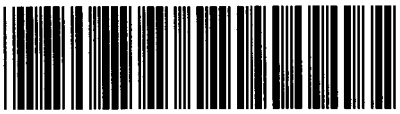

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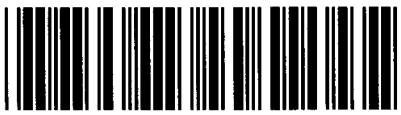

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**PUC DOCKET NO. 45596**



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| **PEDERNALES ELECTRIC COOPERATIVE'S COMPLAINT AND REQUEST FOR EMERGENCY ACTION AND FOR A CEASE AND DESIST ORDER AGAINST GEORGETOWN UTILITY SYSTEMS** | § § § § § | **BEFORE THE PUBLIC UTILITY COMMISSION OF TEXAS** |

**AMICUS REPLY BRIEF OF THE CITY OF AUSTIN DBA AUSTIN ENERGY ON THRESHOLD LEGAL AND POLICY ISSUES**

**TO THE HONORABLE PUBLIC UTILITY COMMISSION OF TEXAS:**

The City of Austin d/b/a Austin Energy ("AE") files this Amicus Reply Brief in response to the Order Requesting Briefing on Threshold Legal/Policy Issues dated June 6, 2016. More specifically, AE files this brief in response to arguments made by Pedernales Electric Cooperative ("PEC"), Oncor Electric Delivery Company LLC ("Oncor"), and Texas Electric Cooperatives, Inc., ("TEC") that a municipally-owned electric utility ("MOU") is an entity legally distinct from the municipality itself.

Though these parties parse through the Texas Public Utility Regulatory Act ("PURA") and Texas Government Code Chapter 1502 in an attempt to persuade this Commission that an MOU is a distinct legal entity[1], the law has been well settled for decades that an MOU has no corporate existence apart from the municipality that owns and operates it.[2] While PURA employs the term "municipality" in some contexts and "municipally owned utility" in others, it has nothing to do with whether they should be considered as distinct corporate entities. Rather, the use of these terms in PURA speaks to the fact that a municipality may act in both a governmental capacity as a regulatory body and also in a proprietary capacity as a utility provider,[3] and PURA uses the terms accordingly. In both instances the actor is the municipality.

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[1] For example, PEC argues that "Section 32.002 preserves a municipality's right to 'regulate or supervise a rate or service of a municipally owned utility' as well as other electric utilities that operate within the municipality." In fact, Section 32.002 is worded differently. It says PURA "does not authorize the commission to… regulate or supervise a rate or service of a municipally owned utility." PEC's paraphrased version – while technically correct – makes it appear as if PURA is worded so as to expressly treat the city as a separate regulating body from the MOU, when in fact it was addressing *the commission's* jurisdiction.

[2] *Guadalupe-Blanco River Authority v. Tuttle*, 171 S.W.2d. 520 (Tex.Civ.App.–San Antonio, 1943. writ ref'd); Tex. Atty.Gen.Op. DM-444 (1997)

[3] Likewise, the distinction between governmental and proprietary functions for purposes of sovereign immunity, relied upon by Oncor, has nothing to do with the involvement of separate legal identities, but rather with the nature of the activity being performed by the municipality. *See, e.g., Wheelabrator Air Pollution Control, Inc., v.*

The nature of a utility (albeit a water utility) governed by a separate board of trustees in relation to its owner-city was first addressed in Texas in *Sifford v. Waterworks Board of Trustees*, 70 S.W.2d 476 (Tex.Civ.App.—San Antonio, 1934, writ ref'd). The issue was whether the water utility could be sued in tort. Holding that it could not, the court reasoned:

> The property [of the utility] is owned by the city, and the department of water is as much under the control and management of the city, through its trustees, as is the department of taxation, streets, police, and fire, except in some particulars stated in the deed of trust. It has been definitely settled by the decisions of different states of the Union that departments of the city created and acting in a similar way to that of the water board of the city of San Antonio could not be held liable for debt or tort, but that the city, if any one, was the party liable under such claims.

*Id.*, at 477.

In *Guadalupe-Blanco River Authority v. Tuttle*, 171 S.W.2d 520 (Tex.Civ.App.—San Antonio, 1943, writ ref'd), the San Antonio Court applied *Sifford* in the context of an electric utility, holding that the board for what is now CPS Energy had no legal identity separate from the city of San Antonio and thereby denying the board's request for an injunction against the city, as it had no separate legal capacity from which to bring suit. A concurring opinion noted that "[i]n a legal sense, the [board members] are not trustees at all. As a board they constitute a department and agency of the City to take charge of and operate for the City its gas and electric system....A trustee has title to the trust property; an agent as such does not have title to the property of his principal, although he may have powers with respect to it." *Id.*, at 525.

