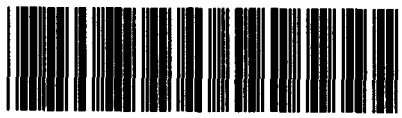

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| **JOINT REPORT AND APPLICATION OF ONCOR ELECTRIC DELIVERY COMPANY AND TEXAS ENERGY FUTURE HOLDINGS LIMITED PARTNERSHIP PURSUANT TO PURA § 14.101** | § § § § § | **BEFORE THE PUBLIC UTILITY COMMISSION OF TEXAS** |

# MOTION FOR REHEARING OF ORDER ON REHEARING SUBMITTED BY NUCOR STEEL – TEXAS

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| **JOINT REPORT AND APPLICATION OF ONCOR ELECTRIC DELIVERY COMPANY AND TEXAS ENERGY FUTURE HOLDINGS LIMITED PARTNERSHIP PURSUANT TO PURA § 14.101** | **§** | **BEFORE THE PUBLIC UTILITY COMMISSION OF TEXAS** |

## MOTION FOR REHEARING OF ORDER ON REHEARING SUBMITTED BY NUCOR STEEL – TEXAS

Nucor Steel - Texas, a division of Nucor Corporation and a party in the captioned proceeding, pursuant to Administrative Procedure Act ("APA") Section 2001.146(a) and Public Utility Commission of Texas ("Commission") Procedural Rule 22.264, timely files this Motion for Rehearing of the Order on Rehearing issued by the Commission in the captioned docket signed on April 24, 2008 ("Order").[1,2]

## I. Introduction

Given the magnitude of the transaction subject to review in this proceeding and the potential impact on consumers in Texas, Nucor has actively

[1] The Outgoing Commission–Signed Order Mail Log indicates that the Order was File Stamped at 10:50 a.m. on April 24, 2008 and mailed to the parties in the proceeding at 11:00 a.m. that day. Nucor's attorneys received notice of the Order pursuant to APA Section 2001.142(c) on April 28, 2008. Pursuant to APA Section 2001.146(a), the filing deadline for this Motion for Rehearing is therefore May 19, 2008.

[2] The Commission issued an order in this proceeding on February 22, 2008 that was mailed to the parties on February 25. Nucor filed a timely Motion for Rehearing on March 17, 2008. Commission Staff ("Staff") filed a Motion *Nunc Pro Tunc or*, in the Alternative, Motion for Rehearing on March 7, 2008. The State of Texas filed a Motion *Nunc Pro Tunc* on March 11, 2008. On April 2, 2008, the Commission notified the parties that it would consider the motions of Staff and the State of Texas at its April 9, 2008 Open Meeting. No Commissioner voted to add Nucor's motion to the Open Meeting agenda. The subsequent Order on Rehearing incorporated some of the changes to the original order suggested by Staff and the State of Texas. Because none of the issues raised by Nucor in its previous Motion for Rehearing were materially altered in the Order on Rehearing, the present Motion for Rehearing of the Order on Rehearing essentially is a restatement of Nucor's original Motion for Rehearing.

participated in this proceeding from the outset. Our goals were: (1) to determine if the transaction is in the public interest; and (2) if not, recognizing the Commission has no authority to stop the transaction, to make recommendations that would at least improve the effects of the transaction on the public interest, including identifying appropriate additional commitments that the parties to the transaction could make. Nucor submitted expert witness testimony twice, including testimony on the non-unanimous stipulation that the Commission ultimately approved with minor modifications. Nucor actively participated in the hearing and submitted an extensive post-hearing brief outlining its recommendations.

Unfortunately, the Commission's Order does not adopt, or even discuss, Nucor's recommendations. Nucor respectfully disagrees with the course charted by the Order. In part, Nucor submits this motion for rehearing to ask the Commission to reconsider, and hopefully adopt, some or all of these recommendations in order to bring the transaction closer to being in the public interest.

Beyond the substantive recommendations made by Dr. Goins on behalf of Nucor on the specifics of the stipulation, Nucor has steadfastly expressed its view throughout this case that the *Preliminary Order and Order on Appeals and Motion to Extend Procedural Schedule* (August 23, 2007) ("Preliminary Order") and various procedural orders incorrectly resolved legal issues related to the scope of the proceeding, discovery, and admissible evidence that unduly constrained the Commission's review of the transaction and prejudiced Nucor's

(and other intervenors') substantial rights in this proceeding.[3] Nucor's view has not changed on this point. As a result, the second purpose for this motion for rehearing is, according to Texas law, to provide the final opportunity to correct these legal problems.

As demonstrated below, the cumulative effect of the various orders in this case violates applicable Texas legal standards. Specifically, we submit that the resulting administrative findings, inferences, conclusions and decisions are:

> [n]ot reasonably supported by substantial evidence, in violation of a constitutional or statutory provision, in excess of the agency's statutory authority, made through unlawful procedure, affected by other error of law, arbitrary or capricious, or characterized by an abuse of discretion.[4]

Multiple grounds exist, as set forth in Nucor's Points of Error, to conclude that these orders, and as a result, the final decision regarding the acquisition of Oncor Electric Delivery Company ("Oncor") by Texas Energy Future Holdings Limited Partnership ("TEF") failed to reflect the reasoned decision-making needed to make a valid public interest finding, as required by law.[5] Although we understand that the Commission is given deference in its decision-making,[6] decisions must

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[3] *See* APA § 2001.174(2). Those orders include, but are not limited to: Preliminary Order, Order No. 27 (September 11, 2007), Order No. 31 (October 1, 2007), Order No. 41 (November 16, 2007) and Order No. 45 (December 10, 2007).

[4] *State of Texas v. Public Utility Comm'n*, 2008 Tex. App. LEXIS 563 at *11 (Ct. App. – 3rd District, January 25, 2008) (citing Tex. Gov't Code Ann. § 2001.174(2)(A)-(F)).

[5] Public Utility Regulatory Act ("PURA") Section 14.101(b) requires the Commission to consider a number of factors in determining whether the acquisition of a public utility is consistent with the public interest. PURA Section 39.262(o) explicitly gives the Commission the power to enforce commitments made by the public utility and/or the acquiring party "in advance of or as part of a filing" under Section 14.101.

[6] *Railroad Comm'n v. Torch Operating Co.*, 912 S.W.2d 790, 792 (Tex. 1995).

still be reasonable and based on substantial record evidence.[7] The evidence as a whole must support reasoned decision-making.[8] Nucor has identified ten points of error that individually or collectively require rehearing:

- **Point of Error No. 1: The Order should have considered and adopted the recommendations offered by Nucor and Nucor's witness, Dr. Dennis W. Goins, to make the Stipulation better serve the public interest.**

- **Point of Error No. 2: The Preliminary Order interpreted PURA Section 39.262(o) contrary to the plain language of the statute, unreasonably restricting the scope of the proceeding as well as the Commission's authority to enforce commitments made in conjunction with the underlying transaction.**

- **Point of Error No. 3: The Preliminary Order interpreted PURA Section 14.101(b) contrary to the plain language of the statute and its own precedent, unreasonably restricting the scope of the proceeding as well as the Commission's authority to enforce commitments made in conjunction with the underlying transaction.**

- **Point of Error No. 4: The interpretation of PURA Sections 39.262(o) and 14.101(b) in this proceeding was arbitrary and capricious by limiting the intervening parties' evidence to issues related to Oncor while permitting TEF/Oncor to include in evidence, and indeed in the Order, issues and commitments not related to Oncor.**

- **Point of Error No. 5: The Order fails to provide a reasoned basis for adopting the Stipulation under the public interest standard, as required by PURA Section 14.101(b) and APA Section 2001.141(d).**

- **Point of Error No. 6: No credible record evidence supports the $72 million, one-time refund, or the $56 million in write-offs, provided for by the Stipulation as a justification for the public interest finding required by PURA Section 14.101(b) for the underlying transaction; this lack of evidence fails to meet the record evidence requirement of APA Section 2001.141(c).**

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[7] *Texas Health Facilities Comm'n v. Charter Med.-Dallas, Inc.*, 665 S.W.2d 446, 452-53 (Tex. 1984).

[8] *See State of Texas*, 2008 Tex. App. LEXIS 583 at **23-24. The Court of Appeals discusses the standard of review in a contested case in considerable detail, as well as examining the elements of review of statutory construction.

