

Control Number: 27576



Item Number: 323

Addendum StartPage: 0

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APPLICATION OF TEXAS-NEW  
MEXICO POWER COMPANY  
FOR RECONCILIATION OF  
FUEL COSTS

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PUBLIC UTILITY COMMISSION  
FILING CLERK  
OF TEXAS

**STAFF'S PROPOSED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

NOW COMES Staff of the Public Utility Commission of Texas ("Commission Staff" or "Staff"), representing the public interest, in the above titled and numbered cause, to submit these Proposed Findings of Fact and Conclusions of Law. Staff's failure to submit proposed findings or conclusions regarding certain issues in this proceeding should not be construed as Staff's agreement with any other party in this proceeding.

**I. Findings of Fact**

***Jurisdiction, Notice, and Procedural History***

1. Texas-New Mexico Power Company (TNMP) is an investor-owned utility that provided retail electric service within the State of Texas through the date of customer choice as that term is defined in PURA<sup>1</sup> § 31.002(4).
2. On April 1, 2003, TNMP filed an application with the Public Utility Commission of Texas (Commission) for reconciliation of fuel revenues and expenses for the period of January 1, 2000, through the meter read date during January 2002 pursuant to P.U.C. SUBST. R. 25.236(g).
3. On April 18, 2003, Commission Staff found TNMP's insufficient because the application lacked certain information and because the application did not clearly state the method of service for some forms of the required notice. TNMP subsequently supplemented its application with the additional information.

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1. Public Utility Regulatory Act, TEX. UTIL. CODE ANN. §§ 11.001-64.158 (West 1998 & Supp. 2003).

4. On April 21, 2003, the Commission granted the motions to intervene filed by the Texas Industrial Energy Consumers (TIEC), the City of Lewisville, the State of Texas, and the Office of Public Utility Counsel (OPUC).
5. On April 25, 2003, the Commission referred TNMP's application to the State Office of Administrative Hearings (SOAH).
6. On May 6, 2003, the Administrative Law Judge (ALJ) memorialized the prehearing conference convened at SOAH on May 1, 2003; deemed TNMP's application sufficient; granted the motions to intervene by City of Dickinson and Texas City; granted a good cause waiver to approve a procedural schedule that exceeded the six month regulatory deadline in P.U.C. SUBST. R. 25.236(g); and provided notice of evidentiary hearing to all parties.
7. On May 14, 2003, the ALJ granted the City of Friendswood's and League City's motions to intervene.
8. On May 30, 2003, the Commission approved the preliminary order.
9. On June 9, 2003, the ALJ granted the motions to intervene filed by the Cities of Alvin, La Marque, and Fort Stockton.
10. On July 2, 2003, TNMP filed its first revision to its application to correct typographical errors and "input errors."
11. On July 2, 2003, TNMP filed its proof of notice.
12. On July 2, 2003, Staff filed revised comments on the sufficiency of TNMP's application, stating that Schedule FR-7 had been found incomplete. On July 21, 2003, the ALJ ordered TNMP to apprise the ALJ of the status of completion of FR-7. TNMP responded on July 23, 2003. TNMP filed the amended Schedule FR-7 on July 30, 2003.
13. On July 24, 2003, Cities moved to declassify certain documents. On July 31, 2003, Twin Oaks Power, LP (Twin Oaks), filed a "limited appearance" and objected to Cities' Motion to declassify certain documents. On August 8, 2003, Walnut Creek Mining Company (WCMC) also filed a "limited appearance" and objections to the Motion to declassify.

14. On August 5, 2003, TNMP filed its second revision to its application to correct typographical and pagination errors.
15. On August 15, 2003, Cities moved to compel production of certain documents for *in camera* inspection to determine whether TNMP's claims of privilege with respect to those documents had merit.
16. On August 18, 2003, the ALJ granted Cities' Motion to declassify certain documents.
17. On August 19, 2003, the ALJ granted Cities' Motion to compel production of documents for *in camera* inspection.
18. As noticed, the ALJs conducted a hearing on the merits on August 20 through 22, 2003.
19. On September 2, 2003, the ALJ adopted the agreement reached between Cities and Twin Oaks to renew the confidential and highly sensitive designation for documents declassified by the August 18, 2003, Order and to permit disclosure of certain information contained in those documents for purposes of this proceeding.

***Uncontested Issues***

20. TNMP collected fuel-related revenues pursuant to the fuel factors and surcharges in effect during the reconciliation period.
21. TNMP made one payment to an affiliate for purchased power.
22. TNMP retained 10 percent of the margins from wholesale non-firm sales during the reconciliation period.

***Stipulated Issues***

23. The parties have agreed that the issue of allocation of over- or under-recovery by rate class, including interest, should be deferred to the stranded cost true-up proceeding to be conducted pursuant to PURA §§ 39.202(c) and 39.262, consistent with prior Commission order in another final fuel reconciliation proceeding.<sup>2</sup>

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2. *Application of West Texas Utilities for Authority to Reconcile Fuel Costs*, PUC Docket No. 26000, Preliminary Order at 4 (July 15, 2002) ("The Commission finds that a final determination should not be made in this proceeding of customer class allocations of any under-recovered fuel

24. The parties have agreed that issue of calculation of post-reconciliation interest should be deferred to the stranded cost true-up proceeding to be conducted pursuant to PURA §§ 39.202(c) and 39.262.

