

Control Number: 38339



Item Number: 848

Addendum StartPage: 0



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

2011 JAN -3 AM 11:20  
Public Utility Commission

January 3, 2011

Hon. Barry T. Smitherman, Chairman  
Hon. Donna L. Nelson, Commissioner  
Hon. Kenneth W. Anderson, Jr., Commissioner  
Public Utility Commission of Texas  
1701 N. Congress Avenue  
Austin, TX 78711-3326

RE: Docket No. 38339; SOAH Docket No. 473-10-5001 – *Application of CenterPoint Energy Houston Electric, LLC for Authority to Change Rates*

HONORABLE COMMISSIONERS:

Attached for your information and consideration is the recent letter ruling by the Travis County District Court in the appeal of the Commission's final order in Docket No. 35717, Oncor Electric Delivery Company's most recent rate case. Also attached is a copy of the amici curiae brief referenced in the court's letter. The brief was filed in the district court on behalf of The University of Texas MD Anderson Cancer Center and eight other state institutions in CenterPoint's service area.

Respectfully,

Bryan L. Baker, Assistant Attorney General  
State Bar No. 00790256

CC: All parties of record in PUC Docket No. 38339; SOAH Judges Wilfong and Arnold

848

## **Attachment A**

Letter Ruling from Presiding Judge Lora Livingston (December 17, 2010)

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



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261ST DISTRICT COURT

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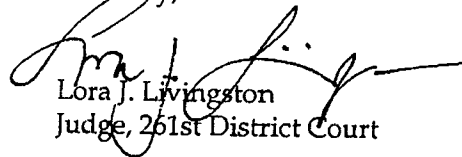
Re: Cause No D-1-GV-10-000137 (Consolidated), *Steering Committee of Cities Served by Oncor v. Public Utility Commission of Texas*, in the 98<sup>th</sup> Judicial District Court of Travis County, Texas

Dear Counsel:

I have considered the pleadings, the evidence and the arguments of counsel, and hereby affirm in part and reverse in part the Order of the Public Utility Commission of Texas. The Order is reversed as to the following points of error regarding Oncor's franchise fees: Plaintiff Steering Committee of Cities' Point of Error No. 6, Plaintiff Alliance of TXU/Oncor Customers' Point of Error No. 2, Plaintiff Oncor Electric Utility Commission's Point of Error No. 5 and Intervenor Centerpoint Energy Houston Electric, LLC's Point of Error No. 2. The Order is also reversed as to the following points of error regarding the application of PURA § 36.351 to Oncor: Plaintiff State Agencies' Point of Error and Amici Curiae State Universities Point of Error. The remainder of the Order is affirmed.

Please prepare an order, circulate it for approval as to form, and submit it for signature at your earliest convenience. If you have any questions, please contact my Staff Attorney, Delaine J. Foss.

Sincerely,



Lora J. Livingston  
Judge, 261st District Court

cc: Ms. Amalia Rodriguez-Mendoza, Travis County District Clerk

## **Attachment B**

Brief of Amici Curiae State Universities (August 31, 2010)

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

[Appendices A & B to the Amici brief, consisting of the Commission's  
January 30, 2009 Order and an Open Meeting Transcript, are omitted.]

CAUSE NO. D-1-GV-10-000137  
(Consolidated)

STEERING COMMITTEE OF CITIES	§	IN THE DISTRICT COURT OF
SERVED BY ONCOR, ET AL.,	§	
Plaintiffs,	§	
	§	
v.	§	TRAVIS COUNTY, TEXAS
	§	
PUBLIC UTILITY COMMISSION	§	
OF TEXAS,	§	
Defendant.	§	98TH JUDICIAL DISTRICT

**BRIEF OF AMICI CURIAE STATE UNIVERSITIES**

**THE UNIVERSITY OF TEXAS MD ANDERSON CANCER CENTER  
THE UNIVERSITY OF TEXAS HEALTH SCIENCE CENTER AT HOUSTON  
THE UNIVERSITY OF TEXAS MEDICAL BRANCH AT GALVESTON  
THE UNIVERSITY OF HOUSTON SYSTEM  
TEXAS A&M UNIVERSITY AT GALVESTON  
TEXAS A&M HEALTH SCIENCE CENTER - INSTITUTE OF  
BIOSCIENCES & TECHNOLOGY  
TEXAS ENGINEERING EXTENSION SERVICE AT GALVESTON  
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TO THE HONORABLE JUDGE LORA LIVINGSTON:

The University of Texas MD Anderson Cancer Center, The University of Texas Health Science Center at Houston, The University of Texas Medical Branch at Galveston, The University of Houston System, Texas A&M University at Galveston, Texas A&M Health Science Center – Institute of Biosciences & Technology, Texas Engineering Extension Service at Galveston, and Prairie View A&M Nursing School (collectively “Amici State Universities”) respectfully submit this brief to assist the Court in considering the statutory interpretation issue raised by State Agencies in this administrative appeal. Amici State Universities believe the Public Utility Commission misinterpreted section 36.351 of the Public Utility Regulatory Act (“PURA”)<sup>1</sup> when it authorized Oncor Electric Delivery Company to terminate the 20% base rate discount for electric service that state universities receive as a result of that provision. Amici State Universities urge the Court to reverse the Commission on this point.<sup>2</sup>

### INTEREST OF AMICI STATE UNIVERSITIES<sup>3</sup>

Amici State Universities have no direct financial interest in the outcome of this specific case, which concerns electric rates charged by Oncor.<sup>4</sup> Amici nevertheless would face significant adverse financial consequences if the Commission’s erroneous interpretation of section 36.351 were upheld. Amici State Universities are major customers in the electric service area of CenterPoint Energy Houston Electric (“CenterPoint”) that receive discounted

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<sup>1</sup> TEX. UTIL. CODE, Public Utility Regulatory Act §§ 11.001 *et seq.* (West 2007 & Supp. 2009).

<sup>2</sup> Amici take no position on the other issues in this appeal.

<sup>3</sup> The fee for preparation of this brief will be paid solely by Amici.

<sup>4</sup> Plaintiff State Agencies include different state universities located in Oncor’s electric service area that are directly impacted by the Commission’s decision.

electric rates as a result of section 36.351. CenterPoint, like Oncor, is a regulated transmission and distribution electric utility (“TDU”). In proceedings now pending before the Commission, CenterPoint is seeking to terminate the electric rate discount it has been providing pursuant to section 36.351 in its service area. CenterPoint’s application to terminate the discount relies directly on the Commission’s ruling in the Oncor case before this Court.<sup>5</sup> CenterPoint filed a brief in this Court supporting the Commission’s decision in the Oncor case.

The proper interpretation of section 36.351 in this case will therefore impact Amici State Universities. The Commission’s interpretation, if upheld, would significantly increase Amici’s cost of electric service. MD Anderson Cancer Center receives an annual discount on its electric rates of approximately \$500,000 as a result of section 36.351. The UT Health Science Center receives an annual discount of approximately \$200,000. The UT Medical Branch at Galveston receives a \$440,000 discount. Amici The University of Houston System and the institutions that are part of the Texas A & M University System also benefit from discounted rates. All told, state universities and colleges in the service area of CenterPoint Energy Houston Electric could be forced to spend on the order of \$2 million more annually if the discount under section 36.351 were eliminated.<sup>6</sup> The proper

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<sup>5</sup> See PUC Docket No. 38339, *Application of CenterPoint Energy Houston Electric, LLC for Authority to Change Rates*, Direct Testimony of Matthew A. Troxle at 41 (filed June 30, 2010). See also PUC Docket No. 38214, *Application of CenterPoint Energy Houston Electric, LLC to Terminate Rider SCUD*, First Amended Application (filed June 4, 2010).

<sup>6</sup> In proceedings before the Commission, CenterPoint has estimated that it would be able to raise its transmission and distribution electric rates by approximately \$2 million if the discount were terminated. See P.U.C. Docket No. 38214, *Application of CenterPoint Energy Houston Electric, LLC to Terminate Rider SCUD*, Application at 4 (Apr. 30, 2010).

interpretation of section 36.351 thus has significant budgetary implications for Amici State Universities and other similarly situated state universities and colleges.