- **Point of Error No. 7: Order No. 27 unlawfully restricted the scope of discovery in Nucor's direct case, thereby violating Nucor's right to discovery under Commission rules and right under APA Section 2001.051 to respond to and present evidence and argument to each issue involved in the case.**

- **Point of Error No. 8: Order Nos. 31 and 45 unlawfully struck relevant portions of Nucor's direct and supplemental direct testimony, thereby violating Nucor's right under APA Section 2001.051 to respond, and present evidence and argument, to each issue involved in the case, as well as the requirement of PURA Section 14.054(b) that each party in a contested case involving a settlement retains the right to a full hearing on issues that remain in dispute.**

- **Point of Error No. 9: Order Nos. 41 and 45, by permitting parties to the non-unanimous settlement to withdraw testimony after Nucor filed its supplemental direct testimony, then striking portions of Nucor's supplemental direct testimony referencing and/or incorporating withdrawn testimony violated various legal constraints on Commission action including, but not limited to: (a) Nucor's due process rights; (b) Nucor's right under APA Section 2001.051 to respond to and present evidence and argument to each issue involved in the case; (c) the requirement of PURA Section 14.054(b) that each party in a contested case involving a settlement retains the right to a full hearing on issues that remain in dispute; and (d) applicable evidentiary rules including Texas Rules of Evidence 801(e)(2) and 803(8)(C).**

- **Point of Error No. 10: Order No. 45, by striking Nucor's supplemental direct testimony that referenced and/or incorporated withdrawn testimony by Commission Staff and intervenors, while permitting TEF/Oncor to introduce into evidence at hearing rebuttal testimony to withdrawn testimony by Commission Staff and intervenors violated various legal constraints on Commission action including, but not limited to: (a) Nucor's right to due process under the United States and Texas Constitutions; (b) Nucor's right to equal protection under the law under the United States and Texas Constitutions; (c) Nucor's right under APA Section 2001.051 to respond to and present evidence and argument to each issue involved in the case; and (d) the requirement of PURA Section 14.054(b) that each party in a contested case involving a settlement retains the right to a full hearing on issues that remain in dispute.**

## II. Background

This proceeding began April 2, 2007 when TEF filed a letter with the Commission providing "the legally binding stipulation and agreement" to undertake a series of commitments relating to its acquisition of TXU Electric Delivery Company (later renamed Oncor Electric Delivery Company) in conjunction with TEF's purchase of all of the shares of TXU Corp., Oncor's parent company.[9] The subsequent Joint Report, filed on April 25, 2007, contained the ten commitments made in the April 2nd letter to the Commission and also included an additional set of five commitments "to support the separateness of Oncor from the rest of TXU Corp. and its subsidiaries."[10] The Joint Report also included four self-styled "commitments unrelated to Oncor's business and this proceeding."[11] The Joint Report was accompanied by a number of exhibits and supporting testimony.

Although TEF/Oncor claimed that the merger arrangement did not technically trigger Commission review and that they had "chosen to seek a public interest determination pursuant to Section 14.101(b) of PURA,"[12] there is no question that TEF's acquisition of 100 percent of the stock of TXU Corp. triggered the statute's 50 percent stock acquisition threshold. Moreover, regardless of the Commission's authority prior to the filing, the choice to make

[9] A merger agreement was reached between TEF and TXU Corp. on February 25, 2007. *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* ("Joint Report"), Oncor/TEF Ex. 1 at 1.
[10] *Id.* at 6.
[11] *Id.* at 7-8.
[12] *Id.* at 1-2.

the filing made all of the issues raised by the transaction issues in this proceeding.

The proceeding commenced with a number of parties conducting discovery that raised questions concerning the scope of the proceeding – including whether commitments made by TEF that related to affiliates other than Oncor were reviewable and/or enforceable through this proceeding. In a series of actions, the Commission narrowed the scope of the proceeding to "commitments that directly affect Oncor."[13] On July 27, 2007, the Commission requested briefing from the parties on threshold legal and policy issues affecting the scope of the proceeding, paying particular attention to the impact of new PURA Section 39.262(o) on the scope of the Commission's power to enforce commitments made by the purchaser of a regulated utility, as well as whether the evaluation of commitments relating to affiliates of a public utility should be limited to how those commitments would affect the public utility.[14] The Preliminary Order of August 23, 2007, issued more than four months after the proceeding was initiated and less than a month before intervenor direct testimony was due, limited the inquiry into the underlying transaction to how the transaction would affect Oncor, with the Commission specifically stating that it could not "evaluate or enforce any commitment made that relates to the affiliate of the public utility. . . ."[15]

The Preliminary Order had an immediate impact on Nucor's participation (as well as that of other parties) in this proceeding. In separate Requests for

[13] Preliminary Order at 2.
[14] *Order Requesting Briefing on Threshold Legal/Policy Issues* at 1.
[15] Preliminary Order at 2.

Information ("RFI") to Oncor and TEF filed on August 20, 2007, Nucor sought further information on the four commitments TEF/Oncor raised in the Joint Report and in supporting testimony, which TEF/Oncor then claimed were outside the scope of the proceeding.[16] Armed with the Preliminary Order, TEF and Oncor filed scope-of-the-proceeding objections to Nucor's RFIs addressing those four commitments. These objections were sustained by the ALJ in Order No. 27, relying on the Preliminary Order.[17]

On September 14, 2007, Nucor filed the *Direct Testimony of Dr. Dennis W. Goins* ("Goins Direct"). Dr. Goins addressed, *inter alia*, the four commitments TEF/Oncor referenced in the Joint Report and/or supported with TEF/Oncor testimony, which TEF/Oncor claimed were beyond the scope of the proceeding. He also criticized the limitations placed on the scope of the proceeding. Again relying on the Preliminary Order, Oncor moved to strike extensive portions of Dr. Goins' testimony relating to these issues.[18] In Order No. 31, citing the Preliminary Order, the ALJ struck large portions of Dr. Goins' testimony.[19]

On October 5, 2007, TEF/Oncor filed a *Notice of Settlement in Principle and Joint Motion for Extension of Procedural Schedule,* which was followed on October 24, 2007 by a *Stipulation* that was eventually supported by all parties in the proceeding, other than Nucor, Chaparral Steel and AARP.[20] All of the parties

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[16] *Nucor Steel's First Request for Information to Oncor Electric Delivery Company* (Nucor's RFIs to Oncor") at 10-11; *Nucor Steel's First Request for Information to Texas Energy Future Holdings Limited Partnership* (Nucor's RFIs to TEF") at 10-11.
[17] Order No. 27 at 5.
[18] *Oncor Electric Delivery Company's Motion to Strike Portions of the Direct Testimony of Nucor Steel Witness Dennis W. Goins* (September 21, 2007) at 1.
[19] Order No. 31 at 2-3.
[20] Tex-La Electric took no position on the Stipulation. Order at 5 (Finding of Fact ("FOF") 23).

in the proceeding were given the opportunity to conduct limited discovery on the Stipulation and supporting testimony and submit supplemental testimony.[21]

On November 6, 2007, Nucor sent a letter to all parties asking the parties to confirm that their direct and rebuttal testimony filed prior to the Stipulation would be placed into evidence at hearing, pursuant to representations made in a Proposed Order attached to the Stipulation.[22] On November 14, 2007, after receiving a written response from only TEF/Oncor[23] and a verbal response from Staff, Nucor submitted a *Motion to Clarify Status of Previous Testimony Submitted by Settling Parties* ("Motion to Clarify"). Nucor maintained that it had a right to rely on the representations made in the Stipulation in preparing its direct case vis-à-vis the Stipulation and asked the ALJ to order the settling parties to confirm the status of their previously-filed direct testimony.

In Order No. 41, filed on November 16, 2007, the ALJ directed the settling parties to designate whether previously filed testimony would be entered into evidence at hearing on the Stipulation.[24] However, the ALJ gave the parties until November 27, 2007 to respond,[25] six days after Nucor was required to file direct testimony. Nucor filed Dr. Goins' *Supplemental Direct Testimony in Opposition to Stipulation* ("Goins Supplemental Direct") on November 21, 2007, as

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[21] Order No. 35 at 1.
[22] Nucor Letter re Hearing Exhibits, November 6, 2007; *see Stipulation*, Oncor/TEF Ex. 17, Exhibit A at 2-3 for a listing of the exhibits the parties to the Stipulation claimed would be entered into evidence at hearing.
[23] "Consistent with the Stipulation," TEF/Oncor indicated they would offer into evidence at hearing all of the previously submitted direct testimony. *Applicants' Response to Nucor Steel's Letter Concerning Exhibits and Request for Prehearing Conference* (November 13, 2007) at 1.
[24] Order No. 41 at 2.
[25] *Id.*

scheduled. All of the intervening parties, including Staff, filed responses to Order No. 41 on November 27, withdrawing their previously filed direct testimony.

