

Control Number: 47186



Item Number: 38

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APPLICATION OF RIO GRANDE  
ELECTRIC COOPERATIVE, INC. FOR A  
CEASE AND DESIST ORDER AGAINST  
AEP TEXAS INC.

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§

PUBLIC UTILITY COMMISSION  
OF TEXAS

PUBLIC UTILITY COMMISSION  
FILING CLERK

**AEP TEXAS INC.'S REPLY BRIEF ON THRESHOLD LEGAL AND POLICY ISSUES**

COMES NOW, AEP Texas Inc. (AEP Texas or Company) and files its Reply Brief on Threshold Legal and Policy Issues in the above-styled and docketed proceeding pursuant to the Public Utility Commission of Texas' (PUC or Commission) Order Requesting Briefing on Threshold Legal/Policy Issues (Briefing Order) issued on July 21, 2017. Pursuant to the Commission's Order Extending Deadline to Brief Threshold Legal/Policy Issues, the deadline to file Reply Briefs is September 14, 2017. Accordingly, AEP Texas' Reply Brief is timely filed and the Company would respectfully show as follows:

**I. INTRODUCTION AND SUMMARY**

AEP Texas, Staff and Rio Grande Electric Cooperative, Inc. (RGEC or Cooperative) filed initial briefs in this docket providing responses to the Commission's three identified legal/policy threshold issues. AEP Texas, Staff and RGEC all generally agree that Chapter 15, subchapter D of PURA<sup>1</sup> and 16 Texas Admin. Code § 25.54 (TAC) regarding Commission-issued cease and desist orders do not apply in the context of RGEC's request for cease and desist order in this case. Staff and RGEC assert in their briefs that equitable principles in defense of a claims brought forth in a complaint do not apply as a bar against the Commission. As further addressed in Section II below, however, equitable defenses raised by AEP Texas in this case are not being asserted against the Commission but against RGEC as the complainant. Thus, AEP Texas' assertion of *laches* against the RGEC as the complainant herein should not be barred. Finally, applicable Commission precedent (including in boundary disputes) has procedurally placed the burden of proof and production on the party bringing a complaint against a respondent, not initially and not as a shift in burden of production upon the complainant's showing of a *prima facie* case. The Commission in this complaint case should continue to follow its precedent by setting forth the burden on the RGEC as the complainant seeking affirmative relief.

<sup>1</sup> Public Utility Regulatory Act, TEX. UTIL. CODE ANN., § 11.001-66.016 (West 2007 & Supp. 2016) (PURA).

## **II. AEP TEXAS' REPLY TO BRIEFS IN RESPONSE TO BRIEFING QUESTIONS**

- 1. Do PURA chapter 15, subchapter D, and Commission rule 16 TAC § 25.54 apply to requests for cease-and-desist orders sought in certificated-service-area disputes? In addressing this issue, the parties should not address whether PURA § 15.104 has divested the Commission of its long-recognized inherent authority to issue cease-and-desist orders. The Commission already addressed this in Docket No. 45596.<sup>2</sup>***

Staff, RGEC and AEP Texas all agree that in the context of RGEC's complaint brought forth in this case regarding its certificated service area boundary dispute, Chapter 15, subchapter D of PURA and 16 TAC § 26.54 addressing cease and desist orders do not apply. In order for these provisions to apply to the present boundary dispute, the Commission on its own motion would need to issue a cease and desist order demonstrating the requirements in the pertinent PURA and rule provisions. RGEC does not seek such an order from the Commission as premised under these PURA and Commission rule provisions, on the Commission's own motion or otherwise.<sup>3</sup> Thus, AEP Texas does not believe the question posed is relevant to or applicable to RGEC's complaint.

- 2. May equitable defenses, including but not limited to estoppel or laches, be considered in claims of service in violation of PURA §§ 37.051 or 39.105(b)? In addressing this issue, please address the principles underlying the Commission's decisions that laches is not applicable to overbillings,<sup>4</sup> and the principle that the provisions of PURA and the Commission's rules cannot be waived by a private entity.<sup>5</sup>***

Staff and RGEC both argue in their initial briefs that the equitable principles of *estoppel* and *laches* do not apply as defenses to be asserted against the state or governmental bodies to bar the enforcement of statutes.<sup>6</sup> However, as further argued in its Initial Brief, AEP Texas is not

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<sup>2</sup> The Briefing Order cites to *Pedernales Electric Cooperative, Inc.'s Complaint and Request for Emergency Action and for a Cease-and-Desist Order against Georgetown Utility Systems*, Docket No. 45596, Preliminary Order at 5-6 (Sept. 12, 2016) citing *City of Brownsville v. Pub. Util. Comm 'n*, 616 S.W.2d 402, 406, 408 (Tex. App.—Texarkana 1981, writ ref d n.r.e.).