***Walnut Creek Lignite Supply Contract***

25. TNMP obtained solid fossil fuel for its generator TNP One through a long-term contract for Texas lignite with WCMC.
26. The contract with WCMC contained a provision that permitted the parties to redetermine the price of the lignite once every five years. Under the contract, a party could request price redetermination; a period of negotiation was to follow the request at the end of which, if the parties had not reached an agreement, the parties could proceed to arbitration to resolve the price redetermination contest.
27. In 1999, the parties began negotiating a possible price reduction, in preparation for the 2000 price redetermination period contemplated in the contract.
28. In May 2000, WCMC offered to reduce the price of lignite in exchange for concessions by TNMP: that it waive its right to perform an annual test burn for five years and that it allow WCMC to provide lignite from a new seam, the "Twin Oaks reserves."
29. TNMP analyzed WCMC's offer assuming that it would prevail the maximum extent possible were the price redetermination to proceed to arbitration and assuming that it would obtain the maximum price reduction available under the contract during the next price redetermination period, in 2005.
30. On May 31, 2000, TNMP rejected WCMC's offer and informed WCMC that it would request price redetermination pursuant to the contract and begin testing alternative fuel.

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balance associated with WTU's ERCOT service area. As observed by the other parties, any findings would be subject to revision in the true-up proceeding.").

31. TNMP and WCMC were unable to negotiate a price reduction during the negotiation period mandated by the contract, and the parties arbitrated TNMP's price redetermination request.
32. TNMP's price redetermination request was not successful, and the price was not reduced.
33. During the reconciliation period, the contract permitted TNMP to purchase 540,000 Dth of alternative fuel for testing purposes.
34. For the relevant time period during the reconciliation, petroleum coke, an alternative fuel was less expensive than the WCMC Texas lignite under the contract.
35. Although petroleum coke was less expensive than the WCMC Texas lignite, TNMP bought and burned less than its allotted 540,000 Dth.
36. During the reconciliation period, TNMP bought 518,766 Dth of western coal which was, during the relevant time period, more expensive than the WCMC Texas lignite.
37. TNMP had successfully burned western coal in TNP One in the past.
38. The most significant expense associated with the price of western coal was a fixed cost: the fee for rail transport. The remaining variable costs for burning western coal were insignificant portions of the overall cost of burning.
39. At the time TNMP purchased the western coal, TNMP would have been able to rely on expert consultants to estimate the total cost of burning the western coal.
40. Although TNMP bought the western coal purportedly for testing purposes, a test burn was unnecessary.

***TNMP/Constellation Power Supply and Service Agreement***

Staff did not address this issue.

***Panda Paris Power Contract—O&M Expense as Eligible Fuel Expense***

Staff did not address this issue.

***ERCOT Charges as Eligible Fuel Expense***

Staff did not address this issue.

### ***Allocation of Costs in January 2002***

Staff did not address this issue.

## **II. Conclusions of Law**

1. TNMP is a public utility under the terms of PURA § 31.002(1).
2. The Commission has jurisdiction in this docket under PURA §§ 14.001 and 36.203, and P.U.C. SUBST. R. 25.236.
3. SOAH has jurisdiction over matters related to conduct of the hearing and preparation of a proposal for decision in this proceeding, pursuant to PURA § 14.052 and Texas Government Code § 2003.049.
4. TNMP provided notice of this proceeding in compliance with P.U.C. SUBST. R. 25.235(b).
5. TNMP accurately accounted for the fuel-related revenues collected pursuant to the fuel factors and surcharges in effect during the reconciliation period.
6. TNMP's payment to an affiliate for purchased power met the statutory standard necessary for recovery from its customers.
7. TNMP recorded revenues and expenses from off-system sales in a manner consistent with the P.U.C. SUBST. R. 25.236(a) and Commission orders.
8. TNMP is entitled to retain 10 percent of the margins from off-system sales as it meets the requirements of P.U.C. SUBST. R. 25.236(a)(8).
9. The Cities' rate case expenses are reasonable and suitable for recovery.
10. Good cause exists to extend the procedural schedule beyond the six month deadline specified in P.U.C. SUBST. R. 25.236(g).
11. TNMP failed to meet its burden of proof under P.U.C. SUBST. R. 25.236(d)(1) to prove that all of its eligible fuel expenses incurred pursuant to and in association with the WCMC lignite supply contract were reasonable and necessary expenses incurred to provide reliable electric service to TNMP's retail customers.
12. TNMP's rejection of WCMC's price reduction offer in May 2000, based on unreasonable assumptions about the likelihood of success during

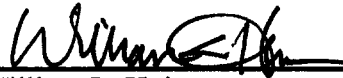
arbitration and during the 2005 price redetermination period, was imprudent.

13. TNMP's failure to purchase the full amount of its allotted alternative fuel was imprudent because the alternative fuel was less expensive than the WCMC Texas lignite purchased under that contract.
14. TNMP's purchase of western coal for a test burn was imprudent because a test burn was unnecessary and because western coal was, at that time, more expensive than WCMC Texas lignite.
15. TNMP failed to show that its management of the WCMC lignite supply contract was reasonable and prudent in that it rejected WCMC's offer to reduce the price of lignite, it failed to purchase its allotted amount of less expensive petroleum coke, and it purchased the more expensive western coal unnecessarily.

Respectfully submitted,

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Division

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## CERTIFICATE OF SERVICE

I certify that a copy of this document was served on all parties of record by first class U.S. mail, postage pre-paid on this date, September 11, 2003, in accordance with P.U.C. Procedural Rule 22.74.

  
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William L. Huie