#### SUMMARY OF THE ARGUMENT

The Court should reverse the Commission's decision on the issue raised by State Agencies because the Commission's construction of PURA § 36.351 is not consistent with the statutory language. The statute directs that, "[n]otwithstanding any other provision of this title, each electric utility . . . shall discount charges for electric service provided to a facility of a four-year state university . . . ." It is undisputed that Oncor is an electric utility, and it is indisputable that Oncor provides transmission and distribution electric service to the facilities of state universities.

The Commission's sole rationale for relieving Oncor of its statutory obligation to provide the discount is that Oncor does not directly charge state universities for the electric service it provides them. Instead, Oncor bills retail electric providers ("REPs") who then include that cost as part of their bill to the state universities. Contrary to the Commission's interpretation, the lack of a direct customer billing relationship does not mean Oncor does not "provide electric service to facilities of" state universities. Section 36.351's applicability is not restricted to electric utilities that provide *retail* electric service, and PURA is explicit that an electric utility's "rate" includes both direct and *indirect* charges collected.

Another discount provision in PURA underscores the Commission's statutory construction error. In section 36.354, the Legislature required electric utilities to provide a similar discount to military bases. In that instance, however, the Legislature specifically restricted this requirement to areas of the state where by law there is no competition and vertically-integrated electric utilities charge the retail-customer military base directly. The

Commission's interpretation impermissibly engrafts this restriction onto the state university discount in section 36.351 which contains no such restricting language.

CenterPoint's alternative rationale, not adopted by the Commission, fails to save the Commission's order. Senate Bill 7, which restructured the electric industry and introduced retail competition in 1999, included an uncodified Section 63. That section extended the availability of regulated rates for state universities until 2007, thereby providing state universities rate stability for a transitional period at the onset of competition. Contrary to CenterPoint's interpretation, Section 63 did not decree that the section 36.351 discount would expire when the regulated rate extension ended. The Commission correctly found that section 36.351 "remains in effect despite section 63."

Finally, adhering to the statutory language does not lead to absurd results. Oncor and CenterPoint suggest that it would be "impractical" and "nonsensical" to provide the discount when the REP has no statutory duty to pass on the discount in the bill to its state university customers. Quite the opposite. State universities receive substantial benefits from the discount in lower rates through contracting with their REPs, a practice that makes eminent sense in a competitive market.

#### ARGUMENT

**I. The Commission's interpretation of PURA § 36.351 is inconsistent with the plain language of the statute.**

Courts review questions of statutory interpretation *de novo*.<sup>7</sup> An administrative agency's construction is entitled to serious consideration but only "so long as that

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<sup>7</sup> *Cities of Corpus Christi v. Public Util. Comm'n*, 2010 WL 2330366 at \*3 (Tex. App.—Austin, June 11, 2010).

construction is reasonable and consistent with the statutory language.”<sup>8</sup> In this instance, the Commission’s construction is not consistent with the statutory language.

The statute at issue, PURA § 36.351, states:

(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.<sup>9</sup>

The Commission interpreted this provision to be inapplicable to Oncor even though, as Oncor acknowledges in its brief, “[i]t is undisputed that Oncor is an electric utility as defined by the statute.”<sup>10</sup> Oncor and CenterPoint are transmission and distribution utilities (“TDUs”) created as part of the electric industry restructuring and introduction of competition mandated by Senate Bill 7 (“SB 7”) in 1999.<sup>11</sup> Although section 36.351 was enacted prior to that in 1995, the Legislature in SB 7 included TDUs within the statutory definition of “electric utility” and left section 36.351 itself unchanged. Therefore, as Oncor observes, on its face “it might seem odd that a statute obligating an electric utility does not apply to an entity clearly included in the statutory definition of ‘electric utility’.”<sup>12</sup>

The Commission’s Order attempts to reconcile this oddity by concluding that Oncor

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<sup>8</sup> *Id.*

<sup>9</sup> Emphasis added.

<sup>10</sup> Oncor Response Brief at 64.

<sup>11</sup> “In 1999, the Legislature substantially revised the Public Utility Regulatory Act (PURA) to bring about a major restructuring of the electric power industry in Texas to allow retail electric rates to be determined by competition.” *City of Corpus Christi v. Public Util. Comm’n*, 51 S.W.3d 231, 235 (Tex. 2001) (*per curiam*). The PURA amendments “provid[ed] for the transition from a regulated industry to a competitive deregulated market” in many parts of the state. *Office of Pub. Util. Counsel v. Public Util. Comm’n*, 303 S.W.3d 904, 907 (Tex. App.—Austin 2010).

