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PUC DOCKET NO. 35639

**APPLICATION OF CENTERPOINT §
ENERGY HOUSTON ELECTRIC, §
LLC FOR APPROVAL OF §
DEPLOYMENT PLAN AND REQUEST §
FOR SURCHARGE FOR AN §
ADVANCED METERING SYSTEM §**

**BEFORE THE
PUBLIC UTILITY COMMISSION
OF TEXAS**

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CITY OF HOUSTON'S INTERIM APPEAL OF ORDER NO. 3

Pursuant to Public Utility Commission (the "Commission" or "PUC") Procedural Rule 22.123, the City of Houston hereby files this interim appeal to the Commission of Order No. 3 in the above-captioned docket, which disallows municipalities from recovering rate case expenses incurred in connection with this proceeding. In support of its request that the Commission reverse this order, the City of Houston respectfully shows as follows:

I. Introduction

The City of Houston believes that the outcome of PUC Docket 35369 (sometimes referred to as the "Docket" or "proceeding") could be very valuable to its citizen ratepayers and is hopeful that cost effective advanced meters will be installed within the city at the earliest possible date. Therefore, the City of Houston's participation in this proceeding is extremely important to ensure that implementation of the Advanced Metering Systems (sometimes referred to as "AMS") as proposed by Centerpoint Energy Houston Electric, LLC. ("CPE" or "Centerpoint") is both timely and cost-effective for all ratepayers.

The City of Houston intervened in this proceeding on May 8, 2008, and retained legal counsel and consultants based, in part, on the understanding, pursuant to Section 33.023 of the Public Utility Regulatory Act ("PURA")¹ and PUC Substantive Rule 25.130(d)(2), that this case is a ratemaking proceeding for which it, as a municipality, would be entitled to reimbursement of

¹ PURA is codified as TEX. UTIL. CODE ANN. §§ 11.001-66.017 (Vernon 1998 & Supp. 2005).

its reasonable rate case expenses. This belief was buttressed by the Final Order in Docket 32093, in which the Commission adopted the stipulation and settlement agreement ("Settlement Agreement") reached by the parties. *See Petition by Commission Staff for a Review of Rates of Centerpoint Energy Houston Electric, LLC Pursuant to PURA §36.151*, Docket 32093, Final Order (September 5, 2006). In Article III (F) of the Settlement Agreement, the parties agreed that any proceeding filed by CPE to recover advance meter expenses from customers would be a rate case and that municipalities participating in the proceeding would be entitled to reimbursement of their expenses from CPE. *See* Docket 32093, Filing of Stipulation and Agreement of the Parties and Request for the Scheduling of a Prehearing Conference (July 31, 2006).

Recently however, the Administrative Law Judge ("ALJ") in this proceeding issued an order that eradicates the terms of the agreement made by the parties in Docket 32093 as well as this Commission's approval of such agreement. Namely, Order No. 3 provides that the municipalities are not entitled to reimbursement of their rate case expenses in this proceeding. The City of Houston is appealing Order No. 3 because it believes that the Order is erroneous and inconsistent with PURA § 33.023, PUC Substantive Rule 25.130(d)(2), and prior Commission precedent, which requires reimbursement of reasonable rate case expenses to municipalities participating in this Docket.

II. Argument and Authorities

A. Section 33.023 Requires Reimbursement of Reasonable Municipal Rate Case Expenses

Section 33.023 of PURA clearly requires municipal reimbursement of reasonable rate case expenses in this Docket. This Section provides, in pertinent part, as follows:

- (a) The governing body of a municipality participating in or conducting a ratemaking proceeding may engage consultants, accountants, auditors, attorneys and engineers to:
 - (1) conduct investigations, present evidence, and advise and represent the governing body; and
 - (2) assist the governing body with litigation in an electric utility ratemaking proceeding before the governing body, a regulatory authority, or a court.
- (b) The electric utility in the ratemaking proceeding shall reimburse the governing body of the municipality for the reasonable cost of the services of a person engaged under Subsection (a) to the extent the applicable regulatory authority determines is reasonable.

This provision essentially has four requirements for municipality reimbursement of incurred expenses: (1) municipal participation; (2) in a ratemaking proceeding; (3) pertaining to an electric utility; and (4) reasonableness of costs. *See id.* As discussed in more detail below, each of these requirements has been met by the City of Houston in this case.

1. Municipal Participation

The Commission has previously determined that intervention in a docket constitutes “municipal participation.” *See Southwestern Bell Statement of Intent to Change and Restructure the Company’s Local Transport and Directory Transport Categories of its Switched Access Service*, Docket 12784, Order No. 8 (July 1, 1994). Since the City of Houston intervened in Docket 35639 on May 8, 2008, it is “participating” in this docket according to Commission precedent.

