



Control Number: 34077



Item Number: 474

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JOINT REPORT AND APPLICATION  
OF ONCOR ELECTRIC DELIVERY  
COMPANY AND TEXAS ENERGY  
FUTURE HOLDINGS LIMITED  
PARTNERSHIP PURSUANT TO  
PUBLIC UTILITY REGULATORY  
ACT SECTION 14.101

BEFORE THE  
PUBLIC UTILITY COMMISSION  
OF TEXAS

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**TEXAS INDUSTRIAL ENERGY CONSUMERS'  
RESPONSE TO ONCOR'S MOTION TO COMPEL ONCOR'S  
FIRST SET OF REQUESTS FOR INFORMATION**

Texas Industrial Energy Consumers ("TIEC") files the following response to Oncor Electric Delivery Company's ("Oncor") motion to compel responses to its First Request for Information ("RFI") to TIEC. For the reasons set forth below, TIEC argues the Administrative Law Judge ("ALJ") to deny Oncor's motion.

**I. Response**

**1-2(k) [Please Provide the following information for each witness that will provide direct testimony for TIEC:] a complete copy of all prior testimonies submitted, or testified to at hearing by the witness to the topic the witness will address in this docket. This should include all exhibits and rebuttal testimony;**

TIEC and Oncor have reached a Rule 11 agreement regarding this RFI. Accordingly, the ALJ does not need to rule on this request.

**1-2(l) [Please Provide the following information for each witness that will provide direct testimony for TIEC:] copies of all transcripts from proceedings in which the witness testified at hearing relating to the topic the witness will address in this docket;**

TIEC and Oncor have reached a Rule 11 agreement regarding this RFI. Accordingly, the ALJ does not need to rule on this request.

**1-2(o) [Please Provide the following information for each witness that will provide direct testimony for TIEC:] the number of hours spent by the witness on this case by week;**

TIEC has responded to this RFI in a supplemental filing. Accordingly, the ALJ does not need to rule on this request.

**1-6(b) [Regarding each witness' services in this docket, please provide the following:] all bills and invoices submitted by the witnesses for the services, including detailed time and expense information;**

TIEC has responded to this RFI in a supplemental filing. Accordingly, the ALJ does not need to rule on this request.

**1-8 Provide copies of all e-mails from January 1, 2006 to present relating to the transaction covered by this docket.**

TIEC objected to this question as unduly burdensome, harassing, overly broad and not reasonably calculated to lead to the discovery of admissible evidence. As originally propounded, this request sought every e-mail related to the transaction without limitation as to person, place or subject matter or reasonable limitation as to time. Oncor has now limited the request to emails of TIEC and its members in the Oncor service area that relate to the transaction as it affects Oncor. This limitation does not go nearly far enough. Oncor stated in its motion to compel that it "finds it somewhat ironic that TIEC would object to what is essentially the same question that it propounded to Oncor."<sup>1</sup> In fact, TIEC agreed to modify that TIEC 1-7 to limit the request to e-mails that were responsive to the other substantive questions in TIEC's First Set of RFIs to Oncor.<sup>2</sup> Oncor has offered no such limitation here. TIEC also objected to this question to the extent that it seeks information covered by the attorney-client and attorney work product privileges.

TIEC further notes that the argument contained in Oncor's motion to compel makes it clear that Oncor is requesting information that is not in TIEC's possession, custody or control. Oncor stated, "[i]f TIEC's member companies have created e-mails concerning the Transaction as it relates to Oncor, then those e-mails are relevant to this proceeding and Oncor has a right to obtain them."<sup>3</sup> TIEC would note that it has no ability to compel its member companies to provide information to the association. If Oncor desires to seek e-mails from the individual companies, it must use the usual PUC procedures for third party discovery. In that case, each

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<sup>1</sup> Oncor Motion to Compel at 5 (Aug. 27, 2007).

<sup>2</sup> TIEC Motion to Compel Responses to First Set of RFIs to Oncor at 18-19 (Aug. 22, 2007).