<sup>12</sup> Oncor Response Brief at 65.

“does not provide electric services” to state universities within the meaning of section 36.351.<sup>13</sup> The Commission’s interpretation was that TDUs, though electric utilities, do not provide electric service to a facility of a state university, but instead provide electric service only to retail electric providers (“REPs”) who “in turn sell their electric services” to state universities.<sup>14</sup>

The problem with this interpretation is that it substitutes “*retail* electric services” into the statute in place of “electric service.” As the Commission’s brief stresses, “Oncor does not, and cannot, provide *retail* electric service to [state universities].”<sup>15</sup> Oncor similarly emphasizes that, “as a TDU, [it] is statutorily precluded from offering *retail* electric services.”<sup>16</sup> Both the Commission and Oncor cite PURA’s definition of REPs as entities that sell “retail electric service” to end-users,<sup>17</sup> and point out that that REPs are the only ones allowed to provide “retail electric service.”<sup>18</sup> Oncor cites other provisions that likewise refer to “retail electric service” or “residential electric service.”<sup>19</sup>

But section 36.351 does not say “retail electric service”; it uses the general term “electric service,” and PURA defines “service” to have “its broadest and most inclusive meaning.”<sup>20</sup> Transmission and distribution service is an essential “electric service” that is

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<sup>13</sup> Administrative Record (“AR”), Item 178, Order, Conclusion of Law 3, (Jan. 30, 2009) (hereinafter “Order”) (incorporated into Order on Rehearing in Finding of Fact 205). A copy of the Order is attached as Appendix A.

<sup>14</sup> *Id.*, Finding of Fact 5.

<sup>15</sup> Commission Brief at 56 (emphasis added).

<sup>16</sup> Oncor Response Brief at 64 (emphasis added).

<sup>17</sup> PURA § 17.002(6).

<sup>18</sup> PURA § 39.352(a).

<sup>19</sup> See Oncor Response Brief at 64-65 (citing PURA §§ 17.008, 39.101(c)-(e) and (h), and 39.107(g)).

<sup>20</sup> PURA § 11.003(19).



“provided to a facility of” state universities. Oncor, a regulated electric utility, transmits and distributes electric energy over electric lines that run from power generation plants to the electric meter located on or near the premises of retail electric customers, including state universities, in Oncor’s exclusive service territory. Oncor has individual “Electric Service Identifiers” (“ESI IDs”) assigned to each end-use retail customer premises where it delivers the electricity.<sup>21</sup> As Oncor itself states in its brief, “[c]learly, Oncor’s facilities transmit electricity from the generating stations to the meters at the end-use customers’ premises.”<sup>22</sup> Which is to say that Oncor provides electric service to a facility of a state university. Just as a TDU is one type of electric utility under PURA, a TDU provides one type of electric service to state university facilities under PURA.

It is true that Oncor does not directly charge state universities for the transmission and distribution service the utility provides them. Instead, as a TDU, Oncor sends its bills to REPs based on the metered usage of the electricity that Oncor provided to the state university facility. The REP then incorporates that cost into a total electric bill paid by the state university, which also includes the cost of the generated electricity supplied by the power generator.

This form of transaction, with the REP as middle-man, was central to the Commission’s decision. Under the Commission’s interpretation, an electric utility is deemed not to provide electric service unless the utility directly charges and collects from the end-

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<sup>21</sup> 16 Tex. Admin. Code § 25.214(d), *Tariff for Retail Delivery Service* at 9-10 (defining ESI ID as the basic identifier assigned to each Point of Delivery, with the Point of Delivery being the point where “all Retail Customers . . . receive electric Delivery Service from the [TDU].” CenterPoint has 931 retail customer ESI IDs, including those for the facilities of Amici State Universities, that are marked as eligible for the state university discount. P.U.C. Docket No. 38214, *Application of CenterPoint Energy Houston Electric, LLC to Terminate Rider SCUD*, Application at 4 (Apr. 30, 2010).

