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APPLICATION OF CENTERPOINT ENERGY HOUSTON ELECTRIC, LLC FOR AUTHORITY TO CHANGE RATES	§ § § §	**PUBLIC UTILITY COMMISSION OF TEXAS**

STATE AGENCIES' INITIAL BRIEF ON THE MERITS

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STATE AGENCIES' INITIAL BRIEF ON THE MERITS

The State of Texas' agencies and institutions of higher education ("State Agencies") served by CenterPoint Energy Houston Electric, LLC ("CenterPoint") file this Initial Brief on the Merits. Pursuant to Order No. 5 (July 23, 2010), this Brief is timely filed.

I. Introduction

This case was initiated as a result of a preliminary determination by the Public Utility Commission ("PUC") Staff and two city groups that CenterPoint was over-earning.[1] Despite CenterPoint's initial reluctance to come in for a rate case, the utility now asserts that it is *under*-earning – by an amount which continued to grow as it filed additional errata. State Agencies agree with the testimony and opening statements of Staff, the three city groups, Office of Public Utility Counsel ("OPUC") and Texas Industrial Energy Consumers ("TIEC") that further investigation has confirmed the initial assessment of over-earning and that CenterPoint's rates should therefore be reduced. This Brief provides State Agencies' assessment of the law and the evidence on some of the major issues presented by Staff, intervenors and CenterPoint.

[1] *Petition by Commission Staff for a Review of the Rates of CenterPoint Energy Houston Electric, LLC Pursuant to PURA § 36.151*, Docket No. 32093, Joint Notice of PUC Staff, City of Houston and Gulf Coast Coalition of Cities of Rate Filing Package (March 30, 2010). Docket No. 32093 was CenterPoint's last previous rate case, and the utility agreed to file a rate case if even one of these three groups requested it. *See id.*, Final Order at 19-20, Ordering Paragraphs 3, 7 & 13 (September 5, 2006). In the event, Staff and the two city groups unanimously agreed that CenterPoint should file.

In addition, State Agencies address an issue which is of paramount importance to state institutions of higher education, including the University of Houston, the University of Texas ("UT") M.D. Anderson Cancer Center, the UT Health Science Center at Houston, Texas Southern University, the UT Medical Branch at Galveston, the Texas Woman's University Houston Center, Texas A&M University and others. CenterPoint seeks to terminate the statutory base rate discount which the Legislature has provided these state universities and teaching hospitals.

This termination, if approved, would cost state institutions of higher education in CenterPoint's service area two million dollars a year[2] and have a significant negative impact upon these vital public institutions in a time of budgetary stress. These taxpayer-funded institutions, including UT M.D. Anderson Cancer Center – a premier cancer research center – and UT Medical Branch at Galveston which is in the process of rebuilding from Hurricane Ike, provide broad public benefits. Their costs should not be increased, especially in these challenging economic times, without careful consideration by the Administrative Law Judges ("ALJs"). In this initial brief, State Agencies will show that CenterPoint's interpretation of the relevant statute is inconsistent with applicable law, and pray that the ALJs disapprove this increase in costs to crucial state institutions of higher education.

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[2] This figure comes from an application filed by CenterPoint earlier this year. *Application of CenterPoint Energy Houston Electric, LLC to Terminate Rider SCUD*, PUC Docket No. 38214, First Amended Application at 7 (June 4, 2010). State Agencies have not independently verified this estimate, and the application itself was dismissed by the Commission as premature and duplicative of the instant proceeding. *See id.*, Order No. 5 (August 13, 2010). The discount is worth less to state universities now than it was prior to the advent of retail competition. Before January 1, 2002, state universities received a discount on the entire base rate charged by CenterPoint's bundled predecessor. Today, they only receive a discount on the transmission and distribution ("T&D") portion of the tariffed rate charge by the regulated T&D utility. Nonetheless, continued availability of the discount remains significant to these taxpayer-supported institutions.

II. Executive Summary

State Agencies recognize that the Commission has previously decided, in the Oncor rate case, that a transmission and distribution utility in an area open to retail competition was no longer obligated to provide a discount to state universities pursuant to Public Utility Regulatory Act ("PURA") § 36.351.[3] Nonetheless, the Commission included the state university discount in the Preliminary Order as an issue which "must be addressed in this docket":

> Is CenterPoint's proposal to remove the state college and university discount rider (Rider SCUD), currently provided in accordance with PURA § 36.351, consistent with applicable law?[4]

The Commission is thus open to considering the matter further and State Agencies, while mindful of the previous Oncor decision, bring additional arguments to bear upon the question.

In the Oncor case, the Commission's termination of the university discount was based solely upon its conclusion that "Oncor does not provide electric services to the entities listed under PURA § 36.351(a) [*i.e.*, state universities]."[5] According to the Commission, "Oncor's status as a transmission and distribution company that operates in an area open to competition limits its provision of services to retail electric providers (REPs)."[6] As will be shown under the pertinent headings below, these findings and conclusions are contrary to the statute as a whole, to the regulatory scheme established by the statute, to the Commission's rules, and to tariff language prescribed by the Commission.

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3 *Application of Oncor Electric Delivery Company, LLC for Authority to Change Rates*, PUC Docket No. 35717, Order (January 30, 2009) ("Oncor Order on University Discount"). *See also id.*, Order on Rehearing at 15, Findings of Fact ("FOF") Nos. 26-28, and at 33, FOF No. 205 (November 30, 2009) (incorporating by reference the pertinent results of the January 30 Order on University Discount). This ruling is currently on appeal.

4 Preliminary Order at 6 and at 8 ¶ 30 (July 30, 2010).

5 Oncor Order on University Discount at 4, Conclusion of Law ("COL") No. 3 [Att. A].

6 *Id.* at 2.

Taken literally, the conclusion that CenterPoint provides service only to REPs would prevent the ALJs from setting rates in this proceeding. For example, PURA § 36.051 requires that CenterPoint's invested capital be "used and useful in providing service to the public" and CenterPoint's witness has testified that "the public" are retail customers rather than REPs. In addition to numerous conflicts with the statute, the conclusion is contrary to other orders issued by the Commission. Earlier this week, the Commission approved a settlement in which CenterPoint accepted a fine for providing unsatisfactory "service" to "retail customers."[7] For these reasons and others set out below, State Agencies pray that the ALJs DENY CenterPoint's request to terminate the discount mandated by PURA § 36.351.

In addition, State Agencies brief the following issues raised by Staff and intervenors: the Consolidated Tax Savings Adjustment, the Storm Hardening cost rider, and the late-filed ADFIT DT and DTA tax trackers. State Agencies' decision not to brief other issues should not be taken as agreement with the Company.

