



Control Number: 34800



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April 22, 2008

Judge Catherine C. Egan
Judge Wendy K. L. Harvel
Judge Michael J. O'Malley
Judge Thomas H. Walston
State Office of Administrative Hearings
300 W. 15th Street
Austin, TX 78701-1649

Re: *PUC Docket No. 34800, SOAH Docket No. 473-08-0334; Entergy Gulf States, Inc.
(EGSI) Rate Case*
Texas Industrial Energy Consumers (TIEC) Letter Regarding Discovery Issues

Dear Administrative Law Judges:

Based on the guidance in Order No. 28, EGSI has withdrawn or limited a number of RFIs and TIEC has withdrawn its objections to producing all non-privileged information within its possession to the remainder, with the exception of RFI 2-19.¹ TIEC has already responded to many of the RFIs and will produce any additional information on or before the April 25 due date. Despite the guidance of Order No. 28, EGSI has not sought third-party discovery of any individual customers, but has insisted that its discovery to TIEC has the same effect as if it had served subpoenas on the thirteen TIEC member companies. Accordingly, TIEC anticipates that EGSI will find TIEC's April 25 response unsatisfactory because it will not include information that TIEC does not have and has no right to obtain. TIEC also requests a ruling on its objection to 2-19, which asks:

Do any TIEC members or affiliates of TIEC members provide any goods or services pursuant to a regulated rate, whether in Texas, the rest of the United States, or elsewhere? If so, please identify such TIEC member or affiliate and describe such rate, the nature of the goods or service provide under the rate, the regulatory authority that sets the rate, and the proceeding in which the current rate was established.

¹ Specifically, EGSI has withdrawn RFIs 31-38 and TIEC has agreed to produce any non-privileged documents it has in response to the remainder of the RFIs addressed in EGSI's motion to compel, as limited therein.

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Order No. 28 did not issue a preliminary ruling with respect to this RFI. As a practical matter, TIEC does not maintain or collect such information (as already set forth in TIEC's Response to EGSI's First Set of RFAs and Second Set of RFIs). However, since EGSI persists in pursuing this RFI, which seeks information that is not relevant to this proceeding and that is clearly designed to be overly broad, burdensome and harassing, TIEC must restate its objection.

TIEC's April 25 response will be consistent with its practice before this Commission in hundreds of cases over the last 30 years, including dozens of Entergy cases in which Entergy has never before taken the idiosyncratic position it takes here. EGSI has made clear its strong displeasure with the substantive positions that TIEC has taken in this case and other pending cases, particularly those relating to the legality of EGSI's attempted transfer of the CCN, but that is no justification for it to retaliate with unreasonable positions in discovery against TIEC.² In light of EGSI's persistence in attempting to use RFIs to TIEC in lieu of third-party discovery, TIEC submits the following response to EGSI's April 7 filing. TIEC supports the ALJs' position on this issue as set forth in Order No. 28.

The Commission's rules specifically provide for intervention by associations of customers,³ and the Commission has long relied on testimony and argument by such intervenors in contested cases. On those rare occasions where the issue has been raised of whether a trade association intervenor must somehow produce documents it does not have, the Commission's practice has been clear. The issue was most recently addressed last year in Docket 34077, a case before the Commission itself. The Commission rejected the very arguments EGSI makes here and made it clear that TIEC's response would be limited to documents "within the possession, custody, and control of TIEC."⁴ There is no basis for a different result here. In view of the importance of the issue to the ability of customer associations to participate in PUC cases, however, TIEC will address the authorities discussed by EGSI in more detail.

- **EGSI Misstates Commission Precedent and Texas Jurisprudence Related to Associations**
 - **Docket 29526 supports TIEC's position**

EGSI ignores the ALJ's specific ruling regarding TIEC in Docket No. 29526 and points to a separate order regarding the Houston Council for Health and Education (HCHE).⁵ EGSI misstates the ALJ's findings. In Docket No. 29526, the ALJ determined that HCHE was an *ad hoc* organization without bylaws, not a true trade association. EGSI's reliance on the Commission's order regarding HCHE, rather than the Commission's separate order specifically ruling on TIEC, makes little sense. If TIEC was not an *ad hoc* organization in PUC Docket No. 29526, it is not one now. It has participated in over 75 Entergy cases alone, as shown in the

² It is telling that even in this case, EGSI has not taken the same position against other associations who have intervened.