TEF/Oncor subsequently moved to strike portions of Dr. Goins' supplemental direct testimony, once again invoking the Preliminary Order on scope of the proceeding and, in addition, asking the ALJ to strike testimony addressing or incorporating withdrawn testimony by other parties, even though some of that testimony was withdrawn *after* Nucor filed Dr. Goins testimony.[26] Staff also moved to strike portions of Dr. Goins' testimony referencing or incorporating the withdrawn testimony of Staff witness, Dr. Craig R. Roach, as well as Texas Industrial Energy Consumers' ("TIEC") witness, Jeffry Pollock.[27] Order No. 45, filed on December 10, 2007, with no comment as to Nucor's arguments against the motions to strike, struck significant portions of Dr. Goins' testimony and exhibits.[28]

At the December 11, 2007, Prehearing Conference, Nucor offered four separate exhibits into the record which were objected to by TEF/Oncor and denied admission by the ALJ. Nucor made a timely offer of proof at the conclusion of the prehearing conference and placed these exhibits into the

[26] *See TEF's and Oncor's Motion to Strike Supplemental Direct Testimony of Dr. Dennis W. Goins* (November 30, 2007) at 1-2. It will be remembered that the Proposed Order attached to the Stipulation indicated that all intervenor previously submitted direct testimony would be offered into evidence at hearing. No indication to the contrary was made until November 27, six days after Nucor submitted Dr. Goins' supplemental direct testimony.
[27] *Commission Staff's Motion to Strike Portions of the Supplemental Direct Testimony of Dennis W. Goins* (December 5, 2007).
[28] Order No. 45 at 3.

record for subsequent appellate consideration.[29] Nucor also asked the ALJ to reconsider Order No. 45, and that request was denied.

The December 12, 2007 hearing, held before the Commission, included cross-examination of Nucor, AARP, Staff and TEF/Oncor witnesses. Parties filed post-hearing briefs on January 11, 2008. The Commission discussed its decision in this docket at its January 25, 2008 Open Meeting. As noted above, an order was filed on February 22, 2008. Several parties, including Nucor, timely filed motions for rehearing and/or motions for order *nunc pro tunc.* While the Commission opted not to add Nucor's motion for rehearing to the agenda of its April 9, 2008 Open Meeting, it considered and adopted changes to the February 22 order offered by Staff and the State of Texas. An Order on Rehearing was filed on April 24, 2008. That Order is the subject of this Motion for Rehearing.

## III. Grounds for Rehearing

**Point of Error No. 1: The Order should have considered and adopted the recommendations offered by Nucor and Nucor's witness, Dr. Dennis W. Goins, to make the Stipulation better serve the public interest. (Findings of Fact ("FOF") 47, 49, 51, 78, 84, 96, 97, 101 and 102; Conclusions of Law ("COL") 4, 6, 9, 10; Ordering Paragraph ("OP") 1)**

Nucor submitted direct and supplemental direct testimony recommending changes to the underlying transaction and the Stipulation that would have addressed some of the public interest concerns about the merger and acquisition of TXU Corp. by TEF. Nucor also filed a post-hearing brief that summarized and

[29] These Exhibits, Nucor OOP-1, OOP-2, OOP-3 and OOP-4, contain Nucor's RFIs to Oncor 1-4, 1-5, 1-6 and 1-7 (inquiries about the four commitments claimed to be beyond the scope of the hearing); Nucor's RFIs to TEF 1-4, 1-5, 1-6 and 1-7 (the same four commitments); Dr. Goins' unredacted/unstricken Direct Testimony; and Dr. Goins' unredacted/unstricken Supplemental Direct Testimony, respectively.

discussed its recommendations.[30] The Order referenced neither our brief nor our testimony. There was no discussion of Nucor's recommendations – either positive or negative. Given the magnitude of the transaction under consideration in this proceeding, we believe an examination of the limited number of recommendations from parties choosing not to sign on to the Stipulation merited consideration.

The Order should have considered and adopted the following recommendations:

- Any public interest finding should be interim or conditional in nature, with the Commission reserving authority for at least 5 years to evaluate risks and harms that may arise;[31]
- Oncor should be required to cap rates at 2007 levels for 5 years to protect consumers from rate increases resulting from the underlying transaction;[32]
- Oncor's cost of debt and cost of capital should be capped at pre-transaction levels, absent extraordinary circumstances, through 2013;[33]
- The entire $200 million commitment in DSM expenditures should be administered through Oncor, consistent with Dr. Goins' recommendations;[34]

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[30] *Post-Hearing Brief Submitted by Nucor Steel-Texas* ("Nucor Post-Hearing Brief") (January 11, 2008).
[31] Goins Supplemental Direct, Nucor Ex. 6 at 5:10-17; Nucor Post-Hearing Brief at 12-13.
[32] Goins Supplemental Direct, Nucor Ex. 6 at 5:22-26; Nucor Post-Hearing Brief at 13-14.
[33] Goins Supplemental Direct, Nucor Ex. 6 at 6:10-13; Nucor Post-Hearing Brief at 14-15.
[34] Goins Supplemental Direct, Nucor Ex. 6 at 6:28-7:14; Nucor Post-Hearing Brief at 15-18.

- The financial transparency commitment should be broadened to include all necessary information from all TEF subsidiaries in addition to Oncor, in order to maintain public interest protections.[35]

Dr. Goins' testimony and Nucor's Post-Hearing Brief, which are incorporated herein by reference, detail the reasons for adding these recommendations to the commitments made by TEF/Oncor to better serve the public interest. While we do not believe that the Stipulation, in its present form, meets the public interest standard, we do believe that considering and adopting our recommendations would significantly benefit and protect consumers.

**Point of Error No. 2: The Preliminary Order interpreted PURA Section 39.262(o) contrary to the plain language of the statute, unreasonably restricting the scope of the proceeding as well as the Commission's authority to enforce commitments made in conjunction with the underlying transaction.[36] (FOF 11, 96, 97, 102; COL 4, 6, 9, 10; OP 1)**

In the most recent Legislative session, PURA Section 39.262 was amended to include Section 39.262(o), dealing with the extent to which the Commission can enforce commitments made by a party seeking to acquire or merge with a public utility. The exact language of the statute is as follows:

> (o) If an electric utility or transmission and distribution utility or a person seeking to acquire or merge with an electric utility or transmission and distribution utility files with the commission a

[35] Goins Supplemental Direct, Nucor Ex. 6 at 7:19-27; Nucor Post-Hearing Brief at 18.

[36] Nucor brought this issue to the Commission's attention many times in this proceeding, including: *Nucor Steel – Texas' Brief on Threshold Legal/Policy Issues, Post-Hearing Brief Submitted by Nucor Steel – Texas, Nucor Steel's First Request for Information to Oncor Electric Delivery Company, Nucor Steel's First Request for Information to Texas Energy Future Holdings Limited Partnership, Nucor Steel-Texas` Motion to Compel Response of Texas Energy Future Holdings Limited Partnership to Nucor Steel's First Request For Information, Nucor Steel-Texas` Motion to Compel Response of Oncor Electric Delivery Company to Nucor Steel's First Request For Information*, Dr. Goins' Direct Testimony and Dr. Goins' Supplemental Direct Testimony. These documents are incorporated herein by reference.

> stipulation, representation, or commitment in advance of or as part of a filing under Subsection (l) or under Section 14.101, the commission may enforce the stipulation, representation, or commitment to the extent that the stipulation, representation, or commitment is consistent with the standards provided by this section and Section 14.101. The commission may reasonably interpret and enforce conditions adopted under this section.

The plain language of the statute grants power to the Commission to take appropriate measures to enforce all commitments, stipulations and representations made by any person in the transaction that is the subject of the present proceeding. The statute recognizes that the entity acquiring the utility may not itself be a utility. Nonetheless, the Commission has the power to enforce "all commitments" to the extent this is consistent with the standards provided by Sections 39.262(o) and 14.101.

Section 14.101 obliged the Commission to investigate the acquisition and to determine "whether the action is consistent with the public interest."[37] In making that determination, the Commission was required to consider:

> (1) the reasonable value of the property, facilities, or securities to be acquired, disposed of, merged, transferred, or consolidated;
>
> (2) whether the transaction will:
>
> (A) adversely affect the health or safety of customers or employees;
> (B) result in the transfer of jobs of citizens of this state to workers domiciled outside this state; or
> (C) result in the decline of service;

[37] PURA § 14.101(b).

(3) whether the public utility will receive consideration equal to the reasonable value of the assets when it sells, leases, or transfers assets; and

(4) whether the transaction is consistent with the public interest.[38]

Read in tandem with Section 39.262(o), the Commission clearly has authority to enforce commitments made by any "person" seeking to acquire a regulated utility, with no restriction that those commitments have to relate specifically to the utility.[39] Collectively, such commitments need be of sufficient weight and enforceability to secure a public interest finding.

Given the timing of the legislation, the Legislature was well aware of the present proceeding and the commitments made by the parties when it enacted the statute. The overall legislation was careful to give the Commission the present authority to enforce all commitments, while reserving the authority for approving acquisitions and mergers to future transactions.[40] The well-known fact, apparent from reading the statute, is that PURA Section 39.262(o) was added in response to the then-proposed acquisition of TXU Corp. by TEF. Arguing that Section 39.262(o) does not, or should not, apply to the Commission's review in Docket No. 34077 is ignoring the facts in direct contradiction to legislative intent.

Section 14.101(b) requires the Commission to consider whether the transaction is in the public interest, weighing the value and equity of the

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[38] *Id.*

[39] PURA Section 11.003(14) defines a "person" as: "an individual, a partnership of two or more persons having a joint or common interest, a mutual or cooperative association, and a corporation, but does not include an electric cooperative." TEF holds itself out as a limited partnership and thus is a "person", as defined by the statute.