III. Rate Base

State Agencies have not briefed any issues under this heading; however, silence on these issues should not be interpreted as agreement with the Company's position.

IV. Rate of Return

State Agencies have not briefed any issues under this heading; however, silence on these issues should not be interpreted as agreement with the Company's position.

V. Cost of Service

A.-K. Not Briefed

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[7] *Agreed Notice of Violation and Settlement Agreement Relating to CenterPoint Energy Houston Electric, LLC's Violation of PURA § 38.005 and P.U.C. SUBST. R. 25.52 Concerning Reliability and Continuity of Service*, PUC Docket No. 38671, Order at 3, COL Nos. 3 & 5 (Oct. 19, 2010).

L. Federal Income Taxes

1. Consolidated Tax Savings Adjustment (CTSA)

As a basis for his CTSA recommendations, Company witness John Reed speculates about what may have been in the mind of Commissioner Judy Walsh[8] around the time the Commission issued its decision in Docket No. 14965. Although the underlying memo was offered by TIEC, admission was refused by the Administrative Law Judges. Mr. Reed's commentary, however, is likewise inadmissible because of long-standing Texas authority holding that evidence purporting to explore the underlying thought process or mindset of decision makers or commissioners that underlie a decision is relevant evidence:

> It is immaterial what a commissioner may have said or thought in the process of arriving at a decision. *City of Frisco v. Texas Water Rights Comm'n*, 579 S.W.2d 66, 72 (Tex. Civ. App.–Austin 1979, writ ref'd n.r.e.); *see also United States v. Morgan*, 313 U.S. 409, 61 S.Ct. 999, 85 L. Ed. 1429 (1941) (applying federal administrative law). "The thought processes or motivations of an administrator are irrelevant in the judicial determination whether an agency order is reasonably sustained by appropriate findings and conclusions that have support in the evidence." *City of Frisco*, 579 S.W.2d at 72.[9]

> [I]n reviewing the Commission's order we do not invade the thought processes of the commissioners or speculate about their individual motivations.[10]

By offering commentary on the supposed mindset of an individual commissioner, CenterPoint invites this tribunal to go behind the findings of fact and conclusions of law set out in the Final Order in Docket No. 14965.

Second, CenterPoint's assessment that its "fair share" of consolidated tax savings is "zero" is based upon a strained reading of PURA § 36.060 that would allow unregulated entities

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8 CenterPoint Ex. 25, *Direct Testimony of John J. Reed* at 28:6-9, also 30:1-3.

9 *Pedernales Electric Coop. v. Pub. Util. Comm'n*, 809 S.W.2d 332, 342 (Tex. App–Austin 1991, no writ).

10 *State v. Pub. Util. Comm'n.*, 110 S.W. 3d 580, 588 (Tex. App.–Austin 2003, no pet.) (citations omitted).

whose losses offset the Company's income to have first claim on any tax savings.[11] While Mr. Reed articulates his legal interpretation as "benefits follow burdens," under the Company's approach Texas ratepayers would be deprived of the savings that the legislature intended them to have and would be subsidizing CenterPoint's unregulated affiliates. This is neither reasonable nor necessary. By reducing their CTSA to zero, the Company asks Texas ratepayers to bear the cost of the ultimate "payments" of these tax savings to unregulated affiliates as a subsidy, in derogation of PURA § 36.058.

Finally, the Company's contention that it is "ring-fenced" and financially isolated is presented only in the testimony of John Reed. Its public filings tell a different story.[12] State Agencies request that the ALJs apply the long-standing policy of a CTSA to CenterPoint, as supported by City of Houston's witness Ellen Blumenthal.

2. Medicare Part D Subsidy

[Not Addressed]

M. Taxes Other than Income Taxes

[Not Addressed]

N. Municipal Franchise Fees

[Not Addressed]

VI. ERCOT Transmission Cost of Service

[Not Addressed]

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[11] *See* CenterPoint Ex. 25, *Direct Testimony of John J. Reed* at 34-35; Centerpoint Ex. 26, *Direct Testimony of Alan D. Felsenthal* at 27:14-28:2.

[12] *See, for example*, TIEC Ex. 4, CenterPoint Energy Houston Electric, LLC Form 10-K at 17 ("We are managed by officers and employees of CenterPoint Energy. Our management will make determinations with respect to the following: our payment of dividends; decisions on our financings and our capital raising activities; mergers or other business combinations; and our acquisition or disposition of assets.")

VII. Cost Allocation and Rate Design

A. Cost Allocation

[Not Addressed]

B. Rate Design

[Not Addressed]

C. Billing Determinants

[Not Addressed]

D. Riders

1. System Hardening Rider (Rider SH)

a. There is no statutory authority to impose a Storm Hardening ("SH") Rider.

Although CenterPoint may be expected to argue that the PUC has unlimited discretion to set rates, unless PURA specifically prohibits such an exercise of authority,[13] this runs contrary to Texas law. The limits on state agencies' authority is clear:

> [Administrative agencies] exercise only those specific powers conferred upon them by law in clear and express language, and no additional authority will be implied by judicial construction. However, with respect to *a* power specifically granted the agency, the full extent of *that* power must be ascertained with due regard for the rule that the Legislature generally intends that an agency should have by implication such authority as may be *necessary* to carry out the specific power delegated, in order that the statutory purpose might be achieved. . . .
>
> The agency may not, however, on a theory of necessary implication from a specific power, function, or duty expressly delegated, erect and exercise what really amounts to a new and additional power or one that contradicts the statute, no matter that the new power is viewed as being expedient for administrative purposes.[14]

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13 *See* CenterPoint Ex. 61, *Rebuttal Testimony of Matthew A. Troxle* at 2:9-11 ("I believe there are no prohibitions to the Commission approving Rider SH....").

14 *Sexton v. Mt. Olivet Cemetery Ass'n*, 720 S.W.2d 129, 137-38 (Tex.App.–Austin 1986, writ ref'd n.r.e.) (emphasis in original, citations omitted), cited with approval by the supreme court in *Pub. Util. Comm'n v. GTE-SW*, 901 S.W.2d 401, 406-07 (Tex. 1995); *State v. Pub. Util. Comm'n*, 883 S.W.2d 190, 194 (Tex. 1994). See also *Tex. Mun. Power Agency v. Pub. Util. Comm'n*, 253 S.W.3rd 184, 192-193 (Tex. 2007) and *Public Util. Comm'n v. City Pub. Serv. Bd.*, 53 S.W.3d 310, 315-16 (Tex. 2001). In a recent preliminary order, the Commission has correctly recognized this limitation on its own authority. *Application of CenterPoint Energy*

The charges that CenterPoint seeks through its SH rider are typically the types of costs included in base rates. As discussed in Sub-section b., below, this proposed rider is an automatic adjustment prohibited by PURA § 36.201. Over the years, the Legislature has provided for a number of exceptions to § 36.201. For example: "*Notwithstanding Section 36.201*, the commission may approve wholesale rates that may be periodically adjusted to ensure timely recovery of transmission investment."[15] Similar explicit exceptions may be found in PURA §§ 36.203, 36.205 and other provisions of PURA, but no such exception may be found for costs that would be recovered through Rider SH. The recent Commission rulemaking requiring utilities to submit storm hardening plans in no way expressly nor impliedly permits a *monthly* cost collection for storm plan measures. It is clear that CenterPoint may be frustrated with the pace of legislative action to allow certain isolated cost adjustments; however, it is up to the Legislature to weigh and debate amendments to the PURA automatic adjustment provisions.