³ PUC SUBST. R. § 22.103.

⁴ *Joint Report and Application of Oncor Electric Delivery Company and Texas Energy Future Holdings Limited Partnership Pursuant to PURA § 14.101*, Docket No. 34077, Order No. 26 (Sept. 7, 2007).

⁵ EGSI's Reply at 4.

attached partial list.⁶ TIEC has also been a longstanding party in Commission proceedings for all other major electric utilities and has been advocating consumer interests at the Commission and in other forums for the last 30 years. TIEC submitted in this docket the Articles of Association and Bylaws that govern the association, which clearly demonstrate that TIEC is a legitimate trade organization entitled to participate in PUC cases as an association as it has done for decades. EGSI's reference to a ruling regarding a separate *ad hoc* organization is not relevant to TIEC. Docket 29526 has a specific on-point ruling concerning TIEC that rejects the arguments EGSI makes here.

- **The Attorney General Opinions cited by EGSI do not support its case**

EGSI's Reply also cites several informal letter rulings issued by the Attorney General under the Open Records Act.⁷ EGSI has obviously scoured every source possible in a futile attempt to find support for its position. Setting aside the fact that Attorney General informal letter rulings do not establish precedent, a review of those letters reveals that they do nothing to bolster EGSI's case and in fact support the PUC's longstanding practice. Each ruling addresses a situation in which an entity (presumably Texas Energy Future Holdings Limited Partnership (TEF)) filed an open records request with a city seeking information that was the subject of pending TCEQ litigation.⁸ What EGSI fails to acknowledge about these letter rulings is that TEF was not seeking to compel an association to produce information of its members in a regulatory proceeding. Since Texas precedent does not permit that approach, TEF—separately from the TCEQ proceeding—served open records requests on the cities directly. The open records requests were essentially third-party discovery, which would be the proper avenue for EGSI to conduct discovery on its individual customers, if it chooses to do so. The fact that TEF sought discovery via open records requests served directly on the member cities, rather than through the association, is itself an acknowledgement that discovery of information in the possession of an association's members must be obtained through third-party discovery. That is directly contrary to EGSI's position here.

- **SPS cases**

EGSI has repeatedly cited to a 2001 SPS interim fuel factor/surcharge proceeding. TIEC's role in that case was extremely limited and it did not brief the issue in any depth prior to the initial ruling that EGSI cites. EGSI pointedly left out a number of salient facts, including:

- The issue was resolved prior to any appeal or even a final resolution by the Administrative Law Judge;
- No documents from individual TIEC members were produced in that case, nor could they have been;

⁶ Attached is a partial list of Entergy cases in which TIEC has intervened (Attachment 1).

⁷ EGSI's Reply at 3.

⁸ OR2007-03710 at 1; OR2007-03713 at 1; OR2007-03714 at 1; OR2007-03762 at 1; OR2007-03814 at 1; OR2007-04120 at 1. These open records requests were submitted by the law firm representing TEF.

- Following the initial order cited by EGSI, the ALJ permitted TIEC to set out its position more fully and address issues about which the ALJ expressed some curiosity and confusion (see attached transcript);
- Five years later, the same ALJ was presented by SPS with the same issue and the same arguments EGSI makes here, which were fully briefed and argued;⁹
- The ALJ denied SPS's motion to compel in that case;¹⁰
- In subsequent cases, SPS has abandoned its position that discovery on TIEC is discovery on its individual members.¹¹

EGSI has consistently ignored recent and on-point Commission precedent and relies on a mooted initial order that the ALJ herself has not applied in subsequent cases.

- **EGSI's reliance on common law is unavailing**

EGSI's Reply also mistakenly claims that TIEC has cited no applicable case law that would allow TIEC to divorce itself from its members for purposes of discovery.¹² TIEC disagrees and would point the ALJs to TIEC's Response to EGSI's Motion to Compel, in which TIEC cites a litany of case law that it will not repeat here. Moreover, TIEC's position is supported by the Texas Supreme Court's ruling in *Cox v. Thee Evergreen Church*, a case that EGSI ironically relies upon in its Reply.¹³ In the *Cox* case, the court specifically addressed the dissolution of the historical common law doctrine that an association and its members were one and the same. At issue in the *Cox* case was whether a member of an unincorporated charitable association could sue the association for negligence in a personal injury suit.¹⁴ Under common law, such a suit was not viable, because the negligence of the association was imputed to the association's member. In rejecting this vestige of the common law doctrine, the court held:

So what remains of the early common law rules regarding unincorporated associations and the imputed negligence doctrine? Apparently, very little. We allow suits by and against unincorporated associations in their own name. *See* Tex. R. Civ. P. 28. We allow nonmembers to bring suits, including those for negligence, against unincorporated associations. *See Golden*, 4 S.W.2d at 143-44. We allow members to sue unincorporated associations for acts committed that are strictly adverse to the member's interests. *See Borden*, 328 S.W.2d at 742. We allow members to sue unincorporated associations when the association

⁹ *Application For Authority to Change Rates; Application of Southwestern Public Service Company for Authority to Surcharge Its Fuel Under-recoveries*, Docket No. 32685, Interchange Documents 42, 45, 46.

¹⁰ *Id.*, Proposal For Decision at 13.

¹¹ *See* SPS's RFIs to TIEC in Docket 32766.

¹² EGSI Reply at 3.

¹³ EGSI's Reply at 3, FN 4.

¹⁴ *Cox v. Thee Evergreen Church*, 836 S.W.2d 167, 168-169 (Tex. 1992).

conspires to bring about or ratifies the wrongful conduct. *See Id.* at 744-45. We refuse to apply the imputed negligence doctrine in the analogous joint enterprise context when there is no business or pecuniary purpose. *See Shoemaker*, 513 S.W.2d at 16-17. And lastly, a number of states allow suits against unincorporated associations by their members for injuries resulting from the association's negligence. *See, e.g., Buteas*, 591 A.2d at 628. Nevertheless, one vestige of the common law survives—our obedience to an ancient precept automatically imputing the negligence of an unincorporated association to an injured member. Considering the development of the law in regard to our treatment of unincorporated associations, *see Tex. R. Civ. P. 28, Borden*, 328 S.W.2d at 742, combined with our refusal to apply the imputed negligence doctrine in other contexts, *see, e.g., Shoemaker*, 513 S.W.2d at 16-17, we perceive no compelling reason for retaining this remnant of the original common law rules. In this regard, we share the concerns expressed by the South Carolina Supreme Court when it stated:

Why should a church member be precluded from suing an association in tort when a paid workman would be allowed to maintain an action for the very same injury?

Crocker, 409 S.E.2d at 371. We also are unable to discern a defensible reply to this query. Consequently, we hold that a member of an unincorporated charitable association is not precluded from bringing a negligence action against the association solely because of the individual's membership in the association. Any assets of the unincorporated charitable association held either by the association or in trust by a member of the association may be reached in satisfaction of a judgment against the association.¹⁵

Thus, the very case that EGSI cites *rejects* the notion that an association and its members are alter egos of each other and acknowledges that the historical doctrine regarding associations has been eroded by Texas common law and the Texas Rules of Civil Procedure.

EGSI also cites the *Rove* case, seemingly claiming that the historical common law view regarding associations is binding in this discovery dispute.¹⁶ EGSI is again mistaken. The *Rove* case addresses the standard for determining whether an individual is liable for the debts of an association pursuant to a contract. The court held:

Pursuant to this law, an individual is not liable for the debts of the association merely because of his status as a member or officer of

¹⁵ *Id.* at 173.

¹⁶ EGSI Reply at 3, FN 4.

the association. Rather, principles of the law of agency are applied to the particular facts on a case by case basis to decide whether the individual in question is liable. Fundamentally, a member is personally responsible for a contract entered into by the nonprofit association only if—viewing him as though he were a principal and the association were his agent—that member authorized, assented to, or ratified the contract in question.¹⁷

Again EGSI relies on a case that makes clear that, under Texas law, an individual is not *de facto* the alter ego of an association.