2. Ratemaking Proceeding

A ratemaking proceeding is defined as any proceeding in which a rate is changed. PURA § 11.003(17); *Southwestern Public Serv. Co. v. Public Util. Comm’n of Texas*, 962 S.W.2d 207 (Tex. App.—Austin 1998, pet. denied). The definition of “rate” includes “any compensation,

tariff, charge, fare, toll, rental, or classification that is directly or indirectly demanded, observed, charges, or collected by a public utility for a service.” *Id.* at § 11.003(16). Rule 25.130(d)(2) specifically states that a surcharge proceeding is considered a “ratemaking proceeding.” This Docket involves, at least in part, CPE’s application for approval of a “surcharge” to be collected by CPE from its customers. Therefore, the requirement of a ratemaking proceeding has also been satisfied. Furthermore, in adopting the parties’ Settlement Agreement in Docket 32093, the Commission determined that this case would be a ratemaking proceeding.

3. Electric Utility

There is no question that the applicant in this Docket, CPE, qualifies as an “electric utility.” *See* PURA § 11.003. Therefore, this provision is likewise met.

4. Reasonableness of Costs

Finally, PURA provides that the reasonableness of municipal costs will be reviewed by the Commission pursuant to long standing procedures in which the municipalities present testimony and evidence to establish the reasonableness of their expenses. This issue addresses the amount and type of expenses recoverable and not the applicability of Section 33.023 to the request for recovery. As such, it is appropriate for the City of Houston, along with the other municipalities participating in this Docket, to submit such evidence and testimony for consideration at the conclusion of this proceeding

B. Section 33.023 Does Not Require that a Municipality have Original Jurisdiction over Particular Rates to Invoke Municipal Reimbursement of Costs

The ALJ in this case issued Order No. 3 on June 5, 2008. The ALJ concluded that although this proceeding is a ratemaking proceeding, Section 33.023 does not apply, because the cities do not have original jurisdiction over the Advanced Meter Systems surcharge. This finding is in error based on the fact that there is no requirement in Section 33.023 that the cities

have original jurisdiction over particular rates as a prerequisite to reimbursement. In reaching his decision, the ALJ relies upon the Final Order on Rehearing in Docket 33734. *Application of Electric Transmission Texas, LLC for a Certificate of Convenience and Necessity, for Regulatory Approvals, and Initial Rates*, Docket 33734, Order on Rehearing (December 21, 2007). Contrary to the conclusions made by the ALJ in Order No. 3, the order in that case, actually supports, rather than rejects, reimbursement of municipal rate case expenses in this Docket. Finally, longstanding Commission precedent runs contrary to the ultimate finding made by the ALJ in Order No. 3.

1. The Final Order in Docket 33734 Supports Municipal Rate Case Reimbursement in this Docket

The ALJ's reliance upon the Final Order in Docket 33734 to support his finding that the Commission "construed PURA § 33.023 to apply only when the municipality has jurisdiction over the subject matter of the rate case" is clearly misplaced. In fact, the plain language of that Final Order actually supports municipal reimbursement in this case. The Final Order, as cited by the ALJ, states as follows:

The Commission is persuaded by Staff's arguments, including the conclusion that PURA § **33.023 applies only to rate cases where rates for retail services within the city are set**, and that cities have no jurisdiction to set wholesale transmission rates. *See id.* (emphasis added).

This case clearly involves the setting of rates for *retail services* within the City of Houston. Any rate approved in this Docket will be implemented on the distribution portion of customers' bills. Nor does this case involve wholesale transmission rates. Therefore, the Final Order clearly supports municipal reimbursement in this Docket.

In further support of his finding, the ALJ relies upon a comment by Commissioner Parsley during the Open Meeting on September 13, 2007 pertaining to the rate case expense

issue in Docket 33734. However, the issue of municipal reimbursement in *distribution* rate cases was not before the Commission in that Docket, and it seems apparent that Commissioner Parsley was not addressing the broader issue of whether municipalities are entitled to rate case reimbursement in *distribution rate cases*, but rather was addressing the narrow issue before the Commission of whether municipalities were entitled to reimbursement in *wholesale transmission cases*. This is supported by the language in the Final Order, which specifically allows reimbursements for rate cases where *retail services* are set, but denies reimbursement for wholesale transmission cases.

