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SOAH DOCKET NO. 473-11-2330
PUC DOCKET NO. 38929

APPLICATION OF ONCOR ELECTRIC
DELIVERY COMPANY LLC FOR
AUTHORITY TO CHANGE RATES

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BEFORE THE STATE OFFICE OF
ADMINISTRATIVE HEARINGS

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**STATE AGENCIES' BRIEF IN SUPPORT OF CITIES'
MOTION TO COMPEL RESPONSES TO THIRD AND FOURTH RFIs**

The State of Texas' agencies and institutions of higher education ("State Agencies") submit this brief in support of the Steering Committee of Cities Served by Oncor's ["Cities"] Motion to Compel Responses to Third Set of Requests for Information (January 27, 2011) and Cities' Motion to Compel Responses to Fourth Set of Requests for Information (January 31, 2011). This brief also supports the Office of Public Utility Counsel's ["OPC's"] Motion to Compel Oncor's Response to Cities' Third Request for Information (January 31, 2011).

State Agencies have an interest in receiving timely responses to the Requests for Information ("RFIs") at issue in Cities' and OPC's Motions because we will rely upon such responses in developing our own case for hearing and briefing. State Agencies would be asking substantially similar questions if Cities had not propounded them first. Reliance upon the Cities' RFIs promotes judicial economy by avoiding duplication of effort.

Oncor repeats the same objections to nearly all of the RFIs at issue: (1) the information is irrelevant "since Oncor is a ring-fenced entity;"¹ and, (2) the information is irrelevant "since the Commission found in Docket No. 35717 that Oncor is not subject to a consolidated tax

¹ Oncor Objections to Third RFIs at 3-4; Oncor Objections to Fourth RFIs at 3 & 4.

savings adjustment.”² With regard to one question in the third set, Oncor asserts that the workpapers used to prepare its tax returns are privileged.³

State Agencies agree with Cities that the RFIs to which Oncor objects are relevant, for the reasons stated in Cities’ Motions to Compel: Oncor is not “ring-fenced” for tax purposes, the decision in Docket No. 35717 did not decide for all time that Oncor would never be subject to a consolidated tax savings adjustment, and certain of the RFIs seek information about matters which Oncor itself has placed at issue through its pre-filed direct testimony.⁴ State Agencies also agree with Cities that Oncor has not provided adequate argument or documentation showing that its tax workpapers are privileged, that Oncor has itself made its tax liability an issue in this proceeding, and that the confidentiality of Oncor’s workpapers is adequately secured by the protective order.⁵ State Agencies also agree with OPC that Oncor’s pre-filed testimony has placed its tax rates and expenses at issue, and that the information is relevant under binding Texas case law.⁶ State Agencies need not repeat these arguments in full, and simply incorporate them by reference.

State Agencies offer one additional argument regarding Oncor’s objections that certain RFIs are irrelevant “since the Commission found in Docket No. 35717 that Oncor is not subject to a consolidated tax savings adjustment.” It is a matter of record that several parties to Docket No. 35717 have appealed this aspect of the Commission’s final order in that prior rate case. In fact four separate plaintiffs, Cities, OPC, Texas Industrial Energy Consumers (“TIEC”) and State

² Oncor Objections to Third RFIs at 3; Oncor Objections to Fourth RFIs at 3-4.

³ Oncor Objections to Third RFIs at 4; Oncor also asserts that other unspecified material may be privileged, but has not provided any index to such material because it was also subject to the relevance objection.

⁴ Cities’ Motion to Compel Third RFIs at 2-5; Cities’ Motion to Compel Fourth RFIs at 4-7.

⁵ Cities’ Motion to Compel Third RFIs at 6-9.

⁶ OPC’s Motion to Compel Third RFIs at 5.

Agencies have all perfected administrative appeals of the consolidated tax issue.⁷ Although the district court did not reverse the Commission on this issue, it is anticipated that some or all of these parties will appeal this ruling to the court of appeals, meaning that the consolidated tax savings issue has not been finally decided by a court of last resort.

The Commission has consistently taken the position that matters which remain on appeal are superseded and therefore are not yet binding,⁸ and the consolidated tax savings adjustment clearly falls into this category. Even assuming, for the sake of argument, that the decision in Docket No. 35717 had decided Oncor's tax status for all time – a proposition which Cities and State Agencies categorically deny – the decision of that issue on appeal is still in doubt. So long as the legal issue remains open, the parties must be able to make a complete factual record in the instant proceeding and therefore must be allowed discovery on all matters pertinent to such an adjustment. The alternative proposed by Oncor, to foreclose all such inquiry as irrelevant, would require re-litigation of the entire issue when and if this aspect of Docket No. 35717 is reversed in the Third Court of Appeals or the Texas Supreme Court. As Cities persuasively argue, the consolidated tax savings issue was *not* decided for all time in Docket No. 35717. However, even if it had been, the prudent course in this proceeding is to allow discovery and testimony on the subject so long as the issue remains on appeal and therefore liable to reversal and remand.

⁷ *Steering Committee of Cities Served by Oncor v. Public Utility Commission of Texas*, Cause No. D-1-GV-10-000137 in the 98th Judicial District Court of Travis County, Texas. See Cities' Init. Br. at 16-21, OPC's Init. Br. in its entirety, TIEC's Init. Br. in its entirety and State Agencies' Br. at 5 (all filed June 22, 2010).

⁸ See, e.g., Tex. Pub. Util. Comm'n, *Application of Electric Transmission Texas, LLC for Regulatory Approvals Related to Installation of a Sodium Sulfur Battery at Presidio, Texas*, Docket No. 35994, Order No. 11 at 2 (November 19, 2008) (denying State's and TIEC's Motions to Dismiss) ("Under the Texas Rules of Appellate Procedure, enforcement of the district court's judgment overturning the grant of ETT's CCN would be superseded pending appeal. . . . Accordingly, the district court's decision does not moot ETT's application or remove the application from the Commission's jurisdiction." (footnote omitted)). See also *id.*, Final Order at 6-7, Findings of Fact No. 8-11 (April 6, 2009). These orders are Items No. 51 & 114 on the PUC Interchange. See also TEX. R. APP. P. 24.1.

State Agencies pray that Cities' and OPC's Motions to Compel be granted, so that Oncor's responses to these important questions can be relied upon by all parties to this proceeding, including State Agencies, and potentially relied upon by the Administrative Law Judges and by the Commission in arriving at just and reasonable rates for Oncor.

Dated: February 2, 2011

Respectfully submitted,

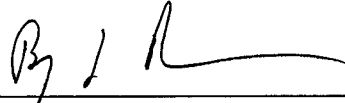
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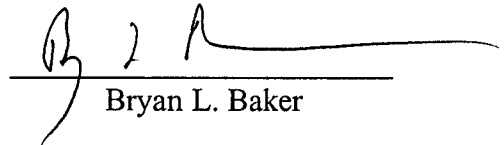
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Certificate of Service

I hereby certify that a true and correct copy of **State Agencies' Brief in Support of Cities' Motion to Compel Responses to Third and Fourth RFIs** 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 February 2, 2011.



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