Unless and until the Legislature chooses to supplant or amend the statutory rate-setting mechanisms, the prescribed method excludes all others.[16] The proposed rider appears to be based upon CenterPoint's discontent with "regulatory lag" – an aspect of utility ownership that the Texas Supreme Court has many times recognized as inherent in the utility business. To quote the supreme court:

Houston Electric, LLC to Defer Energy Efficiency Cost Recovery and for Approval of an Energy Efficiency Cost Recovery Factor, Docket No. 38213, Supplemental Preliminary Order at 6 (June 23, 2010) ("An administrative agency is a creation of the legislature and has only those powers expressly conferred and those reasonably necessary to accomplish its express powers. An agency cannot, 'in the guise of implied powers, exercise what is effectively a new power, or a power contrary to a statute.'") (footnotes omitted).

15 PURA § 35.004(d) (emphasis added).

16 *Cobra Oil & Gas Corp. v. Sadler*, 447 S.W.2d 887, 892 (Tex. 1968), quoting *Foster v. City of Waco*, 113 Tex. 352, 354, 255 S.W. 1104, 1105 (1923). Again, this principle was correctly recognized by the Commission in Docket No. 38213, Supplemental Preliminary Order at 6.

These procedures [now codified in PURA Chapter 36] are designed, in part, to compensate a utility for "regulatory lag."[17]

[W]e agree that regulatory lag is ordinarily an element of risk for utilities. . . . [I]f the effects of regulatory lag infringe on the Commission's ability to regulate in a manner necessary to carry out the provisions of PURA, then the Commission may respond within its powers, both express and implied, under PURA to alleviate the impact of regulatory lag in order to fulfill its statutorily imposed duties. . . . At the same time, the authority to allow the deferral of post-in-service costs is not unfettered. Rather, the Commission must not alleviate regulatory lag unless necessary to comply with the provisions of PURA.[18]

Any discussion of when the Commission's rate orders should be effective must start with the fundamental principle that utility rates are set for the future, and not the past. *See Railroad Commission v. Houston Natural Gas Corp.*, 155 Tex. 502, 289 S.W.2d 559, 562 (1956). Section 43(f) of PURA [now incorporated in § 36.111] implicitly recognizes this principle by prescribing that rates set by order of the Commission "are thereafter to be observed . . . ." Of necessity, the rates are based on historical data obtained from a test year; therefore, some lag is inherent in the process. Art. 1446c, § 3(t) [now PURA § 11.003(20)]. Regulatory lag is an element of the risk associated with investment in a utility. Garfield and Lovejoy, *Public Utility Economics,* pp. 122-23 (1964); Bonbright, *Principles of Public Utility Rates,* p. 242 (1961).[19]

The supreme court in *Lone Star Gas Co.* concluded that: "Any change in protection for the utility against undue regulatory lag should come from the legislature."[20]

b. Proposed Rider SH amounts to an "automatic adjustment" expressly prohibited by PURA § 36.201.

PURA § 36.201 states that:

Except as permitted by Section 36.204, the commission may not establish a rate or tariff that authorizes an electric utility to automatically adjust and pass through to the utility's customers a change in the utility's fuel or other costs.

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17 *Pub. Util. Comm'n v. GTE-SW*, 901 S.W.2d 401, 405 (Tex. 1995).

18 *State v. Pub. Util. Comm'n*, 883 S.W.2d 190, 196 (Tex. 1994) (citations omitted). In that case, "extraordinary" regulatory lag was found to threaten the utilities' financial integrity, *id.*, and statutory authority to alleviate some of the lag was found in the Commission's "broad authority in setting and defining a utility's system of accounts." *See id.* at 194-95. A demonstrable threat to *financial integrity* (as opposed to merely "measurable harm") was later held to be an absolute prerequisite to the use of deferred accounting in relieving regulatory lag. *Office of Pub. Util. Counsel v. Pub. Util. Comm'n*, 888 S.W.2d 804, 808 (Tex. 1994).

19 *Railroad Comm'n v. Lone Star Gas Co.*, 656 S.W.2d 421, 425 (Tex. 1983).

20 656 S.W.2d at 427.

Mr. Troxle has verified that the purpose of the rider is to circumvent review of the full body of costs and revenues inherent in a base rate case:

> Rider SH is being presented by the Company as an alternative that would allow the Commission to address the needs of system hardening without having to burden the Commission, the Company, and ratepayers with annual general rate cases to recover the costs associated with making the electrical system more resilient to the extreme weather conditions that are occurring with more frequency in the Gulf Coast region.[21]

That this would be done on a monthly basis under the proposed rider underscores that it operates as an automatic pass-through of costs rather than the permissible *opportunity* to earn a reasonable return on investments and to recover reasonable test-year operating expenses. Moreover, the new storm plan rule, P.U.C. SUBST. R. 25.95, merely requires the filing of a storm hardening report to assure that the utility will be able to meet the requirement of continuous and adequate service provision under PURA §37.151(2). It has nothing to do with cost recovery.

c. The proposed rider amounts to "piecemeal ratemaking."

PURA § 36.051 provides the fundamental formula for setting electric utility rates:

> In establishing an electric utility's rates, the regulatory authority shall establish the utility's overall revenues at an amount that will permit the utility a reasonable opportunity to earn a reasonable return on the utility's invested capital used and useful in providing service to the public in excess of the utility's reasonable and necessary operating expenses.

The detailed implementation of this formula for setting "overall revenues" is prescribed in other sections of PURA Chapter 36, Subchapter B, as well as elsewhere in the statute and in the Commission's Substantive Rules.

As Staff witness Richard Lain points out, there already exists statutory authority for recovery through base rates of extraordinary and unforeseen storm costs.[22] He explains

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[21] CenterPoint Ex. 30, *Direct Testimony of Matthew A. Troxle* at 50:13-17.