<sup>3</sup> Oncor Motion to Compel at 6.

company would have the opportunity to move to quash and to raise whatever objections it deems appropriate. If the ALJ upholds Oncor's motion to compel on relevance ground, TIEC will fully respond to Oncor's requests for information by providing all documents in its possession, custody, and control, including any documents it has a right to obtain from others. However, since Oncor has raised arguments in its motion to compel about its ability to somehow compel TIEC to produce documents in the possession of association members, TIEC responds to those arguments here.

It is important to note that this precise issue has previously been addressed in other proceedings before the Commission. In PUC Docket No. 29526, CenterPoint sought to compel the production of individual companies' information through TIEC.<sup>4</sup> The ALJ rejected CenterPoint's arguments, denied the motion to compel, and directed that CenterPoint conduct any discovery on individual TIEC members through the third-party subpoena process. A second ALJ came to the same conclusion when Southwestern Public Service Company sought documents from TIEC's members in PUC Docket No. 32685.<sup>5</sup> There is no reason for a different result here.

**a) TIEC has valid standing as a separate entity from its individual members.**

An association's individual members are separate legal entities from the association itself. Imagine a court or Commission granting a litigant's motion to compel an association to gather, collect, and obtain information in the possession of every doctor in the American Medical Association, for example, or every lawyer in the American Bar Association, or every member of a large religious organization. Such an order would not only be beyond the ability of the association to comply, but it would also violate the rights of the individual members of those associations. As set forth below, it is well established that an association's participation in a lawsuit does not grant opposing parties the right to treat each member of that association as a party for discovery purposes.

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<sup>4</sup> *Application of CenterPoint Energy Houston Electric, LLC, Reliant Energy Retail Services, LLC and Texas Genco, LP to Determine Stranded Costs and Other True-Up Balances Pursuant to PURA Sec. 39.262*, P.U.C. Docket No. 29526, Order No. 12 (Jun. 2, 2004).

<sup>5</sup> *Application of Southwestern Public Service Company for Authority to Surcharge Its Fuel Underrecoveries*, Docket No. 32685, Proposal for Decision (Aug. 24, 2006) at 13.

TIEC is an unincorporated association separate and apart from the TIEC members that may participate in any given contested case. TIEC, for example, actively participates as an association in rule-making proceedings before the Commission, in the development of market protocols at ERCOT, and in all major electric rate cases at the Commission, and it has its own Articles of Association. As a matter of law, and as a matter of practical reality, TIEC is a separate legal entity, not merely an *ad hoc* organization constituted for the sole purpose of this intervention. Oncor's efforts to disregard the existence of the association and treat TIEC members as if they were direct parties must be denied.

TIEC's standing has been recognized in hundreds of PUC cases over the past 30 years, along with the associational standing rights of all the other organizations that regularly intervene in PUC cases. A discussion of the requirements an association must satisfy to have standing under Texas law is still instructive. In *Texas Association of Business v. Texas Air Control Board and Texas Water Commission*, the Texas Supreme Court held that an association has standing to sue on behalf of its members when:

(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.<sup>6</sup>

TIEC satisfies each of the *Texas Association of Business* criteria and clearly has independent standing in this case.<sup>7</sup> First, TIEC's members as ratepayers in the Oncor service area clearly would have standing to participate in their own right. Second, the interests that TIEC seeks to protect in this case are germane to TIEC's purpose. TIEC's Articles of Association show that TIEC was "organized to respond to and address issues relating to the provision of electric utility service to industrial customers in the State of Texas." Further, TIEC's Statement of Principles in those Articles includes the premises that the "transition to a

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<sup>6</sup> 852 S.W.2d 440, 447 (Tex. 1993) (quoting *Hunt v. Washington State Apple Adver. Comm'n.*, 432 U.S. 333, 343 (1977)).

<sup>7</sup> Under the Commission's Procedural Rule Section 22.103(b), a person has standing to intervene if that person: "(1) has a right to participate which is expressly conferred by statute, commission rule or order or other law; or (2) has or represents persons with a justiciable interest which may be adversely affected by the outcome of this proceeding."

fully competitive generation market should be orderly, economically efficient and brief,” and that “to the extent that the electric utility industry in Texas remains regulated, including the provision of transmission and distribution service... [r]egulated electric utility rates in Texas should be fair and equitable . . . .”