Finally, EGSI relies on a bankruptcy court ruling to seemingly make the claim that TIEC could be the alter ego of its members. EGSI's interpretation of the ruling is similarly off base. In *In re Faith Missionary Baptist Church*, the court held that, in order to find that an association's members are liable for tax obligations of the association, there must be a showing that the association is the alter ego of its members.¹⁸ Upon just such a showing, the court held that funds levied by the Internal Revenue Service from a minister who had formed a church as an unincorporated charitable association did not have to be returned to the minister because he was the alter ego of the church.¹⁹ In making that determination, the court noted that the minister had unrestricted control over and use of the association's assets without credible explanation or accounting. The court also noted that prayer meetings were held at the minister's house, and that rarely did someone outside the minister's family attend the services.²⁰ While the court did not go so far as to find that the minister's action were fraudulent, it did find that the minister was the alter ego of his church and that he could not evade tax obligations by claiming himself to be an unincorporated charitable association.²¹ TIEC is not such an *ad hoc* charitable association and it cannot be compared to the charitable association that was at issue. TIEC is not and has never been the alter ego of its member companies, nor does it possess, collect or have a right to collect the individual member company information EGSI seeks.

As previously explained in TIEC's Response to EGSI's Motion to Compel, it would be fraught with legal peril for TIEC or similar trade associations composed of individuals or companies who are business competitors to collect the information requested in EGSI's RFIs.²² The collection of such information would violate TIEC's anti-trust policy and could potentially open TIEC to anti-trust liability. Trade associations provide a forum for competitors to meet. Therefore, they must safeguard against potential anti-trust claims, and membership and participation in trade association activities should be carefully controlled and monitored.²³ Generally accepted procedural safeguards against anti-trust violation include limiting the

¹⁷ *Karl Rove & Co. v. Thornburgh*, 39 F.3d 1273, 1285 (5th Cir. 1994).

¹⁸ *See In re Faith Missionary Baptist Church v. IRS*, 174 B.R. 454 (Bkty. E.D. Tex. 1994).

¹⁹ *Id.* at 472.

²⁰ *Id.* at 458.

²¹ *Id.* at 472.

²² TIEC's Response to EGSI's Motion to Compel at 7-8.

²³ Corp. Compl. Series: Antitrust § 4:18 (2007).

collection of confidential information among association members and avoiding "discussion of or exchange of information about prices, terms of sale, production costs or volume, specific customers, marketing or sales plans and other matters of competitive significance."²⁴ TIEC has made clear in its pleadings in this docket and others that it too follows such guidelines, yet EGSI continues in a relentless pursuit of information that it knows TIEC does not and cannot collect without creating potential anti-trust liability.

EGSI continues to try to impose an obligation on TIEC to produce information that the association that does not collect or maintain. Simply put, EGSI wants TIEC to produce what it doesn't have, despite that its rationale for doing so runs contrary to both established Commission precedent and policy and Texas jurisprudence. TIEC will fully respond to the remaining RFIs with any and all documents it has. Should EGSI find that it wants documents TIEC does not have, its remedy is discovery on whatever customers it seeks to compel to produce such documents.

Respectfully submitted,



Rex D. VanMiddlesworth

Attorney For Texas Industrial Energy
Consumers

RV:dl

cc: All parties of record

²⁴ *Id.*

ATTACHMENT 1

LIST OF GSU/EGSI CASES

| | |
|---------------|---|
| Docket #3871 | GSU 1981 Rate Case |
| Docket #4510 | GSU 1982 Rate Case |
| Docket #5560 | GSU 1984 Rate Case |
| Docket #5820 | GSU Step 2 1984 Rate Case |
| Docket #6525 | GSU 1985 Rate Case |
| Docket #7147 | GSU Joint Venture Cogeneration Project |
| Docket #7195 | GSU Rate Case |
| Docket #8702 | GSU |
| Docket #10894 | GSU Fuel Case |
| Docket #11292 | GSU/Entergy Merger |
| Docket #12423 | '89 GSU Rate Case |
| Docket #12852 | GSU §42 Proceeding (includes #13922) |
| Docket #13170 | GUS Fuel |
| Docket #13409 | '94 GSU Application |
| Docket #13922 | GSU Refund In Compliance with Docket 12852 |
| Docket #14075 | GUS Good Cause Exception to PUC Subst. R. 23.59(a)(2) |
| Docket #15102 | '96 GSU Fuel Case |
| Docket #15489 | GSU Application-Fixed Fuel |
| Docket #16705 | '97 GSU Rate Case |
| Docket #16705 | '97 GSU Rate Case |
| Docket #17899 | EGS Remand of #7195 |
| Docket #18088 | EGS Demand-Side Mgmt Prog Issues |
| Docket #18249 | EGS Service Quality Issues |
| Docket #18290 | GSU Remand of Actual Taxes Paid |