[22] Staff Ex.6, *Direct Testimony of Richard Lain* at 38:1-13.

succinctly how the proposed rider amounts to piecemeal ratemaking and why it would constitute poor policy in this case.[23]

This Commission has historically and wisely held that piecemeal ratemaking, if not actually illegal, is bad public policy. Pursuant to PUC SUBST. R. 25.231(a), rates are to be based upon an electric utility's cost of service during a historical test year, adjusted for known and measurable changes. The purpose of this requirement is to ensure that "the attendant impacts on all aspects of a utility's operations can be with reasonable certainty identified, quantified, and matched."[24] Piecemeal ratemaking defeats this regulatory scheme because it allows utilities to adjust a limited set of rate factors in isolation, without the proper consideration of all factors affecting the utility's cost of service.[25] For example, increases in a utility's costs may often be offset by increases in its revenue. It is both unfair and illegal to adjust for storm hardening cost factors without also making matching adjustments to all other contemporaneous rate components. As an exemplar of piecemeal ratemaking the proposed Rider SH rule is contrary both to PURA *and* to sound public policy.

The U.S. Supreme Court case of *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), is frequently cited by utility companies in their base rate cases.[26] This oft-cited case underscores that it is the end result, not a line-item analysis, which determines whether rates are just and reasonable to both investors and ratepayers:

> Rates which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed

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[23] *Id.*, at 39:1 through 40:3.

[24] *Central Power & Light Co. v. Pub. Util. Comm'n*, 36 S.W.3d 547, 563 (Tex.App.–Austin 2000, pet. denied).

[25] *See* Staff Ex. 6, *Direct Testimony of Richard Lain* at 39:4-7; also TIEC Ex. 1, *Direct Testimony of Jeffry Pollock* at 46:7-20.

[26] *See, e.g.*, CenterPoint Ex. 35, *Direct Testimony of Robert B. Hevert* at 5:21 - 6:6; CenterPoint Ex. 25, *Direct Testimony of John J. Reed* at43:17-20.

> certainly cannot be condemned as invalid, even though they might produce only a meager return on the so-called "fair value" rate base.[27]

The Supreme Court agreed that the Federal Power Commission had, in fixing Hope's rates, assessed the overall financial history of the company and found it a sound and attractive investment for many of the same reasons that are present in the instant case.

A Chapter 36 base rate case considers the entirety of costs and revenues, and the Commission sets *overall* revenues to allow a reasonable opportunity for the utility to earn a reasonable return on invested capital.[28] The Company exhibits flawed reasoning in seeking additional storm hardening costs that it contends "are not otherwise being collected in current delivery rates."[29] Rates are set prospectively, based on a historical test year.[30] Because the Commission sets an *overall* revenue requirement, rates collected in coming years are not properly characterized as a form of dollar-for-dollar reimbursement of isolated test year costs, as Mr. Troxle's revised "rebuttal" tariff implies.[31] Absent evidence that the Company performed no storm hardening functions, such as vegetation management or pole replacement, during the test year, Mr. Troxle's concern that such future activities would constitute a category of costs "not accounted for in setting its revenues" is erroneous. But even if there *were* such evidence, the principles upon which rates are set reflect a total financial picture whose individual components will vary from year to year. As Mr. Troxle also acknowledges, it is "simply fact" that costs and collections change in between rate cases.[32]

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27 *Hope*, 320 U.S. at 605.

28 PURA §36.051

29 TIEC Ex. 34, CenterPoint Energy Houston Electric LLC's Response to TIEC RFI 2-08.

30 P.U.C. SUBST. R. 25.231(a) & 25.234(b).

31 *See* CenterPoint Ex. 61, *Rebuttal Testimony of Matthew A. Troxle* at 7:12-13 and Rebuttal Ex. MAT-1.

32 *Id.*, at 6:5-7.

Rule 25.95 itself requires no expenditures and makes no provision for the Commission to mandate expenditures, which is the slim premise for Mr. Troxle's argument that the Rider SH is designed to recover only "mandated" costs.[33] Rider SH is a remedy without a problem, unless that problem is seen as public participation inherent in the traditional statutory base rate case. The fact that Mr. Troxle performed major surgery on the Company's original SH proposal[34] does not address the lack of a demonstrated need for the proposed rider or cure the other defects raised by the Staff and intervenors.[35] Rider SH should be rejected.

2. EECRF

[Not Addressed.]

3. Rider SCUD

In its application, CenterPoint proposes to terminate the State Colleges and University Discount Rider ("Rider SCUD"). The only reason given is that:

> In Docket No. 35717, the Commission determined that the 20% discount [specified in PURA § 36.351] does not apply to electric services provided by a transmission and distribution utility to REPs that in turn sell their electric services to four-year state universities, upper-level institutions, Texas State Technical College, or colleges in areas of the State that are open to competition.[36]

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33 *Id.*, at 6:12-13.

34 State Agencies' Ex. 3.

35 As brought out in State Agencies' Ex. 1-3 and related cross-examination of Mr. Troxle, the amended SH Rider would have made it into the record through the Second Errata to Mr. Troxle's Direct Testimony even if the ALJs had granted State Agencies' Motion to Strike this new SH rider. Although Mr. Troxle speculated that this was "a mistake," an erratum is supposed to correct, not make, mistakes.

36 CenterPoint Ex. 61, *Direct Testimony of Matthew A. Troxle*, at 41, citing *Application of Oncor Electric Delivery Company, LLC for Authority to Change Rates*, PUC Docket No. 35717, Order at 3-4 (January 30, 2009), Finding of Fact ("FOF") No. 5 and Conclusion of Law ("COL") No. 7. In the cited Order, the Commission affirmed in part and reversed in part the SOAH ALJ's Proposal For Decision (November 12, 2008) ruling upon the State of Texas' Motion for Partial Summary Disposition. In this Brief, State Agencies refer to this Proposal For Decision and Commission Order as the "Oncor PFD on University Discount" and the "Oncor Order on University Discount."

The ruling in Docket No. 35717, which is currently being appealed,[37] is not dispositive of this issue. The Commission has included among the issues which must be addressed in this proceeding:

> Is CenterPoint's proposal to remove the state college and university discount rider (Rider SCUD), currently provided in accordance with PURA § 36.351, consistent with applicable law?[38]

The inclusion of the state university discount among the matters to be addressed indicates the Commission's continuing interest and uncertainty with regard to this issue. During the Commission's deliberations on this issue in the Oncor rate case, at least one Commissioner considered this "a close question."[39] Because of the importance of this issue to state institutions of higher learning and the Commission's continuing interest, State Agencies pray that the ALJs give this matter careful consideration rather than simply relying upon one witness's reference to a prior Commission order. In this Brief, State Agencies offer some new legal arguments which have not previously been considered by the Commission. We also reference a new Commission Order, signed October 19, 2010, which contradicts the Oncor orders from 2009.

a. Background on the State College and University Discount

The state university discount was enacted by the Legislature in 1995 and later codified as PURA § 36.351. The statute states in pertinent part:

> (a) Notwithstanding any other provision of this title, each electric utility and municipally owned utility shall discount charges for electric service provided to a facility of a four-year state university, upper-level institution, Texas State Technical College, or college.
>
> (b) The discount is a 20-percent reduction of the utility's base rates that would otherwise be paid under the applicable tariffed rate. . . .