<sup>3</sup> RGEC's Initial Brief at 1-2.

<sup>4</sup> The Briefing Order cites to *Complaint of Victoria County Against Noble Americas Energy Solutions*, Docket No. 44562, Docket No. 44562, Preliminary Order at 2-3 (May 22, 2015).

<sup>5</sup> The Briefing Order cites to *Complaint of Rusk County Electric Cooperative, Inc. Against TXU Electric Delivery Company and TXU Power*, Docket No. 30037, Proposal for Decision at 7-8, (Jan. 25, 2010), *adopted by Order on Rehearing*, (May 19, 2015).

<sup>6</sup> Staff's Initial Brief at 2 and RGEC Initial Brief at 2.

seeking to bar any action brought forth against it by the Commission as a governmental body. Further, AEP Texas is not seeking to bar in this matter the Commission from pursuing some enforcement action of PURA §§ 37.051 or 39.105(b) or the Commission's rules against the Company.<sup>7</sup> Rather, AEP Texas is asserting these equitable principles in defense to claims brought by RGEC against the Company. Staff's and RGEC's arguments are analogous to a plaintiff in a civil case arguing that a defendant cannot claim *estoppel* and/or *laches* as a defense to the plaintiff's claims because such defenses cannot be asserted against the court to bar its enforcement of a statute. The equitable principles are asserted as defenses to the plaintiff's claims against the defendant, not as some bar to the court's authority and jurisdiction to adjudicate the matter applying an applicable statute. In essence, such an argument conflates a defendant's equitable defense argument to a plaintiff's claim with a plea to the court's jurisdiction. AEP Texas is not seeking to assert a bar to the Commission's jurisdiction, but that is in essence what Staff and RGEC claim the Company is seeking. AEP Texas' equitable defenses are asserted *against* RGEC from bringing its claims against the Company because of decades long delay to which the Company detrimentally relied upon to continue serving the area in dispute and not as a as a bar against the Commission's authority to enforce PURA or its rules.

In its Initial Brief, Staff cites to the jointly filed AEP Texas North Company (TNC) and Taylor Electric Cooperative, Inc. Docket No. 31064 matter for support of its position that the Commission has previously held in a boundary dispute case that equitable defenses do not apply to the Commission in enforcement matters.<sup>8</sup> As also addressed by AEP Texas in its Initial Brief, the cooperative and intervenors in Docket No. 31064 asserted equitable defenses of *laches* and *estoppel* against TNC alleging that TNC did not timely assert that the cooperative was encroaching on its singly-certificated area and had given up its right to serve.<sup>9</sup> The Commission ultimately agreed with the Administrative Law Judge (ALJ) finding that equitable defenses are

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<sup>7</sup> As addressed in AEP Texas' Initial Brief, the Administrative Law Judge in the *Rusk County Electric Cooperative, Inc.* complaint case in Docket No. 30037 relied on *Sorsby v. State*, 624 S.W.2d 227, 236 (Tex. Civ. App. – Houston 1981, no writ) for the proposition that *laches* do not run against the state. However, *Sorsby v. State* addressed and determined *laches* as inapplicable against the State as a party litigant in the case and not in an adjudicative capacity.

<sup>8</sup> Staff's Initial Brief at 2-3.

<sup>9</sup> AEP Texas Initial Brief at 6, *citing* to Docket No. 31064, Proposal for Decision at 20-21.

inapplicable *against the Commission*.<sup>10</sup> However, the Commission in Docket No. 31064 still entered in its Final Order a number of findings of fact addressing “Equitable Arguments” towards the merits of the case.<sup>11</sup> As also addressed in AEP Texas’ Initial Brief, the ALJ in the instant docketed proceeding has likewise opined that AEP Texas’ *laches* argument raises equitable issues that the Commission may consider in determining what relief to grant in the matter.<sup>12</sup> The ALJ’s opinion in RGEC’s complaint in this docket is consistent with the Commission’s determination in Docket No. 31064 considering and entering “Equitable Arguments” with respect to its decision on the merits in that matter. AEP Texas believes that equitable principles apply as defenses to claims but agrees that the Commission should at the very least consider equitable principles when determining what if any relief to grant, including denial of RGEC’s complaint.