More recently, and citing *Tuttle*, the Texas Attorney General opined that the board members of an MOU are only agents of the city, and that a utility board may not hold title to property:[4]

> We conclude that [New Braunfels Utilities] may manage and control certain property for the city, but only the city may own the property. A utility board cannot hold title to real property; only the municipality that created the utility board may do so. A possession and holding by a municipal utility system is in fact a possession and holding by the municipality.

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*City of San Antonio*, 2016 WL 1514542 (Tex. 2016)("The City of San Antonio acts by and through CPS Energy, *so CPS Energy is treated as a municipality.*" (emphasis added)).

[4] In its brief, PEC argues that "GUS owns the electric facilities in question, and the City owns the consuming facilities." This is squarely contrary to existing Texas law, which holds that the city owns both.

The opinion further stated that "employees of a municipal utility system are in fact employees of the municipality." Taken together, these opinions make it clear that a utility has no legal status separate from the city which owns and operates its facilities, and that the board members appointed to run the utility are simply agents of the city with the power to make certain management and operational decisions on the city council's behalf. Perhaps even more relevant to the issue of whether a city can provide retail electric service to itself, the San Antonio court also held that a contract with a utility board is a contract with the city itself.[5]

To summarize, the state of Texas has eighty years of jurisprudence which, taken together, holds that:

- An MOU's property is property of the municipality, and is not separately titled.
- Employees of an MOU are employees of the municipality.
- A contract with an MOU is a contract with the municipality.
- An MOU board may not be sued apart from the municipality.
- MOU board members are agents of the municipality.
- An MOU is a department of the municipality, just as is a fire department.

Despite these holdings, PEC and Oncor implore the Commission to conclude that under PURA an MOU is a separate and distinct legal entity from the municipality which owns and controls it. No decisions or case law are proffered to directly support this conclusion.[6] PEC argues that "it would be illogical for a municipality to 'own' itself." Yet municipalities own fire stations, and no one would reasonably contend that a fire department should not logically be considered part of the municipality which owns it. This is a specious argument.

Oncor also looks to Government Code Chapter 1502 as evidence that the law considers an MOU and its municipality to be distinct. Chapter 1502 in fact demonstrates just the opposite. Bonds secured by an MOU's revenues are not issued separately by the MOU, but by the municipality. That it is necessary for the bond issuance to contain language preventing recourse

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[5] *Delta Elec. Const. Co. v. City of San Antonio*, 437 S.W.2d 602, 605 (Tex.Civ.App.—San Antonio, 1969, writ ref'd n.r.e)

[6] PEC's and Oncor's reliance on *Complaint of Rusk County Electric Cooperative, Inc., Against TXU Delivery Company and TXU Power,* Docket No. 30037; *Destec Energy, Inc., v. Houston Lighting and Power Co.,* 966 S.W.2d 792 (Tex.App.-Austin 1998, no pet.) begs the very question at issue. Both of these cases involved what were clearly distinct entities (separate but affiliated corporations and a partnership and its individual partners, respectively), but do nothing to address the question of the nature of the relationship of an MOU and its municipality. The entities in *Rusk County* and *Destec* were indisputably capable of contracting between themselves and otherwise acting as fully separate legal entities.

against the city's general fund is further evidence that the law considers an MOU and municipality to be one and the same – if they were separate legal entities requirement this would be unnecessary. Lastly, Chapter 1502 also governs revenue bonds issued for municipal parks and swimming pools. Arguing that Chapter 1502 demonstrates legal separation between an MOU and its municipality would require the same conclusion about one's neighborhood pool – an absurd result.

The City of Austin appreciates the opportunity to comment on this issue. There is no support within PURA or Texas law for the proposition that an MOU and its municipality have separate corporate identities for any purpose. Like the distinction between proprietary and governmental functions in the context of sovereign immunity, PURA's use of both terms in different contexts reflects only the fact that a municipality is capable of acting in both capacities, not that two distinct entities exist.

Respectfully submitted,

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**ATTORNEY FOR CITY OF AUSTIN**
**DBA AUSTIN ENERGY**

## CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was served by fax to all parties of record on this 8th day of July, 2016.

Andrew J. Perny