| | |
|---------------|---|
| Docket #19651 | Modification of EGS Rider IS |
| Docket #19834 | EGSI Fuel Case |
| Docket #19907 | EGSI Revision to Equal Pay & Levelized Billing Plan |
| Docket #19917 | EGSI Interruptible Rider |
| Docket #20015 | EGSI Waiver Good Cause |
| Docket #20150 | '99 EGS Rate Case |
| Docket #20817 | EGS Modified Schedule BRR |
| Docket #20952 | EGSI Good Cause Exception Re: Fuel Reconciliation |
| Docket #20960 | EGS Final Refund True-Up |
| Docket #21111 | EGS Fuel Reconciliation |
| Docket #21258 | EGS Compliance Per Docket 20150 |
| Docket #21384 | EGS Interim Fuel Surcharge |
| Docket #21401 | Investigation Into Interruptible Service |
| Docket #21538 | EGSI De Novo Review of City Ordinances |
| Docket #21957 | EGSI Business Separation Plan (BSP) |
| Docket #21984 | CES Issues (severed from EGSi BSP) |
| Docket #22356 | Entergy Texas UCOS |
| Docket #23000 | EGSI Fuel Surcharge |
| Docket #23335 | Entergy Merger |
| Docket #23550 | EGSI 2001 Fuel Reconciliation |
| Docket #23798 | EGSI Interim Fuel Surcharge |
| Docket #24309 | EGSI Certification of SPP |
| Docket #24336 | EGSI PTB Fuel Factor |
| Docket #24440 | EGSI Fuel Factor |
| Docket #24469 | EGSI Transition to Competition |

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|---------------|---|
| Docket #24687 | EGSI Regulatory Asset Treatment |
| Docket #24953 | EGSI Interim Fuel Surcharges |
| Docket #25089 | Entergy Protocols |
| Docket #26168 | Entergy Protocols Extension |
| Docket #26612 | Entergy Fuel Surcharge |
| Docket #27273 | Entergy Interim Solution for Retail Open Access |
| Docket #28504 | Entergy Interim Fuel Surcharge |
| Docket #28818 | Entergy Independence |
| Docket #29408 | 2004 Entergy Fuel Reconciliation |
| Docket #30123 | EGSI 2004 Rate Case |
| Docket #30163 | EGSI Interim Fuel Surcharge |
| Docket #31315 | EGSI Incremental PCR Rider |
| Docket #31544 | EGSI Transition to Competition Costs |
| Docket #31598 | EGSI Interim Fuel Surcharge |
| Docket #31710 | EGSI Special Cost Recovery Treatment |
| Docket #32465 | EGSI Fuel Surcharge |
| Docket #32710 | EGSI Fuel Reconciliation |
| Docket #32907 | EGSI Hurricane Recovery |
| Docket #32915 | EGSI Fuel Factor |
| Docket #33239 | EGSI Fuel Surcharge Termination |
| Docket #33343 | EGSI Interim Fuel Surcharge Termination |
| Docket #33586 | EGSI Financing Order |
| Docket #33687 | EGSI TCC Plan |
| Docket #33886 | EGIS Fixed Fuel Factor |
| Docket #33966 | EGSI Interim Fuel Refund |

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|---------------|-------------------------|
| Docket #34467 | EGSI Sanctions |
| Docket #34642 | EGSI Fixed Fuel Factor |
| Docket #34724 | EGSI Rider IPCR |
| Docket #34800 | EGSI Rate Case |
| Docket #34953 | EGSI Fuel Refund |
| Docket #35183 | TIEC Declaratory Ruling |

ATTACHMENT 2

TRANSCRIPT OF PROCEEDINGS BEFORE THE
STATE OFFICE OF ADMINISTRATIVE HEARINGS
(FOR THE PUBLIC UTILITY COMMISSION OF TEXAS)
AUSTIN, TEXAS

APPLICATION OF SOUTHWESTERN)
PUBLIC SERVICE COMPANY, FOR) SOAH DOCKET NO.
AUTHORITY TO (1) REVISE ITS) 473-01-2135
VOLTAGE LEVEL FUEL FACTORS; (2))
SURCHARGE ITS HISTORICAL FUEL)
UNDER-RECOVERIES; (3) SURCHARGE)
ITS ESTIMATED FUEL UNDER-) PUC DOCKET NO.
RECOVERIES; AND (4) RELATED) 23718
GOOD-CAUSE WAIVERS)