[40] PURA Section 39.262(l), which will require Commission approval of future transactions, was limited by Section 39.262(n) to acquisitions finalized after April 1, 2007. New Section 39.262(m) likewise applies to future acquisitions. No such limitation was placed on Section 39.262(o).

transaction, whether the transaction adversely affects public or employee health or safety, whether it will result in the loss of jobs to other states, cause a decline in service and how it impacts the public interest generally. Although enforcement powers may be reasonably implied, explicit enforcement is limited to Section 14.101(c), which gives the Commission power to "take the effect of the transaction into consideration in ratemaking proceedings and disallow the effect of the transaction if the transaction will unreasonably affect rates or service." New Section 39.262(o) thus considerably broadens the Commission's enforcement powers regarding stipulations, representations and commitments associated with an acquisition or merger by making the power to enforce those commitments explicit.

The Preliminary Order, however, took the position that the review of mergers and acquisitions under Sections 14.101 and 39.262(o) "is limited in scope and that the Commission can only enforce the commitments that are directly related to the public utility."[41] The Preliminary Order concluded that the Commission "cannot evaluate or enforce any commitment made that relates to the affiliate of the public utility, and can only address commitments that directly affect Oncor."[42] The Preliminary Order referred generally to legislative intent to limit Section 39.262(o) only to the public utility and commitments directly affecting the public utility, without citing to any legislative history.[43]

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[41] Preliminary Order at 2. The Preliminary Order is itself final. The Commission explicitly stated at page 5 that the Preliminary Order was not subject to motions for rehearing or reconsideration. Nucor attempted to appeal Order No. 27 to the Commission on grounds that the Commission unreasonably narrowed the scope of the proceeding, but the Commission declined to place Nucor's appeal on its Final Order agenda.

[42] Preliminary Order at 2.

[43] *See id.*

The Preliminary Order incorrectly interpreted the statute, was arbitrary and capricious and lacked reasoned decision-making. We do not believe that the Preliminary Order's interpretation of PURA Section 39.262(o) will withstand scrutiny:

> An administrative agency's construction or interpretation of a statute, which the agency is charged with enforcing, is entitled to serious consideration by reviewing courts, so long as that construction is reasonable and does not contradict the plain language of the statute. *Employees Ret. Sys. v. Jones*, 58 S.W.3d 148, 151 (Tex. App—Austin 2001, no pet.) (citing *Steering Comms. For the Cities Served by TXU Elect. & Cent. Power & Light Co. v. Pub. Util. Comm'n,* 42 S.W.3d 296, 300 (Tex.App.-Austin 2001, no pet.)). However, when the interpretation does not involve technical or regulatory matters within the agency's expertise but requires the discernment of legislative intent, we give much less deference to the agency's reading of a statute. "Courts do not defer to administrative interpretation in regard to questions which do not lie within administrative expertise, or deal with a nontechnical question of law." 2B Norman J. Singer, *Statutes and Statutory Construction* § 49:04, at 23-24 (6th ed. 2000).[44]

First, the Preliminary Order is contrary to the plain language of the statute. Second, the Preliminary Order lacks any reasoned basis for its conclusions. The negative impact of the Preliminary Order is clear. In Nucor's case, the Preliminary Order was used, as noted *supra,* as well as in subsequent Points of Error, to unilaterally strike portions of Nucor's discovery, direct testimony and supplemental direct testimony.[45] Thus, Nucor and with that, the Commission,

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[44] *Flores v. Employees Ret. Sys.*, 74 S.W.3d 532, 545-546 (Tex. App.—Austin 2002, petition for review filed (June 3, 2002)).

[45] *See* Order No. 27 at 5; Order No. 31 at 2; Order No. 45 at 3. Order No. 45 does not explain the ruling at all. However, in referencing the arguments used in TEF/Oncor's Motion to Strike on

was barred from inquiring into and addressing TEF's coal unit, emerging technologies, ten percent price cut and five-year TXU Corp. investment commitments, even though the commitments were referenced in the Joint Report and in TEF/Oncor direct testimony.[46] In short, these commitments were placed before the Commission by TEF/Oncor as an inducement to secure a public interest finding and should have been evaluated under the standards established by PURA Section 39.262(o). The Preliminary Order not only violates a statutory provision, but resulted in a series of erroneous decisions that prejudiced Nucor's substantial rights in this proceeding.

**Point of Error No. 3: The Preliminary Order interpreted PURA Section 14.101(b) contrary to the plain language of the statute and its own precedent, unreasonably restricting the scope of the proceeding as well as the Commission's authority to enforce commitments made in conjunction with the underlying transaction. (FOF 11, 96, 97, 102; COL 4, 6, 9, 10; OP 1)**

As noted above, the Preliminary Order concluded that "its review of the transaction under PURA § § 14.101 and 39.262(o) is limited in scope and . . . the Commission can only enforce the commitments that are directly related to the public utility."[47] The Preliminary Order, without reference, claimed that most of the precedent pertaining to public interest findings "took place prior to S.B. 7 and a restructured electric industry in ERCOT, and are not directly comparable to this proceeding."[48] The Preliminary Order essentially extended the limitations it

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page 1 of the Order, the ALJ appears to have relied on "the Administrative Law Judge's (ALJ) and the Commission's previous rulings regarding scope of this proceeding. . . ."

[46] The Joint Report introduced all of these commitments into the proceeding. *See* Joint Report, Oncor/TEF Ex. 1 at 7-8; *Direct Testimony of Frederick M. Goltz*, Oncor/TEF Ex. 4 at 23-25 (coal units), 24 (emerging technologies).

[47] Preliminary Order at 2.

[48] *Id.*

placed on evaluating commitments under PURA Section 39.262(o) to evidence that would be considered in making a final public interest finding under Section 14.101(b)(4). In essence, having concluded that the Commission would only consider enforceable commitments that related directly to Oncor, the Preliminary Order defined "public interest" for purposes of this proceeding as the effects the merger had on Oncor itself, rather than the broader question of whether the acquisition was good for ERCOT and good for Texas.

Order Nos. 12, 14 and 15 all limited the scope of the proceeding to matters directly related to Oncor, with the Preliminary Order specifically denying ATOC's appeal of Order Nos. 14 and 15.[49] The limitations set in the Preliminary Order eventually went beyond the limitations on the Commission's authority to enforce commitments. Once the Stipulation was filed, the mention of any matter broader than the transaction as it applied narrowly to Oncor was strictly forbidden. The effect of this was to erroneously limit the public interest evaluation in this case to matters directly affecting Oncor. A graphic illustration is the following language stricken by the Judge from the direct testimony of AARP's expert witness, John Antonuk, addressing the Stipulation:

> The limits established on the scope of these proceedings do not permit a sufficiently robust consideration of the public interest. Generally, the issues excluded from this proceeding concern the nature of the Texas electricity market, the roles of these affiliated companies in that market, and the potential for a highly-leveraged corporate family to affect that market.[50]

[49] *Id.* at 4.
[50] *Direct Testimony and Exhibits of John Antonuk* ("Antonuk Direct"), AARP Ex. 1 at 7:8-12.

Order No. 44 gave no reason for the ruling, leaving us to assume that the ALJ affirmed TEF/Oncor's motion to strike, which claimed that the Preliminary Order limited Mr. Antonuk's "complain[t]s about the scope of the proceeding".[51] In case there was any doubt that the "public interest" now was narrowly defined to only those commitments directly affecting Oncor, Order No. 44 went on to strike the following testimony:

> I believe, based on my experience, that public-utility regulators generally have considered and should consider the totality of the factors that affect the actual and prospective ability of utilities to meet their public-service responsibilities. Those factors include all those under which holding-company and affiliate structure, operations, interaction, business risk, financial risk, and separation have the potential for affecting a public utility. It has not been my experience that commissions draw such a tight circle around the affiliate issues they will consider. Doing so, whether or not required by state law or commission practice, can subject a public utility and its customers to harm that may be contrary to a sufficiently encompassing definition of "public interest." The best way to protect the public interest in transactions of this sort is for a commission, where it has the power, to consider the full range of issues that are potentially relevant, and to consider all appropriate steps for protecting a utility and its customers. Doing so requires a robust treatment of all these issues through evidence and argument. I understand that the record in these proceedings does not provide that foundation now, even if the Commission were able to take an expanded view of the issues it may consider.[52]

It is readily apparent that the Preliminary Order, along with the later evidentiary rulings by the ALJ, had the effect of erroneously extending the

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[51] *Oncor Electric Delivery Company's and Texas Energy Future Holding Limited Partnership's Motions to Strike Portions of Direct Testimony of AARP Witness John Antonuk* at 1-2.
[52] Order No. 44 at 2 (striking Antonuk Direct, AARP Ex. 1 at 9:7-21).

"Oncor-only" limitation placed on enforcing commitments under Section 39.262(o) to the broader question of protecting the public interest set forth in Section 14.101(b). This incorrect legal interpretation resulted in a public interest review of the transaction far more narrow than prescribed by the statute.

