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APPLICATION OF TXU ENERGY  
RETAIL COMPANY TO INCREASE  
PRICE TO BEAT FUEL FACTORS

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

**TXU ENERGY RETAIL COMPANY'S OBJECTIONS  
TO OFFICE OF PUBLIC UTILITY COUNSEL'S REQUEST TO ADMIT**

**TO THE HONORABLE LILO D. POMERLEAU, ADMINISTRATIVE LAW JUDGE:**

COMES NOW TXU Energy Retail Company ("TXU Energy") and files this its Objections to Office of Public Utility Counsel's Request to Admit, and would respectfully show the following:

**I. INTRODUCTION**

TXU Energy objects to requested admissions 3-7 on the basis of relevance. Tex. R. Civ. P. 192.3(a); Commission Procedural Rule 22.141(a). Information is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tex. R. Evid. 401. Under Substantive Rule 25.41(g) ("PTB Rule"), the scope of a price to beat ("PTB") fuel factor adjustment proceeding is limited. The limited nature of the showing required to modify the PTB fuel factors – a 5% change in NYMEX gas price futures – was recently upheld in *State of Texas v. Public Utility Commission of Texas*, 131 S.W.3d 314 (Tex. App. – Austin 2004, pet. filed). The Commission has repeatedly held that information beyond the NYMEX price of gas is not relevant, as recently as last month in Docket No. 29516, *Application of TXU Energy Retail Company to Increase Price to Beat Fuel Factors*, Order at 3-4 (Findings of Fact Nos. 12-19) and 5 (Conclusions of Law Nos. 5-6 and 8-9). As will be detailed below, the admissions OPC seeks to obtain involve information that is not relevant to this proceeding and those requested admissions are thus improper as being outside the scope of permissible discovery.

**II. OBJECTIONS TO SPECIFIC REQUESTED ADMISSIONS**

**(3) TXU has acquired contract(s) for purchases of power which have fixed rate terms for all or part of the contract pricing.**

In attacking the PTB Rule, the State of Texas, Office of Public Utility Counsel ("OPC") and the City of Houston (jointly, "Appellants") advanced several contentions, one of which was

that:

an AREP's price to beat must be based on that AREP's actual costs of purchased energy because the statute requires an AREP to prove that its own fuel factor is inadequate to reflect market changes. Appellants contend that the legislature thereby meant to require an individualized showing rather than an adjustment based on a broad market index.

131 S.W.3d at 322. The theory that the statute requires this individualized showing based on the AREP's actual contracts was rejected by the Austin Court. 131 S.W.3d at 324-25. As the Commission has concluded:

5. TXU Energy's actual costs and revenues used to serve PTB customers are not relevant to this proceeding under PURA § 39.202(l), P.U.C. SUBST. R. 25.41(g), and the Commission's established precedent in *Application of TXU Retail Energy Company to Increase its Price to Beat Fuel Factors*, Docket No. 28191, Final Order (August 25, 2003), all of which look only to the market price of natural gas and purchased energy as determined by the NYMEX Henry Hub index.

Docket No. 29516, Order at 5 (Conclusion of Law No. 5). The requested admission goes to the types of purchased power contracts TXU Energy has or has had in the past, and all such information about TXU Energy's actual costs – including the contracts TXU Energy has – is not relevant.

**(4) TXU admits that the facts set out in the attached news article relating to TXU's Corporate plans to increase its PTB fuel factors are true.**

**(5) TXU admits that TXU's Corporate CEO John Wilder stated that TXU's plan to seek PTB fuel factor increases is to raise TXU's margins toward 25 to 30%.**

These requested admissions go to the impact of the proposed PTB fuel factor increase on TXU Energy's margins or profits. As detailed above, the Commission concluded that information as to actual costs and revenues is not relevant. In other words, the profits, if any, TXU Energy is earning are not relevant to whether a PTB fuel factor adjustment request meets the statutory standard. Again, the Austin Court considered attacks against the PTB Rule on the basis that:

rule 25.41 contravenes the legislative intent to promote competition in order to lower rates because the rule improperly permits electricity rates to rise more than the AREP's actual cost of obtaining that power.

131 S.W.3d at 322. The Court rejected this argument. 131 S.W.3d at 324-25. In addition, in responding to the argument that the Commission had not provided a reasoned justification for the PTB Rule, the issue of so-called "windfall profits" was again considered by the Court. The

Court held that the Commission had adequately summarized Appellants' arguments, "including the concern that tying the fuel factor to market rates rather than the AREP's actual fuel costs would lavish windfall profits on the AREPs." 131 S.W.3d at 330. The Court also held that the Commission had adequately explained why it had rejected that contention. 131 S.W.3d at 331. The Court explicitly stated that, under the Commission's logic – which the Court upheld – "the AREPs' costs, losses, or profits are irrelevant." *Id.* The Court of Appeals has held that information as to an AREP's profits "are irrelevant" under the PTB Rule, and OPC's requested admissions relating to TXU Energy's profits or margins are thus clearly not relevant to this proceeding.

**(6) TXU is required to provide its PTB customers an electricity facts label.**

**(7) The attached Ex. B is TXU's electricity facts label.**

It is not clear exactly what portion of TXU Energy's Electricity Facts Label that OPC thinks is relevant. Assuming that the information OPC is interested in is the sources of power generation TXU Energy uses to serve its customers, then this again is an issue that the Commission and the Austin Court of Appeals have both held is not relevant. The concept that the PTB fuel factor adjustment should apply only to some gas-generation portion of the fuel factors has been repeatedly rejected. *See, e.g.,* Docket No. 29516, Order at 5 (Conclusion of Law No. 9); Project No. 21409, *Rulemaking Relating to Price to Beat*, Order at 59. This issue was also raised in the appeal of the PTB Rule, with the Court stating that one of Appellants' complaints was that:

"the exclusive use of the NYMEX natural gas index ignores the market price of purchased energy generated by coal, nuclear, and other sources.... They complain that the formulaic use of the NYMEX natural gas index improperly permits AREPs to obtain an increase in their fuel factor and price to beat, even if the price they pay for electricity has not increased (due, for example, to lower-than-market, long-term contracts), and even if they do not rely on natural gas for electricity generation.

131 S.W.3d at 322. This contention was likewise rejected by the Austin Court. Thus, information as to TXU Energy's sources of power generation is not relevant. The PTB Rule looks only to the market price of natural gas.

### **III. CONCLUSION AND PRAYER**


TXU Energy appreciates OPC's need to maintain its legal positions while its PTB Rule appeal is pending before the Supreme Court and the initial round of PTB adjustment cases is

pending before the Austin Court of Appeals. However, every Commission and court decision in those cases has rejected all challenges to the PTB Rule, and the limited scope of the PTB fuel factor adjustment proceedings held under that Rule has repeatedly been affirmed. The admissions OPC seeks involve information that is not relevant to this proceeding, and thus is not subject to discovery. Further, TXU Energy would note that OPC's appellate points are legal in nature, and that OPC can maintain its legal positions in this case without obtaining such information.

WHEREFORE, TXU Energy prays that OPC's requested admissions 3-7 be found to involve information that is not relevant to this proceeding, that these Objections be granted, and that TXU Energy be relieved of the obligation of having to respond to OPC's requested admissions 3-7.

**Respectfully submitted,**

**TXU LEGAL**

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**ATTORNEY FOR**  
**TXU Energy Retail Company**

**CERTIFICATE OF SERVICE**

It is hereby certified that a copy of the foregoing has been hand delivered or sent via first class United States mail, postage prepaid, to all parties of record in these proceedings on this the 24<sup>th</sup> day of June, 2004.

