25.41(f)(1)(C)("An electric utility...shall file...price to beat tariffs and supporting workpapers for the ***price to beat rates***...At the time of this filing, the affiliated REP may request that a ***price to beat rate*** not be developed from a particular rate of service rider along with justification for the request."). Reliant was an active participant in the PUC Project No. 21409, the rulemaking to develop § 25.41. No party contested the rule's characterization of the Price To Beat as a "rate".

27 *Citizens Bank of Bryan v. First State Bank of Hearne*, 580 S.W.2d 344, 348 (Tex. 1979).

28 *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981).

29 *Railroad Commission of Texas v. Olin Corp.*, 690 S.W.2d 628 at 631 (Tex.App.-Austin 1985).

There is no rational basis for failing to apply the Commission's determination in Docket Nos. 23950, 24195, and 24335 to this proceeding. Accordingly, Cities request that, on rehearing, the Commission find Cities' rate cases expenses to be reasonable and should be reimbursed by First Choice.

PRAYER FOR RELIEF

Cities request that the Commission grant this Motion for Rehearing, and on rehearing deny First Choice's application for want of proof and find Cities' rate case expenses to be reasonable and order First Choice to reimburse Cities for such costs.

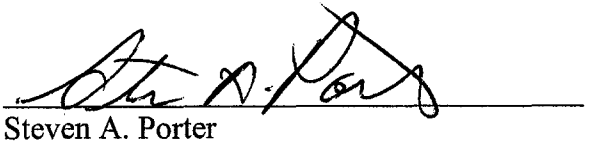
Respectfully submitted,

LLOYD, GOSSELINK, BLEVINS,
ROCHELLE, BALDWIN & TOWNSEND, P.C.
P. O. Box 1725
Austin, Texas 78767
(512) 322-5800
(512) 472-0532 (Fax)

By: 
STEVEN A. PORTER
State Bar No. 16150700

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was transmitted by fax, email, and/or regular, first class mail on this 14th day of February 2003 to the parties of record.


Steven A. Porter