HEARING ON THE MERITS
WEDNESDAY, MAY 16, 2001

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P. COMMISSION

BE IT REMEMBERED THAT at 10:00 a.m., on Wednesday, the 16th day of May 2001, the above-entitled matter came on for hearing at the State Office of Administrative Hearings, Stephen F. Austin Building, 1700 North Congress Avenue, Hearing Room AB, Austin, Texas 78701, before LILO POMERLEAU, Administrative Law Judge; and the following proceedings were reported by Lou Ray and Steve Stogel, Certified Shorthand Reporters of:

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1 representing the Texas Cotton Ginners and the
2 Texas Cattle Feeders and Plains Cotton Growers,
3 Incorporated.

4 JUDGE POMERLEAU: Is there any
5 other person or parties who wish to make an
6 appearance this morning? Is there any persons
7 here who would like to make public comment?

8 Hearing none, at this time I'd ask the
9 parties to report on settlements as it appears
10 from some pleadings that the parties are
11 attempting to settle some or all issues. I will
12 also then take up a discussion about the hearing
13 for the motion for sanctions. I turn to SPS to
14 ask for a report on the settlement.

15 MR. SHACKELFORD: Your Honor, two
16 things. One, we've had a couple of phone
17 conferences on settlement, and a couple of the
18 parties were needing to clear things with their
19 clients.

20 I think that we're not going to be able
21 to settle the entire case. It appears that
22 we're not going to be able to settle the
23 off-systems sales issue. But the other issues
24 we need a little bit of a break to discuss and
25 see if we can resolve those.

1 And on the -- I'd hope that you had
2 already received it because we sent it out last
3 night, but we've withdrawn our motions and do
4 not request any action on that motion to
5 sanction -- or that motion to dismiss we had
6 filed.

7 JUDGE POMERLEAU: Thank you. I
8 had not received the withdrawal motion at this
9 time.

10 I would like to make a comment at this
11 time. Concerning the off-systems sales issues,
12 I have read the testimony and the rebuttal
13 testimony. I found very interest Staff's
14 revised statement of position, and I would make
15 this comment. After considering the testimony
16 and the statements of position, I want the
17 parties to know that it is my position that this
18 is not an issue that should be addressed at a
19 fuel factor proceeding.

20 However, I have not heard from SPS in
21 terms of the motion to strike, and I understand
22 that the parties have put some time into this.
23 So I will allow the testimony on that issue to
24 go forward, but the parties should be aware that
25 I'm not likely to change -- recommend a change

1 to the Commissioners to SPS's fuel factor and
2 the way that they've handled it concerning the
3 off-system sales is going -- that I will
4 recommend a change.

5 I agreed with Staff's statement of
6 position -- and I know it's unusual for me to
7 express this up front. I will keep an open
8 mind, but I will not allow a lot of time to be
9 spent on this issue. It is not something in my
10 mind that should be dealt with very much in
11 depth in this -- in this short of a hearing. I
12 think it would be something that would be more
13 appropriate for a rate case.

14 I would also like to state that I found
15 the issues raised by TIEC's objections -- the
16 motions to compel, the motion for sanctions --
17 very interesting. In spite of that, I felt that
18 because the issue of the underlying discovery
19 dispute in light of TIEC's revised statement of
20 position, appeared to be moot; that I would have
21 likely found the entire issue moot. However,
22 I'm curious as to how this issue -- if it will
23 ever come up before the Commission again.
24 Mr. VanMiddlesworth, did you want to say --

25 MR. VanMIDDLESWORTH: Well, Your

1 Honor, I anticipated that even though the issue
2 is revolved that you might have some curiosity.
3 And this is an issue that really exists in every
4 case in which TIEC participates, although I
5 don't think it's ever come up or it's been
6 argued before. And really, if you would like me
7 to take just two or three minutes, I can kind of
8 walk you through our understanding of why -- how
9 and why we participate as TIEC and the cotton
10 ginners and cattle growers participate as
11 associations, and hundreds of other
12 organizations participate as associations, not
13 through their individual members. And there is
14 some fairly well-developed law in that case
15 which we would have -- ready to file for brief
16 this afternoon.