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37 *Steering Committee of Cities Served by Oncor, et al., v. Public Utility Commission of Texas*, Cause No. D-1-GV-10-000137 in the 98th Judicial District Court of Travis County, Texas.

38 Preliminary Order at 6 and at 8 ¶ 30 (July 30, 2010).

39 Docket No. 35717, Open Meeting Tr. 54 (December 18, 2008).

> (f) An investor-owned electric utility may not recover from residential customers or any other customer class the assigned and allocated costs of serving a state university or college that receives a discount under this section. . . .

No one disputes that CenterPoint is an "electric utility,"[40] that it "charges for electric service," or that CenterPoint's charges are determined in accordance with "tariffed rates." Indeed, the ALJs' ultimate task in this proceeding is to decide the tariffed rate which CenterPoint may charge to each class and category of customer for transmission and distribution ("T&D") service, which the Commission has determined to be a form of "electric service."

As it did in the Oncor case, CenterPoint may be expected to argue that Senate Bill 7 ("SB 7"), enacted in 1999 to initiate the transition to retail competition, was intended to immediately terminate the state university discount, because as a transmission and distribution utility it does not "provide" electric service to end-use customers. Under this interpretation of the statute, the discount was only extended by an uncodified section of Senate Bill 7:

> SB 7 as a whole made PURA § 36.351 inapplicable to TDUs. Stated another way, under the provisions of PURA as enacted by SB 7, TDUs would have not been obligated to provide discounts to state institutions of higher learning as of January 1, 2002, the start of the competitive retail market, but § 63 of SB 7 extended that obligation on TDUs, affiliated retail electric providers ("AREPs"), and others through the state fiscal year ending August 31, 2007.[41]

Although the SOAH ALJ rejected this argument and ruled that Oncor should continue to provide the statutory discount,[42] the Commission agreed with CenterPoint and Oncor that: "Oncor's status as a transmission and distribution company that operates in an area open to competition *limits its provision of services to retail electric providers*."[43] At the same time,

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40 PURA § 31.002(6).

41 Docket No. 35717, CenterPoint Exceptions at 2 (November 25, 2008).

42 Oncor PFD on University Discount at 5-7.

43 Oncor Order on University Discount at 2 (emphasis added); *see also id.* at 3, FOF No. 5.

however, the Commission rejected arguments by CenterPoint and Oncor that transmission and distribution ("T&D") service was not "electric service," and also re-affirmed that uncodified § 63 had not repealed the state university discount provision.[44]

b. CenterPoint's proposed termination of the state university discount contradicts express statutory language.

When construing a statute, legislative intent should be determined from the entire act, not just isolated portions, and the statute as a whole should be read in a way which gives effect to all its parts.[45] One provision should not be given a meaning out of harmony or inconsistent with other provisions, even though it might be susceptible to such a construction standing alone.[46] A term used in more than one provision of a statute should be given a consistent interpretation throughout the statute.[47] Applying these principles to give the statute as a whole a consistent and harmonious reading, it is apparent that CenterPoint does indeed "provide electric service" to end-use customers, including state universities. Any other reading renders numerous statutory provisions meaningless.

Chapter 38, for example, is entitled "**Regulation of Electric Services**," and every one of its twelve sections provides a conclusive repudiation of the proposition that in areas where retail choice exists, customers receive "electric service" only from REPs. Every section of Chapter 38 refers to an "electric utility," and by definition a REP can *never* be an electric utility.[48]

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44 *Id.* at 3, FOF No. 5 (referring to the "electric service" provided by Oncor); *id.* at 4, COL No. 6.

45 *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003).

46 *Helena Chemical Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001).

47 *McIntyre v. Ramirez*, 109 S.W.3d 741, 745 (Tex. 2003) (stating that the Court "will not give an undefined statutory term a meaning that is out of harmony or inconsistent with other provisions in the statute."); *Texas Dep't of Transportation v. Needham*, 82 S.W.3d 314, 318 (Tex.2002) ("Statutory terms should be interpreted consistently in every part of an act.").

48 *See* PURA § 31.002(6)(H): "The term ['Electric utility'] does not include: . . . a retail electric provider."

Moreover, it is apparent in reading through Chapter 38 that all of the "electric services" which are to be regulated are transmission and distribution services provided by TDUs like CenterPoint.

One sub-section of Chapter 38 is particularly clear. **PURA § 38.005(a) states: "The commission shall implement service quality and reliability standards relating to the *delivery of electricity to retail customers by* electric utilities and *transmission and distribution utilities.* . . ."** (Emphasis added.) This provision was added by the 1999 Legislature as part of SB7.

Because the entirety of Chapter 38 is concerned with the "regulation of electric services," it is impossible to read § 38.005(a) in a way which supports the proposition that TDUs provide electric service only to REPs. Indeed, the Commission just this week signed an agreed order which penalized CenterPoint for the poor quality of electric service it had provided to certain retail customers, citing § 38.005(a) as the basis for its authority to do so.[49] While CenterPoint may seek to argue that its agreement to this enforcement order, in the context of a settlement, does not bind the utility to any particular interpretation of § 38.005(a), the order simply quotes the plain language of the statute – about which there can be no disagreement. In any event, it is difficult to imagine why CenterPoint would agree to pay a fine for the poor quality of electric service provided to certain retail customers if as a matter of law it does not provide electric service to retail customers.

In addition to the "Regulation of Electric Services" set out in Chapter 38, the certification provisions of Chapter 37 compel the conclusion that regulated utilities like CenterPoint must provide service to end-use customers. PURA § 37.051(a) states: "*An electric utility* or other person *may not directly or indirectly provide service to the public* under a franchise or permit

[49] *Agreed Notice of Violation and Settlement Agreement Relating to CenterPoint Energy Houston Electric, LLC's Violation of PURA § 38.005 and P.U.C. SUBST. R. 25.52, Concerning Reliability and Continuity of Service*, Docket No. 38671, Order at 3, COL Nos. 3 & 5 (October 19, 2010). Although COL No. 3 notes that § 38.005 was amended in 2009, the language concerning "the delivery of electricity to retail customers by . . . transmission and distribution utilities" remains unchanged.

unless the utility or other person first obtains from the commission a certificate that states that the public convenience and necessity requires or will require the installation, operation, or extension of the service." (Emphasis added.) It is undisputed that the requirement to obtain a certificate to construct transmission facilities applies to TDUs in areas open to competition.[50]

PURA § 37.056, which the Commission also holds specifically applicable to TDUs,[51] states that: "(a) The commission may approve an application and grant a certificate only if the commission finds that the certificate is necessary for the *service*, accommodation, convenience, or safety of *the public*," while § 37.056 (c) states that the Commission shall consider: "(1) the adequacy of existing *service*; [and] (2) the need for additional *service*. . . ." In all these provisions, it is apparent that the service provided to the public by TDUs is transmission and distribution service, which the Commission holds to be a form of "electric service."