Finally, pursuant to the third prong of this test, the relief TIEC seeks in this proceeding does not require the participation of its individual members. In interpreting this prong, the United States Supreme Court has stated that:

Whether an association has standing to invoke the court’s remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case *the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured.*<sup>8</sup>

While courts have found that relief in the form of specific monetary damages to be paid to an individual requires individualized proof and therefore individual participation of parties, relief other than individualized damages can be sought by associations without requiring individual parties to intervene.<sup>9</sup> There is no doubt that TIEC satisfies each prong in this test and has standing, separate and independent from the standing its members would have individually. In fact, no party has contested TIEC’s standing as an association in this or any other docket.

**b) Oncor is seeking third-party discovery and is improperly attempting to force TIEC to gather the information it seeks.**

Because Texas law is clear that an association has standing to intervene separately from its individual members, Oncor is seeking third-party discovery and must therefore follow the third-party discovery rules. No party is prevented from seeking discovery from third parties in a contested proceeding. However, when third-party discovery is sought, particular requirements and rules must be met to obtain such information. If the information Oncor seeks is critical to its case, Oncor has avenues to seek such third-party discovery under well-established Commission

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<sup>8</sup> *Hunt v. Washington State Apple Adver. Comm’n.*, 432 U.S. 333, 343 (1977) (emphasis added).

<sup>9</sup> See *Texas Ass’n of Business* 852 S.W.2d at 448 (holding that an association may bring suit where damages specific to individual members are not at issue); *Tex. State Employees Union/CWA Local 6184 v. Tex. Workforce Comm’n*, 16 S.W.3d 61, 69 (Tex. App.-Austin 2000, no pet.).

rules and practice. By seeking to compel TIEC to produce information that it does not have and that it cannot gather, Oncor is refusing to follow these long-established rules for discovery on third parties.

A number of administrative and court cases make it clear that associations may not be compelled to produce materials in the exclusive possession, custody, or control of their non-party members. In PUC Docket No. 29526, CenterPoint argued that because TIEC's standing was "based on the justiciable interests of its individual members, the individual members are obligated to participate in the proceeding through the Association...."<sup>10</sup> The Commission rejected CenterPoint's arguments, holding that since TIEC's member companies were not parties to the proceeding and TIEC did not possess the required information, CenterPoint should conduct this discovery through third-party subpoenas.

Other public utility commissions have reached the same conclusion. In *In re Alternative Regulatory Frameworks for Local Exchange Carriers*,<sup>11</sup> the California PUC overturned an administrative law judge's ("ALJ's") decision granting a motion to compel individual members of the California Cable Television Association to respond to data requests:

We do not believe that members of an association should automatically be subject to discovery merely because they are a member of an association. Otherwise, an association could subject all of its members to discovery by virtue of the association's participation in the proceeding. Such a result would be unduly burdensome on the individual members.<sup>12</sup>

In *In re: Joint Application of Entergy Gulf States, Inc. and Entergy Louisiana, Inc. for Interim and Permanent Recovery in Rates of Costs Related to Hurricanes Katrina and Rita*,<sup>13</sup> the Louisiana Commission addressed the same arguments Oncor presents here in denying a motion to compel responses from individual members of the Louisiana Energy Users Group ("LEUG"),

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<sup>10</sup> CenterPoint Order No. 12.

<sup>11</sup> Docket Nos. 87-11-033, 85-01-034, 87-01-002, 94-08-028, 55 C.P.U.C. 2d 672, 1994 WL 496409 (California Public Utilities Commission, Aug. 3, 1994).

<sup>12</sup> *Id.* at 10.