<sup>22</sup> Oncor Response Brief at 71.

user. The Commission's brief accordingly justifies the Commission's decision on the ground that "[t]he transmission-and-distribution utility has no financial arrangement with the retail customer."<sup>23</sup> PURA is explicit, however, that the "rate" of a TDU or other electric utility includes "any . . . charge . . . that is directly *or indirectly* demanded, observed, charged, or collected" by an electric utility.<sup>24</sup> As a TDU, Oncor provides transmission and distribution electric service directly to the facilities of state universities, and "charges and collects" for that service "indirectly" through the REP. No direct billing arrangement is required by the statute. Instead, section 36.351(b) provides only that the discount is to be reflected as "a 20-percent reduction of the utility's base rates that would otherwise be paid under the applicable tariffed rate." In accordance with this provision, the discount had been consistently reflected in Oncor's tariffs as "Rider SCUD" ("State College and University Discount") until the Commission authorized its termination in this case.

In sum, the Commission's construction of section 36.351 is not consistent with the statutory language. That language unequivocally directs that, "[n]otwithstanding any other provision of this title, each electric utility . . . shall discount charges for electric service provided to a facility of a four-year state university . . . ." Oncor is an electric utility that provides electric service to the facilities of state universities. Oncor therefore must discount its charges for that electric service under the applicable tariff as section 36.351 mandates.

## **II. PURA § 36.354 underscores the Commission's statutory construction error.**

As stated in the Commission's Order, by excluding TDUs, the Commission construed section 36.351 to apply only to "electric services provided by an electric utility to [state

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<sup>23</sup> Commission Brief at 59.

<sup>24</sup> PURA § 11.003(16) (emphasis added).

universities] *in areas of the State that are not open to competition.*”<sup>25</sup> Areas not open to competition, where there is no “customer choice,”<sup>26</sup> are served by vertically-integrated utilities that provide all the electric services: generating power; providing transmission and distribution service; and selling a packaged product at retail. By reading section 36.351 to apply only to each electric utility in an area where customer choice is not available, the Commission’s Order exempts those electric utilities – TDUs – which operate in areas where customer choice *is* available.

Amici State Universities respectfully submit that it is the Legislature’s prerogative, not the Commission’s, to carve out such a limitation. The Legislature in fact chose to craft this very limitation when it provided an electric discount for military bases in PURA § 36.354. The table below compares (1) the language of section 36.351 which provides the state university discount; (2) the Commission’s new construction of section 36.351; and (3) the language of section 36.354 which provides the military base discount.

PURA § 36.351 as enacted by the Legislature:	PURA § 36.351 as construed by the Commission:	PURA § 36.354 as enacted by the Legislature:
(a) Notwithstanding any other provision of this title, each electric utility . . . shall discount charges for electric service provided to a facility of a four-year state university . . .	(a) Notwithstanding any other provision of this title, each electric utility . . . <u>in an area where customer choice is not available</u> shall discount charges for electric service provided to a facility of a four-year state university . . .	(a) Notwithstanding any other provision of this title, each . . . electric utility <u>in an area where customer choice is not available</u> . . . shall discount charges for electric service provided to a military base.

<sup>25</sup> See Order, Finding of Fact 4 (emphasis added) (attached as Appendix A to this brief).

<sup>26</sup> The statute uses the phrase “customer choice” to signify areas of the state where competition is mandated. See, e.g., PURA § 39.001(a) (stating the legislative finding that “the public interest in competitive electric markets requires that, except for transmission and distribution services . . . , [electricity] prices should be determined by *customer choices* and the normal forces of competition”) (emphasis added).

As the table illustrates, the Commission's interpretation engrafts onto section 36.351 (state university discount) the different language in section 36.354 (military base discount), thereby limiting the state university discount to areas without customer choice served only by vertically-integrated electric utilities.

The Commission's error is further underscored by the difference between subsection (b) in the two provisions. The military base discount in section 36.354 applies to the rate the "electric utility would otherwise *charge the military installation*," contemplating a direct billing relationship. By contrast, the state university discount does not require a direct billing relationship; instead, the discount applies to the utility's base rate "that would otherwise *be paid under the applicable tariffed rate*." Oncor until this case had applied the discount under the applicable tariff, which went to the REP for the benefit of the state university billed by the REP.

