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PUC DOCKET NO. 32289

JOINT PETITION OF EL PASO ELECTRIC COMPANY AND THE CITY OF EL PASO FOR APPROVAL OF FUEL-RELATED PROVISIONS OF RATE AGREEMENT	§ § § §	**BEFORE THE PUBLIC UTILITY COMMISSION OF TEXAS**

CITY OF EL PASO'S RESPONSE TO TEXAS ROSE'S MOTION TO COMPEL

TO THE HONORABLE PUBLIC UTILITY COMMISSION OF TEXAS:

Comes now the City of El Paso (the "City") and files this Response to Texas Ratepayers' Organization to Save Energy ("Texas ROSE") Motion to Compel in the above-styled and numbered docket and would respectfully show the Commission as follows:

I. INTRODUCTION

This case is simply a case in which the applicants have requested Commission approval of the fuel related provisions of the rate settlement between the City and El Paso Electric Company ("EPE"). The Request is limited solely to those matters over which the Commission has jurisdiction. Base rates within the City are not at issue in this proceeding, neither are any provisions of the Rate Agreement of July 2005, other than the fuel related provisions.

II. BACKGROUND

This case was filed on January 17, 2006 as a Joint Petition to have the Commission approve those aspects of a rate agreement between the City and EPE which are within the jurisdiction of this Commission, namely the fuel related provisions of the agreement. None of the other provisions of the rate agreement between the City and EPE, including rates to be charged within the city limits of the City of El Paso, are part of the request.

On May 11, 2006, Texas ROSE served its First Request for Information to the City. The RFI's consist of 16 questions all of which, by admission of Texas ROSE, pertain to information about a

program between the El Paso Water Utilities ("EPWU") and EPE which relates to information on the website of the EPWU concerning a program related to refrigerated air conditioning. Counsel for the City attempted to address the issue with counsel for Texas ROSE, but was unable to resolve any differences, and timely filed objections. Texas ROSE then filed a Motion to Compel on June 5, 2006. Texas ROSE did not reveal in either its RFI's or its Motion that it had obtained information from EPE relating to the Agreement between EPE and itself.

The Rate Agreement between the City and EPE was approved on July 12, 2005 ("Rate Agreement"), and, to the extent it set rates within the City, was final and appealable on that date. No person or entity attempted to appeal that decision and the time for any appeal has expired. Tex. Until. Code Ann. §33.053. The City has exclusive original jurisdiction over the rates and services for utility service within its municipal boundaries. Tex. Until. Code Ann, §33.001. Once the rates were set, in the absence of an appeal by any party (no appeal was made), neither this Commission nor any other entity has the authority to change those rates, except in compliance with the law. Accordingly, this Commission has no authority or jurisdiction over the rates to be charged within the City. Similarly, this Commission only has jurisdiction over electric utility rates, and has no jurisdiction over the rates or services to be charged by a water utility, particularly a municipal water utility. Simply put, in this proceeding, the Commission has no jurisdiction to make any change in a rate approved one year ago by the City, and has no jurisdiction at any time to address a matter related to water rates.

The scope of discovery is governed by the provisions of the Texas Rules of Civil Procedure ("T.R.C.P.") and the Texas Rules of Evidence ("T.R.E."). 16 TAC §22.141. The T.R.C.P. provide that material is discoverable only if it is relevant to the subject matter of the lawsuit, or is calculated to lead to discovery of admissible evidence. T.R.C.P. Rule 192.3, see also *In Re CSX Corp.* 124 S.W. 3d 149 (Tex. 2003). Relevance is defined by T.R.E. 401 as, "evidence having 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." There are five issues the Courts will examine, of which two are applicable to the case at hand. The first applicable issue is whether the information is relevant pursuant to T.R.E. 401. See *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813 (Tex. 1995). Obviously, the evidence does not need to be admissible in order to meet this test, so long as it satisfies the second test, that it is calculated to lead to the discovery of admissible evidence. In the instant case, since neither the Rate Agreement itself, the Air Conditioning Rate Rider, nor any policy or rate of the EPWU are at issue or can be altered or changed, any underlying information concerning those charges, agreements, or rates are not relevant. They do not tend to prove or disprove any fact of consequence in this proceeding. Thus, the information sought by Texas ROSE is not discoverable.

In its Motion to Compel, Texas ROSE speaks to the relevance as being the overall reasonableness of the Rate Agreement.[1] The argument is based upon faulty assumptions. First, the Commission has no jurisdiction to approve or not approve the Rate Agreement. The issue in this case is related to the fuel provisions. The second basis is the offering of the Air Conditioning Rider ("Rider"). Texas ROSE contends that the Rider is contingent on the fuel provisions being approved. This is not correct. The Rider, as such, was approved by the governing body of the City almost one year ago. Its terms and applicability will not change. The only question is the effective date. Third, matters which relate to the reasons or even the advisability of the program between the EPWU and El Paso Electric are not at issue in any way in this proceeding. Nothing in this proceeding will change those provisions.

Finally, the City notes that Texas ROSE does not advise the Commission that it had received information informally from EPE on this subject, and much of that information it received months ago,

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[1]Motion to Compel P 5

or that EPE had provided considerable information subject to its response to RFI's submitted to EPE by Texas ROSE, in which EPE voiced the same relevance concerns. Accordingly, the information requested is no longer even outstanding.

WHEREFORE, PREMISES CONSIDERED, the City prays that the Motion to Compel be in all things denied.

Respectfully submitted,

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Certificate of Service

I certify that a true and correct copy of this document was served by either facsimile, electronic mail, or United States first-class mail on all parties of record in this proceeding on June 12th, 2006.

By:_____
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