**Point of Error No. 4: The interpretation of PURA Sections 39.262(o) and 14.101(b) in this proceeding was arbitrary and capricious by limiting the intervening parties' evidence to issues related to Oncor while permitting TEF/Oncor to include in evidence, and indeed in the Order, issues and commitments not related to Oncor. (FOF 11, 96, 97, 102; COL 4, 6, 9, 10; OP 1)**

As discussed in Points of Error 2 and 3, the Commission decided through a series of orders that both the enforcement of commitments under PURA Section 39.262(o) and the determination of public interest under PURA Section 14.101(b) were limited to commitments that directly affected Oncor. This limited Nucor and other parties to discussing a narrow range of issues, rather than the broad series of commitments and issues, some involving TEF and its non-Oncor subsidiaries, related to the underlying transaction. Nucor, for example, was not permitted to address certain commitments that involved TEF/Oncor affiliates, being specifically prohibited from discovery into and submitting testimony on four issues involving commitments made by non-Oncor TEF affiliates.[53]

On the other hand, TEF/Oncor was permitted to address such issues and commitments in its testimony and evidence. Both the Joint Report and Mr. Goltz' direct testimony addressed the very issues that Nucor and other intervenors were

[53] *See* Order Nos. 27, 31 and 45. Nucor discusses the individual orders in detail later in this Motion for Rehearing.

prohibited from addressing in either discovery or testimony.[54] Even more troubling is that the Order also includes non-Oncor-related commitments in its Findings of Fact. For example, FOF 84(ii) provides:

> The other $100 million of incremental DSM expenditures will be funded and spent by TEF affiliates other than Oncor for the benefit of industrial, commercial, residential and municipal, state, and other governmental customers from January 1, 2008 through December 31, 2012.

Since the Commission has approved the Stipulation and described the above as a supplement to the DSM commitment appearing elsewhere in the Stipulation,[55] it would appear that a commitment to be made by TEF affiliates other than Oncor can be a part of the agreement and, as such, is enforceable by the Commission and, presumably, part of the public interest determination. However, when TEF/Oncor included other affiliate commitments in their Joint Report and supporting testimony, as will be discussed further later in this Motion, Nucor and other parties were not permitted to address these matters in discovery or testimony. This unequal, arbitrary and capricious approach to the scope of the proceeding issues resulted in an evaluation of the transaction that favored the parties supporting the underlying transaction and later, the Stipulation, at the expense of parties that questioned whether approval of the transaction was in the public interest.

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[54] *See,* Joint Report, Oncor/TEF Ex. 1 at 7-8 and Direct Testimony of Frederick M. Goltz ("Goltz Direct"), Oncor/TEF Ex. 4 at 23-25 (coal units commitment); Joint Report, Oncor/TEF Ex. 1 at 8 and Goltz Direct, Oncor/TEF Ex. 4 at 24 (emerging technologies commitment); Joint Report, Oncor/TEF Ex. 1 at 7-8 (ten percent price cut and five-year TXU Corp. investment commitments).
[55] Order at 20, FOF 84(iii) (referencing Order at 8-9, FOF 49).

**Point of Error No. 5: The Order fails to provide a reasoned basis for adopting the Stipulation under the public interest standard, as required by PURA Section 14.101(b) and APA Section 2001.141(d). (FOF 11, 96, 97, 102; COL 4, 6, 7, 9, 10; OP 1.)**

The Order references, but does not elaborate upon, the standards for approval of a non-unanimous stipulation set forth in *City of El Paso v. Public Utility Commission*.[56] In that case, the Texas Supreme Court relied on *Mobil Oil Corp. v. Federal Power Commission*[57] for the proposition that, even where there is a lack of unanimity, a settlement may be adopted as a resolution on the merits if the Commission makes an independent finding supported by substantial evidence on the record as a whole that the settlement will establish just and reasonable rates.[58] As to that finding,

> An agency's decision is arbitrary or results from an abuse of discretion if the agency: (1) failed to consider a factor the legislature directs it to consider; (2) considers an irrelevant factor; or (3) weighs only relevant factors that the legislature directs it to consider but still reaches a completely unreasonable result.[59]

In the present case, the Commission failed to evaluate all of the commitments made in this proceeding under the standards of new PURA Section 39.262(o), which operates in tandem with PURA Section 14.101. The Commission failed to make an independent finding that the non-unanimous stipulation was supported by a preponderance of the record evidence and resulted in just and reasonable rates. There is no such reference to

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[56] 883 S.W.2d 179 (Tex. 1994).
[57] 417 U.S. 283, 94 S.Ct. 2328, 41 L.Ed.2d 72 (1974).
[58] *El Paso*, 883 S.W.2d at 183 (quoting *Mobil Oil*, 417 U.S. at 314, 94 S.Ct. at 2348-49, 4 L.E.2d at 98).
[59] *El Paso*, 883 S.W.2d at 184 (citing *Gerst v. Nixon*, 411 S.W.2d 350, 360 n.8 (Tex. 1966)).

preponderance of evidence.[60] In fact, in crucial areas, such as the $72 million one-time refund, there is no record evidence supporting $72 million as a proper settlement figure. Moreover, this case is not a rate proceeding, where the Commission is making a determination as to just and reasonable rates. This failure to exercise reasoned decision-making required by law[61] merits a rehearing of the case to evaluate all of the commitments placed before the Commission in the Joint Report.

More importantly, the Order does not meet the standard set for findings of fact in a final order in a contested case. APA Section 2001.141(d) requires that: "Findings of fact, if set forth in statutory language, must be accompanied by a concise and explicit statement of the underlying facts supporting the findings." Simply concluding that the Stipulation and merger are in the public interest by referencing the statutory language of Section 14.101(b), as the Order does, cannot meet the statutory requirement.[62] The Order does little more than restate the terms of the Proposed Order submitted by the settling parties with the Stipulation, with no further explanation on how the acquisition of Oncor by TEF is itself in the public interest.

As an intervenor that participated extensively in this proceeding, Nucor notes that no consideration is given to the argument and evidence offered by the non-settling parties in the Order. Unlike most orders that may become final,

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[60] The Commission finds that, based upon record evidence, "the terms of the stipulation reached by certain parties in this docket are reasonable." Order at 27, FOF 96. Also based upon record evidence, "the stipulation reached by certain parties in this docket is in the public interest." Order at 27, FOF 97. These conclusory statements are not buttressed by a statement of facts supporting the findings.

[61] *State of Texas,* 2008 Tex. App. LEXIS 563 at **23-24.

[62] *See* Order at 27, FOF 97 and 102.

there is virtually no discussion whatsoever of the issues in this proceeding, nor reference to record evidence.

To cure this defect, the Commission should reopen the proceeding to carefully assess all of the arguments and evidence (including those offered by opponents to the Stipulation) on each provision of the Stipulation in a final order and make the necessary findings to support the conclusions it reaches. In its present form, the Order does not meet the requirements of PURA Section 14.101(b) and is not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole.

**Point of Error No. 6: No credible record evidence supports the $72 million, one-time refund, or the $56 million in write-offs, provided for by the Stipulation as a justification for the public interest finding required by PURA Section 14.101(b) for the underlying transaction; this lack of evidence fails to meet the record evidence requirement of APA Section 2001.141(c). (FOF 66, 77, 96, 97, 102; COL 4, 6, 7, 8, 9, 10; OP 1)[63]**

Findings of fact in a contested case may be based only on the record evidence and on matters that are officially noticed.[64] An agency's decision is arbitrary or results from an abuse of discretion when it considers an irrelevant factor in reaching a decision in a contested case.[65]

FOF 96 in the present case states that "[b]ased upon the record evidence, the terms of the stipulation reached by certain parties in this docket are reasonable."[66] FOF 97 concludes that the record evidence shows that the

[63] Nucor brought this issue to the Commission's attention several times in this proceeding, including Dr. Goins' Supplemental Direct Testimony and the *Post-Hearing Brief Submitted by Nucor Steel – Texas.*
[64] APA Section 2001.141(c).
[65] *El Paso*, 883 S.W.2d at 184.
[66] *Order* at 27.

Stipulation is in the public interest.[67] Finding of Fact 102 states that "[t]he merger, coupled with the terms of the stipulation, as amended is in the public interest."[68] FOF 77 provides details of the one-time $72 million credit to Retail Electric Providers that will be directly paid or credited to their retail customers.[69]

The importance of the $72 million credit to the settlement of this proceeding is reflected in the Commission's decision to discuss none of the other commitments in its brief introductory remarks in the Order. According to the Order, the Commission "determines that the one-time $72 million credit represents a great benefit for Texas retail consumers."[70] Unfortunately, nothing in the record provides reasonable evidence that a one-time $72 million refund was even a reasonable settlement of Docket No. 34040, much less why it is a "great benefit" in Docket No. 34077.