17 The seminal Texas case, of course, is
18 TAB versus TACB case at 852 SW2d 440, which
19 really adopts the well-established Hunt versus
20 Washington Apple Growers case standard for
21 associational interventions and associational
22 standing. That's a U.S. Supreme Court case
23 which was adopted by the Texas Supreme Court as
24 a standard in Texas and it applies in Texas.
25 And it establishes that associations, including

1 voluntary associations, have standing to
2 intervene and participate in cases on their own
3 behalf independent of their members.

4 So, for instance, I'm a member of the
5 Travis County Bar Association. It can
6 participate in cases, even though it's just an
7 association. I don't know if you're a member of
8 any parents' associations at schools, but I am,
9 and the parents' associations have standing to
10 litigate cases in which they have an interest
11 and if the interest is germane to the
12 organization's purposes and they satisfy that
13 Hunt standard.

14 That is the standard that applies to
15 all associational intervention at the Commission
16 and in courts. And applying that standard, of
17 course, we see interventions by Retail Merchants
18 Association, by Texas ROSE on behalf of low
19 income consumers, by Consumers Union, by all
20 these alphabet soup organizations that
21 intervene, not for the individuals specifically,
22 but on behalf of the organization itself. And
23 the individuals -- individual low-income
24 customers or individual HEBs or individual
25 industrial companies are not themselves parties

1 to the case. And that's made clear, I think, by
2 the associational standing cases, that is the
3 association.

4 I do a lot of work -- when I'm not over
5 here, I do a lot of civil rights and voting
6 rights litigation, and I deal with nothing but
7 associations. I deal with MULDEF and NAACP and
8 Houston Contractors Association and the Minority
9 Contractors Association and MBELDF, and those
10 are the parties that are the parties to the
11 case. And when they're in the case, I may
12 sometimes -- sometimes somebody who is a member
13 of the organization is a witness to something
14 that's important and I invoke the third-party
15 discovery procedures to get that and I'll notice
16 the deposition, that witness will show up with
17 his own lawyer. I'll pay the witness fee. I'll
18 follow the rules in the Texas Rules of Civil
19 Procedure and the Administrative Procedure Act,
20 for that matter, if it's an administrative case,
21 for third-party discovery. Nobody who is a
22 witness is precluded from providing third-party
23 testimony. It's typically not done because in a
24 case at the PUC the burden is on the utility and
25 the utility doesn't go around and notice the

1 depositions of Enron about natural gas and
2 National Economic Research Association about the
3 price of equity. I suppose they could and would
4 come to you for --

5 JUDGE POMERLEAU: Discovery
6 issues --

7 MR. VanMIDDLESWORTH: -- yeah and
8 an issue be presented there, but it's typically
9 not done in these cases, but there's no
10 prohibition on it.

11 But the principal point is the party to
12 this case is TIEC, the association. Its
13 members -- TIEC intervenes, its members have
14 standing and under the Hunt case, therefore, the
15 association has standing.

16 JUDGE POMERLEAU: It's not the
17 issue of standing that I'm confused about. It
18 is more how much power or authority that the
19 Commission has in order to reach down and ask in
20 discovery from members. For instance, in this
21 particular instance, it appeared to me that the
22 questions -- the RFIs were relevant. And I
23 understand that there may have been some
24 disagreement about that, but in my mind what we
25 never heard from was whether or not ASARCO -- I

1 apologize, I can't --

2 MR. VanMIDDLESWORTH: Oxy

3 Permian --

4 JUDGE POMERLEAU: Oxy Permian --

5 MR. VanMIDDLESWORTH: ASARCO is in
6 as a part and they can ask them all the
7 questions they want.

8 JUDGE POMERLEAU: Right. No, the
9 Texaco folks, if you could reach down and ask
10 them questions, even if they had said "We don't
11 have that information," then that would have
12 been enough in terms of responding to the RFIs.

13 MR. VanMIDDLESWORTH: Well, the
14 answer to that, Your Honor, is that -- I mean, I
15 did ask those folks after your order came out.
16 I had no right to compel them to produce the
17 information. I do not act as their attorney. I
18 act as TIEC's attorney. But I talked with
19 member companies and said "There's an order,
20 would you provide -- I know you're not obligated
21 to provide this to TIEC, of course, but we have
22 an order, would you provide this information?
23 I'm asking you for it."

