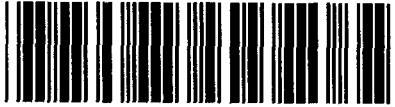




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APPLICATION OF FIRST CHOICE
POWER, INC. TO INCREASE ITS
PRICE TO BEAT FUEL FACTORS

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BEFORE THE PUBLIC UTILITY COMMISSION
PUBLIC UTILITY COMMISSION
CLERK
COMMISSION OF TEXAS

**FIRST CHOICE POWER'S RESPONSE TO
OFFICE OF PUBLIC UTILITY COUNSEL'S
LATE-FILED MOTION TO INTERVENE
AND LATE-FILED STATEMENT OF POSITION**

TO THE HONORABLE PUBLIC UTILITY COMMISSION OF TEXAS:

COMES NOW, First Choice Power (First Choice), and files this response to the Office of Public Utility Counsel's ("OPC") late-filed Motion to Intervene and late-filed Statement of Position ("Statement") and respectfully shows as follows.

I.

OPC states that it only became aware of this proceeding on June 22, 2004. First Choice served notice of this application to increase its price to beat ("PTB") fuel factors on OPC and all other parties that participated in First Choice's last PTB fuel factor proceeding, PUC Docket No. 27511 via first class U.S. mail on May 28, 2004. Between June 1, 2004 and June 4, 2004, First Choice also published notice of this filing in newspapers having general circulation in areas where First Choice provides retail electric service under its price to beat tariff. Proof of these publications was filed in this docket on June 18, 2004. Additionally, First Choice served a copy of its Proposed Findings of Fact and Conclusions of Law to OPC via facsimile on June 18, 2004. Notwithstanding the fact that First Choice gave OPC proper notice of this proceeding, First Choice has no objection to the Commission considering and addressing OPC's Statement.

II.

OPC argues in its Statement that, pursuant to PURA §39.202(l), First Choice must show that its existing fuel factors are inadequate considering significant changes in the market prices of natural gas and purchased energy it pays to serve its retail customers, and that First Choice must present evidence of this fact. First Choice's actual costs and revenues used to serve PTB customers are irrelevant to this proceeding under PURA §39.202(l), P.U.C. SUBST. R. 25.41(g), the Commission's established precedent in *Application of First Choice Power, Inc. to Increase its Price to Beat Fuel Factor*, Docket No. 25885, Order (Aug. 26, 2002), and the Texas Third Court of Appeals ruling in *State of Texas v. Public Utility Commission of Texas*, No. 03-03-00239-CV (Tex. App.---Austin March 11, 2004, no pet. h.). The Third Court of Appeals held that the Commission's rule on PTB fuel factor adjustments, P.U.C. SUBST. R. 25.41, is valid, and does not contravene specific statutory language. In addition, as stated in the Proposed Order in this proceeding, the volatility of the gas market is not a new circumstance that would warrant a good cause exception to make First Choice's fuel factor increase only temporary. The Commission has already rejected this notion in Project No. 21409 and as such, OPC's position should be denied.

WHEREFORE, First Choice Power, respectfully requests that the Commission enter a final order adopting the Proposed Order filed on June 25, 2004, and for such other and further relief to which it is justly entitled.

Respectfully submitted,



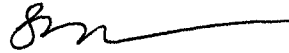
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**ATTORNEYS FOR FIRST CHOICE
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CERTIFICATE OF SERVICE

Counsel for First Choice Power certifies that a copy of this document was served on all parties of record in this proceeding on this 25th day of June, 2004, by hand delivery, facsimile, or United States mail, postage pre-paid.



Counsel