The parties to the settlement had an obligation to provide testimony supporting the $72 million settlement figure. This they failed to do. Indeed, there was no evidence in this proceeding offered to show Oncor's cost of service, which evidence would be required to determine if a rate refund was reasonable. Nor was there any evidence that otherwise leaving Oncor's rates in place was a reasonable action. In contrast, Nucor's witness, Dr. Goins, pointed out that:

> The $72-million credit is directly linked to the dismissal of a case (Docket No. 34040) initiated after the Staff estimated Oncor's excess revenues at approximately $80 million. No one knows whether a full review of Oncor's operations in that docket would affirm or disprove the Staff's $80 million excess

[67] *Id.*
[68] *Id.*
[69] *Id.* at 14-17.
[70] *Id.* at 2.

> revenue estimate. In fact, if Docket No. 34040 went forward, the Commission might find that Oncor's excess revenues were significantly greater than $80 million. Unfortunately, if the Stipulation is approved, we will never know the answer.[71]

As Dr. Goins points out, the Commission initiated Docket No. 34040 after its Staff concluded, without a full case to review the cost of service, including necessary discovery, that Oncor was overearning by $80 million. The real figure could easily be larger or smaller, but the Stipulation included a resolution of Docket No. 34040, with a one-time payment of $72 million to retail electric providers, without any investigation and no supporting evidence.

The parties supporting the Stipulation had a duty in this proceeding to demonstrate that the $72 million settlement figure was reasonable based on some cost-of-service evidence, but failed to present any record evidence supporting this number. Dr. William Avera, for example, referred to the $72 million one-time payment as a benefit, but did not explain why it was reasonable to settle an $80 million overearning preliminary estimate by one party, which may have extended over multiple years with even greater monetary impact, with a one-time $72 million payment.[72] Mr. Shapard refers to the $72 million payment as an "economic benefit" but, again, does not explain why the amount is reasonable or how it was derived or relates to Oncor's actual cost of service.[73] Dr. Avera and Mr. Shapard had ample opportunity to demonstrate the reasonableness of the $72 million one-time solution to the $80 million

[71] Goins Supplemental Direct Testimony, Nucor Ex. 6 at 4.
[72] *See* Direct Testimony of William E. Avera, Ph.D., CFA in Support of the Stipulation, Oncor/TEF Ex. 6 at 8:4-5; 9:24-25 and 10:4-12.
[73] *See* Supplemental Direct Testimony in Support of Stipulation of Robert S. Shapard, Oncor/TEF Ex. 20 at 4:9-11; 6:27 through 7:7.

overearning problem, since all of the relevant evidence and data is in the utility's hands, but declined to do so in their supplemental direct or rebuttal testimony.[74] Moreover, even if this was a reasonable settlement of the other docket, this does not make it a "great benefit" of the transaction under review in this docket. Again, there was simply no evidence, only unsupported assertion, to support this finding.

The only way to have determined whether the $72 million one-time payment is a reasonable resolution of Docket No. 34077 would have been to require TEF/Oncor to prove this fact through evidence and to permit discovery and testimony by other intervenors to address this issue; unfortunately this did not occur. As it stands, the Order's approval of the $72 million settlement figure is arbitrary and not reasonably supported by substantial, reliable and probative evidence.

The same defect applies to the $35 million in storm reserve and $21 million in 2002 restructuring expenses held as regulatory assets that Oncor has agreed not to include in its 2008 rate case. The purported benefit of these write-offs is completely chimerical, as there is no guarantee that Oncor would have requested recovery of either of these expenses in its 2008 rate case, or that the Commission would have granted the request. Indeed, there is no evidence on

[74] Staff witness, Darryl Tietjen, took this approach by stating that "the amount of the $72 million credit closely approximates the $80 million excess-revenue figure estimated by Staff in its review of Oncor's 2005 P.U.C. earnings report." *Direct Testimony in Support of Stipulation – Darryl Tietjen*, Staff Ex. 1 at 7 n.2. Mr. Tietjen's reference was to a portion of his testimony describing the resolution of rate issues, and not the reasonableness of the settlement. Moreover, while $72 million is within 10 percent of $80 million, the overearnings report relied upon by Staff was based on 2005 alone. Overearning could have continued in 2006 and 2007, in which case retail customers did not get a good deal at all in the Stipulation. Whatever the outcome, none of the settling parties offered record evidence showing the reasonableness of the $72 million figure in terms of settlement of the present proceeding.

these points either. Moreover, the write-offs have absolutely nothing to do with whether or not the transaction in this case is in the public interest. They are not transaction-related benefits.[75]

**Point of Error No. 7: Order No. 27 unlawfully restricted the scope of discovery in Nucor's direct case, thereby violating Nucor's right to discovery under Commission rules and right under APA Section 2001.051 to respond to and present evidence and argument to each issue involved in the case.[76] (FOF 11, 96, 97, 102; COL 4, 6, 9, 10; OP 1)**

On August 20, 2007, Nucor propounded its first set of RFIs to Oncor and TEF, both of whom objected to four Nucor RFIs addressing commitments made by TEF in regard to the underlying transaction that TEF considered outside the scope of this proceeding.[77] As discussed *supra*, TEF placed these commitments at issue in the proceeding by referencing them in the Joint Report and in direct testimony. Relying on the Preliminary Order, the ALJ ruled in Order No. 27 that "[t]he subject RFIs are beyond" the scope of the proceeding, as described in the "Threshold Legal and Policy Determinations" portion of the Preliminary Order.[78] The Preliminary Order, which was "not subject to motions for rehearing or

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[75] Goins Supplemental Direct, Nucor Ex. 6 at 4.

[76] Nucor brought this issue, and the underlying scope of the proceeding issues, to the Commission's attention many times in this proceeding, including *Nucor Steel – Texas' Brief on Threshold Legal/Policy Issues, Post-Hearing Brief Submitted by Nucor Steel – Texas, Nucor Steel's First Request for Information to Oncor Electric Delivery Company, Nucor Steel's First Request for Information to Texas Energy Future Holdings Limited Partnership, Nucor Steel-Texas` Motion to Compel Response of Texas Energy Future Holdings Limited Partnership to Nucor Steel's First Request For Information, Nucor Steel-Texas` Motion to Compel Response of Oncor Electric Delivery Company to Nucor Steel's First Request For Information, Nucor Steel-Texas' Appeal of Order No. 27,* Dr. Goins' Direct Testimony and Dr. Goins' Supplemental Direct Testimony. We incorporate herein by reference Point of Error No. 2 and supporting argument.

[77] The RFIs are repeated in their entirety in Order No. 27 at 2-4.

[78] *Id.* at 5.

reconsideration,"[79] was clearly considered dispositive in determining the limited scope of PURA Sections 39.262(o) and 14.101(b) in this proceeding.[80]

Nucor appealed Order No. 27, asking the Commission for "final clarification" of scope-of-the-proceeding issues.[81] Nucor specifically requested the Commission clarify that: 1) the scope of the case was limited to the underlying transaction, as it pertains to Oncor; and 2) the Commission could not evaluate or enforce any commitment made that related to an Oncor affiliate, rather than Oncor itself.[82] Nucor described the purpose of its appeal as:

> . . . to ensure that the record is absolutely clear that the intent of the Commission's Preliminary Order was to limit the scope of the proceeding to the Transaction, as it pertains to Oncor. We also wish to clarify that it is the Commission's position that it cannot evaluate or enforce any commitment made that related to an Oncor affiliate. If Order No. 27 is permitted to stand, it not only affects Nucor's substantial and material rights to seek Commission determination that all of the commitments made by TEF and Oncor collectively are in the public interest, but also materially affects the course of the hearing by placing substantial restraints on any public interest evaluation.[83]

On September 26, 2007, the Commission notified all parties of record that "[n]o Commissioner voted to add the appeal of Order No. 27 in the above styled

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[79] Preliminary Order at 5.
[80] Ironically, discovery in Commission proceedings usually is very broad, allowing discovery of most matters not privileged or exempted. PUC Proc. Rule 22.141. While discovery can be excluded on grounds of relevance, a more reasoned approach to discovery would have been to permit Nucor and others to examine the commitments in question, particularly since they were raised in the Joint Report and supporting testimony, and then determine their importance later in the proceeding, depending upon how discovered information was used.
[81] *Nucor Steel-Texas' Appeal of Order No. 27* at 3.
[82] *Id.* at 4.
[83] *Id.*

docket to an open meeting agenda."[84] In short, the Commission denied the appeal.

APA Section 2001.051 provides: "In a contested case, each party is entitled to an opportunity . . . (2) to respond and to present evidence and argument on each issue involved in the case." The Preliminary Order unlawfully and arbitrarily decided that the Commission "cannot evaluate or enforce any commitment made that relates to the affiliate of the public utility and can only address commitments that directly affect Oncor."[85] The Coal Unit, Emerging Technologies, Ten Percent Price Cut and Five-Year TXU Corp. Investment Commitments made in the Joint Application and referenced in direct testimony were placed directly at issue in this proceeding by TEF/Oncor (and ultimately admitted into evidence). If they were intended to have no impact on the public interest finding in this proceeding, they should not have been placed at issue before the Commission and not have been admitted into evidence. As a part of TEF/Oncor's direct case, Nucor and other parties were entitled by statute to present argument and evidence on these same issues. Order No. 27 denied Nucor's right to develop its case through discovery on these issues. The hearing should be reopened to conduct discovery and testimony on the impact of these commitments on the public interest.