<sup>13</sup> Docket No. U-29203, Ruling on Entergy's Motion to Compel and Alternative Motions (Louisiana Public Service Commission, Feb. 6, 2006).

the Louisiana counterpart of TIEC. The ALJ found that Entergy could “request information through data requests only from other parties to the proceeding, including LEUG—and not from LEUG’s members, who are not parties to the proceeding.”<sup>14</sup>

Federal courts around the country have similarly determined that associations may not be compelled to answer discovery on behalf of their individual members. In *Sherwin-Williams Co. v. Spitzer*,<sup>15</sup> the court held that the National Paint and Coating Association (“NPCA”) did not have a “duty to be a clearinghouse for the requested information that would inextricably come from the individual members and not NPCA.”<sup>16</sup> In *University of Texas at Austin v. Vratil*,<sup>17</sup> the Tenth Circuit held that NCAA member institutions were not subject to party discovery, finding that “[t]he district court erred in characterizing unserved, nonparty petitioners as ‘real parties in interest’ for discovery purposes.”<sup>18</sup> In *New Hampshire Motor Transp. Ass’n v. Rowe*,<sup>19</sup> the Maine Attorney General moved to dismiss the complaint on the basis that the association-plaintiff lacked standing because it was a shield for its largest member, UPS.<sup>20</sup> The court held that the nature of relief requested justified associational standing, however, and the court required the Attorney General to conduct third-party discovery on UPS, despite the fact that such discovery might be “more cumbersome and somewhat more costly” than party discovery.<sup>21</sup>

Third party discovery is the appropriate vehicle for Oncor to seek information that is not in TIEC’s custody and control. Oncor has raised no legitimate attack on TIEC’s claim to associational standing or its members’ status as non-parties to this case. Instead, it prefers to ignore the Commission’s procedures for third-party discovery and somehow require non-parties to forgo their procedural right to receive and respond to subpoenas directing the production of

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<sup>14</sup> *Id.* at 7.

<sup>15</sup> 61 ERC (BNA) 1182, 2005 WL 2128938, 2005 U.S. Dist. LEXIS 18700 (N.D.N.Y. Aug. 24, 2005).

<sup>16</sup> *Id.* at 20.

<sup>17</sup> 96 F.3rd 1337 (10th Cir. 1996).

<sup>18</sup> *Id.* at 1340.

<sup>19</sup> 324 F. Supp. 2d 231 (2004).

<sup>20</sup> *Id.* at 234.

<sup>21</sup> *Id.* at 237.



their documents. If Oncor wishes to conduct discovery on TIEC's member companies or anyone else, it may do so by following the Commission's rules for third party discovery. Under PUC Procedural Rules 22.143 and 22.145, Oncor may file and serve subpoenas on any customer and request the issuance of commissions for depositions of their representatives. This is not TIEC's burden or obligation.

**c) TIEC has no capability to compel its members to provide the requested information.**

Even if the ALJ were to grant Oncor's motion to compel it to respond to the various RFIs that request information and documents from its members, TIEC can only provide documents or information within its "possession, custody, or control" as prescribed by Texas Rule of Civil Procedure 192.3(b). TIEC does not have a "superior right to compel the production from a third party," like one of its members, to respond to the relevant RFIs.<sup>22</sup> Similarly, the American Medical Association would not have a right to require a doctor belonging to its ranks to provide it with information or documents related to every heart surgery he or she had ever performed for production in a lawsuit that the AMA has joined regarding malpractice claims related to the performance of cardiac surgeries.

TIEC simply does not have a right to compel its member companies to produce information, and Oncor has made no showing whatsoever that TIEC has a right to obtain possession of the requested documents or information.<sup>23</sup> In fact, TIEC takes great care not to obtain such information, as its Antitrust Policy has strict requirements in order to avoid any allegations of antitrust law violations. Its policy provides that "TIEC members shall not disclose confidential information . . . which could support an inference of an unlawful agreement, or could affect competition with other members or with parties in end product markets or in the markets for electrical energy." TIEC members must be extremely careful not to share or provide information to TIEC that could lead to an inference that member companies were illegally sharing confidential information or strategies. Thus, TIEC does not have "possession, custody, or control" as prescribed by Texas Rule of Civil Procedure 192.3(b), nor a right to obtain such

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<sup>22</sup> P.U.C. PROC. R. § 22.141(a).