24 And they said "No, we don't provide it.
25 In fact, read your own articles of association

1 and by-laws TIEC. You're precluded from getting
2 this information from us."

3 So I have no authority to get the
4 information from members. I don't have an
5 attorney/client relationship with the individual
6 companies any more than the lawyer for
7 St. Steven's Parents Association is my attorney
8 in litigation or a dispute involving St. Stevens
9 Association, or has the ability to get my tax
10 records or school records or anything else. If
11 someone -- if SPS wanted that, they could go
12 through the third party discovery procedures.

13 But that's why, you know, I can't go
14 and ask all the low-income intervenors
15 individually for their individual information
16 about usage and et cetera that would be relevant
17 to a case because they're not parties to the
18 case. So that's why -- in the discovery process
19 you have -- there are two types of discovery.
20 There's discovery of the parties and there's
21 discovery to non-parties. TIEC is a party to
22 this case. Under the associational standing
23 cases, we've met all the requirements for
24 independent standing as a voluntary association.
25 The individual members of TIEC or, for that

1 matter, the individual cattle feeders or cotton
2 growers, are not in their individual capacity
3 parties to this case unless they choose to be so
4 like ASARCO, which intervened on its own behalf
5 and is then subject to party discovery.

6 If you're not a party -- TIEC is a
7 party and, of course, had to and did produce all
8 documents within its possession, custody or
9 control or which it had a superior right to
10 compel under the rule. The individual companies
11 are not parties, so you have to go through the
12 non-party discovery procedures to get that.

13 That would be our position, and I know
14 that the motion is moot -- or has been withdrawn
15 and is moot, but you'll be in other cases and
16 this issue may arise and I know you're curious
17 about it, so I thought I would -- I hope I'm not
18 delaying things, but I thought I would lay out
19 that explanation.

20 If you would like, we were preparing --
21 we haven't finished. We were proceeding a
22 pleading that we would have filed this
23 afternoon. If you want it, we can file it. If
24 not, we'll leave it for now and see if the issue
25 arises again. It hasn't arisen in 25 years; it

1 might be another 25, but we'll see.

2 JUDGE POMERLEAU: Thank you.

3 Mr. Shackelford?

4 MR. SHACKELFORD: Your Honor, if I
5 might, I'd like to have leave to come around and
6 hand you our motion. We had faxed this to you
7 last night, and I had my secretary call to even
8 make sure that SOAH got the fax and they
9 acknowledged that they did. I'm sorry that that
10 did not get communicated to you before the
11 hearing.

12 We had settled all our issues with
13 TIEC, and as part of that we agreed not to urge
14 these motions and not to argue the motions. And
15 so I feel like it would be inappropriate for me
16 to make some kind of response. We disagree with
17 some of the statements made and think that the
18 PUC has specific rules dealing with
19 interventions of associations, but, anyway, at
20 this point, we're not asking for any ruling and
21 simply request that you not make any rulings on
22 either the motion for sanctions or the motion to
23 dismiss that was filed.

24 JUDGE POMERLEAU: Thank you very
25 much. It's my understanding that

1 Mr. VanMiddlesworth was offering his opinion
2 and --

3 MR. VanMIDDLESWORTH: -- not
4 arguing --

5 JUDGE POMERLEAU: -- all the
6 lawyers in the room, I'm sure there may be a
7 different opinion. Thank you.

8 Then what I'd like to turn to now is
9 other pending motions and see how much is still
10 in dispute. I have a couple that appear to be
11 moot. Going way back, we have the Cities'
12 motion to strike prefiled SPS testimony and to
13 my understanding that would be moot. Cities?

14 MR. SLAUGHTER: Judge?

15 JUDGE POMERLEAU: Yes.

16 MR. SLAUGHTER: Yes, ma'am, I
17 believe that that may be a moot motion at this
18 point, but it would depend on whether or not the
19 Company actually abides by its representations
20 that it wouldn't seek to introduce that --

21 JUDGE POMERLEAU: I'll let you --

22 MR. SLAUGHTER: -- and I have no
23 reason to doubt that they would not abide by
24 their promises.

25 MR. S. ARNOLD: Your Honor, we