Oncor and CenterPoint nevertheless argue that the military base discount provision should be disregarded because it was enacted in 2003, after the state university discount and after the introduction of competition in 2002. If anything, the difference in timing enhances its relevance. If the intent had been to limit the application of the state university discount upon the introduction of competition in 2002, surely the Legislature would have amended section 36.351 to state that henceforth it applies only to electric utilities in areas not open to customer choice. The Legislature did not amend section 36.351, and the provision continues to apply by its plain language to "each electric utility" in the state.

The military base discount in section 36.354 underscores the Commission's error. If the state university discount is to be limited to vertically-integrated electric utilities, it should be done by the Legislature, not the Commission.

**III. Uncodified section 63 of SB 7 fails to save the Commission's erroneous construction of PURA § 36.351.**

Evidently uneasy with the Commission's rationale for exempting TDUs from section 36.351, CenterPoint offers section 63 of SB 7 as "another, independent reason" to uphold the Commission's decision.<sup>27</sup> CenterPoint interprets section 63 to have decreed that section 36.351 "expired in 2007" at least as to TDUs.<sup>28</sup> This would indeed be an independent reason to justify the Commission's decision. As Oncor correctly notes, "[t]he PUC previously found that Section 63 of S.B. 7 does not repeal section 36.351 either explicitly or implicitly."<sup>29</sup> In the present case as well, the Commission heard the parties' arguments based on section 63 and did not adopt them.<sup>30</sup>

CenterPoint's interpretation of section 63 is not reasonable. Section 63 was enacted into the General Laws in 1999, was not codified, and expired by its own terms on September 1, 2007. The language of section 63<sup>31</sup> shows that it had a specific, temporary purpose. That purpose was to afford state universities a transitional period of rate stability by extending the

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<sup>27</sup> CenterPoint's Response to State Agencies' Brief at 2.

<sup>28</sup> *Id.* at 6.

<sup>29</sup> Oncor Response Brief at 70.

<sup>30</sup> See Appendix A, Conclusion of Law No. 6 ("PURA § 36.351 remains in effect despite Section 63 of Senate Bill 7.").

<sup>31</sup> Section 63 provided in relevant part:

Notwithstanding any other provision of this Act or Title 2, Utilities Code, any person or entity that provides electric service to a four-year state university, upper-level institution, Texas state technical college, or college, as provided by Section 36.351, Utilities Code, on December 31, 2001, shall continue to offer electric service to a four-year state university, upper-level institution, Texas state technical college, or college, as provided by Section 36.351, Utilities Code, until September 1, 2007, at a total rate that is no higher than the rate applicable to the university, institution, or college on December 31, 2001. The rate applicable to a four-year state university, upper-level institution, Texas state technical college, or college, as provided by Section 36.351, Utilities Code, on December 31, 2001, shall be based on the rates provided for or described in Section 36.351, Utilities Code. . . . (Emphasis added.)

availability of regulated rates upon the commencement of electric competition. Specifically, section 63 set a temporary freeze, or cap, on the “total rate” for electric service paid by state universities. Section 63 specified that the total rate could not exceed the regulated rate “applicable to the [university] on December 31, 2001.” Without this provision, rates for many state universities would have been subject to unpredictable change beginning the next day, January 1, 2002, when electric competition commenced.<sup>32</sup> Section 63 protected state universities from this rate uncertainty by preserving the total regulated rate they had been paying as of December 31, 2001 until September 1, 2007. After that date, section 63 including the regulated rate expired by its own terms.

Unlike section 63, section 36.351 is codified in the Texas Utilities Code and serves a different, permanent purpose. Section 36.351 does not set or cap the “total rate” as section 63 did, but instead gives state universities a “discount” on a component (the “base rate”) of whatever the total rates may be. Underlying section 36.351 is a legislative policy choice that state universities, which have limited resources and provide general societal benefits through education, should receive a discount vis-a-vis other electric customers. The discount and its underlying legislative policy apply independently of section 63’s temporary preservation of regulated rate stability at the onset of competition. The discount, permanently codified in section 36.351, both pre-dates and post-dates the temporary regulated rate extension in uncodified section 63.