<sup>23</sup> See *In re U-Haul Int'l, Inc.*, 87 S.W.3d 653, 656 (Tex. App.—San Antonio 2002, orig. proceeding).

documents or information. In fact, the only way for TIEC to obtain the documents Oncor seeks would be for it to seek subpoenas to the individual companies, the approach Oncor has for whatever reason decided not to pursue.

**d) Compelling individual ratepayers to collect and produce documents and information would contradict Commission policy.**

Although it is beyond the scope of the pending motion, TIEC would point out that, if and when Oncor chooses to seek discovery directly from any individual ratepayers who have the temerity to join organizations that intervene in rate cases, serious legal and policy issues would be raised. Allowing utilities to conduct the type of discovery sought by Oncor would have a chilling effect on the willingness and ability of ratepayers to participate in PUC proceedings either individually or through associations. The Commission has a longstanding policy to encourage participation in its proceedings from a broad base of constituents, including trade associations.

The Commission has long relied on the participation of trade associations and other customer groups in rate cases. TIEC has participated in every major electric rate case since the Commission's inception—and it is not alone. Commercial ratepayers are routinely represented through the Coalition of Commercial Ratepayers. Residential ratepayers also have been active in numerous cases through organizations like Texas Ratepayers Organization to Save Energy. The Texas Cotton Ginners' Association often intervene to protect the interest of dozens of Texas cotton ginners. The Commission relies on these associations to present evidence and develop the record upon which it bases its decisions. The suggestion that every cotton ginner, residential customer, commercial business, industrial customer, or retail merchant that was a member of these organizations had somehow inadvertently become subject to discovery in those cases is without merit.

If Oncor or other utilities were allowed to freely engage in the type of offensive discovery Oncor has requested here, they would have the potential to significantly reduce intervenor participation in PUC matters. The Commission has long relied on the testimony of TIEC and other associational intervenors to raise issues and develop the record in electricity cases. In recent years, in fact, intervenor testimony has been far more extensive in most major

cases than PUC Staff testimony. Creating a regime whereby ratepayer associations are dissuaded from participating in PUC proceedings because of intrusive discovery requests to individual ratepayers would be bad public policy, as the reduction of associational intervenors would result in less scrutiny of utilities' proposals and poorer records upon which to base decisions. While these arguments would be presented more fully if and when Oncor seeks third party discovery through the appropriate procedures, it is worth noting some of the policy concerns that would be implicated, and that ultimately led to strict limits on third party discovery in the CenterPoint case.

**1-9 Please provide a list of all current members of TIEC.**

TIEC has responded to this RFI in a supplemental filing. Accordingly, the ALJ does not need to rule on this request.

**Questions 1-10(c), 1-11, 1-12, and 1-13**

**1-10(c) [In its Motion to Intervene filed in this proceeding, TIEC indicated that it was “an association of industrial consumers of electricity” and that its “members participating in this docket include Occidental Energy Ventures Corp.”] Please indicate any entities other than Occidental that, in TIEC’s opinion, are considering participating in this docket.**

**1-11 Please provide a list of all TIEC members that were asked by TIEC to participate in this docket, but declined.**

**1-12 Of those members in Question 1-11 that declined to participate, please indicate the reason for such member’s declination.**

**1-13 Of those members in Question 1-11 that declined to participate, please provide copies of all communications between TIEC and such member.**

TIEC objected to these requests because they seek information that is not relevant to this proceeding and is not provided for in the Commission’s rules. It is not relevant whether any additional TIEC members are considering participating, or have declined participation. Nor do the reasons for such declination have any relevance to this proceeding. The only relevant inquiry is which TIEC members are participating in the proceeding. P.U.C. PROC. R. 22.103 provides that an association need only provide the list of members *that will be represented by the association in the proceedings*. In accordance with this rule, TIEC has provided this information

to Oncor in response to RFI questions 1-10(a) and 1-10(b). TIEC has also provided a list of all of its members in response to RFI question 1-9.