2. The Commission Has Already Rejected the Argument that a Municipality Must Have Original Jurisdiction Over Rates to Qualify for Reimbursement of Reasonable Rate Case Expenses

Further, the Commission has previously held that a municipality does not have to have original jurisdiction over rates to qualify for reimbursement of rate case expenses under Section 33.023. In Docket 12784², the Commission expressly rejected the argument by Southwestern Bell and Contel that a municipality must have original jurisdiction over rates to allow reimbursement of municipal rate case expenses:

The ALJ does not accept this narrow view of the scope of PURA § 24(a)[now Sec. 33.023], as confined exclusively to PURA § 43(a) proceedings . . . ***The 1983 changes to PURA established a right to rate case reimbursement in cases where the municipality did not have historical, original jurisdiction.***

Moreover, SWB and Contel's argument leads to unreasonable results. If SWB's and Contel's argument is accepted, then the Commission has violated and continues to violate the holding in the El Paso case in a variety of regulatory areas, because municipal reimbursement should not be permitted in any proceeding

² *Application of Southwestern Bell Telephone Company, Contel of Texas, Inc. and GTE Southwest, Inc. to Restructure Rates and Pricing of the Local Transport and Directory Transport Categories of Their Switched Access Service Tariffs*, Docket 12784, Order No. 8 - Ruling on Cities' Motion for Reimbursement of Rate Case Expenses (July 1, 1994).

(including PURA § 42 and fuel proceedings) other than one particular type of case, a utility-filed PURA § 43A proceeding.³

3. Years of Commission Precedent Supports Municipal Reimbursement of Reasonable Rate Case Expenses in Retail Distribution Rate Cases

Finally, there are years of Commission precedent allowing municipal reimbursement in proceedings that affect retail distribution rates, regardless of whether the Commission or the Municipality had original jurisdiction over those rates. The following dockets are but a few of the dockets which the Commission allowed municipal reimbursement of ratecase expenses, regardless of the fact that the Cities arguably did not have original jurisdiction over such rates:

Docket No. 12784 – *Southwestern Bell Statement of Intent to Change and Restructure the Company's Local Transport and Directory Transport Categories of Its Switched Access Service*

Docket No. 12284 - *Petition for Expanded Local Calling Service from the Point Exchange to The Greenville, Emory, and Tawakoni Exchanges*

Docket No. 29526 - *Application of Centerpoint Energy Houston Electric, LLC and Texas Genco, LP to Determine Stranded Costs and Other True-Up Balances Pursuant to PURA §39.262*

Docket No. 22355 – *Application of Reliant Energy HL&P for Approval of Unbundled Cost of Service Rate Pursuant to PURA §39.201 and Public Utility Commission Substantive Rule §25.344*

Docket No. 26195 – *Application of Texas Genco, LP and CenterPoint Energy Houston Electric, LLC, to Reconcile Eligible Fuel Revenues and Expenses Pursuant to Subst. R. 25.236*

Docket No. 32795 - *Staff's Petition to Initiate a Generic Proceeding to Reallocate Stranded Costs Pursuant to PURA §39.533(f)*

Docket No. 24635 – *Application of Devcom for Texas Pay Telephone Service Provider*

³ See also *Petition for Expanded Local Calling Service from the Point Exchange to the Greenville, Emory, and Tawakoni Exchanges*, Docket 12284, Order No. 15 - Ruling on Motion for Reimbursement of Rate Case Expenses (September 2, 1994) (“As Cities noted, the 1983 changes to PURA arguably established a right to rate case reimbursement in cases where the municipality did not have original jurisdiction”).

Docket No. 32898 - *Application of Southwestern Electric Power Company for Authority to Reconcile Fuel Costs*

Docket No. 32710 - *Application of Entergy Gulf States, Inc. for the Authority to Reconcile Fuel and Purchased Power Costs*

Docket No. 33106 - *Application of Texas New Mexico Power Company to Adjust Carrying Charges Pursuant to P.U.C. SUBST. R. 25.263*

4. Texas Courts of Appeals have Affirmed the Commission's Interpretation of PURA as Not Requiring Original Jurisdiction for Municipal Reimbursement

Likewise, the Texas Court of Appeals in Austin has affirmed the Commission's conclusion that PURA does not require a municipality to have original jurisdiction over rates before it is entitled to reimbursement of municipal rate case expenses from a utility. In *Southwestern Pub. Serv. Co. v. Public Util. Comm'n*, both the Commission and the City challenged the district court's reversal of the Commission's order requiring Southwestern Public Service Company ("Southwestern"), a utility company, to reimburse the City of Amarillo for the costs that it had occurred while participating in a proceeding to reconcile its fuel expenses incurred between January 1, 1992 and December 31, 1994. 962 S.W.2d at 209-10. Southwestern took the position that the district court had correctly determined that the City of Amarillo was not entitled to reimbursement of its costs because a fuel reconciliation proceeding does not change rates but usually only results in a one-time surcharge or refund on a customer's bill. *See id.* at 211. However, the Court of Appeals agreed with the Commission in finding that fuel reconciliation proceedings fall within the definition of "rates" under PURA because they result in an immediate change in the utility customer's bill. *Id.* at 217-20. In addition, the court held that the nature of the petition filed was irrelevant to whether a proceeding was a ratemaking proceeding and that the proceeding constituted a ratemaking proceeding because the proceeding changed the compensation utility company could charge its customers. *Id.*