Finally, the rate-setting provisions of Chapter 36 – and the rules which implement them – require that electric utilities such as CenterPoint must provide electric service to retail customers as well as to REPs. PURA § 36.051, which sets out the fundamental rate-setting formula, permits CenterPoint an opportunity to recover a return only on invested capital which is "used and useful in providing service to the public."[52] As with the provisions of Chapter 37, this reference to "the public" is clearly a reference to retail customers rather than to REPs.[53]

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50 *See, e.g., Application of Centerpoint Energy Houston Electric, LLC, for a Certificate of Convenience and Necessity (CCN) for a Proposed 69 kV Transmission Line within Brazoria County*, Docket No. 30617, Final Order (March 22, 2006) at 3, FOF No. 1 ("CenterPoint Energy Houston Electric, LLC (CenterPoint) is a transmission and distribution utility providing service under Certificate of Convenience and Necessity (CCN) No. 30086.") and at 14, COL No. 2 ("The Commission has jurisdiction over this matter pursuant to PURA §§ 14.001, 32.001, 37.051, 37.053, 37.054, and 37.056.").

51 *Id.* at 14, COL No. 2.

52 *See also* PUC SUBST. R. § 25.231 (a), which states that "rates are to be based upon an electric utility's cost of rendering service to the public during a historical test year."

53 See *El Paso Elec. Co. v. Pub. Util. Comm'n*, 917 S.W.2d 846, 856 (Tex.App.–Austin 1995, writ dism'd by agr.) ("PURA is concerned primarily with balancing the interests of utilities and their consumers in the area over

The provisions of Chapter 36, and the associated rules, are being applied in this proceeding to set the rates of all classes and categories of retail end-use customers. PURA § 36.351, which prescribes how base rates are to be set for state universities, should be given as much effect as every other rate provision and interpreted in a manner which is consistent with the statute as a whole. In order to consistently construe all the pertinent provisions of PURA, State Agencies pray that the ALJs conclude that CenterPoint provides electric service to retail end-use customers, including state universities.

c. State Agencies' reading of PURA § 36.351 is confirmed by a textual comparison to the military base rate discount in PURA § 36.354.

A major part of the Commission's rationale for concluding that Oncor need no longer provide the PURA § 36.351 discount was its finding that the 20% discount does not apply to TDUs "in areas of the State that are open to competition."[54] This distinction – between unbundled electric utilities "in areas open to competition" and bundled electric utilities in areas without customer choice – effectively inserts language into PURA § 36.351 that simply is not there. Words should not be inserted into a statute except to give effect to clear legislative intent.[55]

The Commission's distinction also violates another rule of construction: "When the Legislature employs a term in one section of a statute and excludes it in another section, the term

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which the utilities enjoy a monopolistic advantage. As part of this balance, a utility is entitled to have the prudently incurred costs of 'used and useful' property included in its rate base when providing service to customers in its service area."). Although this case predates retail competition, CenterPoint retains "a monopolistic advantage" in its service area, and its rates and revenues remain regulated by the PUC. *See, e.g.*, PURA §§ 11.002(b) and 39.001(a).

54 Oncor Order on University Discount [Att. B] at 3, FOF No. 5.

55 *See Laidlaw Waste Systems (Dallas)*, 904 S.W.2d at 659, citing *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d at 540 and *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d at 552.

should not be implied where excluded."[56] PURA contains another rate discount statute that, unlike PURA § 36.351, expressly distinguishes competitive areas of the state from non-competitive areas:

> **Sec. 36.354. DISCOUNTED RATES FOR MILITARY BASES.**
>
> (a) Notwithstanding any other provision of this title, each municipally owned utility, electric cooperative, or electric utility *in an area where customer choice is not available or the commission has delayed the implementation of full customer choice* in accordance with Section 39.103 shall discount charges for electric service provided to a military base.
>
> (b) The discount under Subsection (a) is a 20 percent reduction of the base commercial rate that the municipally owned utility, electric cooperative, or electric utility *would otherwise charge* the military installation.
>
> .... [Emphasis added.]

The legislative specification, that the military discount in PURA § 36.354 applies exclusively in areas of the state which are not open to competition, is the same limitation which CenterPoint seeks to engraft onto the state university discount in PURA § 36.351. It is apparent that the Legislature knows how to make the distinction when it is appropriate. The Legislature did so in 2003 when passing PURA § 36.354, but did not see fit to amend PURA § 36.351 to exclude "areas of the state open to competition" from the state university discount.

In addition to engrafting language into sub-section (a) of § 36.351, CenterPoint seeks to alter sub-section (b) in a way which makes it read like the military discount in § 36.354(b). The military discount refers to the base commercial rate that the electric utility "would otherwise charge the military installation," and thus requires a direct billing relationship between the utility and the military base. The corresponding sub-section of the state university discount provision does not require such a direct relationship, instead requiring only that the discount be applied to

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[56] *Laidlaw Waste Systems (Dallas)*, 904 S.W.2d at 659, citing *Smith v. Baldwin*, 611 S.W.2d 611, 616 (Tex.1980).

"the applicable tariffed rate." As argued in the next section of this Brief, tariffed rates by definition include both direct and *indirect* charges to the public. Again, the distinction between the state university discount and the military discount should be recognized and given effect, and PURA § 36.351 should be read strictly as the Legislature wrote it.

This textual comparison between the two discounts provided by PURA §§ 36.351 and 36.354 was not presented to the Commission in the Oncor case. Unlike the military base discount, operation of the state university discount provision is *not* limited to areas without customer choice and does *not* require a direct billing relationship between the electric utility and the retail customer. State Agencies pray that the ALJs give due consideration to the differences between these two provisions, and decline CenterPoint's invitation to alter the plain language of the state university discount statute.

d. Terms in PURA § 36.351 should be construed in a way that is consistent with their statutory definitions.

As noted above, one provision of a statute should not be given a meaning out of harmony or inconsistent with other provisions, even though it might be susceptible to such a construction standing alone.[57] Certainly, defined terms should be construed according to the specific statutory definitions which they have been given.

