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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
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RESPONSE TO MOTION FOR PARTIAL SUMMARY DECISION

El Paso Electric Company (EPE) and the City of El Paso file this response to the Motion for Partial Summary Decision filed by the State of Texas. Contrary to the allegation of the State, the Public Utility Commission of Texas (Commission) undoubtedly possesses the jurisdiction and authority to grant the relief requested by EPE, the City of El Paso, Commission Staff, and Border Steel, Inc. in the Stipulation filed in this case, including the request that EPE continue to recover fuel and purchased power expenses in accordance with the Commission's fuel rule in effect on July 1, 1995. The Commission has granted this relief before and can do so again under the plain language of its current substantive rules.

Consistently, the Commission has continued to define EPE's eligible fuel expenses by the standards in place in 1995—even after the language in the current fuel rule was passed.¹ The 2005 Rate Agreement calls for EPE to continue to recover its fuel and purchased power costs during the new 2005 Rate Agreement freeze period according to the Commission's Substantive Rules in effect on July 1, 1995 (the rules in effect at the time the Docket No. 12700 base rates were set). As explained in the direct testimony of EPE Witness Gary R. Hedrick, the 1995 rules regarding fuel cost recovery are substantially the same as the Commission's current rules, with the notable exception of transmission wheeling. In 1995, the fuel rule allowed EPE to recover

¹ See, e.g., *Petition of El Paso Elec. Co. to Reconcile Fuel Costs*, Docket No. 26194, Final Order FoFs 11-13, 46, 95-97, CoL 6 (May 5, 2004) (contested fuel reconciliation after Rule 25.236 became effective and applying 1995 fuel rule to define eligible costs, sharing revenues from margins on off-system sales and wheeling transactions, and the Palo Verde performance standards).

expenses for wheeling transactions. The 2005 Rate Agreement, as with its predecessor stipulation entered in Docket No. 12700, states that during the relevant base rate freeze period, “the Company and its customers in Texas will be protected from the effects of transactions that shift costs between base rates and fuel.”² Maintaining a constant definition of eligible fuel costs (those defined in the 1995 fuel rule) is necessary to avoid any such shifts.

I.

Commission Authority to Grant Relief Requested by Stipulation

PURA § 36.203 confers jurisdiction on the Commission to establish procedures for reconciling fuel costs. Pursuant to this grant of jurisdiction, the Commission adopted its fuel rule, Substantive Rule 25.236. This rule sets out the definitions of eligible fuel expense that will be applied in fuel proceedings. The request that EPE continue to recover fuel and purchased power expenses in accordance with the Commission’s fuel rule in effect on July 1, 1995 asks nothing different from the Commission: to set out the definitions of eligible fuel expense that will be applied in subsequent fuel proceedings. The application of the 1995 fuel rule will serve a function no different from that of the current fuel rule and is a function expressly allocated to the Commission under PURA § 36.203.

The Stipulation is entirely consistent with the Commission's statutory authority and its past practice. The Stipulation maintains the fuel treatments that the Commission has previously approved for EPE. The 1995 Docket No. 12700 Agreed Order and Stipulation, to which the State was a signatory, established the standards that would govern EPE's fuel cases going forward for ten years. That included using the 1995 substantive rules to define EPE's eligible

² Paragraph 1(f), 2005 Rate Agreement.

fuel costs and the sharing of off-system sales margins and wheeling revenues based on percentages specified in advance.³ The Stipulation filed in this case addresses these same issues.

Certainly, Docket No. 12700 is not the only case in which the Commission has specified fuel treatments that differ from the generic standards stated in the fuel rule. As is noted in the rebuttal testimony of Mr. Hedrick, other instances include Docket No. 29801, involving Southwestern Public Service Company, Docket No. 19265, the American Electric Power/Central and Southwest merger, and Docket No. 13369, involving West Texas Utilities Company. In each of these cases, the Commission allowed the utility to retain a percentage of off-system sales margins different from that provided for under the then-current rule.⁴

The Commission's current substantive rules enable the Commission to specify treatments that differ from the generic standards stated in those rules. The Commission may order exceptions to its substantive rules for good cause.⁵ Consequently, the plain language of the Commission's rules provide the flexibility to grant the relief requested in the Stipulation. The State does not challenge this fact. EPE does not dispute that new laws may supersede old laws or that new rules may supersede old ones. However, there is nothing in the language of the Commission's rules or PURA that bars the Commission from specifying differing treatments for purposes of subsequent cases.