Oncor asserts that discovering the reasons that certain companies chose not to participate in this proceeding will lead to information that could be “damaging” to any position that the participating companies may take at the hearing.<sup>24</sup> The reason that a particular company may or may not have chosen to join TIEC’s intervention in this case has absolutely no bearing on the issues that the Commission will analyze in this proceeding. Oncor’s request is merely a fishing expedition based on the pure speculation that TIEC’s litigation position could be undercut through anecdotal statements from TIEC’s non-participating members. This irrelevant inquiry is clearly designed to harass TIEC’s membership.

The questions clearly demonstrate that Oncor is attempting to distract the ALJ and the Commission from the primary issues in this proceeding. Those issues, as identified by the Commission in its Preliminary Order, relate to the effect of the transaction on Oncor, and whether the transaction is in the public interest. The internal corporate decisions of individual TIEC members are in no way relevant to the existence of any facts that is of consequence to the Commission’s determination in this proceeding.

Additionally, TIEC objected to these questions because any information that may be responsive to this request may be attorney work product and attorney-client privileged information. Neither attorney work product nor attorney-client privileged information are discoverable under the Commission’s rules or the Texas Rules of Civil Procedure.

#### **Questions 1-14 and 1-15**

- 1-14 Please provide all documents describing the agreement(s) between TIEC and any entity participating in this docket regarding that entity’s participation in this docket.**
- 1-15 Please provide copies of all emails between TIEC and any entity participating in this docket regarding that entity’s participation in this docket.**

TIEC objected to these requests to the extent that they seek information covered by the attorney work product and joint defense privileges. TIEC further objected because the requests

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<sup>24</sup> Oncor Motion to Compel at 9.

seek information not relevant to any issues in this docket. When it made its objections, TIEC believed that these questions requested agreements and emails between TIEC and the other intervenors in this docket. Following further discussions with counsel for Oncor, it appears that Oncor is actually seeking agreements and emails between TIEC and its member companies. Oncor agreed to limit these questions to TIEC members in Oncor's service area.

TIEC renews its objection that the information sought is covered by the attorney-client and attorney work product defenses. TEX. R. CIV. P. 193.3(c) provides that a party may withhold privileged documents without filing an index if those documents meet the following three criteria: (1) they are privileged communications to or from a lawyer or lawyer's representatives, or other privileged document of a lawyer or lawyer's representatives; (2) they were created in anticipation of or during the current litigation; and (3) they concern the current litigation. TIEC has no non-privileged materials to provide in response to these RFIs, and pursuant to the Texas Rules of Civil Procedure no privilege log is required for the privileged documents that may exist.

**1-16 Please provide all documentation concerning all instances where the health and/or safety of any of TIEC's members were threatened by Oncor's operations.**

TIEC objected to this request because it seeks information that is not relevant to this proceeding. Oncor has agreed to limit this question to TIEC members in Oncor's service area. This limitation does not go far enough. The relevant inquiry under PURA § 14.101 is whether the transaction *will* adversely affect the health and safety of customers or employees, not whether the public utility's operations have *previously* affected the health and safety of customers or employees. Oncor argues that it needs a baseline from which to measure potential changes. However, Oncor certainly already has the relevant information in its possession. Oncor must have information in its files regarding instances when its operations threatened the health and safety of its own customers. TIEC would also note that it has not filed any testimony on health and safety to date, and thus it is premature to ask questions regarding a topic that may not even be an issue in this case.

Finally, this request seeks information not in the possession, custody or control of TIEC. As discussed in response to Question 1-8, TIEC cannot compel the production of material in the possession of its member companies. Thus, even if the ALJ grants Oncor's motion to compel on

relevance grounds, TIEC will not be able to produce documents solely in the possession, custody and control of its member companies.