The statutory language at issue here concerns "a 20-percent reduction of the utility's base rates that would otherwise be paid under the applicable tariffed *rate*."[58] In deciding the Oncor case, the Commission apparently believed that TDUs do not provide electric service to retail customers because regulated *rates* for transmission and distribution service are charged to REPs

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[57] *Helena Chemical Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001).

[58] PURA § 36.351(b) (emphasis added).

rather than directly to retail customers.[59] This reading conflicts with PURA's definition of "rate" to include:

> any compensation, tariff, *charge*, fare, toll, rental, or classification that is directly *or indirectly* demanded, observed, charged, or collected by a public utility for a service, product, or commodity described in the definition of utility in Section 31.002. . . .[60]

Section 31.002 in turn defines "electric utility" as:

> a person or river authority that owns or operates for compensation in this state equipment or facilities to produce, generate, *transmit*, *distribute*, sell, or furnish electricity in this state. . . .[61]

Thus, in accordance with the unambiguous language of the statutory definitions, the "charges" and "rates" by an "electric utility" in PURA § 36.351 include not only those directly charged to retail end-use customers by a bundled utility but those which are *indirectly* "demanded, observed, charged, or collected" by an unbundled TDU providing transmission and distribution electric service. All of CenterPoint's regulated rates are charged indirectly, based upon the usage of and rate class occupied by particular customers. There is no principled or statutorily-based reason to treat the rates charged to state universities differently than the rates charged to other retail end-use customers.

The interpretation that TDUs do not provide electric service to state universities also conflicts with the statutory definition of "service":

> "Service" has its broadest and most *inclusive* meaning. The term includes *any* act performed, *anything* supplied, and *any facilities used or supplied by a public*

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[59] Oncor Order on University Discount at 3, FOF No. 5 (finding that TDUs provide electric services to REPs "that in turn sell their electric services to" state universities). Logically, this emphasis on sales would apply to every rate charged to REPs for T&D service to end-use customers.

[60] *Id.* § 11.003(16) (emphasis added); *see also id.* § 11.004, defining "public utility" and "utility."

[61] *Id.* § 31.002(6) (emphasis added). This definition expressly excludes the other two unbundled entities exempted from rate regulation: power generation companies and REPs. PURA § 31.002(6)(A) & (H).

utility in the performance of the utility's duties under this title to its patrons, employees, other public utilities, an electric cooperative, and *the public*. . . .[62]

This broad and inclusive definition of service further refutes the conclusion that TDUs do not "provide electric services" to state universities. Under the plain language of the statute, CenterPoint provides "service" by delivering electricity to facilities of state universities, and indirectly charges state universities a "rate" for such service. Therefore, CenterPoint must comply with the requirement in PURA § 36.351(a) to "discount charges for electric service provided to a facility of" a state university.

The argument regarding the statutory definition of "rate," to include charges collected *indirectly* by an electric utility, was not squarely presented to the Commission in the Oncor case. State Agencies pray that it be given due consideration by the ALJs in this case when construing the meaning of PURA § 36.351. CenterPoint's "applicable tariffed rate" includes charges collected indirectly through the REPs. Indeed, all of CenterPoint's tariffed rates are collected indirectly but set in accordance with the applicable statutes and rules. The rates charged to state universities should be discounted in accordance with the plain language of PURA § 36.351 and the pertinent definitions in §§ 11.003 and 31.002.

e. A determination that CenterPoint "does not provide services to" facilities of state universities would be contrary to the Substantive Rules and prescribed tariffs.

In addition to the statutory provisions which specify that Oncor must provide service to retail end-use customers, the Commission Substantive Rules applicable to TDUs require the same conclusion. The Commission, like other agencies, is bound to follow its own rules.[63]

Particularly direct and germane is PUC SUBST. R. § 25.214 (a): "A TDU shall provide retail delivery service . . . to all Retail Customers." The Commission's rules define "Retail

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62 PURA § 11.003 (19) (emphasis added).

63 *See Flores v. Employees Retirement System of Texas*, 74 S.W.3d 532, 542 (Tex.App.–Austin 2002, pet. denied).

Customer" as "[t]he separately metered end-use customer who purchases and ultimately consumes electricity."[64] CenterPoint's tariff, as prescribed by the Commission, similarly defines "Retail Customer" as an "end-use customer who purchases Electric Power and Energy and ultimately consumes it." [65]

Another section of the rules concerns "Continuity and Reliability of Service." This section is expressly applicable to "all transmission and distribution utilities,"[66] and it is clear from the language that the "service" is provided to end-use customers.[67]

The Commission's Substantive Rules prescribe a standard tariff generally applicable to all TDUs such as CenterPoint.[68] The provisions of this tariff further confirm that TDUs such as CenterPoint must provide electric service to retail end-use customers. In accordance with the Commission-prescribed tariff, every TDU provides "Delivery System Services" that retail customers "receive from [the] Company" and are "charged to Competitive Retailers [REPs] serving retail customers."[69] (It is apparent that Delivery System Services, defined as one form of "service performed by Company pursuant to this Tariff for the Delivery of Electric Power and Energy," [70] are a form of "electric service.") The tariff also explains that the TDU delivers the

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64 PUC SUBST. R. § 25.5 (114).

65 Prescribed Tariff at 9. This Commission-prescribed Tariff for Retail Delivery Service may be found online at http://www.puc.state.tx.us/rules/subrules/electric/25.214/25.214fig%28d%29%281%29.pdf.. *See also* PUC SUBST. R. § 25.214 (b) & (d)(1).

66 PUC SUBST. R. § 25.52 (a). *See also* PUC Final Order in Docket No. 38671, at 3, COL No. 3 ("As a transmission and distribution utility, CenterPoint is required to comply with the service quality and reliability standards established by . . . P.U.C. SUBST. R. 25.52.").

67 *See, e.g.*, PUC SUBST. R. § 25.52 (c)(1), (c)(2)(D), (c)(5), (c)(6), (d), (e)(1), and (e)(2), all of which refer to "customers." It is apparent from the context that all of these references are to retail end-use customers.

68 PUC SUBST. R. § 25.214(d)(1); *see also* PUC SUBST. R. § 25.214(b), stating that this pro-forma tariff "governs the terms and conditions of retail delivery service by all TDUs in Texas."