Section 63 without question includes references to section 36.351. But the legislative purpose for doing so is evident on the face of section 63: to make explicit that the regulated

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<sup>32</sup> See PURA § 39.102(a) (providing that retail electric customers “shall have customer choice on and after January 1, 2002”).

rate during the extension period had to include the section 36.351 discount state universities had been receiving. Contrary to CenterPoint's assertion, section 63 nowhere stated that the section 36.351 discount would expire on September 1, 2007 when the regulated rate extension ended.

In contrast to CenterPoint, Oncor acknowledges the rate stability purpose of section 63.<sup>33</sup> Oncor nonetheless joins CenterPoint by characterizing section 63 as a "phase-out provision" that terminated the section 36.351 discount in 2007. As discussed, however, this characterization finds no support in the language of section 63. What ended in 2007 was the regulated rate extension, not the section 36.351 discount. The Commission was correct not to rely on section 63 as a basis for its decision.

#### **IV. Adhering to the plain language of PURA § 36.351 does not lead to absurd results.**

Oncor and CenterPoint both seek to bolster the Commission's decision with an argument based on their view of the practicalities. As Oncor expresses it, "continuing section 36.351 in a competitive market no longer [makes] practical sense" because "whether [REPs] pass on the discount will depend on the results of contract negotiations between the REPs and the colleges and universities."<sup>34</sup> CenterPoint labels it "nonsensical" for a TDU to provide the discount because "REPs are not required to pass the savings on to colleges and universities."<sup>35</sup>

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<sup>33</sup> See Oncor Response Brief at 70 (observing that in section 63, "the Legislature guaranteed state colleges and universities pricing stability for six years as competition emerged"). See also *id.* at 66 (quoting earlier Commission order finding that "the effect of Section 63 of SB7 is to continue the rate freeze, for state institutions of higher learning, until September 1, 2007") (emphasis omitted).

<sup>34</sup> *Id.* at 71.

<sup>35</sup> CenterPoint Brief at 8. The Commission's brief (at 59) observes less argumentatively that the Commission "could not order [a REP] to pass the discount on to the universities and colleges."

Although not couched as such, this is simply an argument to disregard the plain language of the statute because it would lead to “absurd results.”<sup>36</sup> Yet there is nothing absurd or impractical or nonsensical about providing the discount to the REP for the benefit of the REP’s state university customers. Oncor until this rate case and CenterPoint to this day have provided the discount to REPs who in turn have billed their state university customers at reduced rates. As explained in their Statement of Interest above, Amici State Universities have received significant rate reduction benefits as a result of the discount. The fact that the benefits were obtained by contract and not by regulatory edict demonstrates that the discount makes sense in a competitive market.

#### CONCLUSION AND PRAYER

The Administrative Law Judge who considered this issue ruled that Oncor must continue to provide the state university discount under section 36.351.<sup>37</sup> When the Commissioners convened in open meeting and decided to reverse the ALJ, Commissioner Kenneth Anderson remarked:

But I think it’s a close question. I mean, there’s some good arguments I think to sustain the ALJs. I think that this is likely to go up – well, I won’t say likely – may go up on appeal and it will be interesting to see what the courts actually do with it.<sup>38</sup>

Amici State Universities urge the Court to reverse the Commission and uphold the ALJ’s determination that Oncor has a statutory obligation to provide the state university discount prescribed in PURA § 36.351.

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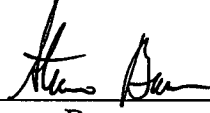
<sup>36</sup> See *City of Rockwall v. Hughes*, 246 S.W.3d 621, 626 (Tex. 2008).

<sup>37</sup> AR, Item 113 (*Proposal for Decision on the State of Texas’ Motion for Partial Summary Decision*).

<sup>38</sup> See Appendix B attached (Open Meeting, Agenda Item No. 11, Transcript at 54-55 (Dec. 18, 2008)).



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**CERTIFICATE OF SERVICE**

I certify that, on August 31, 2010, a true and correct copy of this amicus brief was filed electronically in compliance with Travis County Local Rule 15.3.3, and a true and correct copy was served on counsel for the parties below who are deemed to have consented to electronic service under Local Rule 15.5.1. Counsel for parties who have not consented to electronic service were served with a true and correct copy of this document by first class United States mail as indicated below.



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