**Point of Error No. 8: Order Nos. 31 and 45 unlawfully struck relevant portions of Nucor's direct and supplemental direct testimony, thereby violating Nucor's right under APA Section 2001.051 to respond to and present evidence and argument to each issue involved in the case, as well**

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[84] *Letter to All Parties Re: No Commissioner Voted to Add the Appeal of Order No. 27 to an Open Meeting Agenda* at 1.
[85] Preliminary Order at 2.

**as the requirement of PURA Section 14.054(b) that each party in a contested case involving a settlement retains the right to a full hearing on issues that remain in dispute.[86] (FOF 11, 96, 97, 102; COL 4, 6, 7, 9, 10; OP 1)**

Order No. 31, relying on the Preliminary Order, struck portions of Dr. Goins' Direct Testimony that addressed the previously discussed commitments that did not directly affect Oncor.[87] Specifically, Order No. 31 struck Dr. Goins' discussion of TEF's capacity resource commitments, selected customer price cuts, TEF's commitments involving TXU Energy and Luminant, and the Commission's self-defined limits on its authority granted by PURA Section 39.262(o).[88]

Similarly, Order No. 45, ruling on objections by TEF, Oncor and Staff to portions of Dr. Goins' supplemental testimony, apparently relied on the Preliminary Order and "previous rulings" in granting portions of the motions to strike.[89] The objections to portions of Dr. Goins' Supplemental Direct Testimony stricken on hearsay and relevance grounds after previously filed direct testimony by other intervenors was withdrawn will be addressed below in Points of Error 9 and 10.

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[86] Nucor raised this issue, and the underlying scope of the proceeding issues, many times in this proceeding, including *Nucor Steel – Texas' Brief on Threshold Legal/Policy Issues, Post-Hearing Brief Submitted by Nucor Steel – Texas, Nucor Steel-Texas' Response to Oncor Electric Delivery Company's Motion to Strike Portions of the Direct Testimony of Nucor Witness Dennis W. Goins, Nucor Steel-Texas' Response to TEF's and Oncor's Motion to Strike Supplemental Direct Testimony of Dr. Dennis W. Goins, Nucor Steel-Texas' Response to Commission Staff's Motion to Strike Portions of the Supplemental Direct Testimony of Dennis W. Goins,* Dr. Goins' Direct Testimony and Dr. Goins' Supplemental Direct Testimony. We incorporate by reference herein Points of Error 2 and 7 and supporting argument.

[87] Order No. 31 at 2.

[88] Order No. 31 at 2-3 has a complete list of the stricken portions of Dr. Goins' Direct Testimony.

[89] Order No. 45 at 3 delineates the stricken portions of Dr. Goins' supplemental direct testimony.

Nucor incorporates here its arguments made in Points of Error 2, 3 and 4 regarding the Preliminary Order's unlawful and arbitrary limitation of the scope of the proceeding. Order Nos. 31 and 45, pertaining to expert testimony, continued the practice established in Order No. 27 of relying on the Preliminary Order to exclude any discussion of commitments made by TEF/Oncor that did not directly pertain to Oncor. Thus, the erroneous exclusion of Dr. Goins' testimony stems from an erroneous interpretation of the scope of the proceeding.

APA Section 2001.051(2), requires that each party in a contested case be given the opportunity to respond to and present argument on each issue in the case. In addition, once a settlement has been introduced into a proceeding, as here, PURA Section 14.054(b)(1)(A) recognizes that "each party retains the right to a full hearing before the commission on issues that remain in dispute." Order No. 45, in addition to violating APA Section 2001.051(2) and relying on the scope of proceeding errors adopted in the Preliminary Order, denied Nucor's right to a full hearing on issues that remained in dispute after the Stipulation was filed.

The Commission should reopen the proceeding to include the materials excluded in Dr. Goins' direct and supplemental direct testimony and consider this evidence as it pertains to the public interest determination defined by PURA Sections 39.262(o) and 14.101(b).

**Point of Error No. 9: Order Nos. 41 and 45, by permitting parties to the non-unanimous settlement to withdraw testimony after Nucor filed its supplemental direct testimony, then striking portions of Nucor's supplemental direct testimony referencing and/or incorporating withdrawn testimony violated various legal constraints on Commission action including, but not limited to: (a) Nucor's due process rights; (b) Nucor's right under APA Section 2001.051 to respond to and present evidence and argument to each issue involved in the case; (c) the requirement of PURA**

**Section 14.054(b) that each party in a contested case involving a settlement retains the right to a full hearing on issues that remain in dispute; and (d) applicable evidentiary rules including Texas Rules of Evidence 801(e)(2) and 803(8)(C).[90] (FOF 11, 96, 97, 102; COL 4, 6, 7, 9, 10; OP 1)**

As discussed *supra,* Order No. 41 created an unnecessary procedural problem by giving the parties to the Stipulation the option to declare whether their previously filed direct testimony would be offered as record evidence *after* non-settling parties filed their supplemental direct testimony. The Proposed Order submitted with the Stipulation included a list of hearing exhibits showing that all settling parties, other than Staff, would offer their previously submitted testimony into evidence at hearing.[91] However, largely because Staff filed additional testimony in conjunction with the Stipulation and appeared not to intend to offer its original testimony into evidence, Nucor asked the parties by letter to confirm the status of their testimony and, when answers were not forthcoming, filed a motion asking the ALJ to order them to do so.[92]

Nucor filed Dr. Goins' Supplemental Direct Testimony on November 21, 2007. In his Supplemental Direct Testimony, Dr. Goins included references to direct testimony of Staff witness, Dr. Craig R. Roach, and TIEC witness, Jeffry Pollock.[93] In addition, Dr. Goins included excerpts from Dr. Roach's testimony as

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[90] Nucor brought these issues to the Commission's attention several times in this proceeding, including its *Post-Hearing Brief Submitted by Nucor Steel – Texas, Nucor Steel-Texas' Motion to Clarify Status of Previous Testimony Submitted by Settling Parties, Nucor Steel-Texas' Response to TEF's and Oncor's Motion to Strike Supplemental Direct Testimony of Dr. Dennis W. Goins,* and *Nucor Steel-Texas' Response to Commission Staff's Motion to Strike Portions of the Supplemental Direct Testimony of Dr. Dennis W. Goins.* These documents are incorporated herein by reference.

[91] *Stipulation*, Oncor/TEF Ex. 17, Exhibit A at 2-3.

[92] A complete discussion of the circumstances surrounding Nucor's attempt to clarify the status of previously filed testimony can be found in Nucor's Motion to Clarify.

[93] Goins Supplemental Direct Testimony, Nucor Ex. 6 at 8-11.

an exhibit.[94] On November 27, 2007, pursuant to the filing deadline set in Order No. 41, Staff and TIEC stated that the previously submitted testimony of Dr. Roach and Mr. Pollock would not be offered into evidence at hearing.[95]

On November 30, 2007, TEF and Oncor filed a motion to strike portions of Dr. Goins' Supplemental Direct Testimony on grounds of inadmissible hearsay.[96] On December 5, Staff weighed in with its own motion to strike, identifying the same pages of Dr. Goins' testimony as hearsay.[97] The testimony in question discussed Dr. Roach's and Mr. Pollock's direct testimony at pages 8-11 and included excerpts of Dr. Roach's testimony as Exhibit DWG-S-2. Nucor filed responses to both motions. However, Order No. 45 granted much of what TEF/Oncor and Staff requested. Order No. 45 gave no reason for the ruling, which struck pages 8-11 and Exhibit DWG-S-2 of Dr. Goins' supplemental direct testimony. Presumably the ALJ agreed with the inadmissible hearsay allegations.[98] The failure to give a reason for the ruling itself is an illustration of the lack of reasoned decision-making.

It was highly prejudicial error for Order No. 41 to permit parties to withdraw previously filed testimony after having the opportunity to review Dr. Goins'

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[94] *Id.* at Ex. DWG-S-2.

[95] Staff had earlier redesignated Dr. Roach as a consulting expert and the Stipulation appeared to indicate that his testimony would not be offered into evidence at hearing. *Staff's Withdrawal of Designation of Testifying Expert* at 1; *Stipulation*, Oncor/TEF Ex. 17, Exhibit A at 2-3. However, the Stipulation proved to be unreliable, as it appeared to indicate that Mr. Pollock's testimony would be offered into evidence, as would the previously filed testimony of Cities, OPUC and a joint Cities/TIEC witness. *Id.*

[96] *TEF's and Oncor's Motion to Strike Supplemental Direct Testimony of Dr. Dennis W. Goins* at 2.