**3. *Does the party complaining that electric service violates PURA bear the burden of persuasion? If the complaining party establishes a prima facie case that the electric service is occurring in an area certificated to the complaining party, does the burden of production (the burden of going forward) shift to the party providing the electric service?***

Staff recommends in its Initial Brief that each utility or person that has a certificated service area has the burden of proof with regard to its service area boundaries and the location of the consuming facility therein with all other issues lying with the applicant or complaining party.<sup>13</sup> Thus, Staff recommends that RGEC has the burden of proof, as the party seeking affirmative relief and the party seeking to change the status quo.<sup>14</sup> However, as to AEP Texas’ response of having grandfathered rights in the area in dispute in the Uvalde Estates Subdivision, Staff recommends that the Company has the burden of proof as it is asserting this fact as an affirmative defense against RGEC.<sup>15</sup> RGEC argues in its Initial Brief that since both utilities are

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<sup>10</sup> Docket No. 31064, Final Order at 8.

<sup>11</sup> *Id.* Findings of Fact 32-37, adopting PFD “Equitable Arguments” findings.

<sup>12</sup> SOAH Order No. 2 at 2 footnote 4.

<sup>13</sup> Staff’s Initial Brief at 4.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 6.

alleging the right to serve the disputed area that both RGEC and Company bear the burden of proof to establish their right to serve. RGEC goes further and argues that the burden of production should then shift to AEP Texas to establish its affirmative defense that it has grandfathered rights to serve the area in dispute.<sup>16</sup> As addressed in AEP Texas' Initial Brief, these positions do not comport with the Commission's precedent in complaint cases and in boundary dispute cases in particular.

AEP Texas cites in its Initial Brief to numerous complaint cases previously adjudicated before the Commission in which the complainant bore the burden of proof and production as indicated by the procedure adopted in the cases.<sup>17</sup> No procedure in those cases was established to initially place or shift the burden of production to the respondent utility to establish and prove any affirmative defenses to the complainant's claims.<sup>18</sup> While there have been instances in which the two utilities desiring the Commission's determination on boundary dispute shared the burden, as in Docket No. 31064 addressed above, such cases entailed the utilities jointly petitioning the Commission's clarification of the boundaries as affirmative relief in the matter.<sup>19</sup> That is not the case and not the procedural posture in this complaint filed by RGEC against AEP Texas. This case is like the many other complaint cases previously adjudicated by the Commission have placed the burden on the complainant seeking affirmative relief. RGEC is clearly seeking affirmative relief and AEP Texas is defending against such relief from being granted. Based on Commission precedent, of which there is no reason for the Commission to overturn, the burden of proof and production should lie with RGEC as the complainant.

Staff in its Initial Brief cites to State Office of Administrative Hearing's (SOAH) rule of procedure 16 TAC § 155.427 for insight as factors in consideration in determining which party bears the burden of proof. Even taking those factors into consideration, the determination points towards RGEC bearing the burden. Applying the SOAH rule factors to this case, RGEC is not at some disadvantage to AEP Texas in terms of sophistication or experience with respect to the

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<sup>16</sup> RGEC's Initial Brief at 4-5.

<sup>17</sup> AEP Texas' Initial Brief at 8.

<sup>18</sup> One case, Docket No. 46602, cited by AEP Texas in its Initial Brief, did employ a burden shifting procedure. However, as further addressed in the Company's Initial Brief, that matter entails the burden shifting to the appellant utility in an appeal of a customer complaint matter decided by a city.

<sup>19</sup> AEP Texas' Initial Brief at 8.

question of “the status of the parties.” As Staff points out in its brief, RGEC also has sufficient access to and control over information pertinent to the case (maps and the original certification docket) to prosecute its complaint.<sup>20</sup> Most importantly, as Staff also points out, RGEC is the party seeking affirmative relief in this case and the party seeking to change the status quo.<sup>21</sup> Based on these factors, the analysis militates towards RGEC bearing the burden of proof and production. Taken together with the Commission’s long precedent in rightly placing the burden of proof and production on the complaining party seeking relief, RGEC should bear such burdens in its complaint in this docket.

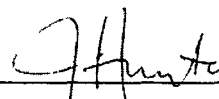
### **III. CONCLUSION**

AEP Texas respectfully requests that the Commission enter a Preliminary Order addressing the issues identified in its Briefing Order consistent with and adopting the Company’s responses to such issues provided its Initial and Reply Briefs.

Dated: September 14, 2017

RESPECTFULLY SUBMITTED,

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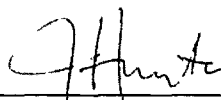
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<sup>20</sup> *Id.* at 6.

<sup>21</sup> *Id.*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was served on all parties of record in this proceeding by hand-delivery, overnight delivery, facsimile transmission, or U.S. first-class mail on the 14th day of September, 2017.



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Jerry N. Huerta