**Questions 1-17, 1-18, and 1-19**

**1-17 For all entities participating in this docket, please state whether or not they received electric transmission and distribution services from Texas-New Mexico Power Company ("TNMP") during each of the years 1998-2006.**

**1-18 For all entities participating in this docket that received service from TNMP, please describe the facilities of each entity served by TNMP.**

**1-19 On July 15, 1999, TNMP and TNP Enterprises, Inc., which was the parent company of TNMP, filed a joint *Application Regarding Merger of TNP Enterprises, Inc. and ST Acquisition Corp.* seeking a declaratory order from the Public Utility Commission of Texas that the proposed merger of ST Acquisition Corp. and TNP Enterprises, Inc. ("TNMP Transaction 1 ") was consistent with the public interest (PUC Docket No. 21112).**

**On July 24, 2004, PNM Resources, Inc entered into an agreement to purchase 100% of the outstanding common stock of TNP Enterprises, Inc., the parent corporation of TNMP ("TNMP Transaction 2"). TNMP Transaction 2 was the subject of PUC Docket No. 30172.**

**a. For each entity responsive to Question 1-17 above that received electric transmission and distribution services from TNMP in any year from 1998-2006, please provide a detailed description of said entity's reliability experience with TNMP and provide all documents that support that description:**

- i. before the occurrence of TNMP Transaction 1;**
- ii. between the occurrence of TNMP Transaction 1 and the occurrence of TNMP Transaction 2; and**
- iii. after the occurrence of TNMP Transaction 2.<sup>25</sup>**

TIEC objected to these requests because Oncor is seeking information that has absolutely no relevance to the current proceeding. The TNMP merger proceedings involved a completely different utility (TNMP) and completely different purchasers (TNP Enterprises and ST Acquisition Corp. and PNM Resources). These proceedings did not involve Oncor, TXU Corp. or Texas Energy Futures, the relevant entities to *this* proceeding.

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<sup>25</sup> TIEC observes that in its Motion to Compel, Oncor includes additional subparts (b) and (c) to question 1-19. However, subparts (b) and (c) were not included in Oncor's original request for information served on TIEC on August 15, 2007.

Oncor and TEF have vociferously argued through the duration of this proceeding that the scope of the Commission's review is limited to the effect of the transaction on Oncor. Oncor cannot now claim that a completely unrelated utility merger is somehow encompassed in this limited review. Oncor acknowledges that it believes that questions pertaining to transactions in other jurisdictions are objectionable.<sup>26</sup> Yet amazingly, Oncor argues that transactions affecting an ERCOT utility are relevant. Oncor cannot have it both ways. It cannot argue that on the one hand, information regarding other jurisdictions is irrelevant, but that information regarding a Texas utility—despite the fact that a completely different set of buyers was involved—is somehow relevant to the Oncor transaction.

Oncor posits that TIEC may argue that ownership of Oncor by a private equity group may result in a decline in service reliability.<sup>27</sup> Oncor then suggests that it may try to rebut this claim by demonstrating that TIEC's members did not experience a decline in service when TNMP was owned by a private equity firm.<sup>28</sup> Whether TIEC members experienced a decline in service through the management practices of a completely different leveraged buyout firm has no bearing on the issues that the Commission will analyze in this proceeding. Again, Oncor has set out on a fishing expedition for irrelevant information.

Finally, this request seeks information not the possession, custody or control of TIEC. As discussed in response to Question 1-8, TIEC cannot compel the production of material in the possession of its member companies. Thus, even if the ALJ grants Oncor's motion to compel on relevance grounds, TIEC will not be able to produce documents in the possession, custody and control of its member companies.

## II. CONCLUSION

TIEC requests that the administrative law judge sustain TIEC's objections, deny Oncor's motion to compel, and grant TIEC any other relief to which it is entitled.

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<sup>26</sup> Oncor Motion to Compel at 14.

<sup>27</sup> *Id.* at 14.

<sup>28</sup> *Id.*

Respectfully submitted,

ANDREWS KURTH LLP



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ENERGY CONSUMERS

**CERTIFICATE OF SERVICE**

I, Caren Pinzur, Attorney for TIEC, hereby certify that a copy of this document was served on all parties of record in this proceeding on this 4th day of September, 2007, by electronic mail, facsimile or First Class, U.S. Mail, Postage Prepaid.



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Caren Pinzur