The State's position is clearly form over substance. While not challenging the fact that the Commission may order treatments different from the existing fuel rule, the State alleges that the Commission may not make use of a prior rule in doing so. In other words, it seems that, if the Commission simply sets out the provisions of the prior rule as those that will control, the

³ *Application of El Paso Elec. Co. for Authority to Change Rates and for Approval of Reacquisition of Palo Verde Leased Assets*, Docket No. 12700, Agreed Order at Ordering ¶17, FoFs19-20, Schedule D at ¶¶2(f), 7(d), 9, and 12(c) (August 30, 1995); see also *Petition of El Paso Elec. Co. to Increase Fuel Factor and for Fuel Surcharge*, Docket No. 23530, Final Order at FoF 29-34, Ordering ¶7, Attachment D (November 1, 2001).

⁴ Hedrick Rebuttal at 14-15.

⁵ §25.3(b).

State would not object. But if the Commission were to make convenient reference to the prior rule itself, the State would object. The State cites no authority for such a narrow reading of the Commission's authority.

Due Process

The State's Motion mischaracterizes the relief requested, incorrectly stating that the signatories to the Stipulation request that the 1995 fuel rule "be applied in this proceeding." In truth, the signatories to the Stipulation request the Commission set out the standards that will apply in future fuel proceedings. In other words, to borrow a phrase from the State's Motion, the signatories to the Stipulation request that the Commission apprise the parties, "prior to the hearing, [a future fuel proceeding,] as to which version of a substantive rule will control." There is simply no merit to the State's allegation that the Stipulation raises due process concerns.

II.

In the second part of its Motion, the State alleges that the Commission should decline to grant this request of the Signatories, "as a matter of policy." What the Attorney General believes is or is not proper Commission policy is not grounds for a motion for summary decision. As discussed above, as a matter of law, the Commission has the authority to grant the relief requested by the signatories to the Stipulation. For that reason, the State's motion for summary decision must be denied.

The primary factual support for the approval of the fuel-related provisions of the 2005 Rate Agreement is contained in the direct and rebuttal testimonies of Mr. Hedrick, as well as in the direct testimony of City of El Paso Witness Mr. William F. Studer, Jr. That evidence is largely unaddressed and unchallenged by the testimony of State's Witness Mr. Hugh K. Higgins, Jr. Further, as noted above, in his direct testimony, Mr. Hedrick explains that, unlike the general treatment of non-ERCOT utilities in the Commission's present fuel rules, the 1995 rule (the rule

applicable when the Docket No. 12700 base rates were set) classifies wheeling revenues and expenses as components of eligible fuel costs.⁶ The 2005 Rate Agreement, as with its predecessor stipulation entered in Docket No. 12700, protects both EPE and its customers from the effects of transactions that shift costs between base rates and fuel. Maintaining a constant definition of eligible fuel costs (those defined in the 1995 fuel rule) is necessary to avoid any such shifts. Clearly, factual support exists for the request of the signatories to the Stipulation in this case.

The State complains of the ills that would come if “any and all previous versions of a rule are . . . potentially applicable to a given case.” The State does not appear to understand the nature of this proceeding. Under the relief requested by the signatories to the Stipulation, any and all previous versions of the fuel rule will not be applicable to EPE fuel proceedings. Instead, the 1995 rule will continue to be applicable in EPE fuel proceedings, as it has for the past ten years.

To conclude, as a matter of law, the Commission has the authority to grant the relief requested by the signatories to the Stipulation. Further, significant factual support for this request exists. For those reasons, the State’s motion for summary decision is improper and should be rejected.

⁶ Hedrick Direct at 7.


Respectfully submitted,

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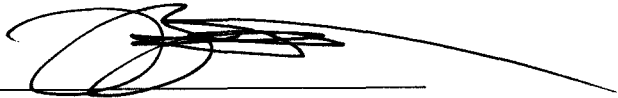
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CERTIFICATE OF SERVICE

I certify by my signature below that a true and correct copy of the foregoing was served on all parties of record by hand delivery, over-night delivery, facsimile, or first class mail on this 10th day of October, 2006.

A handwritten signature in black ink, appearing to be 'William Coe', written over a horizontal line.

William Coe