69 Commission Prescribed Tariff at 9; *see* PUC SUBST. R. § 25.214(d)(1).

70 *Id.* at 8-9.

electricity to the "Point of Delivery" on the retail customer's premises where the TDU has installed meters to measure usage.[71]

Chapter 5 of the prescribed TDU tariff is specifically devoted to the TDU's "Provision of Delivery Service to Retail Customers."[72] This chapter "governs the terms of access and conditions of the *provision of Delivery Service by Company to Retail Customers. . . .*"[73] In the first paragraph related to "Service," the tariff recites that "*Company shall provide Delivery Service* pursuant to the terms and conditions of this Tariff *to any Retail Customer* within Company's certificated service territory *requiring such service.*"[74]

Because the prescribed tariff, like the Commission's rules, specifies that TDUs must provide Delivery Service to all Retail Customers, the Commission's conclusion in the Oncor case that TDUs provide service only to REPs is questionable at best. State universities clearly fall within both the rules' and the tariff's definitions of Retail Customers,[75] and State Agencies pray that the ALJs give serious consideration to the rules and the prescribed tariff in assessing the applicability of PURA § 36.351 to state universities in CenterPoint's service area.

f. Conclusion with regard to Rider SCUD

In sum, the plain language of PURA § 36.351, the language and structure of PURA as a whole (including statutory definitions), a textual comparison to a similar but significantly different discount statute, and the Commission's rules and tariffs all demonstrate that

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71 *See id.* at 69, ¶ 5.10.1 ("Unless otherwise agreed to by Company [in this instance, CenterPoint] and Retail Customer, Delivery Service is provided through one Point of Delivery, with Retail Customer's service entrance arranged so that Company can measure Retail Customer's Service with one Meter.").

72 *Id.* at 51.

73 *Id.*, ¶ 5.1.1. (emphasis added).

74 *Id.* at 53, ¶ 5.3. (emphasis added).

75 PUC SUBST. R. § 25.5 (114) (defining Retail Customer as "[t]he separately metered end-use customer who purchases and ultimately consumes electricity"); Tariff for Retail Delivery Service at 12 (defining "Retail Customer" as an "end-use customer who purchases Electric Power and Energy and ultimately consumes it.").

CenterPoint provides electric service to state universities and are required by statute to offer such universities a 20% base rate discount off the applicable tariffed rate. State Agencies pray that the Administrative Law Judges make this recommendation to the Commission in their Proposal For Decision.

4. Deferred Tax Riders

Presentation of these riders ("DT" and "DTA") for the first time on October 1, 2010 is regrettably consistent with CenterPoint's "moving target" style of case presentation.[76] Although State Agencies moved to strike these riders as supplemental direct, the motion was denied for reasons not stated on the record. The Company asserted that these riders were crafted as a result of Mr. Felsenthal's rebuttal testimony. However, the nature of these riders as supplemental direct is apparent from Mr. Felsenthal's Direct Testimony, in which he commented on the ADFIT "timing problem" that these rider/trackers are ostensibly designed to address.[77] In his rebuttal testimony, which does not specifically reference the riders attached to Mr. Troxle's rebuttal testimony, Mr. Felsenthal followed up on his direct by speculating about a remedy to address this timing problem. This rebuttal has only the barest description of the process whereby the rider would operate, and Mr. Troxle's rebuttal testimony does no more than reference his (Troxle's) attached riders without describing their operation. In sum, neither of these witnesses explains or justifies the DT or DTA rider mechanisms.

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[76] The PUC Interchange and State Agencies' Ex. 2 reflects the following amendments to the Company's case, excluding rate case expenses, after 10/01/2010: October 5: Errata and Motion for Admission (several hundred pages which includes a new Second Errata to Mr. Troxle's Direct Testimony as well as exhibits to Mr. Watson's Rebuttal Testimony not filed with that testimony); October 6: Errata to Rebuttal Testimony of Mr. Felsenthal; October 7: Errata to Direct Testimony of Mr. Hagen; October 11: Errata to both Direct and Rebuttal Testimony of Mr. Finley, Second Errata to Mr. Watson's Rebuttal testimony, Errata to Rebuttal Testimony of Mr. Reed, Second Errata to Direct Testimony of Jay Joyce; October 13: Errata to Rebuttal Testimony of Jay Joyce.

[77] CenterPoint Ex. 26, *Direct Testimony of Alan D. Felsenthal* at 65:5 through 67:15.

This history demonstrates that the riders were hastily assembled and not well thought-out by the Company, a fact supported by Mr. Troxle. Mr. Troxle testified during cross examination on his direct testimony that the drafting and review of a new rider would take "weeks." However, he testified during rebuttal cross-examination that he had prepared these two new tax riders when he became aware – at an unspecified date after the filing of intervenor direct testimony – that there was "a need" for such riders. Taking Mr. Troxle's testimony at face value leads to the inescapable conclusion that these two riders were thrown together shortly before rebuttal testimony was filed on October 1, 2010, at a time when Mr. Troxle was necessarily working on rebutting many other issues.

It would be bad public policy to adopt these trackers. Among other things, they appear to have been hastily drafted and given scant review by the Company. Because they were not part of the Company's direct case, intervenors have had an inadequate opportunity to analyze and respond to them. Although they have been admitted, over State Agencies' objection, the cursory testimony which allegedly supports them should be given little weight by the ALJs.

5. Other Riders

[Not Addressed]

VIII. AMS

[Not Addressed]

IX. Rate Case Expenses

[Not Addressed]

X. Conclusion and Prayer

State Agencies support the Staff and Intervenors in concluding that CenterPoint is not entitled to receive a rate increase, and preponderance of the evidence shows that decreased rates

would provide the utility a reasonable opportunity to earn a reasonable return. Among other reasons for arriving at this conclusion, State Agencies believe that CenterPoint's proposed elimination of the Consolidated Tax Savings Adjustment, its proposed Storm Hardening Rider, and its eleventh-hour proposal of DT and DTA ADFIT trackers should all be rejected.

Of particular importance to State Agencies is CenterPoint's proposed elimination of the statutory base rate discount mandated for state institutions of higher learning. CenterPoint's position is based solely upon the Commission's prior determination, in the Oncor rate case, that transmission and distribution utilities provide electric service only to REPs and not to metered retail customers. State Agencies in this Brief offer legal argument not presented to the Commission during the Oncor case, and this argument demonstrates that termination of the discount would be contrary to express statutory provisions and definitions, contrary to the regulatory scheme as a whole, and contrary to the Commission's rules and tariffs. In addition, the Commission's prior determination that transmission and distribution utilities provide service only to REPs is contradicted by a final order issued by the Commission earlier this week, in which the Commission fined CenterPoint for the poor quality of service to retail customers.

State Agencies pray that CenterPoint's request to terminate the PURA § 36.351 state university discount be DENIED, that CenterPoint's rates be reduced in accordance with the testimony of Staff and intervenors, and for such other and further relief to which we may be entitled.

Dated: October 22, 2010

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Certificate of Service

I hereby certify that a true and correct copy of **State Agencies' Initial Brief on the Merits** has been served upon all parties of record by hand delivery, e-mail, or facsimile, and by First Class U.S. Mail on or before October 22, 2010.

Susan M. Kelley

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