[97] *Commission Staff's Motion to Strike Portions of the Supplemental Direct Testimony of Dennis W. Goins* at 1.

[98] Order No. 45 references TEF/Oncor and Staff hearsay objections to the pages and exhibit in question at pages 1-2. This, of course, is not an acceptable substitute for identifying grounds supporting the ruling.

supplemental testimony and then decide whether it negatively impacted their support of the Stipulation. This alone violated Nucor's right to present evidence and argument on each issue in the case, as provided in APA Section 2001.051(2), as well as the right of a non-settling party to a full hearing on outstanding issues, set forth in PURA Section 14.054(b)(1)(A).

Moreover, Order No. 45, the direct result of Order No. 41, was clear error. In striking portions of Dr. Goins' testimony on grounds of inadmissible hearsay, the ALJ ignored established rules of evidence applicable to Commission proceedings such as this proceeding. Dr. Roach's testimony was admissible subject to the TEX. R. EVID. 803(8)(C) exception for public records and reports. Dr. Roach was retained by Staff, using public funds, to prepare his testimony, which is essentially a report reflecting his expert opinion and conclusions regarding the underlying transaction. TEX. R. EVID. 803(8)(C) provides an exception to the hearsay rule for:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies setting forth . . . (C) in civil cases as to any party . . . factual findings resulting from an investigation made pursuant to authority granted by law; unless the sources of information or other circumstances indicate lack of trustworthiness.

Dr. Roach is a trustworthy source of information, or he would not have been retained by Staff, nor would his direct testimony have been filed in this proceeding. His conclusions regarding what measures needed to be taken in order to make the underlying transaction in this proceeding minimally acceptable and in the public interest are factual findings resulting from his investigation, which was conducted pursuant to instructions given by Staff, pursuant to

authority granted by law. There is no question that Dr. Roach's testimony, withdrawn or not, is a report of record that falls under the public records and reports exception to the hearsay rule.

Order No. 45 further erred by failing to recognize that, public record or not, the testimony excerpts of Dr. Roach and Mr. Pollock were fully admissible as non-hearsay admissions by party-opponents. TEX. R. EVID. 801(e)(2) is almost self-illustrating:

> **(e) Statements Which Are Not Hearsay.** A statement is not hearsay if:
>
> * * * * *
>
> (2) *Admission by party-opponent.* The statement is offered against a party and is:
>
> (A) the party's own statement in either an individual or representative capacity;
> (B) a statement of which the party has manifested an adoption or belief in its truth;
> (C) a statement by a person authorized by the party to make a statement concerning the subject; [or]
> (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship.

In the case of both Staff and TIEC, the testimony submitted by Dr. Roach and Mr. Pollock certainly qualifies as statements in which the respective parties "manifested an adoption or belief in its truth," or the parties would not have filed the testimony. Dr. Roach and Mr. Pollock were authorized by their respective clients to file testimony (make a statement) concerning the subject matter. The statements of these two experts concerned a matter within the scope of their agency or employment during the existence of their relationship with Staff and

TIEC. The testimony stricken in Order No. 45 was admissible as an admission by party-opponent to Staff and TIEC, as well as to all of the parties to the Stipulation, who chose to align themselves in the latter stages of the proceeding with TIEC and Staff.

The exclusion of portions of Dr. Goins' Supplemental Direct Testimony by Order No. 45 substantially prejudiced Nucor's rights in this proceeding. Striking Dr. Goins' testimony without any stated reasons for doing so in the "Ruling" section of the order demonstrates a lack of reasoned decision-making that is required in a contested case.

**Point of Error No. 10: Order No. 45, by striking Nucor's supplemental direct testimony that referenced and/or incorporated withdrawn testimony by Commission Staff and intervenors, while permitting TEF/Oncor to introduce into evidence at hearing rebuttal testimony to withdrawn testimony by Commission Staff and intervenors violated various legal constraints on Commission action including, but not limited to: (a) Nucor's right to due process under the United States and Texas Constitutions; (b) Nucor's right to equal protection under the law under the United States and Texas Constitutions; (c) Nucor's right under APA Section 2001.051 to respond to and present evidence and argument to each issue involved in the case; and (d) the requirement of PURA Section 14.054(b) that each party in a contested case involving a settlement retains the right to a full hearing on issues that remain in dispute.[99] (FOF 11, 96, 97, 102; COL 4, 6, 7, 9, 10; OP 1)**

Order No. 45 substantially prejudiced Nucor's rights by establishing a double standard for hearsay and relevance. As discussed above in relation to Point of Error No. 9, TEF/Oncor argued that portions of Dr. Goins' Supplemental

[99] Nucor brought this issue to the Commission's attention earlier in this proceeding in its *Post-Hearing Brief Submitted by Nucor Steel – Texas, Nucor Steel-Texas' Response to TEF's and Oncor's Motion to Strike Supplemental Direct Testimony of Dr. Dennis W. Goins,* and *Nucor Steel-Texas' Response to Commission Staff's Motion to Strike Portions of the Supplemental Direct Testimony of Dennis W. Goins.* We incorporate our discussion of Point of Error 9, as appropriate.

Direct Testimony and exhibits should be stricken as inadmissible hearsay. Order No. 45 subsequently struck pages 8-11 and Exhibit DWG-S-2, presumably on those grounds.

In its Response to TEF/Oncor's motion to strike, Nucor asked the ALJ to apply the same standard to the previously-filed rebuttal testimony TEF/Oncor indicated that they would offer into evidence rebutting previously filed direct testimony that now had been withdrawn: "Given Movants' position that rebuttal testimony referencing previously filed, but subsequently withdrawn, testimony should be stricken, Your Honor should strike all of Movants' rebuttal testimony responding to witnesses whose testimony will not be offered into evidence at hearing."[100] Nucor identified at length the previously filed rebuttal testimony of TEF witnesses Schwarcz, Fetter, Goltz and Avera, and Oncor witnesses Pulis and Shapard that should be stricken in whole or in part because they addressed withdrawn, previously filed direct testimony by parties now aligned with TEF/Oncor.[101] Order No. 45 ignored this request and took no action. The net result was that Nucor was not allowed to submit testimony referencing withdrawn, previously filed direct testimony, while TEF/Oncor were permitted to offer their previously filed rebuttal testimony addressing previously filed and subsequently withdrawn direct testimony into the record of this proceeding.

Denying Nucor the right to develop its case pursuant to rights granted by APA Section 2001.051 and PURA Section 14.054(b), which guarantee the right to respond and to present evidence and argument on each issue involved in a

[100] *Nucor Steel-Texas' Response to TEF's & Oncor's Motion to Strike Supplemental Direct Testimony of Dr. Dennis W. Goins* at 9.
[101] *Id.* at 9 n.14.

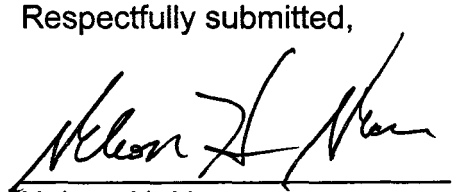
case, including one involving a settlement, prejudiced Nucor's substantial rights. The actions taken in Order No. 45 were not only unlawful, arbitrary and capricious but, in this case, were a clear abuse of discretion that violated both constitutional and statutory provisions. Due process and equal protection guarantee equal treatment in administrative proceedings.[102] That was not the case in the present proceeding. The ultimate effect of Order No. 45 was to allow into the record commentary on withdrawn testimony that supported the desired outcome in this proceeding, while excluding testimony referencing withdrawn testimony that tended to show that the underlying transaction, even as supplemented by the Stipulation, was not in the public interest. This is the very definition of unreasonable decision-making.

[102] Texas Constitution, Article 1 (Bill of Rights), Section 19 (Deprivation of Life, Liberty. Disenfranchisement, Etc., Due Course of Law); U.S. Constitution, Amendment XIV, Section 1; Texas Constitution, Article 1 (Bill of Rights), Section 3 (Equal Rights).

## IV. Prayer

For the above reasons, Nucor respectfully requests that the Commission grant this motion for rehearing, reconsider Nucor's and Dr. Goins' recommendations on substantive issues related to the *Stipulation*, reopen the proceeding to permit discovery, additional testimony and an opportunity for further hearing on the issues where the scope of the proceeding was erroneously narrowed, and, where appropriate, modify the identified orders and change its findings of fact, conclusions of law and operating paragraphs, as appropriate. Nucor also prays for all other relief to which it may be justly entitled.

Respectfully submitted,



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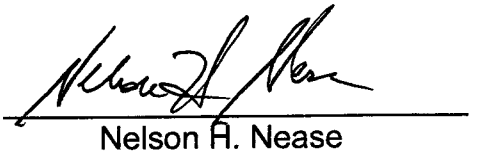
**AUTHORIZED REPRESENTATIVES FOR NUCOR STEEL-TEXAS**

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was hand delivered and/or mailed this 14th day of May, 2008 by First Class, U.S. Mail, postage pre-paid to all parties of record.



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