C. PUC Substantive Rule 25.130(d) Specifically States that this Case is a Ratemaking Proceeding

Rule 25.130 expressly states that a surcharge proceeding, such as this case, is a “ratemaking proceeding.” More specifically, Rule 25.130(d) provides as follows:

Six months prior to initiating deployment of an AMS or as soon as practicable after the effective date of this section, whichever is later, an electric utility that intends to deploy an AMS shall file a Statement of AMS Functionality, and either a Notice of Deployment or a Request for Approval of Deployment. An electric utility may request a surcharge pursuant to subsection (k) of this section in combination with a Notice of Deployment or a Request for Approval of Deployment, or separately. A proceeding that includes a request to establish or amend a surcharge shall be a ratemaking proceeding and a proceeding involving only a Request for Approval shall not be a ratemaking proceeding.

The term “ratemaking proceeding” is a defined term in PURA. Because “ratemaking proceeding” is a defined term, one must look to the instances where that term is used in PURA or the Commission’s Rules to determine what is meant by the term. There is only one substantive area where the term “ratemaking proceeding” is used in PURA.⁴ This term is only used in the context of municipal reimbursement for reasonable rate case expenses. In fact, other than the definition of ratemaking proceeding contained in PURA § 11.003, the only place that the term “ratemaking proceeding” is used is in Section 33.023, addressing municipal reimbursement for electric utility proceedings, and the nearly identical Section 51.009, addressing municipal reimbursement of reasonable rate case expenses for municipalities in telecommunication proceedings. Therefore, using strict statutory construction, the language in Rule 25.130 must have been intended, at least in part, to bring the proceeding within the ambit of Section 33.023.

It is clear that the Commission segregated the deployment process for advanced meters and the surcharge proceeding for advanced meters to allow a simplified process for determining

⁴ The term “ratemaking proceeding” is not used in the Commission’s substantive rules, other than in the definition sections and Rule 25.130(d).

whether the deployment plan meets the functionalities of the rule, while ensuring that any costs that are going to go into rates are allowed greater ratemaking scrutiny, which allows for adequate notice and participation of the interested parties. An integral part of this scrutiny has always been municipal participation. CPE chose to file this surcharge case together with the deployment plan so that it could avoid the risk that some of its costs would be disallowed if the cases were filed separately. Therefore, it is clear that Rule 25.130(d) clearly subjects this proceeding to the heightened scrutiny and procedures that are provided for in rate cases, including municipal reimbursement of expenses.

D. The Stipulation Entered in Docket 32093 Specifically Provides for Municipal Reimbursement of Rate Case Expenses in this Docket

In addition to the plain language of PURA § 33.023 and PUC Substantive Rule 25.130(d), the Stipulation approved by the Commission in CPE's last general rate case, Docket 32093, also specifically states that any docket related to advanced metering is a rate case for purposes of municipal reimbursement:

Nothing in this Agreement shall be construed to limit CenterPoint Houston's right to file to recover costs incurred to provide advanced metering through any type of filing (other than a system-wide general base rate change) other utilities are permitted to use. Any Party may oppose the request on any grounds, including but not limited to, claims that (1) the amounts requested were not reasonable or necessary, (2) cost reductions or revenue increases should be recognized or (3) CenterPoint Houston's request would not properly allocate the increased amounts; provided, however, that the only amounts at risk in such proceeding shall be the incremental amounts requested by CenterPoint Houston and no Party shall contend that any of CenterPoint Houston's base rates should be reduced. *Parties agree that any proceeding initiated by CenterPoint Houston under this Paragraph F shall be deemed to be a ratemaking proceeding for purposes of reimbursement of municipal rate case expenses.*⁵

⁵ Docket 32093, Filing of Stipulation and Agreement of the Parties and Request for the Scheduling of a Prehearing Conference at p. 17 (July 31, 2006).

The parties to this docket clearly intended that this proceeding be a ratemaking proceeding so that municipalities would be allowed to fully participate in any docket addressing the costs associated with the advanced metering systems and receive reimbursement of the expenses that they incurred in connection with same.

Prayer

WHEREFORE, the City of Houston respectfully requests that the Commission reverse Order No. 3 and enter a ruling that the municipalities participating in this proceeding, including the City of Houston, are entitled to recover all of the reasonable rate case expenses that they incur in connection with this Docket.

Respectfully submitted,

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with permission 
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CERTIFICATE OF SERVICE

I hereby certify that on this the 16th day of June 2008, a true and correct copy of the foregoing document was served upon all parties of record by facsimile and/or First-Class Mail United States mail, postage paid.

Michelle R. Moore

Michelle R. Moore

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Craig S. Jankela